

## FLSA-221

September 21, 1978

This is in reply to your letter dated August 16, 1978, requesting an opinion under the Fair Labor Standards Act regarding an on-call pay system you have developed for use by several of your clients.

You state that the type of employees to be employed under this system are those with some technical training, but who do not qualify for the minimum wage and overtime pay exemption provided by Section 13(a)(1) of the Act. These employees normally maintain and repair electronic equipment at the customer's business site. The electronic equipment is the type used to store and process data, such as inventory figures and payroll information and since delays resulting from equipment failure may be costly, immediate servicing is necessary. Accordingly, during certain of these non-exempt employees' non-working hours they will be assigned to an "on-call" status for a 4-hour increment, normally 8 hours at one time. Such employees will be supplied with a "beeper" or only be required to leave a telephone number where they may be reached; otherwise, they will be free to do whatever they wish. A stipend of \$6.50 per 4-hour increment on weekdays (\$8.50 on Saturdays and \$10.00 on Sundays or holidays) will be paid to these employees for the on-call periods. If called in, all hours worked will be paid for in addition to the "on call stipend". A minimum of 2 hours' pay at the overtime premium rate is guaranteed when the employees are called in to work.

Based on the above information you ask four questions.

Your first question asks if the "on call" time would be considered hours of work for purposes of computing overtime pay under the Act.

Answer:

We concur in your opinion that such standby "on call" time is not hours of work. See Section 785.17 of 29 CFR Part 785, copy enclosed.

Your second question asks if the "on-call stipend" would become part of the employees' regular rates of pay for purposes of overtime compensation computation.

Answer:

As explained in Section 778.223 of 29 CFR Part 778, copy enclosed on-call payments are paid as compensation for performing a duty involved in the employee's job and must be included in an employee's regular rate of pay for purposes of overtime compensation.

Your third question asks if we concur in your opinion that the "on-call stipend" may not be used to offset any overtime compensation and that the 2-hour call in guaranteed premium pay may be used to compensate for earned overtime, but is not considered in

calculating the regular rate of pay.

Answer:

Section 7(h) of the Act provides that extra compensation paid as described in Paragraphs (5), (6) and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section. See Sections 778.201 through 778.206. Since the on-call stipend does not fall within any of these provisions, it may not be used to offset any overtime pay due. (see Section 778.207(a)).

As explained in Section 778.221, extra premiums required by minimum "call-back" or "call-out" payment agreements, such as the one you propose which are paid for actual hours of overtime work may be excluded as true overtime premiums in computing the employee's regular rate of pay and may be credited toward compensation due under the Act.

Finally, you ask that we illustrate our conclusions to the above questions with a calculation of the week's compensation for the following example. A field engineer works a normal 40 hour schedule. In addition he is assigned to on-call status for 4 hours on Tuesday and 8 hours on Saturday. He is called in to work 3 hours on Monday and 4 hours on Saturday.

Answer:

(We will use an hourly rate of pay of \$5 per hour in our calculation.) In your example, the employee has worked 47 hours in the workweek. His total hourly straight time pay would be 47 times \$5, or \$235; to determine the total straight time remuneration, the on-call stipends of \$6.50 for Tuesday and \$17 for Saturday (2 times \$8.50) are added to this amount, or  $\$235.00 + \$6.50 + \$17.00 = \$258.50$ . Since overtime compensation is based on the regular rate of pay, the above remuneration must be divided by the hours of work, or  $\$258.50 \div 47 = \$5.50$ , to determine the regular rate. One-half this amount is due for each overtime hour of work,  $1/2 \text{ times } \$5.50 \text{ times } 7 = \$19.25$  total overtime premium pay due. His total pay is  $\$258.50 + \$19.25 = \$277.75$ .

Sincerely,

HC

Xavier M. Vela  
Administrator

Enclosures