FLSA-474

October 20, 1977

This is in reply to your letter dated April 6, 1977, asking whether we would consider the plan described therein a "profit sharing plan" within the meaning of the Fair Labor Standards Act.

You indicate that the plan is a voluntary performance payment based on the employer's profits. Eligibility of the employees is based on 18 months of service prior to the end of the fiscal year (June 30). The profit share is distributed at Christmas prior to the end of the fiscal year and it is calculated on anticipated profits. Each eligible employee's share is calculated on the basis of five points for each year of service and one point for each $100 in compensation. The profits are expressed in points and posted monthly. In the event that no profits are realized in a particular year, no payments would be made. It is your opinion that the payments made pursuant to the plan need not be included in the employee's regular rate of pay because the payments are based upon the employer's profits.

The authority to exclude from an employee's regular rate of pay payments made pursuant to a bona fide profit sharing plan is contained in section 7(e)(3)(b) of the Act. The requirements of the Secretary of Labor with regard to such plans are set forth in 29 CFR Part 549, copy enclosed. You will note that in order for payments made to a profit sharing plan to be excludable from the employee's regular rate of pay, all the requirements of section 549.1(b) through (g) must be met and the plan may not contain any of the disqualifying provisions of section 549.2.

We do not have enough information about the plan to be able to state whether all of the requirements in Part 549 are met. However, we do have sufficient information to say that the requirement in section 549.1(e) is satisfied, namely, the amounts paid to individual employees are determined in accordance with a definite formula or method of calculation specified in the plan or trust. It also appears that the plan would not be disqualified under section 549.2(a). This section disqualifies any plan if the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency.

We are unable to determine from the facts available whether the plan in question meets various other requirement in Part 549. Thus, it is not clear whether the requirement in section 549.1(d)(1) concerning eligibility of employees to share in profits have been met. If the plan does not include all employees subject to the minimum wage and overtime provisions, it will be necessary to resubmit the plan for approval as required by section 549.1(g).

We also wish to caution you that there exists the possibility that a profit share which is distributed prior to the end of the fiscal year when, we assume, profit or loss is normally determined may have to be included in the employees regular rate of pay. For example,

assume a situation where the employer distributes the profit share at or near the end of the second fiscal quarter (Christmas) based upon projected profits to the end of the fiscal year (June 30) when a determination of profit or loss is normally made. In the third and fourth quarters the employer experiences an unanticipated business downturn of such proportion that a loss in sustained in that fiscal year. In such a situation, the so-called profit share paid at or near the end of the second fiscal quarter would have to be included in the regular rates of pay of the employees involved since it is not derived from profits.

Payments made in the nature of gifts at Christmas time or on other special occasions may be excluded from the employee's rate of pay pursuant to section 7(e)(1) of the Act. This is discussed more fully in section 778.212 of the enclosed copy of 29 CFR Part 778.

We regret the delay in responding to your letter.

Sincerely,

Xavier M. Vela
Administrator