



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2006-26

July 24, 2006

Dear **Name***:

This is in response to your letter and attachments requesting an opinion on the application of section 13(a)(1) of the Fair Labor Standards Act (FLSA) to certain employees of your subsidiary, the Hospital. We regret the delay in responding to your request. You ask for confirmation that the Hospital's respiratory therapists (RTs) who are paid on a salary basis that meets the regulatory standard are appropriately classified as exempt professionals under the FLSA as the term is defined in 29 C.F.R. Part 541 (copy enclosed).

To be employed as an RT at the Hospital, each RT must possess an active state license in respiratory therapy. To obtain such a license, an individual must first obtain the credential of Certified Respiratory Therapist by passing the National Board for Respiratory Care Certification Examination for Entry Level Respiratory Therapists. To sit for this examination, the individual must complete an accredited respiratory therapy educational program. Accredited respiratory care educational programs include two to four years of specialized instruction, leading to an Associate's Degree or a Bachelor's Degree. To be accredited, a respiratory therapy educational program must include in its curriculum "modules and courses of instruction in general studies, basic science, clinical science and respiratory care accompanied or followed by a series of structured laboratory and clinical experiences." Twelve percent of accredited respiratory care educational programs in the country are at the baccalaureate level.

You indicated that the Hospital requires greater levels of academic and professional achievement from its RTs than the state's licensure or Respiratory Care Departments at other hospitals. Your Hospital's RTs must have at least an Associate's Degree in Applied Science, but a Bachelor's Degree is preferred and the Hospital targets its hiring at this higher level. At the time of your request, however, only 20 of 68 of the Hospital's RTs possessed Bachelor's Degrees in respiratory therapy. Of the remaining 48 Associate's Degree level-trained RTs, 15 also held Bachelor's Degrees in some other, complementary field. You also stated that each RT must be certified in both Basic and Advanced Cardiac Life Support, and that the hospital requires RTs to continue studying in their field throughout their tenure at the Hospital through participation in continuing education programming offered both within and outside of the Hospital's Respiratory Care Department.

As you know, section 13(a)(1) (copy enclosed) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees, and certain employees in computer-related occupations, as these terms are defined in the implementing regulations, 29 C.F.R. Part 541. Your particular request concerns the applicability of the "learned professional" exemption to the Hospital's RT employees. Please note that revisions to 29 C.F.R. Part 541 were published as a final rule in the *Federal Register* on April 23, 2004 and became effective on August 23, 2004. See *Defining and Delimiting the Exemption for*

Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (April 23, 2004) (codified at 29 C.F.R. Part 541 on August 23, 2004). Our response is applicable under both the new and prior versions of the regulations, as there were no substantive changes in the long-standing educational requirements for the learned professional exemption. *See* 69 Fed. Reg. 22,149 (copy of 69 Fed. Reg. 22,148-22,157 enclosed). This response is consistent with WH Opinion Letters January 10, 1986 and April 2, 1981 (copies enclosed).

Under section 541.300 of the new regulations, the “learned professional” exemption applies to any employee: (1) compensated on a salary or fee basis at a rate of not less than \$455 per week, and (2) whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. As explained in section 541.301(b), work requiring advanced knowledge “means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.” Moreover, the requirement that the advanced knowledge be “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the learned professional exemption “to professions where prolonged specialized academic training is a standard prerequisite for entrance into the profession,” and the “best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.” 29 C.F.R. § 541.301(d). However, the learned professional exemption is not available for occupations that could customarily be performed with knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical, or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced, specialized intellectual instruction. *Id.*

As further explained in the preamble accompanying the final rule, an individual may work in “a field of science or learning” but still not meet the requirements for the learned professional exemption because the *occupation* does not require knowledge “of an advanced type ... customarily acquired by a prolonged course of specialized intellectual instruction.” *See* 69 Fed. Reg. 22,149. The proper focus of the inquiry is upon whether all required elements have been satisfied for the particular occupation, not upon any job title or “status” that an individual employee within an occupation might have or on an individual employer’s specified hiring preferences. *Id.* Rather, only occupations that *customarily* require an advanced specialized degree are considered learned professional fields under both the old and new versions of the regulations. Thus, the learned professional exemption is not available for the respiratory therapist because that occupation does not require knowledge of an advanced type that is customarily acquired by a prolonged course of specialized intellectual instruction.

Some jobs require only a four-year degree in any field or a two-year degree as a standard prerequisite for entrance into the particular field. Other jobs may require only completion of some other short course of specialized training. The revised final regulations at section 541.301(d) make it clear that such occupations would not qualify for the learned professional exemption. *See* 69 Fed. Reg. 22,150. While certain occupations in the health care field are

expressly recognized as meeting the duties requirements for the learned professional exemption, many other health care employees generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a *standard prerequisite for entry into such occupations*. See 29 C.F.R. § 541.301(e). These provisions of the regulations are consistent with the prior regulations and long-standing policies of the Wage and Hour Division. See 69 Fed. Reg. 22,156.

The regulations do recognize, however, in section 541.301(f), that the areas in which the learned professional exemption applies are expanding, and that when an advanced specialized degree has become a standard prerequisite for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Furthermore, the regulations note that accrediting and certifying organizations similar to those listed in the regulations may develop similar specialized curriculums and certification programs. However, as further explained in the preamble to the final regulations, “[a]ccredited curriculums and certification programs are relevant to determining exempt learned professional status to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the occupation as required under section 541.301.” 69 Fed. Reg. 22,157. Neither the identity of the certifying organization nor the mere fact that certification is required is determinative if certification does not, in fact, involve a prolonged course of specialized intellectual instruction. By way of example, certified physician assistants are considered to meet the duties requirement for the learned professional exemption because certification requires four years of specialized post-secondary school instruction. *Id.*

Based on your description of the requirements for work as an RT, the work of the Hospital’s RTs can be performed by an individual who possesses the minimum qualifications of a licensed and certified respiratory therapist following completion of an accredited respiratory care educational program that involves only two years of specialized instruction leading to an Associate’s Degree. While your Hospital’s RTs may be highly skilled as a result of their training, this level of intellectual instruction and academic training does not qualify the RT occupation as one requiring advanced knowledge “customarily acquired by a prolonged course of specialized intellectual instruction.” Moreover, 12% of accredited programs in the country are at the baccalaureate level, thus indicating that four years of specialized post-secondary school instruction is not a standard prerequisite for entry into the field. Therefore, it is our opinion that the RT positions in question do not qualify for the learned professional exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express 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 letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.,
Acting Administrator

Note: *The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).