

APR - 3 1995

This is in response to your letter requesting an opinion concerning whether certain practices by your client would defeat the salaried status of exempt employees as defined under section 541.118 of Regulations, Part 541.

You state that your client performs contract work for a Federal agency. The agency requires the employer and others bidding on contracts to complete a "Contract Pricing Proposal" known as an "Optional Form 60." This form requires the employer to estimate the hours each employee is expected to work on the contract in addition to each employee's hourly rate. Optional Form 60 does not allow contractors to submit bids showing exempt employees' salaries. Once contracts are awarded, the Federal agency requires that (1) each employee's time be billed to that agency on an hourly basis, (2) all hours billed to the agency be actually worked and paid to the employee (i.e., all labor billed must equal all labor paid).

Your client uses the Accounting System and is required to list all hours worked by both nonexempt and exempt employees. This system is set up to handle two types of overtime: one for nonexempt employees at the rate of one and one-half times the employee's regular hourly rate and another for exempt employees at the employee's regular hourly rate. Government contract auditors audit the contractor's accounting records to determine that all hours billed to the Federal agency for direct labor are actually worked and paid to the employee at straight time.

You further state that the exempt employee regularly works 40 or more hours per workweek under a Federal contract. This employee generally receives a salary for all hours worked in the workweek. His/her annual salary is based on the hourly rate quoted to the Federal agency times 2080 hours divided by the 24 pay periods in each year, which results in the employee receiving a paycheck in that amount. Should the employee work less than 40 hours per week, he/she is required to take vacation, sick leave, or some

other type of paid leave, and continues to receive his/her regular salary based on a 40-hour workweek. In the event that the exempt employee works more than 40 hours in one workweek, he/she accrues compensatory time at the straight time rate for each hour over 40. The employer requires the employee to take compensatory time off at any time during the fiscal year in lieu of receiving the straight time overtime pay.

In light of the above, you client seeks an opinion on the following two issues: (1) whether its present practice of providing compensatory time to its professional employees at the straight time rate for all hours worked over 40 per workweek, defeats the employee's salaried basis status and therefore renders the employee nonexempt; and (2) whether implementing a practice of paying overtime to its professional employees at the straight time rate for all hours worked over 40 per workweek would defeat the employee's salaried basis status and render the employee nonexempt.

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/her employment agreement he/she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or 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.

It has been our longstanding position that additional compensation, as defined in section 541.118(b), besides an exempt employee's guaranteed salary is not inconsistent with the salary basis of payment. It continues to be our opinion that extra compensation by the hour, in addition to an exempt employee's guaranteed salary, for hours worked in excess of 40 in a workweek would not defeat the exempt status of an otherwise exempt employee.

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 both practices addressed by your client in compensating its exempt employees would not defeat the salaried status within the meaning of 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 discussion is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator