U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

JAN 14 2009

Mr. John E. Thompson
Fisher & Phillips LLP
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326-1125

Dear Mr. Thompson:

This is in response to your request for an opinion regarding whether the proposed method of your client (the employer) for computing retroactive payment of overtime complies with the Fair Labor Standards Act (FLSA). Based on a review of the information provided, it is our opinion that the proposed method satisfies the FLSA.

The employer has for some time considered certain employees to qualify for exemption under section 13(a)(1) of the FLSA.* The employer expected the employees to work at least 50 hours per week and paid them a guaranteed salary bi-weekly. The employer's payroll software converts the bi-weekly salary to an hourly rate by dividing the salary by 100, the minimum expected number of hours worked for a two-week payroll period. This is done without regard to whether the employee has worked more or less than 100 hours in the pay period. For example, if the employee's salary is $1,825.50, the payroll software converts this to an hourly rate of $18.25 ($1,825.50 divided by 100). The paycheck stub shows the $18.25 per hour rate and the 100-hour divisor. In a follow-up correspondence, you stated that the employees' hours worked fluctuated above and below fifty hours per week notwithstanding the minimum fifty-hour week expectation. Typically, however, the employees worked at least fifty hours per week.

The employer recently realized that due to a reorganization, the nature of the work performed by some of the employees ceased to meet the duties test of the section 13(a)(1) exemptions. The employer now treats the affected employees as nonexempt and complies with the recordkeeping, minimum wage, and overtime requirements of the FLSA for these employees. The employer will pay back wages to the employees for overtime hours worked during the period of misclassification. The employer is reconstructing the number of hours worked by the employees over this period. Once this is completed, the employer will pay overtime retroactively by (1) dividing the weekly equivalent of the employee's bi-weekly salary by the employee's hours worked in that workweek; (2) multiplying the resulting regular rate by one half; and (3) multiplying the half-time rate by the number of overtime hours worked in that workweek. In the follow-up correspondence, you stated that the salaries involved are high enough that the regular rate would in all cases exceed the applicable minimum wage.

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

You ask whether the proposed method of computing retroactive payment of overtime complies with the FLSA.

Under the fluctuating workweek method of payment an employee may be paid a fixed salary that serves as compensation for all hours worked if it is sufficient to compensate the employee for all straight time hours worked at a rate not less than the minimum wage and the employee is paid an additional one-half of the regular rate for all overtime hours. *See* 29 C.F.R. § 778.114(a). The regular rate of pay will vary due to the fluctuating hours worked week to week. *See id.* § 778.114(b). The full salary must be paid even when the full schedule of hours is not worked. *See id.* § 778.114(c). Finally, there must be a "clear mutual understanding of the parties that the fixed salary" is "compensation for however many hours the employee may work in a particular week, rather than for a fixed number of hours per week." *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230 (10th Cir. 2008); *see* 29 C.F.R. § 778.114(a). As stated in Wage and Hour Opinion Letter FLSA-772 (Feb. 26, 1973),

> [a]n agreement or understanding need not be in writing in order to validate the application of the fluctuating workweek method of paying overtime. Where an employee continues to work and accept payment of a salary for all hours of work, her acceptance of payment of the salary will validate the fluctuating workweek method of compensation as to her employment.

Furthermore, the Department's regulations do not require that the "clear and mutual understanding" extend to the method used to calculate the overtime pay. *See Valerio v. Putnam Associates Inc.*, 173 F.3d 35, 40 (1st Cir. 1999) ("The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not."). Rather, 29 C.F.R. § 778.114 only requires that the employees have a "clear and mutual understanding that they would be paid on a salary basis for all hours worked." *Clements*, 530 F.3d at 1230.

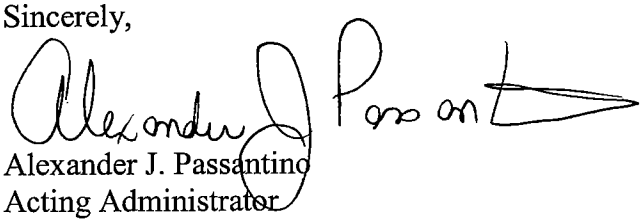
It is clear the employer paid the employees a fixed salary for variable hours worked and not on an hourly basis. The payroll software's conversion of the salary into an hourly rate and the hourly rate notation on the paycheck stub do not negate this fact. Therefore, because the fixed salary covered whatever hours the employees were called upon to work in a workweek; the employees will be paid an additional one-half their actual regular rate for each overtime hour worked, which at all times exceeds the minimum wage; and the employees received and accepted the salary knowing that it covered whatever hours they worked, it is our opinion that the employer's method of computing retroactive payment of overtime complies with the FLSA.

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. This opinion does not constitute supervision of payment of back wages due to any employees under 29 U.S.C. § 216(c) of the FLSA.

We trust that this letter is responsive to your inquiry.

Sincerely,



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February 27, 2007

Mr. Paul DeCamp
Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, D.C. 20210

Re: Request for Opinion

Dear Mr. DeCamp:

We request your opinion regarding the calculation of Fair Labor Standards Act overtime premium under the circumstances described in this correspondence.

A. FACTUAL BACKGROUND

An employer has for some time considered certain of its employees to qualify for the executive exemption, the administrative exemption, or the professional exemption provided for in the FLSA's Section 13(a)(1), 29 U.S.C.A. § 213(a)(1). At all times, the employer has paid each of these employees on a "salary basis" within the meaning of 29 C.F.R. § 541.602. In every instance, each such employee's salary has exceeded the minimum figure necessary to support his or her exempt status. These employees are expected to work at least 50 hours a week.

Employees treated as exempt are paid bi-weekly. To facilitate the underlying calculation, the employer's payroll software breaks each employee's bi-weekly salary down to an hourly rate by dividing it by [(50 hrs. × 52 wks.) ÷ 26] = 100. This is done without regard to whether the employee has in fact worked more or less time than 100 hours in the bi-weekly period. For example, if an employee's bi-weekly salary is $1,825.50, the software converts his or her salary to an hourly rate of ($1,825.50 ÷ 100) = $18.255. When the paycheck is printed, the check stub bears an hourly rate of $18.255 and reflects the 100-hour divisor.

The employer recently realized that an unanticipated consequence of a reorganization a year ago was that the nature of the work performed by some of these employees ceased to meet the duties-related exemption tests. Management immediately began to treat the affected employees as nonexempt, and since that time their compensation has complied with the FLSA's minimum-wage, overtime, and timekeeping requirements.

The employer is reconstructing the number of hours worked by the affected employees over the year of misclassification. Once it has done so, it will then compute and pay overtime compensation retroactively for each such employee's hours worked over 40 in a workweek during that time. The employer will calculate such an employee's overtime compensation for a workweek by (1) dividing the weekly equivalent of that employee's salary by the hours he or she worked in that workweek; (2) dividing the resulting hourly rate by two; and (3) multiplying this half-time rate times the number of overtime hours worked in that workweek.

B. DISCUSSION AND ANALYSIS

The question we wish to present is whether the employer's proposed method of computing retroactive overtime, particularly its intended determination of an employee's regular rate of pay, satisfies the Act's requirements. Our position is that it does.

Our evaluation of the question has been informed in part by this firm's long experience with The U.S. Labor Department's handling of similar matters arising under the FLSA. Specifically, in the scenario we have described, the Wage and Hour Division routinely calculates back overtime wages in the fashion this employer proposes. The Division typically accomplishes this by using the "Coefficient Table" (*see* Forms WH-134, WH-135), but this simply represents a shorthand way of determining half-time overtime premium pay.

The Division's practice is of course consistent with the fundamental regular-rate principle, *i.e.*, that an employee's regular rate "is determined by dividing his total remuneration for employment . . . in any workweek by the total number of hours actually worked in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. For a salaried employee, this rate is determined by dividing the salary "by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113(a). One-half of that rate is then due for all overtime hours which the salary was paid to cover. *See, e.g.*, 29 C.F.R. § 778.325.

In this employer's situation, the facts establish that each affected employee's salary was intended to be compensation for whatever amount of work he or she performed. Indeed, that is the very definition of the "salary basis" upon which the employer paid them, and the employer and the employees conducted themselves consistently with this proposition until the time the employer converted their status. This demonstrates that the proper computation of retroactive overtime is the one this employer intends to use. *Cf.* Section 32b04, *Field Operations Handbook* (March 24, 1967).

The fact that the employees were expected to work at least 50 hours a week is not at all inconsistent with their salaried-for-all-hours-worked status. *Cf., e.g., Opinion Letter Of Deputy Wage-Hour Administrator FLSA 2006-6* (March 10, 2006). We further submit that calculating these employees' salaries via computer software which uses an hourly-based formula to generate a pay amount does not call for a different computational approach. *Cf. Acs v. Detroit Edison Co.*, 444 F.3d 763 (6th Cir. 2006); *Kavanagh v. City of Phoenix*, 87 F.Supp.2d 958 (D. Ariz. 2000); *Opinion Letter of Wage-Hour Administrator No. FLSA 2003-5* (July 9, 2003). Neither does showing the underpinning of that arithmetic on the employees' paycheck stubs negate their salaried-for-all-hours-worked status. *See Zoltek v. Safelite Glass Corp.*, 884 F.Supp. 283 (N.D. Ill. 1995)(hourly-rate and hours-worked information in records and on salaried employee's check stubs were "accounting artifacts").

Based upon the foregoing, we seek your confirmation that the employer's proposed calculation of overtime is the correct one under these circumstances.

We know how very busy the Division is at this time. Nonetheless, the matter we have put before you is pressing and important, and we ask that you reply at your earliest opportunity. In the event that you do not sign the response yourself for some reason, we ask that it be signed by someone authorized to issue opinions for purposes of reliance under Section 10 of the Portal-to-Portal Act, 29 U.S.C.A. § 259.

Finally, we hereby represent that this request is not being sought by a party to pending private litigation concerning these issues. We further represent that this request is not being tendered in connection with any investigation or litigation involving the U.S. Wage and Hour Division or the U.S. Department of Labor.

Thank you in advance for your consideration and cooperation.

Sincerely,

JOHN E. THOMPSON
For FISHER & PHILLIPS LLP

JET:jdi