



October 8, 2004

FLSA2004-18NA

Dear *Name**,

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to an alternative work schedule proposal the International Brotherhood of Electrical Workers, Local Union No. 77, submitted to *Name** a municipality owned electric utility.

The proposed alternative work schedule during any two week period in which there is not a holiday involves working 9 days and 80 hours during a two-week period with the workweek beginning at 11:00 am on Friday. The Monday through Thursday work schedule is nine hours per day, 0700 –1630, with a one-half hour uncompensated lunch period. The Friday when pay is issued is an eight hour day, 0700 –1530, with a one-half hour uncompensated lunch period. This schedule calls for a day off on the other Friday. The workweek ends every Friday at 11:00 a.m.

Below is an example of the proposed non-holiday work schedule:

Workweek One:

Monday	Tuesday	Wednesday	Thursday	Friday	(payday)
9	9	9	9	4	(workweek ends at 11:00 a.m.)
(0700-1100)					

Total hours worked: 40

Workweek Two:

Friday	Monday	Tuesday	Wednesday	Thursday	Friday	(non-payday)
4	9	9	9	9	day off	
(1100-1530, with 30 min. lunch)						

Total hours worked: 40

For those weeks when there is a holiday, the adjusted work schedule is Monday through Friday, with employees working eight hours per day, 0700 – 1530, with a one-half hour uncompensated lunch period. There appears to be no day off on the non-payday Friday during this holiday work schedule. These hours apply to the week that a holiday falls in and the following week. Below is an example of a holiday workweek and the two (2) following workweeks, when the holiday occurs in a payday week (such as September 1, 2003 in the calendar you provided).

Workweek One:

Monday	Tuesday	Wednesday	Thursday	Friday	(payday)
H	8	8	8	4	(workweek ends at 11:00 a.m.)
(0700-1100)					

Total hours worked: 28

Workweek Two:

Friday	Monday	Tuesday	Wednesday	Thursday	Friday	(non-payday)
4	8	8	8	8	4	(workweek ends at 11:00 a.m.)
(1100-1530, with 30 min. lunch)						

Total hours worked: 40



Workweek Three:

Fri day Monday Tuesday Wednesday Thursday Friday (payday)
 4 9 9 9 9 4 (workweek ends at 11:00 a.m.)
 (1100-1530, with 30 min. lunch)

Total hours worked: 44

You ask if the proposed work schedule discussed above complies with the FLSA.

As you know, the FLSA requires that all covered and nonexempt employees be paid not less than the minimum wage, \$5.15 an hour, for all hours worked and overtime pay for all hours worked over 40 in a workweek. An employee's workweek is a fixed and regularly recurring period of 168 hours, comprised of seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. 29 CFR 778.105. For this reason, it may be possible for an employer to establish a workweek that will accommodate a flexible work schedule such as that described above. Such a workweek would have to begin at a point somewhere during a workday so that no more than 40 hours are worked in each workweek.

Please note that for purposes of computing pay due under the FLSA, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by the employee. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made is discussed in Regulations, 29 CFR Part 778.301 and 778.302.

A review of the calendar attached with your letter shows that in most weeks employees would be working 40 hours. In some instances, however, they would be working 44 hours a week. Under section 7(a) of the FLSA, overtime compensation at time and one-half of the regular rate must be paid to all covered and nonexempt employees for all hours worked in excess of 40 in the workweek. Under certain conditions, public employees may receive compensatory time off pursuant to section 7(o) of the FLSA in lieu of cash overtime compensation as described in Regulations, 29 CFR Part 553.20 -.28. As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the FLSA requires an agreement or understanding be reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and a representative of the employees, or between the public agency and individual employees. The agreement or understanding may be oral or written [see 29 CFR Part 553.23(b) and (c)].

The FLSA does not set a minimum or a maximum number of hours in a day or in a week that an adult employee may be required or may choose to work, nor does it regulate work schedules or employers' utilization of their work force, so long as overtime is paid or compensatory time off is given if an employee works more than 40 hours in a workweek. Thus you and the employer may agree to the adjustment of the "9/80" work schedule to 8 hours of work, Monday through Friday, in the week a holiday falls in and also the following week. However, please note that under the proposed alternative work schedule, overtime workweeks occur as a result of reverting to the 8 hour day, 5 days per week work schedule in the week after a holiday that occurs in a payday week.



Please feel free to visit our website at www.dol.gov/esa/whd/ for general Wage and Hour information. If you need further assistance you may contact our local district office below:

U.S. Department of Labor
Wage and Hour Division
1111 Third Avenue, Suite 755
Seattle, WA 98101-3212
Tel. (206) 398-8039
Fax. (206) 398-8050

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 represented that this opinion is not sought by a party to pending private litigation concerning the issue 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 the above is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
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).*