

FLSA-382

February 27, 1990

This is in response to your letter on behalf of *** concerning the flextime program at the *** Department of Revenue.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA). The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 per hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The minimum wage will increase to \$3.80 an hour beginning April 1, 1990, and to \$4.25 an hour after March 31, 1991.

The flextime plan described in *** letter calls for employees to work four 9 hour days in one week followed by four 9 hour days and one 8 hour day the next week. Employees will work 36 hours one week and 44 hours the following week. Section 7(a) of FLSA requires that all covered and nonexempt employees be paid at one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Based on the information provided in *** letter, it is our opinion that those nonexempt employees who work this schedule must be paid one and one half their regular rates of pay for hours worked over 40 in a workweek. Alternatively, the provisions of section 7(o) of FLSA authorize a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off, with certain limitations, in lieu of monetary overtime compensation. The use of compensatory time off and the limitations on its use are discussed in detail in 29 CFR Part 553.20 through .27 (copy enclosed).

Moreover, the language of FLSA and the controlling court decisions make it clear that the Department of Labor does not have 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 of the United States said that the policy consideration of the Congress in enacting FLSA forbids waiver of basic minimum and overtime wages under FLSA. The Court stated further that "while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law was passed and so to that of the community at large."

We trust that the above information is responsive to your inquiry. If we can be of further assistance to you or your constituent, please do not hesitate to contact me.

Sincerely,

Nancy M. Flynn
Acting Administrator