FLSA-919

July 21, 1986

This is in further response to your letter of January 31, in which you request an opinion concerning the application of the Fair Labor Standards Act (FLSA) to individuals who work for more than one employer in a workweek. We regret the delay in responding to your inquiry.

Your inquiry is on behalf of a labor union which has a collective bargaining agreement (CBA) with a representative of a number of employers in the construction business. This agreement allows an employer, under certain conditions, to pay employees less than the hourly rate of pay which has been established by the CBA. In a telephone conversation on May 30, you advised a member of my staff that this lower rate of pay will be $3.35 an hour in most cases. It is also our understanding that employees will only be paid in this manner pursuant to a prior agreement with the employer. Without such an agreement, no employee will be required to work for an hourly rate which is less than that established by the CBA.

Since the union has a labor agreement with an employers' association which represents a number of construction contractors, it is possible that an individual could work for more than one of these employers in a workweek. During this period, the individual could be paid at the collectively-bargained hourly rate by one employer and at a lower rate of $3.35 an hour by the other employer. Under these circumstances, and specifically for the purpose of applying the overtime pay provisions of FLSA, you wish to know if this individual is jointly employed by the two employers. If there is a joint employment relationship, you also wish to know what hourly rate should be used to compute overtime pay when necessary.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of $3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

A single individual may stand in the relationship of an employee to two or more employers at the same time under FLSA, since there is no provision in FLSA which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment's for purposes of FLSA depends upon all of the facts in the particular case.

If it is established that the employee is employed jointly by two or more employers, i.e., employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered to be one employment for purposes of FLSA. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of

the applicable provisions of FLSA, including the overtime pay provisions, with respect to the entire employment for the particular workweek.

An employee who performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, will be jointly employed by the employers where the employers are not completely disasssociated with respect to the employment of a particular employee. The employers may be deemed to share control of the employee directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. Also, where one business entity controls another through total stock ownership, and/or interlocking directorates and common corporate officers, the courts have held that employees of the latter are simultaneously employees of the former.

In your telephone conversation on May 30, you provided the following additional information in this matter:

(1) The employers are separately controlled and completely disassociated as to the employment of the employees involved.

(2) The employees do not perform any work which simultaneously benefits both employers.

(3) The employees are not shifted between the employers during the same workday.

(4) Each employer keeps separate payroll records for the employees in question.

Based on this information, it is our opinion that employees are not jointly employed when they work for more than one of the construction contractors referred to in your inquiry.

Although the employees in this case are not jointly employed, there may be occasions when they work more than 40 hours at two different rates of pay for one employer. In such instances, the following information should be of assistance in determining an employee's regular rate of pay for the purpose of computing overtime compensation.

The principles for computing overtime pay based on an employee's regular rate of pay are discussed in section 778.107 through 778.122 of 29 CFR Part 778, copy enclosed. As indicated in section 778.115, where an employee in an overtime workweek works at two or more different types of work for which different nonovertime rates of pay have been established, the regular rate for that week is the weighted average of such rates. That is, the total earnings from all rates are divided by the total number of hours worked in the workweek. The employee should receive one-half the resulting average hourly rate as premium pay for the hours worked in excess of 40. An exception to these principles is made for employees who are employed pursuant to section 7(g)(2) of FLSA.

Under section 7(g)(2) of FLSA, an employee may agree with the employer in advance of the performance of the work that the employee will be paid during overtime hours at a

rate of not less than one and one-half times the hourly nonovertime rate established for the type of work being performed during such overtime hours, This method of payment is explained further in sections 778.417 and 778.419. As explained in the latter section, one of the requirements which must be met for a section7(g)(2) agreement to be bona fide is that there be established straight-time hourly rates of pay for the different kinds of work.

For example, in the case of an employee who normally performs construction work and who occasionally does some general maintenance work for some employer, the rate of pay which is established for the maintenance work may be lower than the rate which is paid for the employee's construction work. In this case, the maintenance work is a different type of work than that which is normally performed by the employee, and the lower rate for this work is a bona fide rate for the type of work performed. As explained in section 778.419(b) of Part 778, an hourly rate will be regarded as a bona fide rate for a particular kind of work if it is the rate actually paid for such work when performed during nonovertime hours. Where the particular kind of work for which the rate has been established is performed only during overtime hours, the rate established for this work will be considered bona fide if it is the rate which would be paid for this particular work should it be performed during nonovertime hours. As stated above, this method of payment should be implemented pursuant to a prior agreement or understanding between the employer and the employees.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure