



August 19, 2005

FLSA2005-20

Dear **Name***,

This is in response to your letter following up on a phone conversation you had with an investigator from our Montgomery, Alabama office. You presented two questions regarding the Nurse Practitioner (NP) classification and shift differential pay for exempt classifications of executive, administrative and professional employees under the Fair Labor Standards Act (FLSA), section 13(a)(1), copy enclosed. The Regulations regarding the section 13(a)(1) exemption can be found at 29 C.F.R. Part 541, which were revised effective August 23, 2004. See 69 Fed. Reg. 22122; April 23, 2004.

You stated in your letter that your hospital needs a PRN-Nurse Practitioner (PRN) to cover shifts for absent NPs and during periods of high patient load. The PRN will be paid on an hourly basis and is a nonexempt position. Additionally, you have an NP position that is paid on a salary basis and is an exempt position. An NP who normally works the day shift is eligible for shift differential pay if he or she is required to work evenings or nights.

First, you inquire as to whether you may pay non-exempt NPs on an hourly basis without affecting the exemption status of salaried NPs whom we will presume otherwise fulfill all the requirements for the professional employee exemption found at 29 C.F.R. § 541.300, such as the requirements related to primary job duties and payment of at least the minimum salary required. You recognized that paying the PRN hourly disqualifies him or her from the professional employee exemption. It is our opinion that having some employees within the same job classification who perform the same duties but who are paid on a different (hourly) basis, does not affect the status of any other exempt employees paid on a salary basis. Exemptions under 29 C.F.R. Part 541 are not based upon a job title or job classification, but upon the salary and duties of each individual employee. See 29 C.F.R. § 541.2, copy enclosed. However, only if the NPs meet the salary and duty requirements of Regulation 541, can they be exempt from the overtime and minimum wage requirements of the FLSA.

Next, you ask whether paying exempt employees a shift differential pay for working evenings and nights will affect their salary basis of pay. In addition, you would like to know whether this shift differential premium must be paid on an entire shift basis, or if the employees may be paid on an hourly basis only for the additional hours worked during the evening shift. 29 C.F.R. § 541.602, copy enclosed, states that an employee is compensated on a salary basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting *all or part* of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Emphasis added. The predetermined salary does not have to include *all* of the compensation that the employee will be paid. Furthermore, 29 C.F.R. § 541.604(a), copy enclosed, states that "the exemption is not lost if an [otherwise] exempt employee who is guaranteed at least \$455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off." Therefore, the exempt employees may be paid an overtime premium or shift differential pay that may be paid on an hourly basis without invalidating their otherwise-exempt status. Of course where an exempt employee's pay is computed on an hourly, daily, or shift basis, there must be a reasonable relationship between the guaranteed salary and the amount actually earned. 29 C.F.R. § 541.604(b).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 questions 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 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. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:
FLSA section 13(a)(1)
29 C.F.R. Part 541.600
29 C.F.R. § 541.2

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