

FLSA-1336

January 21, 1997

This is in response to your request for an opinion concerning the legality of a proposed pay policy under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* Specifically, you have asked whether, under section 3(m), your client may include, as part of the compensation for the first two weeks of employment, the reasonable cost of the meals it customarily provides, deduct, during those two weeks, the reasonable cost of the meals from the compensation as an offset against its expense of purchasing uniforms and safety equipment, and exclude the reasonable cost of the meals from the calculation of the employee's regular rate, pursuant to section 7(e)(2). The employees have the option of purchasing the uniforms and safety equipment, rather than having deductions taken from their pay for these items. Also, under the policy, the contract wage will be the statutory minimum.

Section 3(m) allows an employer to consider as part of wages the reasonable cost of providing "board, lodging or other facilities" that are customarily furnished for the benefit of employees, except to the extent that such costs are excluded by the terms of a bona fide collective bargaining agreement. An employer may credit the reasonable cost or the fair value of furnishing section 3(m) facilities toward payment of the minimum wage, or deduct the amount from the compensation, even though the deduction reduces the pay below the statutory minimum. Thus, your client may legally include as part of compensation the reasonable cost of furnishing meals or deduct this cost from the wages paid.

Section 3(m), however, does not apply to the costs of uniforms and safety equipment furnished. In nonovertime workweeks, an employer may take bona fide deductions for such non-section 3(m) costs to the extent that they do not result in the employees receiving less than the minimum wage in cash free and clear for their hours worked. 29 C.F.R. 531.36(b). In addition, in accordance with an agreement or understanding with the employees, the employer may also take these deductions in overtime workweeks, provided that all straight time hours are paid at not less than the minimum wage in cash free and clear, and that the regular rate is calculated before any deductions are made. 29 C.F.R. 531.37.

Under the pay policy proposed by your client, since the employees' cash wage is the statutory minimum, the deductions to recover the costs of the uniforms and safety equipment will reduce the cash compensation below the minimum wage. Consequently, such deductions are in violation of the Act. Moreover, it is our longstanding position that the cost of uniforms and safety equipment required by the employer is a business expense of the employer. Thus, even if the employees purchase these items, this cost may not reduce their wages below the minimum wage, nor decrease their overtime compensation.

Additionally, your client cannot exclude the reasonable cost or fair value of furnishing meals which it counts as part of compensation from the calculation of the regular rate.

Section 7(e)(2), in pertinent part, excludes from the employee's regular rate, "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours worked." The reasonable cost or fair value of furnishing board, lodging and other facilities to employees is regarded as compensation under section 3(m) and it does not come within section 7(e)(2). 29 C.F.R. 778.216(d). Where the employer makes payments to employees in the form of facilities which are considered as part of wages, the reasonable cost to the employer or the fair value of furnishing such facilities must be included in the regular rate. 29 C.F.R. 778.116.

Finally, your assertion that the employer's expense of providing transportation to and from pick up points to the job site falls within the section 7(e)(2) exclusion is incorrect. Section 7(e)(2) has no application to these transportation expenses since that provision applies to payments made to an employee as reimbursement for expenses he or she incurs on his employer's behalf, or where the employee is required to expend sums solely by reason of action taken for the employer's convenience. 29 C.F.R. 778.217. It does not apply to expenses incurred by the employer. Also, these transportation expenses are not "facilities" which may be included as compensation under section 3(m). See 29 C.F.R. 531.33.

We trust that this satisfactorily responds to your inquiry. If you have further question on this matter, do not hesitate to contact us.

Sincerely,

Maria Echaveste
Administrator