

Irwin Siegel Agency, Inc.
Human Service Program
Risk Management Division

WAGE AND HOUR ISSUES



TO CONSIDER WHEN STAFFING COMMUNITY RESIDENCES

**WAGE AND HOUR ISSUES
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COMMUNITY RESIDENCES**

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PREFACE

To protect yourself from liability, it is important to have an understanding of the U.S. Department of Labor rules that commonly apply to human service agencies that provide community supports in group residences, foster homes and the homes of people who require support.

This guidance is not intended to be comprehensive, nor does the author engage in rendering legal, accounting or other professional services. These materials must be supplemented by referral to 29 Code of Federal Regulations, Parts 500 to 899 or through consultation with U.S. Department of Labor officials or an attorney who specializes in labor law.

State labor laws often differ from federal law and the stricter of the two always applies. It is therefore advisable to carefully review state law in the context of the federal provisions discussed in these materials.

Joni Fritz
Wage and Hour Specialist

The Irwin Siegel Agency greatly appreciates Joni Fritz's work on and dedication to this resource. For information on how to contact her, refer to page 15 of this resource.

This booklet, *Wage and Hour Issues to Consider When Staffing Community Residences*, is offered in the hope that readers will benefit from it. It does not purport to be a complete discussion of the subject and since state labor laws may differ from federal laws we recommend that you review state laws as well. The Irwin Siegel Agency, Inc.'s Risk Management Department maintains an extensive reference file on various loss control items. Please feel free to contact the Risk Management Department at 800-622-8272 to request further information on safety resources and other available services and materials.

Wage and Hour Issues To Consider When Staffing Community Residences

HISTORY

The Fair Labor Standards Act (FLSA), passed in 1938, established the minimum wage at just \$.25 per hour. The federal minimum wage has been increased incrementally since that time to the \$5.15 per hour enforced today.

Staff of community living arrangements was covered by a provision added to the FLSA in 1966. Statutory language specifically identifies homes engaged in the care of the sick, the aged, and the mentally ill or defective that reside on the premises.

OVERTIME

Each employee not specifically exempted must be compensated at least the minimum wage for the first 40 hours worked in each workweek and paid overtime for each hour worked thereafter.

- The hourly rate of pay for all hours worked in excess of 40 hours per week must equal one and one half times the employee's "regular rate of pay."
- The "regular rate" includes all remuneration for employment, including the value of room and board deducted from wages and promised or routine bonuses.
- Gifts, discretionary bonuses, holiday, vacation and sick pay (which are payments for hours not worked) need not be included in determining the regular rate of pay.
- Employees do not have to be paid overtime for hours worked within a 40-hour workweek on a day for which they were also receiving premium holiday pay that equals at least one and one half times their regular rate of pay.

Law prohibits employees from waiving their statutory right to be paid the required minimum wage plus overtime compensation for all hours worked in excess of 40 hours in each workweek.

DEFINITION OF WORKWEEK

Wages are computed on the basis of a workweek.

“Workweek” is defined in 29 Code of Federal Regulations, Section 778.105, as a regularly recurring period of 168 hours - seven consecutive 24-hour periods. This need not be the same as a calendar week. It may begin on any day of the week and at any hour of the day, and may differ for each employee. Once established however, it must remain fixed for the employee. The workweek may be changed, but only if the change is intended to be permanent.

AVERAGING WAGES

Averaging wages over two or more workweeks is prohibited except under one very specific provision for hourly employees of hospitals and “residential care facilities” (20 CFR §778.601). This provision is often referred to as the “eight and eighty.” Under the eight and eighty, 80-hour, 14-day work periods may be established for hourly employees. The payment of overtime is required any time the employee works more than eight hours on a single day, even if he or she does not work a total of 80 hours within that 14-day work period.

This is the **only** situation in which the FLSA requires overtime to be calculated on a daily basis. This provision would be the result of a conscious decision by the employer and must be approved by the employee in advance of employment.

SALARIED EMPLOYEES

Hourly employees may be paid on a salary basis with hours that fluctuate from week to week, pursuant to a prior understanding between employer and employee. However, the salary may **not** include the weekly overtime premium payment due each workweek, and computation of wages due is relatively complicated (29 CFR §778.114 - see Appendix I, page 17).

Employers must be aware of their obligations to all salaried employees.

Salaried employees must receive their **full** salaries for any week in which they perform any work without regard to the number of days or hours worked (29 CFR §541.118). (This provision is also subject to the general rule that employees need not be paid for any workweek in which no work is performed.) In **no** case may deductions be made for less than a full day of work, but an employer may substitute sick pay or vacation pay in lieu of the regular salary to comply with these requirements.

Deductions from salaries may be made only:

- a) When an employee is absent from work for a day or more for personal reasons;
- b) For absences because of sickness or accident - if done in accordance with a bona fide plan, policy or practice of compensation for loss of salary because of both sickness and disability when an employer's plan requires a specific period of work before the employee is eligible for paid sick leave, or has exhausted the leave allowance under the plan.

Caution: It is important to recognize that while many workers in the U.S. attach status to salaries and are offended when they are paid on an hourly basis, it is illegal to pay on anything but an hourly basis unless employees meet the requirements outlined below.

Employees who are exempt from minimum wage and overtime requirements must meet very specific salary and duty tests. Those often used in human service agencies include provisions for executive, administrative and professional employees; for house-parents in orphanages, and for employees who provide "companionship services" for people with disabilities. Contractors also receive a set fee for services performed. Each is discussed briefly below.

Tests for the "executive exemption" (§541.1):

- a) Primary duty consisting of the management of an enterprise or of a customarily recognized department or subdivision thereof, and
- b) Customary and regular direction of the work of two or more other employees, and
- c) Authority to hire or fire other employees, or whose suggestions and recommendations regarding hiring and firing, advancement and promotion will be given great weight, and
- d) Customary and regular exercise of discretionary power, and
- e) Devotion of fewer than 20 percent of the hours of work in a workweek to activities not directly and closely related to the performance of management and supervision (except for employees who are in sole charge of an independent establishment or a physically separated branch of an establishment, as discussed below), and
- f) Compensation on a salary basis at a rate of no less than \$155 per week, exclusive of board, lodging or other facilities. (The salary test has not been revised since the 1970's and in practice this rate will not be found acceptable. Rather, Labor Department wage and hour officials will look at the relationship between the executive's salary and that of employees whom she or he supervises.)

SOLE CHARGE EXCEPTION

Tests for employees under the “sole charge exception” (§541.113), which removes the percentage limitations on nonexempt work:

- a) This exception applies to a single employee in charge of an independent establishment or a physically separated branch of an establishment that is geographically separated from other company property, and who is
- b) In charge of company activities at the location, and
- c) Supervises two or more full-time employees or their equivalent, and is
- d) Paid on a salary basis at a rate of no less than \$250 per week.

ADMINISTRATORS

Tests for “administrative exemption” (§541.2):

- a) Duty consisting either of:
 - 1) Office or non-manual work *directly related to management policies or general business operations* of the employer or the employer’s customers, or
 - 2) The performance of functions in the administration of a school system, educational establishment or institution, or of a department or subdivision, in work directly related to academic instruction or training, and
- b) Customary and regular exercise of discretion and independent judgement, and
- c) Performance of work that involves the:
 - 1) Regular and direct assistance of a proprietor, or an employee employed in a bona fide executive or administrative capacity, or
 - 2) Performance of work under only general supervision along specialized or technical lines requiring special training, experience or knowledge, or
 - 3) Execution of special assignments and tasks under only general supervision, and
- d) Compensation on a salary basis at a rate of no less than \$155 per week, exclusive of board, lodging or other facilities. (As with executive employees, in practice, this salary would be inadequate for purposes of exemption.)

PROFESSIONALS

Tests for the “professional exemption” (§541.3):

- a) Primary duty consisting of:
 - 1) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, or
 - 2) Work that is original and creative in character in a recognized field of artistic endeavor, the result of which depends on invention, imagination or talent, or
 - 3) Teaching, tutoring, instructing or lecturing as a teacher in a school system or educational establishment, or
 - 4) Work that requires theoretical and practical application of highly specialized knowledge in computer systems analysis, programming and software engineering as a computer systems analyst, computer programmer, software engineer or similar position in the computer software field, with compensation at no less than \$27.35 per hour, and
- b) Work requiring consistent exercise of discretion and judgement, and
- c) Work that is predominantly intellectual and varied as opposed to routine mental, manual, mechanical or physical work, and
- d) Devotion of fewer than 20 percent of the hours in a workweek to activities that are not an essential part of and necessarily incidental to the professional duties, and
- e) Compensation of all but computer professionals on a salary basis at a rate of no less than \$170 per week, exclusive of board, lodging or other facilities. (As with the other salary tests, this is generally inadequate to meet U.S. Department of Labor expectations for exempt professionals.)

