FLSA-642

January 23, 1983

This is in response to your letter in which you request our opinion regarding the applicability of Section 3(m) of the Fair Labor Standards Act (FLSA) to proposed salary reduction plans which would involve deductions from and additions to wages to cover child care expenses. You indicate that the firm you represent *** Inc., is in the process of developing salary reduction plans to present to its clients which would provide tax advantages to both employers and employees who participate in these arrangements.

It is our understanding that there are two methods in which the plans would operate:

Method I. Employees who utilize the child care service would have deductions made from their wages to cover the cost of such service.

Method II. Employees whose salaries would be reduced by the amount of the child care expense, would pay for the child care service and would then receive a reimbursement from the employer for the cost of the service.

In accordance with the FLSA, Section 531.40 of 29 CFR Part 531 provides that, where an employer is directed by an employee to pay a sum for the benefit of the employee to a third party, such payment will be considered the same as payment to the employee, if the employer does not directly or indirectly derive any profit or benefit from the transaction.

In a telephone conversation on January 10, 1983, with Corlis Sellers of my staff, you indicated that a third party (licensed by the State) would be providing the child care service either on or off the employer's premises and the employer would receive no profit or benefit from the arrangement. In this regard, we believe that deductions made from the employees' wages for child care expenses under the salary reduction plan you describe may be considered as wages by employers under section 3(m) of the FLSA in meeting their minimum wage obligations.

Under the second arrangement, where the employee receives reimbursement for the child care expenses, we would consider such reimbursements as wage payments under the FLSA. This would be true even if the employee chose not to use the reimbursements to pay the child care expenses. However, the employer must ensure that each FLSA covered and nonexempt employee is paid at least the minimum wage of $3.35 an hour for all hours worked in each workweek. Therefore, the employee must receive reimbursement for each workweek in which his/her salary falls below the minimum wage due to the salary deduction arrangement and such reimbursement must be paid on the regular pay day for the workweek(s) in question: it may not be paid in a subsequent pay period.

We wish to point out that the amounts of the deductions and reimbursements must be included when computing the regular rate of pay for overtime pay purposes.

This opinion is rendered pursuant to the provisions of the FLSA and is not to be construed as approval or disapproval of any interpretations which may be issued by the Internal Revenue Service in this regard.

Sincerely,

William M. Otter
Administrator