

FLSA-508

September 20, 1972

This is in reply to your letter of July 27, 1972, concerning the treatment under the Fair Labor Standards Act of the manner in which your brake and wheel mechanics are paid.

The central issue is whether payment to such employees pursuant to 29 CFR 778.210 (percentage of total earnings as bonus) constitutes compliance with section 7 of the Act. Where the amount of a bonus is based on a percentage of total earnings, including overtime premiums, the premium payable on the bonus is calculated simultaneously with the calculation of the bonus itself and the requirements of section 7 are met.

The existence of a true "bonus", however, is a precondition to the application of section 778.210. The term "bonus" as used in 29 CFR 778 is defined in section 778.502(a). As there stated, the term is properly applied to a sum paid as an addition to total wages, usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract.

A "bonus" or percentage of total earnings based on sales, which the employee makes as a regular part of his assigned duties, is clearly a part of the regular wages the employee is entitled to receive under his regular wage contract. In this situation there is not a true "bonus", and the percentage of total earnings bonus principle is inapplicable.

Under your method of payment, a sales quota based on installation charges plus parts is set at 2 1/2 times the amount of straight-time and overtime pay due for the scheduled hours. For all sales over 100% of the quota and under 200% a commission of one-half of one percent of total pay (straight-time and overtime) is paid for each one percent the quota is exceeded. For all sales over 200% of the quota, the commission rate is three-quarters of one percent of total pay. These rates are applied to the total pay in the form of a single percentage. This percentage is directly based on the amount of sales in excess of the established quota.

It seems clear that your present method of payment is predicated on hourly rates which are not true regular rates in that they do not control the total amount of remuneration expected under the contract. The real measure of pay is determined by the amount of sales. The straight-time and overtime pay computed at hourly rates serves in actual fact as a minimum guarantee. The percentage of total earnings payment is applied to this guarantee.

The above described arrangement is equivalent to a "pseudo-bonus" of the type discussed in sections 778.503(b)(1) through 778.503(b)(3). As indicated there, no part of a commission payment on sales that is made as a percentage of the total hourly pay can be considered as overtime compensation. Such a commission is a type of payment which does not qualify for exclusion from the regular rate under section 7(e) of the Act.

Therefore, it must be included in the regular rate of pay and additional overtime must be computed and paid on it.

In your letter of July 27, you point out that the employee's earnings are the same or nearly so whether computed pursuant to section 778.110(b) or by the method currently used by your company. The examples you give are mathematically sound and illustrate the principles of the percentage of total earnings method described in section 778.210. Your examples of the 778.110(b) method necessarily involve a commission computed as a percentage of only the straight-time pay because this is a requisite of that section. However, your examples are not in accord with your pay plan, as under your plan the commissions are computed as a percentage of both straight-time and overtime pay. The basic difficulty of your current method, as explained to you orally, is that it fails to comply with the requirement that additional overtime pay be paid on any sales commission paid as a percentage of total straight-time and overtime earnings.

The method of payment under discussion is within the purview of sections 778.117 through 778.122 dealing with the treatment of commission payments. As noted in section 778.117, commissions are payments for hours worked and must be included in the regular rate whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. Treatment of the commission by any means other than as prescribed in sections 778.117-778.122 does not result in compliance with the Act. You may note that section 778.118 and 778.110(b) produce the same mathematical result.

Sincerely,

Horace E. Menasco
Deputy Assistant Secretary