

**FLSA-756**

November 30, 1983

This is in response to your October 31 inquiry regarding the legality under the Fair Labor Standards Act (FLSA) of deductions made from the compensation of an employee who is paid a fixed salary for a variable or fluctuating workweek. You also wish to know the proper method of calculating the amounts of deductions when made for an employee whose work hours are irregular.

You describe a situation in which an employee is paid \$400 for a variable workweek which ranges from 44 to 54 hours. When the employee works 50 hours, (s)he is due \$440 (\$400 plus 10 hours at \$4.00 an hour). When such employee works 42 hours (s)he is owed \$409.52 (\$400 plus 2 hours at \$4.76 an hour). You wish to know whether deductions may be made from the salary of \$400 when the employee works less than 40 hours, and if so, how the rate of pay would be calculated since the work hours vary from week to week.

As explained in 29 CFR Section 778.114, an employee may be paid a fixed salary for hours that fluctuate in a workweek, if there is a mutual understanding between the employer and such employee that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek. Under this salary arrangement, the regular rate of pay decreases as the number of hours worked increases. However, the salary must be sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings fall below the minimum wage required by the Act.

Under the pay arrangement discussed in Section 778.325 (salary for a variable workweek), an employee may be paid a fixed salary for a varying number of hours up to a certain amount. For example, an employee may be paid a salary of \$400 for all hours worked up to 55 in a workweek. The regular rate of pay thus varies from week to week. However, for all hours worked in excess of 55, the regular rate of pay remains \$7.27 an hour.

It is our position that generally an employee paid under either a fluctuating or variable workweek basis must receive his or her full salary in any week in which any work is performed. Deductions made for excused absences, even for personal reasons, (such as time off to visit a relative who is ill) would be inconsistent with such a method of compensation. However, disciplinary deductions may be made for willful absences, tardiness, or for example, where an employee is sent home from work because of a major work rule infraction. However, if such deductions are made frequently or consistently, the practice would raise serious questions as to the validity of the plan.

Where disciplinary deductions are made during weeks when employees are due overtime compensation, their regular rates of pay must be computed before the deductions are made.

While there is no specific formula for calculating the deduction amounts for employees whose salaries cover varying hours in a workweek, as a practical matter, we would suggest a calculation based on a daily rate or a pro rate share thereof. For example, where an employee is paid a weekly salary of \$400 and normally works a 5-day workweek, his/her daily rate would be \$80 ( $1/5 \times \$400$ ). Deductions may be made for partial work days based on a fraction of the daily rate.

On the other hand, the salary of a Section 13(a)(1) exempt employee cannot be reduced for absences

of less than a day (See 29 CFR 541.118.) Where there has been a prior agreement between the employer and a bona fide executive, administrative, or professional employee as to the number of days which constitute a normal workweek, if such an employee is absent for personal reasons, the amount which may be deducted must be calculated on a daily rate (as described above). The daily amount thus computed is applicable regardless of the number of hours the employee is scheduled to work.

We trust the above is responsive to your inquiry.

Sincerely,

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Administrator