

Frederic W. Cook & Co., Inc.

New York • Chicago • Los Angeles

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**DEPARTMENT OF LABOR OPINION AFFECTING  
BROAD-BASED STOCK OPTION AWARDS**

In a February 1999 letter, the Department of Labor's (DOL's) Wage and Hour Division issued an opinion<sup>(1)</sup> that could lead to the exclusion of non-exempt salaried and hourly employees (non-exempt employees) from their companies' broad-based stock option plans. In what we believe is the DOL's first ruling with respect to stock option gains, they state that the actual gain from a stock option would have to be spread over the employee's wage base and be used in overtime calculations. Due to the complexity of the calculations and increased cost, which could be quite variable from person to person, we expect that, if this ruling stands, companies would no longer make broad-based option grants to non-exempt employees. This would reverse a trend that has been viewed very favorably by corporate America.

This opinion was requested by a company that planned to grant 100 option shares to each of its full-time employees, except executives and union employees. The company asked if the grant of these options could be considered as a one-time bonus or gift or otherwise qualify for an exclusion from the Fair Labor Standards Act's (FLSA's) requirement that payments to non-exempt employees must be included in their regular rate of pay when calculating overtime compensation. The opinion stated that the gain could not be excluded and that it should be spread over the employee's regular pay rate between the date of exercise and the date the option became available to the employee, up to a maximum of two years. Because employees typically have several years in which to exercise options once they have vested, one or more separate calculations will need to be performed for each non-exempt optionee.

We presume the DOL believes that this opinion with respect to treatment of the gain will increase compensation for non-exempt employees. In our view, the ruling is unfortunate and will have the opposite effect. It could curtail the use of broad-based stock options for non-exempt employees with the result that they will receive lower potential compensation than if they could have received the options. Also, the use of employee stock purchase plans could be curtailed if this principle were applied to those grants as well.

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General questions may be addressed to Beverly Aisenbrey in our New York Office at (212) 986-6330. Specific questions should be referred to counsel. Copies of this letter and other published materials are available on our web site, [www.fwcook.com](http://www.fwcook.com).

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<sup>(1)</sup> DOL opinion letter February 12, 1999, Re: Inclusion of a Stock Option Bonus in Hourly Employees' Regular Rate of Pay