P.D.

U.S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS
WASHINGTON, D.C. 20210

AUG 17 1970

This is in reply to your letter of July 16, 1970, concerning a profit-sharing retirement plan.

Since the proposed plan provides for the payment of death, disability or retirement benefits, it must be considered under the provisions of section 7(e)(4) of the Fair Labor Standards Act. It makes no difference that such a plan is financed from profits. In order for an employer's contributions to a plan to qualify for exclusion from the regular rate of pay under section 7(e)(4) of the Act, the requirements of sections 778.214 and 778.215 of Interpretative Bulletin, Part 778 must be met.

A reading of the plan indicates that the company will contribute to the plan for each plan year an amount equal to six percent (6%) of the total salaries of the active participants, provided that no contribution will be made if the company's pre-tax net profits for the plan year are less than $20,000. The Board of Directors of the company at its discretion may make a greater or lesser contribution for any plan year but in no event shall such contribution be more than fifteen percent (15%) of the total salaries paid during such year to active participants.

The plan fails to meet the formula requirements of section 778.215(a)(3) of Part 778, in that it does not contain a definite formula for determining the amount to be contributed by the employer. You may wish to consider amending the plan to include one of the alternatives suggested in subsections (i) through (iv) of section 778.215(a)(3).

Where a plan does not qualify under section 7(e)(4) of the Act, it is possible, as discussed in section 778.210 of Part 778, that the method of allocation may provide for the simultaneous payment of the overtime compensation due on the contributions. For example, where irrevocable contributions to a plan are distributed as a predetermined percentage of the employee's total compensation, including straight time, overtime, bonuses, and commissions, the overtime due under the Act is automatically included and no additional computation or payment of overtime is required.

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This condition is met where the contributions are allocated to the individual participants in the proportion that each participant's total compensation bears to the total compensation of all participants. However, the subject plan excludes bonuses from the computation and the percentage factor is not multiplied by the employee's total compensation. Since the plan does not take the employee's total compensation into consideration, it cannot qualify under section 778.210. As an alternative to amending the plan to qualify under section 778.215(a)(3) you may wish to consider amending it to qualify under section 778.210.

Sincerely,

Robert D. Moran
Administrator

by [illegible]
Deputy Administrator

Enclosure