

FLSA-842

September 2, 1971

This is in reply to your letter of August 26, 1971, concerning the application of the Fair Labor Standards Act to volunteers.

The volunteers are nurses employed by the *** Hospital who, in addition, have volunteered their services in a clinic that is operated by the hospital. It is the Department's interpretation of the Act that a person may not be both an employee as defined in section 3(e) of the Act and a volunteer while performing essentially the same duties in the workweek. For example, if a person is employed as a nurse, her on-duty time cannot be divided into "working hours" and "volunteer hours" while performing the same duties.

Section 13(a)(1) of the Act provides an exemption from both its minimum wage and overtime pay provisions for any employee employed in a professional capacity. Regulations, Part 541 explains the criteria for exemption of professional employees. Under these criteria registered nurses would generally be exempt as professional employees if they are paid at least \$140 on a salary basis per week. Therefore, those nurses who meet the standards for exemption as professional employees would not have to be paid any extra compensation for work in the clinic.

You state that there is a tacit understanding that the nurses will return the money paid for clinic work to the hospital as a charitable contribution. As indicated in section 531.35 of Regulations, Part 531, the wage requirements of the Act will not be met where the employee "kicks-back" to the employer the whole or part of the wage delivered to the employee. The bona fides of the "contributions" would be called into question where the amount was mandated by the employer or where refusal to participate would cast doubt on the voluntary nature of the contribution.

We recognize that the service rendered by such clinics is, in a literal sense, a vital one. Because of this, we have been making all possible efforts to assist the *** Hospital Association and its members in proper applications of the law through cooperation on bulletins such as you enclosed with your letter. However, neither we nor the affected employees have the right to waive the statute's provisions. The law does not contemplate that such vital services should be at the expense of the dedicated employees who provide it.

Sincerely,

Ben P. Robertson
Deputy Administrator

Horace L. Menesco
Administrator

Enclosures