

FLSA-885

October 1, 1984

This is in further response to your letter on behalf of your client, ***, asking whether three proposed payroll procedures comply with the monetary provisions of the Fair Labor Standards Act (FLSA).

You request that we consider these payroll procedures in conjunction with a proposed recordkeeping system. The recordkeeping system would involve preparation of a schedule of all employees regularly scheduled work hours and posting of the schedule on a regular (e.g., monthly) basis. On days when employees actually work the hours scheduled, they would verify these hours worked by initialing the posted schedule. On days when employees work more or less than their scheduled hours, they would either note and initial the change on the schedule itself or record the time on separate slips designed for that purpose and which would be then signed by the employee and his/her supervisor. You indicate that in the event deviations from scheduled work hours result in "docking of hours" or in overtime work, such deductions and/or overtime pay will be calculated using either the employee's regular hourly rate (for deductions) or 1.5 times the employee's regular hourly rate (for overtime pay), as appropriate.

Since you present three separate proposed payroll procedures, we will address them in the order presented.

The first payroll procedure is derived from section 778.329 of 29 CFR Part 778. You state that the normal office schedule would be fixed on a permanent basis, but would involve fixed workweeks of alternating lengths. In this regard, three out of four weeks on the permanent schedule would be scheduled for 42.5 hours of work. Employees would be hired on a fixed weekly salary to work these alternate workweeks of different fixed lengths. The fixed salary would be compensation for the regularly scheduled hours of both the long and short workweeks (including scheduled overtime hours of work in the long workweeks). This arrangement would be permanent (i.e., not frequently modified). The employee's regular weekly schedule, weekly wage for regularly-scheduled hours, and regular hourly rate for each of the fixed workweeks would not be altered simply because the employee may actually work more or less than the scheduled work hours of any particular workweek.

As explained in section 778.329, employees may be employed on a salary basis with the understanding that the weekly salary is intended as compensation for the fixed schedule of hours of work (and no more) and that this fixed schedule provides for alternating workweeks of different fixed lengths. In addition, the arrangement should be permanent. The length of the respective workweeks and the rates for such weeks should be fixed on a permanent-schedule basis far in advance of when the work is to be performed and, therefore, not subject to control by the employer or fluctuations in business. While your first payroll procedure contains these provisions, it does not specifically contain another provision which would be necessary to satisfy FLSA monetary requirements. As explained in section 778.326, an employer cannot otherwise discharge his/her statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight-time and overtime compensation for an "agreed" number of hours. This principle also applies with respect to the provisions of section 778.329. However, if you amend the payroll procedure so that the fixed salary for long workweeks will be reduced by 1.5 times the employee's regular rate of pay for each hour not worked between 40 and 42.5 scheduled work hours, the plan would satisfy FLSA monetary

provisions. We wish to point out that further reduction in the salary based on the employee's regular rate would not be required when actual hours of work are 40 or less.

Your second payroll procedure is premised on a prepayment plan. Under this proposal, regular salary advances would be set up for each employee with a credit made to those accounts during the first ("short") week of each four-week cycle. Employees would repay 1/3 of the advance in each of the following three weeks of the cycle, and a new salary advance would be made to the employees in the first week of the next four-week cycle. The salary advance structure would be documented by a "salary advance" loan agreement to be signed by each employee, with the employee authorizing the company to make regular paycheck withholdings to "recapture" the salary advances previously made. Because the advances are loans to be repaid, if an employee quits or employment is terminated when advance money is outstanding, the employee would be required to repay the amount. At no time would the employee's advance account have a negative balance. If an employee works more overtime hours in a week than are regularly scheduled, additional overtime pay would be due that week.

The basic element of a prepayment plan is that while an employee may owe an employer money, an employer may not owe the employee. Also, amounts paid to an employee while absent from work due to vacation, holiday, or sick leave cannot be considered prepaid compensation by the employer just as time off during such periods may not be used to balance overtime worked within the pay period. Bona fide plans of this type require the use of a recordkeeping system whereby the employer can maintain a running account. As explained previously, a fixed salary for a fixed amount of hours will not satisfy FLSA monetary provisions, unless there is a reduction in the fixed salary when scheduled overtime hours are not worked. However, under a prepayment plan these amounts could be credited to the employee's account. Therefore, detailed recordkeeping is essential to the bona fides of the proposed prepayment plan.

Your third payroll procedure concerns establishing 13 additional paid holidays during a year. These company holidays will be paid in addition to the regular paid holidays which the employees currently receive. The operation will be shut down every fourth Saturday, as a designated "company holiday," and each of these dates will be regarded as one of the additional paid holidays. As with any other paid holiday, employees will not exercise any choice regarding the timing of "company holidays" but will take them on the day designated. During weeks in which there is a "company holiday," employees will be paid the amount they would have received had there been no holiday shutdown and they had worked the full schedule.

It is our opinion that this last payroll procedure would not satisfy FLSA monetary provisions. As a rule, employer payments for holidays not worked, in amounts approximately equivalent to regular earnings paid to employees for a similar period of work time, can be excluded from total remuneration for purposes of calculating an employee's regular rate of pay, pursuant to FLSA section 7(e)(2). However, as stated in section 778.218 of 29 CFR Part 778, it is our position that this provision of section 7(e)(2) refers to recognized holidays. Therefore, if an employer designates holidays without regard to recognized holidays, the payments for such days not worked would not qualify as holiday pay under section 7(e)(2). Moreover, it is our belief that employer-designated holiday payments would not qualify as any of the other FLSA section 7(e)(2) excludable-type payments.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator