

FLSA-621

June 9, 1981

This is in reply to your letter of May 21, 1981, concerning the application of the Fair Labor Standards Act (FLSA) to a part-time nursing shift supervisor, a new position recently established by your client, a voluntary hospital.

You indicate that the part-time shift supervisors are compensated on a per diem basis, i.e., they are paid for 8 hours of work on each day they are scheduled to work regardless of how many hours they actually work that day. These employees work varying hours and may exceed eight hours in one day, but will not work in excess of 40 hours per week. You further indicate that the hospital pays its registered nurses under the special overtime provisions available for hospital employees contained in section 7(j) of the FLSA whereby overtime is paid in excess of eight hours in any workday and in excess of 80 hours in a 14-day work period.

You ask the following questions:

1. Assuming that the part-time shift supervisors are bona fide professionals and receive a per diem fee equivalent to \$80, are they exempt from overtime on the theory that they are compensated on a "fee basis" within the meaning of section 541.313 of Regulations 29 CFR Part 541?
2. If the answer to the first question is "no", can the hospital permanently change the part-time shift supervisors back to the normal 40 hour workweek for purposes of overtime compensation while retaining all other registered nurses, including full-time shift supervisors, under the special 8/80 overtime provisions for hospital employees?

The \$80 per diem paid to part-time nursing shift supervisors would not be considered a fee. Thus, such employees may not qualify for exemption as bona fide professional employees since they are not paid on a salary or fee basis within the meaning of sections 541.312 and 541.313. As indicated in 541.313(b), payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

Your client may change its overtime compensation plan for part-time shift supervisors so that the 40-hour standard under section 7(a) will be applicable, provided such change is intended to be permanent for those employees. Your client may continue to use the section 7(j) provision for its other employees.

Sincerely,

Henry T. White, Jr.
Deputy Administrator

Enclosures