U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-2

January 7, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning whether proposed payments to educational consultants constitute payments on a fee basis or salary basis under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) and applicable regulations. This opinion is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

You state that the company employs educational consultants to provide services to schools and school districts throughout the country. These educational consultants are assigned to projects lasting various periods of time. You request that the Department of Labor (Department) assume that educational consultants meet the duties tests of the administrative or professional exemptions.[1] You state that the company will determine educational consultants' compensation on a per-project basis regardless of the amount of time required to complete the project. The company will make payments for the project in "equal pre-determined installments" biweekly or monthly. You request that the Department assume that the amount of the per-project payment will exceed the currently enforced minimum salary threshold required by 29 C.F.R. § 541.605(b).[2]

Your letter includes two examples of the proposed method of payment:

Example 1: The company assigns educational consultant A to Project One to develop a new curriculum for teaching literacy for its school district client. Educational consultant A will work on the project for the district's academic year (a 40-week duration), and he or she will work irregular hours ranging from zero to 80 per week, including a minimum of 100 days of on-site support. Educational consultant A will be paid $80,000 for the project in 20 biweekly

[1] As the administrative and professional exemption applies only to "employees," *see* 29 U.S.C. § 213, the Department also necessarily assumes that the educational consultants described in the facts you have presented are properly classified as employees, rather than as independent contractors.

[2] The Department revised the regulations located at 29 C.F.R. part 541 and issued a Final Rule on September 27, 2019 with an effective date of January 1, 2020. *See* 84 FR 51230. The Final Rule set the standard salary level at $684 per week (or $35,568 annually for a full-year worker), up from the previously enforced salary level of $455 per week. *Id.* The Final Rule also set the total annual compensation level for highly compensated employees at $107,432, up from the previously enforced annual compensation level of $100,000. *Id.*

installments of $4,000 (*i.e.*, $2,000 per week) regardless of the number of hours worked in any specific week. Educational consultant A will perform no other work for the company when not working on Project One.

Example 2: While working on Project One, educational consultant A is assigned to Project Two. Project Two will last eight weeks and involves designing and conducting five teacher workshops. Educational consultant A will be paid an additional $6,000 in four $1,500 biweekly payments for Project Two (*i.e.*, $750 per week). During the four biweekly periods when Projects One and Two overlap, educational consultant A will be paid $5,500 biweekly (= $4,000 Project One + $1,500 Project Two, or $2,750 per week).

As illustrated in your second example, in which educational consultant A accepts an assignment from the company for Project Two while already performing work on Project One, resulting in additional compensation on top of the $2,000 per week already being paid, the total compensation paid to an educational consultant in any particular week or pay period might change several times throughout the year depending on the number of projects to which the consultant is assigned. Additionally, you indicate that the company and customer may reevaluate and revise the scope of a particular project after it has commenced. On unusual occasions, changes to the scope of a project are so significant that the company and customer will renegotiate their agreement. As a result of such changes, the total compensation paid to the employee for that project may be changed prospectively, impacting the amount of the biweekly payments.

Regarding these examples, you ask whether the proposed per-job payment method is in compliance with the fee basis regulations described in 29 C.F.R. § 541.605(a). If it is not payment on a fee basis, you inquire as to whether the company's proposed pay method would qualify as a permissible salary in accordance with the salary basis regulations found in 29 C.F.R. §§ 541.600 and 541.602.

GENERAL LEGAL PRINCIPLES

The FLSA exempts from its minimum wage and overtime pay requirements any "employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). An employer may claim this exemption for any employee who satisfies the duty- and salary-related requirements set forth in 29 C.F.R. part 541.[3] To determine the scope of an exemption, WHD gives the statutory text a "fair (rather than a narrow) interpretation" because the FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum wage and] overtime-pay requirement[s]." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted).

An employer may properly claim the exemption for administrative and professional employees that satisfy the duties tests applicable to those exemptions, provided the employees are paid "on a salary or fee basis." 29 C.F.R. §§ 541.200(a)(1) and 541.300(a)(1). An employee is paid on a salary basis if he or she receives each pay period on a weekly or less frequent basis, a

[3] As noted earlier, we assume that the educational consultants meet the duties requirements set forth in the regulations regarding administrative and professional employees for purposes of this request.

predetermined amount constituting all or part of their compensation that is not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. § 541.602(a). The salary cannot be less than the amount required under 29 C.F.R. § 541.600 and must meet the other requirements set forth in 29 C.F.R. § 541.602. In contrast, administrative and professional employees are paid on a fee basis pursuant to the regulations if they receive "an agreed sum for a single job regardless of the time required for its completion." 29 C.F.R. § 541.605(a). It is based on the "accomplishment of a given single task" and not "on the number of hours or days worked." *Id.* Fee basis payments "resemble piecework payments" except that a fee is paid for a "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." *Id.*