Proposed minimum salary levels and rule changes for these “white collar” exemptions were published by the U.S. Department of Labor on March 31. Public comments are due June 30. If finalized as proposed, the minimum salary level for all of the EAP exemptions would become \$425 per week (\$22,100 per year). Other changes would remove the 20 percent of duties tests, and make it clear that the DOL intends that the exemptions be used for employees who hold the highest positions of responsibility and importance in their place of business.

HOUSE PARENTS OF ORPHANAGES**Statutory requirement for “house parents of orphanages”:**

- a) A couple must be hired, and
- b) Paid a combined salary of at least \$10,000 per year, exclusive of room, board and other facilities, and
- c) Live at and be employed by a nonprofit educational institution, and
- d) The children they serve must be enrolled in the educational program provided by that institution and reside there, and
- e) At least one parent of each child must be deceased.

COMPANIONS**Requirements for employees who provide “companionship services” (§552.6, see also Appendix II, page 18):**

- a) Work must occur in the home of the person who is receiving support who, because of age or infirmity, cannot care for himself or herself;
- b) Work involves fellowship, care and protection;
- c) Services may include household work related to the care of the individual such as meal preparation, bed making, washing clothes and other similar services;
- d) Services may also include general household work, provided that such work does not exceed 20 percent of the total number of hours worked in the workweek;
- e) Services may **not** include those performed by trained personnel such as registered or practical nurses.

Employment by a third party does not defeat the exemption as long as:

- a) Joint employment between the third-party employer and the person receiving supports and/or that individual’s guardian is provided;
- b) Services rendered during each assignment in a workweek comes within the definition of companionship services.

Note: Live-in companions paid by a third party are treated as exempt only from overtime requirements of the FLSA.

CONTRACTORS

Contractual arrangements:

While some workers can be hired on a contractual basis, it is essential to follow DOL and IRS guidelines when you establish contractual arrangements with people who are self-employed. Arrangements for carpenters, computer professionals or psychologists to complete specific tasks are traditional contractual arrangements, but such employees who work for only one employer are usually considered employees and must be paid as such.

Generally, people who work for an employer on an hourly basis cannot also contract with that employer to do other work on a self-employed basis, with one exception - those who provide “foster care.”

“Foster care” has changed significantly over the past two decades and does not fit comfortably within the criteria established by the Department of Labor or Internal Revenue Service to identify contractual arrangements. It is, however, generally recognized as a traditional contractual arrangement, though it remains undefined in Labor Department regulations. Foster homes (which may be labeled “host homes” or “developmental homes”) must provide those supports in the home of the direct support provider. Foster providers are considered to be self-employed (See Appendix III, page 19).

EMPLOYEES WHO PERFORM TWO JOBS

Provisions for paying employees who perform two different jobs for an employer (§778.115):

Employers may pay an employee two different rates of pay for performing two distinctly different jobs within a workweek (e.g., for awake time and sleep time, for driving a vehicle and for working in direct support or for training time and work time).

In most cases where people are paid two separate rates for two different jobs, overtime must be paid on the basis of a “weighted average” (see Attachment IV. A, page 20). The only exception occurs when all of the overtime occurs at the end of an employee’s workweek in the lower paying position **and** that employee agrees in advance to be paid at the overtime rate for the lower paying job.

Caution: U.S. tax law (section 131 of the Internal Revenue Code) excludes from income foster care payments paid by State or local governmental entities, or by a “qualified foster care placement agency” that is licensed or certified by a state or licensed government “for the foster care program of such State or political subdivision to make foster care payments to providers of foster care.”

RECORD KEEPING

The Department of Labor requires all employers to keep certain basic data about each person employed (§516.2). This information should include:

1. Employee's full name used for Social Security purposes, and any identifying number or symbol used in place of the name on time, work or payroll records;
2. Home address, including zip code;
3. Date of birthday, if under age 19;
4. Sex and occupation in which employed (this provision is related to equal pay provisions of the FLSA);
5. Time of day and day of week on which employee's workweek begins;
6. Regular hourly rate of pay for any week in which overtime compensation is due, and basis on which wages are paid (e.g., "\$6 an hour" or "\$300 per week" - when non-exempt employees are paid on a salary basis, it is important to note that the hourly rate may vary from week to week and records containing this information must be maintained);
7. Hours worked each day and total hours worked each workweek;
8. Total daily or weekly straight-time earnings, exclusive of overtime;
9. Total premium pay for overtime hours, excluding straight-time earnings;
10. Total additions to or deductions from wages paid each pay period, plus nature of items, which constitute the additions and deductions;
11. Total wages paid each pay period; and
12. Date of payment and pay period covered by payments.

