

FLSA 1217

September 25, 1986

This is in further response to your letter of October 29, 1985, addressed to the Wage and Hour *** Field Station, concerning the application of the Fair Labor Standards Act (FLSA). You wish to know if the practice of making certain deductions from probationers' wages complies with the requirements of FLSA. We regret the delay in responding to your inquiry.

In your letter, you refer to a program operated by the Adult Probation Department, County of *** (the County), which provides employment opportunities to convicted offenders whose sentences have been suspended during a probationary period prior to their release. These probationers are required to live in a restitution center under the supervision of the staff at the facility. During this time, the probationers may perform work for private employers in the community.

Any wages earned by the probationers are paid to the director of the restitution center who is then responsible for the disbursement of this money pursuant to Article 42.12 of the Code of Criminal Procedure (the Code). You enclose pertinent sections of the Code with your inquiry which indicate that the director of the restitution center is required to make deductions from a probationer's wages for:

- (1) the cost to the center for the probationer's food, housing, and supervision;
- (2) necessary travel expense to and from work and community-service projects, and other incidental expenses of the probationer;
- (3) support of the probationer's dependents; and
- (4) restitution to the victims of an offense committed by the probationer.

The remaining balance of the probationer's wages is held for this individual and is payable upon his or her release. You specifically wish to know if this practice complies with the provisions of FLSA.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

The FLSA applies to employees who are individually engaged in interstate commerce or in the production of goods for interstate commerce, and to all employees of certain enterprises. The monetary provisions of FLSA apply to employees of State and local governments as a result of the decision by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia), 105 S.Ct. 1005 (February 19,

1985). However, in order for FLSA to apply to a person engaged in work subject to its provisions, an employment relationship between an employer and employee must exist. In Rutherford Food Corp. v. McComb (331 U.S. 722) and United States v. Silk (331 U.S. 704), the Supreme Court said that the determination of an employment relationship is not based on "isolated factors" or any single characteristic. Instead, the determination depends "upon the circumstances of the whole activity" including the "economic reality." Based on our understanding of the facts in this case, it appears that the probationers are jointly employed by the County and the private employers who are involved in the program.

Regulations, 29 CFR Part 531 contains official determinations and administrative interpretations by the Department of Labor concerning wage payments under FLSA. Section 531.35 of Part 531 states that "'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.'" However, as explained in section 531.39 of Part 531, deductions may be made from an employee's wages where the employer is legally required or ordered by a court to make them, provided that the employer does not derive any profit or other benefit as a result. The circumstances which involve the restitution center and the probationers as described in your letter appear to be analogous to a situation where an employer is legally required to make certain deductions from an employee's wages. Under these circumstances, the Wage and Hour Division would take no enforcement action in regard to these deductions.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosures