

FLSA-934

November 17, 1983

This is in reply to your letter of October 13, asking on behalf of a client whether a premium compensation paid to employees for special function work performed during non-normal worktime is excusable from the regular rate of pay computation pursuant to Section 7(e)(5) of the Fair Labor Standards Act (FLSA).

You state your client's employees generally work regular shifts of eight hours per day and 40 hours per week. Occasionally, once or twice a week, your client asks employees to work at special functions which occur outside their normal work hours. These functions generally run two to three hours in duration and occur several hours after the employee's normal workshift ends. In order to induce employees to work at these special functions, your client is willing to compensate the employees with a premium hourly rate of pay. Your client will pay \$15.00 an hour even though an employee's regular rate of pay during normal work hours may be only \$6.00.

You state that sometimes the work performed at these special functions is the same type of work the employee performs in his/her normal job, sometimes the type of work is different. Further, it is possible that the employees may work at special functions during their non-normal work hours on a scheduled day off and, therefore, will not have worked a full schedule prior to working the non-normal working hours.

Since you ask five questions we will respond to them in the order presented.

Your first question asks whether the premium compensation paid for work performed during non-normal work hours at these special functions is properly excluded from the computation of an employee's regular rate of pay under FLSA Section 7(e)(5).

As explained in Section 778.108 of 29 CFR Part 778, copy enclosed, the overtime rate, like the regular rate, is a rate per hour. To qualify as an overtime premium payment under FLSA section 7(e)(5), the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour. Further, the extra compensation must be paid because such hours are worked in excess of eight in a day or 40 in a week, or in excess of the employee's normal working hours or regular working hours.

As explained in Section 778.202(c) of Part 778, if the normal workday is artificially divided into a "straight-time" period to which one rate is assigned, followed by a so-called "overtime" period for which a higher "rate" is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered as part of the regular rate of pay.

Based on the information you provided, it is our opinion that the premium pay for the special function work performed during non-normal worktime on scheduled workdays at

the rate of \$15.00 per hour would qualify as a FLSA section 7(e)(5) type payment. Further, payment of the premium pay for special function work performed on a scheduled day off would qualify as a FLSA section 7(e)(6) type payment. As such, the premium payment of \$9.00 (15.00 minus \$6.00) would be excludable from the regular of pay computation and creditable pursuant to FLSA section 7(h) against any overtime premium pay otherwise due an employee.

Your second question asks whether the premium payment for work performed during non-normal work hours must be at least time and one-half the individual's regular rate of pay to be excludable pursuant to FLSA section 7(e)(5).

For premium payments to be excluded from the regular rate of pay computation under FLSA section 7(e)(5) they need not be at least one and one-half times the regular rate of pay. It is only necessary that the premium payment be greater than the employee's regular hourly rate of pay. Under FLSA section 7(e)(6), however, the extra compensation to be excluded from the regular rate of pay computation must be at least one and one-half times the pay rate established in good faith for like work performed during non-overtime hours.

Your third question asks, if the work performed during non-normal work hours is the same as the work performed during normal work hours would our answer be different.

Our answer would not be different if the work during both periods was not the same.

Your fourth question asks if our answer would be different if payment of the premium pay was conditioned upon the employee having in fact already worked a normal work period prior to the special function being performed, or conditioned only upon the work being performed during non-normal working hours.

As explained in section 778.202(a) of Part 778, it is not required that an employer pay the FLSA section 7(e)(5) type premium payments when an employee has not worked a normal working period. As explained in section 778.203(d) of Part 778 however, Section 7(e)(6) type premium payments must be paid because work is performed on the days specified and not for some reason which would not qualify the premium payment as an overtime premium under section 7(e)(5),(6) or (7).

Your fifth question asks whether the employees must be notified in writing that the premium payments could be excluded before the premium payment could be excludable from the regular rate of pay computation.

Neither FLSA section 7(e)(5) nor FLSA section 7(e)(6), in contrast to FLSA section 7(e)(7), specify or imply that employees be advised in writing that a premium payment will be excluded from the regular rate computation before such premium payments can be excluded. However, as specified in Section 516.5(b)(3) of 29 CFR Part 516, copy enclosed, such employer shall preserve for at least three years, plans, trusts, employment contracts, and collective bargaining agreements under section 7(e) of the Act. Hence, while your client need not advise his employees in writing of the treatment of these

premium payments where more than 40 hours are worked in a workweek, the documents concerning their character must be retained.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator

Enclosures