

FLSA-1331

November 5, 1996

This is in response to your request for an opinion as to whether a rental property owner may deduct from the wages it pays to its maintenance employees the cost of an apartment furnished to these employees. In addition, if such a deduction is allowable you wish to know when determining the appropriate amount of the deduction about the provision in 29 C.F.R. 531.3(c). You ask if the limit in that section of not more than a five and one-half percent interest deduction on the depreciated amount of capital invested by the employer is binding or whether the employer may base the deduction on the interest rate on the mortgage that is being paid on the property, 8 percent, for example.

Deductions from employees' wages under Section 3(m) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, 203(m), for housing furnished to the employees are not allowed when the employer requires an employee to leave an existing home and live on the employer's premises to be "on call" to meet the needs of the employer. In such cases, the housing is considered to be furnished primarily for the benefit of the employer and the employer is not entitled to have the cost included in computing wages under Section 3(m) of the FLSA. See Marshall v. DeBord d/b/a/ Bernie's Rest Haven, 84 Lab. Cas. (CCH) §33,721 (E.D. Okla. 1978); Bailey v. Pilot's Association, 406 F. Supp. 1302 (E.D. Pa. 1976). Conversely, if use of the employer's housing is completely at the option of the employee it is considered to be primarily for the benefit of the employee and its cost may be considered part of the employee's wages. You have not provided sufficient information for us to determine the extent to which use of the housing is at the employees' option or is required by their employer.

With respect to your second question, we believe that five and one-half percent is the maximum deduction allowable. The Wage and Hour Division does not have the authority to waive this regulatory requirement.

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

Sincerely,

Corlis Sellers for

Maria Echaveste
Administrator