

JUN - 1 2001

OPINION LETTER

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to Tribal employees who are employed as nurses to work in a hospital and health clinics operated by the _____. You request that the Secretary of Labor waive the overtime requirements of the FLSA with respect to such employees.

The Tribal health facilities are operated under a contract with the Indian Health Service of the U.S. Department of Health and Human Services (HHS). Both Tribal and Federal nurses are employed at the health care facilities. The _____ seeks application of the same overtime provisions that apply to Federal employees so that Tribal nurses employed on a contract with the Indian Health Service may work side-by-side with Federal nurses under the same scheduling and overtime pay requirements.

First, section 4(f) of the FLSA authorizes the Office of Personnel Management (OPM) to administer the application of the FLSA with respect to most Federal employees including those employed by the Indian Health Service. The Department of Labor has no jurisdiction with respect to the application of the FLSA to such employees.

Any "waiver" of FLSA overtime requirements to permit alternative work schedules for Federal employees results from specific statutory authority codified at Title 5 of the U.S. Code. Questions about such authority should be directed to OPM, 1900 E Street NW, Washington, DC 20415-0001 (telephone: 202-606-1800).

The FLSA does not authorize the Secretary of Labor to waive an individual's right to the minimum wage or overtime compensation for the reason you have described. It is well settled that the minimum wage and overtime provisions of the FLSA may not be waived by direct agreement between an individual worker and the employer or through a collective bargaining agreement between the employer and the workers'

union. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). Moreover, the Act creates a private right of action under section 16(b) that allows an individual employee to vindicate such rights independently without action by the Secretary of Labor.

As to the Indian Self-Determination and Education Assistance Act of 1975 (PL 93-638), nothing in this law *specifically* authorizes the Secretary of Labor to waive the minimum wage or overtime requirements of the FLSA for the employees of concern. Thus, the Department of Labor is without authority to grant your request for an FLSA waiver.

Section 13(a)(1) of the FLSA provides an exemption from its minimum wage and overtime requirements for certain executive, administrative, professional and outside sales employees. Under this exemption, registered nurses (RNs) are considered to be exempt as professional employees, provided that they are paid on a salary basis or fee basis as described in 29 CFR 541 (copy enclosed).

Section 7(j) of the FLSA provides special overtime provisions for hospital and residential care establishments. These provisions, which are an alternative to the section 7(a) overtime requirements, are found in section 778.601 of 29 CFR 778 (copy enclosed). This provision, which uses a 14-day period and 80 hour standard for computing overtime, would accommodate 36/44 scheduling without overtime compensation, provided that the daily hours worked do not exceed 8 hours.

Under certain "compressed" scheduling (9/5/4) employees can be scheduled to work four 9-hour days followed by an 8-hour "split" workday (of which the first 4 hours are attributable to the first workweek and the second 4 hours to the follow-on workweek) (the workweek begins and ends in the middle of the "split" workday) followed by four 9-hour days in the second workweek. Under such an arrangement, which is fully consistent with the principles in sections 778.103 - .105 of the regulations, the employee would not work more than 40 hours in each workweek.

Finally, you should be aware that there are a number of decisions issued by the United States Court of Appeals for the Tenth Circuit (which includes Oklahoma) that may have a bearing on the application of federal employment laws to tribal employers. See *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (1982); *EEOC v. Cherokee Nation*, 871 F.2d 937 (1989). We would be pleased to provide

technical assistance to the . with respect to
any FLSA provisions including those described above. If we
may be of further assistance, please do not hesitate to
contact this office.

Sincerely,

Thomas M. Markey
Acting Administrator

Enclosures

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