



Wage and Hour Division (WHD)

FLSA2006-7

March 10, 2006

Dear **Name***:

This is in response to your letter requesting an opinion regarding whether your client may deduct from the salaries of exempt employees or require them to reimburse the company for damage to or loss of company equipment without jeopardizing the employees' exempt status under the Fair Labor Standards Act (FLSA) exemption for executive, administrative, or professional employees. It is our opinion that such deductions or reimbursements would violate the salary basis requirements of FLSA section 13(a)(1) (copy enclosed).

Your client would like to impose a fine on its exempt employees who damage equipment they use in performing their jobs, such as cellular telephones and laptop computers. You ask whether the fine may be imposed as a deduction from an employee's salary for the replacement or repair cost and, if not, whether the employer can require the employee to pay for the damage out of the employee's pocket. The employer currently has a policy that requires deductions from the wages of its non-exempt employees for the cost of lost or damaged tools or equipment, which has never brought a non-exempt employee's net pay below the minimum wage for any given pay period. You stipulate that for the purposes of rendering an opinion, we are to assume that the employees in question are otherwise exempt under the FLSA. Thus, our response expresses no view as to whether the employees in question meet the duties test for the section 13(a)(1) exemptions.

Section 13(a)(1) of the FLSA provides a complete exemption from the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 C.F.R. part 541. An employee may qualify for exemption if all of the pertinent tests are met relating to duties, salary level, and compensation "on a salary basis," as discussed in the regulations. Please note that the Department issued revisions to the Part 541 regulations exempting certain executive, administrative, and professional employees, and these revisions were published as a final rule in the Federal Register on April 23, 2004 (69 Fed. Reg. 22,122). The revised Part 541 regulations went into effect on August 23, 2004.

To qualify for exemption, an employee must generally be paid at a rate of at least \$455 per week on a salary or fee basis. Under 29 C.F.R. § 541.602 (copy enclosed), in order for employees to be considered paid on a "salary basis" they must be paid "a predetermined amount . . . not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). Furthermore, "subject to the exceptions provided in [section 541.602(b)], an exempt employee must receive the full salary for any week in which the employee performs any work." *Id.* Section 541.602(b) lists the permissible exceptions to the above rule. None of the exceptions listed contemplates charging employees a fine for damage to or loss of company equipment. The Wage and Hour Division (WHD) interprets these regulatory provisions to mean that if a particular type of deduction is not specifically listed in section 541.602(b) (formerly section 541.118(a)), then that deduction would result in a violation of the "salary basis" rule.

The WHD takes the position in its enforcement of the FLSA that deductions from the salaries of otherwise exempt employees for the loss, damage, or destruction of the employer's funds or property due to the employees' failure to properly carry out their managerial duties (including where signed "agreements" were used) would defeat the exemption because the salaries would not be "guaranteed" or paid "free and clear" as required by the regulations. Such impermissible deductions violate the regulation's prohibition against reductions in compensation due to the quality of the work performed by the employee. Consequently, any deductions made to reimburse the employer for lost or damaged equipment would violate the salary basis rule.

It is WHD's long-standing position that an exempt employee must actually receive the full predetermined salary amount for any week in which the employee performs any work unless one of the specific regulatory exceptions is

met. In this regard, see Field Operations Handbook § 22b14 (deductions from otherwise exempt employee's salary may not be made for cash register shortages; deductions may be made only for the reasons stated in the regulations); WH Opinion Letter November 4, 1981 (deductions from salary of exempt restaurant manager of amount reflecting unacceptably high charge for unauthorized use of restaurant's business telephone would result in loss of exemption) (copies enclosed). As the preamble to the final rule explains, the final rule retained the salary basis requirement "virtually unchanged from the [now prior] regulation," and but for "a few identified exceptions" an employee must receive the full salary for any week in which the employee performs any work. 69 Fed. Reg. at 22,176. Moreover, the Department specifically rejected suggestions from several commenters that we add an additional exception for payments in the nature of restitution, fines, settlements, or judgments an employer might make based on the misconduct of an employee. 69 Fed. Reg. at 22,178. The commenter identified in the preamble gave as one example of its suggested change allowing an employer to make a deduction for costs arising out of an execution of an order to buy/sell securities for a client if the employee mistakenly orders 1000 shares of stock instead of 100 shares. We believe the commenter's suggestion is similar to the issue your client has raised, and the final rule does not authorize such a deduction from salary.