OPINION

Based on the information provided in your letter, the payment method in example 1 satisfies the salary basis requirement. In this example, you state that for developing a new literacy curriculum, the educational consultant will receive a predetermined amount in 20 biweekly installments paid throughout the district's academic year. You indicate that the amounts of these payments will not vary from week to week or month to month based on the number of hours worked by the consultant on the project and, for purposes here, we presume they will not vary based on the quality of the work performed. We also presume that the other requirements of 29 C.F.R. § 541.602, including the restrictions on deductions, are met. As a result, this payment structure satisfies the requirement that employees be paid a "predetermined amount constituting all or part of the employee's compensation" paid weekly or less frequently, provided the payments are not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. § 541.602(a); *see also* WHD Opinion Letter, 1999 WL 1788150, at *3 (Sept. 3, 1999); *Faludi v. U.S. Shale Sols., L.L.C.*, No. 17-20808, 2019 WL 3940878, at *3 (5th Cir. Aug. 21, 2019).

The scenario described in example 2 also complies with the regulations. In example 2, the same educational consultant in example 1, is assigned to a second eight-week assignment (Project Two) while continuing to work on the original assignment. For completing the second project, in addition to payments received for work on the first project, the consultant will be paid $6,000 in four $1,500 biweekly installments, for a total of $5,500 per pay period during the eight weeks in which the projects overlap. The employer's payments for the second project also satisfy the requirements as "extra" compensation under the regulations. "An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement." 29 C.F.R. § 541.604(a); *see also Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004) (explaining that "as long as there is a non-deductible minimum, additional compensation on top of the non-deductible salary is permissible"); WHD Opinion Letter, FLSA2006-43, 2006 WL 3832994, at *7 (Nov. 27, 2006) (stating that "the … compensation structure, [excess commissions or fees above the guaranteed predetermined minimum amount] as described, meets the salary basis requirements for exemption"). The "additional compensation may be paid on any basis," such as a flat sum, bonus, or hourly amount, and may be paid for "hours worked for work beyond the normal work week." 29 C.F.R. § 541.604(a).

Here, as explained above, the employee is already paid on a bona fide salary basis that is presumably not subject to improper deductions. The additional compensation, even in the form of a weekly lump sum, is paid for additional work beyond the normal workweek, in other words for work beyond the scope of the first project, and can be paid on any basis. *Id*. As the employee's underlying compensation is not computed on an hourly, daily, or shift basis, the reasonable relationship requirement does not apply. 29 C.F.R. § 541.604(b); *see also* WHD Opinion Letter FLSA2018-25. For these reasons, the additional payment for the second project may be made without changing the employee's exempt status.

The fact that the total amount of compensation (*i.e.*, salary plus additional payments) might change several times throughout the year depending on the particular projects to which the educational consultant is assigned, as described above, does not change the conclusion provided the employee's compensation satisfies the salary basis and extra compensation requirements.

Finally, you note that there are unusual occasions whereby the customer and company determine that the scope of a project should be changed prospectively, such that the employee's per-project pay—and, therefore, the amount of the employee's biweekly payment going forward—may be increased or decreased. These changes may not necessarily defeat the salary basis exemption provided the revised biweekly payment meets the minimum threshold. Indeed, WHD has long found that employers do not violate the salary basis test by prospectively reducing the salaries of exempt employees under certain conditions. *See, e.g.*, WHD Opinion Letter, 1970 WL 26462 (Nov. 13, 1970) (advising that an employer can prospectively reduce its 52 five-day workweeks per year to 47 and have its employees work five four-day work weeks at the end of each year, without losing its exemption for salaried professionals); WHD Opinion Letter, 1998 WL 852696 (Feb. 23, 1998) (concluding that an employer can reduce its salaried employees' workweek because of a temporary work shortage without defeating the FLSA's professional exemption); *see also Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1231 (10th Cir. 2008) (explaining that "an employer may prospectively reduce salary to accommodate the employer's business needs unless it is done with such frequency that the salary is the functional equivalent of an hourly wage," in which case the exemption will be denied) (citation and internal quotation marks omitted). An employee's exempt status may be undermined, however, if the employer and customer engage in such frequent revisions to the contract that the amount of the employee's biweekly compensation for a certain project is rarely the same from pay period to pay period and the circumstances suggest the amount of the payment is, in fact, actually based on the quantity or quality of work performed.

For these reasons, the proposed payment method in the two examples set forth in your letter would constitute payments on a salary basis under a "fair reading" of FLSA Section 13(a)(1), *Encino Motorcars*, 138 S. Ct. at 1142, and the regulations enforced by the Department.[4]

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the Wage and Hour Division for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance,

[4] Having found that the method of payment presented in the examples of your letter is a salary basis, WHD will not separately address whether the method of payment is compliant with the fee basis method.

the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id*.

We trust that this letter is responsive to your inquiry.

Sincerely,

Cheryl M. Stanton
Administrator

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