FLSA-537

February 22, 1974

This is in reply to your letters of January 22 and 23, 1974, requesting an opinion that the employers' contributions and payments pursuant to the subject plan, as amended December 31, 1973, are excludable from the regular rate under the Fair Labor Standards Act as a percentage bonus. Such an exclusion is permissible where the employers' contributions are allocated in the proportion that the individual participant's total wages bear to the total wages of all participants.

The December 31st amendment supersedes the proposed amendments discussed in your letter to us of November 27, 1973 and, therefore, makes it unnecessary to reply to the November 27th letter.

Under the terms of the December 31st amendment, the aggregate contribution of the participating employers for the plan year is determined pursuant to a formula based on the consolidated income of the participating employers. This aggregate contribution is then divided into two parts as provided in the amended section 5.1 of the plan. Each employee in Group A, which comprises all of the employees subject to the Act's minimum wage and overtime pay requirements, then receives an allocation from the contribution allocated to Group A. The allocation to each Group A employee consists of such sum of the total contribution allocated to the Group for the plan year as shall bear the same ratio to the total contribution of the participating employers allocated to this group as the employee's compensation for the plan year bears to the aggregate compensation of all participants within this group. Compensation as defined in amended section 2.3(m)(1) of the plan means total compensation paid to a participant in Group A during a plan year by a participating employer including, without limitation, all bonuses, overtime pay, shift premium, and any other extra or special remuneration of any kind.

We find that the contributions to employees in Group A by the companies pursuant to the plan are excludable from their regular rate of pay under the Fair Labor Standards Act pursuant to the provisions of 29 CFR 778.210, on the grounds that the employers' contributions to this group are allocated in the proportion that the individual participant's total wages bear to the total wages of all participants in Group A.

Since Group B will include only employees who are exempt from the Act's minimum wage and overtime pay standards, the allocation of the contributions to this group raises no regular rate considerations for overtime pay purposes.

Sincerely,

Warren D. Landis
Acting Administrator
Wage and Hour Division