

FLSA-513

January 8, 1973

This is in reply to your letter of July 12, 1972, requesting an opinion that contributions and payments made pursuant to the subject plan qualify for exclusion from the participating employee's regular rates of pay pursuant to section 7(e)(4) of the Fair Labor Standards Act.

A reading of the plan indicates that the amount of the aggregate contribution or the exact formula to be used in any particular plan year to determine the amount of the aggregate contribution shall be established by resolution of the Board of Directors. Thus, the plan fails to meet the formula requirements of section 778.215(a)(3) of Part 778, in that it does not contain a definite formula for determining the amount to be contributed by the employer. The plan would therefore not qualify as a bona fide benefit plan under section 7(e)(4) of the Act.

As indicated in section 778.208, bonuses and benefit plan contributions which do not qualify for exclusion from the regular rate of pay under section 7(e) of the Act must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. However, when a benefit plan does not meet the requirements of section 7(e)(4) and the employer's contributions to the plan are based upon a percentage of total earnings of the participating employees, the employer's contributions may be excluded from the regular rate of pay if the conditions prescribed in section 778.210 of Part 778 are met. Under the method of allocation discussed in this section, where an employer's irrevocable contributions are distributed as a predetermined percentage of the employees' total compensation, including straight time, overtime, bonuses, and commissions, the overtime due under the Act is automatically included and no additional computation or payment of overtime is required.

Under section 5.1 of the plan, for each plan year the participants earn one point for each \$100 of compensation (presumably rounded off to the nearest \$100) and one point for each full year of continuous service. The allocation to each participant's account (prescribed in section 5.2) is the portion of the employer's contributions for each plan year according to the ratio which the number of earned points credited to the employee bears to the total number of points earned by all of the participating employees. Compensation as defined in section 2.3(1) includes "without limitation all salary, commissions, bonuses (contractual, discretionary, or otherwise), overtime pay, shift premium and any other extra or special remuneration of any kind".

Since the formula provides one point for each \$100 of total compensation, it does not include the employee's total compensation within the meaning of section 778.210 of Part 778. However, in our enforcement of the Act we do not now assert that this feature, taken alone, would increase your client's liability for payment of overtime compensation to the employees involved.

The method of computation provided in the formula does not, however, provide for the inclusion of the overtime due on that part of the bonus derived from the length of service factor. For this reason the bonus is not predicated on a predetermined percentage of the employees' total compensation as contemplated in section 778.210. For a detailed explanation of this problem see the fourth and sixth paragraphs, in particular, of the enclosed copy of an opinion letter dated January 28, 1964. In order to include the overtime due on the part of the bonus attributable to length of service, the gross earnings, or in this particular formula the points earned for each \$100 of such earnings, should be weighted by multiplication by the length of service factor or points. A total bonus can then be distributed on a percentage basis to each individual member sharing in the bonus by dividing the total weighted points of the participating employees in this formula into the total bonus. Each point would thus have a fixed dollar value. If each participating employee is then paid as his share the number of dollars represented by his total weighted number of points for the bonus period, the bonus mathematically will include a fixed percentage of both the straight time and overtime and such payment will be in compliance with the Act.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division