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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