EXHIBIT

1

elaws - Fair Labor Standards Act Advisor

Volunteers

The Fair Labor Standards Act (FLSA) defines employment very broadly, i.e., "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar **non-profit** organizations that receive their service.

For example, members of civic organizations may help out in a sheltered workshop; men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria as a public duty to maintain effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip. Similarly, an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with disabled children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs.

Under the FLSA, employees may not volunteer services to **for-profit** private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception - public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed. There is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

For information about independent contractors and trainees (including School-to-Work programs) or to find out whether you are covered by the FLSA, click on the underlined text.

Remember that some employees are exempt from various provisions of the law. To explore the broad categories of these exemptions or to obtain further information about the FLSA, click on the underlined text.

For more information, please contact your local Wage and Hour District Office.

Please click on the **Back** button to return to the Advisor.

EXHIBIT

2

U.S. Wage and Hour Division
Little Rock District Office, 10810 Executive Center Drive, Suite 220, Little Rock, AR 72211

August 6, 2013

Subject: Rhea Lana, Inc. d/b/a Rhea Lana's – 1677670

To Whom It May Concern:

A recent investigation of the above named firm under the Fair Labor Standards Act (FLSA) indicates that you might not have been paid as required by the law for the period 01/28/2011 to 01/27/20136. The FLSA requires employers to pay each employee covered by the Act no less than the federal minimum wage and overtime premium pay (at time and one-half the regular rate of pay) for all hours worked in excess of 40 hours in a single workweek. The law contains numerous exemptions from these basic standards.

The Wage and Hour Division contacted the firm and explained the FLSA wage requirements, but the firm did not agree to make payments to you. Under the law, the Wage and Hour Division has the authority to supervise voluntary payment of back wages but cannot itself order such payment. The Department of Labor (Department) is authorized to file lawsuits against employers and request that a court order the payment of back wages; however, after reviewing all of the circumstances in this case, it has been decided and it is not suitable for litigation by the Department. Consequently, no further action will be taken to secure payment of additional money possibly owed to you.

The fact that we will take no further action on your behalf does not affect your private right under the FLSA to bring an independent suit to recover any back wages due. The Congress, recognizing that all complaints may not be resolved or developed for litigation by the Department, has included provisions in FLSA to bring an independent suit to recover any back wages and an equal amount as liquidated damages plus attorney's fees and court costs. The Department does not encourage or discourage such suits. The decision is entirely up to you. However, keep in mind that recovery of back wages under this law is subject to a statute of limitations. Generally, this means that any part of a back wage claim which was earned more than two years before suit is filed may not be collectible.

A copy of the Handy Reference Guide to the Fair Labor Standards Act is enclosed for your information.

Sincerely,

Robert A. Darling
District Director

Link in e-mail: Handy Reference Guide

EXHIBIT

3

U.S. Department of Labor

Wage and Hour Division
10180 Executive Center Drive Suite 220
Little Rock, AR 72211
Phone: 501-223-9114
Fax: 501-223-8734

August 26, 2013

Rhea Lana Rhiner
c/o Rhea Lana's
1055 Sunflower Drive, Suite 104
Conway, AR 72034

Subject: FLSA - Minimum Wage/Overtime Violations of Rhea Lana, Inc. dba Rhea Lana's and Rhea Lana an individual

File Number: 1677670

Dear Ms. Rhiner:

The recent investigation of your firm conducted by Investigator Haynes under the Fair Labor Standards Act (FLSA) covered the period 01/28/2011 to 01/27/2013. The investigation disclosed that your employees are subject to the requirements of the FLSA.

The investigation disclosed violations of FLSA section 6 resulting from the failure to pay employees at least the applicable minimum wage for all hours worked and/or FLSA section 7 resulting from the failure to pay statutory overtime pay for hours worked in excess of 40 hours per week. You agreed to pay $6,369.74 due to 39 employees. Investigator Haynes has advised me that you have agreed to comply with the employees identified as managers and that you have agreed to pay the above-described back wages in full by 06/19/2013.

It is further my understanding that you refuse to comply with the employee group known as consignors/volunteers. Letters have been sent to the consignors/volunteers informing them of their private right under the FLSA to bring an independent suit to recover any back wages due.

We would like to direct your attention to section 16(e) of the FLSA and Regulations, Part 578. As you will note, section 16(e) provides for the assessment of a civil money penalty for any repeated or willful violations of section 6 or 7, in an amount not to exceed $1,100 for each such violation. No penalty is being assessed as a result of this investigation. If at any time in the future your firm is found to have violated the monetary provisions of the FLSA, it will be subject to such penalties.

Copies of the FLSA, Regulation 578, and a Handy Reference Guide are enclosed for your reference. If you have any questions about the investigation or about any aspect of the FLSA, please do not hesitate to contact me or Investigator Haynes.

Sincerely,

Robert A. Darling

Robert A. Darling
District Director

EXHIBIT

4

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

AUG 30 2013

The Honorable Tim Griffin
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Griffin:

Thank you for your letter to Acting Deputy Administrator Mary Beth Maxwell regarding the U.S. Department of Labor (DOL), Wage and Hour Division's (WHD) investigation of Rhea Lana's Franchise Systems, Inc. (Rhea Lana's), located in Conway Arkansas. You ask whether or not the consignors at Rhea Lana's events should be considered employees under the Fair Labor Standards Act (FLSA) and request additional information on the WHD decision to pursue this case.

The FLSA provides that certain volunteers may receive nominal compensation for their services. Section 3(e)(4)(A) of the FLSA provides that the term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State or an interstate governmental agency if the individual receives no compensation or is paid expenses, reasonable benefits or a nominal fee to perform the services for which the individual volunteered and such services are not the same type of services which the individual is employed to perform for such public agency. Examples of volunteers for public agencies include volunteer firefighters, reserve police officers, emergency medical technicians, ambulance drivers, high school coaches, and advisors for extracurricular school activities.

Section 203(e)(5) of the FLSA provides that the term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

WHD communicates to its offices and investigators impart, through the WHD Field Operations Handbook (FOH). The FOH provides WHD investigators and staff with interpretations of statutory and regulatory provisions, procedures for conducting investigations, and general administrative guidance. The FOH reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. FOH section 10b03(c) addresses volunteers (copy enclosed). It states "the nature of religious, charitable, and similar nonprofit organizations, and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for the services rendered."

The FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes. The WHD has recognized that a person may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations. Such a person will not be considered an employee for FLSA purposes if the individual volunteers freely for public services, religious or humanitarian objectives, and without contemplation or receipt of compensation.

The FLSA defines employment very broadly for work performed for a for-profit employer covered by the FLSA. In prior opinion letters, for example, the WHD considered whether the FLSA permitted covered retailers to use members of a charitable organization to wrap Christmas presents or to count inventory in exchange for payments to the charities in lieu of paying wages directly to the workers. The WHD concluded that the protections of the FLSA applied to the members of the charitable organization. In both cases the individuals engaged in activities that were an integral part of the FLSA-covered, for-profit retailer's business. Accordingly, the company's costs of doing business and profitability were favorably enhanced by the proposed "volunteer" activity.

This distinction between "ordinary volunteerism" and the performance of FLSA-covered "work" by employees for commercial profit-making companies has been acknowledged by the U.S. Supreme Court. The Court has recognized that a fundamental purpose of the FLSA was to prevent covered employers from gaining an unfair competitive advantage over other employers through payment of substandard wages. The Court has also recognized that individuals may not waive their statutory entitlements under the FLSA by characterizing the activities they perform for a covered employer as "volunteer." *See Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299 (1984); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). In its only decision directly addressing the status of volunteers under the FLSA, the Supreme Court stated that the purposes of the FLSA "require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. * * * Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." *Alamo Foundation*, 471 U.S. at 302. *See* Wage and Hour Opinion Letter FLSA2002-9, Oct. 7, 2002 (copy enclosed).

Section 203(g) of the FLSA defines employment very broadly to include "to suffer or permit to work." In the application of the FLSA, as distinguished from a person who is engaged in a business of his or her own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant. *See* Fact Sheet #13: Employment Relationship Under the FLSA (copy enclosed).

The WHD has a long standing policy of limiting volunteer status to those individuals performing charitable activities by for-profit organizations. The WHD determined that consignor's at Rhea Lana's events who brought in items to be sold, dropped them off, and then left the premises, were not employees. However, other workers who considered themselves to be "volunteers" and any consignors who also worked at the event (operating the cash register, providing security, and assisting in the sorting and sales of goods) were found to be employees. The WHD determined that the "volunteers" and "consignor volunteers" engaged in activities that are an integral part of the Rhea Lana's FLSA-covered, for-profit business.

Thank you again for your concerns in this important area. If we may be of further assistance to you or your staff, please contact Nikki McKinney in the Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

Laura A. Fortman

Laura A. Fortman
Principal Deputy Administrator

10b THE EMPLOYMENT RELATIONSHIP

10b00 Employment relationship required for FLSA to apply.

In order for the FLSA to apply there must be an employee-employer relationship. This requires an "employer" and "employee" and the act or condition of employment. FLSA Secs 3(d), (e) and (g) define the terms "employer", "employee", and "employ".

10b01 FLSA employment relationship distinguished from the common law concept.

The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of the master and servant relationship. The difference between the FLSA employment relationship and the common law employment relationship arises from the FLSA statement that "Employ includes to suffer or permit to work". The courts have indicated that, while "to permit" requires a more positive action than "to suffer", both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for him or her by another is sufficient to create the employment relationship under the FLSA.

10b02 Method of compensation not material.

The fact that no compensation is paid and the worker is dependent entirely on tips does not negate his/her status as an employee, if other indications of employment are present. If the worker is paid, the fact that he or she is paid by the piece or by the job or on a percentage or commission basis rather than on the basis of work time does not preclude a determination that the worker is, on the facts, an employee with respect to the work for which such compensation is received.

10b03 Religious, charitable, and nonprofit organizations, schools institutions, volunteer workers, member of religious orders.

(a) There is no special provision in the FLSA which precludes an employee-employer relationship between a religious, charitable or nonprofit organization and persons who perform work for such an organization. For example, a church or religious order may operate an establishment to print books, magazines, or other publications and employ a regular staff who do this work as a means of livelihood. In such cases there is an employee-employer relationship for purposes of the Act.

(b) Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees". However, the fact that such a person is a member of a religious order does not preclude an employee-employer relationship with a State or secular institution.

(c) In many cases the nature of religious, charitable and similar nonprofit organizations, and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for the services rendered. For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children;

or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with children with disabilities or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employee-employer relationship.

(d) Although the volunteer services (as described in (c) above) are not considered to create an employment relationship, the organizations for which they are performed will generally also have employees performing compensated service whose employment is subject to the standards of the Act. Where such an employment relationship exists, the Act requires payment of not less than the statutory wages for all hours "worked" in the w/w. However, there are certain circumstances where such an employee may donate services as a volunteer, and the time so spent is not considered to be compensable "work". For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. WH will not consider that an employee-employer relationship exists with respect to such volunteer time between the establishment and the volunteer or between the volunteer and the person for whose benefit the service is performed. Another example is where an office employee of a church may volunteer to perform non-clerical services in the church preschool during off duty time from his or her office work as an act of charity. Conversely, a preschool employee may volunteer to perform work in some other facet of the church's operations without an employment relationship being formed with respect to such volunteer time. However, this does not mean that a regular office employee of a charitable organization can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from exigencies of the operations conducted by the employer.

(e) As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not "work" of the kind contemplated by Sec 3(g) of the Act and do not result in an employee-employer relationship between the student and the school or institution. Also, the fact that a student may receive a minimal payment for participation is such activities would not necessarily create an employment relationship.

(f) The sole fact that a student helps in a school lunchroom or cafeteria for periods of 30 minutes to an hour per day in exchange for their lunch is not considered to be sufficient to make him or her an employee of the school, regardless of whether he or she performs such work regularly or only on occasion. Also, the fact that students on occasion do some cleaning up of a classroom, serve the school as junior patrol officers or perform minor clerical work in the school office or library for periods of an hour per day or less without contemplation of compensation or in exchange or a meal or for a cash amount reasonably equivalent to the price of a meal or, when a cash amount is given in addition to a meal, it is only a nominal sum, is not considered sufficient in itself to characterize the students as employees of the school. A similar policy will be followed where the students perform such tasks less frequently but for a full day, with an arrangement to perform their academic work for such days at other times. For example, the students may perform full-day cafeteria service four times per year. In such cases, the time devoted to cafeteria work in the aggregate would be less than if the student worked an hour per day. However, if there are other indicia of employment or the students

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

October 7, 2002 **FLSA2002-9**

Dear ***Name****,

This is in response to your correspondence addressed to Ms. Kristine Iverson, Assistant Secretary for Congressional and Intergovernmental Affairs, on behalf of ***Name**** Principal. Mr. ***Name**** has concerns over a decision made by his local supermarket, ***Name**** to discontinue charity bagging as a fundraiser for his school. Under this program, students bagged customers' groceries at local food stores and carried the bags to people's cars for tips and donations, but without receiving any wages from the stores. ***Name**** discontinued the program, which took place periodically on weekends, due to concerns that it violated the minimum wage, record-keeping, and child labor provisions of the Fair Labor Standards Act (FLSA) and possibly state law.

Please know that the Administration of President George W. Bush fully supports the principles of volunteerism. As you may recall from his State of the Union address earlier this year, President Bush issued a call to service for all Americans to dedicate at least two years of their lives – the equivalent of 4,000 hours over a lifetime – to serve their communities, our Nation and the world. The President established the USA Freedom Corps and brought together the broadest group of service organizations ever assembled to create the USA Freedom Corps Network as a comprehensive clearinghouse to help citizens find volunteer service opportunities within their neighborhoods and communities at home, and in countries around the globe. The USA Freedom Corps is matching potential volunteers with local service opportunities that strengthen our communities, help people in need, and extend American compassion throughout the world.

It is also important to note that the FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes. The Wage and Hour Division has recognized that a person may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA. Such a person will not be considered an employee for FLSA purposes if the individual volunteers freely for public service, religious or humanitarian objectives, and without contemplation or receipt of compensation. Typically, such volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.

The FLSA defines the concept of employment very broadly with respect to activities performed for the benefit of a for-profit employer covered by the FLSA. In prior opinion letters, for example, the Wage and Hour Division considered whether the FLSA permitted covered retailers to use members of a charitable organization to wrap Christmas presents or to count inventory in exchange for payments to the charities in lieu of paying wages directly to the workers. The Division concluded that the protections of the FLSA applied to the members of the charitable organization. In both cases the individuals engaged in activities that were an integral part of the FLSA-covered, for-profit retailer's business. Accordingly, the company's costs of doing business and profitability were favorably enhanced by the proposed "volunteer" activity.

This distinction between "ordinary volunteerism" and the performance of FLSA-covered "work" by employees for commercial profit-making companies has been acknowledged by the Supreme Court of the United States. The Supreme Court has recognized that a fundamental purpose of the FLSA was to prevent covered employers from gaining an unfair competitive advantage through payment of substandard wages. The Court has also recognized that individuals may not choose to decline or waive their statutory entitlements under the FLSA by characterizing the activities they perform for a covered employer as "volunteer." See Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 299 (1984); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945). In its only decision directly addressing the status of volunteers under the FLSA, the Supreme Court stated that the purposes of the FLSA

"require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. ***Name**** Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." Alamo Foundation, 471 U.S. at 302.

In *Alamo Foundation,* a non-profit religious organization operated commercial businesses staffed by the Foundation's "associates," who were mostly drug addicts, derelicts or criminals before their conversion and rehabilitation by the Foundation. The Foundation provided food, clothing, shelter, and other benefits to the workers, but no cash wages. One associate, for example, testified that she considered her work in the Foundation's businesses as part of her ministry and that she did not work for material rewards. *Id.* at 300. This same associate also testified that "no one ever expected any kind of compensation, and the thought is totally vexing to my soul." *Id.* at 300-01.

In *Alamo Foundation*, the district court held that the Foundation was a covered "enterprise" under the FLSA and, despite its incorporation as a non-profit religious organization, its businesses were engaged in ordinary commercial activities in competition with other commercial businesses. While "associates" who worked in the businesses testified at trial that they vigorously protested the payment of wages, asserting that they considered themselves volunteers working only for religious and evangelical reasons, the court nevertheless found they were "employees" under the FLSA's economic reality test of employment. The Court of Appeals for the Eighth Circuit affirmed the district court's interpretation.

The Supreme Court also upheld the Court of Appeals decision. In so doing, the Court distinguished the activities of nonprofit groups that may be excluded from coverage under the FLSA on the basis that they lack a business purpose, citing the Department of Labor's regulations at 29 C.F.R. §779.214. The Court observed that both lower courts had found that the Foundation's businesses served the general public in competition with ordinary commercial enterprises, and that the payment of substandard wages would give the Foundation and similar organizations an advantage over their competitors. The Court noted that "it is exactly this kind of 'unfair method of competition' that the Act was intended to prevent, see 29 U.S.C. §202(a)(3), and the admixture of religious motivations does not alter a business' effect on commerce." 471 U.S. at 299. Moreover, the Court affirmed the finding that "the associates must have expected to receive in-kind benefits – and expected them in exchange for their services ..."

While certain differences may be noted between the *Alamo Foundation* case and the charity bagging activities at ***Name**** we believe that the Supreme Court's holdings control the conclusions reached in this matter. Our review revealed that the local supermarket involved, which is a commercial for-profit retailer subject to the requirements of the FLSA, reduced the working hours of some of its paid employees in order to have the students bag the customers' groceries. The Wage and Hour Division found that the bagging activities were an integral part of the employer's provision of customer service because the employer paid regular employees to do the activities when the students were not present. The retail supermarket is organized for a business purpose, engages in ordinary commercial activities, and serves the general public in competition with other commercial enterprises. The students expected to receive compensation for their services in the form of customer tips. Their services were not in themselves devoted to their community programs, but instead were being provided directly to a commercial for-profit business enterprise that derived an economic benefit from their services. It does not matter that the students indicated a desire that payment of the tips they received in exchange for performing their services for the supermarket should go to their particular community organizations. In this situation, it is our view that the students would have to be considered employees of the retail supermarket and not volunteers. Consequently, the retail supermarket would be responsible for complying with the FLSA with respect to the students who bag the customers' groceries at the supermarket and carry them to the customers' cars.

Our conclusion is based on the specific facts of this scenario. Charitable activities performed in another set of circumstances might require a different analysis and conclusion. Of course, after being paid their

wages, employees are certainly free to donate part or all of their wages to charitable causes of their choosing. In addition, there are many other types of fundraising activities that the students could consider that would not raise concerns under the FLSA – such as holding a car wash, bake sale, or spaghetti dinner, or just soliciting contributions for their various charitable causes, among other possibilities.

It is truly unfortunate that in the scenario described the students may not perform this specific activity as a fundraiser for their schools without implicating compliance issues under the FLSA. However, as explained above, the principles of law established by the courts do not permit them to perform uncompensated services on a volunteer basis for a commercial for-profit employer subject to the FLSA in circumstances like those of the baggers at ***Name****.

Sincerely,

Eric S. Dreiband
Deputy Administrator

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

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(Revised July 2009)

Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the FLSA.

Characteristics

An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1) The extent to which the services rendered are an integral part of the principal's business.

2) The permanency of the relationship.

3) The amount of the alleged contractor's investment in facilities and equipment.

4) The nature and degree of control by the principal.

5) The alleged contractor's opportunities for profit and loss.

6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7) The degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Requirements

When it has been determined that an employer-employee relationship does exist, and the employee is engaged in work that is subject to the Act, it is required that the employee be paid at least the Federal minimum wage of $7.25 per hour effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The Act also has youth employment provisions

which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

Typical Problems

(1) One of the most common problems is in the construction industry where contractors hire so-called independent contractors, who in reality should be considered employees because they do not meet the tests for independence, as stated above. (2) Franchise arrangements can pose problems in this area as well. Depending on the level of control the franchisor has over the franchisee, employees of the latter may be considered to be employed by the franchisor. (3) A situation involving a person volunteering his or her services for another may also result in an employment relationship. For example, a person who is an employee cannot "volunteer" his/her services to the employer to perform the same type service performed as an employee. Of course, individuals may volunteer or donate their services to religious, public service, and non-profit organizations, without contemplation of pay, and not be considered employees of such organization. (4) Trainees or students may also be employees, depending on the circumstances of their activities for the employer. (5) People who perform work at their own home are often improperly considered as independent contractors. The Act covers such homeworkers as employees and they are entitled to all benefits of the law.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

EXHIBIT

5

3 of 5 DOCUMENTS

[NO NUMBER IN ORIGINAL]

U.S. DEPARTMENT OF LABOR

1996 DOLWH LEXIS 26

July 18, 1996

JUDGES: Maria Echaveste, Administrator

OPINION:

[*1]
This is in response to your letter requesting an opinion within the meaning of Section 10 of the Portal-to-Portal Act, *29 U.S.C. § 259* (1985) on behalf of your client, a mail order company offering general merchandise to the public through a catalog. You are seeking an opinion as to the application of the Fair Labor Standards Act (FLSA) to groups who wish to "volunteer" their services to your client.

You state that your client, in an effort to provide enhanced customer service, offered gift-wrapping services to customers in the four to six-week period preceding the 1995 Christmas season by utilizing temporary employees. The gift wrapping must be done on the premises of the client so as not to slow the delivery process.

Your client is again considering offering gift-wrapping services during the 1996 pre-Christmas holiday season. Several non-profit community and church groups have offered to provide volunteer members to do the gift-wrapping for your client. These groups have also expressed a hope that your client would donate a sum of money to the group; and one or more of the groups have suggested that the donation be equated to a per package [*2] amount. Your client does not plan to control the hours of the volunteers, will not directly supervise them, will only establish general rules of conduct, and will permit use of restrooms and breakroom facilities to the volunteers. Furthermore, your client believes that these volunteers do not fall within the definition of employees under the FLSA and, thus, feels no obligation to pay than directly for their time worked.

Please note that we have a longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations. In order for the FLSA to apply, an employment relationship must exist. The FLSA defines the term "employ" as including "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually [*3] on a part-time basis, for public service, religious, or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable, and similar not-for-profit organizations which receive their services.

It is our opinion that the groups in question would be employees of your client and not volunteers, as discussed above. Their services would not in themselves contribute to community or religious programs; instead the services are going to a profit-seeking company. It makes no difference that the groups have agreed that payment should; go to their community organizations or churches. The groups intend to contribute an amount of money, not services, to their organizations. The groups are selling their services to your client in order to earn that money. Therefore, your client would be responsible for complying with the monetary provisions of the FLSA, as discussed in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

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 [*4] 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 also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any 'agreement or order applying, of requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormationOffer & AcceptanceEstate, Gift & Trust LawPersonal GiftsElements of Valid GiftsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral Overview

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[NO NUMBER IN ORIGINAL]

U.S. DEPARTMENT OF LABOR

1996 DOLWH LEXIS 22

June 28, 1996

JUDGES: Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team

OPINION:

[*1]
This is in response to your letter requesting an opinion as to the treatment of certain volunteers under the Fair Labor Standards Act (FLSA).

You state that you represent a not-for-profit hospital which utilizes volunteers. These volunteers generally perform functions related to patient comfort and welfare such as tending to the patients' non-medical requests such as requests for drinks, snacks, magazines and personal care items. The volunteers also perform certain functions which are generally the duties of compensated employees, including office duties and some duties which are performed by nurses and orderlies. Some of the volunteer positions are staffed by a local service organization for which the hospital makes donations. The volunteers do not work in compensated positions at the hospital nor do they receive remuneration from the hospital or service organization.

Further, the hospital maintains several gift shops which sell flowers, balloons, gifts, publications, personal care items and sundries, and which are generally staffed by volunteers. However, due to a lack of volunteers available or willing to work on weekends and holidays, the hospital pays certain employees to [*2] work at these gift shops on weekends and holidays. Specifically, you wish to know whether the staffing of these gift shops with volunteers would be in violation of the FLSA.

Please note that we have a longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations. In order for the FLSA to apply, an employment relationship must exist. The FLSA defines the term "employ" as including "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable, and similar not-for-profit organizations which receive [*3] their services.

With respect to individuals seeking to perform volunteer services in hospitals, the Department does not consider

individuals who volunteer to minister directly to the comfort of the patients in a manner not otherwise provided by the hospital to be employees under the FLSA. This could include reading to the patients, writing letters for the patients or entertaining the patients, which are duties not ordinarily performed by nurses or other such employees of the hospital. The work in the gift shop, however, does not involve ministering directly to the comfort of the patients and is on occasion performed by paid employees of the hospital. Therefore, individuals working in the gift shop are employees under the FLSA subject to the requirements of the Act.

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 [*4] a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesInvestigative Authority

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[NO NUMBER IN ORIGINAL]

U.S. DEPARTMENT OF LABOR

1995 DOLWH LEXIS 48

September 11, 1995

JUDGES: Maria Echaveste, Administer

OPINION:

[*1]
This is in response to your inquires concerning the application of the Fair Labor Standards Act (FLSA) to "volunteering" by employees of a for-profit employer. We regret the delay in responding to your inquiry.

As you know, we have a longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations. On a rare occasion, we have considered as volunteers, and not employees, individuals who performs activities of a charitable nature for a for-profit hospital, where the hospital does not derive any immediate economic advantage from the activities of the volunteers and there is no expectation of compensation. However, we have never opined that employees of for-profit hospitals may perform activities for their employers, and we decline to do so here.

You also ask about volunteers with respect to organizations that provide hospice services to the terminally ill. You state that there is an apparent conflict between FLSA and the medicare provisions of the Social Security Act (SSA) (*42 U.S.C. 1302* et seq.). The latter [specifically, *42 U.S.C. 1395x* [*2] (dd) (2) (E) (i)] defines a "hospice program," in part, as an organization that "utilizes volunteers in its provision of care and services."

We do not believe that the SSA repeals the FLSA by implication with respect to volunteers. Nor do we believe that the SSA necessarily creates a conflict with our policy on volunteers under the FLSA. We see no reason to treat hospice volunteers differently than volunteers in a hospital situation. Therefore, the Wage and Hour Division will not assert an employment relationship between a for-profit hospice and individuals who volunteer their services to perform activities of a charitable nature, such as running errands, sitting with patients so that a family may have a break, and going to funerals. We consider these types of activities to have humanitarian and, for some, religions implications, and are what the Supreme Court was referring to when it mentioned "ordinary volunteerism" in *Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985).*

On the other hand, individuals may not donate their services to hospices to do activities such as general office or administrative work that are not charitable [*3] in nature. Moreover, with respect to those individuals already employed by a hospice, they may not "volunteer" their services to the hospice.

You have also asked a general question about whether employees of a for-profit organization may donate their service without compensation for activities such as staffing a booth at a function where the employer displays its goods or services, or working as a guide during an employer's "open house." The answer to this question is no. Employees may not donate their services to their for-profit employers.

We trust that the above is responsive to your inquiry.

Sincerely,

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicareCoverageGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesHospitals

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[NO NUMBER IN ORIGINAL]

U.S. DEPARTMENT OF LABOR

1998 DOLWH LEXIS 83

September 28, 1998

JUDGES: Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team

OPINION:

[*1]
Dear

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to volunteer ushers for a not-for-profit performing arts center. Specifically, you would like to know if these volunteer ushers are exempt from the definition of "employees."

The center's mission is to bring quality performing arts to local residents. It recently entered into a long-term lease of a medium-size theater, and announced that one of its goals in leasing the theater was to open a venue whose rental costs would be affordable for not-for-profit performing arts groups. Typically, rental costs are driven by two factors: the costs of the facility and the theater staff.

The theater's ushers are represented by their own local union. The center's current contract with this union, which governs for-profit productions only, contains no minimum employment requirement for the theater. The center is permitted under its union contract to hire whatever number of ushers in whatever classifications it deems necessary for each performance. There is usually only one performance per day, lasting no more than three hours. The ushers are paid between $ 24.50 and $ [*2] 36.50 per performance, and not per hour. Employees are entitled to overtime if they exceed a contractual maximum number of performances in a single workweek, they work performances in excess of three hours in duration, or if they work Sundays, holidays or more than two performances in a single day. The ushers also accrue vacation pay based on their gross earnings. The center bills production companies who lease the theater the entire expense of its ushers.

During collective bargaining negotiations, the center has proposed that it could lower the cost of ushers to non-profit production companies by using a reduced core group of ushers who would be paid at union scale. The center would then use volunteers to augment its core, paid usher staff. The volunteers would be drawn from a list developed by the center through general advertisement, and it would require non-profit companies to provide their own personnel (presumably volunteers) to complete the appropriate complement of ushers. Under both plans, the volunteers would receive no compensation for their services, although they would be permitted to watch the non-profit performance for free. The center hopes to recruit a sufficient [*3] number of volunteers so that different volunteers are used for each performance.

The center believes that the volunteer ushers are not employees because (1) they work for their own advantage on the premises of another, without promise or expectation of compensation; (2) they would not as a matter of economic reality depend upon the business to which they render their service; (3) the amount of time rendered by each volunteer usher is relatively insubstantial -- not more than two or three hours per a single night; (4) the center is a non-profit organization, organized for charitable purposes: and (5) they would only be used with the consent of the union, which weighs against the argument that the volunteers would replace regular employees.

We have a longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations. In order for the FLSA to apply, an employment relationship must exist. The FLSA defines the term "employ" as including "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who, without any express or implied compensation [*4] agreement, might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable, and similar not-for-profit organizations which receive their services.

In the situation you describe, the volunteer ushers would be expected to provide the same service that the permanent ushers are being paid to provide, thereby reducing the need for a full complement of paid ushers. The use of unpaid volunteer ushers during the performances sponsored by not-for-profit production companies would result in the displacement of some number of regular paid ushers. In a previous opinion on a similar issue of the use of volunteers at a not-for-profit hospital, the Department allowed that individuals who volunteered to minister directly to the comfort of the patients in a manner not otherwise provided [*5] by the hospital, such as reading to, writing letters for and entertaining the patients were not covered by the FLSA. However, the individuals who were volunteering to work in the hospital gift shop were found to be covered by the law. These employees were not considered to be ministering directly to the patients and the work in the gift shop was staffed at times by paid employees of the hospital.

Therefore, after a careful review of your submission, it is the Department's position that the individuals you propose as volunteer ushers would be considered employees under the FLSA and have to be paid in accordance with the provisions of the law.

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 also represented that this opinion is not sought on behalf of [*6] a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsFormationContracts LawTypes of ContractsLease AgreementsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral Overview

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[NO NUMBER IN ORIGINAL]

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

1999 DOLWH LEXIS 103

September 30, 1999

JUDGES: Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team

OPINION:

[*1]
Dear

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to a not-for-profit organization which provides care and a variety of support services to persons with physical and mental disabilities.

The disabled persons reside in a number of situations including residence with their own family members and in facilities provided by your client and staffed by your client's employees. Your client's employees work in a variety of positions which are both exempt and nonexempt under the FLSA. Some employees provide direct care and services to disabled persons; others work in more indirect roles such as clerical, human resources, accounting and maintenance.

Your client provides periodic trips and outings for disabled persons that involve overnight travel, sightseeing, and touring. These trips may last as long as two continuous weeks. They are designed to provide activities for disabled persons that they would otherwise not be able to experience. In order to staff these trips and outings, the client solicits volunteers from its employees who function as chaperons, tour guides, and companions. Because of the wide variety and [*2] unpredictability involved in the activities, the number of hours that any one employee might devote specifically to administering to the disabled persons as opposed to generally being a member of a touring party is extremely difficult to determine.

To be eligible for selection for the trip, the employee must have basic first aid and related training. He or she is not required to work in a direct care position for the employer. The client pays all travel, lodging and meal expenses for those employees who accompany disabled persons on field trips.

You would like to know if time spent on the trips are considered "hours worked" within the meaning of the FLSA if employees who participate in these trips do so voluntarily without any pressure or coercion from the employer. You

would also like to know whether employees involved in these trips do so voluntarily when their normal jobs (e.g., secretary, clerk or accounting) do not involve regular direct care to the disabled, or when their regular jobs involve feeding, bathing and other supervision of the disabled in a more "permanent" residential setting.

We have a longstanding policy of limiting volunteer status to those individuals performing [*3] charitable activities for not-for-profit organizations. In order for the FLSA to apply, an employment relationship must exist. The FLSA defines the term "employ" as including "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable, and similar not-for-profit organizations which receive their services. Someone who is a paid employee of a not-for-profit organization may not volunteer to perform the same type of services that they perform as a part of their regular job. Moreover, if any employee including someone who typically performs unrelated duties is paid his/her [*4] regular pay or any part of his/her pay, or receives compensation in a non-monetary form such as room and board, or airfare, and free admission to amusement park or other recreational activities, the employee cannot also be in a volunteer status.

In your incoming letter you ask if some or all of these employees are not considered volunteers while on field trips, would the following compensation agreements violate the FLSA.

> **. Full time nonexempt employees would be paid for their normal weekly scheduled hours ranging from 35 to 40 hours at an hourly rate of pay equal to or greater than the applicable minimum wage for the first full workweek they are continuously on such a trip. Additional days on the trip beyond the first workweek would be paid from the employee's accumulated paid leave account. Because their exact hours of "duty" would be difficult to determine, there would be an understanding in effect similar to that addressed in Regulations § 785.23.**
>
> **Additional information on the nonexempt employees was provided to a member of my staff as follows: Nonexempt employees would seldom be asked to volunteer to go on field trips that are for more than one week. Nonexempt** [*5] **employees who have no accrued leave or who run out of leave would be advanced paid leave to be earned later. New nonexempt employees who have not accrued any leave would not be qualified for or selected to participate in field trips as volunteers.**
>
> **. Employees exempt under the "white collar" exemptions would receive their regular salary for the first workweek spent on any trip. Additional days or weeks spent on the trip would be paid for so that the exempt employee would receive his or her regular salary for the workweek with the understanding that these additional days on the trip beyond the first workweek would be deducted from their accumulated paid leave account.**

Before addressing the specific compensation arrangements, it may be helpful to review the principles for determining what are compensable "hours worked." In general, hours worked includes all time an employee may be on duty at the employer's premises or at any other prescribed place of work. However, in the situation you present, there are periods when employees are "off duty", and are completely relieved from duty and which are long enough to enable the employee to use his/her time effectively for his/her [*6] own purposes. Such off-duty periods are not hours worked, and, therefore, are not compensable under the FLSA. Section 785.16.

Since section 785.23 is not applicable to the situation you describe, we assume you are referring to the 24-hour duty/sleep time provision under section 785.22 of Regulations, Part 785. Your letter does not contain sufficient detail

for us to make a definitive decision in regard to the situation you describe. However, where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is of more than 8 hours, only 8 hours may be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and meal periods constitute hours worked. If the sleeping period is so interrupted that the employee cannot get at least 5 hours of sleep, the entire period is working time.

Nonexempt Employee

A nonexempt [*7] employee would have to be paid at least the minimum wage for all hours worked in caring for and attending to the disabled persons and overtime for all hours in excess of 40 in each workweek. Merely paying this employee for the normal workweek or 35 to 40 hours may not be sufficient, if the employee is required to be available to assist the disabled person(s) for extended time periods because of the nature and circumstances of the one or two-week field trips. It should be noted that the fact that the employer reduces the employees leave balances for a period of up to one week of the scheduled trip or outing is an issue that should be resolved by the employer and the employee.

Exempt Employee

For an exempt employee, several situations are possible with differing outcomes. First: An exempt employee may participate in these activities and provided (1) his/her primary duty remains exempt work and (2) the employee receives his/her full pay for each week of such activity, the overtime exemption would not be lost. This could be true regardless of whether the employer reduced the employee's leave banks or made no deductions in the amount of leave available to the exempt employee. [*8] In either case the employee must receive his/her full salary. Second: The exempt employee could be converted to an hourly paid nonexempt employee for the duration of the one to two-week trip and paid at least the minimum wage for all hours worked and overtime for all hours in excess of 40 in each workweek during the entire duration of the trip. The employee could not perform any of his/her exempt duties while being paid in a nonexempt status during the trip or outing. The change to nonexempt status would have to be made on a full workweek basis.

With respect to the use of accrued leave for exempt employees, where an employer has proposed a bona fide benefits plan, it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his/her guaranteed salary. Payment of an amount equal to the employee's guaranteed salary must be made even if the employee has no accrued benefits in the leave bank account, and the account has a negative balance where the employee's [*9] absence is for less than a full day. Further, section 541.118(a) states that an exempt employee need not be paid in any workweek in which he/she performs no work.

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 also represented that this opinion is not sought on behalf of a client or firm that is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment at WillEmployeesLabor & Employment LawWage & Hour LawsCoverage & DefinitionsEmploy