

**FLSA-773**

July 15, 1971

This is in reply to your letter of July 6, 1971, concerning an investigation by the Wage-Hour Division of your client, \*\*\* Petroleum Company, for whom your firm prepares payrolls.

You state the computer used to prepare the payrolls cannot calculate the additional half-time overtime due an employee paid salary for a variable workweek. To overcome this difficulty, you paid overtime at the hourly rate obtained by dividing the annual salaries by 2080 hours. This method of calculating overtime, under the particular facts which prevailed, was determined as not satisfying the overtime requirements of the Fair Labor Standards Act.

You suggested for the future that the amount of overtime be estimated based on hours each week and adjusted quarterly by actual hand computation and issuance of a check for any additional sums due. You proposed to make such payment on a quarterly basis since a monthly calculation would not be economic from a cost standpoint. Payment of overtime on a quarterly basis for employees paid semi-monthly would not fulfill the requirements of section 778.106 of Interpretative Bulletin, Part 778, a copy of which is enclosed.

During a telephone conversation with a staff member of this office on July 12, you discussed the application of section 778.114 of the Bulletin to your situation. You stated that, to retain the account with the available computer, you wish to utilize the fluctuating workweek method.

The fluctuating workweek method of computing and paying overtime pay is used in connection with employees who work a varying or irregular number of hours in a workweek. The fundamental characteristic of the method is that the employee receive the full amount of his fixed salary as straight-time pay each week regardless of the number of hours or days worked in the workweek, as long as the employee performs any work during the workweek. Also, a salary will not be considered payment for a workweek of varying hours, for purposes of the Fair Labor Standards Act, unless all the facts demonstrate that this is so, and it is clearly understood and agreed upon by the employee and employer. There must be a clear agreement that the salary is straight time compensation for whatever hours are worked in the workweek, with no possibility that it is earned in the first 40 hours of work or other fixed period.

✉ When a salary is paid for a fluctuating workweek, it must not only in fact assure that no workweek will be worked in which the salary fails to provide at least the current statutory minimum hourly rate of \$1.60, but the salary must also be so arranged that it is reasonably calculated to provide for such a statutory minimum.

After discussing section 778.114 of the Bulletin with our staff member, you stated that you would like to pay more than additional half-time for overtime. You propose to pay, in addition to a salary which will compensate the employees for all the straight time hours they may be required to work in a workweek, additional overtime pay at double the half-time rate. You also wish to avoid weekly computations of the regular rate and thus use your present computer, and therefore would like to divide the weekly salary by 40 hours and use this rate as the regular rate in all weeks. If the employees clearly understand and agree to this basis of computing overtime, payment of such overtime would appear to satisfy the overtime requirements of the Act.


Sincerely,

Francis J. Costello

Assistant Administrator

Horace E. Menasco  
Administrator

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 Minimum wage has been increased by later amendments to the Act.