



April 5, 2004

FLSA2004-2NA

Dear *Name**,

This is in response to your request for an opinion regarding whether a cash out payment of accrued vacation time to firefighters is to be considered in the computation of the regular rate for overtime compensation purposes under the Fair Labor Standards Act (FLSA).

The *Name** has entered into a collective bargaining agreement with certain firefighters. Two proposals have been developed for programs that would allow bargaining unit members to obtain cash for certain accumulated vacation hours defined in the bargaining agreement. The firefighters may elect to receive the equivalent of "two weeks' pay for two weeks' vacation," although the firefighter does not take the vacation time off. Under Proposal One, cash for accumulated vacation hours will be paid at the employee's current hourly rate, at the end of June or December of Year 2. Under Proposal Two, cash for accumulated vacation hours will be paid at the hourly rate then applicable during each month of Years 2, 3, and 4. The firefighters will continue to be compensated at the customary rate for hours worked. The elected cash payment for vacation hours is not compensation for hours worked.

Section 7(e) of the FLSA requires the inclusion in the regular rate of pay of all remuneration for employment except eight specified types of payments. Section 7(e)(2) provides that the term "regular rate" shall not be deemed to include payments made for occasional periods when no work has been performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause. . . . and other similar payments to an employee which are not made as compensation for his hours of employment.

Section 778.219(a) of the regulations (29 C.F.R. 778.219(a)) clarifies that 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, the additional specified sum received as holiday or vacation pay is to be excluded from the regular rate.

Based upon the information in your letter, the cash payments to be made under the proposed plans for cashing out accrued vacation time need not be included in the regular rate of pay for purposes of computing overtime compensation pursuant to section 7(e)(2).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to or subject to the terms of any agreement or order applying or requiring compliance with the provisions of the FLSA.

Sincerely,

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



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