FLSA-1045

June 15, 1982

This is in reply to your letter of April 28, 1982, in which you request an opinion under the Fair Labor Standards Act (FLSA), concerning a proposed pay plan for automobile salespersons who qualify for the overtime pay exemption contained in section 13(b)(10) of the Act.

The proposed plan would establish a pay period of one month and provide for a weekly draw against commissions earned each month (4 weeks for purposes of discussion). At the end of each month, total sales commissions would be computed and the weekly draws deducted from the resultant sum. In the event the total commissions exceeded the weekly draws, the excess commissions would be paid and carried over as a credit during the following months to be applied to the minimum wage, if needed. Shortages in commission earnings would be treated in the same manner.

To illustrate the proposed plan, you assume that a commission salesperson works 50 hours a week and receives a draw of $150 against earned commissions which are to be paid at the end of the month. The employee earns $800 in commissions during the month, from which $600 paid in weekly draws is deducted, resulting in the employee's being paid the remaining $200. The $180 paid in excess of the minimum wage (200 hours x $3.35 = $670) would be brought forward to be applied as a credit at the end of a subsequent pay period.

In the succeeding month, the employee works the same hours and is paid another $600 in draws against commissions earned. However, the employee earns only $500 in commissions during the month, resulting in a deficiency of $100 against the draws and $170 against the minimum wage. As you indicated to a member of my staff in a telephone discussion of this matter, your proposal would "debit" the employee's "account" in the amount of $170 (ignoring the fact that the employee was actually paid $600 in draws) and offset the $130 "credit" from the preceding month, thus creating a $40 debit to be carried forward to the following month. The employee would not actually be paid the $170 as indicated in your letter.

An employer is required to pay covered employees not less than the minimum wage, currently $3.35 an hour, for each hour of work. Where an employer has fulfilled this requirement in a pay period in which the employee has earned less than that amount in commissions, the difference between what the employee earned in commissions and the minimum wage may be deducted from any commissions earned in a subsequent pay period which are in excess of the minimum wage required to be paid for the hours worked in that pay period.

Conversely, where an employee *** (but is not paid) commissions in excess of the minimum wage in a pay period, the employer may carry over such excess *** commissions (which have not yet been paid) to a succeeding pay period. However, once

commissions are paid, they may not be carried forward to satisfy minimum wages due an employee in a subsequent pay period.

Therefore, the proposed pay plan described in your letter and further explained by you in a telephone conversation with a member of my staff would not comply with the minimum wage provisions of FLSA during the second month in your illustration, in that it would offset commissions previously paid against minimum wages due the commissioned salesperson for that month.

Sincerely,

William M. Otter
Administrator