



February 14, 2001

FLSA2001-1

Dear *Name**,

This is in response to your letter requesting an opinion concerning the application of section 7(e)(3)(b) of the Fair Labor Standards Act (FLSA) to the 401(k) pension plan of the *Name**. Specifically, you are seeking the Administrator's approval of your plan as a bona fide thrift or savings plan.

The *Name** originally established a 401(k) plan on December 1, 1985 and has maintained a favorable IRS determination. After a contract agreement with the Guild of *Name** employees, *Name** restructured the 401(k) plan effective July 1, 1999. Under the plan, an eligible participant is any *Name** employee who is covered by the Guild of *Name** employees' contract with the *Name**. An employee may choose to contribute 1% of his/her pay, and *Name** will match 1.5%. You enclosed an additional matching scale based upon the employee's length of service to the *Name**. If the length of service ranges from 0-5 years, 5-10 years, or over 10 years and the employee chooses to contribute 2% of his/her pay, the maximum employer contribution would be 3%, 4%, and 5%, respectively.

Effective July 1, 2000, if savings achieved from health insurance enrollment changes are \$26,000 or more, and the employee chooses to contribute 2% and his/her length of service range from 0-5 years, 5-10 years, 11-20 years, or over 21 years, the maximum employer contribution to the pension plan would be 3%, 5%, 6% and 7%, respectively. As a result of the changes to the 401(k) plan, *Name** will be contributing more than 100% of the match of any employee who chooses to participate in the 401(k) plan. This additional employer contribution would cause the total employer contributions to exceed the total amount saved or invested by the participating employees during the year.

As you know, a "bona fide thrift or savings plan" for the purpose of section 7(e)(3)(b) of the FLSA is required to meet all the standards set forth in paragraphs (b) through (f) of §547.1 and must not contain any of the disqualifying provisions set forth in §547.2 of 29 CFR Part 547. For example, the plan must be a definite written program adopted by the employer or by contract as a result of collective bargaining for the purpose of encouraging savings by providing employees with an incentive to accumulate regularly and retain savings. The plan must set forth the category of employees eligible to participate and may not base eligibility on hours of work, productivity or efficiency (except to exclude part-time or casual employees). The plan also must specify the amount an employee may save or provide a definite formula for determining the amount, such as a percentage of pay. Subsection 547.1(e) provides, among other things, that the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year, provided, however, that a plan permitting a greater contribution may be approved by the Administrator if the plan would otherwise be a valid one.

Based on the information presented, it is our opinion that the 401(k) plan meets the requirements of §547.1 and does not contain any of the disqualifying provisions in §547.2 and, thus, is approved as a bona fide thrift or savings plan within the meaning of section 7(e)(3)(b) of the FLSA.

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 on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.



Sincerely,

Thomas M. Markey
Acting Administrator

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