

## FLSA-796

May 20, 1981

Thank you for your letter 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 (FLSA). Under section 7(e)(4) of the FLSA, such payments are 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."

We are concerned about the provision of the IRA plan, as described in your letter, which permits employees to withdraw all or part of their account balances whenever they choose, subject to a 10% penalty tax if the withdrawal is made prior to age 59½ (except in the cases of death or disability). This provision appears to be inconsistent with our interpretation published at 29 CFR Section 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 circumstances 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 understand that the early withdrawal feature of the plan is a standard feature of IRA plans. 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 believe that under normal circumstances such contributions need not be included.

At an initial glance, it is conceivable that the early withdrawal feature of the IRA could convert the plan into another source of cash compensation for employees. Since Congress has provided for a 10% penalty tax, as well as for the loss of the advantages of tax deferral, we believe that this risk is not great under normal circumstances. Furthermore, early withdrawals may ordinarily not be made without a declaration of intention as to the disposition of the amount withdrawn and this also tends to discourage unnecessary withdrawals. The Internal Revenue Service informs us that 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 Section 778.215(a)(5)(iii), "not inconsistent with the general purposes of the plan to provide the benefits described."

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

Sincerely,

Henry T. White, Jr.  
Deputy Administrator