



March 17, 2005

FLSA2005-13

Dear **Name***,

This is in response to your request for an opinion concerning the application of the domestic service exemption under the Fair Labor Standards Act (FLSA).

Your client, a provider of services and support to persons with disabilities and to special needs youth, supplies nurses, nursing assistants, home care aides and other personnel who provide medical care, personal care services and other support services in residential settings.

Under the proposed plan, a licensed practical nurse (LPN) or registered nurse (RN) will be employed by your client to live with a special needs youth who is a 19-year-old quadriplegic in his own apartment. The resident nurse will be paid a salary and benefits to oversee the individual's care on a 24-hour basis. The LPN or RN would also have some number of relief hours during the day or week, probably five to six hours daily. The LPN or RN would generally be expected to be able to sleep through the night, with the only expected interruption in sleep being one catheter change during the night. Thus, the resident nurse will be able to sleep with only this one regular interruption. The nurse's general duties will include companionship, supervision, preparation of meals, assistance with personal hygiene (including bathing, dressing, and brushing of teeth), and attending to medical needs (including changing of catheter, monitoring of ventilator, and periodic suctioning). You seek a confirmation, that the "domestic service" exemption contained in § 13(b)(21) of the FLSA will apply to this situation.

As you know, § 13(b)(21) provides an exemption from the overtime requirements of the law for "any employee who is employed in domestic service in a household and who resides in such household." Nurses, certified nurse aides, home health aides, and other individuals providing home health care services fall within the term "domestic service employment" when they provide services in or about a private household." 29 CFR § 552.3. The term is defined the same for purposes of both § 13(a)(15) and § 13(b)(21); see generally, 29 CFR 552.101; opinion letter dated April 8, 1999. As Section 552.3 states, the sample list of jobs in the regulation that may qualify as domestic service employment is only "illustrative and not exhaustive." A copy of the Regulations, Part 552 is enclosed. The 13(b)(21) exemption may be applicable also to employees employed by an employer or agency other than the family or household using their services.¹

Based on the information provided in your letter, it appears that this situation would meet all of the requirements of the exemption. It is, therefore, our opinion that the LPN or the RN would qualify for the "domestic service" exemption under § 13(b)(21) of the FLSA. In addition, registered nurses may qualify for the minimum wage and overtime pay exemption contained in section 13(a)(1) of FLSA for bona fide professional employees, if all pertinent tests (including payment on a salary basis) discussed in Regulations, 29 CFR 541.300 (copy enclosed) are met.

The § 13(b)(21) exemption "does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in

¹ See 29 CFR 552.109(c); Opinion of Wage and Hour Administrator dated August 16, 2002 (copy enclosed). See also *Johnston v. Volunteers of America, Inc.*, 213 F. 3d 559, 562 (10th Cir. 2000) and cases cited therein (upholding validity of 29 CFR 552.109(a)), *cert. denied*, 531 U.S. 1072 (2001). But see *Coke v. Long Island Care at Home, Ltd.*, 376 F. 3d 118, 131-32 (2d Cir. 2004) (finding 29 CFR 552.109(a) unenforceable).



worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. " 29 CFR 552.102(a); see regulations 29 CFR Part 785, §§ 785.16(a); 785.19 and 785.23, copy enclosed.

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 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 represented that this opinion is not sought by a party to a 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.
Deputy Administrator

Enclosures

Note: * The actual name(s) was removed to preserve privacy.