



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

FLSA2009-20

January 16, 2009

Dear **Name***:

This is in response to your letter regarding the application of the Fair Labor Standards Act (FLSA)* to your client, a private nonprofit institution, based on its use of an enterprise-covered employee leasing company. Specifically, you ask whether the leasing company's "employment relationship" with any employer affects your client's overtime obligations to its employees who are not individually covered under the FLSA, and whether your client could be subject to joint employer liability. We conclude that any joint employment relationship between the leasing company and your client does not affect the institution's enterprise coverage under the FLSA and does not make the institution responsible for compliance with the minimum wage and overtime obligations.

Your client is a nonprofit institution providing care for neglected and dependent children. You state that it is not operated in conjunction with a hospital, covered institution, or school within the meaning of sections 3(r)(2)(A) and 3(s)(1)(B) of the FLSA, 29 U.S.C. 203(r)(2)(A) and (s)(1)(B). Your client has retained an "employee leasing company." You state that all of your client's employees are "employees of the leasing company for compensation purposes," but your client maintains the day-to-day control over all material personnel matters, including recruiting, interviewing, hiring, training, counseling, promoting, demoting, and terminating employees. The "leasing company" serves as a "super payroll agent" that processes employees' pay and assumes responsibility for workers' compensation, group health benefits, and recordkeeping. You state that the leasing company is a covered enterprise under the FLSA.

The FLSA applies to enterprises with "employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person." 29 U.S.C. § 203(s)(1)(A)(i). Further, the enterprise must have an annual dollar volume of \$500,000 or more in sales made or business done exclusive of excise taxes at the retail level that are separately stated. *See id.* § 203(s)(1)(A)(ii); Wage and Hour Opinion Letter [FLSA2002-8](#) (Sept. 5, 2002). Enterprise coverage does not extend to religious, educational, or eleemosynary activities of private nonprofit organizations, unless they engage in ordinary commercial activities or they are one of the types of institutions named in sections 3(r)(2)(A) and 3(s)(1)(B) of the FLSA. *See* [29 C.F.R. § 779.214](#).

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

It does not appear that your client's private, nonprofit institution is a covered enterprise under the FLSA. The institution provides care for neglected and dependent children and, as you state, is not a hospital, covered institution, or school within the meaning of sections 3(r)(2)(A) and 3(s)(1)(B) of the FLSA. For employees not individually covered by the FLSA, the institution is not subject to the Act's overtime pay provision. *See* Wage and Hour Opinion Letter [FLSA2005-8NA](#) (Sept. 2, 2005).

You ask whether the institution's relationship with the leasing company affects the institution's FLSA obligations to its employees not individually covered under the Act, and whether the institution could be subject to joint employer liability. Although the employees receive compensation directly from the employee leasing company, the institution maintains sufficient control and supervision to establish that the institution is an employer.

We do not read your request as assuming that a joint employment relationship exists, and your request does not provide enough information to determine if such a relationship exists. Even if joint employment does exist, however, it would not affect your client's obligations under the FLSA. If the leasing company exercises sufficient control and supervision over the employees so as to become an employer, it would be responsible for compliance with the FLSA, assuming that it is a covered enterprise. This would not, however, change your client's status as a non-covered enterprise. "Whether two companies constitute a single enterprise for FLSA coverage and whether they are liable as joint employers under § 207 are technically separate issues." *Chao v. A-One Medical Servs., Inc.*, 346 F.3d 908, 917 (9th Cir. 2003). Enterprise status is necessary for coverage under FLSA's jurisdiction requirements. *See id.* at 916. To be subject to the FLSA's requirements, the entity must either be an enterprise in its own right, or part of a single enterprise. The criteria for determining whether various entities constitute a single enterprise are contained in section 3(r)(1): the entities must perform "related activities" through "unified operation" or "common control" for a "common business purpose." 29 U.S.C. § 203(r)(1). Joint employers do not automatically constitute a single enterprise. *See Thompson v. Robinson, Inc.*, 2007 WL 2714091, at *4 (M.D. Fla. 2007). Thus, your client would be subject to enterprise coverage under the Act by virtue of its relationship with the leasing company only if your client and the leasing company were determined to be a single enterprise based on the criteria in section 3(r)(1), which does not appear to be the case.

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 issue 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,

Alexander J. Passantino
Acting Administrator

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