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Branch Copy

This is in response to your letter requesting an opinion as to the exempt status of certain employees under section 13(a)(1) of the Fair Labor Standards Act (FLSA). You specifically request an opinion as to whether these employees would be paid on a "salary basis" if paid under two methods of compensation described in your letter. You state that we are to assume that all the other requirements for exemption contained in Regulations, 29 CFR Part 541, are met.

With respect to Method 1, you indicate that an employee receives five-days of sick leave, no vacation pay, and no holiday pay. A paid "holiday" is provided to the employee for full day absences occasioned by the employer or the operating requirements of the business. In addition, no deductions from pay are made for partial day absences, and extra compensation is provided to the employee for billable hours worked in excess of 80 in a two week period. The floating "holiday" concept is apparently intended to address periods when no work is available to the employee due to the operating requirements of the business. It is assumed that such "holiday" pay is provided to the employee in whatever increments are necessary to prevent deductions from salary that may be attributed to the lack of available work, i.e., an unspecified number of days ranging from none to multiple days dependent upon available work. The pay practices outlined under this method would technically meet the criteria contained in § 541.118 of the regulations for payment on a "salary basis." We note, however, that such practices have the effect of forcing an employee into a leave-without-pay status for any absence of a full day, including sickness when the five-days of sick leave are exhausted, that is taken when work is available. These austere pay practices are somewhat unusual as more and more employers seek to establish high-performance, family-friendly workplaces.

Under Method 2, employees are provided unlimited sick leave, vacation pay, and holiday pay. Absences for full and partial days are deducted from accrued vacation balances, and deductions

from pay are only made for full-days after available leave balances are exhausted (no deductions from pay are made for partial day absences). As in Method 1, extra compensation is provided to the employee for billable hours worked in excess of 80 in a two week period. We must take issue, however, with the practice that mandates the use of vacation days when the customer requests a slowdown in work. It has been the Department's longstanding position that where an employer has a bona fide vacation pay benefit plan, it is permissible to substitute or reduce the accrued leave in the plans 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 or her guaranteed salary. Inherent in this approved pay practice is the element that the absence from work was occasioned voluntarily by the employee. It is our position, therefore, that the practice of requiring an employee to use accrued vacation time to accommodate the operating requirements of a business would be inconsistent with the requirement to pay the employee on a "salary basis." While the salary of the employee is technically not reduced by this approach, it imposes a condition that is not unlike a direct deduction from pay, which is prohibited by § 541.118(a)(2) of the regulations.

We also note that both methods provide for extra compensation for hours billed in excess of 40 per week. In this regard, it is the Department's longstanding position that the furnishing of extra compensation over the guaranteed salary is not inconsistent with payment on a salary basis. With respect to the requirement that an employee must record all billable hours worked, we wish to point out that several recent court cases have denied the exemption based on a variety of employer practices that relate 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 hours in a week, requiring use of personal or sick leave by the hour, and the recording of hours worked, among 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 and 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,

Maria Echaveste
Administrator

Enclosure