



WHD-OL-1997-NNNN

July 21, 1997

**NAME\***

This is in response to your letter requesting an opinion as to the application of the Fair Labor Standards Act (FLSA) to the proposed flexible work schedule of **NAME\***.

You represent 19,000 employees throughout the U.S. and locations around the world. In an effort to retain and attract the most qualified workers, the company has embraced the flexible and alternate workweek program that would allow employees to work 4 ten-hour days or 9-hour days over a two-week period with one extra day off.

You are specifically concerned about the 9-hour work days over a two-week period in which the employee would work four 9-hour days and one 8-hour day for a total of 44 hours in the first workweek. Instead of being paid for all 44 hours, the employee would only be paid for 40 hours and the additional 4 hours would be put into a "bank." In the second workweek, the employee would work four 9-hour days for a total of 36 hours, and he/she would take off one 8-hour day (either Monday or Friday). At the end of the second workweek, the four banked hours would be added to the 36 hours for a total of 40 hours. All hours above the base hours either week would be paid as overtime.

You asked the following question about employees working 9-hour days over a two-week pay period:

- Q. Are there any Federal regulations that would prohibit such practices with regard to hourly and non-exempt employees?
- A. Yes. The regulations implementing the FLSA, 29 CFR Part 778 (copy enclosed), prohibit the proposed work practices regarding hourly, non-exempt employees. Section 778.104 does not permit the averaging of hours over a two-week pay period as indicated in your proposal to "bank" four hours in the first workweek to be added to the hours worked in the second workweek. A non-exempt employee must be paid an overtime premium pay for all hours worked in excess of 40 in a workweek. However, if you use Friday at noon as the beginning of the workweek, an employee may work the hours you suggest in consecutive workweeks with no overtime pay due to the employee. Thus, the 8 hours worked on Friday is split (4/4) to indicate the end of workweek 1 and the following of workweek 2. This is illustrated as follows:

Workweek 1:

F (PM) S S M T W T F (AM)  
0 - - 9 9 9 9 4

Workweek 2:

F (PM) S S M T W T F (AM)  
4 - - 9 9 9 9 0

Although an employee's workweek may begin on any day and at any hour of the day, the workweek once selected must be a fixed and regularly recurring period of seven consecutive 24-hour periods. The beginning of the workweek may be changed if the change is intended to be permanent, but not where the change is designed to evade the overtime requirements of the FLSA. (29 CFR 778.105).

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 question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

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

Sincerely,

Daniel F. Sweeney  
Office of Enforcement Policy  
Fair Labor Standards Team

Enclosure

\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).