



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-24. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See [29 C.F.R. §§ 790.17\(d\)](#), [790.19](#); *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990). Wage and Hour Opinion Letter FLSA2009-24 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement



FLSA2009-24

This Opinion Letter is withdrawn.

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether your client's proposed pay system complies with the fluctuating-workweek method of payment under [29 C.F.R. § 778.114](#).¹ Based on the information provided, it is our opinion that the proposed system complies with the fluctuating-workweek method.

Your client proposes to pay certain non-exempt employees a fixed salary that will compensate them for all hours worked, whether few or many, and, in addition, to pay them a "double-time" premium for hours worked on a Sunday or a holiday. The double-time premium is calculated by taking the employees hourly rate (salary divided by 40), multiplied by the number of Sunday and/or holiday hours worked, multiplied by .5, and multiplying the resulting product by two.² You provide three examples to illustrate the proposed method based on a weekly salary of \$1000:

If an employee works 45 hours Monday through Friday:

$$\text{\$1000} / 40 \text{ hours} = \text{\$25 per hour}$$

$$\text{\$25} \times 5 \text{ hours} \times .5 = \text{\$62.50 overtime compensation}$$

$$\text{\$1000} + \text{\$62.50} = \text{\$1062.50}$$

If an employee works 40 hours in the workweek, including five hours on Sunday:

$$\text{\$1000} / 40 \text{ hours} = \text{\$25 per hour}$$

$$\text{\$25} \times 5 \text{ hours} \times .5 \times 2 = \text{\$125 Sunday premium compensation}$$

$$\text{\$1000} + \text{\$125} = \text{\$1125}$$

If an employee works eight hours on Monday, Tuesday, and Wednesday of Thanksgiving week and works four hours on Thanksgiving:

$$\text{\$1000} / 40 \text{ hours} = \text{\$25 per hour}$$

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

² Although the employees' Sunday and holiday pay is multiplied by .5, this method results in a true double-time premium because the employees are already compensated straight-time pay for the holiday and Sunday work through their salary.

$\$25 \times 4 \text{ hours} \times .5 \times 2 = \100 holiday premium compensation

$\$1000 + \$100 = \$1100$

You state that in overtime weeks, the premium pay for holiday and Sunday work is not added to the regular rate pursuant to 29 U.S.C. § 207(e)(6).

The FLSA requires that overtime compensation be paid at a rate of not less than one and one-half times the regular rate of pay for all hours worked in excess of 40 in a workweek. The regular rate of pay of an employee "is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." [29 C.F.R. § 778.108](#). Section 207(e) of the FLSA requires the inclusion in the regular rate of pay all remuneration for employment except certain specified types of payments including, in relevant part, premium payments paid for working on a Sunday or a holiday. 29 U.S.C. § 207(e)(6).

29 C.F.R. § 778.114 provides an illustration³ of how the regular rate is determined in the case of an employee working varying hours who receives an agreed upon salary intended by the parties to cover all hours worked. *See also Overnight Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942) ("It is this quotient which is the 'regular rate at which an employee is employed' under contracts of the types described and applied in this paragraph for fixed weekly compensation for hours, certain or variable."). According to section 778.114(a), a salary paid based on the fluctuating workweek method is intended to compensate an employee "for whatever hours he is called upon to work in a workweek, whether few or many." In addition, paragraph (c) of that section requires that "the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked." Thus, the fixed salary is the employee's straight time compensation, both "for long workweeks as well as short ones." 29 C.F.R. § 778.114(c). Receipt of additional bonus payments does not negate the fact that an employee receives straight-time compensation through the fixed salary for all hours worked whether few or many, which is all that is required under § 778.114(a).

Thus, where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary and any bonuses, premium payments, or other additional pay of any kind not excluded from the regular rate under section 7(e)(1) through (8) of the Act is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest, and if the employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half the employee's regular rate of pay.

³ Part 778 is interpretive rather than regulatory in nature and, therefore, is simply one in a series of examples of how the regular-rate principles of [§ 778.109](#) apply in different situations.

Your client's proposed plan appears to be consistent with regular-rate principles as applied in the fluctuating-workweek context. The salary paid by your client appears sufficient to compensate each employee at a rate not less than the current federal minimum wage rate for each hour worked in any workweek, and the employees receive the salary regardless of the number of hours worked. Additionally, the employees are paid overtime compensation for all hours over 40. As long as your client and the employees paid under the proposed plan have a clear understanding that the fixed salary paid to them shall be straight-time compensation for whatever number of hours they work, the fluctuating workweek method may be used. Further, if such an understanding exists, the fact that the regular rate is determined by dividing the salary by 40, instead of the actual number of hours worked, does not prevent use of the fluctuating workweek method. *See Wage and Hour Opinion Letter October 31, 2002 (copy enclosed).*

Finally, pursuant to 29 U.S.C. § 207(e)(6), the Sunday and holiday premiums are properly excluded from the regular rate when computing the additional half-time required under the fluctuating workweek method and may also be credited against any overtime due under section 207(h)(2).

Therefore, based on the information provided, it is our opinion that the proposed compensation system complies with the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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