



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2008-12

December 1, 2008

Dear **Name***:

This is in response to your request for an opinion regarding whether an employer may exclude bonus payments from the regular rate of pay for overtime purposes under section 7(e)(3) of the Fair Labor Standards Act (FLSA).^{*} It is our opinion that the bonuses may be excluded from the regular rate of pay.

Your city decided to pay a \$1,000 bonus to full-time emergency communications operators employed since October 1, 2005. The bonus was in recognition of the high stress level of the employees' duties. Your city made no prior agreement or promise to pay such a bonus, but the union, as the employees' bargaining agent, had to approve the bonus before the city could pay it. The parties formalized the approval by signing the memorandum of understanding (MOU) on December 14, 2005. The MOU subsequently became a part of the bargaining unit contract and made provisions for future bonus payments. Your city paid the first bonus on December 22, 2005. Your city is concerned that because it actually paid the first bonus after signing the MOU, the bonus is no longer "discretionary" under section 7(e)(3). You requested our view only with regard to the first bonus payments and not subsequent bonus payments.

Under the FLSA, the regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee, except payments specifically excluded such as discretionary bonuses. See 29 U.S.C. § 207(e)(3).

In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount.

[29 C.F.R. § 778.211\(b\).](#)

Further, an employer may not exclude a bonus from the regular rate of pay if it is paid "pursuant to any prior contract, agreement, or promise." For example, any bonus which

^{*} Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act.” 29 C.F.R. § 778.211(c). We agree with you that the bonus here is accurately characterized as discretionary, paid in recognition of the stress endured in the position. Your city formally decided to pay a bonus after the events giving rise to the payments already occurred — full-time employment as of a specific date. Your city had discretion as to both the fact and the amount of payment by solely deciding to pay the bonuses and the terms and amounts of the bonuses. *See* 29 C.F.R. § 778.211(b). Neither the employees nor the union could have compelled the city to decide to pay bonuses much less dictate their amounts.

Moreover, based on the facts provided, you did not issue the bonuses pursuant to the MOU, but rather used the agreement to formalize a decision previously made. In a conversation with a member of the Wage and Hour Division staff, you stated that the city approached the bargaining unit *after* deciding to give the bonus and that the timing of the MOU was close enough to the “end of the period for which the bonus [was] paid” to establish no advance expectation of payment. *Id.* (“[I]f an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion.”). Based on the timing of the MOU and the payment of the first bonus, it appears your city paid the bonus “without prior promise or agreement” and that the signing of the MOU was merely perfunctory. *Id.* It is our opinion that the bonus your city provided to its operators was discretionary and excludable from the regular rate of pay under section 7(e)(3).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**