



September 28, 2004

FLSA2004-16NA

Dear **Name ***,

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to a pay plan used by your client.

You state that your client employs delivery persons who regularly work more than 40 hours per workweek. Each delivery employee is paid a guaranteed salary of \$600.00 per week for all hours worked in the workweek. In order to induce these employees to work more than 40 hours in a workweek, the employer proposes to offer these employees a lump sum weekly overtime premium, which is predetermined based upon the volume of the delivery person's deliveries for the week.

You provided the following examples. If the delivery person's volume of deliveries for the week is at X level, the predetermined weekly overtime premium would be a lump sum of Z dollars. If the volume of delivery person's deliveries for the week was at Y level, the predetermined weekly overtime premium would be a lump sum of Q dollars.

Based on the above described proposed payment plan, you ask the following:

- 1) Is the employer correct in excluding the weekly overtime premium from the compensation amount in determining the regular hourly rate – the calculation would be \$600 divided by the total number of hours worked in the week from which the FLSA overtime calculation would be made?
- 2) Is the employer correct in crediting the weekly overtime premium payment against the FLSA overtime payment amount required for work in excess of 40 hours in the workweek (one and one-half times the regular hourly rate for hours worked in excess of 40) so that if the weekly overtime premium payment exceeded one and one-half times the regular hourly rate times the hours worked in the week over 40 hours no additional time and one-half pay would be required for hours worked over 40 hours in a week?

This type of payment plan does not meet the overtime compensation requirements under section 7 of the FLSA. The principles for computing overtime pay are discussed in Regulations, 29 CFR Part 778 (copy enclosed). An overtime premium must be paid at a rate of pay not less than one and one-half times the regular rate of pay for all hours worked in excess of 40 in a workweek. The regular rate of pay is an hourly rate which must be computed in accordance with the principles in sections 778.107 through 778.122 of Part 778. Under section 7(e) of the FLSA, the regular rate is determined by dividing an employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours worked by the employee in the workweek.

The statute does not exclude nondiscretionary bonuses, such as you described, from the regular rate. Section 7(e)(3)(a) excludes only discretionary bonuses, where both the fact that a payment will be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period covered by the bonus. See section 778.211 of Part 778. Moreover, even if the bonus you describe were viewed as a fixed sum paid only for work during the overtime hours (which it does not appear to be since it is a reward for all deliveries during the week), section 7(e) would not exclude it from the regular rate. As indicated in section 778.310 of Part 778, a premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium under the FLSA even though the amount of money may be equal to or greater than the sum owed on a per hour basis. See also section 778.207 of Part 778.

Therefore, the proposed payments are not excludable from the regular rate, nor is the premium creditable against any overtime compensation due. See section 778.310 of Part 778.



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 represented that this opinion is not sought by a party to pending private 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 this information is responsive to your inquiry.

Sincerely,

Barbara Relerford
Office of Enforcement Policy
Fair Labor Standards Act Team

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