



WHD-OL-1998-0005

February 19, 1998

NAME*

This is in response to your letter requesting an opinion concerning whether or not your client's policy on vacation and sick leave accrual procedures interferes with the exempt status of its salaried employees.

You represent a non-profit employer that operates a facility which counsels, treats and educates juveniles on an in and out-patient basis. The exempt employees in question are state licensed teachers, psychologists, nurses, social workers and executive administrators who receive a salary based upon their tenure and job category, regardless of the quantity or quality of work performed. For purposes of this opinion request, we are to presume that these salaried employees satisfy the definition of a bona fide exempt employee pursuant to Regulations 29, Part 541.

Under your client's plan, a salaried employee who has worked at least one year accrues 10 days of vacation each year, which accumulates at the rate of 0.83 days (6.67 hours) per month. A two-year employee accrues 12 days of vacation at the rate of 1 day/month, and employees having worked three years or more accrue 18 days of vacation annually at the rate of 1.5 days per month. All employees accrue 12 days of sick time per year regardless of their years of service. They stop earning vacation time once they accumulate 240 hours. An employee will be paid cash for all unused accrued vacation if she leaves the company. Employees who separate from their employment do not receive a cash payout for unused accrued sick time. When a salaried employee takes a few hours during the day to tend to a personal matter, the employer's computerized payroll system automatically deducts this time from the employee's accrued vacation "bank" in hourly increments. The employee's paycheck contains a running statement of the remaining number of hours of unused accrued vacation and sick time.

Section 13 (a) (1) of the Fair Labor Standards Act (FLSA) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in Regulations, Part 541. An

employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate section of the Regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the Regulations.

An employee will be considered to be on a salary basis within the meaning of the Regulations if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of variations in quality and quantity of the work performed.

Deductions may be made, however, when the employee is absent from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for one or more full days to handle personal affairs, his or her salaried status will not be affected if deductions are made from his or her salary for such absences.

Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deductions are made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such plan, policy or practice and after he or she has exhausted his or her leave allowance thereunder.

Where an employer has proposed a vacation and sick time policy/plan, such as the one described in your letter, it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such leave "bank" the employee receives in payment an amount equal to his or her guaranteed salary. Payment of an amount equal to the employee's guaranteed salary must be made even if an employee has no accrued benefits in the leave "bank", and the amount has a negative balance, where the employee's absence is for less than a full day.

Based on the information provided in your letter and provided all of the other requirements of the Regulations are met, it is our opinion that your client's vacation and sick time policy/plan would not interfere with the exempt status of its salaried employees.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above discussion is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact me.

Sincerely,

John R. Fraser
Acting Administrator

*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).