Accordingly, any employer policy that requires deductions from the salaries of its exempt employees to pay for the cost of lost or damaged tools or equipment issued to them would violate the salary basis requirement, thereby necessitating an evaluation under 29 C.F.R. § 541.603 to determine the effect of the improper deduction. It would not matter whether an employer implements such a policy by making periodic deductions from employee salaries, or by requiring employees to make out-of-pocket reimbursements from compensation already received. Either approach would result in employees not receiving their predetermined salaries when due on a "guaranteed" basis or "free and clear" and would produce impermissible reductions in compensation because of the quality of the work performed under the terms of the employer's policies, contrary to 29 C.F.R. § 541.602(a).

By way of background, you also mentioned that your client has adopted a policy requiring its nonexempt employees to sign a statement that they will be responsible for the costs of loss or damage to the employer's tools and equipment that the employer provides for the employees to perform their jobs, and that the policy requires deductions from the employees' wages for such costs. With respect to nonexempt employees, an employer may not lawfully require an employee to pay for an expense of the employer's business if doing so reduces the employee's pay below any statutorily-required minimum wage or overtime premium that is due, because employers must pay all statutorily-required minimum wage and overtime premium finally and unconditionally, or "free and clear." 29 C.F.R. § 531.35 (copy enclosed)¹. For example, "tools of the trade" and other materials or equipment incidental to carrying on the employer's business are considered business expenses of the employer that may not be transferred to employees if doing so cuts into their statutory minimum wage or overtime premium pay entitlements. 29 C.F.R. §§ 531.3(d), 531.32(c) (copies enclosed). Violations occur in two ways: (1) directly, when an employer deducts the cost of furnishing the employee with tools or equipment used in the employer's business from an employee's pay; or (2) indirectly, when the employee must incur out-of-pocket expenses to buy the item and the employer fails to reimburse the employee for the outlay. See 29 C.F.R. § 531.35; WH Opinion Letter February 16, 2001 (copy enclosed).

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. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; Hultgren v. County of Lancaster, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures:

FLSA §§ 13(a)(1), 18(a)

29 C.F.R. § 541.602

29 C.F.R. §§ 531.3,-.26,-.32,-.35, and-.37

WH Opinion Letters Dated November 4, 1981 and February 16, 2001

Field Operations Handbook § 22b14

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

¹ While you indicated that these deductions have never brought a nonexempt employee's net pay below the minimum wage for any given pay period, you did not indicate whether such deductions may have reduced any of the time-and-one-half overtime premium pay that would be due when such employees worked over 40 hours in a single workweek. Under the FLSA, an employer must pay overtime compensation, at not less than one and one-half times the employee's full regular rate of pay, for each hour worked in the workweek in excess of the applicable maximum hours standard, and no impermissible deductions may reduce any such statutorily-required overtime pay (in addition to the FLSA's protection of minimum wage earnings in a non-overtime workweek). 29 C.F.R. § 531.37 (copy enclosed). Furthermore, various other federal, state, and local laws regulate payment of wages, prohibit or restrict payment of wages in services or facilities, outlaw "kickbacks," restrain assignments, and otherwise govern the calculation of wages and the frequency and manner of paying them. Nothing in the FLSA or its regulations or interpretations overrides or nullifies any higher standards or more stringent provisions of such other laws. See 29 U.S.C. § 218(a); 29 C.F.R. § 531.26 (copies enclosed).