

## FLSA-927

May 15, 1979

This is in reply to your letter dated April 20, 1979, requesting an opinion as to whether a particular incentive plan would invalidate an otherwise valid "Belo" contract under the Fair Labor Standards Act.

You state the employees in question will receive a bonus payable at the end of each contract year, if employed at the end of the value of service agreements which the employees sell to or renew with customers whose equipment they maintain. In addition, a special bonus is also paid yearly based upon the number of visits made to certain types of accounts for preventative maintenance services. Further, by written agreement, none of the bonuses are deemed earned until the end of the contract year. You believe such bonuses are of the type discussed in 778.408(d) of 29 CFR Part 778, and thus, would not invalidate an otherwise valid "Belo" contract.

We do not agree. We have consistently held that payment of a yearly sales bonus invalidates an otherwise valid "Belo" contract for the following reasons. The rate specified in a contract which qualifies under section 7(f) must be a regular rate which is actually operative in determining the total amount of an employee's compensation. Therefore, if the employee receives a regular bonus or other earnings which are part of his or her regular rate in addition to the regular rate specified in the contract, it cannot be said that the contract rate determines the total amount of the employees' compensation. The fact that the additional payments are based on a percentage of total earnings, including straight-time and overtime compensation, is immaterial to this question, since the regular rate will no longer be the hourly rate specified in the contract, but a higher rate determined by adding the amount of the bonus payments to the employee's earning at the guaranteed weekly salary. The fact that the employees are not guaranteed any specific percentage of sales or the fact that the employees must be employed when the bonus is distributed does not alter the affect of the bonus inclusion. Since the bonus, in some amount and at a specified date is regularly paid, it must be considered as part of their regular wages.

The above principles would not be altered by basing a bonus payment on certain specific types of visits.

Sincerely,

Herbert J. Cohen  
Assistant Administrator