

FEB 27 1995

This is in response to your letter requesting an opinion concerning the application of section 778.114 of CFR Part 778 to deductions for vacation and sick leave when employees have worked some in the weeks that they take this time off.

You state that an employer gives each of his employees one day vacation and one day sick pay for each four-week period that the employee works. An employee who is paid on the fluctuating workweek salary basis takes two days off during a workweek for personal reasons. The employer pays the employee his full salary for that workweek, and deducts two days vacation pay from his accrued vacation time. Such deductions occurred several times when the employee took off for personal reasons until he had exhausted all of his vacation time. We note that the employee was paid his full salary during these workweeks.

You further state that the employer closed down all operations for one week for its annual vacation, but did not pay the employee who is paid on a fluctuating workweek basis any vacation pay because he had previously used up his vacation time. The employee does not believe that the fluctuating workweek salary basis was met because of the deductions made.

Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114, one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. Therefore, in your situation the requirements of section 778.114 are met where the employee is paid his/her full salary in any workweek when he/she performs any work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion. While the principles set forth in section 541.118 of 29 CFR Part 541 are not applicable with regard to the principles set forth in

section 778.114, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his/her full salary in any workweek when he/she performs no work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator