

FLSA-1398

April 24, 1980

Thank you for your letter concerning the appropriateness of certain proposed payment plans under the overtime pay provisions of the Fair Labor Standards Act. You ask us to consider proposed pay plans to be utilized by an employer who has concluded that the overtime premium pay required by the Act is not sufficient inducement to get his or her employees to work several additional hours on weekends. You describe four situations as follows:

A. The employer pays employees a salary which exceeds the minimum wage and is intended to compensate for a forty-hour work week, Monday through Friday. Employees receive time and one-half their regular hourly rates for all hours worked over forty. Employees are required to work approximately three or four hours on one or two Saturdays per month. The employer wishes to pay the employees a premium for Saturday work, which is expressed as a rate that exceeds time and one-half their regular hourly rate, and guarantees the employees a minimum number of hours of work. (In effect, this provides a guaranteed payment for work on Saturday.)

B. Circumstances are the same as in "A" except that the employer desires to pay employees who work on Saturday at a rate of time and one-half their regular hourly rate, but not less than \$30. (In effect, this also provides a guaranteed payment for work on Saturday.)

C. The circumstances are the same as in "A", except that the employer wishes to pay employees working on Saturday a flat sum which is greater than time and one-half their regular hourly rate for four hours of work. Employees would receive compensation at a rate of time and one-half their regular hourly rate for all time worked on Saturday over four hours.

D. The employer pays employees a salary which exceeds the minimum wage and is intended to compensate a forty-hour work week, Monday through Friday. Employees are so informed at the time of hire. However, they are regularly scheduled to work 38 hours per week. From time to time, they may work over 40 hours.

You ask if an employer may exclude the Saturday premium compensation from the regular rate calculation and credit it against any overtime compensation due.

A premium payment in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked 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. Thus, since A, B, and C guarantee a fixed amount of pay for Saturday work without regard to the actual hours of work, the proposed payments are not excludable from the regular rate, nor is the premium part creditable against any overtime compensation due. In this connection, see section 778.310 of Part 778, copy enclosed.

Your second question asks how might an employer provide employees with compensation greater than time and one-half their regular hourly rates, without resorting to the use of a higher overtime rate, so as to exclude the premium compensation and credit it against overtime compensation due.

As explained in section 778.308 of Part 778, the overtime rate, like the regular rate, is a rate per hour. To qualify as an overtime premium under section 7(a)(5), (6), or (7), the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour. Thus, if the employer pays a premium rate for each hour of work performed by employees on a Saturday, the payments are excludable and creditable under section 7(a) of the Act if the applicable conditions specified in section 778.201 through 778.206 are satisfied.

With regard to excluding guaranteed payments as overtime premiums, you ask if section 778.310 of Part 778 creates a per se rule. It is a per se rule when applied against lump sums paid for work performed on any day without regard to the actual hours of work. Further, it does not conflict with the section 7(e) provisions since it is required for such premium payments to be excludable and offsetable that they be a rate per hour of work.

Your final question concerns the computation of the regular rate of pay for overtime compensation computation purposes. You ask if the divisor in situation D should be 38 or 40 hours.

If the agreement is that the salary is intended to cover 40 hours of work and the actual practice has been to divide by 40, then 40 is the proper divisor. However, if the actual practice has been to divide by 38 hours, then the divisor is 38 since the actual practice negated the original agreement that the salary was intended to pay for 40 hours of work. Of course, our response assumes that more than 40 hours have been worked in the workweek in question.

Sincerely,

Henry T. White, Jr.
Deputy Administrator
Enclosure