

FLSA-772

February 26, 1973

This is in reply to your letter of February 4, 1973, to Secretary of Labor Brennan concerning the amount of back wages you received as the result of an investigation of your former employer, *** Incorporated.

Your correspondence indicates that you were paid on a salary basis. Where an employee is paid a stipulated salary with the understanding that it constitutes straight-time pay for all hours of work, and if her hours of work fluctuate from week to week, her regular rate for any particular week is the quotient of the amount paid per week divided by the number of hours worked in that week. Payment at one-half this regular rate for each hour over 40 in that particular workweek, in addition to the fixed weekly wage which supplies the straight-time pay, constitutes compliance with the overtime provisions of the Act. This method of compensation is explained in section 778.114 of Interpretative Bulletin, Part 778.

An agreement or understanding need not be in writing in order to validate the application of the fluctuating workweek method of paying overtime. Where an employee continues to work and accept payment of a salary for all hours of work, her acceptance of payment of the salary will validate the fluctuating workweek method of compensation as to her employment.

The Supreme Court in the case of Overnight Motor Transportation Company v. Missel, 316 U.S. 572 (1942), held that the fluctuating workweek method of payment is lawful.

The other aspect of your question on the amount of back wages concerns the fact that such wages were computed for two years rather than three years. A two-year statute of limitations applies to the recovery of back wages under the Act, except in the case of willful violations for which there is a three-year statute of limitations. As in all cases in the administration of this law, we are constrained to operate in accordance with authoritative legal concepts and official decisions.

Conclusive evidence of willfulness, beyond that required in civil cases, is needed to sustain the burden of proof required by the courts to establish willful violations, as such violations may be prosecuted criminally and the violator fined up to \$10,000. A second conviction for each a violation may result in imprisonment.

In this instance it was determined that there was not sufficient evidence to sustain the burden of proving that the violation was willful. We therefore arranged and supervised the payment to you of your back wages without undergoing time consuming litigation.

Our review of this matter confirms that the computation of your back wages was made in conformance with the law as interpreted by the courts, and that you were properly advised by our area office.

Sincerely,

Joseph P. Mcauliffe, Director
Division of Minimum Wage
and Hour Standards