

FLSA-482

April 10, 1992

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to an in-hospital registry program initiated by *** Memorial Hospital (the Hospital) in *** .

You state that the nurses who work under the registry program do so voluntarily, and that the hours worked under the registry program are in addition to the employees' normal working hours or regular working hours. The hours worked under the registry program are paid at a premium rate. You specifically request an opinion as to whether the premium rate paid to the nurses when they work under the registry program can be excluded from their regular rates of pay for purposes of calculating overtime premium pay.

As we advised in our letter to you of April 16, 1991, under the FLSA an employee's regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee except those payments specifically excluded by section 7(e) of the FLSA. Under section 7(e)(5) of the FLSA, the regular rate of pay shall not be deemed to include extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under section 7(a) of the FLSA or in excess of the employee's normal working hours or regular working hours as the case may be. This is discussed in more detail in section 778.202 of Interpretative Bulletin, 29 CFR Part 778.

Based on the information you provide, and provided all the requirements of section 778.202 of the Interpretative Bulletin, are met, it is our opinion that the premium pay paid for certain hours worked by the nurses under the registry program that are in excess of the employees' normal working hours or regular working hours may be excluded from the employees' regular rates of pay under section 7(e)(5) of the FLSA. Such payments would, also, be creditable pursuant to section 7(h) of the FLSA against any overtime premium pay otherwise due such employees.

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 that 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 that is in litigation with respect to, or requiring compliance with, the provisions of the FLSA.

Sincerely,

Karen R. Keesling
Acting Administrator