FLSA-679

December 3, 1985

This is in reply to your letters of September 12 and November 8 in which you supplied additional information concerning your client's petition of June 18 under section 13(b)(11) of the Fair Labor Standards Act (FLSA) for exemption from the overtime pay provisions of FLSA for local delivery drivers and helpers.

In your original correspondence of June 10, you stated that the average number of hours worked by drivers and drivers' helpers employed by *** , during the most recent annual representative period prior to implementation of your client's plan was 41.9 hours per week. You did not provide the average number of hours worked for the first quarter in which your client's delivery payment plan was in effect. Therefore, we could not determine initially whether your client's plan had the general purpose and effect of reducing hours worked to, or below, the maximum workweek applicable under section 7(a) of FLSA.

In your subsequent correspondence, you stated that for the first seventeen weeks after implementation of the delivery payment plan, the average number of hours worked by drivers and drivers' helpers was 37.8. In a telephone conversation on November 13 with a member of my staff, you stated that for the first quarter of implementation, the average number of hours worked by drivers and drivers' helpers was 37.75.

Notwithstanding the lack of experience under the plan for a representative period of one year, the information you provide on the manner of the plan's operation for the first quarter-year in which it has been in operation, and a review of the plan's other provisions as submitted on June 18, indicate that, by the end of such first representative year, the effect of the plan can reasonably be expected to reduce the weekly hours worked by the covered employees in such first year of operation to, or below, the maximum workweek applicable to them under section 7(a) of FLSA. Therefore, the plan is approved on an interim basis, as provided for in section 551.2(c) of Regulations, 29 CFR Part 551, subject to the conditions which follow.

The weekly hours worked and the average workweek of all of the full-time employees covered by the plan, during the second quarter-year in which the plan is in operation, will be calculated in the same manner as the first quarter-year in which it was in operation. If, at the end of the second quarter-year period, the effect of the plan has not been to reduce the hours worked of the covered employees to, or below, the maximum workweek applicable to them under section 7(a) of FLSA, the employer must pay overtime compensation to each of the employees on the basis of each workweek within the quarter-year period standing alone, unless the employee is otherwise exempt. This procedure will be followed at the end of each subsequent quarter-year period in the initial year of operation.

The hours of work of the covered employees shall be cumulative from quarter-year period to quarter-year period. The average workweek at the end of each quarter-year period will be determined by dividing the cumulative hours of work at the end of such quarter-year period by the number of employees covered under the plan. At the end of the first year of operation of the proposed plan, a summary of the firm's operations shall be submitted to this office, unless the plan is terminated earlier. If the plan has not had the effect of reducing the weekly hours of work of the covered employees to, or below, the maximum workweek applicable to them under section 7(a) of FLSA, this interim finding will be null and void and overtime premium pay will be due for all hours worked in excess of 40 in a workweek by such employees over the previous year.

As stated in section 551.8(a), this exemption may not apply to drivers and drivers' helpers in any workweek in which more than 20 percent of their hours of work results from the performance of duties other than those included in making local deliveries. These employees must be paid overtime compensation for all hours worked over 40 in such workweeks, unless another exemption applies.

This interim approval is conditioned upon proper notification being given to the collective bargaining representatives for the employees subject to the plan as required by section 551.3 and a copy of such notice being sent to this office.

This finding will be effective so long as there is no significant change in any of the essential facts presented in support of the petition. Your attention is directed to section 516.14 of Regulations 29 CFR Part 516 which prescribes the additional records which your client must maintain.

Sincerely,

Nancy M. Flynn
Deputy Assistant Administrator/OPO

Herbert J. Cohen
Deputy Administrator