



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

FLSA2009-4NA

January 15, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether your client's compensation plan (the plan) complies with the Fair Labor Standards Act (FLSA).^{*} It is our opinion that during workweeks in which an employee works between 40 and 55 hours, the plan fails to satisfy the FLSA section 7(a)'s overtime requirement that employees receive time and one-half their regular rate of pay for hours worked over 40 in a workweek. However, during workweeks in which an employee works over 55 hours, the plan satisfies the FLSA's overtime requirements.

Your client (the company) provides residential contracting services. The company submits labor bids to its customers for particular projects. The company assigns an employee to a particular project and anticipates that most projects take approximately 55 hours to complete. You indicate that the employee's regular compensation for a project is 88 percent of the project's labor bid, regardless of the number of hours that the project actually requires (provided, however, that the company ensures that no employee's regular compensation for any week ever falls below the statutory minimum wage). Each employee is subject to a floor of 32 credited hours per project.

The company uses three distinct methods to determine compensation depending on the number of hours worked in a workweek. Under the first method, if an employee works fewer than 32 hours in a week to complete the project, he or she is credited with 32 hours that week and is paid an amount equal to 88 percent of the labor bid. Under the second method, the employee works between 32 and 55 hours in a week to complete the project, he or she is credited with 55 hours. For instance, if an employee completes the project in 50 hours, he or she is credited with an additional five hours for a total of 55 credited hours for the week. The company divides the amount corresponding to 88 percent of the labor bid by the total number of credited hours (55 hours) to obtain an hourly rate. The company then pays the employee 88 percent of the labor bid plus additional compensation of one-half of this hourly rate for the 15 credited overtime hours. Thus, in working a given project, an employee receives the same fixed amount when he or she works anywhere from 32 to 55 hours in a week. Under the third method, if the employee works more than 55 hours in a week to complete the project, he or she is paid overtime compensation based on the actual hours worked. For example, if the employee completes the project in 60 hours, the company divides the amount corresponding to 88 percent of the labor bid by 60 to obtain an hourly rate. The employee then receives 88 percent of

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

the labor bid plus additional compensation of one-half this hourly rate for every hour worked over 40.

You ask whether the three payment methods described above comply with the FLSA's overtime requirements. The first method does not present any overtime compensation compliance issues because the employee does not work more than 40 hours in a workweek under this method. Similarly, no overtime compensation compliance issues arise for employees working between 32 and 40 hours a week under the second method. Therefore, we address only the second method for employees working between 40 and 55 hours a week and the third method for employees working over 55 hours a week.

The following example illustrates our understanding of how the second method of compensation works: An employee works 45 hours to complete a project with a labor bid of \$1,000 and receives 55 credit hours under the plan. The following week, the employee completes his or her project with the same labor bid in 50 hours and is again credited with 55 hours. According to your letter, for the first week, the company pays the employee 88 percent of the labor bid, equaling \$880. In addition, the company pays the employee an additional amount for the 15 credited overtime hours. To calculate this amount, the company derives an hourly rate by dividing \$880 (88% of the labor bid) by 55 credited hours, equaling \$16 per hour. The company pays the employee half that hourly rate for the 15 credited hours ($\$8 \times 15$ hours), which is a total of \$120. The employee earns a total of \$1,000 for the week ($\$880 + \120). The employee receives the same amount in the second week regardless of having worked more hours that week, because he is again credited with 55 work hours. Employees who work anywhere from 32 to 55 hours, always receive the same fixed amount, and this amount always corresponds to 100 percent of the project's labor bid. Thus, the number of overtime hours worked between 40 and 55 has no effect on the employee's earnings.

The regular rate of pay for a nonexempt employee paid a flat sum for a particular job without regard to the number of hours worked is the total amount earned in the workweek, less any statutory exclusions, divided by the total number of hours actually worked. The employee is entitled to extra half-time pay at this rate for all hours actually worked over 40 in that workweek. *See* [29 C.F.R. § 778.112](#). The company's method of compensation using a fixed percentage of the labor bid constitutes a job rate under § 778.112. Even if the flat sum paid for a particular job varies because it is based on a percentage of the labor bid, it is nonetheless a job rate which requires compliance with § 778.112. *See Powell v. Carey Int'l., Inc.*, 514 F. Supp. 2d 1302, 1313 (S.D. Fla. 2007) (flat sum paid for a particular job falls under § 778.112 even when the flat sum is based on a variable amount). The company's compensation method for employees who work between 40 and 55 hours a week contravenes § 778.112 because those employees are paid a fixed lump sum of 100% of the labor bid, regardless of the hours actually worked.

Specifically, the second method of the company's plan fails to properly calculate the regular rate for overtime compensation and is prohibited under [29 C.F.R. § 778.500\(d\)](#):

[I]t is not possible for an employer lawfully to agree with his employees that they will receive the same total sum, comprising both straight time and overtime compensation in all weeks without regard to the number of overtime hours (if

any) worked in any workweek. The result cannot be achieved by the payment of a fixed salary or by the payment of a lump sum for overtime or by any other method or device.

Because the employer pays the same total lump-sum amount to employees working between 32 and 55 hours, regardless of whether the employee actually works any overtime hours, the lump sum paid by the company to all employees who work between 40 and 55 in a week must be included as part of an employee's regular rate. *See* [29 C.F.R. § 778.310](#) (a premium in the form of a lump sum for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium as required by the FLSA); Wage and Hour Opinion Letter August 31, 1999 (copy enclosed). Using the example above of the employee who works 45 hours in a workweek, under the company's plan the employee will receive 88 percent of the labor bid (\$880), plus half-time at the rate of \$8 for 15 hours of credited overtime (\$120), for a total amount of \$1,000. Because the employee is paid a guaranteed \$1,000 for the week (whether he works 32 hours or 55 hours), his regular rate should be \$22.22, which is computed by dividing the number of hours actually worked (45) by the total amount of his wages (\$1,000). This employee must be paid for 5 hours of overtime at one-half of the regular rate, \$11.11, which totals \$55.55. Thus, the employee should be paid his guaranteed \$1,000 for the week, plus \$55.55 for the 5 hours of overtime, for a total of \$1,055.55.

In contrast to the second method, the third method under the company's plan complies with section 7(a) of the FLSA and 29 C.F.R. § 778.112. When an employee works over 55 hours in a workweek, the regular rate is calculated based on the number of hours actually worked and the employee is paid overtime of one-half of the regular rate for the number of hours over 40 in a workweek that the employee actually worked.

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,

Monty Navarro
Fair Labor Standards Team
Office of Enforcement Policy

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