FLSA-944

August 9, 1983

This is in response to your May 16 letter to *** Assistant Regional Administrator for the Wage and Hour Division in Philadelphia, Pennsylvania, requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to two proposed pay plans involving "call-back" pay.

The principles regarding typical minimum "call-back" payments are discussed in Section 778.221 of the enclosed copy of CFR Part 778. Such minimum payments usually consist of a specified number of hours' pay at the applicable straight time or overtime rates which an employee receives on infrequent or sporadic occasions when, after his/her scheduled hours of work have ended and without prearrangement(s)he responds to a call from the employer to perform extra work. The portion of such "call-back" payments which represents compensation of the applicable rates for the straight time or overtime hours actually worked, if any, during such period may be credited as straight time or overtime compensation, as the case may be, in computing overtime compensation due under the Act. The amount by which the specified number of hours' pay exceeds such compensation for the hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due him.

However, the plans you propose do not meet the requirements of "call-back" pay and, therefore, such payments must be added to the amount of straight time compensation paid to determine the regular rate of pay for overtime purposes.

You state that the first pay plan applies to nonexempt driver-deliverymen of a fuel oil distributor. The drivers are paid $196 per week for a regular 40 hour workweek. This provides an hourly rate of $4.90. For emergency deliveries, the company charges the customer $15 as a service charge. The drivers for such emergency deliveries are paid $10 of the $15 the company receives. Since practically all of the deliveries take an hour or less, the company would like to consider such delivery as being equal to one hour of work even if the time worked by the driver is one-half or less. Such payments must be considered as a fixed sum for varying amounts of overtime which may be worked up to and including one hour. In such instances, the regular rate of pay is calculated by adding the lump sum payment to the amount of straight time compensation paid and dividing by the number of hours worked in the workweek. This is further explained in section 778.310 of the enclosed bulletin.

As a variation of the first pay plan, it is suggest that if the time for a single emergency delivery is more than one hour, the company will record such additional time and pay for such time. However, the company proposes various options to determine the compensation for the time spent working beyond one hour and uses as an example an employee working one and one-quarter hour on an emergency repair. The following methods of computing compensation, in addition to the payment of $10 for the first hour, are suggested:

1. One and one-half times the $4.90 rate for the one- quarter hour.

2. One quarter of $10 for the one-quarter hour.

3. Additional half time for the one-quarter hour.

These payments are not minimum payments for a specified number of hours but are combinations of a flat rate (a percentage of a fee charged customers) and an hourly component and are not amounts based on the applicable straight time or overtime rate. In such instances, the regular rate of pay is calculated by adding these payments to the amount of straight time compensation paid and dividing by the number of hours worked in the workweek.

Your final variation of the first pay plan would have the company pay the employees a salary on a fluctuating workweek basis and, in addition, pay the amounts described above for the emergency delivery. These payments would also not achieve compliance with the provisions of the Fair Labor Standards Act for the same reasons mentioned above.

The second pay plan involves burner service mechanics. These employees are paid $186 per week for a 40 hour workweek which provides an hourly rate of $4.65. The company charges the customer $22 for a night call. The employee receives $12 of the payment. This $12 is intended to compensate the employee up to the first one-half hour of work. Beyond the first one-half hour of work and up to the hour, the employee would be paid at the rate of $8 per hour (or $4 for one-half hour). This would be the method of payment for each call, even if there is more than one in an evening. This method of payment would be considered a lump sum payment since it is a fixed sum for varying amounts of overtime which may be worked up to and including one hour.

As a variation of this second pay plan, it is suggested that when an employee works more than one hour on one repair call, the company will pay the employee to the nearest quarter of an hour using the $8 per hour rate. These amounts would not be considered "call-back" payments since the rate paid is not a rate based on the applicable straight time or overtime rates.

Finally, you state that the company may wish to pay the employees a salary for all hours worked and additional half time for the overtime hours worked over 40 in the workweek. The company then wishes to combine this salary for a fluctuating workweek with the method of pay from the emergency repair work. The additional amounts paid for the emergency repair work would be considered additional straight time compensation and must be added to the other straight time compensation paid and divided by the number of hours worked in the workweek to determine the actual regular rate of pay for overtime pay purposes.

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

Sincerely,

William M. Otter
Administrator

Enclosure