

U. S. DEPARTMENT OF LABOR
Employment Standards Administration
Washington, D.C. 20210

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MAY 1 1975

This is in reply to your letter of February 18, 1975, in which you request that section 778.603 of 29 CFR Part 778, be amended to provide that an employer who has failed to meet the conditions under which a partial overtime pay exemption may become applicable, be permitted to satisfy the conditions for applying the exemption retroactively.

Section 13(b)(8)(A) of the Fair Labor Standards Act, for example, provides that the provisions of section 7(a), (payment of overtime after 40 hours per week) shall not apply with respect to any employee (other than an employee of a hotel, or motel who performs maid or custodial services) who is employed by an establishment which is a hotel, motel, or restaurant and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed. It is our opinion that the exemption is applicable, if all other conditions are met, only if the employer pays the employee time and one-half the regular rate of pay for all hours worked over 48 in a workweek. If the employer failed to pay an employee time and one-half for the hours worked over 48 in a particular workweek, overtime pay is due for all hours worked in excess of 40 in that week. See, in this connection, Holtville Alfalfa Mills, Inc. v. Wyatt, 230F. 2d 398 (11 WHC 30; 12 WHC 635); Wirtz v. Osceola Farms 372F. 2d 584 (17 WHC 575).

In applying the principle set forth in section 778.603 of the Bulletin, the Wage-Hour Division does not revert to section 7(a) for back wages in all situations. All the circumstances involved in any failure to pay proper overtime is taken into consideration. For example, where all the other requirements of the exemption are met and the employer has made a bona fide attempt to comply with the exemption, we will not revert to section 7(a) because of a misunderstanding as to what constitutes hours worked or failure to include certain extra payments in the regular rate. In such cases, overtime compensation would be based on the standards specified in the exemption. Simple bookkeeping errors will not, also, affect the application of the exemption.

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We have carefully considered your request and have concluded that the policy in section 778.603 is correct under the law. We therefore do not plan to change this long-established policy at this time.

Sincerely,

/s/ Warren D. Landis

Warren D. Landis
Acting Administrator
Wage and Hour Division