



Solo se consideran horas  
trabajadas 9467, 10235...

Commonwealth of Puerto Rico  
**DEPARTMENT OF LABOR AND HUMAN RESOURCES**

January 30, 1998

Re: Inquiry No. 14441

This is in reply to your inquiry pertaining to overtime computation under the provisions of Act No. 379 of May 15, 1948. Your specific inquiry is the following:

This is a request for an opinion on whether a Sunday pay differential for employees whose regular work week includes Sunday should be considered as part of the employee's regular rate of pay when computing overtime.

Specifically, our client compensates its employees at one and one half (1½) times the hourly basic wage rate for time worked on a Sunday during a regular workweek. Such one half (1/2) payment is not considered time worked and is not included in the overtime calculations.

It is our opinion that pursuant to the Working Days and Hours Law, 29 LPRA 271, et seq ("Law 379"), and the facts described herein, the Sunday pay differential need not be included in the extra hours computations.

Since this issue has been discussed extensively in the federal jurisdiction, I think it proper to bring to your attention the following.

Federal Law

Section 7(e) of the Fair Labor Standards Act, 29 USC 201, et seq., ("FLSA") provides in its pertinent part that:

"As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration paid for employment paid to, or on behalf of, the employees, but shall not be deemed to include ...

...

- (6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one half times the rate established in good faith for like work performed in nonovertime hours on other days; ..."

In support of your contention, you quote at length from the FLSA Interpretative Bulletin, 29 CFR Part 778, specifically Parts 778.201-203. Pursuant to those provisions, certain premium payments made by employers for hours worked in excess of specified daily or weekly standards or on certain "special days" are regarded as bona fide overtime premiums, which may thus be excluded from the employee's regular rate for the purpose of computing overtime compensation required under Section 7 of the Act. In addition, Part 778.201 provides that under Section 7(h) such extra compensation may be credited toward the overtime payments required by the Act.

You also quote Part 778.203, which in interpreting Sections 7(e)(6) and 7(h) of the Act, states that "extra compensation provided by a premium rate of at least time and one half which is paid for work on Saturdays, Sundays, holidays, or

workweek... may be treated as an overtime premium for the purposes of the Act." Applying this principle to your client's situation, you conclude the following:

Taking into consideration that time worked on a Sunday during an employee's normal workweek is compensated at one and one half times the hourly basic wage rate, the "Sunday payments" need not be included in the extra hour computation under the FLSA.

After concluding your analysis of the relevant FLSA provisions, you provide a similar discussion of the application of local law as follows:

#### Local Law

Article 5 of the Working Hours and Days Law, Law 379 of May 15, 1948, as amended, 29 LPRA 271, 274, ("Law 379"), which mandates the payment of overtime for work performed during extra hours states that "to determine the wage rate agreed upon for regular working hours, the daily, weekly, or monthly wages or wages otherwise stipulated, shall be divided by the number of regular hours worked during the same period..."

Article 19 of Law 379, 29 LPRA 288, defines "wage" to include "salary, day, wages, payment and any other form of cash compensation." (Our emphasis)

Thus, it appears from Articles 5 and 19 of Law 379 that to determine the wage rate used for computation of overtime pay, any form of compensation should be included. This, however, is a literal interpretation of Articles 5 and 19 of Law 379. We are of the opinion that when Law 379 was enacted in 1948 the legislators were not contemplating premium payments for work performed on Saturdays, Sundays and other "special days". Only hours actually worked are generally considered for overtime compensation in Puerto Rico.

Moreover, the Interpretative Bulletins issued from time to time by the United States Department of Labor construing different provisions of the overtime laws are highly persuasive to local courts, labor arbitrators and the Puerto Rico Department of Labor. The reason therefrom, is that Law 379 and the FLSA pursue very similar objectives. Thus, it seems reasonable to argue that the United States Department of Labor's interpretation of Sunday pay differential should be followed locally.

Furthermore, to consider the Sunday pay differential as part of an employee's regular rate of pay when computing overtime, would, in effect, benefit a group of employees over another who do not receive the Sunday pay differential. As stated before, only hours actually worked are generally considered for overtime compensation in Puerto Rico.

Lastly, the inclusion of the Sunday pay differential in the computation of overtime would, in our view, result in what is known as pyramiding, a practice rejected in both the local and federal jurisdiction.

Thus, taking into consideration the above, we are of the opinion that there exists ample basis to conclude that under Law 379 the Sunday pay differential should not be considered as part of the employees' regular rate of pay when computing overtime.

However, since there are no court opinions or administrative rulings on the subject, we hereby request and [sic] opinion from you on this issue.

We have carefully considered the issues presented and the reasoning underlying your contention that the Sunday pay differential provided by your client's collective bargaining agreement should not be considered as part of the employees' regular rate of pay for purposes of computing overtime compensation due under Act No. 379. As you point out, in resolving issues under local law, the courts in Puerto Rico

resolving issues under local law, the courts in Puerto Rico have consistently followed interpretations of similar Federal laws and regulations, to the extent that such interpretations are not in conflict with local laws that provide for higher standards. Thus, the provisions of 29 CFR Part 778 have been generally regarded as authoritative, with due allowance for the fact that Act No. 379 requires overtime compensation at double time, instead of the time and one-half Federal standard, and for the daily overtime provision of Act No. 379 that is absent from the FLSA.

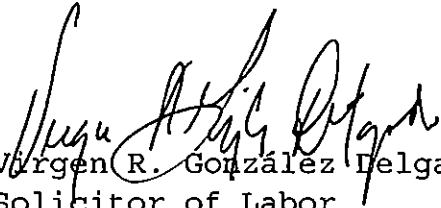
Similarly, Act No. 379 explicitly provides in Section 8 (as renumbered by Act No. 83 of July 20, 1995) that if an employee is paid a weekly salary, such salary will cover only the employee's regular workweek, i.e., 40 hours. Thus, all hours over 40 per week will be considered overtime hours, and as such must be paid at double time. Under the FLSA, on the other hand, a nonexempt employee may be hired at a fixed weekly salary for a workweek longer than 40 hours, with additional overtime compensation at half-time for the hours in excess of 40. The regular rate of such an employee, pursuant to Part 778.113(a), is determined by dividing the salary by the number of hours which the salary is intended to compensate, which thus may be more than 40 hours. In Puerto Rico, of course, that provision is preempted by the higher standard contained in Act No. 379.

Aside from the above-noted exceptions, we agree with our premise that Act No. 379 adheres closely to its Federal counterpart, and that our courts have accordingly followed the interpretations of Part 778 in resolving questions of law under Act No. 379. In the instant case, there is no provision in Act No. 379 which would lead us to conclude that our legislature intended such a pay differential to be treated in a manner inconsistent with Part 778. Accordingly, it is our opinion that the extra pay for Sunday work provided in your client's collective bargaining agreement need not be included in the regular rate for purposes of computing overtime compensation under Act No. 379. It is also our opinion that for the same reasons such extra pay may be credited toward the overtime compensation required by Act No. 379.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the

have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by this Department's Bureau of Labor Standards or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of Act No. 379 or any other labor statute or regulation enforced by this Department.

Cordially,

  
Virgen R. González Delgado  
Solicitor of Labor