

SEP - 5 1997

This is in response to your letter in which you request an opinion under the Fair Labor Standards Act (FLSA) concerning a client's proposed pay plan whereby it would pay overtime premium compensation to employees who work 2 different jobs, for which different rates are paid, based on the rate paid for the secondary job.

Under your client's plan employees would work 7 hours a day, Monday through Friday, on their regular jobs. In addition they may work additional hours during the week or on weekends on "secondary" jobs, which are distinctly different from their regular jobs, and for which different rates of pay have been established. The employees would be paid their normal rates of pay when performing their regular jobs and the rate established for the secondary jobs when performing them during hours in excess of 7 in a day and on weekends. Your client would pay overtime premium pay at a rate of one and one-half times the rate established for the secondary job for all hours over 40 in a workweek, regardless of when in the workweek the secondary job was performed. For example, if an employee were to work 35 hours at his/her regular job and two 7-hour shifts at a secondary job, overtime pay would be computed for 9 hours ( $35 + 14 - 40 = 9$ ) at one and one-half times the rate paid for the secondary job regardless of whether the work was performed early in the week or later, i.e., even if work during hours 41 through 49 were not performed on the secondary job, but on the primary job.

Section 7(g)(2) of the FLSA provides an exception from the general regular rate requirement of section 7(a) and allows, under specified conditions, the computation of overtime pay on the basis of the bona fide hourly rate in effect when the overtime work is performed. Where the provisions of section 7(g)(2) are met, as discussed in 29 CFR 778.415 through 778.421, the required overtime compensation may be paid at a rate of not less than one and one-half times the hourly nonovertime rate established for the type of work performed during such overtime hours. The recordkeeping requirements for employers who pay employees under section 7(g)(2) agreements are contained in section 516.25 of 29 CFR Part 516.

As stated in section 778.419(a)(2), the overtime hours for which the overtime rate is paid must qualify as overtime hours under section 7(e)(5) [hours in excess of 8 in a day or 40 in a week or in excess of the employee's normal working hours]; 7(e)(6) [hours on Saturdays, Sundays, and other "special days"]; or 7(e)(7) [hours outside of the hours established by agreement or contract as the basic workday or workweek]. In addition, the number of overtime hours for which the overtime rate is paid must equal or exceed the number of hours worked in excess of the applicable hours standard.

In our view, the time worked on the "secondary" job would not qualify under section 7(e)(5), (6), or (7) because your client does not pay premium pay for overtime hours on other than a 40-hour-workweek basis and the hours on the "secondary" job are not necessarily "overtime" hours. In most weeks, some of the hours worked by an employee on his/her regular job would occur beyond the 40th hour. Your client would have to pay for overtime hours either at one and one-half times a weighted average rate (see 29 CFR 778.115) or, under section 7(g)(2), on the rate -- regular or secondary -- at which an employee actually works during each hour over 40 in a workweek.

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 that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client that has been under investigation by the Wage and Hour Division, or that has been 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.

Sincerely,

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