

FLSA-530

August 6, 1973

This is in reply to your letter of July 19, 1973, requesting an opinion under the Fair Labor Standards Act on a proposed wage plan. Under the proposal, employees would work 75 hours in nine days over a two week period. On the days an employee is working, he would be expected to be on duty between 9:00 a.m. and 3:00 p.m. and could choose to take a 30-minute rather than a one-hour lunch period. Outside of the basic 9:00 a.m. to 3:00 p.m. period, he would have flexibility to schedule his own hours so long as he meets the requirement of working a total of 75 hours in a two week period. You indicate that the standard workweek is Sunday through Saturday and that employees will be paid a straight salary on a bi-weekly basis.

We observe under the proposed plan and the example of an employee's schedule you give that more than 40 hours may be worked in one workweek and less than 40 hours in the other workweek of the bi-weekly pay period. Although no overtime compensation would be paid under the plan in such a case, you indicate your belief that the proposed plan is entirely within the spirit of the law, that it leaves to the employee's discretion the decision as to whether he will work any overtime hours in any workweek and that it should be approved.

Under the provisions of section 7(a) of the Act, employees who are subject to its standards are entitled to receive not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 hours "in any workweek". As further indicated in 29 CFR 778.100, et seq., the language of the statute itself requires that the workweek be the basis for applying section 7(a) of the Act. Except for section 7(j) which is limited to hospital employees, the Act takes a single workweek as its standard and does not permit the averaging of hours over two or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours in excess of 40 worked in the second week. (See 29 CFR 778.104.) There is no provision of the law (other than section 7(j)) or any indication in the legislative history of the Act that Congress intended overtime to be computed on any basis other than the number of hours worked in each workweek.

The language of the Act and the controlling court decisions make it clear that an employee cannot waive his statutory right to be paid overtime compensation for all hours worked in excess of forty in any workweek as you suggest. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, the Supreme Court of the United States said that the policy consideration of Congress in enacting the Fair Labor Standards Act "forbids waiver of basic minimum and overtime wages under the Act". The court stated further that "While in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law was passed, and so to that of the community at large".

It is beyond the authority of this Department to sanction a wage plan, such as you propose, which is at variance with the requirements of the law. The plan could, however, be modified to comply with the Act. Such modifications would include limiting the hours worked to 40 hours or less each workweek as an objective and provide that when the hours worked exceed 40 in a workweek, overtime compensation as required by the Act would be paid.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division