

FLSA-636

January 26, 1988

This is in further response to your letter requesting an opinion on the application of the Fair Labor Standards Act (FLSA) to a "cafeteria plan" (the plan). You wish to know whether wages which employees elect to contribute to the plan and which reduce the employee-participants' wages below the "minimum wage" would be in violation of FLSA.

As you explained in your letters, the plan is funded through the *** Trust (the trust), a trust within the meaning of section 501(c)(a) of the Internal Revenue Code, and is controlled by an independent trustee. The trust currently purchases benefits through a third party insurance company on a minimum premium basis. The plan provides for an employee to elect to have his or her share of the contribution paid by the employer with a corresponding reduction in the employee's taxable wages or salary. Employee participation is voluntary but is irrevocable for the plan year except for changes in family status. The employer receives no benefit from the trust and upon termination of the trust, the trust fund will be distributed in a manner which solely benefits those employees receiving benefits under the plan and those employees who are participating in the plan at the time of termination.

Section 3(m) of FLSA provides that "wages" paid to any employee include the reasonable cost, as determined by the Secretary of Labor, to the employer for furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, that the cost of board, lodging or other facilities shall not be included as a part of the wages paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee

As explained in section 531.40 of Regulations, 29 CFR Part 531, where an employer is directed by a voluntary assignment, or order of his or her employee to pay a sum for the benefit of the employee to a creditor, donee or other third party, a deduction from wages of the actual sum so paid is not prohibited: Provided, that neither the employer nor any person acting in his or her behalf or interest, directly or indirectly, derives any profit or benefit from the transaction. In such cases, payment to the third person for the benefit and credit of the employee will be considered the equivalent, for the purposes of FLSA, to payment to the employee.

Since the plan allows employees to voluntarily elect participation and meets all of the other requirements discussed above, it is our opinion that the plan is in compliance with the minimum wage requirements of FLSA, provided the sum of cash wages and the voluntarily reassigned wages when divided by the hours of work yields the minimum wage. In addition, we wish to point out that the computation of the regular rate of pay for overtime compensation will not be affected by the redesignation of wages.

We trust that the above is responsive to your inquiry. Our opinion, of course, does not reflect the position of any other Federal agency or any other Federal law.

Sincerely,

Paula V. Smith
Administrator