

FLSA-914

November 10, 1986

This is in further response to your letter of September 11, 1985, in which you request an opinion as to whether a payment plan proposed by your client, an electrical company, is in compliance with the provisions of section 7 of the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

As outlined in your letter, your client proposes to pay electricians different rates of pay for what your client considers different types of work. Accurate time and payroll records will be maintained, segregating the periods during which the different types of work are performed. Electricians will be compensated for hours in excess of 40 in a workweek at a rate of not less than one and one-half times the weighted average of the rates or one and one-half times the hourly nonovertime rate established for the type of work the electrician is performing during overtime hours.

Specifically, your client proposes to divide electricians' work assignments into two types: (1) service and local, and (2) nonlocal.

Service and local electricians will work within a ten-mile radius of the main shop. Employees in local crews will be required to report to the main shop at 6:30 a.m. to perform tasks, such as loading trucks, assigned by their foreman. At 7:30 a.m. the crew will leave the shop and travel to the work site in the company vehicle. At the site the crew will work until 3:30 p.m., with a half-hour lunch break during which the crew will be completely relieved of duty. At the conclusion of the workday, the crew will return to the shop where they will perform any additional tasks and be released. All time, except for the meal period, will be counted as hours worked. If, for some reason, the employees do not receive their meal periods, they will be compensated for the time. The service/local electricians will be paid under your client's proposal at a level rate, but not less than the minimum wage of \$3.35 an hour: (1) from the time they clock in and begin work in the morning until the time they arrive at the job site and (2) from the time they leave the job site in the afternoon until the time they punch out at the shop. All other time, except for bona fide meal periods, will be paid at the higher electrician's rate, even when the service/local employee is required to perform multiple jobs during the day at different sites.

Nonlocal electricians will be divided into two groups: drivers and nondriver employees. The driver will be required to report to the shop at 6:30 a.m., load the company vehicle, receive assignments, and perform miscellaneous duties as assigned before leaving the shop at 7:00 a.m. to drive to the job site. At the end of the workday, the driver will be required to return the company vehicle to the shop. All hours from the time the driver begins work at the shop in the morning until he or she is released from duty at the end of the day will be considered to be compensable hours of work. Like service/local employees, the driver will be paid a lower rate, but not less than \$3.35 an hour, for the time spent driving, writing, receiving instructions or loading. For all hours actually spent

at the job site, the driver will receive the regular electrician's rate. The driver will clock in when he or she arrives at the shop and will clock out after he or she has returned to the shop and has been relieved of duty.

Nonlocal employees other than the driver will not be required to report to the shop. They may report directly to the job site or may opt to meet, at a site away from the shop, the designated driver who will transport them to the job site. The electricians who ride with the driver will not be compensated for any travel time. For all work performed at the job site, the nonlocal electricians will be paid the regular electrician's rate. In the event that they perform any loading or stacking before arriving at or after departing from the job site, the electricians will be paid a lower rate, but not less than \$3.35 an hour.

Accurate time records will be maintained. Local/service, designated driver, and nonlocal service employees will punch a time card when they arrive at the shop to commence work and after they return to the shop and are relieved from all duties. All employees will report in writing their time of arrival and time of departure to and from the job site each day. If nondriver, nonlocal employees perform any work before leaving the shop or after returning to the shop, such time will be reported as hours worked.

Overtime for the electricians will be based upon a regular rate which is the weighted average of the multiple rates in accordance with section 778.115 of Interpretative Bulletin, 29 CFR Part 778 or a regular rate which is the hourly rate established for the type of work being performed during overtime hours in accordance with section 778.419.

In addition, your client will employ four leadmen (lead employees) who will be compensated on the fluctuating workweek method of overtime.

The FLSA requires that all covered and nonexempt employees be paid not less than \$3.35 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in the workweek.

There is nothing in FLSA which prohibits an employer from paying an employee at different rates of pay for work at different times or various types of work as long as no rate is less than the statutory minimum wage. As noted in section 778.115, where an employee in a single workweek works at two or more different types of work for which different hourly rates of pay (of not less than the applicable minimum wage) have been established, his or her regular rate for that week is the weighted average of those rates. This is determined by computing the employee's total compensation during the workweek from all such rates, and dividing by the total number of hours worked at all jobs.

An alternative method of paying overtime compensation to an employee who performs two or more different types of work for which different nonovertime rates of pay have been established is provided by section 7(g)(2) of FLSA. Under this method of compensation, an employee may agree with his or her employer in advance of the performance of the work that he or she 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 section 778.419, 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 types of work.

At issue in your client's proposal is whether the travel between the job site and the main shop is work which is different from travel between job sites during the weekday. In the past, the Wage and Hour Division has taken the position that, if different rates are established pursuant to a collective bargaining agreement for travel which is hours worked between shop and job site and for travel during the workday between job sites, then the travel is considered two different types of work for the purpose of applying sections 7(g)(1) or 7(g)(2). We conclude that the same position would apply in the absence of a collective bargaining agreement. Therefore, provided the other provisions of section 7(g) are met, as outlined in sections 778.417 and 778.419, we will not question your client's proposal which defines travel between the shop and the job and travel between job sites during the workday as two different kinds of work.

The recordkeeping requirements for employers who pay employees under section 7(g)(2) agreements are contained in section 516.25 of Regulations, 29 CFR Part 516.

With respect to your client's proposal to pay overtime to the lead employees on the fluctuating workweek method, you may wish to make reference to section 778.114. As discussed in this section, an employee may be paid a fixed salary for hours that fluctuate from week to week if there is a mutual understanding between the employer and the employee that the fixed salary is compensation for all hours worked each workweek, whether few or many.

The employer cannot specify that the salary is intended to cover a specific number of hours in the workweek. You indicate in your letter that your client will pay the lead employee a salary which is intended to cover all hours worked up to 40 in a workweek.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator