



Commonwealth of Puerto Rico  
DEPARTMENT OF LABOR AND HUMAN RESOURCES

June 15, 2001

Re. Inquiry No. 14902

This is in reply to your inquiry regarding the following: "According to the US Federal Law, an employer does not have to pay overtime to an employee who gets paid hourly plus commission if the commission is higher than the hourly salary. So, what is the correct law in Puerto Rico?"

Under Act 379 of May 15, 1948, as amended, overtime pay is required for all nonexempt employees. With regard to employees paid on a commission basis, Puerto Rico's Supreme Court has ruled that overtime exemptions enacted under the Fair Labor Standard Act, (FLSA), apply in Puerto Rico, but only with respect to hours over 40 per week; Orlando Vega y otros v. Yiyi Motors Inc., 98 JTS 97.

The norm you present can be related to the specific case of employees in the business of selling vehicles. Act No. 33 of April 30, 1996 amended the Article 16 of the Act 379 to clarify when they will be exempt and to conform the local Law with the Fair Labor Standard Act, FLSA. According to Act, all salesmen primarily engaged in selling automoviles, trucks, heavy vehicles or any other motor vehicles in the premises of the enterprise and who are paid with salaries plus commissions or combination of both, are nonexempt employees. The Act establish that this exempt will be valid only if the employer comply with the Act No. 180 of July 27

1998, as amended, (Puerto Rico's Minimum Wage Law Act). Also, if the employer guarantees the employee the minimum salary for every work hour, in each week, unless they don't earn commissions. In addition, the Law requires that the employee must earn more than a half of their income from the commissions and that their compensation per hour, including commissions, be equivalent not less than one and a half the federal minimum salary.

With respect to commission and overtime pay, the general rule in Puerto Rico is in 29 Code of Federal Regulations (CFR) Part 778 Section 117, to 122. Sections 117 and 118 establish the following:

"778.117 Commissions, (whether based on a percentage of total sales or on sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earning are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

778-117 When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek (except overtime premiums and other payments excluded as provided in section 7(e) of the Act), and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard."


Puerto Rico's Supreme Court has ruled that commission are "wages" under the Minimum Wage Law, Junta de Relaciones del Trabajo vs. Orange Crush of Puerto Rico, 86 DPR 652. Failure to pay all wages, to which the employee is entitled, is thus a violation of Act No. 180. The Act No. 379 also requires the employer to pay overtime, only if the employee is entitled, as is establish in the law.

In conclusion, apart of the above information, we don't find in our Law the norm you present. So, you can make a consultation to the agency that administer the FLSA, to the following address:

Mr. David Heffelginger  
Director  
U.S. Department of Labor  
Wage and Hour Division  
San Patricio Office Center Suite 402  
Tabonuco Street Num. 7  
Guaynabo, Puerto Rico 00968  
Tel. 775-1947

We trust the foregoing is responsive to your inquiry.

Cordially,

  
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Maria M. Crespo Gonzalez  
Solicitor of Labor