

FLSA-917

June 2, 1980

This is in reply to your letter of April 7, 1980, in which you ask whether individuals who have been ruled to be "administrative" employees by the Division would still be considered exempt under section 13(a)(1) of the Fair Labor Standards Act, if paid in accordance with a pay plan you describe.

The tests for exemption from the Act's minimum wage and overtime pay provisions for bona fide administrative employees are contained in section 541.2 of Regulations, Part 541, a copy of which is enclosed. One such test requires that an employee be paid on a salary basis within the meaning of section 541.118 of the regulations. In order to be considered paid on a salary basis, the employee must receive each pay period a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of variations in quality or quantity of the work performed. This salary must be paid free and clear and must not be less than that required by the regulations. If commissions and other payments allocated to the particular pay period do not yield at least the guarantee, an offset plan whereby the deficiency is made up by a corresponding reduction in a subsequent pay period of higher earnings may not be used.

Upon review of the information contained in your letter it appears that the employees in question are not being paid the guaranteed salary free and clear. You state that the employees are paid a salary of \$155 per week. The employees work on a commission basis, in addition to their salary, and at the end of each week have their commission computed. Where an employee has generated sales, which result in commission earnings greater than \$155 per week, the employee receives the commission payment which is in excess of the \$155 per week guarantee.

Should the employees's sales generate commission income less than the \$155 salary per week, the employee is still paid \$155 per week. In such event, a debit account is established for that employee, which is subsequently offset by future commission earnings exceeding \$155 per week determined on a weekly basis. Once the debit account is eliminated, the employee receives any additional commission income, as well as the \$155 weekly guarantee.

Because a deficiency cannot be made up in a subsequent pay period of higher earnings when the commissions and other payments allocated to the particular pay period do not yield at least the guarantee, it is our opinion that the recovery of deficits in the manner you describe would not satisfy the regulations.

For your information, we are enclosing a copy of an opinion letter relative to your question. If you should have any further questions concerning this matter or any other provisions of the Fair Labor Standards Act, you may find it more convenient to contact our Area Office in New York at 26 Federal Plaza, Room 2946 (Zip Code:

10007)(Telephone: 264-8185). That office will be pleased to offer every possible assistance.

Sincerely,

Henry T. White, Jr.
Deputy Administrator

Enclosures