FLSA-637

January 6, 1984

This is in response to your letter of December 3, asking whether dependent care expenses paid by *** Corporation (the employer) on behalf of its employees to dependent care providers would constitute wages under the Fair Labor Standards Act (FLSA).

You refer to an earlier opinion request you submitted similar to this one and to which we responded favorably on June 13, 1983. Your client has now decided to expand the Plan to provide for dependent care expenses under Section 129 of the Internal Revenue Code. You state it is contemplated that each participant who has dependents (within the meaning of the Internal Revenue Code) would be permitted to direct reduction of his/her compensation by an amount up to $500 per month. The amount of the reduction would be credited to the employee's account and would be available for reimbursement of dependent care expenses. Employees would submit a statement of these expenses to the company periodically and the company would issue a check for that amount. At the end of the year, any sum remaining in the account could be withdrawn by the employee or carried over to the next year at the employee's option. The maximum amount that could be carried over to the next year, however, would be $1,000, and any amount in the account in excess of $1,000 would be paid to the employee at year end. It is anticipated that the $500 maximum monthly deposit and the $1,000 maximum carryover would be increased in the future to reflect changes in the cost of living or in the needs of the participants.

All employees who are in job classifications eligible to participate in the company's existing group medical Plan would be eligible to participate in this Plan supplement. You believe that these voluntary deductions for dependent care expense reimbursement are similar to those made for medical expense reimbursement and as such should constitute wages under FLSA.

It is our opinion that the proposed supplement to the Plan which allows employees to select either cash wages or dependent care expense reimbursement as part of their compensation would result in compliance with the minimum wage requirement of FLSA, provided that the sum of cash wages, medical expense and/or premium reimbursement, and dependent care expense reimbursement when divided by the hours of work yields the minimum wage. In addition, we again wish to point out that computation of the regular rate of pay for overtime compensation purposes would not be affected by the redesignation of wages.

Sincerely,

Nancy M. Flynn
Deputy Assistant Administrator/OPO

William M. Otter
Administrator