FLSA-754

December 19, 1978

This is in reply to your letter of November 6, 1978, requesting an opinion regarding a proposed pay plan under the Fair Labor Standards Act. One of your clients is considering a variable workweek method of compensation pursuant to section 778.114 of 29 CFR Part 778, copy enclosed.

Under the plan, an employee would be paid a straight time salary of $180 per week for all hours worked in a workweek of not less than 32 hours and not more than 54. In any week in which the employee worked in excess of 40 hours but not in excess of 54, the employee would be entitled to additional overtime pay at one-half the regular rate (computed weekly), and in the event more than 54 hours were worked in a workweek, the employee would receive additional overtime compensation at the rate of time and one-half the regular rate of pay for the hours in excess of 54. You also make reference to our position in section 778.114 that one of the elements of a variable workweek method of compensation is that there must be an understanding between the employer and the employee that the employee will receive a fixed amount of money as straight time pay for whatever hours he or she is called upon to work in a workweek, whether few or many (emphasis added). However, you state that you are unable to find authority for the proposition that an employer and employee cannot agree that a salary will cover minimum and maximum limits (provided, of course, that the regular rate in each week is not less than the statutory minimum wage). Mr. Brooks Sipes, of our staff, in a telephone conversation on November 16th, was informed by you that a workweek of less than 32 hours would not occur because of lack of work but could occur because an employee absented himself or herself, knowing that the stipulated salary would be received regardless of how few hours he or she worked. While, as stated above, it is our position that generally an employee paid under a fluctuating or variable workweek basis must receive his or her full salary in any week in which any work is performed, it is also our position that disciplinary deductions may be made for willful and unexcused absences, so long as such deductions do not result in the employee receiving less than the statutory minimum wage or any overtime compensation that may be due. Of course, if such deductions were made frequently or consistently, the practice would raise serious questions as to the bona fides of the plan.

As you know, payment under a variable or fluctuating workweek method of compensation has both advantages and disadvantages for employees. A disadvantage is that the longer an employee works, the lower becomes his or her rate of pay per hour. The advantage is that the employee is guaranteed a weekly amount for both long and short workweeks. As you suggested, your client may wish to reconsider the adoption of such a plan because of the limitations set forth in section 778.114 of Part 778.

Payments made under the variable workweek method of compensation under the Act were held to be permissible by the U.S. Supreme Court in Overnight Motor Transportation Company, Inc. v. Missel, No. 939, June 8, 1942 (WH Cases, Volume 2, pages 47 and 35).

We trust the above is responsive to your inquiry.

Sincerely,

HC

Xavier M. Vela
Administrator

Enclosure