

FLSA-970

July 15, 1980

This is in reply to your letter of June 13, 1980, requesting an opinion as to whether quarterly vacation and bonus pay must be included in the regular rate of pay for overtime pay purposes under the Fair Labor Standards Act.

Your client's plan provides that an employee is to receive up to two weeks of paid vacation for completing two calendar year quarters. The plan also provides that for completion of three or four quarters during each calendar year a money bonus equal to one week of each employee's regular wages will be paid for each quarter. Active employment is necessary during the whole of each quarter year period in order to receive the benefits. The employees are not entitled to receive paid vacation time or the money bonus payment unless and until each quarter is completed. However, in order to fulfill both your client's needs and the employee's desires, your client is willing to provide a wage advance to employees who take vacations prior to completing the necessary quarters and those desiring to receive an amount equal to the money bonus prior to the end of the October-December quarter. These wage advances would be recovered, without interest or other fees, from the wages earned during the final one or two weeks of the quarter for which the advance was made or if employment is terminated for any reason, recovery of the wage advances would be accelerated.

Section 7(e) of the Act requires the inclusion in the regular rate of pay of all remuneration for employment except seven specified types of payments, including certain bonuses. It is our opinion based on section 7(e)(2) of the Act that payments made under your client's plan for vacations need not be included in the employees' regular rate of pay. It would appear that your client is agreeing to pay for time not worked due to vacations. This is somewhat of a hybrid compensation plan in that it has some aspects of an attendance bonus and some aspects of a vacation plan. However, on balance, it is our opinion that it more closely resembles an annual leave plan.

The Act does not require an employer to pay for hours not worked due to vacations. Therefore, the employer may condition any payment for such hours on factors such as attendance for full workweeks or quarters.

With regard to the money bonus proposed in your client's plan, this would be an attendance bonus and not considered a Christmas bonus. The purpose of this plan appears to be to encourage attendance of the employees each quarter. Accordingly, the amount of the attendance bonus paid the employees must be taken into account in computing the regular rate of pay for the purpose of computing overtime compensation due under the Act. As explained in sections 778.108 and 778.109 of the enclosed copy of 29 CFR Part 778, the regular rate of pay of an employee is determined by dividing the total remuneration (i.e., straight time compensation) for employment in any workweek by the total number of hours actually worked by the employee in that workweek.

The bonuses described in your letter would not be considered cash advances. Therefore, any deductions from the employee's wages which reduce the wages below the minimum wage or reduce the amount of overtime compensation which may be due would result in a violation of the Act. This has been a long standing position of the Department of Labor and has been upheld in the courts.

If you have any further questions, please feel free to contact this office at any time.

Sincerely,

Henry T. White, Jr.
Deputy Administrator

Enclosure