

11/9/98

Dear

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to home health registered nurses.

You represent a community hospital located in Virginia which operates a home health agency that employs registered nurses (RNs) and licensed practical nurses (LPNs). The nurses travel to the homes of patients who are convalescing from in-hospital treatment to provide a variety of health care services ranging from personal grooming and hygiene to the administration of medication. In an average week, each nurse visits approximately 25-30 patients.

You have concluded that the tasks performed by the LPNs do not qualify them for exemption from the overtime requirements in Regulations 29, CFR Part 541 (copy enclosed). They are paid on a pieceworker basis and receive overtime compensation consistent with Regulations 29, CFR Part 778.418.

The RNs are assigned to patients with more complex medical conditions and they perform tasks that require the skill and knowledge of a registered nurse. Their duties include (1) evaluating patient status and developing a plan of care; (2) developing and revising the plan of care as needed under the direction of a physician; (3) documenting clinical findings of visits and reporting to the treating physician any significant changes or reactions to treatment; (4) coordinating the care needs of the patient with the various medical disciplines; (5) acting as a case manager for the patient; (6) instructing and supervising home health care aides and caregivers; and (7) participating in status meetings with other medical care providers. You ask that we assume that the RNs satisfy the duties test applicable to the professional exemption in the Regulations.

The hospital seeks guidance on its proposal to pay RNs a fee of \$30 per patient visit made. Because the average home health visit takes 1.54 hours, the RN who works a 40-hour workweek would receive far in excess of \$250. Furthermore, the hospital seeks guidance as to whether RNs are properly paid according to the Regulations if they are paid a fixed salary plus a productivity bonus. In this regard, you ask two questions for which our responses follow:

Question 1 - Assuming that the RNs otherwise qualify as exempt professional employees based upon their duties performed, would the RNs be considered as properly paid on a “fee basis” for purposes of §§541.3(e) and 541.313, if the RNs are paid a fee for each visit made, the total of which will not be less than \$250 per week for the equivalent of a 40 hour workweek?

Answer 1 - As you know, §541.313 characterizes payment on a “fee basis” as “payment of an agreed sum for a single job regardless of the time required for its completion.” This regulation further provides that a “fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again.” Id.

It is our opinion that payment on a “per visit” basis is not the type of fee payment arrangement contemplated by the regulations. Section 541.313(d) refers to payment methods made to singers, artists and illustrator/writers to demonstrate the adequacy of a fee payment, i.e., whether the amount of payment meets the regulation’s requirement that the rate of pay is “not less than \$170 per week to a professional employee.” The use of these professional occupations to demonstrate this point suggests to us that the character or nature of the job itself must be unique, and not simply that the performance of the job vary from day to day. While we recognize that the nurse will necessarily make professional judgments and assessments based on his or her skills in providing patient care on each visit, such work is not unique in character because unlike work performed by a singer, artist, or illustrator, the work performed by the nurse is generally repetitive and not original in character.

Question 2 - Would the RNs be considered as properly paid on a “salary basis” for purposes of §§541.3(e) and 541.118 if the RNs are paid both (i) a fixed guaranteed salary of \$750 per week which is not subject to reduction because of variations in the quality or quantity of the work performed, except as otherwise permitted under §541.118(a)(2) and other subsections as applicable; and (ii) a productivity bonus of \$30 for each visit over 25 in a workweek?

Answer 2 - Yes, the RNs would be considered properly paid on a “salary basis” under the Regulations. As discussed in §541.118(b), additional compensation besides the required minimum weekly salary guarantee of at least \$250 may be paid to exempt employees for hours worked beyond their standard workweek without affecting the salary basis of pay. Thus, extra compensation may be paid to an exempt employee on any basis. The extra payment need not be at time and one-half, but may be at straight time, or at one-half time, or flat sum, or on any other basis -- including a \$30 productivity bonus.

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 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,

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

Enclosure