



September 20, 2004

FLSA2004-14NA

Dear **Name ***,

This is in response to your letter requesting an opinion on how to properly compute an employee's regular rate for the computation of overtime pay due under the Fair Labor Standards Act (FLSA).

You represent a company that sells private security systems. Your client wishes to pay its installers either by piece rate or a guaranteed \$6.00 per hour minimum, whichever is higher in a two-week period. If the hourly rate exceeds piece rate earnings, the employee would be paid by the hour with time and one-half \$6.00 for hours over 40 per week. No "deficiency" would be carried into the next pay period. If, on the other hand, the employee's piece rate earnings for a two-week period exceeded the hourly guarantee, the employer would pay in this manner: the employee's straight and overtime wages would be totaled based on a regular rate of \$6.00 per hour; this sum would be subtracted from the employee's piece-rate earnings for the period; the difference, which represents the excess earnings due from piece rate pay, would be paid to the employee as a "bonus." You wonder whether this calculation complies with the provisions of 29 CFR Part 778.111(b) or whether your client should, instead, include the piece rate "bonus" in the regular rate calculation.

Determination of an employee's regular rate is a mathematical computation in which *all* forms of remuneration, except those excluded by statute, are combined and then divided by the total number of work hours. See 29 U.S.C. 207(e). This procedure is the same for employees paid by piece rate with a minimum hourly guarantee. Section 207(e)(3) of the FLSA excludes only discretionary bonuses from the regular rate. Because the FLSA does not contain an exclusion for the non-discretionary "bonus" or excess piece rate earnings the employees will receive, your client must include the amount of the piece rate "bonus" when determining the employee's regular rate for the calculation of overtime pay.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought by a party to pending litigation concerning the issue 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 the above information is responsive to your inquiry.

Sincerely,

Barbara Relerford
Office of Enforcement Policy
Fair Labor Standards

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