

FLSA-867

February 9, 1978

This is in reply to your letter dated December 17, 1977, requesting, on behalf of your client, the *** opinions on a proposed even-pay and a bonus plus under the Fair Labor Standards Act.

We are responding to your questions in the order presented in your letter.

The even-pay plan is an attempt to pay the employees in advance for overtime which may be worked, so that the wages will be relatively constant from pay period to pay period; each employee will receive a written notice explaining the plan. Each of the employees under the plan will be hired at a regular hourly rate, not less than the applicable minimum wage, and will receive overtime compensation at one and one-half times this rate for hours worked in excess of 40 in a workweek. Any excess payment for short workweeks (those weeks having less hours of work than the amount of hours of work for which they are paid), is regarded by both the employer and the employee as a loan or cash advance to the employee, to be repaid by offset against future hours of work or by refund when employment is terminated. At no time will the employer owe the employee any overtime compensation. On each pay day the employee will receive a statement showing how many unworked hours are owed the employer. Finally, every effort will be made to recover any unearned compensation due from the employees.

Though overtime compensation due an employee must normally be paid at the time of the employee's regular pay period, there is no objection if the employer pays in advance the anticipated overtime compensation to become due to an employee. This is the basic principle of the prepayment plan. Thus some employers, in an attempt to keep the wage or salary constant from pay period to pay period, have resorted to paying their employees a sum in excess of what they earn or are entitled to in a particular week or weeks which sum is considered to be a prepayment or advance payment of compensation for overtime to be subsequently worked. In other words, the employer and the employee agree that in any week in which the employee works less than the applicable statutory workweek, the employer will advance to the employee the difference between pay for the applicable statutory maximum workweek and the amount he would have received if he had been paid only for the number of hours he worked.

Plans of this type require the use of a record system whereby the employer can maintain a running account for each employee of the amount to the employer's credit. At no time may the employer owe the employee overtime compensation. In any workweek in which the prepayment credits are not sufficient to equal the additional overtime compensation due the employee, the difference must be paid in cash.

A prepayment plan cannot be applied to an employee who is paid a salary under an agreement that the employee will receive the salary even when he works less than the regular number of hours in some weeks. Also, it cannot be applied to an employee paid a

salary for a fluctuating number of hours worked from week to week. Since the nature of such employees' employment is that they will receive the fixed basis salary regardless of the number of hours worked, it cannot be said that they are paid in excess of what they earn, or to which they are entitled, in any week in which they receive the fixed salary, even though such weeks may have been short workweeks.

Accordingly, it is our opinion the even-pay plan would, if all ten points are adhered to, be in compliance with the Act. We have enclosed copies of the relevant pages of Interpretative Bulletin No. 4 which were not included in 29 CFR Part 778 (copy enclosed), due to a lack of employer interest in the prepayment plans. Many employers who have attempted to operate prepayment plans have run into compliance problems.

Your second question concerns a discretionary incentive bonus plan, variable in amount, and terminable at any time by the employer. A bonus fund will be established by the employer and the bonus fund will be calculated 3 times a year for the preceding 4-month period and disbursement will be made as soon as possible after the end of the month but no later than the 25th of the month following each period. The bonus fund will be based on a positive subtraction resulting from the previous period's sales of propane (2 cents per gallon), 25% of gross profits on all appliance sales, 25% of labor charges, 25% of tank rentals, and sales of cylinder gas (2 cent per gallon). The period ending June 30 will have its fund reduced by parts and appliance inventory leases and 50% of any written-offs accounts in excess of 1% of charge sales. Further, bad debt write-offs in excess of 50% of 1% of charge sales and inventory leases are offset against future and current bonus funds until these deficits are satisfied.

The distribution will be based on an employee's straight-time earnings and overtime earnings as they relate to all other participating employees' straight time and overtime earnings. You believe that this method of disbursing a percentage of total earnings bonus comports with section 778.210 of 29 CFR Part 778.

Based on the information provided in your letter, it is our opinion that the bonus funds distribution meets the requirements of section 778.210.

Sincerely,

Xavier M. Vela
Administrator

Enclosures