



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2008-13NA

September 29, 2008

Dear **Name***:

This is in response to your request for an opinion regarding whether employees of daycare centers qualify as exempt teachers under section 13(a)(1) of the Fair Labor Standards Act (FLSA).*

You state that the daycare center instructors spend a majority of their time teaching children between the ages of three and five a curriculum of basic reading, counting, and social skills. The daycare centers are not licensed by the State Department of Education.

The 1972 Amendments to the FLSA extended FLSA coverage to preschools as covered “enterprises,” regardless of whether public or private or operated for profit or not for profit, and without regard to the annual dollar volume of the business. As a result, all such enterprises are required to comply with the applicable provisions of the FLSA. *See* 29 U.S.C. § 203(s)(1)(B).

Section 13(a)(1) of the FLSA exempts from minimum wage and overtime pay “any employee employed in a bona fide . . . professional capacity (including any employee employed in the capacity of . . . teacher in elementary . . . schools)” as defined in 29 C.F.R. Part 541. Under [29 C.F.R. § 541.303](#),

“employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.

Section 541.204(b) defines an “educational establishment” as including “an elementary . . . school system.” Section 3(v) of the FLSA defines an elementary school as “a day or residential school which provides elementary education, as determined under State law.” For instance, “[u]nder the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education. . . .” [29 C.F.R. § 541.204\(b\)](#).

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

Unless the daycare center provides grade school curriculums, introductory programs in kindergarten, or nursery school programs in elementary education of the sort described in § 541.204(b), as determined under state law, the instructors are not within the scope of the teacher exemption of the FLSA. You have represented that the daycare centers are not licensed by the State Department of Education, but instead are licensed by the Department of Public Welfare. This indicates that the state does not consider the daycare centers to be providing educational services. Absent any information to the contrary, we conclude that the instructors do not qualify for the teacher exemption under section 13(a)(1) of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Monty Navarro
Office of Enforcement Policy
Fair Labor Standards Team

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**