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AUG 5 1983

Robert D. McDonald, Esq.  
Power and McDonald  
1919 Pennsylvania Avenue, NW  
Washington, D.C. 20006

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Dear Mr. McDonald:

This is in reply to your letter of May 24, 1983, in which you make inquiry regarding deductions from the salary of employees who are covered and nonexempt and who are paid on a fluctuating workweek basis under the Fair Labor Standards Act (FLSA).

As you noted, this method of payment is discussed in 29 CFR Part 778, Section 778.114. You state the deductions would be made only for absences of a day or more for personal reasons and would always result in workweeks of less than 40 hours.

Your first question asks, "In instances in which the employee requests and is granted time off, for purely personal reasons, may a deduction be made from his or her salary without invalidation of the fluctuating workweek compensation system; i.e., may the employer determine an hourly rate on the basis of a forty-hour workweek, and pay the employee for the actual number of hours worked at this rate?"

Since the fundamental characteristic of the fluctuating workweek method of compensation is that the employee receives the fixed salary as straight time compensation for the week, regardless of the number of hours or days worked, if this method is adopted, an employer is obligated to pay the full salary as long as the employee performs any work during the workweek. The making of deductions for excused absences even for personal reasons (such as, time off to visit a relative who is ill) is inconsistent with such a method of compensation.

Your second question asks, "May the employer make such a deduction in instances where the employee takes time off totally without permission or notice to the employer?"

It is our opinion that disciplinary deductions, in such instances as the above, which do not cut into the required minimum wage or overtime compensation may be made for willful absences or tardiness, or, for example, where an employee is sent home because of a major work rule violation. However, if such deductions are made frequently

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or consistently, the practice would raise serious question as to the bona fides of the plan.

With regard to your reference to 29 CFR Part 641, Section 541.118 (salary basis), we wish to point out that this section has application only with respect to the salary qualification of employees for whom exemption from the minimum wage and overtime pay provisions of the FLSA is claimed; it does not have application to the salary paid nonexempt employees under the fluctuating workweek method of compensation. It should also be noted that section 541.118 does not authorize deductions from the required salary of exempt employees on a per hour basis.

We trust the above is responsive to your inquiry.

Sincerely,

James L. Vain  
Assistant Administrator  
Wage and Hour Division  
William M. Otter  
Administrator