



February 17, 2006

FLSA2006-4NA

Dear **Name***:

This is in response to your request for an opinion concerning the applicability of the overtime requirements of the Fair Labor Standards Act (FLSA) to your client's proposed bonus plan (Plan). It is our opinion that the calculation of the bonus under the Plan as a percentage of the total earnings satisfies in full the overtime provisions of section 7(a) of the FLSA (copy enclosed) and therefore no additional computation or payment of overtime is required.

You state that your client's Plan will pay a monthly bonus to its nonexempt employees who meet a certain attendance standard. The bonus will be calculated as a percentage multiplied by the employee's total earnings (straight time plus any overtime pay). The same bonus percentage will be applied to the employee's straight time and overtime earnings. For example, if the Plan awards a 5% bonus during a month when the employee has no absences and earns \$1,000, which includes straight time and overtime pay, the Plan will pay the employee a \$50 bonus ($\$1,000 \times 0.05$). You ask whether the bonus calculation under the Plan is consistent with the computation described in 29 C.F.R. § 778.210 (copy enclosed).

FLSA section 7(a) requires that all overtime be paid at "one and one-half times the regular rate" at which the employee is employed. Where an employer's bonus payments under the Plan are based on a percentage of the employee's total earnings, the payments may be excluded from the regular rate if the conditions in 29 C.F.R. § 778.210 are met. Under section 778.210, a bonus paid as a predetermined percentage of an employee's total compensation – including straight time, overtime, bonuses, and commissions – increases the total earnings by the same percentage, and thereby includes proper overtime compensation as an arithmetic fact. The employer must pay the same percentage of the straight time and overtime earnings. Based on the information you provided, it is our opinion that the bonus payment under the Plan satisfies the conditions set forth in 29 C.F.R. § 778.210 because the same predetermined percentage is applied to the employee's straight time and overtime earnings. Bonus payments under the Plan automatically include the overtime pay due under the FLSA, and therefore no additional computation or payment of overtime is required. *See* WH Opinion Letters January 23, 1997; September 21, 2004; and August 26, 2005 (copies enclosed).

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,

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

Enclosures:

Section 7(a) of the FLSA
29 C.F.R. § 778.210
WH Opinion Letters January 23, 1997; September 21, 2004; and August 26, 2005

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