



May 13, 2004

FLSA2004-3

Dear *Name**,

I am writing in response to your request for an opinion regarding whether reimbursement for certain employee meal expenses may be properly excluded from the employee's "regular rate" of pay under the Fair Labor Standards Act (FLSA). As you know, Section 7(e)(2) of the FLSA allows for an exclusion from the regular rate when an employer reimburses an employee for expenses incurred in the furtherance of the employer's interests, such as reasonable payment for travel expenses.

Your client requires that his or her employees frequently travel out of town to work. They are paid by the hour and receive time and one-half their hourly rate when they work more than 40 hours per week. In addition, your client reimburses them for actual out-of-town expenses such as tolls, gas, lodging, all meals, and on rare occasion repair of company property. You wish to know whether it is acceptable under the FLSA to exclude from the regular rate reimbursement payments that are made for the meals an employee eats while in travel status. You state that you wish a response from this office that your client may rely on under Sections 259 and 260 of the Portal-to Portal Act, an "absolute defense" to any claims of a violation of the FLSA.

Although you state that you find 29 CFR 778 (copy enclosed) to be unclear on the subject of meal reimbursements, focusing on the context in which the meal occurs should clarify the regulatory guidance. For example, section 778.217(d) mentions employee lunches in the discussion of reimbursement for "expenses personal to the employee." An employer ordinarily may not exclude from an employee's regular rate of pay the payment for costs that an employee would ordinarily incur for his or her own benefit. In other words, if an employer reimburses an employee for expenses normally incurred by the employee for the employee's benefit, then the employer is increasing the employee's regular rate by the amount of the reimbursement. On the other hand, section 778.217(b)(4) *does* allow an exclusion from the regular rate when an employer provides "supper money," or a reasonable amount given an employee to cover the cost of supper in a situation where he or she would ordinarily leave work in time to have supper at home, but instead must remain to work additional hours for the employer's benefit.

Similarly, section 778.217(b)(3) allows the exclusion from the regular rate of payments that an employer makes as reimbursement of over-the-road expenses incurred when an employee travels on his or her employer's business. You state that this is the case for your client's employees. In this situation the regulation allows an exclusion from the regular rate for transportation, travel expenses and "*living expenses away from home*" [italics added]. Certainly the phrase "living expenses" includes the cost of food, and the necessity of eating meals away from home is an additional expense that the employee incurs for the employer's benefit. Thus, your client may properly reimburse employees for the cost of their meals while traveling for work, and exclude this payment from the employee's regular rate of pay.

Please note that section 778.217(c) cautions that any payments to an employee which are disproportionately large or which are not reasonably approximate to the employee's expense *will* be included in the employee's regular rate of pay.

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 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 the above information is responsive to your inquiry.



Sincerely,

Tammy D. McCutchen
Administrator

Enclosure

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