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

October 3, 2005 **FLSA2005-36**

Dear ***Name****,*

The is in response to your letter inquiring about the application of the overtime provisions of the Fair Labor Standards Act (FLSA) to double-time wages paid under the notice provisions of an employment contract.

Specifically, the employment contract provides that employees who are called in to work outside of their regularly scheduled shift hours with less than four hours notice are paid double time for such hours. You refer to this practice as "short-call." In your letter, you state that the employer only asks employees to work "short call" on infrequent and sporadic occasions such as when another employee is ill. Your letter suggests that the additional premium paid under the notice provision qualify as either "reporting" pay under 29 C.F.R. § 778.220, "call-back" premiums under 29 C.F.R. § 778.221, or "other payments similar to 'call-back' pay" under 29 C.F.R. § 778.222 because they are made on infrequent and sporadic occasions for extra work done outside the employee's regularly scheduled hours. You present the following scenario and ask two questions:[1]

> **The employee's "short-call" work commences at 8:30 AM and concludes at 2:30 PM, whereupon the employee commences her regular shift at 3:00 PM. The remainder of the week, the employee works only her regular hours. At the end of the week, the employee has worked a total of 46 hours, 40 of which were straight time and six of which were "short-call." Accordingly, the employee is paid a total of $260 ($200 for 40 hours of straight time worked and $60 for six hours of "short-call" at the double-time rate).**
>
> 1. **Is the employer entitled to exclude the double-time wage paid as a result of the "short-call" provision from the calculation of the employee's regular rate?**
>
> 2. **Is the employer entitled to credit double-time wage paid as a result of the "short-call" provision against the employer's overtime liability?[2]**

Under § 7(e)(2) of the FLSA, 29 U.S.C. § 207(e)(2) (2000) (copy enclosed), payments that are not made as compensation for hours worked may be excluded from the regular rate. However, such payments may not "be credited toward overtime compensation due under the act." 29 C.F.R. § 778.216 (copy enclosed). Only payments that qualify as exceptions under FLSA §§ 7(e)(5), (6) or (7) may be excluded from the regular rate and be credited toward overtime premiums owed. 29 U.S.C. § 207(h).

[1] Note that the current federal minimum wage is $5.15 per hour; therefore, your hypothetical rate violates the FLSA.

[2] We have reordered your questions because, to properly analyze the statute, the first question must be whether the premium payment may be excluded from the regular rate.

In response to the first question, we look to 29 C.F.R. §§ 778.220, 778.221 and 778.222 (copies enclosed). These regulations discuss the applicability of FLSA §7(e)(2) and the ability to exclude payments to employees from their regular rate of pay. The types of premium pay in these sections are not regarded as payment for the hours worked, and while they may be excluded from the calculation of regular rate, they cannot be credited toward overtime due. 29 C.F.R. § 778.220(a). *See also* Opinion Letter dated May 25, 1973 (copy enclosed).

The most analogous section of the regulations is 29 C.F.R. § 778.222 discussing payments similar to call-back pay, such as:

> (a) Extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule; and
> (b) extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a "rest period."

29 C.F.R. § 778.222.

Your “short-call” pay qualifies under 29 C.F.R. § 778.222 because it is a payment made on infrequent and sporadic occasions for failure to give employees sufficient notice to report for work outside of their regular working hours. Therefore, “[t]he extra payment, over and above the employee’s earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be), is considered as payment that is not made for hours worked.” 29 C.F.R. § 778.222. Accordingly, the Wage and Hour Division would allow you to exclude the premium that you pay your employees under the “short-call” provision of your employment agreement from their regular rate. *See* 29 U.S.C. § 207(e)(2).

Your second question addresses the employer’s overtime liability. You asked whether the extra compensation you pay your employees who work “short-call” may be credited towards the employer’s overtime liabilities. Section 7(h) of the FLSA provides that extra compensation described in FLSA §§ 7(e)(5), (6), and (7) may be credited toward overtime compensation, but that compensation excluded under the other portions of § 7(e) may not be credited toward compensation due. As stated above, the “short-call” premium qualifies under FLSA § 7(e)(2) and not under § 7(e)(5)-(7). Accordingly, the extra compensation may not be credited towards the employer’s overtime obligation under the FLSA. However, the regular compensation provided for the “short-call” hours worked, i.e. the first $5 per hour paid, under the scenario you presented, may be counted towards the minimum wage obligation under the Act. Therefore, the employee’s regular rate would remain $5 an hour and the employee would also be entitled to 6 hours pay at one-half times the regular rate, or an additional $15, bringing the total compensation to $275.

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 issue 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.

This opinion is issued as an official ruling 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*, 913 F.2d 498, 507 (8th Cir. 1990).

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

Sincerely,

Alfred B. Robinson, Jr.,
Deputy Administrator

Enclosures: FLSA §§ 7(e) and (h)
29 C.F.R. § 778.216
29 C.F.R. §§ 778.220-.222
Opinion Letter dated May 25, 1973

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