FLSA-667

July 30, 1980

This is in further response to your letter of June 20, 1979, requesting an opinion as to whether employer payments deposited into individual retirement accounts (IRA's) are excludable from employees' regular rates of pay for the purpose of computing overtime compensation under the Fair Labor Standards Act. Under section 7(e)(4) of the Act, 29 U.S.C.§207(e)(4), payments are so excludable if they are "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees."

In our previous response of September 27, 1979, we expressed concern about the provision of the IRA plan, as described in your letter, which would permit employees to withdraw all or part of their account balance whenever they chose, subject to a 10% penalty tax if the withdrawal was made prior to age 59-1/2 or a substantial medical disability. We feared this provision was inconsistent with our interpretation published at 29 CFR §778.215(a)(5), which provides as follows:

The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: Provided, however, That if a plan otherwise qualified as a bona fide benefit plan under section 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit (i) at the time of the severance of the employment relation due to causes
other than retirement, disability, or death, or (ii) upon proper termination of the plan,or (iii) during the course of his employment under circumstance specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7 (e)(4) of the Act.

We now understand that the early withdrawal feature of the plan you described is a standard feature of IRA plans and a mandatory feature of all Simplified Employee Pension (SEP) plans. See 26 U.S.C. §408 (k)(4); see also Internal Revenue Service Form 53-SEP (copy enclosed). The question therefore is whether employer contributions to such plans generally must be included in employees' regular rates of pay for overtime compensation purposes. We now believe that under normal circumstances such contributions need not be so included.

While we were concerned that the early withdrawal feature of the IRA plan, as described in your letter, could convert the plan into just another source of cash compensation for employees, we now believe that under normal circumstances this risk is not great. Congress has already provided for a 10% penalty tax, as well as for the loss of the advantage of tax deferral, in order to discourages early withdrawals from IRA's. Furthermore, early withdrawals may ordinarily not be made without a declaration of intention as to the disposition of the amount withdrawn, see Internal Revenue Form 5305-

A, Article V (copy enclosed), and this too tends to discourage unnecessary withdrawals. The Internal Revenue Service informs us that in fact early withdrawals from IRA's are quite rare. We therefore believe that in general the early withdrawal feature is, in the words of 29 CFR §778.215 (a)(5)(iii), "not inconsistent with the general purposes of the plan to provide the benefits described."

We also note that to require that contributions to IRA and SEP plans be included in employees' regular rates could tend to discourage establishment of such plans. These plans have particular advantages both for employers (e.g., simplicity) and for employees (e.g., immediate 100% vesting). We do not believe that in general these plans should receive less favorable treatment than other plans also approved by the Internal Revenue Service. See 29 CFR §778.215 (b).

We emphasize, however, that this opinion is limited to what we understand to be the normal circumstances of the operation of IRA's. Should there be circumstances in which IRA's fail to operate in a manner consistent with 29 U.S.C. §207 (e)(4) and 29 CFR §778.215--e.g., where IRA's become routine source of cash compensation rather than benefits--we would of course, deny the exclusion from the regular rate.

Sincerely,

Henry T. White, Jr.
Deputy Administrator