

## **FLSA-955**

March 22, 1983

This is in reply to your letter of January 23, 1983, asking whether your client's employee benefit plan complies with the monetary requirements of the Fair Labor Standards Act.

The Plan's objectives are to: (1) increase productivity of all employees through a plan designed to recognize efforts made throughout the shop and office; (2) reward individual employees promptly for productivity gains made by the group as a whole. (3) design the Plan to be flexible enough to accommodate changes in the nature of the business, yet simple to understand and administer, and (4) protect the Company's interests against downturns in the business cycle. Every active full or part-time employee, not including Company officers, members of the staff group and commission salesmen, who has completed 90 days of active service with the Company, is a participant.

The bonus pool will be determined by calculating the difference between the production sales values and the productivity basis (theoretical value of goods produced, determined by dividing production wages paid for a production week (total wages paid for production hours (all regular and overtime hours and paid sick time) plus overtime premium pay, by the productivity factor) over the four most recent production weeks, multiplied by the productivity factor. Productivity factor means total production wages paid divided by production sales value for the Company's fiscal year ending June 30, 1982. Excess production sales values as multiplied by the production factor will be added to the bonus pool, while shortages will be subtracted from the bonus pool.

Additions to the bonus pool will be allocated to three separate accounts: (a) 25% to the employee monthly bonus distribution account; (b) 25% to the employee monthly year end bonus distribution account; and, (3) 50% to the Company retention account. Subtractions from the bonus pool will be allocated 100% to the employee year-end bonus distribution account.

Bonus amounts added to the employee monthly distribution account will be determined by multiplying each week's bonus amount by the percentage an employee's base wages bear to the base wages paid all such participants for the same production week. Base wages mean for hourly employees, regular wages paid multiplied by base hours. Base hours means all regular and overtime hours. For salaried employees, regular wages are determined by dividing an employee's annual salary by 2080.

An employee will be paid on or about the tenth of each month, the amount which has been accumulated in the monthly distribution account. However, the monthly distribution amount shall be limited to 15% of the lesser of each participant's base wages paid during the production weeks on which the distribution is calculated, or 40 times the hourly rate of the highest occupied factory labor grade as of January first of each year, multiplied by the number of production weeks on which the distribution is based. Any forfeitures

resulting from employment terminations shall be added to the employee year-end distribution account.

The year-end bonus pool includes 25% of the bonus amount found for a production week, 100% of all forfeitures on a monthly basis and from the previous year-end bonus amount, and 50% of inventory gains. The year-end bonus pool is reduced by amounts where during a production week the sales values are less than the productivity basis and all inventory losses.

The employee's year-end bonus amount is determined by comparing his/her base wages paid during the plan year to the base wages paid all such participants for the plan year. However, an employee's year-end bonus will be limited to the lesser of 5% of his/her base wages paid during the plan year, or 2080 times the hourly rate at the midpoint of the highest occupied factory labor grade as of January first of each year.

You ask whether the proposed bonus plan affects the regular rate of pay for purposes of overtime compensation calculation.

The regular rate of pay for overtime compensation purposes would be affected. This is so since the Plan's proposed bonus payments are based on worker efficiency, i.e., productivity. Such bonus payments are not excluded from the regular rate computation. In this regard, see Section 778.211 of 29 CFR Part 778, copy enclosed.

As explained in Section 778.107 of Part 778, the Act's general overtime pay standard requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. As stated in section 778.109, the regular hourly rate of pay of an employee is determined by dividing his/her total remuneration for employment in any workweek by the total number of hours actually worked by him/her in that workweek for which such compensation was paid. In your client's situation, the bonus amount paid would be added to an employee's weekly earnings and this total would be divided by the hours worked during that period to determine his/her regular rate of pay. One-half times such regular rate would be due for all overtime hours.

We believe an illustration may be helpful. For example, assume that an employee is paid \$5.00 an hour for his/her work and worked 50 hours in a workweek. In such case the employee would be due \$5.00 x 50 hours of work, or \$250.00 as straight time wages and \$5.00 x 10 overtime hours x 1/2 (the overtime premium), or \$25.00 as overtime pay, for gross wages of \$275.00 for that workweek. Assuming also that the weekly bonus amount to be paid at the end of the month does not exceed the limits specified, it is not necessary in this case to add the bonus amount to the wages already paid since overtime pay has been properly paid on these wages. Therefore, only calculation of the overtime premium pay due on the bonus remains to be done. If the employee's monthly distribution account was credited with \$50.00 as a bonus for that workweek, the additional overtime pay that would be due would be calculated as follows: \$50.00 (the bonus amount) divided by 50 hours of work equals \$1.00, the regular rate of pay increment. The overtime premium pay

increment due on this additional payment is \$1.00 (the regular rate of pay) x 1/2 (the overtime premium) x 10 overtime hours, or \$5.00 as overtime pay. Thus, the employee would be due a total of \$55.00 when the \$50.00 bonus is paid for the workweek.

With respect to the year-end bonus we will also assume that the limits specified on the bonus amount will not be exceeded and that the wages and monthly bonus have been properly paid as illustrated above. Since part of the year-end bonus amount represents the weekly additions to the monthly bonus distribution account, only the additional overtime pay increment due for monthly and year-end bonus forfeitures and inventory gains remains to be calculated. These latter three bonus amount components are not, it appears, attributable to any particular workweek. Therefore, the total hours worked in the year will be the divisor. The regular rate increment resulting from this division would be multiplied by the total number of overtime hours worked in the year. This overtime premium pay (1/2 of regular rate) increment would be added to the weekly bonus overtime pay increment previously determined above to derive the total amount of overtime pay due when the year-end bonus is paid.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter  
Administrator

Enclosure