

June 29, 1981

This is in reply to your letter of June 2, 1981, requesting an opinion concerning the application of the Fair Labor Standards Act to a bonus which your client wishes to give to certain hourly paid supervisors.

Your client owns a business which involves crews working on construction jobs. Your client wishes to reward supervisors who obtain increased efficiency and productivity. For each job performed by a supervisor and crew, an estimated acceptable overall labor cost is predetermined. Whenever actual labor costs are held below estimated labor costs, it is your client's desire to pay a bonus to the supervisor which would be an amount equalling or approximating the difference in amount between the estimated and actual labor cost, i.e., cost savings. The percentage figure to be used in calculating the bonus can only be determined after the work is completed and the cost savings be determined. Once the cost savings are determined for the period involved, this amount is divided by the supervisor's total earnings to obtain the percentage of the bonus. However, the amount of the bonus to be given is known before the percentage is determined. This restatement of the bonus plan is based on information contained in your letter and that provided in a telephone conversation between a member of my staff and Mr. *** our office on June 16, 1981.

When the employer's contributions to a plan are based upon a percentage of total earnings of the participating employees, the employer's contributions may be excluded from the regular rate of pay if the conditions prescribed in section 778.210 of the enclosed copy of 29 CFR Part 778 are met. Under the method of allocation discussed in this section, where an employer's contributions are distributed as a percentage of the employees total compensation, including straight time, overtime, bonuses, and commissions, the overtime due under the Act is automatically included and no additional computation or payment of overtime is required.

Based on the information provided, it appears that the bonus proposed by your client would not be a bona fide percentage of total earnings bonus.

In fact, in this case the bonus itself is predetermined and the percentage is calculated subsequently. Therefore, this bonus amount would have to be included in the regular rate of pay for overtime purposes.

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

Sincerely,

Henry T. White, Jr.
Deputy Administrator

Enclosure