

FLSA-95

November 16, 1976

This is in reply to your letter of October 12, 1976, posing a number of questions as to the application of the Fair Labor Standards Act to a proprietorship which you represent, *** .

The Act applies to employees engaged in or producing goods for interstate commerce and to employees in certain enterprises. *** provides registered nurses, licensed practical nurses, home health aides/nurses aides, and companions to individuals confined to home, to nursing institutions and to hospitals. You further advise that all of these employees who nurse for or are companions to these individuals in the individual's home, in the hospital or the nursing home are considered employees of ***. On this basis we would characterize *** a temporary help agency.

Employees of temporary help services working on various assignments are considered to be jointly employed by the company and the client to whom they are assigned. Thus, employees of a temporary help firm are entitled to the Act's benefits if in any portion of the workweek they are engaged in or producing goods for interstate commerce either in the operation of the employer's business or in that of the client of their employer, or if the temporary help firm or the client to whom they are assigned is a covered enterprise. Accordingly, and in response to the questions posed in the last paragraph of your letter, if the annual dollar volume of business of *** , including any branch offices, is more than \$250,000 (the annual dollar volume necessary for 3(s)(1) enterprise coverage), the private care provided by employees of *** in hospitals or nursing homes or in individual homes would be covered by the Act's provisions. Also, when the care is provided for in the household of an individual, the nurse, aide or companion is a domestic service employee of the householder and he or she would be covered by the Act.

In response to questions 1 and 2, any such covered employees, regardless of the method of payment (hourly, salary, etc.) must be paid at least the applicable minimum wage and overtime pay as appropriate unless their employment is exempt by a specific provision in the law. In this regard, in any workweek in which the temporary help employee works exclusively as an employee of a client subject to an exemption and performs work that is within such exemption, the employee will be exempt.

With regard to questions 3 and 4, section 13(a)(1) provides an exemption from its monetary provisions for any employee employed in, among others, a bona fide professional capacity provided he or she meets the tests enumerated in section 541.3 of Regulations, Part 541 (copy enclosed). While registered nurses may be exempt as "professional" employees provided he or she meets all the pertinent duty, responsibility and salary (\$170 per week) tests, practical nurses would not meet the prolonged course of specialized instruction and study test. See sections 541.3(a)(1), 541.302(a)(1) and 541.314 of the Regulations.

With regard to questions 5, 6 and 7, we direct your attention to sections 552.2, 552.6, 552.102, 552.106 and 552.109 of Regulations, Part 552 as it pertains to the application of the law to domestic service employees. The above cited sections should provide the answers with respect to home health aides/nurses aides and companions working in the household of the individual client.

Should you have further questions on behalf of your client, it is suggested that you get in touch with our Area Office in . Local representatives in that office are in a better position to gather all necessary facts and be of direct assistance to you in the matter.

Sincerely,

William Hoffman, Director
Division of Minimum Wage
and Hour Standards

Enclosure