

FLSA-594

November 19, 1975

This is in reply to your letter of September 19, 1975, requesting approval of a proposed Profit Sharing Plan under section 7(e)(3)(b) of the Fair Labor Standards Act and 29 CFR Part 549 issued pursuant thereto.

You state that those for whom the plan is proposed are managers of gasoline service stations. Some of the managers are exempt from the minimum wage and overtime pay provisions of the Act by virtue of section 13(a)(1) and 29 CFR Part 541, while others are not and consequently entitled to both minimum wage and overtime pay benefits. The Profit Sharing Plan funds to be distributed will be computed on the basis of a percentage of the net profits of each station managed, minus the amount of all shortages and losses of cash, merchandise and equipment from the station managed. In connection with any such losses or shortages, the manager will be granted a non-cumulative allowance of \$15 per month to be credited against sums owing in that month. Payment of losses and shortages which are not offset by the \$15 allowance will be made by offset to profit sharing payments but in no event shall payment due from managers for shortages and losses in any year exceed the total profit sharing payments they are entitled to receive in that year.

Section 549.1(e) provides, as one of the essential requirements for qualification, that the amounts paid to individuals are determined in accordance with a definite formula or method of calculation specified in the plan or trust. The formula or method of calculation may be based on any one or more of such factors as straight time earnings, total earnings, base rate of pay of the employee, straight time hours or total hours worked by the employees, or distribution may be made on a per capita basis.

Under the proposed profit sharing plan, an employee might receive 100% of the amount payable to the employee under the plan or receive nothing because of deductions for certain specified losses and shortages, or the employee may receive some amount between zero and 100%, depending upon the amount of losses and shortages. Therefore, the contribution percentage is not controlling and there is no "definite formula or method of calculation."

Additionally, pursuant to section 549.2(a), a profit sharing plan does not qualify as "bona fide" where, by virtue of its provisions the share of an employee can be determined in substance on the basis of merit rating factors such as quality or quantity of work or efficiency. It is clear that a factor in a manager's quality of work and efficiency is his control of losses and shortages by his employees. Since the profit sharing amount of an employee may vary from zero to 100%, it could be affected in substance by an efficiency factor. Accordingly, the plan does not qualify under section 7(e)(3)(b) of the Act and Regulations, Part 549.

With regard to employees who are exempt from the minimum wage and overtime pay provisions of the Act, payments under the plan would have no effect on the regular rate of pay since overtime pay need not be computed.

Sincerely,

Warren D. Landis
Acting Administrator
Wage and Hour Division