FLSA-33

May 16, 1983

This is in reply to your letter of April 25, 1983, concerning the application of the overtime provisions of the Fair Labor Standards Act (FLSA) to a business which consists of a registry of nurses, licensed practical nurses (LPN), and sitters or companions. You indicate such employees care for the sick and dying in hospitals, nursing homes, and private homes. On certain jobs, LPNs and companions are on 24-hour duty and live-in at home. You indicate that the business grosses less than $250,000. presumably, you feel that the employees are not covered on an individual or enterprise basis as discussed on pages 2 and 5 of the enclosed Handy Reference Guide.

It is not clear from your letter whether your client functions as an ordinary employment agency. It has been our position that the employment agency that refers nurses, LPNs, sitters, or companions to a potential employer is not an employer of such personnel. In such a case the usual procedure is for the individual referred to contact the potential employer and contract directly with the potential employer as to compensation, hours, and other terms of work. Under these circumstances, where the work is performed in a household, the nurse, LPN, sitter, or companion, is a domestic service employee of the householder and covered by the provision of the FLSA where the conditions of section 6(f) are met. Private duty nursing in a hospital or nursing home would not be covered unless the hospital or nursing home establishment control and supervise the nurse or other personnel in a manner similar to which it exercises control and supervision of its staff employees.

However, if your client's registry functions as a temporary help agency, a different result would obtain. For example, if the registry maintains a log of assignments showing the shifts worked, established the rate which will be charged, maintains the payrolls and pays the employees, and otherwise exercises control over the employees' behavior and work schedules, then an employment relationship would be deemed to exist and the persons on your client's registry would be considered employees of your client.

Employees of your client would be covered under the FLSA if they are individually engaged in interstate commerce or in the production of goods for interstate commerce or on an enterprise basis if your client meets the test for coverage in section 3(s)(1) of the Act. However, in the absence of such coverage, employees of your client would be covered as domestic service employees under the joint employment relationship between your client and the householder for whom the services are provided. Joint employment is discussed in the employees WH Publication 1297. We are also enclosing a copy of regulations, 29 CFR Part 552 with respect to domestic coverage and third-party employment.

Employees of your client would also be covered under joint employment by a hospital or residential care establishment enterprise under section 3(s)(5) of the FLSA. Please note

that there is no dollar volume test applicable to such coverage. Covered employees would have to be paid in accordance with the Act's minimum wage and overtime pay provision, unless specifically exempt.

Section 13(a)(1) of the Act provides a complete minimum wage and overtime pay exemption for any employees employed in a bona fide executive, administrative, professional, or outside sales capacity as those terms are defined by Regulations, 29 CFR Part 541 (copy enclosed). An employee, whether or not (s)he is paid by a third-party employer, may qualify for exemption as a bona fide professional employee if all the pertinent tests relating to duties, responsibilities, and salary in section 541.3 of the regulations are met. Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the Act. Generally, it has been found that LPNs do not meet all the pertinent tests for exemption as bona fide professional employees under section 541.3 of the regulations.

Section 13(a)(15) provides a complete minimum wage and overtime pay exemption for any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves. This exemption would apply to employees providing such services even though employed by an employer or agency other than the family or household using the services. See section 552.109 of the regulations. However, as indicated in section 552.6, this exemption does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

Section 7(j) contains a special provision for hospital and residential care establishments. It provides that a hospital or residential care establishment employer may pay overtime after 80 hours in any work period of 14 consecutive days rather than on the 7-day workweek basis, provided (1) that the employer and the employee have an agreement or understanding prior to the performance of work that this basis will be used, and (2) the employer agrees to pay one and one-half times the employee's regular rate after 8 hours of work in any day even if the employee fails to exceed 80 hours in the work period. The extra compensation provided by the premium rate paid for daily overtime hours may be credited toward any overtime compensation payable under section 7(j) for time worked in excess of 80 hours in such period.

As indicated above, employees of a temporary help company working on assignments in hospitals or other residential care establishments are considered to be jointly employed by both the temporary help company and the client establishment in which they are employed. For enforcement purposes, the Wage and Hour Division will not take exception to a claim by a hospital or residential care establishment that section 7(j) applies during the 14-day period where the employees work exclusively for that employer, provided, that before performance of the work an agreement is made between the hospital and the employees to use the 14-day period in lieu of the normal workweek. On the other hand, section 7(j) will not apply to any employee who during a 14-day period is employed in more than one hospital or residential care establishment even

though all such establishments may be operating under section 7(j) with respect to their regular employees.

If after reading the enclosed material you have any further questions, you may find it more convenient to get in touch with our Area Office . That office is responsible for enforcement of Act in your area and would be pleased to be of all possible assistance.

Sincerely,

James L. Valin
Assistant Administrator
Wage and Hour Division

William H. Otter
Administrator

Enclosures