FLSA-638

June 13, 1983

This is in reply to your letter of May 25, 1983. You ask on behalf of a client whether funds deducted from employee wages at the employees' direction and paid into individual health expense accounts under a proposed cafeteria plan constitute wages under Section 3(m) of the Fair Labor Standards Act (FLSA).

You state that under the proposed cafeteria plan, an employee could elect to have his/her wages reduced by an amount specified by the employee. The employer would credit that amount to an individual health expense account established for that employee. The funds in the health expense account would then be used to pay the cost of the employee's share of his/her medical or dental insurance coverage, or to pay for the employee's uninsured medical or dental expenses, or both. The cost of the employee's share of medical and dental insurance coverage could be paid directly from the employee's health expense account. Any surplus could be used to reimburse the employee for uninsured medical expenses incurred. Under your client's proposed cafeteria plan, an employee would submit a statement of uninsured medical expenses (s)he incurred each quarter and your client would then issue the employee a check for that amount if the the account's balance is sufficient to allow such reimbursement. At the end of the year, any sum remaining in an employee's health expense account could be withdrawn or carried over to the next year, at the employee's option. The maximum amount that could be carried over to the next year, however, would be $1,500, and any amount in the employee's health expense account in excess of $1,500 would be paid to the employee at year end.

You state that all employees who are eligible to participate in your client's group medical insurance plan would also be eligible to participate in the proposed cafeteria plan. Employees who are eligible to participate in the medical insurance plan but who choose not to do so would still be eligible to participate in the cafeteria plan. Employees could elect out of the cafeteria plan at any time by giving your client 15 days' notice. Any amount remaining in an employee's health expense account would be paid to the employee at the end of the quarter in which the employee ceased participation.

You are aware of our response of May 7, 1981 (Wage-Hour Opinion letter #508), opining that where there is a voluntary pay reduction so that a medical expense may be paid on the employee's behalf, the pay reduction may constitute wages paid for purposes of the FLSA when they occur during the same pay period. However, you believe that if wage deductions pursuant to a cafeteria plan are restricted only to medical expenses occurring within a pay period, your client's proposed cafeteria plan will lose much of its utility for lower paid workers. In support of your client's proposed cafeteria plan you state that by allowing employees to "bank" wage deduction amounts over several pay periods, lower paid employees are given security against the possibility of large medical bills in the future. Further, because there would almost certainly be a substantial time lag between the time expenses were incurred and the time they could be reimbursed, it would be very

difficult to administer a plan for a large number of employees unless wage deductions could be accumulated. Accordingly, you ask whether voluntarily authorized wage deductions for future uninsured medical expenses may be treated as wages paid for minimum wage purposes.

Since the proposed cafeteria plan allows employees to select either cash wages or medical expense reimbursement as part of their compensation, it is our opinion that it would result in compliance with the minimum wage requirements of the FLSA, provided that the sum of cash wages and medical expense and/or premium reimbursement when divided by the hours of work yields the minimum wage. In addition, we wish to point out that the computation of the regular rate of pay for overtime compensation will not be affected by the redesignation of wages.

You also ask whether we would make a distinction between payments to an independent insurance company such as Blue Shield/Blue Cross and when such benefits are provided employees through a health maintenance organization (HMO) or are paid by a voluntary employees' beneficiary association (VEBA) and related trust qualifying under Section 501(c) of the Internal Revenue Code.

We would not change our opinion regarding the equivalent wage amount of medical expense reimbursement amounts provided that neither the employer nor any person acting in his behalf or interest, directly or indirectly, derives any profit or benefit from the transaction, as explained in Section 531.40 of 29 CFR Part 531. In this regard, the fact that either a HMO or VEBA is more cost effective than a private insurance company would not, in our opinion, be considered as providing the employer, either directly or indirectly, any profit or benefit within the meaning of section 531.40.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator