

FEB 25 1997

This responds to your letter of October 16, 1996, concerning the application of the Fair Labor Standards Act (FLSA) to a salaried exempt employee. This executive, administrative, or professional employee works a full workweek in his exempt position and then works up to eight additional hours on rare occasions in a nonexempt position for the same employer.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law and not otherwise exempt must be paid a minimum wage of not less than \$4.75 an hour for all hours worked and not less than one and one-half times his regular rate of pay for all hours worked in excess of 40 in a workweek.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Regulations at 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. One such test requires that an otherwise exempt employee devote no more than 20% (40% for a retail or service establishment employee) of his hours worked in the workweek to nonexempt work.

An exempt employee must be paid on a salary basis, as described in section 541.118 of the regulations. As stated in section 541.118, an employee will be considered to be paid "on a salary basis" if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of the quality or quantity of the work performed.

There is no requirement that the exempt employee be paid for extra work in a nonexempt position. However, it should be noted that if the employee devotes more than 20% (40% for a retail or service establishment employee) of his time in the workweek to the extra work, he will not be classified as an exempt employee for that workweek and must be paid the full

minimum wage and overtime compensation during that workweek at a regular rate determined by dividing his full salary for that week by 40 hours. If the employee loses the exemption on a regular and recurring basis, we would question whether the employee is actually an exempt employee, and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no work in the nonexempt position was performed.

It has been our longstanding position that additional compensation besides an exempt employee's guaranteed salary is not inconsistent with the salary basis of payment. Thus, extra compensation by the hour for hours worked in excess of 40 in a workweek would not defeat the exempt status of an otherwise exempt employee.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team