MAR 17 1997

Thank you for your letter concerning the application of the Fair Labor Standards Act (FLSA) to salaried professional employees who are paid additional compensation for hours worked in excess of 40 per week.

We carefully reviewed your letter and concluded that your concerns involving

relate to actions taken by the State of Department of Labor under State law, which apparently is similar to the FLSA. We understand that the administration of the Federal law is not an issue and the U.S. Department of Labor is not involved in the case. As you may be aware, compliance with the FLSA does not relieve employers from having to comply with State laws setting standards higher than the FLSA. Under these principles, States may set their own labor standards which can vary from Federal requirements.

With respect to your questions on the proper interpretation of the requirements for exemption from the FLSA as a "professional" employee, we do not interpret our regulations to require time-and-a-half compensation for hours worked over 40 in a week by *bona fide,* salaried professional employees who are otherwise exempt, merely because the employer provides additional compensation for the additional hours. The Department has consistently held that, standing alone, extra hourly compensation for working more than 40 hours in a week does not defeat an otherwise applicable FLSA exemption for a professional employee, provided the employee meets all of the regulatory tests relating to duties, responsibilities, and compensation including the requirement for payment of a *bona fide* guaranteed salary as defined in the Department's regulations on "salary basis" of pay in 29 CFR § 541.118.

The Federal regulations explain that a salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, under U.S. Department of Labor regulations, additional compensation besides the guaranteed salary, such as discussed in your letter, is not inconsistent with the salary basis of payment and does not invalidate an otherwise applicable exemption (29 CFR § 541.118(b)). The Department considers several factors when determining if employees in fact are paid a guaranteed salary or on an hourly basis, including whether the employer reduces employees' pay by the hour for each hour absent from work and whether additional compensation is paid on an hourly basis, among others. Where all the pertinent facts indicate that an employee is paid on an hourly basis rather than on a guaranteed salary basis, the exemption does not apply.

In Brock v. The Claridge Hotel and Casino, 846 F.2d 180 (3d Cir.), cert. denied, 488 U.S. 925 (1988), to which your letter refers, you should be aware that the employees in that case were strictly hourly-paid workers, not salaried workers. Their pay always varied in direct relation to their actual hours of work and there was no evidence that the employer ever paid them so as to conform to a "guarantee." The court thus found that the employees were not salaried and, therefore, correctly held that they could not qualify for exemption. See, also, Klein v. Rush Presbyterian St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993); Michigan Ass'n of Gov't Employees v. Michigan Department of Corrections, 992 F.2d 82 (6th Cir. 1993). We believe that those decisions correctly denied exempt status to employees where the facts demonstrated that the employees had not actually been paid on a "salary basis."

Again, thank you for letting me know of your concerns about this important issue. If I may be of further assistance, please do not hesitate to contact me at 219-8305.

Sincerely,

John R. Fraser
Acting Administrator