

FLSA 1239

April 2, 1981

This is in reply to your letter of December 29, 1980, requesting an opinion as to whether respiratory therapists, medical technologists, and therapeutic dietitians employed by one of your clients are exempt under section 13(a)(1) of the Fair Labor Standards Act.

Section 13(a)(1) of the Act provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541, a copy enclosed. An employee will qualify for exemption if all the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate section of the regulations are met.

You ask for an opinion as to whether the respiratory therapist qualifies for exemption as a bona fide professional employee. You state that this employee currently earns \$261.20 per week, and that the job requires an Associate or B.S. degree in respiratory therapy. You question whether the educational qualifications of the therapist satisfies the "prolonged course of specialized study" requirement for exemption, and whether the employee's work requires the consistent exercise of discretion and judgment.

A "prolonged course of *** study" has generally been held to include only those employees who have acquired at least a baccalaureate degree or its equivalent which includes a longer intellectual discipline in a particular course of study, as opposed to a general academic course otherwise required for a baccalaureate degree. Under section 541.302, a learned profession is generally recognized as one which combines a breadth of intellectual knowledge in related fields with specialized technical knowledge in a chosen field.

It is clear that the kind of instruction and training you describe does not meet the prolonged course of specialized intellectual instruction and study test of the regulations. Although the therapists of your client may be highly skilled medical technicians, it is our opinion that they would not qualify for exemption as "professional" employees under section 541.3 of the regulations. It would also appear that these employees are not using the kind of discretion and judgment required by the regulations for exemption.

You state that the medical technologists earn at least \$170 per week and some earn in excess of \$250 per week. These employees must complete a four year program leading to a B.S. degree in medical technology, biology, or biochemistry. You further state that the medical technologists, as well as lesser skilled laboratory employees, must perform many simple routine, and preliminary tests that are not necessarily related to more complex procedures. It is estimated that the medical technologists spend more than 20 percent of their time performing such routine tests.

A technologist who meets all the duty, responsibility, and salary tests under the regulations qualifies as an exempt "professional" employee. The term "professional," as used in section 541.3(a)(1), has reference to those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study. As set out in section 541.302, technologists in the physical, chemical, and biological sciences who possess the appropriate academic degree will meet the prolonged study test. However, those medical technologists who earn at least \$170 a week but less than \$250 per week and spend more than 20 percent of their time in the performance of nonexempt work would not qualify for this exemption. Please note that if your client is operating a hospital or nursing home, the limitation of nonexempt work discussed above is 40 percent of the employees' work time.

Those employees who are compensated on a salary or fee basis at a rate of at least \$250 per week exclusive of board, lodging, or other facilities will be deemed to meet all the tests for exemption as a

bona fide professional employee if the primary duty of such employees consists of the performance of work requiring knowledge of an advanced type in a field of science or learning which includes work requiring the consistent exercise of discretion and judgment.

You ask our opinion as to whether the employee employed as a therapeutic dietitian is an exempt "professional" or "administrative" employee. You state that your primary concern is whether this employee exercises sufficient independent judgment and discretion to qualify for exemption. The employee currently earns \$240 per week and holds a B.S. degree in nutrition and meets the academic requirements of the American Dietetic Association. The therapeutic dietitian's primary duty is to plan modified diets according to the physician's orders, and to educate patients in their special nutritional needs in meal planning. The therapeutic dietitian works in accordance with orders given by a physician. The employee selects foods for the patient's menu, and determines the manner in which they are prepared, in order to meet the physicians' limitations. In making this selection, the dietitian gives due regard to the patient's food preferences, as determined by interviewing the patient.

Based on the duties and responsibilities described in your letter, it is our position that the therapeutic dietitian cannot be properly classified as a bona fide professional employee, as that term is defined in the regulations.

Although there is not enough information in your letter for us to make a definite determination concerning the exempt status of the therapeutic dietitian as a bona fide administrative employee, the following should be of assistance to you. It is our opinion that such an employee may qualify for exemption as a bona fide administrative employee if all the pertinent tests relating to duties, responsibilities and salary, as described in section 541.2 of the regulations, are met. One such test requires that the employee customarily and regularly exercise "discretion and independent judgment" in the performance of his or her duties.

The term "discretion and independent judgment" implies that the person in question has the authority or power to make independent choices, free from immediate direction or supervision, and with respect to matters of significance. In your case if the amount of direction and supervision received by the dietitian from the physician or chief dietitian is so close that the employee is not able to use discretion and independent judgment in the preparation of the patient's menu, and in the choice of foods to be prepared; or if the dietitian is merely applying knowledge in prescribed techniques, procedures and specified standards found in standardized charts and various other publications, the employee would not be using discretion and independent judgment. Of course, the exempt status of the dietitian you have in mind would depend on the actual facts in his or her case, and not on a job title or job description.

If after reading the enclosed material you have any further questions on this matter or any other provision of the Fair Labor Standards Act, you may find it more convenient to get in touch with our Area Office in Baltimore at the Federal Office Building, Room 913, 31 Hopkins Plaza (Zip Code: 21201). That office will be pleased to offer every possible assistance.

Sincerely,

Henry T. White, Jr.
Deputy Administrator

Enclosure