U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2018-25

November 8, 2018

Dear **Name***:

This letter responds to your request for an opinion concerning whether a guaranteed weekly salary for a professional employee has a "reasonable relationship" with his or her "usual earnings" for purposes of determining whether the employee is paid a salary under 29 C.F.R § 541.604(b). This opinion is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

You state that your client, an engineering firm, classifies its engineers and senior designers as exempt professionals under the Fair Labor Standards Act (FLSA). You ask WHD to assume that their job duties meet the requirements of the professional exemption. Your client pays these employees a guaranteed weekly salary of $2,100. Your client derives this amount by multiplying $70 by 30 hours (the minimum hours the employees typically work per workweek). Your client pays this guaranteed weekly salary even if an employee works fewer than 30 hours. If an employee works more than 30 hours, however, your client pays $70 for each additional hour. For example, if an engineer works 45 hours in a workweek, he or she will receive $3,150 (the $2,100 weekly guarantee plus $1,050 for the extra hours worked ($70 × 15 hours)). You state that the employees' work hours are "virtually impossible to predict" from workweek to workweek due to the varying requirements of clients' projects. Although actual weekly earnings vary, you informed WHD staff that the employees earned an average of $2,721 per week in 2017, with average weekly compensation ranging from $1,793 to $3,761.

GENERAL LEGAL PRINCIPLES

The FLSA exempts from its minimum wage and overtime requirements any "employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). This exemption applies to an employee who satisfies the duties- and salary-related requirements of 29 C.F.R. § 541. Salaried employees may receive additional compensation, including hourly wages for "hours worked ... beyond the normal workweek," without losing the exemption in certain circumstances. 29 C.F.R § 541.604(a). As relevant to this letter, they may also receive compensation "on an hourly, daily, or shift basis, without losing the exemption or violating the salary basis requirement," if they receive a guaranteed weekly salary of at least the

standard salary level and "a reasonable relationship exists between the guaranteed amount and the amount actually earned." 29 C.F.R § 541.604(b). A "reasonable relationship" exists when "the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly ... rate for the employee's normal scheduled workweek." *Id.*

The regulations provide that a guaranteed weekly salary of $500 is roughly equivalent—and therefore reasonably related—to usual weekly earnings of $600–$750. *See* 29 C.F.R § 541.604(b). The ratio of $750 per week to $500 per week is 1.5 to 1. Accordingly, a 1.5-to-1 ratio of actual earnings to guaranteed weekly salary is a "reasonable relationship" under the regulations. *See id.; see also Brown v. Aleris Specification Alloys, Inc.*, 2016 WL 1183207, at *2, *4 (N.D. Ind. Mar. 28, 2016) (finding a "reasonable relationship" when employee's actual earnings did not exceed approximately 1.4-times the guaranteed salary); *Hass v. Behr Dayton Thermal Prods., LLC*, 2008 WL 11351383, at *13 (S.D. Ohio Dec. 22, 2008) (finding a "reasonable relationship" when actual earnings were approximately 1.3-times the guaranteed salary).

OPINION

Because your client's employees receive a guaranteed weekly salary of $2,100, any usual weekly earnings up to $3,150 will satisfy the "reasonable relationship" test ($2,100 × 1.5). *See* 29 C.F.R § 541.604(b). Usual earnings of $3,761, however, materially exceed a 1.5-to-1 ratio and are not "roughly equivalent" to the guaranteed weekly salary of $2,100. The regulations, of course, do not provide that a 1.5-to-1 ratio of actual earnings to guaranteed weekly salary is the absolute maximum permissible ratio to satisfy the "reasonable relationship" test. *See id.* (providing a range of permissible ratios from 1.2-to-1 to 1.5-to-1). But in the facts and circumstances presented here, usual earnings that are nearly 1.8-times—close to double—the guaranteed weekly salary materially exceed the permissible ratios found in the regulations and are not roughly equivalent to that salary under § 541.604(b). *Cf. id.*; *Brown*, 2016 WL 1183207, at *4 (concluding that ratio of approximately 1.4-to-1 constituted a reasonable relationship under § 541.604(b), even though there was "some allure" to concluding otherwise).

You also request clarification concerning how your client may calculate employees' "usual earnings" for a "normal scheduled workweek" when their hours and earnings fluctuate widely from workweek to workweek and are not predictable. We understand that your client, for purposes of this request, calculated average weekly earnings for employees throughout 2017. This method, we believe, is a reasonable method of calculating employees' "usual earnings" for a "normal scheduled workweek" under § 541.604(b). Although not the only reasonable method, in WHD's experience, calculating average weekly earnings over such a period should ordinarily provide ample representation of variations in an employee's earnings and hours for purposes of § 541.604(b). That said, the "usual earnings" inquiry under § 541.604(b) is an employee-specific

analysis, and simply calculating the average earnings for an entire job classification or group of employees may not yield accurate "usual earnings" for each individual employee.

We trust that this letter is responsive to your inquiry.

Sincerely,

Bryan L. Jarrett
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**