FLSA-760

October 1, 1984

This is in reply to your letter of September 14 enclosing correspondence from *** regarding questions raised by *** about the equity of the Fair Labor Standards Act (FLSA) interpretation contained in section 778.114 of CFR Part 778 (copy enclosed). *** contends that the interpretation provides that "the more overtime an employee works, the less he gets paid, down to the minimum wage." You request that we address the issue raised by *** regarding the possible consequences of that interpretation.

First, we will clarify the role of the Department of Labor in interpreting or determining the method of computing overtime compensation under section 7 of FLSA. Section 7(a) of the Act establishes the requirement that employees subject to its provisions must be paid overtime pay at a rate of not less than one and one-half times their regular rates of pay for all hours worked after 40 in a workweek. While section 7 spells out the kinds of remuneration which shall not be included in wages for the purposes of computing the "regular rate" of pay, it provides no specific guidance as to how overtime pay should be computed, nor does it authorize the Secretary to prescribe by regulation how it should be determined. However, in order to obtain consistent administration of FLSA, and to make known to employers and employees alike how the Act will be enforced, interpretations like 29 CFR Part 778 are issued. Where there have been Supreme Court decisions concerning a particular matter, such decisions are relied on in prescribing the interpretations.

In this regard, our interpretation of the computation of overtime pay for employees paid a fixed salary for fluctuating or variable workweeks contained in section 778.114 of 29 CFR 778 is based on the U.S. Supreme Court decision in the case of Overnight Motor Transportation Company, Inc. v. Missel, no. 939, June 9. 1942 (WH Cases vol. 2, page 47). The effect of that decision is that the longer a fixed salaried employee works, the lower his/her regular rate of pay will be. Under this method of overtime compensation, there is an understanding between the employer and the employee that a fixed salary will pay all the straight time wages due for all hours worked, whether few or many. Of course, the guaranteed salary must be sufficiently large so that when the salary is divided by all hours worked, the resulting quotient (i.e., regular rate) will not be less than the applicable minimum wage for each hour of work, currently $3.35 an hour. Further, extra compensation at not less than one-half times the regular rate must be paid for all overtime hours of work in the workweek. The Supreme Court has decided that the monetary provisions of FLSA would be satisfied if these conditions are present.

We have, through the years, received many adverse comments (particularly from employees) concerning this fluctuating or variable hours method of computing overtime compensation. It has been pointed out, for example, that the longer the employee works, the lower the regular rate of pay. On the other hand, it does provide a fairly simple way in which to provide a constant and predictable income as payment for all straight time wages due.

We trust the above is responsive to your inquiry.

The enclosure submitted with your letter is herewith returned.

Sincerely,

William M. Otter
Administrator