



WHD-OL-1998-0010

February 23, 1998

NAME*

This responds to your letter of July 3, 1996, in which you requested an opinion regarding the effects of a proposed work plan on the salary status of some employees. Below, we provide our opinion regarding the proposal.

We understand from your letter that you represent an industrial manufacturer that has several thousand employees throughout the United States. You relate that in an effort to enhance job security and reduce the potential for extensive layoffs or terminations, the company has devised a progressive three-step plan to deploy staff when serious and persistent work shortages occur in a defined work-unit. We assume that the plan would operate in accordance with your description of it, which is consistent with but slightly more detailed than your excerpts of the proposal.

Based on your letter, we understand that under Step 1 of the plan, management may rearrange the work schedules or duties of the employees, but would make no changes in employee pay. If the work shortage persists, management would then proceed to Step 2, whereby management would reduce the hours of work in the affected work unit to 32 hours a week through the end of the fiscal year. Management would also reduce the pay proportionately. If the work shortage continues through the end of the fiscal year, management would proceed to Step 3, which would subject the employees to a temporary layoff. The employees would return to their former duties and schedule at the end of the work shortage.

There are a number of factors to consider, in determining whether employees are exempt from the overtime pay requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. For instance, an executive, administrative, or professional employee must meet both a salary and a duties test in order for the exemption to apply. 29 C.F.R. 541.1 – 29 C.F.R. 541.3.

Even though your letter focuses on the effect of Step 2, with respect to the employees who are paid a salary, we would like to point out that Step 1 also implicates the duties requirement. In this regard, you indicate that under Step 1, the employees would not suffer a reduction in pay, but may have to perform different job duties. In light of the fact that the employees not only must be paid a salary, but must perform certain duties in order to be exempt from the overtime pay requirement, changes in job responsibilities that do not meet the duties part of the test will result in the employee not qualifying for the overtime pay exemption, even if they meet the salary requirements.

As for Step 2 and its effect on the employees being paid a salary, 29 C.F.R. § 541.118(a) provides that employees are considered to be paid “on a salary basis” if they regularly receive each pay period a predetermined amount constituting all or part of their compensation which is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed. However, we have consistently taken the position that a bona fide reduction in an employee’s salary does not preclude salary basis payment as long as the reduction is not designed to circumvent the requirement that the employees be paid their full salary in any week in which they perform work. In addition, the amount paid to the employee in any workweek must not be less than the minimum salary required by the regulations. E.g., Opinion Letter No. 1140 (WH-93) December 10, 1970. Consistent with this position, we have stated that a fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment. Therefore, the exemption would remain in effect as long as the employee receives the minimum salary required by the regulations and meets all other requirements for the exemption.

While we conclude that the exemption would not be lost where an employer makes a bona fide reduction in salary due to economic conditions and the employee meets all other requirements for the exemption, we will also address your inquiry regarding the effect of losing the exemption. We are unable to make a general statement about when a change in police would begin to operate and cause an employee to be nonexempt. However, if an employer changes the duties or reduces the wages so that an employee is not exempt during a given period, the loss of the status would be effective only after the change. Additionally, it is possible to change the position back to an exempt status if the employee subsequently receives a salary and performs the requisite duties. However, the exemption may be lost if the changes in status occur so frequently that one can conclude that the employee is not really paid a salary or otherwise exempt.

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 that 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 that is in litigation with respect to, or requiring compliance with the provisions of the FLSA.

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).