FLSA-204

July 23, 1986

This is in further response to your letter of May 21, in which you ask us to review a letter from *** of the law firm of *** which was sent to Mr. *** (the Company), *** New York. In his letter, Mr. *** concerned with the application of Section 7(b) of the Fair Labor Standards Act (FLSA).

Although Mr. *** 's letter contains considerable detail, it is our opinion that the following information provides a more through discussion of section 7(b) of FLSA. Since your constituent is a specifically concerned with the application of section 7(b)(1) and section 7(b)(2) of FLSA, both of those sections are described in detail below.

Section 7(b) of FLSA provides that:

No employer shall be deemed to have violated sub-section 7(a) (overtime compensation after 40 hours to work in a workweek) by employing any employer for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if the employee is so employed --

- (1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, (NLRB), which provides that no employee shall be employed more than l,040 hours during any period of 26 consecutive weeks or
- (2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the NLRB, which provides that during a specified period of 52 consecutive weeks the employee shall be employed not more than 2,240 hours and shall be guaranteed not less than l,840 hours (or not less than l6 weeks at the normal number of hours worked per week, but not less than 30 hours per week) and not more than 2,080 hours of employment for which he or she shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or 2,080 in such period at rates not less than one-half times the regular rate at which he or she is employed; ***

and if such employee receives compensation for employment in excess of l2 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he or she or she is employed.

The hours limitation under section 7(b)(1) of FLSA must be for not more than 1,040 hours during the particular 26-week period. This is an absolute maximum hours

limitation beyond which the employees may not work without becoming eligible for overtime pay after 40 hours or work for all workweeks during the 26-week period. It is possible for an employer to work employees during the specific 26-week period for less than 1,040 hours, e.g., 800 hours, if the employees are paid time and one-half after 12 hours of work in a day or 56 hours of work in a week, whichever results in the greater amount of overtime pay. However, any further exemption from overtime pay pursuant to section 7(b)(1) of FLSA would be prohibited until 6 months have elapsed after the specified 26-week period has ended.

Under section 7(b)(2) of FLSA there are three statutory tests that must be met. First, only employees employed pursuant to a collective bargaining agreement between an employer and a union certified as bona fide by the NLRB may be compensated under the provisions of this section. Second, the participating employees must be guaranteed annual employment and the agreement must specify the period of 52-consecutive weeks which is applicable. And third, the agreement may guarantee a specified number of hours of work per a specified number of workweeks in a 52-week period. Where the agreement specifies a number of hours work in a 52-week period, the number of hours guaranteed may not be less than 1,840 nor more than 2,080 hours. Finally, where the agreement specifies a number of hours of work per a specified number of workweeks, the number of workweeks guaranteed may not be less than 46 and the number of hours guaranteed per workweek may not be less than 30. It is also important to note that under this alternative guarantee, the maximum number of hours guaranteed may not exceed 2,080 hours in the 52-week period.

In order to have the section 7(b)(2) exemption remain operative, no employee may be employed in excess of 2,240 hours in the 52-week period. This is a condition precedent to the exemption. In those instances where an employer has employed an employee in excess of 2,240 hours in the 52-week period, the employer must recompute the earnings of such employee for each workweek within the 52-week period and pay statutory overtime pay for each hour, or part thereof, worked in excess of 40 in the workweek. However, all straight-time and overtime pay previously paid under the terms of section 7(b)(2) of FLSA may be credited against the amount of wages found due an employee as a result of any such recomputation. Any hours paid for but not worked, such as vacation or sick time, are excluded from the 2,240-hour count.

There are four recognizable maximum hours standards after which overtime premium pay is due that may come into play under a section 7(b)(2)-type agreement. However, the overtime pay standard is applied uniformly throughout at a rate of not less than one and one-half times the employee's regular rate of pay. The regular rate is the agreed upon rate specified in the agreement which may not be less than the statutory minimum wage.

The first maximum hours standard is that which requires overtime pay after 12 hours of work per day or 56 hours of work per week. This standard must be complied with in all workweeks up until the time that the number of hours guaranteed, on either (1) a total number of hours of work in a 52-week basis, or (2) a specified number of hours per a specified number or workweek basis, have been worked. The number of hours

guaranteed may not exceed 2,080 on a 52-week period on either basis. Where the hours guaranteed for 52-week period are less than 2,080, overtime pay must be paid for all hours worked over 40 in a workweek after the guaranteed number of hours have been worked. This is the second maximum hours standard.

The third maximum hours standard requires overtime pay for each and every hour worked in excess of 2,080 hours up to and including 2,240 hours, regardless of the number of hours guaranteed or the basis used to determine the guarantee.

Finally, the fourth maximum hours standard or section 7(b)(2) of FLSA is that which requires overtime pay for all hours worked over 40 in a workweek in all workweeks within the 52-week period because of the fact that the employee worked in excess of 2,240 hours in the 52-week period.

We note from the information contained in Mr. *** letter that the company plans to enter into a collective bargaining agreement modification with the union under which employees would work up to 56 hours per week, seven days a week, for the same total amount of compensation as previously earned, and that the company contemplates providing compensatory time off to the employees. As stated above, both sections 7(b)(1) and 7(b)(2) of FLSA contain daily overtime pay requirements which may affect the total amount of compensation earned by any employee, and which must be taken into consideration if either of these sections are to be applicable. In addition, it should be noted that where overtime premium pay is due, as discussed in the above paragraphs, it must be paid in cash. The substitution or compensatory time off in lieu of such overtime pay will not satisfy the requirements of FLSA. Also see the discussion contained in section 778.602 of 29 CFR Part 778, a copy of which is enclosed.

The NLRB has the authority to process petitions from labor organizations seeking certification as "bona fide" for purposes of sections 7(b)(1) and 7(b)(2) of FLSA. Petitions for such certification should be filed in an appropriate NLRB Regional Office where they will be processed and forwarded to the Board in Washington, D.C., which will make the decision whether or not to issue certification. Therefore, if the tests for exemption under section 7(b)(1) or 7(b)(2) are met and the labor organization is certified as "bona fide" by the NLRB, the employees covered by the "agreement" are eligible for such exemption. Certification by the NLRB is a statutory, requirement for any "agreement" to be valid under sections 7(b)(1) and 7(b)(2) of FLSA. The FLSA makes no provision for exception to this statutory requirement. Such certification can be a relatively routine matter, initiated by a letter or request to the Board.

Section 516.20 of 29 CFR Part 516, copy enclosed, requires employers to file copies of any agreements under section 7(b)(1) of 7(b)(2) with the Administrator within 30 days after such agreements have been made. This enables the Wage and Hour Division to have a record of the agreements and also to examine
them for conformity to FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator