

JAN 23 1997

Dear

This is in response to your request for an opinion under the Fair Labor Standards Act, 29 U.S.C. 201, et seq. ("FLSA") as to the treatment of two types of bonus payments pursuant to a plan proposed to your clients, a number of labor organizations. You wish to know if payments under these plans must be included in the employees' compensation for purposes of calculating their regular rate of pay in overtime weeks.

The first question arises from a plan to pay employees lump sum bonuses on a quarterly basis based on operational improvements measured monthly in such things as plant safety, reduction of quality complaints, and production efficiency as measured by a reduction in downtime. Under the plan, improvements resulting in the payment of the bonuses will be determined by measuring the performance for a month against the performance for that month in the previous year.

As a general matter, all remuneration paid to employees except that expressly excluded by the FLSA is included in their total compensation when computing their regular rate for overtime purposes. See 29 C.F.R. 778.108. At 29 C.F.R. 778.211(c) it is provided that bonuses such as those described above fit none of the statutory exclusions from the regular rate and are included in an employee's total compensation when computing the regular rate:

Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay. (emphasis added).

When including these bonuses in the regular rate of pay, they must be apportioned back over the workweeks of the period during which they may said to have been earned. See 29 C.F.R. 778.209 for the methods of inclusion of bonuses in the regular rate.

The other question arises from a proposal to pay the employees a lump sum computed by multiplying the employees' pay for an unspecified period by a fixed percentage. You indicate that the payments would include the same percentage of both the employees' straight time earnings and any overtime compensation paid to the employees for the period in question. We believe that such a payment would constitute a percentage of total earnings bonus excluded from computation of the employees' regular rate of pay for overtime purposes pursuant to 29 C.F.R. 778.210. Payment of a bonus and simultaneous payment of the overtime compensation due on the bonus satisfies the overtime requirements of the FLSA and no recomputation is required.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your might require a different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.

I trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator