

FLSA-787

October 22, 1981

Thank you for your letter of September 25, 1981, asking on behalf of one of your clients, whether a new compensation system he or she plans to implement would be in compliance with the monetary requirements of the Fair Labor Standards Act. To facilitate our reply we will respond to each segment of your request in the order presented.

You state that the proposed compensation plan would create considerable incentive to perform job functions and result in increased efficiency and productivity by your client's employees. Your client proposes to establish an overall job rate for each construction project. The foreman and each member of a crew will receive a percentage of the overall job rates for his or her work on the project, the percentage allocations will be subject to review by your client. For most crews it is expected that the foreman will receive the largest percentage. Percentages received by crew members may be the same or may vary depending upon such factors as job experience, longevity with your client, job classification, etc. While the percentages may generally be established before each project is undertaken, they almost certainly would be subject to change by the foreman or by the vote of crew members depending upon such variables as the number of hours worked by a crew member on a particular project. You state that it is not meant that the job rate paid to each crew member will vary directly according to hours worked, but that excessive absences, or other factors, including lack of productivity, might be looked to by the crews when varying the percentages paid to crew members. The total straight-time wages paid during the week for each employee would be determined and then divided by the total hours worked by each employee to determine the regular rate of pay. An additional one-half of each employee's regular rate would then be paid for any hours worked in excess of 40 in the workweek.

It is our opinion that the above compensation plan would comply with the Act's monetary requirements, provided that the percentage of the job rate paid to a crewmember equals at least the minimum wage when divided by the hours worked and they receive not less than one and one-half times the regular rate of pay for hours worked in excess of 40 hours in the workweek.

Due to historical compensation differences, your client anticipates that a dual compensation system will have to be used where crew members, other than the foreman, would be guaranteed a minimum hourly wage rate in excess of the minimum wage. As a part of this dual compensation system, for those foremen who insist upon retaining a greater percentage of the job rate for themselves, with a guaranteed minimum hourly wage rate to be provided to the crew members, an understanding would be reached that the portion of the job rate to be paid to the foreman will not be a straight percentage but rather a percentage minus any difference in unearned wages calculated on a crew member's job rate percentage and the employee's minimum guaranteed hourly rate. In other words, if the job rate percentage paid to the crew member when divided by his or her hours of work is less than the guaranteed hourly rate, the difference necessary to bring the crew member's wages up to the guaranteed wage rate will be subtracted from the job rate percentage to be paid the foreman. You believe it proper to compute the foreman's overtime compensation based on the wages actually paid him or her rather than the wages that could have been paid prior to any deductions to bring the crew members' wages up to their guaranteed hourly pay rates.

We agree that the wages actually paid rather than the amount of compensation which could have been paid prior to any recovery by the employee for distribution as wages to other employees, is the proper amount to be divided by the hours worked when calculating the foreman's regular rate of pay for overtime compensation purposes.

You state that on a regular and recurring basis, construction projects will be commenced in one workweek

but not completed until the subsequent workweek. In such cases the job rates will not be calculated and paid as compensation until the construction projects are completed. After reviewing Sections 778.119 and 778.120 of 29 CFR Part 778, you believe it appropriate to apportion the job rate payments to each hour spent by an employee on a project. Compensation thus allocated to each prior workweek is to determine the increase in the regular hourly rate for that workweek. One-half of the increased hourly rate would then be paid for each hour of overtime work. It is your understanding that should the hourly rate fall below the minimum wage, based on wages paid, such would not be a problem once total compensation for the workweek has not yet been calculated and paid.

As explained in Section 778.106 of Part 778, when the correct amount overtime compensation cannot be determined until some time after the regular pay period, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Conversely, as the correct minimum wage obligation can be determined, the employees must receive at least the minimum wage for each hour of work on the regular payday.

You point out that in the construction industry individual employees or entire crews are sometimes required to engage in corrective repair work. It is your understanding that time spent in such corrective repair work must be counted as hours worked under the Act; however, it is your contention that the job's project percentage rate payment is also meant to include payment for time spent in corrective repair work. Therefore, it is your opinion that no additional compensation need be paid for such time unless the average hourly rate fall below the required minimum wage.

Our response is dependent upon the method by which crew members are paid for their work, and also assumes that the corrective repair work is performed in the same workweek the original work was done. Any repair work done subsequent to a pay period must be paid for at a rate of pay at least equal to the statutory minimum wage rate.

If the job project percentage payment method is utilized, the above method of compensating crew members would be in compliance with the Act's monetary requirements. On the other hand, if the guaranteed hourly wage rate is in effect, the crew members would not be considered to have received any overtime compensation until they have received their regular straight-time wages for all hours worked in a workweek. In this regard, see section 778.315 through 778.318, U.S. v. Klinghoffer Brothers Realty Corp., 14 WH Cases 913, and E.W. Stock & Sons v. Thompson, 6 Cir, 194 F. 2d 493, 10 WH Cases 516.

Finally, your client is considering the use of a reducing job rate compensation plan to reflect economics of scale and to also provide additional incentive to support work efficiency and disincentive to work long hours. This proposal is to establish job rates for specific types of construction but with the base job rate for each additional construction project completed during a workweek by one crew being reduced by a predetermined percentage. The discounting method would be applied to projects completed during both straight-time and overtime hours and is not a scheme to attempt to reduce wage payments only during overtime hours.

We do not believe that the discounting of the base job rate to discourage employees from working long hours as described above would be in violation of the Act's monetary requirements.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator