

Wage and Hour Division, Labor

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(b) In pursuance of an applicable employment agreement or understanding or an applicable collective bargaining agreement in a specific amount agreed upon in advance of the performance of the services or special services for which the extra payment is made: *Provided, however*, That where services described in paragraph (a) of this section are performed on a program falling outside of the regular workday or workweek as established and scheduled in good faith in accordance with the provisions of the applicable employment agreement, the Administrator will not regard the Act as requiring additional compensation as a result of the time worked on the program if the parties agree in advance of such program that a special payment made therefor shall include any increased statutory compensation attributable to the additional worktime thereon and if such special payment, when made, is actually sufficient in amount to include the statutory straight time and overtime compensation (computed without regard to talent fees) for the additional time worked in the workweek resulting from the performer's services on such program.

[15 FR 402, Jan. 25, 1950, as amended at 18 FR 5069, Aug. 25, 1953]

§ 550.2 Definitions.

As used in the regulations in this part:

(a) The term *extra payment* shall mean a payment, in a specific amount, made in addition to the straight-time and overtime compensation which would be due the performer under the agreement applicable to his employment and under the Act if the time spent in performing the services or special services referred to in paragraph (a) of § 550.1 had been devoted exclusively to duties as a staff performer; but shall not include any payment any part of which is credited or offset against any remuneration otherwise payable to the performer under any contract or statutory provision;

(b) The term *performer* shall mean a person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, af-

fords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. It shall not include such persons as script writers, stand-ins, or directors who are neither seen nor heard by the radio or television audience; nor shall it include persons who participate in the broadcast or telecast purely as technicians such as engineers, electricians and stage hands;

(c) The term *special services* shall mean services beyond the scope of a performer's regular or ordinary duties as a staff performer under the agreement applicable to the employment.

[15 FR 402, Jan. 25, 1950]

PART 551—LOCAL DELIVERY DRIVERS AND HELPERS; WAGE PAYMENT PLANS

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AUTHORITY: Sec. 9, 75 Stat. 74; 29 U.S.C. 213(b).

SOURCE: 30 FR 8585, July 7, 1965, unless otherwise noted.

§ 551.1 Statutory provision.

The following provision for exemption from the overtime pay provision is contained in section 13(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 213(b)):

(b) The provisions of section 7 shall not apply with respect to:

* * * * *

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such

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plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a).

Under this provision, an employee employed and compensated as described in the quoted paragraph (11) may be employed without payment of overtime compensation for a workweek longer than the maximum workweek applicable to him under section 7(a) of the Act, but only if it is established by a finding of the Secretary that the employee is compensated for his employment as a driver or driver's helper making local deliveries on the basis of trip rates or other delivery payment plan that has the general purpose and effect stated in section 13(b)(11). Such a finding is prescribed by the statute as one of the "explicit prerequisites to exemption". (See *Arnold v. Kanowsky*, 361 U.S. 388, 392.)

§ 551.2 Findings authorized by this part.

(a) The Administrator, pursuant to the authority vested in him by the Secretary of Labor, will make and apply findings under section 13(b)(11) of the Act as provided in this part. Such findings shall be made only upon petitions meeting the requirements of this part, and only as authorized in this section.

(b) For the purpose of establishing whether a wage payment plan has the purpose and effect required by section 13(b)(11) for an exemption from the overtime provisions of the Act, the Administrator shall have authority, upon a proper showing and in accordance with the provisions of this part, to make a finding as to the general purpose and effect of any specific plan of compensation on the basis of trip rates or other delivery payment plan, with respect to the reduction of the length of the workweeks worked by the employees of any specific employer who are compensated in accordance with such plan for their employment by such employer as drivers or drivers' helpers making local deliveries.

(c) Any finding made as to the purpose and effect of such a wage payment plan pursuant to a petition therefor will be based upon a consideration of all relevant facts shown or represented to exist with respect to such plan that

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are made available to the Administrator. A finding that such plan has the general effect of reducing the hours worked by drivers or drivers' helpers compensated thereunder to, or below, the maximum workweek applicable to them under section 7(a) of the Act is not authorized under this part unless the Administrator finds that during the most recently completed representative period of one year (based on the experience of the employer in question, or if such employer has not previously used such plan, on the experience of another employer using such plan under substantially the same conditions, all as defined in § 551.8(g)(1)), the average weekly hours, taken in the aggregate, of all full-time employees covered by the plan are not in excess of the maximum workweek applicable to such employees under section 7(a), or unless the Administrator makes an interim finding with respect to such plan that, notwithstanding a lack of experience under it for a representative period of 1 year, its provisions and manner of operation, together with the other available information concerning the plan, indicate clearly that by the end of such first representative year the effect of the plan will have been to reduce the average weekly hours worked by the employees covered by the plan in such first year of operation to, or below, such maximum applicable workweek.

§ 551.3 Petition for a finding.

Any employer desiring to establish an exemption from the overtime pay requirements of the Act with respect to employees whose employment and compensation may be considered to qualify therefor under section 13(b)(11) may petition the Administrator, in writing, for a finding under such section and this part. If the wage payment plan with respect to which the finding is sought has been the subject of collective bargaining with representatives of employees covered by the plan, the employer shall provide timely notice of such petition, in writing, to the authorized representatives or representatives of such employees and shall submit a copy of such notice to the Administrator.

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§ 551.4 Requirements for petition.

A petition for a finding under section 13(b)(11) of the Act and this part shall include in such detail as the Administrator may deem necessary for evaluation under the standards provided by the statute and this part, all the information required by § 551.5. Such information may be presented in any form convenient to the petitioner; no particular form is prescribed for the petition. The petition shall also include, by attachment, a copy of any collective bargaining agreement or other document governing the method of payment for the work of employees covered by the wage payment plan with respect to which a finding is requested. The petition, together with any such documents, shall be filed with the Administrator, Wage and Hour Division, United States Department of Labor, Washington, DC 20210.

§ 551.5 Information to be submitted.

Every petition filed under §§ 551.3 and 551.4 shall contain the following information:

(a) A full statement of the facts relied upon by the petitioner to establish, under the applicable definitions in § 551.8, that the wage payment plan submitted for consideration: (1) Applies to employees employed (i) as drivers or drivers' helpers, or both, (ii) in "making local deliveries" and (2) determines, "on the basis of trip rates or other delivery payment plan", the compensation which such employees receive for such employment; and

(b) A complete description of the wage payment plan and full information concerning its application showing, among other things: (1) The method of compensation which it provides and the types of payments made to employees covered by the plan, together with such information as may be necessary to show how these payments are computed and how and to what extent they are actually used in determining the total compensation received by employees covered by the plan, (2) a full description of all duties performed by the employees compensated under the plan, including information as to the types of goods delivered, their points of origin and destination and the purposes for and geographical area within which

they are transported by the employees, the relationship of the employer to the consignor and consignee, and the numbers, (minimum, maximum, and average or typical) of round trips made by such employees in transporting such goods during the workday and of deliveries made during each such trip, and (3) other relevant information concerning the employees compensated under the plan including the total number of such employees employed full-time as drivers or drivers' helpers making local deliveries under the provisions of the plan during the most recent representative annual period as defined in § 551.8(g)(1), the weekly hours worked and the average workweek of such employees during such period and, if there are any significant variations in the number of such employees so employed in the particular workweeks within the period, a full statement of the facts concerning such variations, information as to any workweeks in which any employees compensated under the plan devote less than eighty percent of their worktime to duties as drivers or drivers' helpers making local deliveries; and

(c) A statement of the facts and reasons based on the history and application of the plan which are relied upon to support a finding that the plan has the general purpose and effect of reducing the hours worked by drivers or drivers' helpers covered by its provisions to, or below, the statutory maximum workweek applicable to them under the Act.

§ 551.6 Action on petition.

(a) Upon the filing of a petition as provided in this part, the Administrator will give consideration thereto, and make any further inquiry into the facts that he may deem necessary. The Administrator may require, before taking further action thereof, that notice of the petition be given to affected employees in such manner as he shall determine to be appropriate to afford them an opportunity to submit any facts or reasons supporting or opposing the finding prayed for in the petition. If the Administrator determines that the petition fails to satisfy any of the requirements of this part, he shall deny

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the request for a finding or, in his discretion, advise petitioners that further consideration will be given to the submission if the deficiencies are remedied within a specified time. No further consideration will be given, however, to a request for a finding if the Administrator determines that the factual situation as described in the petition is not one in which authority to make the finding is provided by section 13(b)(11) and this part.

(b) If the Administrator determines that a petition meets all requirements of this part and if he is satisfied from consideration of all relevant facts and information available to him that the wage payment plan submitted has, within the meaning of section 13(b)(11) of the Act and this part, the general purpose and effect with respect to drivers or drivers' helpers making local deliveries, who are employed pursuant to its provisions on the basis of trip rates or other delivery payment plan, of reducing the hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a) of the Act, the Administrator will make an appropriate finding to this effect, and notify the petitioner; otherwise the request for such a finding will be denied.

§ 551.7 Finding.

(a) A finding by the Administrator under paragraph (b) of § 551.6 that a wage payment plan has the purpose and effect required for exemption of employees under section 13(b)(11) and this part shall be effective in accordance with its terms upon notification to petitioners as provided in § 551.6(b). The finding shall include such terms and conditions and such limitations with respect to its application as the Administrator shall deem necessary to ensure that no exemption will be based thereon in the event of any significant change in any of the essential supporting facts.

(b) A finding made pursuant to this part may be amended or revoked by the Administrator at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor. Before taking such action, the Administrator shall afford opportunity to interested

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persons to present their views and shall give consideration to any relevant information that they may present.

§ 551.8 Definitions.

As used in this part:

(a) *Secretary* means the Secretary of Labor.

(b) *Administrator* means the Administrator of the Wage and Hour Division, United States Department of Labor.

(c) *Finding* means a finding made pursuant to section 13(b)(11) of the Fair Labor Standards Act as provided in this part.

(d) *Making local deliveries* includes the activities customarily and regularly performed in the physical transfer, to customers of a business establishment situated within the rural or urban community or metropolitan area in which the establishment is located, of goods sold or otherwise disposed of to such local customers by such establishment. Included are activities performed by the driver or driver's helpers as an incident to or in conjunction with making such deliveries, such as picking up and returning the delivery vehicle at the beginning and end of the workday, cleaning the vehicle, checking it to see that it is in operating condition, loading and unloading or assisting in loading or unloading the goods, and picking up empty containers or other goods from customers for return to the establishment. Not included in the making of local deliveries are such transportation as the carriage of passengers; the transportation of any load of goods that would normally require a round trip longer than a single workday for delivery and return to the starting point; any movement of goods which does not accomplish a transfer of possession from one person to another; transportation of goods as a part of a process of production; and transportation of goods within a local community or metropolitan area as an integral part of a carriage of such goods from a point outside such community or area to a destination within it, rather than as a part of the activities customarily performed in making local deliveries, as defined in this section, in the same manner as deliveries of goods held locally for local disposition.

(e) *Employee employed as a driver or driver's helper making local deliveries* includes any employee who is employed in any workweek:

(1) To drive a delivery vehicle used in making local deliveries, or

(2) To assist the driver of such a vehicle in making such deliveries, being required to ride on the vehicle to perform such work,

and whose work in making local deliveries, as defined in paragraph (d) of this section, accounts for at least 80 percent of his hours of work in such workweek. In making and applying any finding as provided in this part, no employee shall be considered to be employed as a driver or driver's helper making local deliveries in any workweek when more than 20 percent of his hours of work results from the performance of duties other than those included in making such local deliveries.

(f) A plan of compensation *on the basis of trip rates or other delivery payment plan* means any plan whereby employees employed as drivers or drivers' helpers making local deliveries are compensated for their employment on a basis such that the amount of payment which they receive is governed in substantial part by a system of wage payments based on units of work measurement such as numbers of trips taken, miles driven, stops made, or units of goods delivered (but not including any plan based solely on the number of hours worked) so that there is a substantial inducement to employees to minimize the number of hours worked.

(g) For purposes of determining whether and to what extent a plan of compensation on the basis of trip rates or other delivery payment plan has the effect of reducing the weekly hours worked by employees employed by an employer as drivers or drivers' helpers making local deliveries pursuant to such plan:

(1) *The most recently completed representative period of one year* (§551.2(c)) or *most recent representative annual period* (§551.5(b)(3)) shall mean a one-year period within which such employees were so employed on a regular full-time basis by such employer (or, if such employer has not previously used such plan, by another employer using

the plan under substantially the same conditions, which period shall include a calendar or fiscal quarter-year ending not more than four months prior to the date as of which the effect of such plan is to be considered, together with the three quarter-year periods immediately preceding such recently completed quarter-year; and

(2) *The average weekly hours or average workweek* of the full-time employees so employed during such annual period shall mean the number of hours obtained by the following computation: (i) All the hours worked during such annual period by all the full-time employees regularly employed under the plan shall be totaled; (ii) the number of workweeks worked by each such employee during such annual period under such plan shall be computed, and the totals added together; and (iii) the average weekly hours, taken in the aggregate, of all such employees shall be computed by dividing the sum resulting from computation (i) by the sum resulting from computation (ii).

§ 551.9 Recordkeeping requirements.

The records which must be kept and the computations which must be made with respect to employees for whom the overtime pay exemption under section 13(b)(11) is taken are specified in §516.15 of this chapter.

[35 FR 17841, Nov. 20, 1970]

PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

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