FLSA-1053

September 14, 1982

This is in reply to your letter of August 22, 1982, concerning the section 7(i) exemption under the FLSA. You refer to your letter of July 22, 1982, and our response thereto dated August 12, 1982.

You indicate that based upon past earning histories of the establishment, an employee of that establishment receives a percentage of that establishment as a compensation which is sufficient to assure that the employee will earn in excess of $5.025 an hour during the representative period. However, one additional condition must be met in order for the employee to be exempt under section 7(i) from the overtime pay requirement of section 7(a) of the Act in a workweek when the employee's hours exceed 40. This additional condition is that the employee's regular rate of pay for such workweek must be more than one and one-half times the minimum hourly rate applicable under section 6 of the Act. If it is not more than one and one-half times such minimum rate, there is no overtime pay exemption for the employee in that particular workweek. See section 779.419 of Regulations, 29 CFR Part 779.

Thus, in each workweek in which overtime is worked, the employee's earnings, whether based upon draw or commissions, must yield in excess of $5.025 an hour. If this condition is not met, the exemption will not apply during the workweek. An employer would have the alternative to pay additional "make-up" pay so that earnings are sufficient to yield in excess of $5.025 an hour, provided the condition that more than half the employee's compensation for the representative period represents commissions on goods or services, is met. Otherwise, the employer would be required to pay additional overtime compensation in accordance with the principle in section 778.118 of 29 CFR Part 778.

We trust that the above is responsive to your inquiry. Please let us know if you have further questions.

Sincerely,

James L. Valin
Assistant Administrator
Wage and Hour Division

William M. Otter
Administrator