

FLSA-729

October 25, 1990

This is in further response to your inquiry concerning the overtime compensation provisions of the Fair Labor Standards Act (FLSA). You raise several questions concerning the proper method of calculating the regular rate of pay and computing overtime premium pay. We regret the delay in responding to your inquiry.

You state that your client's employees are covered by two collective bargaining agreements (CBA). Under the terms of one CBA, employees in classification "A" are paid a straight-time hourly rate of \$11.92 an hour. Overtime compensation is paid at one and one-half times this rate for all time worked in excess of 8 hours per day or in excess of 40 hours per week. Employees in classification "A" will periodically be assigned "standby" duty for a one-week period. An employee on standby must be available to be contacted by telephone at all times except when actually traveling to work or responding to a service request at the direction of the employer. For standby duty, an employee is paid 15 hours of straight-time pay. An employee also receives pay for two hours or the actual time spent working, whichever is greater, at one and one-half times the CBA straight-time rate for each occasion that the employee is called out for duty while on standby. If the call-out is on Sunday or a holiday, the employee is paid double the CBA straight-time rate. When an employee is not on standby but is called out for unscheduled work, the employee is paid for three hours or the hours actually worked, whichever is greater, at one and one-half times the applicable straight-time rate, or twice the applicable straight-time rate if called on a Sunday or a holiday.

Under the other CBA, employees in classification "A" periodically are required to be "on-call" outside their regular working hours and they must remain at home or at another location within their service area where they can be contacted by the employer. Employees are paid one-half hour's pay at the applicable straight-time rate for each four hours of on-call duty. If an employee is called out while in on-call status, the employee is paid the greater of two hours of pay or pay for the hours actually worked at the applicable overtime rate. When an employee who is not on-call is requested to work on an emergency basis, the employee is paid one hour of pay at the applicable straight-time rate for travel time and the greater of two hours' pay or pay for the actual hours worked at the applicable overtime rate.

Section 7(e) of the FLSA requires the inclusion in the regular rate of all remuneration for employment paid to, or on behalf of, an employee except payments specifically excluded in that section. The statutory provisions of section 7(e) are discussed in detail in Interpretative Bulletin, 29 CFR Part 778. You specifically ask what the basis is for the distinction between the treatment of standby or on-call pay (includable in the regular rate of pay) and show-up or call-back pay (which may be excluded from the regular rate of pay).

On-call or standby time may or may not be compensable hours of work under the FLSA depending on the facts of a particular situation. However, the payments for such time must be included in calculating the regular rate of pay. If employees who are on-call or on standby are not restricted to any particular place and may come and go as they please, provided they leave word where they may be reached, the on-call or standby hours are not considered to be hours worked under the FLSA. Although the payments received by employees for such time are, therefore, not allocable to any specific hours of work, they clearly are paid as compensation for performing duties involved in the

employees' jobs and are not of the type excludable from the regular rate under section 7(e) of the FLSA. Such payments must be included in calculating the regular rate of pay in the same manner as any payment for services, such as most bonuses, which are not related to any specific hours of work. On the other hand, travel time spent on an emergency call to an employer's customer constitutes compensable hours of work and must be included in the total hours worked in the workweek for purposes of computing overtime pay. In this regard, see section 785.36 of Interpretative Bulletin, 29 CFR Part 785.

With regard to "show-up" or "reporting" pay, employees, under some employment agreements, may be paid a minimum number of hours of pay at an applicable straight-time or overtime rate on infrequent and sporadic occasions when, after reporting for work they are not provided with the expected amount of work. The amounts paid under such agreements over and above what the employees would be paid at applicable rates for hours actually worked are paid to compensate the employees for the time wasted in reporting for work and to prevent undue loss of pay resulting from the employer's failure to provide expected work during regular hours. See section 778.220 of Part 778.

Under some employment agreements, "call-back" pay typically consists of a specified number of hours of pay at applicable straight-time or overtime rates which employees are paid on infrequent and sporadic occasions when, after their scheduled hours of work have ended and without prearrangement, they respond to calls from their employer to perform extra work. See section 778.221 of Part 778.

For example, employees may, under employment agreements, be guaranteed at least 4 hours' pay for reporting for work, or for being called back to work outside their scheduled hours. If employees work only two hours but are paid for four hours, the pay for the two hours not worked is not considered to be compensation for working time and may be excluded from the regular rate of pay under section 7(e) but may not be credited toward overtime due under the FLSA.

You state that the applicable CBAs provide overtime pay for hours worked in excess of eight per day and, in certain instances, for hours worked on Sundays and holidays. The extra compensation paid to employees under such provisions, whether paid at time and one-half or double the regular rate of pay, may also be excluded from the regular rate of pay under section 7(e) and may be credited toward overtime compensation due under FLSA pursuant to the provisions of section 7(h). See section 778.201.

The calculation of the regular rates shown in your examples are correct. However, some of your examples (Nos. 2, 4, and 6 on pages 3 and 4; and No. 2 on page 5) incorrectly state the overtime compensation actually due. For example, employee 2 (page 3) is paid straight-time compensation totaling \$667.52 for 41 hours worked, which yields a regular rate of \$16.28 an hour. This employee is due an additional \$8.14 ($\$16.28 \times 1/2 = \8.14) in overtime premium pay for the one overtime hour worked. Total compensation due this employee is \$675.66 ($\$667.52 + \8.14). Stated another way, total overtime compensation due for one overtime hour worked is \$20.06 ($\$11.92 + \8.14). Similarly, the other examples cited above overstate the overtime compensation actually due because one and one-half times the calculated regular rate was factored with the overtime hours worked instead of one-half the regular rate.

We are enclosing a Coefficient Table for Computing Extra Half Time for Overtime which, as explained in its instructions, simplifies the calculation of overtime premium compensation due.

Applying, for example, the coefficient for 41 hours (.012) to the straight-time earnings in the example cited above, yields the additional overtime premium compensation due - $\$667.52 \times .012 = \8.01 . Thus, total compensation due = $\$667.52 + \$8.01 = \$675.53$ (difference due to rounding).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require different conclusions from those expressed herein.

We trust that the above information is responsive to your inquiry.

Sincerely,

Samuel D. Walker
Acting Administrator

Enclosure