FLSA-374

May 10, 1985

This is in reply to your letter of February 21, with enclosures, in which you request an opinion as to whether a client's proposed payment plan complies with the Fair Labor Standards Act (FLSA).

The plan is outlined in your correspondence and was further explained by you in a telephone conversation with a member of my staff on April 11.

The purpose of the plan is to protect the pay of the employees of a manufacturing plant during those periods when they are available to work but are unable to do so because of a decision to shut down the line to balance inventories, to wait for the arrival of parts or ingredients, or to do unplanned maintenance. When a shutdown occurs, the employees are sent home. They are not requested or required to wait at the plant on the chance that the line will start up again. Although the examples in the enclosure with your letter illustrates "down" time in full days, you indicated that it can also be of a shorter duration, depending on the reason for the shutdown.

All full-time employees, who are paid weekly, are eligible for this pay protection for up to a maximum of 160 hours in a four-week period. At the end of each period, the company will determine any lost hours of pay due to the above circumstances and will issue separate checks by Thursday of the first week of the next period. There are several exceptions to this policy, one of which provides that the pay protection will not apply to any employee, who, by working overtime, has averaged his or her normal weekly work hours for the four-week period. The above-mentioned examples illustrate how your client's proposal will work.

The principles for determining "hours worked" under the FLSA are contained in 29 CFR Part 785, copy enclosed. As indicated in section 785.16(a), periods during which an employee is completely relieved from duty and which are long enough to enable him or her to use the time effectively for his or her own purposes are not hours worked under the Act. Based on the information provided, it would appear that the "down" time at issue meets all of the criteria in that section and, therefore, need not be counted or compensated as hours of work.

Section 7(e)(2) of FLSA provides that the term "regular rate" shall not be deemed to include "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; …." The term "failure of the employer to provide sufficient work" is discussed in section 778.218(c) of 29 CFR Part 778, copy also enclosed. It is our opinion that, if the "down" time at your client's plan falls within the discussion in that section, the payments made for such time need not be included in the employees' regular rates of pay for purposes of computing overtime compensation due under the Act. Since such

payments are not made as compensation for hours of work, they cannot be credited toward statutory overtime compensation.

We trust that 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,

Herbert J. Cohen
Deputy Administrator

Enclosures