U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 25, 2004 **FLSA2004-5**

Dear ***Name****,*

This is in response to your letter requesting an opinion on the application of Section 13(a)(1) of the Fair Labor Standards Act (FLSA) to two rehabilitation pay programs that your client is considering for exempt employees who are recuperating from an injury or illness. The programs are meant to encourage the employees to return to work on a part-time basis if they are medically able to do so. In particular, you inquired about how the proposed programs would affect the employees' exempt status under the FLSA's salary basis requirement when the employees are medically able to work only part-time and are paid in part through the disability insurance pay program and in part for the time that they work.

You state that under both plans an employee would receive (a) disability pay under a bona fide disability insurance plan and (b) a pro rata share of his or her pre-disability salary. Under both programs, the employee would be guaranteed a total weekly salary of at least $250. Please note that the minimum salary required to qualify for the Section 13(a)(1) exemption rises to $455 per week effective August 23, 2004, see 69 FR 22122. In calculating the employee's pay under both programs, the employer first would compute an hourly rate equivalent, based on the employee's normal weekly salary, and presuming a 40-hour week. Under the first program, for every hour the doctor determined that the employee was medically unable to work, the employee would be paid at a reduced rate (typically 50% to 70%). In addition, the employee under the first program would be paid the full hourly rate for every hour he or she actually worked in the week. For example, an employee normally paid a salary of $800, who was medically able to work only half the week, would receive $280 in disability pay (20 hours x $20/hour x .7). For every hour actually worked, up to the 20 hours a week the doctor allowed, the employee would be paid $20. Thus, the employee's pay would fluctuate each week based upon the number of hours actually worked.

Under the second program, for every hour the employee is medically unable to work, the employee similarly would be paid a reduced portion of the computed normal hourly rate equivalent. In addition, the employee would be guaranteed the full hourly rate for every hour he or she is deemed able to work and anticipates working in a week, whether or not the employee actually works that number of hours. Thus, under the above example, the employee would be guaranteed $280 for the 20 hours he or she is deemed medically unable to work. If the employee anticipated working the other 20 hours, the employee also would receive a fixed amount of $400, whether or not those hours were actually worked. Thus, under this plan, the amount of the employee's compensation would not fluctuate. However, if the doctor's instructions changed as the employee's condition either improved or deteriorated, or the employee's work plans changed, these numbers would vary.

You asked whether an employee paid pursuant to each of the above rehabilitation pay plans would continue to be compensated on a salary basis (and therefore would retain his or her exempt status), where the absences involved partial day absences rather than full day absences.[1] You also stated that your client would consider the alternative of converting the employees to non-exempt status during the period of their recovery. You asked for confirmation that such a conversion would not cause other, non-rehabilitating exempt employees to become nonexempt.

First, we believe that your client could convert recuperating employees to non-exempt pay status during the disability period without jeopardizing the exempt status of other salaried exempt employees who are not on disability. As a November 13, 1970 opinion letter states, if an employee's change in pay moves them from exempt to nonexempt status, that change does not affect the employee's status during other periods of employment when all the requirements for the exemption are satisfied, absent evidence of an

[1] As you correctly noted, if an employee's time off involves absence of a full day or more, the FLSA regulations clearly allow deductions from the employee's guaranteed salary, for full day absences for sickness or disability, where the employee has exhausted his or her leave allowance under the sick leave plan or has not yet qualified for sick leave under the plan. 29 C.F.R. § 541.118(a)(3) and §541.602(b)(2) in the final regulations effective August 23, 2004, see 69 FR 22122. Thus, your question is properly limited to the situation where a recuperating employee's medical condition requires partial day absences, not absences in full day increments.

intent to "circumvent the salary basis requirement." Thus, for example, "[r]ecurrent changes in an employee's status may lead to an across-the-board denial of the exemption" for that employee. Administrator's Opinion WH-93, CCH ¶ 39,710, November 13, 1970. An employee's change in status due to a disability generally will not be recurrent. Moreover, the change will occur only pursuant to a doctor's conclusion that an employee is partially disabled from working, rather than under circumstances indicative of an employer's intention to evade the salary basis requirement. Therefore, such a change to non-exempt pay status will not affect the future exempt status of the rehabilitating employee or other, non-rehabilitating exempt employees.

Second, if your client prefers to maintain an employee's exempt status during the recuperation period, we believe that your client's second proposed rehabilitation pay plan is consistent with the salary basis requirement. As you discussed in your letter, §22b00 of the Field Operations Handbook (FOH) states that an employer may make a bona fide reduction in an employee's salary because of a "reduction in the normal scheduled workweek" so long as the reduction "is not designed to circumvent the salary basis requirement." In the 1970 opinion letter discussed above, we addressed a situation involving an employer that already had made extensive layoffs, but needed to further reduce costs either by reducing the workweek of its employees or laying off additional employees. We concluded in that instance that the salary basis requirement would not preclude a reduction in employees' salaries to match the reduced workweek, because the reduction to avoid layoffs was bona fide and not designed to circumvent the salary basis requirement. A March 4, 1997 opinion letter allowing a salary reduction when the normal workweek was reduced from 40 to 32 hours to avoid layoffs due to reduced state funding for mental health services reached the same result. We believe that a reduction in salary due to an employee's reduced workweek while the employee is medically incapacitated from working full-time is directly analogous to these previous situations, assuming that the rehabilitation pay program applies only to significant periods of disability (*i.e.*, recurrent changes in the normal scheduled workweek, such as a change for every routine short-term illness, more likely would appear to be designed to circumvent the salary basis requirement). Thus, under the second proposed system of payment, your client could properly reduce the employee's guaranteed salary based on the anticipated number of hours worked and continue to meet the FLSA's salary basis requirement.

However, we believe that the first proposed system would not be assured to comport with the salary basis requirement, because the amount of money the employer guarantees to pay would not, in many instances, satisfy the requirement that there be a reasonable relationship between the amount of pay guaranteed to the employee and the employee's actual earnings. Wage and Hour's longstanding "reasonable relationship" requirement, explained in FOH § 22b03, applies where an employee's salary is computed on an hourly rate basis. It requires that the weekly guarantee be roughly equivalent to the employee's actual normal earnings. Using the example in your letter, an employee who may work up to 20 hours would receive $280 under the disability component of the first plan and be paid an additional $0 to $400, depending upon the actual number of hours worked. Thus, the employee's actual earnings could vary significantly from week to week under the first plan, and the plan does not ensure that the guaranteed salary (at least $250 as represented in your letter) would bear a reasonable relationship to the employee's actual normal weekly earnings.[2] Given the numerous compensation arrangements involving an employee's guaranteed minimum and actual earnings, the existence of a reasonable relationship would have to be determined on a case-by-case basis.

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. This opinion is applicable under the old FLSA regulations and the new FLSA regulations implementing minimum wage and overtime pay exemptions

[2] In contrast, your client's second proposed rehabilitation pay program based on the employee's anticipated number of hours worked guarantees the employee 100% of his or her actual normal weekly earnings, *i.e.*, $680 per week under the 20-hour example described above, and thus clearly satisfies the reasonable relationship requirement necessary for employees to be considered paid on a salary basis during the rehabilitation period.

that are scheduled to take effect on August 23, 2004, see 69 FR 22122. 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

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