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

October 28, 2004 **FLSA2004-17**

Dear ***Name****,*

This is in response to your letter asking whether having smokers pay a larger portion of their health insurance premiums would affect the computation of the regular rate for overtime purposes under the Fair Labor Standards Act (FLSA).

You state that your client asks employees at the start of their employment to sign a form to indicate whether they are smokers. If they are not smokers, they receive a $100 per month reduction in the amount they are required to contribute toward their group health insurance premiums. This reduction results in the company paying 95% of the cost of their health insurance premiums. If they are smokers, the company pays 50% of the cost of their health insurance premiums. You state that this $100 benefit appears on the employees' pay stubs as a monthly reduction in their premium payment, not as income. The benefit is paid directly and irrevocably to the health insurance company. It is not taxed as income, and employees do not have the right to assign the benefit to anyone else. Since the rates paid on behalf of the employees differ, your concern is whether this impacts the regular rate for overtime.

Overtime premium payments under the FLSA are based on time and one-half the regular rate of pay. Section 7(e) of the FLSA requires that all remuneration for employment paid to, or on behalf, of an employee must be included in calculating the regular rate, except for those payments specifically excluded by sections 7(e)(1) through 7(e)(8). Section 7(e)(4) of the FLSA excludes from the regular rate "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." Regulation 29 CFR §778.214(b) states that "It is section 7(e)(4) which governs the status for regular rate purposes of any contributions made by an employer pursuant to a plan for providing the described benefits. *This is true irrespective of any other features the plan may have* (italics added). Thus, it makes no difference whether or not the benefit plan is one financed out of profits or one which by matching employee contributions or otherwise encourages thrift or savings."

§778.215 sets forth the conditions necessary for an employer's contribution to a benefit plan to qualify for exclusion from the regular rate. They are:

1) "The contributions must be made pursuant to a specific plan or program adopted by the employer…"
2) "The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like."
3) "In a plan or trust, either (i) The benefits must be specified or definitely determinable on an actuarial basis; or (ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or (iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act."
4) "The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement…The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. …"
5) "The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan."

In the scenario your present, the five criteria above are met. The employer has a specific plan which provides for health insurance. The amounts contributed by the employer are pre-set. The employer's portion of the health insurance premiums is made irrevocably to a bona fide benefit plan, and employees

do not receive any of the employer's contribution in cash. The fact that the two groups of employees (smokers and non-smokers) are receiving different contribution levels toward their insurance premiums is a feature of the plan which does not impact the analysis of the plan under section 7(e)(4). Therefore, the requirements of section 7(e)(4) are met, and the difference between the employer's contributions to the health insurance premiums does not have to be included in the regular rate.

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 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 this information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

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