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

May 4, 2006 FLSA2006-7NA

Dear ***Name*:***

This is in response to your request for an opinion concerning whether the "blended rate" pay plan your union and employer agreed upon complies with the overtime pay provisions of the Fair Labor Standards Act (FLSA). Based on an analysis of the information provided, it is our opinion that the blended rate pay plan as discussed below does not comply with the overtime pay provisions of the FLSA.

According to the documentation you provided, the parties agreed to adopt a standardized twelve-hour shift for certain employees at work locations in three states, subject to receiving approval of the plan by certain state governmental agencies. The agreement provides that the work schedule consists of twelve hours of work per day. The "base rate" is the hourly straight time rate stated in the contract. The "factored rate" is the base rate multiplied by 0.8776, a conversion factor intended to equalize labor costs when the employer transitioned from a 42-hour weekly schedule to a biweekly schedule of seven twelve-hour shifts. The "factored overtime rate" is the factored rate multiplied by 1.5. The "adjusted rate" is the sum of the factored rate for eight hours and the factored overtime rate for four hours, divided by twelve hours per day. In a conversation with a member of the Wage and Hour Division staff, you stated that the adjusted rate is paid for all hours worked in a twelve-hour shift during a normal or regular workweek of three or four twelve-hour shifts. All hours worked outside of the twelve-hour work schedule or more than the regularly scheduled weekly shifts are paid at time and one half of the base rate. The agreement also calls for payment of an evening shift bonus of $0.75 per hour for the last four hours of a twelve-hour day shift. A night shift bonus of $1.50 per hour is also paid for the first eight hours and $2.25 per hour for the last four hours of a twelve-hour night shift.

Your documents suggest the following example:

> Base Rate: $25 per hour
> Factored Rate: $25 per hour x 0.8776 = $21.94 per hour
> Factored Overtime Rate: $21.94 per hour x 1.5 = $32.91 per hour

The employee's adjusted rate of pay is calculated as follows:

> $21.94 per hour for 8 hours = $175.52
> $32.91 per hour for 4 hours = $131.64
> $175.52 + $131.64 = $307.16
> $307.16 ÷ 12 hours = $25.60 per hour.

As mentioned above, hours worked outside the scheduled weekly 36 or 48 hours would be paid at 1.5 x the base rate, or $37.50 per hour.

Under the blended rate pay plan described above, the employer pays the adjusted hourly rate of $25.60 for all hours worked up to 36 hours in a workweek involving three twelve-hour shifts and up to 48 hours in a workweek of four twelve-hour shifts, where no unscheduled overtime is worked. For example, in a regular workweek, an employee would be paid the adjusted hourly rate of $25.60 for each hour worked in a shift of twelve hours or less. Thus, the employee receives the adjusted rate of $25.60 per hour even if the employee works only six hours of the shift. Under the plan, the employer does not pay overtime for the normally-scheduled eight hours that exceed 40 hours in a four-shift week. For the reasons that follow, this payment plan does not meet the overtime compensation requirements under section 7(a) of the FLSA, 29 U.S.C. § 207(a) (copy enclosed).

The principles for computing overtime pay are discussed in the FLSA regulations at 29 C.F.R. Part 778 (copy enclosed). The FLSA requires that an overtime premium be paid at a rate not less than one and one half times the regular rate of pay for all hours worked in excess of 40 in a workweek. The regular rate of pay is an hourly rate that must be computed in accordance with the principles in 29 C.F.R. §§ 778.107-.122 (copies enclosed). The Supreme Court addressed a similar case involving an oil and gas production employer that, in an effort to pay the same total wages for each tour as under previous contracts, adopted a "split-day" plan in which it paid a "base or regular rate" for the first five hours of each 12-hour shift and an "overtime" rate for the remaining hours of the tour. The Supreme Court struck down the plan and construed "regular rate" as follows:

> While the words "regular rate" are not defined in the [FLSA], they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. To compute this regular rate . . . required only the simple process of dividing the wages received . . . by the number of hours. This regular rate was then applicable to the first 40 hours regularly worked . . . and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40.

Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40-41 (1944) (citation and footnote omitted); *see also Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 425 (1945) ("the determination of the regular rate [is] a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts"). Because the adjusted rate of $25.60 per hour is paid for all hours worked up to 48 hours in a workweek where no unscheduled overtime is worked, this adjusted rate is in fact the regular rate for FLSA purposes in such a workweek. The blended rate pay plan incorrectly assumes that overtime pay has already been paid or was included in the adjusted rate. In fact, under the blended rate plan the employer simply pays the same rate for all hours of work up to 48 hours in such a workweek and, therefore, the employer still owes half-time of the regular rate for hours worked over forty in such a workweek. Compliance with the FLSA's overtime rules in this context requires that in a workweek of 48 hours where no unscheduled overtime is worked, the half-time rate of $12.80 ($25.60 multiplied by one half) is due for overtime hours in excess of 40 hours, in addition to the straight time already paid.

We note that the employer may be able to utilize section 7(e)(5) of the FLSA for situations where unscheduled overtime hours are worked and paid according to the plan. Section 7(e)(5), 29 U.S.C. § 207(e)(5) (copy enclosed), provides that an employee's regular rate of pay shall not include "extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked . . . in excess of the employee's normal working hours or regular working hours." *See also* 29 C.F.R. §§ 778.108-.109, 778.202(c); Opinion Letter October 21, 1999; Field Operations Handbook §§ 32b00 and 32e (copies enclosed). Therefore, provided that the employees' normal or regular working hours in this case consist of twelve-hour shifts, the premium of $11.90 (the difference between the $37.50 per hour paid for unscheduled overtime hours and the adjusted hourly rate of $25.60), paid for hours worked beyond twelve hours in a shift, qualifies as an amount under section 7(e)(5) that may be excluded in the calculation of the regular rate. Moreover, section 7(h)(2) of the FLSA, 29 U.S.C. § 207(h)(2) (copy enclosed), allows such daily overtime premium payments to be credited toward the overtime compensation due. This means that in a workweek where unscheduled overtime hours are worked, the overtime pay calculation is computed by determining the regular rate, which is found by dividing the total compensation earned in each workweek, excluding the daily overtime premium payments under section 7(e)(5), by the total number of hours worked in that workweek. The employee is then entitled to a premium of one half of the regular rate for hours worked beyond forty in the workweek. As mentioned earlier, the amount of $11.90 that is excluded in the calculation of the regular rate under section 7(e)(5) may be credited toward the overtime compensation due under section 7(h)(2).[1]

[1] Section 7(e)(5) also allows an employer to exclude premium payments made "because such hours are hours worked in excess of eight in a day . . . ." As explained in 29 C.F.R. § 778.202(a), such extra compensation

We further note that payment of a shift bonus or shift differential is not required by the FLSA. Whether a shift differential is paid only for certain work hours or workdays is a matter for consideration by the parties. However, as indicated in 29 C.F.R. § 778.207(b) (copy enclosed), if a shift differential such as the evening or night shift bonus discussed above is paid to an employee, it must be added to the other remuneration used in determining the employee's regular rate of pay.

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:

FLSA Sections 7(a), 7(e)(5), 7(h)(2)
29 C.F.R. Part 778
Opinion Letter October 21, 1999
Field Operations Handbook §§ 32b00 and 32e

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

may be excluded "[i]f the payment of such contract overtime compensation is in fact contingent upon the employee's having worked in excess of 8 hours in a day . . . ." The regulations further emphasize that to qualify under section 7(e)(5), "the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee's normal or regular working hours," and other plans for dividing the day into a straight time period and an overtime period "will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate." 29 C.F.R. § 778.202(c). Therefore, the employer may not utilize section 7(e)(5) to exclude the payments it makes pursuant to the "factored overtime rate." As discussed above, the employer pays the full "adjusted rate" for all hours worked up to 12 in a day, even if the employee works fewer than eight hours. Thus, the employer does not make the factored overtime rate payments "because" an employee works in excess of eight hours in a day.