

FEB 28 1995

This is in response to your letter requesting an opinion concerning the application of section 541.118 of Regulations, 29 CFR Part 541 to your client's proposed bonus time plan for its exempt employees.

You state that your client wishes to establish a bonus plan to compensate its exempt, salaried employees for inordinate hours worked during seasonal business peaks. The plan would award exempt employees who work more than an average number of hours per week with additional time off (bonus time) or pay during the non-peak season. These employees are normally expected to work a set hourly schedule in order to fulfill the requirements of their jobs, and since they are occasionally called upon to work beyond their scheduled hours, this bonus time system was proposed for tracking and rewarding the employees.

Specifically, you state that if an exempt employee works more hours than expected in a given week, his/her accumulated bonus time will be increased in direct proportion to the extra hours worked that week. If an exempt employee works fewer hours than expected, his/her accumulated bonus time will be reduced in direct proportion to the hours below the expected hours for that week. If the employee works the exact same hours as expected, his/her accumulated bonus time will not change. If the employee should ever work fewer hours than expected in any given week and not have enough accumulated bonus time to offset the shortage, the accumulated bonus time will be reduced as a negative quantity.

You further state that an exempt employee's salary will not be adjusted downward for a reduction in time worked due to scheduling or business reasons. Exempt employees' salaries will never be adjusted downward for absences of less than a full day. In the event that such employee misses time from work due to an illness, injury, or other reason covered under the company's sick leave policy, his/her bonus time will not be reduced for those

hours paid as sick leave. However, if the employee's sick leave has been exhausted, bonus time hours may be used in order for the employee to continue to be paid for days away from the job. The exempt employee's wages may be adjusted downward if he/she misses one or more complete days due to illness, injury or other personal reason and has depleted all of his/her accrued sick leave, bonus time and other applicable paid benefits. We also note that these employees may elect, at his/her own discretion, to take a lump sum payment of his/her bonus time's cash value once a year.

As you know, section 13(a)(1) of the Fair Labor Standards Act (FLSA) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate section of the Regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the Regulations.

An employee will be considered to be on a salary basis within the meaning of the Regulations if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his/her compensation, which amount is not subject to reduction because of variations in quality or quantity of the work performed.

Deductions may be made, however, when the employee is absent from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for one or more full days to handle personal affairs, his/her salaried status will not be affected if deductions are made from his/her salary for such absences.

Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deductions are made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such plan, policy or practice and after he/she has exhausted his/her leave allowance thereunder.

Where an employer has proposed a bona fide bonus time benefits plan such as the one described in your letter, it is permissible to substitute or reduce the accrued leave in the plan for the

time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his/her guaranteed salary. Payment of an amount equal to the employee's guaranteed salary must be made even if an employee has no accrued benefits in his/her bonus time plan account, and the account has a negative balance, where the employee's absence is for less than a full day.

Based on the information contained in your letter and provided all the other requirements of section 541.118 are met, it is our opinion that your client's proposed bonus time plan for its exempt employees appears to meet the requirements outlined in the Regulations.

A recent series of court cases has held that employer policies allowing partial-day deductions defeat the exemption for employees to whom the policies apply, even if such policies never resulted in any actual deductions from pay. A number of courts have expanded upon this interpretation and have denied the exemption based on a variety of employer practices that relate to the employee's pay to the employee's hours worked. Practices with hourly attributes, such as payment of additional compensation for time worked over 40 in a week, requiring use of personal or sick leave by the hour, and others have been declared inconsistent with the "salary basis" requirement in the regulations.

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 that 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 because of an investigation by the Wage and Hour Division, or because of litigation with respect to, 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