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

FLSA2005-17

May 27, 2005

Dear **Name*,**

This is in response to your correspondence requesting an opinion on the application of the Fair Labor Standards Act (FLSA) to the pay practices of your client, a city located in the State of Texas. You state that the city has set a workweek that begins at 12:01 A.M. Sunday and ends at 12:00 A.M. (midnight) the following Saturday. Overtime is paid at time and one-half the regular rate for hours worked over 40 in the workweek, but you ask whether, for purposes of calculating overtime pay, the city may properly include all hours worked in a single shift in the workweek in which that shift begins.

Your specific concern is about employees in some departments who are assigned to work four 10-hour shifts that overlap two different workweeks. The example you provide is of an employee who works four shifts of ten hours each:

Shift 1: Wednesday from 10:00 P.M. until 8:00 A.M. Thursday
(10 working hours)
Shift 2: Thursday from 10:00 P.M. until 8:00 A.M. Friday
(10 working hours)
Shift 3: Friday from 10:00 P.M. until 8:00 A.M. Saturday
(10 working hours)
Shift 4: Saturday from 10:00 P.M. until 8:00 A.M. Sunday
(10 working hours—the first two hours falling in one workweek, and the remaining eight in the following workweek.)

Although individuals who begin the schedule described above will have worked only 32 hours in the city's official workweek, the city wishes to pay them for 40 hours. In the second week the individuals will have worked 40 hours and will be paid for 40 hours, although the 40 hours for which they are paid will include eight hours that fall in the third week of the city's official workweek. In effect, your client wishes to prepay the eight hours worked at the end of the fourth shift (midnight through 8:00 A.M. on Sunday). As you have described the proposal, employees would be paid for all hours worked and would not ordinarily work more than 40 hours in either the city's official workweek or during the period between the beginning (Wednesday evening) and end (Sunday morning) of the four-shift period in question. The final eight hours of the shift that begins at 10:00 P.M. Sunday would be included with hours worked in the city's official preceding workweek when tallying the total number of hours worked. If that total exceeded the anticipated 40 hours, the city would pay for all hours over 40 at time and one-half the employee's regular rate of pay.

The workweek is a fixed and regular recurring period of 168 hours—seven consecutive 24-hour periods. The workweek is established by the employer and need not be the same as a calendar week. A workweek may be established for all employees or different workweeks may be established for different employees or groups of employees. Once an employee's workweek is

established, it remains fixed, and may only be changed if the change is intended to be permanent and is not designed to evade the overtime provisions of the FLSA. Further, each workweek stands alone and averaging of hours over two or more weeks is not permitted. This is true whether an employee works on a standard or swing-shift schedule. Therefore, hours worked and compensation earned must be determined on a workweek basis. 29 CFR 778.104 - .105.

Though compensation due an employee must normally be paid at the time of the employee's regular pay period, the Wage and Hour Division has no objection if an employer, such as your client, pays in advance the compensation that the employee will be due in a subsequent pay period by including all hours worked in a single shift in the workweek in which that shift began. However, employees must always be paid time and one-half their regular rate of pay for each hour actually worked over 40 hours in the workweek and the employer must not manipulate the schedule in order to avoid the overtime pay requirement of the FLSA. See opinion letter dated January 7, 2005; Field Operations Handbook, ¶ 32j16c (enclosed) for a full discussion of prepayment plans.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a 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 letter 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, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

We trust the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:
January 7, 2005 opinion letter
FOH ¶ 32j16c

Note: *The actual name(s) was removed to preserve privacy.