



January 7, 2005

FLSA2005-3

Dear **Name\***,

This is in response to your request for an opinion on behalf of your client, **Name\*** regarding whether a proposed pre-payment plan is permissible under the provisions of the Fair Labor Standards Act (FLSA).

Your client is a contractor that repairs and maintains commercial aircraft. Because many contracts have short lead times and need prompt completion, **Name\*** workforce may work many overtime hours one week, and far fewer than 40 hours in other weeks. The pre-payment plan is intended to afford a more stable wage by paying hourly employees for 40 hours each week. When employees do not work 40 hours, the excess pay is considered an advance against hours that will subsequently be worked. When overtime is worked, the advance offset will be computed at time and one-half the rate then in effect. If the employee works more overtime hours than **Name\*** has advanced, **Name\*** will pay time and one-half in cash on the next payday.

**Name\*** will maintain a running record of pay and hours worked for each employee and will never owe an employee overtime pay. Acceptance of the plan will be a condition of employment. If the company holds pre-payment credits at the time an employee terminates, the amount will be deducted from the employee's final paycheck. If the final check does not cover the advance, the **Name\*** will seek to collect the full amount by whatever method it decides is cost-effective.

As you know, overtime compensation due an employee must normally be paid at the time of the employee's regular pay day. 29 CFR 778.106. As explained in a May 21, 1971 opinion letter (enclosed), there is no objection, however, if the employer pays in advance the anticipated overtime compensation to become due to an employee. This is the basic principle of the pre-payment plan. Thus some employers, in an attempt to keep the wage or salary constant from pay period to pay period, pay their employees a sum in excess of what they earn or are entitled to in a particular week or weeks, and that sum is considered to be a pre-payment or advance payment of compensation for overtime to be subsequently worked. In other words, the employer and the employee agree that in any week in which the employee works less than the applicable statutory work week, the employer will advance the employee the difference between pay for the applicable statutory maximum workweek and the amount he or she would have received if he or she had been paid only for the number of hours worked. Plans of this type require the use of a system whereby the employer can maintain a running account for each employee of the amount to the employer's credit. At no time may the employer owe the employee overtime compensation. In any workweek in which the pre-payment credits are not sufficient to equal the additional overtime compensation due the employee, the difference must be paid on the next payday. See 32j16c of the Field Operations Handbook (enclosed) for a full discussion of the pre-payment plans.

A pre-payment plan cannot be applied to an employee who is paid a salary under an agreement that the employee will receive the salary even when he or she works less than the regular number of hours in some weeks. Also, it cannot be applied to an employee paid a salary for a fluctuating number of hours worked from week-to-week. Since the nature of such employees' employment is that they will receive the fixed basic salary regardless of the number of hours worked, it cannot be said that they are paid in excess of what they earn, or to which they are entitled, in any week in which they receive the fixed salary, even though such weeks may have been short workweeks. See 29 CFR 778.113-.114.

You state that the plan you propose is identical to one used by **Name\*** a corporate affiliate of **Name\*** and you have enclosed a copy of an Opinion Letter dated July 20, 1993 in which the same plan is found to meet the minimum wage and overtime compensation requirements of the FLSA. This position has not changed and the pre-payment plan for hourly employees you describe also meets these requirements.

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 by a party to pending litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.,  
Acting Administrator

Enclosures

*Note: \* The actual name(s) was removed to preserve privacy.*