

FLSA-761

December 3, 1984

This is in further reply to your letter of October 11, with enclosure, in which you request an opinion as to whether a client's proposed pay plan for inside sales personnel complies with the Fair Labor Standards Act (FLSA).

Your client proposes to pay nonexempt inside sales employees a fixed salary for all hours worked plus premium pay for hours over 40 computed by the "fluctuating workweek" method of overtime payment described in section 778.114 of 29 CFR Part 778. The employer also desires to provide a minimum guarantee of compensation covering up to 45 hours of straight time and overtime work each week. In other words, if actual hours worked in a workweek are 45 or less, an employee would be paid as if (s)he had worked 45 hours. If actual hours worked in a workweek exceed 45, overtime pay would be calculated as required by section 778.114.

You believe that the proposed plan complies with FLSA because its terms will be clearly spelled out in an employment contract between the employer and each employee and because the employer desires to provide more pay than required by the Act.

It is our opinion that your client's proposed pay plan would violate the overtime pay provisions of FLSA because the employer would be paying the same compensation each week (pay for 45 hours) even though the employee would be working a varying number of overtime hours (up to 5). The only exceptions would be in those weeks when the employee would work over 45 hours. Such a guarantee cannot comply with FLSA unless it qualifies for the exemption in section 7(f) of the Act.

Section 7(f) is the only provision of the Act which allows 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 provision may only be utilized under the conditions discussed in section 778.402 through 778.414 of 29 CFR Part 778. From the information in your letter, it is clear that your client's proposed pay plan is not the exceptional situation which section 7(f) is intended to meet by the special standards which it provides.

We trust the above is responsive to your inquiry. If we can be of further assistance to you, please do not hesitate to contact us again.

Sincerely,

William M. Otter
Administrator