

FLSA-1309

October 17, 1995

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to a "pay equalization plan" proposed by ***. The issue of concern is whether the plan meets the overtime compensation requirements of the FLSA. We regret the delay in responding to your inquiry.

*** firefighters are covered by the terms of a collective bargaining agreement (CBA) between the union and the County. Firefighters are paid by the hour and scheduled to work 24 hours on and 48 hours off-duty, and the County has adopted a 14-day work period pursuant to §7(k) of the FLSA. Under such scheduling, firefighters work 96 hours in one work period and 120 hours in the following two work periods before the cycle repeats. FLSA overtime compensation is required after 106 hours worked in the 14-day work period. Consequently, no overtime is worked in the "short" work period but 14 hours (120 - 106) of overtime are worked in the following two "long" work periods. Further, you advised that the firefighters are paid biweekly rather than semi-monthly as described in the brief filed on behalf of the County before the Special Master on the collective bargaining "pay equalization" impasse.

We agree with the County's conclusion that the proposed IAFF "pay equalization plan" under which the County would pay its firefighters for an average 116.7 hours worked each pay period regardless of the actual hours worked each work period would not comply with the overtime requirements of the FLSA. We also agree with the County that the union's pay averaging proposal is not a valid "Belo" plan contract pursuant to §7(f) of the FLSA.

It is possible, however, to establish a valid "prepayment plan" under the FLSA that would meet the pay equalization objective that the IAFF seeks.* For purposes of this response, we assume that State or local law allows public employers to advance pay to employees for hours that have not yet been worked.

The principles of such a plan are as follows:

Though cash overtime compensation due an employee must normally be paid on the pay day for the employee's regular work period or workweek, there is no objection if the employers pay in advance the anticipated overtime compensation to become due to an employee for working overtime in some subsequent work period or workweek. This is the basic principle of the prepayment plan. Thus some employers, in an attempt to keep employees' wages as constant as possible from pay period to pay period, have resorted to paying their employees a sum in excess of what they earn or are entitled to in a particular work period or workweek, which sum is considered to be a "prepayment" or advance payment of compensation for overtime to be subsequently worked. In other words, the employer and the employee (or union on the employees' behalf) agree that in any work period or workweek in which the employee works less than the applicable statutory

overtime threshold, the employer will advance to the employee the difference in pay for the overtime work period or workweek and the amount that the employee would earn if paid only for the hours actually worked.

Plans of this type require the use of a record system under which the employer can maintain a running balance account for each employee of the amount owed by the employee to the employer's credit. At no time may the employer owe the employee overtime compensation. In any work period or workweek for which the prepayment credits due the employer are not sufficient to equal the additional overtime compensation due the employee, the difference must be paid to the employee in cash on the pay day for such work period or workweek.

A prepayment plan cannot be applied to an employee who is paid a salary under an agreement that the employee will receive the salary even when he or she works less than the regular number of hours in some weeks. Also, it cannot be applied to an employee paid a salary for a fluctuating number of hours worked from week to week. Since the nature of such employees' employment is that they will receive the fixed basic salary regardless of the number of hours worked, it cannot be said that they are paid in excess of what they earn, or to what they are entitled in any period in which they receive the fixed salary, even though such work periods or workweeks may have been "short."

Under a valid prepayment plan any excess payment made for short work periods or workweeks must be regarded and clearly understood by both the employer and employees as a loan or cash advance to be repaid either by offset against future overtime earnings or by refund in cases where employment is terminated.

The following illustrates a prepayment plan for hourly paid firefighters working scheduled hours as described above. For ease of illustration we have used a regular rate of \$10.00 an hour:

Work Period 1

Scheduled hours 96
Hours worked 96
Hours paid 96 ST @ \$10.00 = \$960.00
14 OT @ 15.00 = 210.00
Gross earnings = 1170.00
OT owed employer 14 hrs. @ 15.00 = \$210.00

Work Period 2

Scheduled hours 120
Hours worked 120
Hours paid 106 ST @ \$10.00 = \$1060.00
7 OT @ 15.00 = 105.00

Gross earnings = 1165.00
OT owed employer 7 hrs. @ 15.00 = 105.00

Work Period 3

Scheduled hours 120
Hours worked 120
Hours paid 106 ST @ \$10.00 = \$1060.00
7 OT @ 15.00 = 105.00
Gross earnings = 1165.00
OT owed employer 0

Work Period 4

Scheduled hours 96
Hours worked 96
Hours paid 96 ST @ \$10.00 = \$960.00
14 OT @ 15.00 = 210.00
Gross earnings = 1170.00
OT owed employer 14 @ 15.00 = 210.00

Work Period 5

Scheduled hours 120
Hours worked 96 (24 vacation/leave)
Hours paid 96 ST @ \$10.00 = \$960.00
24 vac. @ 10.00 = 240.00
Gross earnings = 1200.00
OT owed employer 14 @ 15.00 = 210.00

Work Period 6

Scheduled hours 120
Hours worked 120
Hours paid 106 ST @ \$10.00 = \$1060.00
7 OT @ 15.00 = 105.00
Gross earnings = 1165.00
OT owed employer 7 @ 15.00 = 105.00

Work Period 7

Scheduled hours 96
Hours worked 96
Hours paid 96 ST @ \$10.00 = \$960.00

14 OT @ 15.00 = 210.00
Gross earnings = 1170.00
OT owed employer 21 @ 15.00 = 315.00

and so forth.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

* It has been our experience that because of misunderstandings and the technical requirements of such plans, violations of the FLSA overtime requirements frequently resulted from use of such plans. Consequently, the overtime interpretations contained in 29 CFR Part 778 no longer contain information on prepayment plans.