



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

FLSA2008-12NA

September 22, 2008

Dear **Name***:

This is in response to your request for an opinion regarding whether your client's compensation plan is in compliance with the Fair Labor Standards Act (FLSA).^{*} It is our opinion that your client's method of calculating the regular rate and overtime compensation complies with the FLSA.

Your client, a private company, employs dump truck drivers who are paid solely on a commission basis for intrastate delivery of materials. We assume, for purposes of this response, that the truck drivers are not exempt from the overtime pay provisions under 29 U.S.C. § 213(b)(1). We also assume that your client is not a retail or service establishment and that the exemption to overtime pay under 29 U.S.C. § 207(i) is not applicable to the truck drivers. The truck drivers are paid a commission of 27 percent of the gross revenue received by the employer for the materials delivered by the driver each week. At the end of each workweek, your client divides the commission amount by the total number of hours worked to determine the truck driver's regular rate of pay. The amount of overtime compensation paid to the truck driver is one-half the regular rate multiplied by the number of hours worked over 40 in the workweek. This is the proper method of calculating the overtime compensation due. *See* 29 U.S.C. § 207(a); [29 C.F.R. § 778.118](#).

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 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.

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

We trust that this letter is responsive to your inquiry.

Sincerely,

Monty Navarro
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).**