

**FLSA-526**

August 20, 1991

This is in response to your letters requesting an opinion as to whether a client's proposed pay plan complies with the provisions of the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiries.

You state that your client provides a variety of paid time off to its employees. This includes four days of sick leave per year, between one and four weeks of vacation compensation per year, three days off with pay for attendance at funerals, and a week of paid time per year off for duty as a juror or witness. The employer wishes to integrate the paid time off benefits with the employees' fixed salaries which are paid on a fluctuating workweek basis. Your client, in effect, proposes to substitute paid time off for time when an employee chooses to absent himself or herself from work. Where the employee has exhausted all of his or her paid time off, the employer will make deductions from the employee's salary only for full days when the employee is absent from work. You state that this policy appears to conform to the "salaried basis of payment" for white collar workers, as discussed in section 541.118 of Regulations, 29 CFR Part 541.

Section 778.114 of Interpretative Bulletin, 29 CFR Part 778, describes the method of paying employees a fixed salary for fluctuating workweeks. Under this method, an employer and employee may agree that a fixed salary will pay all straight time compensation for all hours of work, whether the hours be few or many, and that extra compensation at not less than one-half times the regular rate be paid for all overtime hours of work in the workweek. Of course, the salary must be sufficiently large so that when the salary is divided by all hours worked the resulting quotient will not be less than the applicable minimum wage for each hour of work.

The fundamental characteristic of the fluctuating workweek method of compensation is that the employee receives the full amount of his or her fixed salary as straight-time pay every week, regardless of the number of hours or days worked in the workweek, so long as the employee performs any work during the workweek. In your situation your client may substitute paid leave for employee absences provided the total compensation in any week when the absences occur equals the employee's guaranteed fixed salary. Where there is no paid leave to substitute for employee absences, the employer may not make deductions from the employee's guaranteed fixed salary under the fluctuating workweek method of compensation. The discussion of "salary basis of payment" contained in section 541.118 of Regulations, Part 541, refers to the salary requirements for employees who may qualify for exemption from the minimum wage and overtime pay requirements under section 13(a)(1) of the FLSA, and not to the salary requirements under the fluctuating workweek method of compensation.

With regard to your specific question concerning the method of calculating reductions in the salary of an employee paid on a fluctuating workweek method of compensation, it should be noted that under this method of compensation no reductions may be made from such salary provided the employee performs any work during the workweek. See the above discussion on this matter.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also presented that this opinion is not sought on behalf of a client or firm that is under investigation by the Wage and Hour Division, or this is in litigation with respect to, or requiring compliance with, the provisions of the FLSA.

Sincerely,

John R. Fraser  
Acting Administrator