

**FLSA-759**

July 30, 1984

This is in response to your August 3 letter in which you request an opinion on behalf of \*\*\* Corporation regarding the overtime pay provisions of the Fair Labor Standards Act (FLA.).

You indicate that \*\*\* is primarily engaged in the business of providing lawn, tree, and shrub care services to customers through periodic applications of weed control, fertilizer, and insect control materials. Due to the seasonal nature of the lawn care industry, there is a great deal of fluctuation in the number of hours that employees work during the year. In order to provide its lawn care employees with steady compensation, \*\*\* pays them in accordance with the "fluctuating workweek" pay method as discussed in section 778.114 of 29 CFR Part 778.

\*\*\* would like to provide additional overtime payments by modifying this pay arrangement. Specifically, your client would like to provide employees with additional pay for certain overtime hours based upon percentages which are higher than 50% of an employee's hourly rate.

The following illustrates this proposed modification:

<u>Hours Worked Each Week</u>	<u>Overtime Rate for All Hours Over 40</u>
Over 40 but less than 50	regular rate plus 50% of regular rate
50 but less than 60	regular rate plus 60% of regular rate
60 but less than 70	regular rate plus 70% of regular rate
70 and over	regular rate plus 80% of regular rate

Under the pay arrangement discussed in section 778.114, an employee may be paid a fixed salary for hours that fluctuate from week to week, if there is a mutual understanding between the employer and the employee that the fixed salary is compensation for all hours worked each workweek, whether few or many. The salary must be sufficiently large to assume that no work week will be less the minimum wage of \$3.35 an hour. In addition to the straight time salary, the employee must receive additional overtime pay for each overtime hour worked in the week at not less than one-half times the regular rate of pay, unless the employee is otherwise exempt. This pay arrangement does not preclude an employer from paying additional overtime pay which is greater than one-half of an employee's regular rate of pay. Therefore, it is our opinion that your client's proposed pay plan complies with the overtime pay requirements of the Act.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter  
Administrator