FLSA-923

September 12, 1986

This is in reference to your letter of March 26, in which you request an opinion as to whether a proposed method of compensating employees at different rates of pay for different types of work complies with the requirements of the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

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.

You represent an electrical contracting firm which has employees who must travel between the company's shop and various work sites during each workday. In a telephone conversation with a member of my staff on August 20, you indicated that these employees spend approximately 40 minutes each day in such travel, and that they spend an additional 15 to 20 minutes each day in loading their vehicles with equipment or materials for their daily job assignments. You also indicated in your telephone conversation that the employees in question were working more than 40 hours in a workweek. The employer proposes to pay these employees at the minimum wage rate for 5 hours per week as compensation for the time it is "assumed" they have spent in driving and loading activities. The time spent by these employees in the performance of their work as electricians would be paid for at their normal, hourly rates of pay.

As you were advised by a member of my staff during your telephone conversation, the time spent by the employees in loading vehicles and in driving to and from job sites during the workday is hours worked under the FLSA which may be paid for at a rate of pay which is lower than the employees' normal hourly rates, but at a rate of at least $3.35 an hour. During a workweek in which an employee works fewer than 40 hours, the requirements of FLSA would be met provided that the individual received at least $3.35 an hour for all hours worked. However, your client's proposed method of paying at a lower rate of pay, for an average, or "assumed", number of hours worked in an overtime workweek would not comply with the overtime pay and recordkeeping requirements of FLSA. The application of these requirements to your client's proposed compensation plan are discussed below.

The principles for computing overtime pay based on an employee's regular rate are discussed in sections 778.107 through 778.122 of 29 CFR Part 778, copy enclosed. As indicated in section 778.115, where an employee in a single 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 would then be entitled to receive one-half the resulting average

hourly rate 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 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 section 7(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 does some general maintenance work for the same 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.

Section 11(c) of FLSA requires covered employers to keep a record of employees wages and hours worked. This is implemented by Regulations, 29 CFR Part 516 which requires an employer to keep a record of certain information concerning nonexempt employees' identification, wages, and hours worked. Section 516.25 of Part 516 requires employers to keep a specific record of the wages and hours of employees who are compensated in accordance with section 7(g)(2) of FLSA. A copy of this section of the regulations is enclosed for your information. It should also be noted that, pursuant to section 516.25(d), an employer must document the agreement or understanding with employees concerning the use of a pay plan under the provisions of section 7(g)(2) of FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator