

## **FLSA-1397**

May 26, 1983

This is in reply to your letter of May 16, 1983. You ask, on behalf of a client, how a Sunday premium payment paid to employees may be excluded from the regular rate calculation required by the Fair Labor Standards Act (FLSA), for the purpose of computing overtime compensation.

You state the situation arises from a desire by your client to initiate a policy of providing a premium payment to employees for Sunday work. The individuals who are to receive the Sunday premium payment are compensated on the basis of a fluctuating workweek salary pay plan. The salaries range from \$315 to \$355 per week and cover straight-time wages for all hours worked. Hours of work per week, excluding Sunday work, generally range between 48 and 52 hours. It is expected that Sunday work will be between 12 and 14 hours and will be worked on a rotating voluntary basis. In addition to the base salary, your client desires to provide a premium payment of \$50 to each individual for Sunday work regardless of salary level and regardless of the number of hours worked during the week or on any given Sunday.

Your research found that Section 778.207 of 29 CFR Part 778 would require any such lump sum premium payment to be included in the calculation of the employee's regular rate of pay on which overtime pay is computed. Therefore, you request our opinion on possible alternatives which would allow your client to hold labor costs at the level (s)he desires, yet at the same time provide an additional \$50, or approximately that amount to employees who perform Sunday work.

Your first alternative involves use of a lump sum premium payment, but at a reduced level in order to take into account the additional overtime pay related to the Sunday premium and longer hours of work. In other words, the \$50 payment for Sunday work will be closely approximated but it will be split between a lump sum premium and the additional overtime pay created by the premium and additional hours worked. If actual hours of work in a workweek are low, it is possible that few or no overtime hours would be worked. Therefore, your client proposes to adopt a supplemental policy so that if an employee covered by the plan works on a Sunday, then any approved hours of absence during the regularly scheduled workweek will be counted as hours of work to the extent necessary to bring hours of work, excluding Sunday work time, up to a maximum of 16 hours for the sole purpose of calculating pay for that workweek. You state this approach would seem to be allowable under Section 778.320 of Part 778. It is your understanding that paid leave time may be counted as if it were working time for the purpose of computing wages and overtime pay. You state approved absences are, in effect, paid leave time to those employees since they are on the fluctuating workweek salaried pay plan. You believe that if your client desires to use this method but provides somewhat less premium pay in a week where Sunday is worked, but with considerable absenteeism

during the week, then you assume a lower guaranteed hour level for the regular workweek could be used such as 34 hours per week.

The intent of section 778.320 is to honor employer-employee agreements not to count as hours of work certain time spent in noncompensable activities even though paid for. If the parties agreed to count other periods of time for which additional compensation is paid as hours worked, such agreement will also be honored. However, such agreements are distinguishable from the fluctuating workweek salary method of compensation because the primary principle is that a stated salary is guaranteed whether the hours worked be few or many. In your case an additional compensation is paid for the nonwork hours. Therefore, we do not believe the principles contained in section 778.320 are applicable to the situation you present. A premium payment in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per hour basis. Thus, since your first alternative guarantees, more or less, a fixed amount of pay for Sunday work without regard to the actual hours of work on a Sunday, the proposed payment is not excludable from the regular rate, nor is the premium part creditable against any overtime compensation due. In this connection, see Section 778.310 of Part 778.

The second alternative you propose involves use of a variable premium amount so that the end result would be to pay all employees \$50 for working on Sunday (adding the variable premium amount to the additional overtime pay generated). You state the fewer hours that are worked in the week, the higher the premium payment. Depending upon actual hours worked, the variable lump sum premium payment would be increased or decreased from employee to employee depending on actual hours worked in order to take into account required overtime pay with the end result equalling or closely approximating \$50.

It is our opinion that the principles contained in sections 778.302 and 778.303 render invalid an overtime pay plan based on an increase or decrease in the amount of pay for Sunday work in relation to an increase or decrease in the hours of work since the net effect is to provide an approximate \$50 lump sum payment for Sunday work.

Sincerely,

William M. Otter  
Administrator