



May 12, 2006

FLSA2006-15

Dear **Name\***:

This is in response to your letter inquiring whether your client's fluctuating workweek method of payment complies with the requirements of the Fair Labor Standards Act (FLSA) and 29 C.F.R. § 778.114 (copy enclosed).

Your client utilizes the fluctuating workweek method to compensate its salaried non-exempt employees. The employer has an established sick leave plan that allows employees to accrue sick leave absences. An employee may accrue 4 hours of paid sick leave per month after the first 30 days of employment. The employer debits hours from the employee's bank of paid sick leave when the employee is absent under the sick leave policy for any duration. Your client would like to know whether it may take full day deductions from the salary of an employee paid on the fluctuating workweek method after the employee has exhausted the employee's sick leave bank, or before he or she has earned enough sick leave to cover the absence.

According to 29 C.F.R. § 778.114(a), a salary paid based on the fluctuating workweek method is intended to compensate an employee "for whatever hours he is called upon to work in a workweek, whether few or many." In addition, subsection (c) requires that "the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked." You argue that the "salary basis" requirements of 29 C.F.R. Part 541, the regulations implementing the overtime and minimum wage exemption for certain executive, administrative, and professional employees, should apply to the definition of salary in 29 C.F.R. § 778.114. Your argument is erroneous in that the salary basis requirement and the deductions from salary that are allowed as set forth in section 541.602 (copy enclosed) apply solely to the FLSA section 13(a)(1) overtime and minimum wage exemption. *See Wage and Hour Opinion Letter August 20, 1991 (copy enclosed).*

The fluctuating workweek regulation does not authorize similar deductions. In contrast, the regulation requires the employer to pay the fixed salary "for the hours worked each workweek, whatever their number." 29 C.F.R. § 778.114(a). Thus, the fixed salary is the employee's straight time compensation, both "for long workweeks as well as short ones." 29 C.F.R. § 778.114(c). Therefore, it is the longstanding position of the Wage and Hour Division that an employer utilizing the fluctuating workweek method of payment may not make deductions from an employee's salary for absences occasioned by the employee. *See Wage and Hour Opinion Letters August 20, 1991, November 30, 1983, December 29, 1978, and March 1, 1967 (copies enclosed).* However, an employer may take a disciplinary deduction from an employee's salary for willful absences or tardiness or for infractions of major work rules, provided that the deductions do not cut into the required minimum wage or overtime compensation. *See Field Operations Handbook § 32b04b(b) (copy enclosed); see also Sampson v. Apollo Resources, Inc, 242 F.3d 629, 639 (5th Cir. 2001).* If the deductions are made frequently or consistently, then the practice of making such deductions would raise questions as to the validity of the compensation plan. 29 C.F.R. § 778.306(b) (copy enclosed). Therefore, it is our opinion that your client may not make full day deductions from the salary of its fluctuating workweek employees when the employee has exhausted his or her sick leave bank or has not yet earned enough leave to cover the absence.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express 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 letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private 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 is responsive to your inquiry.



Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

Enclosures:

29 C.F.R. § 778.114

29 C.F.R. § 541.602

29 C.F.R. § 778.306

Wage and Hour Opinion Letters 8/20/1991, 3/1/1967, 12/29/1978, and 11/30/1983

Field Operations Handbook § 32b04b(b)

**Note: \* The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7)**