

OCT 31 1997

This is in response to your letter to the Administrator of the Wage and Hour Division. In your letter, you ask "does the "Fixed Salary for Fluctuating Hours" method of paying an employee have to qualify under Section 7(f) of the Act?"

The short answer to your question is no. The fixed salary for fluctuating hours and Section 7(f) of the Fair Labor Standards Act (FLSA) are two separate methods of paying overtime.

Under section 778.114 of Interpretative Bulletin, 29 C.F.R. Part 778, an employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than working for 40 hours or for some other fixed weekly work period, such a salary agreement is permitted by the FLSA if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest, and if the employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay. This is often referred to as the fixed salary for fluctuating hours or the "fluctuating workweek".

Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week, and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary agreement.

Section 7(f) of the FLSA provides an exemption from the overtime pay requirement of the FLSA for certain employees who are paid a weekly guarantee for not more than 60 hours based on a contract or agreement which specifies a regular rate of pay not less than the applicable minimum wage and one and one-half times the regular rate for each hour worked in excess of the applicable hours standard. This method of compensation is often referred to as a "Belo" plan (see Walling v. A.H. Belo Corporation, 316 U.S. 624).

The requirements of FLSA Section 7(f) are explained in Sections 778.402 through 778.414 of Regulations, 29 C.F.R. Part 778. (Copy enclosed.) This method of payment may be implemented only for employees whose duties require irregular hours of work which the employer cannot reasonably control or anticipate. As stated in Section 778.405, the irregularity of hours worked must result in significant variations below as well as above the maximum hours standard provided by Section 7(a) of the FLSA. There is no valid irregularity as required by FLSA Section 7(f) where the variation in hours worked occurs only in the hours over 40; there must also be irregularity in the hours worked under 40. Irregularity caused by absences for personal reasons, illness, vacations, holidays, or scheduled days off will not meet the requirements in Section 7(f).

It is important to note that an employer's employees must agree to any pay plan which is established under the provisions of Section 7(f). Section 516.4 of the Regulations, 29 C.F.R. Part 516, requires employers to maintain a copy of any written agreement concerning the implementation of a plan pursuant to Section 7(f) of the FLSA or, in the case of a verbal understanding, a written memorandum summarizing the terms of such agreement.

We trust that this is responsive to your inquiry.

Sincerely,

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

Enclosure