

DEC 24 1997

This is in response to your letter to Secretary Herman regarding overtime compensation under the Fair Labor Standards Act (FLSA). You ask four specific questions, which will be answered in the order asked.

Question 1: If an employee paid a fixed salary for fluctuating hours (fluctuating workweek method) needs sick/personal or vacation time, can they be required to use vacation/sick for days missed and also can they be docked under this program for partial or full days once they use all available benefits?

Answer 1: Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114 of C.F.R. Part 778 (copy enclosed), one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted. However, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his/her full salary in any workweek when he/she performs no work.

Question 2: If a showroom sales staff is hourly + commission, and they earn a monthly commission, must you take that commission and compute the amount allocable to each week of that month and pay additional overtime, even if you've already paid overtime based on their hourly wage?

Answer 2: Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. Where it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount

of commission actually earned or reasonably presumed to be earned each week, some other method must be adapted. Two methods commonly used are allocating equal amounts of the commission to each workweek during the commission period or allocating equal amounts of the commission to each hour worked during the commission period. These methods of allocating commissions are discussed in section 778.120.

Question 3: If we establish a salary for a regular 45 hour workweek and pay overtime according to a salary for a workweek exceeding 40 hours, can you dock for partial days or full days for sick/personal and or vacation?

Answer 3: If an employee is paid a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for practical purposes employed at an hourly rate of pay.

For example:

If an employee is paid a fixed salary of \$300 for a fixed workweek of 45 hours, the employee's regular rate of pay is \$6.67 (\$300/45hours). During a workweek when the employee works 45 hours, he/she will receive \$300 salary plus \$16.68 in overtime compensation ($1/2 \times \$6.67 \times 5$ hours) or a total of \$316.68.

During a workweek when the employee works 48 hours, he/she will receive \$300 salary plus \$16.68 in overtime compensation for the hours between 40 and 45 plus \$30.02 for the hours worked between 45 and 48 ($\$6.67 \times 1 \frac{1}{2} \times 3$ hours) or a total of \$346.70.

In a workweek where the employee works only 38 hours, he/she will receive \$253.45 (38 hours x \$6.67).

Question 4: Can you pay a showroom sales associate on a salary basis and consider him or her exempt from overtime if the associate does not handle outside sales 80% or more of the time?

Answer 4: The criteria for the executive, administrative, professional and outside sales exemptions are contained in 29 C.F.R. Part 541 (copy enclosed). There is not enough information in your letter for a determination on the exempt status of a showroom sales associate to be made.

If you have further questions regarding the application of the Fair Labor Standards Act you may find it more convenient to contact the Richmond, Virginia Wage and Hour District Office located at The 700 Center, 700 East Franklin Street, Suite 560, Richmond, Virginia, 23219, telephone: 804-771-2995.

We trust this is responsive to your inquiry.

Sincerely,

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

Enclosures