

FLSA-384

November 26, 1973

This is in reply to your letter of September 13, 1973, requesting an opinion that contributions and payment to the subject plan qualify for exclusion from the participating employees' regular rate of pay pursuant to section 7(e)(4) of the Fair Labor Standards Act.

We have examined the plan as revised, and find that it would not qualify as a bona fide benefit plan under section 7(e)(4) for the same reasons as given in our letter of December 1, 1969. You ask, however, that we give consideration to its qualification as a bona fide plan in view of its actual operation.

Where a plan is designed primarily for the payment of death, disability, and retirement benefits, the requirements of 29 CFR 778.214 and 778.215 must be fully met in order for an employer's contributions to the plan to qualify for exclusion from the regular rate of pay under section 7(e)(4). See 778.214(b). The intent of 778.215(a)(3) is to require a definite obligation which you indicate the employer does not wish to adopt. The history of the operation of the plan in prior years cannot be taken as a factor in establishing its qualification, as nothing in the applicable official standards in section 778.215 permits the consideration of such historical data in lieu of actual qualification under such standards. The Department is bound to follow its own Interpretive Bulletin.

Under Section 5.1 of the plan, however, each participant is entitled at the end of the plan year to have allocated to him such sum as shall bear the same ratio to the total contributions of all participating employers for that plan year as such participant's compensation for that plan year bears to the aggregate compensation of all such participating employees for that plan year. Compensation defined in Section 2.3(a) of the plan means the total of all compensation paid a participant during a plan year by a participating employer including without limitation all bonuses, overtime pay, shift premium and any other extra special remuneration of any kind. As we advised you previously, we find that the contributions by the companies pursuant to the plan are excludable from the regular rate under the Fair Labor Standards Act under the provisions of 778.210, on the grounds that the employers' contributions are allocated in the proportion that the individual participant's total wages bear to the total wages of all participants.

In regard to section 778.210, you ask several questions regarding the effect of possible changes in the plan. Where an employer using 778.210 makes a contribution to a retirement plan on the basis of the total compensation of all employees, it must be distributed to each and every employee according to his total earnings. This result would not be accomplished under an amendment which would exclude incentive compensation from the total compensation.

You also ask whether, under section 778.210, payments which are excluded from the regular rate under section 7(e) of the Act may be excluded from the total compensation. In our opinion they may not. Section 7(e) deals with specific kinds of payments which may be excluded from the regular rate, but it does not affect the status of such payments such as remunerations for employment. Our previous letter to which you refer dealt with reimbursement for expenses under section 7(e)(2), and was based on the promise that the type of reimbursement in question could be excluded from the regular rate of pay because it was not compensation to or on behalf of the employee. It does not follow that this concept extends to other kinds of payments listed in section 7(e). The kinds of payments listed in section 7(e) which are clearly remuneration for employment are excluded from the regular rate by virtue of this section, but nevertheless remain as remuneration to the employee for other purposes.

Whether a bonus is included in the regular rate of pay for overtime purposes, which generally depends on whether it is discretionary or not, likewise does not affect its status as remuneration for employment. As stated previously, all remuneration to the employee must be included in applying section 778.210.

We suggest as an alternative to your approach that consideration be given to establishing different groups of participating employees, each of which would be subject to its own different percentage of total earnings as a bonus. Distinctions between the groups could be established on the basis of whether employees are receiving incentive payment, and whether they are exempt from the overtime requirements of the Act.

Sincerely,

Warren D. Landis
Acting Administrator
Wage and Hour Division