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

FLSA2009-3

January 14, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether the proposed method of your client (the employer) for computing retroactive payment of overtime complies with the Fair Labor Standards Act (FLSA). Based on a review of the information provided, it is our opinion that the proposed method satisfies the FLSA.

The employer has for some time considered certain employees to qualify for exemption under section 13(a)(1) of the FLSA.[*] The employer expected the employees to work at least 50 hours per week and paid them a guaranteed salary bi-weekly. The employer's payroll software converts the bi-weekly salary to an hourly rate by dividing the salary by 100, the minimum expected number of hours worked for a two-week payroll period. This is done without regard to whether the employee has worked more or less than 100 hours in the pay period. For example, if the employee's salary is $1,825.50, the payroll software converts this to an hourly rate of $18.25 ($1,825.50 divided by 100). The paycheck stub shows the $18.25 per hour rate and the 100-hour divisor. In a follow-up correspondence, you stated that the employees' hours worked fluctuated above and below fifty hours per week notwithstanding the minimum fifty-hour week expectation. Typically, however, the employees worked at least fifty hours per week.

The employer recently realized that due to a reorganization, the nature of the work performed by some of the employees ceased to meet the duties test of the section 13(a)(1) exemptions. The employer now treats the affected employees as nonexempt and complies with the recordkeeping, minimum wage, and overtime requirements of the FLSA for these employees. The employer will pay back wages to the employees for overtime hours worked during the period of misclassification. The employer is reconstructing the number of hours worked by the employees over this period. Once this is completed, the employer will pay overtime retroactively by (1) dividing the weekly equivalent of the employee's bi-weekly salary by the employee's hours worked in that workweek; (2) multiplying the resulting regular rate by one half; and (3) multiplying the half-time rate by the number of overtime hours worked in that workweek. In the follow-up correspondence, you stated that the salaries involved are high enough that the regular rate would in all cases exceed the applicable minimum wage.

You ask whether the proposed method of computing retroactive payment of overtime complies with the FLSA.

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

Under the fluctuating workweek method of payment an employee may be paid a fixed salary that serves as compensation for all hours worked if it is sufficient to compensate the employee for all straight time hours worked at a rate not less than the minimum wage and the employee is paid an additional one-half of the regular rate for all overtime hours. *See* 29 C.F.R. § 778.114(a). The regular rate of pay will vary due to the fluctuating hours worked week to week. *See id.* § 778.114(b). The full salary must be paid even when the full schedule of hours is not worked. *See id.* § 778.114(c). Finally, there must be a "clear mutual understanding of the parties that the fixed salary" is "compensation for however many hours the employee may work in a particular week, rather than for a fixed number of hours per week." *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230 (10th Cir. 2008); *see* 29 C.F.R. § 778.114(a). As stated in Wage and Hour Opinion Letter FLSA-772 (Feb. 26, 1973),

> [a]n agreement or understanding need not be in writing in order to validate the application of the fluctuating workweek method of paying overtime. Where an employee continues to work and accept payment of a salary for all hours of work, her acceptance of payment of the salary will validate the fluctuating workweek method of compensation as to her employment.

Furthermore, the Department's regulations do not require that the "clear and mutual understanding" extend to the method used to calculate the overtime pay. *See Valerio v. Putnam Associates Inc.*, 173 F.3d 35, 40 (1st Cir. 1999) ("The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not."). Rather, 29 C.F.R. § 778.114 only requires that the employees have a "clear and mutual understanding that they would be paid on a salary basis for all hours worked." *Clements*, 530 F.3d at 1230.

It is clear the employer paid the employees a fixed salary for variable hours worked and not on an hourly basis. The payroll software's conversion of the salary into an hourly rate and the hourly rate notation on the paycheck stub do not negate this fact. Therefore, because the fixed salary covered whatever hours the employees were called upon to work in a workweek; the employees will be paid an additional one-half their actual regular rate for each overtime hour worked, which at all times exceeds the minimum wage; and the employees received and accepted the salary knowing that it covered whatever hours they worked, it is our opinion that the employer's method of computing retroactive payment of overtime 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. This opinion does not constitute supervision of payment of back wages due to any employees under 29 U.S.C. § 216(c) of the FLSA.

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).**