

FLSA-1360

March 2, 1995

This is in reply to your letter concerning our reply of March 18, 1992, to *** on the pay practices of one of his clients as it relates to wages paid to "professional" employees. In that letter we determined that the employees in question were not paid on "a salary basis" as required by section 541.118 of 29 CFR Part 541, for purposes of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA), since the employees were not guaranteed a salary free and clear.

You now state that you are recommending that the client revise its pay practices. Specifically, the revision will provide that the professional employees employed by your client will be offered the option of either receiving a guaranteed fixed base salary, well in excess of \$250 per week, with benefits, or they can choose to be paid a guaranteed fixed weekly salary of \$250 with no benefits. A professional employee choosing to accept the fixed weekly salary of \$250 will not have that salary subject to any reduction, except as permitted under section 541.118(a)(2) of the regulations. In addition to the fixed weekly salary of \$250, such employees will receive a bonus or commission based on revenues received by your client from customers for whom the employee has performed services. The bonus or commission will be calculated as a percentage of the revenues received by your client from its customers less the amount of the guaranteed fixed weekly salary received during the period for which the commission is calculated. In no event will this result in a reduction of the amount of the guaranteed fixed weekly salary of \$250. You request an opinion as to whether this method of compensation satisfies the requirements of section 541.118 of the regulations.

As indicated in section 541.118(b), additional compensation besides the salary paid to an employee is not inconsistent with the salary basis of payment. Thus, where an employee is guaranteed a fixed salary free and clear within the meaning of section 541.118, an employer may pay a "bonus," in addition to the employee's salary without affecting the employee's salary basis of payment or otherwise affecting the employee's exempt status under section 13(a)(1). However, you should be advised that genuine guarantees must be obtained clearly demonstrating that the salary is not simply part of the bonus or commission, and that no circumstances exist which would reduce it or divide it. This could be achieved by having the employer issue separate checks, one for the unvarying \$250 amount and another for the varying commission or bonus amount. Or there may be a clearly stated contractual agreement between the employer and the employee ensuring the payment of the \$250 amount for any work week in which the employee performs any work regardless of whether there are additional earnings. Under these conditions, it is our opinion that the revised pay practices that you are recommending to the client may satisfy the "salary basis" requirement contained in section 541.118 of the regulations.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator