

## FLSA-793

April 2, 1974

This is in reply to your letter of March 17, 1974, concerning the payment of a fixed sum of overtime pay for a variable hours workweek. The subject matter is the same as that of your letter of February 19th, which was answered on March 8th.

In essence, you believe that once the basic straight time hourly rate has been agreed upon, it may not be changed just because the number of hours changes. The example given in your letter of February 19th was that of payment of \$74 for 40 non-overtime hours plus \$41.63 for 15 overtime hours (a fixed sum) or a total of \$115.63 for 55 hours of work. You believe that you may pay \$115.63 per week if the employee works 55 hours, 51 hours, 47 hours, 43 hours, etc., since the agreed upon basic rate is \$1.85 per hour. You state that "if under section 778.309 a salary rate has been established for a constant 55 hour week, then it would appear that the regular rate must be \$1.85 in lieu of some other rate regardless of the number of hours worked."

First, it is a question of fact whether an hourly rate rather than a weekly salary has been agreed to, and second, whether the agreed hourly rate is applied in practice. For example, a salary of \$150 a week for an expected 50 hour week does not necessarily indicate that the salary includes overtime pay. See the second sentence in section 778.325.

In addition, it cannot be said that an employee is paid the agreed hourly rate if he is paid a fixed sum regardless of the hours worked. An employer and an employee cannot agree that the employee is to receive a fixed sum as total compensation (including overtime pay) for a workweek varying, for example, up to 55 hours. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without the proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than time and one-half his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeds 55 hours. This principle is discussed in section 778.326 of the Bulletin.

Section 7(f) of the Act is the only provision which permits an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. This method of overtime pay computation is discussed in sections 778.402 through 778.414 of the Bulletin.

The Act does not require the establishment of the regular rate of pay in advance of the hours worked. On the contrary, an employee paid a fixed salary for fluctuating hours of

work could conceivably be paid a different hourly wage for each week in the calendar year as explained in section 778.114 of the Bulletin.

The example of overtime pay computation given on page 3 of your letter is not one showing compliance with the overtime requirements of the Act. If an employee is paid \$101.20 for a 44 hour workweek, his regular rate of pay is obtained by dividing \$101.20 by 44 hours, not by 46 hours as you indicate.

It is hoped that this explanation of the overtime requirements for overtime workweeks which vary in number clears up any misunderstanding you may have in this regard. The principles enunciated here are well established and have guided the Department of Labor for many years in enforcement of the Fair Labor Standards Act.

As pointed out in our letter of March 8, 1974, please feel free to contact the Wage-Hour office in Raleigh. The people there will be pleased to discuss the various methods for computing overtime pay.

Sincerely,

Warren D. Landis  
Acting Administrator  
Wage and Hour Division