



August 26, 2005

FLSA2005-24

Dear **Name\***,

This is in response to your request for an opinion concerning whether your client's proposed method of paying professional accountants satisfies the "fee basis" form of compensation under 29 CFR §541.605.

You request that your client's ("Company") proposed method of compensation be evaluated in light of the final rule implementing the minimum wage and overtime pay exemptions under section 13(a)(1) of the Fair Labor Standards Act (FLSA). This section provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in the final rules at 29 CFR Part 541 that took effect on August 23, 2004. An employee may qualify for exemption as a bona fide professional employee if all the pertinent tests relating to duty, salary level and salary or fee basis are met.

In your case, we do not believe that the Company's method of payment qualifies as payment on a fee basis.

You state that the Company outsources accountants to provide accounting and financial information management services, primarily to small and medium sized businesses. A significant portion of the services provided by the accountants is performed in their homes, where they process client financial transactions and maintain accounting records via computer. For discussion purposes, you ask us to assume that the Company's accountants satisfy the "duties test" for the learned professional exemption.

The Company charges its clients primarily on a "per transaction" or "flat fee" basis. That is, a flat fee is charged for each entry into the client's books (transaction), such as, for example, electronically entering a vendor bill; generating a check for bill payment to a vendor; posting payroll entries; entering an invoice or a customer payment, etc. Clients are charged a base flat fee for services, which includes visits to the customer to pick up required documentation, reconciling balance sheet accounts, and maintaining accounting systems. Additional flat fees are charged for extra services, such as generating printed reports and making additional visits to the client.

The Company also charges clients in hourly increments for certain services that cannot be defined on a transaction basis. In a conversation on March 11, 2005 with a member of the Wage and Hour Division staff, you stated that with respect to "hourly" services to the client, such as setting up the computer system or meeting with the client to review certain invoices, the accountant would be paid a percentage of what is charged to the client. The clients in this situation are charged in six-minute increments. You further state that accountants would be paid additional amounts on an hourly basis for certain "non-billable" activities, normally *de minimis*, such as attendance at training sessions and staff meetings.

The Company desires to pay its accountants a percentage of what is billed to clients for actual work performed by the accountants for the clients. It would pay an accountant from 30% to 40% of what is billed to the client for flat fee services, depending on the skill level and experience of the accountant. For example, assume the Company charges \$2.00 per transaction for entries into the client's accounting system. The accountant would then be paid between \$.60 to \$.80 for each such transaction. Similarly, assume the client is charged a flat fee of \$75.00 for weekly base services, including office visits to pick up necessary documentation (invoices, receipts, etc.). The accountant would be paid a designated percentage of the fee charged to the client, in the example given, between 30% to 40% of the \$75.00 fee charged to the client, regardless of the time it took to perform the base services.

The weekly compensation paid to accountants under this system would vary depending upon the amount of billable transactions and services each accountant performs each week. However, you state that, for purposes of this discussion, the requirements of 29 CFR §541.605(b) would be met as the resulting pay



in every case would result in a rate being paid to accountants equal to no less than \$455 per week, if the accountant worked a 40 hour week.

With regard to the “uniqueness” factor under section 541.605(a), you ask us to assume the following facts:

1. The Company employs business accounting software, available for licensing on the open market to perform services to clients;
2. Entries are made and posted by the accountants in accordance with general ledger accounting principles, with which they must be familiar;
3. Many transactions involve entries of a repetitive but not necessarily identical nature. For example, there will be certain bills and invoices that may be entered each week, month, etc. The amounts vary from week to week or month to month, but the general ledger account in which the entry is made does not change. However, the accountant must exercise professional judgment in the management of a client’s accounting system, in assuring that each entry is made correctly in the appropriate category, in assuring that the client’s internal and external reporting requirements are met, in advising clients regarding the accounting treatment of expenses, revenues, receipts, payments, etc.

Below is a discussion of the “fee basis” form of payment under the regulations, which is followed by an analysis of whether the Company’s proposed method of compensation discussed above can be considered as payment on a “fee basis” within the meaning of the regulations.

As stated in section 541.605(a), “[a]dministrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a ‘fee basis’ within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a ‘fee’ is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.”

After reviewing the proposed pay plan described above, we believe that the “per transaction” or “flat fee” basis of compensation, from which an accountant would primarily derive his or her pay based on a percentage, more resembles piecework payments rather than payments on a “fee basis” under the regulations. It appears that an accountant, for example, paid \$.60 to \$.80 for each entry he or she makes to the client’s accounting system would be performing a series of jobs repeated an indefinite number of times for which identical payments would be made over and over again. Moreover, the history of the fee basis regulation, as there were no substantive changes made to the previous rule, demonstrates that the fee basis of payment does not involve a predetermined amount paid regularly over a long period of time. See 69 FR 22122, 22184 (April 23, 2004); Opinion Letter dated October 19, 1999 (copy enclosed). The fact that the accountants in question would be paid the same predetermined sum for each transaction is a strong indication that such transactions are not unique. Id.; Opinion Letter dated April 15, 1982 (copy enclosed). Accordingly, it is our opinion that payment based on a “per transaction” or “flat fee” basis as discussed above is not a “fee basis” arrangement that satisfies the regulations.

We also believe that the “hourly” services basis of compensation, from which an accountant would in part also derive his or her pay based on a percentage, cannot be considered payment on a “fee basis” under the regulations. Such compensation would be based on the amount of time worked and not on the accomplishment of a given single task regardless of the time required for its completion as the rule requires. Therefore, it is our opinion that such accountant would not be compensated on a “fee basis” within the meaning of 29 CFR §541.605(a). Thus, an accountant who meets the duties test under the learned professional exemption would nevertheless fail to qualify for the exemption if compensated in the manner discussed above. Even if the first aspect of the pay plan were modified so that it could be determined to be a proper “fee basis” under the regulations, the plan nevertheless would not qualify



under these same regulations because it is combined with an hourly pay component. As explained in the preamble to the final rule, “[w]e continue to believe that payment of a fee is best understood to preclude payment of additional sums based on the number of days or hours worked.” See 69 Fed. Reg. at 22184; Elwell v. University Hospitals Home Care Services, 276 F.3d 832 (6th Cir. 2002).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a 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 letter 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, Nebraska, 913 F.2d 498, 507 (8<sup>th</sup> Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.  
Deputy Administrator

Enclosures: Opinion Letters dated October 19, 1999 and April 15, 1982

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