

## FLSA 1269

June 1, 1994

This is in further response to your request for an opinion as to whether payments made pursuant to the \*\*\* proposed plan (Plan) to share financial results with certain employees qualify for exclusion from the regular rate under §7(e)(3)(b) of the Fair Labor Standards Act (FLSA). You seek approval of the Plan pursuant to the profit-sharing plan or trust regulations at 29 CFR 549. We regret the delay in responding to your inquiry.

Under the terms of the proposed Plan, employees will receive 1% of their base salary if the company meets its company-wide performance goals and from 1% to 10% of their base salary if the company exceeds its threshold performance goals. The performance goals include overall profit, measured by return on equity, and, to a lesser extent (not more than 10% of the goals), other unspecified company-wide performance measures, such as customer satisfaction. Employees whose performance rating is below standard in any given year will not be eligible for a payout. Employees covered by the company's collective bargaining agreement and employees covered by the company's annual bonus plan or sales incentive plan are not covered by the Plan.

Section 549.2(a) disqualifies a plan "[i]f the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency." Under the proposed Plan, employees with substandard performance ratings will be ineligible to receive payouts from the Plan. Although it is anticipated that only a small number of employees will receive substandard ratings, the shares of those employees will be determined by the quality or quantity of their work. Therefore, the Plan would be disqualified under §549.2(a).

Section 549.2(e) disqualifies a plan "[i]f the employer's contributions or allocations to the fund or trust to be distributed to the employees are based on factors other than profits such as hours of work, production, efficiency, sales or savings in cost." Under the proposed Plan, the employees' share is determined in part (up to 10% of the performance goals) by company-wide performance measures, which are not specified in the proposal. Thus, to an extent the Plan is designed to reward employees for improving the company's performance in measures unrelated to profit.

Although the information on the "company-wide performance measures" is vague, it appears that the Plan is similar to an incentive plan that provides non-discretionary bonus payments to covered employees as compensation for increases in production or efficiency. As indicated in 29 CFR §§778.208, 778.209, and 778.211, bonuses of this type must be included in the regular rate of pay.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste  
Administrator