



October 6, 2004

FLSA2004-17NA

Dear *Name**,

This is in response to your question regarding the application of the Fair Labor Standards Act (FLSA) to the vacation policy of one of your clients. Under your client's plan, employees earn paid vacation hours each pay period. The longer the employee works for the firm, the more vacation hours are earned. The employer permits employees to take up to two weeks of advanced vacation prior to accruing vacation hours. An employee who takes vacation prior to accrual incurs a negative leave balance that is reduced as the employee continues to accrue vacation. If the employee leaves the company before he or she has accrued sufficient vacation time to correct this negative leave balance, your client deducts the amount of the unearned vacation time from the employee's final paycheck. You ask whether this is permissible if the deduction reduces the employee's rate of pay below the minimum wage in the final paycheck.

You have identified two sources that you are concerned appear to provide conflicting advice on such a situation. The Wage and Hour Division (WHD) Opinion Letter No. 834 (10/11/84) that you cite states, in part, that "[i]t has been our longstanding position that where an employer makes a loan or an advance of wages to an employee, the principal may be deducted from the employee's earnings even if such deduction cuts into the minimum wage or overtime pay due the employee under the FLSA."

You also cite the BNA Wage and Hour Manual at 91:512, which deems improper employer attempts to deduct money for losses, such as damage to employer equipment. This, however, may be viewed more properly as an employer expense of doing business, not as a bona fide employee loan.

The position expressed in the WHD Opinion Letter may be applied to your client's situation. Employees have presumably been informed in advance of the unearned vacation time policy: the employer will deduct from their pay the cost of such vacation time if they leave the company prior to earning sufficient vacation time to eliminate the vacation deficit. If this is the case, the amount of wages advanced as paid vacation time falls into the same category as a bona fide loan or cash advance to which the employee has voluntarily agreed. As such, the employer may deduct the amount advanced for the vacation hours from the employee's final paycheck, regardless of whether overtime hours were worked in the final week or whether the deduction brings the employee's pay below the applicable minimum wage. See Field Operations Handbook 30c10; opinion letters dated March 20, 1998 and November 16, 1977 (enclosed). The employer may not, however, make any assessment for administrative costs or charge any interest payment that brings the employee below the minimum wage. Moreover, the hourly rate of pay deducted from the final paycheck must be the rate the employee was paid at the time of the advanced paid vacation, rather than a higher rate of pay the employee may earn at the time he or she leaves employment with your client. Please be aware, however, that although such a deduction may be permissible under the FLSA, there may be state statutes under which such a deduction would not be permitted.

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 the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures

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