



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

FLSA2009-3NA

January 15, 2009

Dear **Name***:

This is in response to your letter inquiring whether a proposed method of payment for nonexempt, gasoline service station employees complies with the Fair Labor Standards Act (FLSA) and the applicable regulations.¹ You state that you are seeking guidance “because [you] wish to ease the burden of record keeping for the employer.” It is our opinion that the proposed method of payment does not comply with section 7(f) of the FLSA, 29 U.S.C. § 207(f), or with the regulations at 29 C.F.R. Part 778.

Your client owns a gasoline service station that employs automotive mechanics, gasoline attendants, cashiers, tow truck drivers, and dispatchers for the tow truck drivers. You specifically ask whether the following proposed method of payment accords with the requirements of the FLSA. Employees receive a fixed weekly salary that exceeds the minimum wage and includes compensation for overtime worked in excess of 40 hours per week. Each employee would have a pay agreement with the gasoline service station that provides as follows:

- Automotive mechanics working less than 60 hours per week (54, 56, and 52.5 hours over three weeks respectively) would receive \$800 per week.
- Gasoline attendants and cashiers working less than 50 hours per week (48, 45, and 46 hours over three weeks respectively) would receive \$375 per week.
- Tow truck drivers working less than 70 hours per week (65, 58, and 70 hours over three weeks respectively) would receive \$700 per week.
- Dispatchers for the tow truck drivers working less than 70 hours per week (65, 58, and 70 hours over three weeks respectively) would receive \$700 per week.

Section 7(f) of the FLSA, 29 U.S.C. § 207(f), provides an exception from the overtime pay requirements of the Act for certain employees with duties necessitating irregular hours of work. Specifically, the section 7(f) exception applies if there is an agreement to provide a weekly guaranteed salary for no more than 60 hours at a regular rate of pay that is not less than the applicable minimum wage and compensation at not less than one and one-half times the regular rate of pay for all hours worked over 40 in a workweek.² Section 7(f) is the only provision of the FLSA that allows otherwise nonexempt employees to receive the same amount of total compensation each week, regardless of the

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

² Effective July 24, 2007, the Federal minimum wage increased from \$5.15 an hour to \$5.85 an hour. It will further increase to \$6.55 per hour effective July 24, 2008, and to \$7.25 per hour effective July 24, 2009.

number of overtime hours worked (up to the maximum number of hours guaranteed in the agreement, which may not exceed 60). This method of compensation is known as a “*Belo*” plan. See *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942).

Thus, a *Belo* plan permits a fixed payment when the employee’s duties necessitate irregular work hours and the total wages would vary widely from week to week if computed on an hourly rate basis. See [29 C.F.R. § 778.404](#). But “[t]he nature of the employee’s duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week.” [29 C.F.R. § 778.405](#). In addition, the “duties must necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours.” *Id.* Irregularities caused by absences for reasons unrelated to the nature of the duties being performed -- such as personal reasons, illness, vacations, holidays, or scheduled days off -- do not satisfy the requirements for irregular hours of work. See [Field Operations Handbook § 32g02](#); Wage and Hour Opinion Letter September 15, 1997 (copy enclosed).

It is our opinion that the proposed method of payment does not comply with section 7(f) of the FLSA or 29 C.F.R. Part 778. First, the information provided does not indicate that the employees’ duties require irregular hours that the employer cannot reasonably control. Second, you provided examples of hours worked that do not show that the employees’ varying hours are ever less than the 40 hours per workweek standard of section 7(a).³ As noted *supra*, there must be variation not only in those hours worked over 40 per week, but in those worked under 40 in a week as well. See [29 C.F.R. § 778.406](#) (“[W]here the fluctuations in an employee’s hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not ‘irregular’ within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption.”). Third, the proposed plan for tow truck drivers and dispatchers is based on a weekly guaranteed salary for 70 hours (in the third week of your proposed scenario), which exceeds the 60-hour maximum in the law. See 29 U.S.C. § 207(f); [29 C.F.R. § 778.411](#).

You also ask whether a *Belo* contract or agreement must be signed by the employees and whether employers are required to keep track of the employees’ hours of work. Although “it is certainly desirable” to do so, there is no requirement that the agreement be reduced to writing so long as “the making of the contract and the settlement of its terms were done in good faith.” [29 C.F.R. § 778.407](#). Employers who utilize section 7(f) are subject to the FLSA recordkeeping requirements at 29 C.F.R. Part 516, including the requirement to keep accurate records of the employees’ hours of work. They also must keep a copy of the individual employee contract or collective bargaining agreement governing the plan, “or where such contract or agreement is not in writing, a written memorandum summarizing its terms.” [29 C.F.R. § 516.24](#).

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

³ As indicated *supra*, you provided examples of an automotive mechanic working 54, 56, and 52.5 hours per week; gas attendants and cashiers working 48, 45, and 46 hours per week; and tow truck drivers and dispatchers working 65, 58, and 70 hours per week.

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
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).**