

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington

VACATION PAY NOT COMPENSATION FOR HOURS WORKED

Does Not Affect Overtime Even When Vacation Is Worked
General Fleming Decides After Reconsideration

Vacation pay is not payment for hours worked and does not affect the regular rate upon which overtime is computed, even when the employee works through the vacation period and receives his vacation pay in addition to his earnings. This opinion was arrived at by General Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, after a reconsideration of the problem raised by the Office for Production Management's suggestion that defense industries this year pay their employees double for foregoing vacations. General Fleming rescinded his previous suggestion that the employee's regular rate of pay and overtime compensation might be increased prospectively for a period of time sufficient to net the desired amount.

Two recent releases of the Division (R-1402 and R-1423) on the subject are cancelled.

General Fleming's revised opinion on vacation pay was contained in a letter to a trade association executive:

"This letter is intended to supersede our letter of May 8, 1941, in which we expressed to you our opinion on the question of whether added compensation paid to an employee for foregoing a vacation affects such employee's regular rate of pay under the Fair Labor Standards Act. We said that since the added compensation is compensation for hours worked by the employee, in our opinion it does affect his regular rate of pay. Our letter then offered the following suggestion:

"The remaining question is how such payments are to be calculated into the employees' regular rates of pay and overtime compensation. We suggest that the employees' regular rates of pay and overtime compensation might be increased prospectively for a period of time sufficient to net the desired amount."

"That suggestion has since been the subject of many questions and much apparent misunderstanding and misinterpretation. Moreover, in following the suggestion it is necessary for employers rigidly to control hours of work, if the employee is to receive his customary vacation money without illegal manipulation of rates of pay. In this connection, employers have pointed out their inability to follow the suggestion because of their inability to control the hours of all employees so rigidly. As a result employees may receive either more or less than their customary vacation pay. We have, therefore, reconsidered the whole matter and have decided to revoke our prior utterances on this subject, including our letter of May 8 to you and our subsequent release of May 22 dealing with the same subject. In lieu thereof we have reached the following conclusions.

"A sum paid to an employee for foregoing a vacation, which is in addition to the employee's normal compensation, is not in fact compensation for hours worked. It is a sum which, pursuant to the normal employment arrangement, the employer would pay to the employee for a period during which the employee did not work. The sum remains vacation pay, and, therefore, not compensation for hours worked, even if it is paid in addition to normal compensation for hours worked, when the employee foregoes his vacation. Presumably the employer would pay the employee the usual vacation pay even though the latter refused to give up his vacation. Hence, the fact that the employee chooses to stay on the job does not make the vacation pay he receives compensation for hours worked.

"It is our opinion, therefore, that if an employee's vacation pay is given him in addition to his normal earnings for hours worked, when he foregoes his vacation, such additional payment is not compensation for hours worked and does not affect the employee's regular rate of pay under the Fair Labor Standards Act. This opinion is, of course, limited to situations where (1) there is a bona fide agreement that the employee shall receive a vacation with pay and (2) the sum paid is the approximate equivalent of the employee's normal earnings for a similar period of time. Thus, for a two weeks vacation period the sum paid in lieu of vacation would be the normal earnings of the particular employee for a two weeks period.

"The principles applicable to this situation, in other words, are like those which the Wage and Hour Division has adopted in connection with the general question of absences with pay due to vacations, holidays, illnesses, or other similar causes and the effect of such absences upon the regular rate of pay. You are familiar with such principles."

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