



June 29, 2006

FLSA2006-16NA

Dear **Name*** :

This is in response to your request for an opinion concerning whether your client's proposed pay plan, which takes into account the employee's performance during a calendar quarter to determine that employee's hourly rate for the following quarter, complies with the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). Based on a review of the information provided, it is our opinion that your client's proposed pay plan complies with the FLSA.

You state that your client employs route sales drivers. The proposed pay plan will compensate route sales drivers at a base hourly rate of more than \$16. Upon the pay plan's implementation, the route sales driver's base hourly rate is increased according to length of service. The new base hourly rate is guaranteed.

Under the pay plan, in each quarter, the route sales driver's hourly rate may remain the same, or it may increase or decrease by \$0.20 to \$1.20, based on the route sales driver's performance during the previous quarter. The route sales driver's performance is measured by three main criteria, including customer service, route efficiency, and matters related to safety violations, vehicle abuse, and similar issues. No matter how often the route sales driver meets the criteria in any or all quarters during the duration of the pay plan, the maximum possible cumulative increase is \$1.20 per hour. Moreover, regardless of how many times the route sales driver fails to meet the criteria in any or all quarters, the route sales driver's hourly rate for any quarter will never be less than the guaranteed base hourly rate.

Under the proposed plan, the application of the criteria, the determination of each route sales driver's hourly rate, and the communication to the route sales driver of the hourly rate (including an explanation of how it was derived) would be accomplished before the route sales driver commenced any work for the following quarter. The route sales driver would sign a wage rate notice informing him or her of the applicable hourly rate. All hours worked over 40 in a workweek would be paid at time and one-half of the regular rate.

You ask whether the pay plan described above complies with the FLSA. For purposes of this response, you also ask us to assume that the route sales drivers are subject to the FLSA's minimum wage and overtime pay requirements.

The FLSA requires that all covered and nonexempt employees be paid not less than the federal minimum wage of \$5.15 per hour for all hours worked and overtime for all hours worked over 40 in a workweek. The employer may pay an employee at different rates of pay for work at different times provided no rate is less than the federal minimum wage. See Wage and Hour Opinion Letter January 22, 1999 (copy enclosed). Since the route sales drivers will be paid not less than \$5.15 per hour for all hours worked and overtime for hours worked over 40, it is our opinion that your client's proposed pay plan complies with the FLSA's minimum wage and overtime pay requirements.

We have also examined whether the pay raise may be considered a bonus under FLSA section 7(e)(3) (copy enclosed) that "must be apportioned back over the workweeks of the period during which it may be said to have been earned." 29 C.F.R. § 778.209(a) (copy enclosed). The regulations clarify that "[b]onus payments are payments made in addition to the regular earnings of an employee." 29 C.F.R. § 778.208 (copy enclosed). We believe that the pay raise is not a bonus because there is no payment to the employee of an additional specific sum upon meeting certain criteria; rather, in this case, the employer determines changes to the employee's hourly rate, if any, for prospective



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

implementation, based on meeting those criteria. Therefore, amounts paid to the employee under the proposed pay plan are considered part of the regular hourly wages earned and are included in the employee's regular rate when earned.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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 letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues 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 letter is responsive to your inquiry.

Sincerely,

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

Enclosures:
FLSA section 7(e)(3)
29 C.F.R. §§ 778.208-.209
Wage and Hour Opinion Letter January 22, 1999
Fact Sheet #23

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