

MAR 18 1992

Dear

This is in reply to your letter of January 23, 1992, requesting an opinion on certain pay practices of one of your clients, as it relates to wages paid to "professional" employees. You specifically request an opinion as to whether or not employees who are paid in accordance with these pay practices are exempt under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law must be paid a minimum wage of not less than \$4.25 an hour and overtime premium pay of not less than one and one-half times his or her regular rates of pay for all hours worked in excess of 40 in a workweek, unless specifically exempt.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541, a copy of which is enclosed. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate section of the Regulations, are met. One such test requires that an employee be paid on a salary basis within the meaning of section 541.118 of the Regulations. In order to be considered paid on a salary basis, the employee must receive each pay period a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of variations in quality or quantity of the work performed. The salary must be free and clear and must not be less than that required by the Regulations. We will assume for purposes of this opinion that the "professional" employees you have in mind meet all the duties and responsibilities tests for exemption, as outlined in section 541.3 of the Regulations.

You state that your client has adopted a compensation method for certain "professional" employees, under which the employees may choose to be paid a fixed base salary with benefits, or may "opt" for a percentage of the revenues they generate with no benefits. Those employees who opt for a percentage of the revenues generated agree to forego fringe benefits, such as hospital, medical, dental and life insurance, in exchange for a commission based on seventy percent of the revenues generated and the number of billable hours that they generate in a quarter year, to be advanced to them on a monthly basis. For example, if a professional employee generates 500 billable hours in a quarter at a billing rate of \$40.00 per hour, the total revenue generated would be \$20,000, and the commission paid to the employee that particular quarter would be \$14,000. The employee would receive advances of \$4,000 a month during the first two months, and \$6,000 in the last month of the quarter. You also indicate that in no instance has a professional employee's pay been less than the minimum weekly salary required under the Regulations, and that the annual incomes paid to the employees range from \$35,000 to \$70,000.

From the information contained in your letter, it is clear that the compensation the employees receive is based on a percentage of the hourly charge your client bills its customers. This method of compensation does not satisfy the requirements of section 541.118 of the Regulations. The employees in question are not guaranteed a salary fee and clear, but rather receive compensation based solely on the quantity of the work performed. An employee paid in such a manner would not be paid on a salary basis, as required by the Regulations, and would not qualify for exemption under section 13(a)(1) of the FLSA. Employees who do not qualify for exemption must be paid in accordance with the monetary provisions of the FLSA, including its overtime pay requirements.

We trust that the above discussion is responsive to your inquiry. If we can be of any further assistance, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure