FLSA-995

February 6, 1987

This is in further response to your letter of June 16, with enclosures, concerning the application of the Fair Labor Standards Act (FLSA). You are specifically concerned about the requirement under FLSA that employees be paid for overtime hours worked in a workweek.

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 current minimum wage of $3.35 an hour and not less than one and one-half time their regular rates of pay for all hours worked over 40 in a workweek.

***, manufactures and installs food-processing equipment, such as stainless-steel evaporators and dryers. Your firm employs installation crews who may work at a customer's plant site for several weeks, sometimes months, at a time. You are considering the implementation of a pay plan under which employees on the installation crews would work a large number of hours during a 2-week period and then return home to spend an entire week with their families. During this third week, the employees would be paid for a number of hours carried over "banked" from the total hours worked during the first 2 weeks. Overtime compensation would be paid for hours over 40 for each of the 3 weeks. For example, an employee may work 72 hours during the first workweek and 78 hours during the second workweek. This individual would then perform no work during the third week. Fifty hours would be "banked" from the total hours worked during the first 2 weeks and paid to the employee for the third week. The employee would be paid overtime compensation for all hours over 40 in each of the 3 weeks. If the hours worked in the example are equally divided among the 3 weeks, the employee would be compensated in the following manner under your proposed plan:

Week 1 (72 - 22) = 50 hours (40 regular + 10 overtime)

Week 2 (78 - 28) = 50 hours (40 regular + 10 overtime)

Week 3 (22 + 28) = 50 hours (40 regular + 10 overtime)

In the example, the employee would be paid for 10 overtime hours in each week for a total of 30 overtime hours at one and one-half times his or her regular rate of pay. However, the employee has actually worked a total of 70 overtime hours (40 regular + 32 overtime in the first week and 40 regular + 38 overtime in the second week), since the provisions of FLSA apply to all of the hours worked in a particular workweek rather than to hours which have been averaged with hours worked in another workweek or which have been redistributed in another workweek.

The employee is the example above would not be properly paid for all of the overtime hours worked during each of the first 2 workweeks and, therefore, your proposed method of payment would not comply with the requirements of FLSA. Payment of both the minimum wage and overtime compensation due an employee under FLSA must ordinarily be made on the regular payday for the period in which the overtime work was performed. It has been a long established principle that an employer in the private sector may not credit an employee with the time off with pay (even at a time and one-half rate) for FLSA overtime earned which is to be taken at some mutually agreed upon date subsequent to the end of the pay period in which the overtime was earned, rather than pay cash for the overtime as it is earned. This principle has been upheld by the U.S. Supreme Court (see Walling v.

Harnischfeger Corporation, 325 U.S. 427 (1945)).

In your letter, you indicate that the pay plan which is described above was suggested by your employees and that they are in favor of its implementation. The language of FLSA and the controlling court decisions make it clear that neither an employer nor an employee has the authority to waive the statutory requirement for overtime compensation for hours worked in excess of 40 in any workweek. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, the Supreme Court said that the policy consideration of the Congress in enacting FLSA "forbids waiver of basic minimum and overtime wages under the Act." The Court also stated that "while in individual cases hardship may result, the restriction will enure to the benefit or the general class of employees in whose interest the law was passed and so to that of the community at large."

You also wish to know how the provisions of section 13(b)(1) of FLSA may apply to the members of your firm's installation crews. Section 13(b)(1) of FLSA provides an overtime pay exemption for any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935. The provisions of section 13(b)(1) are explained further in Interpretative Bulletin, 29 (CFR Part 782 (copy enclosed).

The conditions under which an employee of a private carrier such as your firm may be exempt under section 13(b)(1) of FLSA are explained in section 782.2 of Part 782. Drivers, driver's helpers, loaders, and mechanics who are employed by a private carrier and whose duties affect the safety of operation of a motor vehicle and who are engaged in transportation of property on public highways in interstate commerce are not required to be paid overtime compensation for hours worked over 40 in a workweek. Based on the information in your letter, it appears that the members of the installation crews to whom you refer may qualify for the overtime pay exemption under section 13(b)(1), since they are carrying equipment or property across State lines in the furtherance of your firm's commercial activities.

The U.S. Department of Transportation has held that a driver who is engaged in the transportation of goods in interstate commerce would be subject to the Secretary of Transportation's jurisdiction under Section 204 of the Motor Carrier Act for a 4-month period beginning with the date the driver could have been called upon to, or actually did, engage in interstate or foreign transportation. Therefore, during this period, the overtime pay exemption in section 13(b)(1) of FLSA would be applicable to the driver and other employees engaged in safety-affecting activities as described above.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure