FLSA-416

November 12, 1993

This is in response to your letter requesting an opinion on the application of the Fair Labor Standards Act (FLSA) to "cafeteria plans." You wish to know whether wages which employees elect to contribute to the plan and which reduce the employee-participants' wages below the "minimum wage" would be in violation of the FLSA.

As you discussed in your letter, under some conditions the deduction from wages resulting from the application of a "cafeteria plan" will reduce an employee below the legally applicable cash minimum wage. Specifically, you ask whether "minimum wage employees voluntarily using pre-tax dollars to pay bona fide insurance premiums for employer furnished benefits under IRC, Section 125 Cafeteria Premium only Plans" would be paid in violation of the FLSA, for when the "employee uses these pre-tax dollars to obtain benefits through the Section 125 plan, his earnings could fall below the federal minimum wage law."

Section 3(m) of the FLSA provides that "wages" paid to any employee include the reasonable cost, as determined by the Secretary of Labor, to the employer for furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees; provided, that the cost of board, lodging or other facilities shall not be included as a part of the wages paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee.

As explained in section 531.40 of Regulations, 29 CFR Part 531, where an employer is directed by a voluntary assignment, or order of his or her employee to pay a sum for the benefit of the employee to a creditor, donee or other third party, a deduction from wages of the actual sum so paid is not prohibited; provided, that neither the employer nor any person acting on his or her behalf or interest, directly or indirectly, derives any profit or benefit from the transaction. In such cases, payment to the third person for the benefit and credit of the employee will be considered the equivalent, for the purposes of the FLSA, to payment to the employee.

If an employer's "cafeteria plan" allows employees to voluntarily elect participation and meets all of the other requirements discussed above, it is our opinion that the plan is in compliance with the minimum wage requirements of the FLSA, provided that the sum of cash wages and the voluntarily reassigned wages when divided by the hours of work yields the minimum wage. In addition, we wish to point out that the computation of the regular rate of pay for overtime compensation will not be affected by the redesignation of wages.

We trust that the above is responsive to your inquiry. Our opinion, of course, does not reflect the position of any other Federal agency or any other Federal law.

Sincerely,

Maria Echaveste
Administrator