U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-7

June 25, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning whether under the Fair Labor Standards Act (FLSA) an automobile manufacturer's direct payments to an automobile dealership's employee, compensating the employee for work done on behalf of the dealership, may count toward the dealership's minimum wage obligation to the employee. This opinion is based exclusively on the facts you have presented. You represent 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

In your letter and follow-up communications with WHD staff, you represent that your clients, several automobile dealerships ("dealerships"), employ automobile sales consultants ("sales consultants"). At times, these sales consultants receive payments directly from automobile manufacturers ("manufacturers") pursuant to incentive programs for selling certain vehicles or meeting certain sales goals. While the incentive programs are established by manufacturers, participating dealerships communicate program terms to their sales consultants and work with manufacturers to determine whether payments need to be made. Amounts received pursuant to an incentive program are in addition to the compensation paid to the sales consultants by the dealership that employs them. The sales consultants receive the manufacturers' incentive payments only for work performed on behalf of the automobile dealership that employs them, and the dealerships embrace treatment of these payments as wages. You ask whether these incentive payments are considered wages for purposes of satisfying the dealerships' minimum wage requirements under the FLSA.

GENERAL LEGAL PRINCIPLES

The FLSA requires employers to pay their covered, nonexempt employees a minimum hourly wage. 29 U.S.C. § 206(a). This requirement is satisfied if an employee's "overall earnings for the workweek equal or exceed the amount due at the applicable minimum wage for all hours worked . . . up to 40 hours in the workweek." WHD Opinion Letter FLSA 2004-10, 2004 WL 3177883, at *1 (Sept. 20, 2004). The FLSA defines "wage" to include certain non-cash items and, under certain circumstances, a limited amount of tips received by tipped employees. *See* 29 U.S.C. § 203(m). This definition does not serve to limit other payments under the FLSA, but rather establishes that certain non-cash payments and certain tips received by tipped employees may satisfy the FLSA's minimum wage requirements. *See* 29 C.F.R. § 531.27 (explaining that wages under sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206 and 207, standing alone, are presumed to include payment in cash and negotiable instrument payable at par, and section 3(m) "permits and governs the payment of wages in other than cash"). As the Supreme Court has

explained, in the context of determining the regular rate for purposes of calculating overtime pay under section 7(a) of the Act, "[a]s long as minimum hourly rates" established by the FLSA are respected and the regular rate "reflect[s] all payments which the parties have agreed shall be received regularly during the workweek," exclusive of overtime pay, the parties "are free to establish this regular rate at any point and in any manner they see fit." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424–25 (1945) (explaining that "exclusive of overtime payments," the regular rate reflects the payments which the parties have agreed would be received for the work "once the parties have decided upon the amount of wages and the mode of payment"); *see also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948) (the regular rate, which is dependent upon wages, "must be drawn from what happens under the employment contract").

Wages under the FLSA may include third-party payments. *See Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 407–08 (1942) (payments from third parties in the form of tips given to railroad porters were wages creditable towards the employer's minimum wage obligation under the FLSA), *superseded in part by statute*, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101(a), 80 Stat. 830;[1] WHD Opinion Letter (May 25, 1967) (payments from a taxicab company and from a garage to hotel doormen are wages that the hotel may credit toward the hotel's minimum wage requirements); WHD Opinion Letter (Nov. 16, 1966) (monthly "push money" payments from manufacturers or distributors to a retail store's cosmetics or mattress sales employees are wages creditable toward the store's minimum wage requirements, whether paid directly to the sales employees or to the employer for distribution). But this does not mean that all payments from a third party are wages under the FLSA. Whether a payment from a third party constitutes wages depends on the terms of the employment agreement, express or implied, and compliance with the other requirements of the FLSA. *See Jacksonville Terminal Co.*, 315 U.S. at 404; *Sec'y U.S. Dep't of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 133 (3d Cir. 2019) (explaining in the regular rate context that a "third-party payment qualifies as remuneration for employment only when the employer and employee have effectively agreed it will" and looking to whether the practice of the parties showed an implicit agreement concerning the treatment of third-party payments); *see also Bay Ridge Operating*, 334 U.S. at 464; 29 C.F.R. § 778.108 (explaining that the regular rate must be drawn from what happens under the employment contract, dependent upon the amount of wages and the mode of payment decided by the parties).

An agreement to include third-party payments as part of the employee's compensation may be implied based on the particular circumstances, including the understanding and practices of the parties. *See Bristol Excavating*, 935 F.3d at 137 (explaining in the regular rate context that "[t]he deeper an employer gets into the creation, management, and payment of an incentive bonus

[1] In the Fair Labor Standards Amendments of 1966, Congress amended the FLSA to, among other things, extend the Act's protections to additional employees, including in industries that traditionally employ tipped workers. To accompany this expansion of FLSA coverage, Congress additionally amended section 3(m) of the FLSA, 29 U.S.C. § 203(m), to allow employers of "tipped employees," a new term defined in section 3(t), 29 U.S.C. § 203(t), to credit a certain amount of tips received by tipped employees against their minimum wage obligation. In addition, Congress permitted employers to impose mandatory tip pools among employees who "customarily and regularly receive tips," subject to additional requirements. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101(a), 80 Stat. 830.

program, the more those bonus payments begin to look like part of the regular pay structure to which the employer has agreed"); *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2d Cir. 1946) (explaining in the regular rate context that payments may be implicitly part of the employment agreement if actually and regularly paid). "The parties' true agreement is what should matter, not labels." *Bristol Excavating*, 935 F.3d at 132 (citing *Youngerman-Reynolds Hardwood*, 325 U.S. at 424 ("[The regular rate] is not an arbitrary label chosen by the parties; it is an actual fact.")).[2]

Third-party payments similar to the incentive payments at issue here have been found to be wages. *See* WHD Opinion Letter (May 25, 1967); WHD Opinion Letter (Nov. 16, 1966). As the Third Circuit recently opined in a decision addressing the related issue of whether third-party payments constitute "remuneration for employment" for purposes of calculating overtime pay, an employer's embrace of third-party payments as compensation for employment strongly suggests that such payments are part of the employment agreement. *Bristol Excavating*, 935 F.3d at 133 (addressing these WHD Opinion Letters). The Third Circuit further opined that other facts that may be probative in determining whether a third-party payment is part of an implied employment agreement include (1) whether the specific requirements for receiving the payment are known by the employees in advance of their performing the relevant work; (2) whether the payment is for a reasonably specific amount; and (3) whether the employer's facilitation of the payment is more than serving as a pass-through vehicle, as with, *e.g.*, processing tips. *Id*. at 137.

When third-party payments are part of an employment agreement, and to the extent these payments constitutes wages, records must be kept regarding such compensation and it must be included in an employee's regular rate for purposes of calculating overtime under the FLSA. *See* WHD Opinion Letter (May 25, 1967); WHD Opinion Letter (Nov. 16, 1966).

OPINION

Here, the automobile sales consultants receive payments from manufacturers pursuant to an incentive program, and the employing dealership asks whether such third-party payments are wages for purposes of the FLSA's minimum wage requirements. The answer depends upon the agreement between the parties, which may be explicit or implied by the particulars of the incentive program, the understanding and practices of the parties, and any other relevant circumstances.

Although you do not indicate whether the parties have employment agreements that explicitly address whether manufacturers' incentive payments are wages, the facts demonstrate that the payments are, at least implicitly, part of the employment agreement. First, you explain that the dealerships you represent embrace these third-party incentive payments as wages, which as explained by the Third Circuit, strongly suggests the payments are part of the employment agreement. Further, the facts you have represented surrounding the implementation of the incentive programs demonstrate these payments' inclusion in the employment agreement.

[2] Of course, employees cannot agree to waive their rights to compensation under the FLSA. *See, e.g.*, *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (an employee's right under the FLSA to receive overtime compensation "cannot be . . . waived because this would nullify the purposes of the statute and thwart the legislative policies [the FLSA] was designed to effectuate") (internal quotation marks omitted); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705–06 (1945).

Employees know of the specific incentive program terms, which are established by the sponsoring manufacturers and communicated by the dealerships to their sales consultants in advance of performing their sales work. The employing dealerships' role in facilitating these payments is significantly more than serving as a pass-through vehicle. The dealerships learn program terms, communicate these terms to their employees, and work with incentive program sponsors to determine when payments should be made. Given these facts, the incentive payments will be considered part of the employment agreement and count toward minimum wage obligations by the employing automobile dealership.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD 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, 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).**