

## FLSA-524

June 6, 1973

This is in reply to your letter of May 7, 1973, in which you ask if the payment of \$50 per week to an employee as a minimum overtime guarantee for "on-call" work may be excluded in computing the employee's regular rate of pay for overtime pay computation purposes and credited towards any statutory overtime pay due.

The factual situation is stated as follows: An employee works on the premises of the employer for 40 hours per week (8:00 am - 4:30 pm, Monday through Friday) for which he is paid \$5.16 an hour. The employee would then be "on-call" from 4:30 pm to 8:00 am the next day. While "on-call" the employee would either be at home or could leave his home at his discretion to fulfill his personal desires, but would be required to leave a phone number where he could be reached. If the employee is "called-out" to work, he would work on the premises of the customer's place of business. For any time worked over 40 hours per week but less than approximately 46 1/2 hours (time and one-half \$5.16 equals \$7.74 divided into \$50 equals approximately 6.46 hours), the employee would be guaranteed a minimum of \$50 overtime pay. This guarantee is based on an estimate that 6.46 hours is the minimum compensable hours the employee would work during on-call times. We assume this figure is an average obtained from actual working time, and represents weeks in which fewer and more than 6.46 on-call hours were worked.

The subject of "on-call" time as compensable hours of work is discussed in section 785.17 of the enclosed Interpretative Bulletin, Part 785. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he can be reached is not working while "on-call". Accordingly, such an employee need not be compensated by his employer for such "on-call" time. When an "on-call" employee is called out for a job assignment, the time devoted to the job assignment is hours worked and must be counted and paid for as such.

Under the principles stated in section 778.223 of the enclosed Interpretative Bulletin, however, sums received by employees for "on-call" time, while not attributable to any particular hours of work, are paid as compensation for performing a duty involved in their jobs and must, therefore, be included in the employee's regular rate of pay for the purpose of computing overtime pay under the Act. They cannot be credited towards statutory overtime due.

Your attention is also directed to section 778.310 of Part 778, which provides that a premium in the form of a lump sum which is paid for a fixed standard of overtime hours does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per hour basis. For this reason and because of the fact that the sum paid to the employee for a fixed standard of "on-call" time is an integral part of the employee's regular rate of pay upon which statutory overtime compensation

must be computed, the proposed method of compensation would not satisfy the monetary requirements of the Act.

Under the circumstances given, the employee's regular rate of pay could vary each week. It would be computed as follows when the employee works 40 hours on the premises: \$256.40 (40 x \$5.16 plus \$50) divided by the number of hours actually worked that week. If the employee worked 44 hours, for example, his regular rate would be \$256.40 divided by 44 hours or approximately \$5.82 an hour. He would be due additional overtime pay at one-half this rate for the 4 hours of overtime or \$11.64, and his total weekly pay would be \$268.04.

If you would like further information on this matter, you may wish to contact our Area Office located at Room 563, 210 North 12th Boulevard, St. Louis, Missouri (telephone: 622-4796). The people there will be pleased to answer any questions you may have on this or other provisions of the Act.

Sincerely,

Ben P. Robertson  
Acting Administrator  
Wage and Hour Division

Enclosures