

FLSA-1116

February 25, 1986

Your letter of March 22, 1984, to our New York Regional Office has been referred to this office for response. You request an opinion as to whether a compensation plan proposed by your client, *** which operates a residential therapy program for individuals who are recovering from substance abuse, would comply with the provisions of the Fair Labor Standards Act (FLSA). You state that *** proposes establishing individual fund accounts to compensate clients for work they perform while participating in the treatment program. Client wages would be deposited into these accounts and monies would be withdrawn from them to defray the cost of services, including room and board, provided to clients by ***. We regret the delay in responding to your inquiry.

You state that your client is a nonprofit residential care facility providing for substance abusers. *** clients are, for the most part, individuals who have voluntarily requested assistance. From time to time, services have been provided to persons whose participation in *** treatment program was a condition of probation or parole, or was due to some other referral by the criminal justice system. Under the New York Mental Hygiene Law, State-funded substance abuse programs, such as *** are required to collect a fee from financially-able clients for the services rendered to the clients by the program. Few of *** clients, however, can afford to pay for the services that *** renders.

There are a number of client participation levels in *** treatment program. New clients begin at level one and graduate to more senior levels based upon program progress and the amount of responsibility which *** staff believes they are capable of assuming. Among the aspects of *** rehabilitation and training regimen is the opportunity to participate in certain therapeutic training programs, including the operation of *** drycleaning business wholly owned and operated by *** Clients in advanced treatment program levels may obtain training in the fields of (1) plumbing, electricity, and heating; (2) masonry; (3) logging; and (4) carpentry. *** owns and operates a mobile home park as an additional training source for program participants. You state that the principal purpose of each program is therapeutic, not vocational.

*** clients are compensated at the minimum wage level under FLSA for the services they perform in connection with their participation in one or more of the various therapeutic training programs. However, because it would not further the goals of *** program to pay clients in cash for the services performed, *** proposes a delayed payment of wages. The delay in wage payment is necessary to prevent a program participant from using the cash to purchase unlawful substances.

Under the proposed compensation plan, a client will have an individual fund account created for him or her when he or she enters the program. At the same time, the client will be asked to execute an authorization from empowering *** Executive Director (1) to be paid wages and other monies due and owing the client, from whatever source; (2) to pay, on behalf of the client, the cost of services provided to the client by *** (including

board and lodging, where applicable); and (3) to maintain separate books of account relating to the funds belonging to the client (which books shall be subject to a legal accounting at any time, upon the written request of the client and/or any duly authorized governmental entity). If a client has a positive balance in his or her account at the end of program participation, that sum will be paid to the client upon program termination. If there are no funds, the account will be closed and the client will have no obligation to make up the difference. *** will not charge any fee for administering the client's accounts, nor will it commingle funds from these accounts with *** operating funds. Accordingly, you ask whether this compensation plan would comply with FLSA.

The FLSA is the Federal law of most general application concerning wages and hours of work. Under FLSA, all covered and nonexempt employees must be paid not less than the minimum wage of rate of \$3.35 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 3(m) of FLSA allows an employer to credit toward the minimum wage the "reasonable cost" of board, lodging, or other facilities which are customarily furnished by the employer to his or her employees. However, section 529.4(i) of the enclosed Regulations, 29 CFR Part 529, which applies to the employment of patient workers in hospitals and institutions, prohibits the deduction of any sum from the minimum wage and overtime compensation earned by a patient worker to cover the cost of room, board, or services. The patient worker must receive his or her wages free and clear, except for legal deductions.

Section 529.2 defines a "patient worker" as a sick, aged, or mentally ill or defective individual who receives treatment or care by a hospital or institution, whether he or she is a resident or not, and who has an employment relationship with such establishment, other than in a sheltered workshop.

A hospital or institution, as defined in section 529.2(c) is a public or private, nonprofit or for-profit facility primarily engaged in providing residential care for the sick, the aged, or the mentally ill or defective, including, but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirm, halfway houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed.

Based upon the definitions contained in the regulations and the facts outlined in your letter, it is our opinion that *** is an institution employing patient workers. Therefore, all patient workers employed by *** must receive their wages free and clear.

As stated in section 531.35 of Regulations, 29 CFR Part 531, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of FLSA will not be met where the employee "kicks-back" directly or indirectly to the employer or

to another person for the employer's benefit the whole or part of the wage delivered to the employee.

Section 531.40 allows that where an employer is directed by a voluntary assignment or order of the employee to pay a sum for the benefit of the employee to a creditor, donee, or other third party, deduction from wages of the actual sum so paid is not prohibited, provided that neither the employer nor any person acting in his behalf or interest, directly, derives any profit or benefit from the transaction. In such case, payment to the third person for the benefit and credit of the employee will be considered equivalent, for purposes of FLSA, to payment to the employee.

To use the exception to the "free and clear" requirement provided for in section 531.40, three conditions must be met: (1) the transaction must be voluntary, (2) the transaction cannot profit or benefit the employer, and (3) the employee's assignment or order of payment must be made to a third party and not the employer.

The plan proposed by *** does not satisfy all three conditions. The voluntariness requirement would be satisfied by the *** clients who enter the rehabilitation program on their own volition if they authorize *** to set up the individual accounts into which wages would be paid. The last two conditions, however, are not met. Under the plan, wages will not be paid to a third party as required and, while *** proposes to set up individual accounts, it is unclear whether *** will benefit from the use of client's wages. Assuming that *** did not benefit from the use of client wages and that individual accounts were established with a third party, such as a bank, these last two conditions could be met. Lacking such provisions, *** may not utilize the provisions of section 531.40 to satisfy the "free and clear" payment of wages to clients.

However, if the client is incapable of handling money, the requirement for "free and clear" payment may be accomplished by the appointment of a legal guardian, other than the institution, who has power of attorney over the client's personal affairs, including wages, which may be deposited in a bank account in the client's name.

Although the institution may not deduct any sum from the minimum wage and overtime compensation earned by the patient under 29 CFR Part 529 to cover room, board, or services, it is not the intent of the regulations to preclude the institution thereafter from assessing or collecting the reasonable cost of room, board, and other services actually provided to a patient worker. The collection of such sums from patient workers is allowable only to the extent permitted by applicable Federal or State law and on the same basis as it assesses and collects from nonworking patients.

With regard to the delay in payment of wages to the clients until the conclusion of their participation in the program, FLSA contains no specific provision governing the length of a pay period or the time or frequency with which wage payments must be paid. Under FLSA, wages are required to be paid on the regular payday for the pay period in which the work was performed. State or local law, however, may require wages to be paid at

specific intervals. Section 18(a) of FLSA prevents our approval of a delayed compensation plan which would violate State or local law.

We trust that the above is responsive to your inquiry.

Sincerely,

Herbert J. Cohen
Deputy Administrator

Enclosures