

FLSA-1094

August 28, 1984

This is in response to your letter of May 11 to Mr. and to me concerning a program providing vocational evaluation and rehabilitation services for industrially injured clients. You have requested our opinion as to whether *** is required to compensate these clients in compliance with the provisions of the Fair Labor Standards Act (FLSA) for work they perform at your facility.

Under this program, insurance carriers refer workers who have been injured on their job to *** in order to undergo a vocational rehabilitation program. There is a requirement for the worker to be compensated by the insurance carrier. The worker must also agree not to seek other employment until a final disability rating is determined.

The injured worker spends 10 to 15 days at *** approximately five of which are spent in a testing program in which the worker is apparently not performing any productive work. For the remainder of the program, the client is at a work station for six hours a day and is supervised and evaluated by a staff member to determine the effectiveness of the vocational evaluation performed earlier. You indicate that any production by the client at the work station is incidental and insignificant to your revenue producing programs, and that the cost of evaluation and training far exceeds any revenue resulting from the productivities of the client. You further state that the insurance carrier pays compensation to each client based on his/her earnings prior to being injured and any wages paid to the client by *** would be deducted from this compensation.

You state that many of the insurance carriers with which you do business indicate that it is not feasible for them to refer clients to you if you pay them for their productive work because they are being paid temporary disability by the insurance carrier while they are at your facility undergoing evaluation. The insurance carriers feel that there is no employer-employee relationship created between the clients *** and but rather *** is providing a services for a fee to the insurance carrier. The employer-employee relationship, according to the insurance carrier, is between the injured employee and his employer until the evaluation period ends and the client's case comes to final hearings. Any wages paid by *** would be deducted from the compensation paid by the carrier.

The Supreme Court has held that the words "to suffer or permit to work", as used in the Act to define "employ" do not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another. The Court further held that, broad as the definitions of "employ" and "employee" are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.

From the information provided, it is clear that the clients do not expect to be compensated by *** while undergoing vocational rehabilitation. In fact, any wage payments by *** to the clients would not benefit them since such payments would be deducted in full from

the compensation paid the clients by the insurance carriers and processing the adjustments may result in a delay of such payments. Moreover, the evaluation and rehabilitation being provided by *** is in the clients' interest in that it is a condition precedent to the clients being compensated by the workers' compensation carriers. While *** receives a fee from the insurance carriers for providing the evaluation and rehabilitation services, and a listed amount of productive work is done by the clients, more of the parties - the clients, *** or the insurance carriers - would benefit from holding the clients to be employees of . Therefore, under the circumstances of this particular situation, the clients, while undergoing evaluation and rehabilitation, will not be considered to be employees of *** within the meaning of the Act.

The position taken in this case provides guidance only for this particular set of circumstances. Questions concerning other specific programs or situations may be referred to this office or to the regional office serving the area in which the program is established.

Sincerely,

William M. Otter
Administrator