FLSA-1391

January 26, 1994

This is in response to your inquiry on behalf of ***. Mr. *** and other members of the Quality Steering Team at the *** are concerned about the application of the overtime compensation requirements of the Fair Labor Standard Act (FLSA) to a proposed "Gainshare Program" at the Plant.

Gainsharing usually means compensation that is paid to employees because of their efforts in reducing employee controllable expenses (costs) by achieving increased efficiency and productivity. This also appears to be the objective of the program. However, gainsharing is not synonymous with the term profit sharing as used in §7(e)(3)(b) of the FLSA. Factors involved in gainsharing may include, for example, reduced absenteeism; reductions in rework, scrap and set-up time (direct costs attributable to production); and similar measurable efficiencies that may be achieved by employees in a manufacturing environment. Gainsharing compensation may be paid to employees whether or not the employer's operations, taken as a whole, are profitable. The question presented is whether such payments must be included in the "regular rate" for purposes of FLSA overtime compensation.

Section 7(a) of the FLSA requires that covered and nonexempt employees must be paid overtime pay at a rate not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek. Section 7(e) requires inclusion in the regular rate of "all (emphasis supplied) remuneration for employment paid to, or on behalf of, the employee" except payment specifically excluded by paragraphs (1) through (7) of that subsection. See §§29 CFR 778.107 and 778.108.

Section 7(e)(3)(b) provides that payments made pursuant to a bona fide profit-sharing plan or trust meeting the requirements of Regulations, 29 CFR Part 549, may be excluded in calculating the regular rate of pay used in determining FLSA overtime compensation. Section 549.2 of the Regulations provides that certain provisions of profit sharing plans or trusts will disqualify such plans or trusts under §7(e)(3)(b). As indicated in §549.2(e), if the employer's contributions or allocations to the fund or trust are based on factors other than profits such as hours of work, production, efficiency, sales or savings in cost, the plan or trust will not meet the requirements under §7(e)(3)(b).

Gainsharing payments designed to reward employees for improving productivity through the better use of labor and materials are not profit-sharing payments, although such payment plans may lead to success, growth and profitability of an enterprise. It is our opinion that gainsharing payments represent nondiscretionary bonus payments that are made to employees for increases in production or efficiency. As indicated in §§ 29 CFR

778.208, 778.209, and 778.211, bonuses of this type must be included in the regular rate. Sections 778.209 and 778.210 deal specifically with the methods of including bonus payments (however they may be derived by the employer) in the regular rate of pay.

In our view, legislative action would be required to specifically exclude gainsharing (bonus) payments from the regular rate of pay pursuant to §7(e) of the FLSA. Moreover, we also believe that legislation excluding bonuses paid for increased efficiency, savings in cost and the like (whether based on paid hours or flat distributions) from being included in the regular rate could undermine the regular rate concept.

This could lead to overtime compensation being based on one and one-half times the minimum wage rather than on the regular rate. In other works, abusive labor practices could result from such a provision in the FLSA.

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Washington, D.C., Office