

FLSA-884

December 2, 1986

This is in reply to your letter of May 6 requesting an opinion on the application of Interpretative bulletin, 29 CFR Part 778 to the method used by one of your clients to compute the regular rate of pay for overtime purposes under the Fair Labor Standard Act (FLSA). You enclosed for our information a copy of a letter dated April 25 on this matter which you received from ***, Counsel for Legal Advice, Division of Fair Labor Standards of the Department's Office of the Solicitor. We regret the delay in responding to your inquiry.

The Wage & Hour Division is responsible for the administration of FLSA, the Federal law of most general application concerning wages and hours of work. An employee who is covered under FLSA must be paid a minimum wage of not less than \$3.35 an hour and overtime pay of not less than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek, unless specifically exempt.

You state that your client, a financial institution, employs certain nonexempt individuals on a salary basis for a 40-hour week. When they are hired, employees are advised that the employer maintains regular work hours of 8:30 a.m. to 5:00 p.m., with a half day on Saturday and a half day in the middle of the week, and 8:30 a.m. to 7:00 p.m. on Fridays. The employees are also advised at the time of hire that they will be paid on a salary basis which will cover their wages for all hours up to 40 in a week.

Certain of the nonexempt employees are scheduled for a regular workweek of 37 1/2 hours. However, employees work in excess of the 37 1/2 hours in order to meet the demands of the job and respond to the flow of work. Because of the understanding with which the employees have been hired, i.e., that the salary would cover all hours up to 40 each week, the employer does not pay extra wages for the additional hours worked up to 40 each week. The employer does pay extra wages at the overtime rate of one and one-half times the hourly rate (based on a 40-hour week) for all hours worked in excess of 40 each week.

Your view is that the employees' salaries cover all straight-time hours up to 40 hours in a week and that the employer is not obligated to pay for any hours in excess of 37 1/2 hours but less than 40 in a week. You believe that the employer is accurately calculating overtime in accordance with section 778.113(a) of Part 778 by dividing the straight-time rate of the salary by 40 hours. In the alternative, you believe that the salary may be considered as payment for a variable workweek as provided in section 778.323.

On the facts presented, we consider section 778.323 to be applicable to the arrangement you describe. Section 778.113(a) is not applicable because it specifically provides for a regular workweek with a set number of hours. In the situation you describe, employees may work a varying number of hours per week depending on the workload.

Section 778.323 provides that employees who are on a salary basis may agree that the salary will cover a variable workweek up to 40 hours, i.e., a workweek of varying lengths, such as 35, 36, 38, or 40 hours. The regular rate thus varies from week to week, but when the employee works over 40 hours in a week, the regular rate is computed by dividing the salary by 40. The overtime rate for all hours over 40 in a week would thus be one and one-half times the 40-hour week straight-time rate.

It should be noted that, under section 778.323, no deductions in salary may be made for any workweek of less than 40 hours, or whatever length, since the salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his or her full salary if he or she worked only 25 or 40 hours. See also section 778.386(b).

In conclusion, provided that your client makes no deductions for short workweeks, the salary arrangement you have presented would appear to conform with section 778.323 and is thus consistent with the overtime regulations.

We trust that this satisfactorily responds to your inquiry. However, if you have any further questions on this matter, please do not hesitate to let us know.

Sincerely,

Paula V. Smith
Administrator

Enclosure