



July 24, 2006

FLSA2006-18NA

Dear **Name***,

This is in response to your request for an opinion concerning whether holiday pay received by firefighters when they forego certain holidays must be included in the calculation of the regular rate for overtime pay purposes under the Fair Labor Standards Act (FLSA). Based on a review of the information provided, we believe that such payments may be excluded from the calculation of the regular rate for overtime pay purposes.

You state that the firefighters work 24-hour shifts. On occasion, a firefighter might forego taking a holiday but still receives holiday pay for eleven such days at the rate of 12 hours per holiday. This includes nine "recognized" holidays and two "floating holidays." The holiday year is from December 1 through November 30 of the following year. Employees are compensated for holidays by a separate check on the first payday in December of each year. Compensation for a recognized holiday or a used floating holiday is based on the employee's rate of compensation at the time of the holiday. Compensation for an unused floating holiday is based on the firefighter's pay rate at the time of payment.

Firefighters who begin employment during the holiday year are credited holiday hours as follows:

- a) 12 hours for each designated holiday that occurs during the employment period;
- b) 24 hours of floating holiday time if the employee start date is prior to August 1; 12 hours of floating holiday time if the employee start date is between August 1 and September 30; and no floating holiday time if the employee start date is between October 1 and November 30.

In a discussion with a member of the Wage and Hour Division staff, you stated that the holiday pay provisions are part of a collective bargaining agreement between the employer and the union representing the firefighters. In addition to receiving holiday pay, the firefighters who forego holidays continue to be compensated at the customary rate for hours worked. Floating holidays are similar to vacation leave, as the firefighters may use them at any time during the holiday year; floating holidays, however, may not be carried over to the following holiday year.

You ask us to clarify whether the amounts paid for holiday pay and floating holiday time as discussed above need be included in the calculation of the regular rate for overtime pay purposes.

The FLSA includes in the regular rate of pay all remuneration for employment paid to, or on behalf of, the employee, except payments specifically excluded by section 7(e) (copy enclosed). FLSA section 7(e)(2) provides that the term "regular rate" shall not be deemed to include "payments made for occasional periods when no work is performed due to vacation, holiday . . . and other similar payments to an employee which are not made as compensation for his hours of employment."

As indicated in 29 C.F.R. § 778.219(a) (copy enclosed), the exclusion also applies when the employee foregoes a holiday or vacation but still receives the holiday or vacation pay. Thus the regulation provides that when an employee who is entitled to a paid holiday or vacation foregoes his holiday or vacation, performs work for the employer, and is paid at his customary rate (or higher) for hours worked on a holiday or vacation day in addition to the holiday or vacation pay, the additional specified sum received as holiday or vacation pay may be excluded from the regular rate. The regulation states that holiday or vacation pay in such circumstances is still not considered as compensation for hours worked. See Wage and Hour Opinion Letter April 5, 2004 (copy enclosed).

Based upon a review of the information provided, it is our opinion that the described holiday payments made to firefighters when they forego holidays are not considered compensation for hours of work, and therefore, need not be included in the regular rate of pay for purposes of computing overtime



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

compensation pursuant to FLSA section 7(e)(2). You confirmed that when firefighters forego a holiday and perform work for the employer, they receive pay at their customary rate for all hours worked, in addition to the payment for the holiday, which satisfies the requirements for exclusion pursuant to 29 C.F.R. § 778.219. However, since the regulation provides that such payments are not made as compensation for the firefighters' hours worked in any workweek, no part of such payments may be credited toward minimum wage or overtime compensation due under the FLSA. See FLSA section 7(h)(1) and 29 C.F.R. §§ 778.216 and 778.219(a) (copies enclosed).

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,

Barbara R. Relerford
Fair Labor Standards Team
Office of Enforcement Policy

Enclosures:

FLSA sections 7(e), 7(e)(2), 7(h)(1)
29 C.F.R. §§ 778.216, 778.219(a)
Wage and Hour Opinion Letter April 5, 2004

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