FLSA-1110

June 12, 1972

This is in reply to your letter of May 16, 1972, in which you ask if the conditions of section 7(i) of the Fair Labor Standards Act are satisfied if an employer arbitrarily adds sufficient money to an employee's actual hourly earnings of $2.35 to bring his regular rate to at least $2.41 per hour.

Section 7(i) of the Act provides an exemption from its overtime pay requirements for any employee of a retail or service establishment if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.

In the example you give, it is our opinion that such additional payment by the employer in a particular or isolated week to bring the $2.35 per hour rate to at least $2.41 per hour would satisfy the requirement of section 7(i)(1), provided that the make-up payment is not off-set against earnings in a subsequent workweek. However, if such make-up payments occurred frequently, doubt would be cast on the bona fides of the commission rate involved in such arrangement.

Sincerely,

Horace E. Menasco
Deputy Assistant Secretary