

FLSA-522

May 16, 1973

This is in reply to your letter of April 3, 1973, in which you request that the Administrator issue an interim finding pursuant to section 13(b)(11) of the Fair Labor Standards Act and 29 CFR 551.2(c), to the effect that the delivery payment plan of your client, ***, which is applicable to their drivers and drivers' helpers who make local deliveries, has the purpose and effect of reducing the hours worked of such employees to, or below, the maximum workweek applicable to them under section 7(a) of the act.

Notwithstanding the lack of experience under your client's plan for a representative period of one year, I find that its provisions and manner of operation indicate that by the end of such first representative year the effect of the plan can reasonably be expected to reduce the weekly hours worked by the covered employees in such first year of operations to, or below, the maximum workweek applicable to them under section 7(a) of the act. Therefore, the plan is approved on an interim basis subject to the conditions which follow.

Since your client's proposed plan lacks the requisite one year's experience, the weekly hours worked and the average workweek of all of the full time employees covered by the plan during the first quarter-year in which it has been in operation will be taken as representative of the one year period. If at the end of the first quarter-year period the effect of the plan has not been to reduce the hours worked of the covered employees to, or below, the maximum workweek applicable to them under section 7(a) of the Fair Labor Standards Act, the employer must pay to each of his employees overtime compensation on the basis of each workweek within the quarter-year period standing alone, unless the employee is otherwise exempt.

The procedure discussed immediately above will be followed at the end of each subsequent quarter-year period in the initial year of operation. The hours of work of the covered employees shall be cumulative from quarter-year period to quarter-year period. The average workweek at the end of each quarter-year period will be determined by dividing the cumulative hours of work at the end of such quarter-year period by the number of employees covered under the plan.

At the end of the first year of operation of your client's proposed plan a summary of its operations shall be submitted to this office, unless the plan is terminated earlier. If the plan has not had the effect of reducing the weekly hours of work of the covered employees to, or below, the maximum workweek applicable to them under section 7(a) of the act, this interim finding will terminate.

This finding is conditioned upon proper notification being given to the employees covered by this proposed plan, as provided for in Regulations, Part 551.3, in order to afford them an opportunity to submit any facts or reasons supporting or opposing the finding. We are enclosing a form of "Notice to Employees" together with two copies of

Regulations, Part 551. A copy of this Notice should be posted for 15 days in each place where notices to employees are customarily posted, and where all of the employees affected will have an opportunity to see it. The Notice should be posted with a copy of Regulations, Part 551, and a copy or an explanation of the plan. The date of posting the Notice should be entered in the space provided thereon and this office should be advised of such posting.

This finding will be effective so long as there is no significant change in any of the essential facts presented in support of the subject position. Your attention is directed to 29 CFR 516.15 which prescribes the type of records which the company must maintain.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division