Items 6 through 10, need not be kept for employees who are exempt from minimum wage and overtime rules because they meet the specific criteria for exemption as an executive, administrative or professional employee or as a house-parent in an orphanage, companion or outside sales person (§516.3). The basis on which wages are paid, including fringe benefits, must be maintained in sufficient detail to permit calculation of the employee's total remuneration for each pay period.

Most records must be preserved for three years (§516.5). Basic daily time sheets may be discarded after two years, according to the Department of Labor rules, but employers are advised to keep these for three years as well to address potential challenges of "willful" violations.

Federal rules do not require the use of time clocks to keep track of hours worked for employees who are paid on an hourly basis.

“ON CALL” TIME

A definition of “on call” time (29CFR §785.17):

Non-exempt employees who are not required to remain on the premises, but who leave work where they can be reached, or who carry an electronic paging device (beeper) or cell phone, are not considered to be working during their free time and need not be compensated for that time.

Such employees must be compensated for time periods spent responding to calls however, including time spent on the phone and travel time when an employee has returned home after work and must return to a job site to respond to an emergency.

If calls become so frequent or conditions so restrictive that the employees are not actually free to pursue personal activities, they may be considered to be “engaged to wait” and must be fully paid for their time.

TRAINING TIME

Training time and some travel time are considered hours worked for hourly employees and must be compensated. Training time is generally considered work, which requires compensation (§785.27). It need *not* be counted as hours worked only if:

- a) Attendance is outside of the employee’s regular working hours;
- b) Attendance is voluntary;
- c) The course, lecture or meeting is not directly related to the employee’s job;
- d) The employee does not perform any productive work while attending.

TRAVEL TIME

Travel time must be compensated when (§§785.33-41):

- a) An employee’s travel is all part of the routine day’s work;
- b) An employee who has returned home after work is called out on an emergency;
- c) An employee who regularly works at a fixed location in one city travels to a one-day assignment in another city;
- d) An employee’s travel involves one or more nights away from home. (As a “rule of thumb,” in this case travel time that falls within the employee’s regular work hours must be compensated.);
- e) Any work is actually performed outside of the regular work hours.

COST OF EMPLOYEE PHYSICALS

Costs associated with employee physicals must be covered by the employer, both for the examination itself and time spent by the employee undergoing that examination, to the extent that these costs would reduce wages below the minimum wage or cut into the proper overtime pay due.

At one time, time spent taking a pre-employment examination by applicants for employment was not considered time worked and no payment was required. However, the Americans with Disabilities Act now prohibits an employer from requiring a job applicant to take a physical exam, respond to medical inquiries or provide information about previous or current workers' compensation claims until after a job offer is made.

COMPENSATORY TIME

The Department of Labor permits compensatory time off ("comp time") instead of overtime pay in only prescribed circumstances. For compensation purposes time is computed within each workweek. Hours worked by non-exempt employees may not be averaged from one week to the next.

In the private sector, it is possible to control earnings within a pay period to stay within the agency's budget. If the pay period is more than one week long, comp time may be held beyond a workweek and taken before the end of the pay period. If the time off is taken after the workweek in which the extra hours are worked, one and one-half hours of time must be given for each hour of overtime worked. **In no case may comp time be taken beyond the pay period by hourly employees in the private sector.**

Bona fide exempt employees may use compensatory time, with specifics established by the employer.

Employees in the public sector may accumulate up to 240 hours of comp time (480 hours for public safety employees) under collective bargaining or an understanding between employer and employee, and take it at any mutually agreed upon future date, as long as one and one-half hours of time off are given for each hour of overtime (§§553.20-.28).

VOLUNTEER TIME

Individuals may volunteer their services to private nonprofit and public sector organizations without receiving compensation. Such people are excluded from the definition of employee and are therefore not covered by the FLSA. Bona fide volunteers may be compensated for any expenses they incur on behalf of an organization, and may receive "reasonable" benefits and "nominal fees."

Employees may volunteer their services to their employer only under very limited circumstances. (Rules applied to the public sector described in 29 CFR §553.100 are generally applied to the private sector through policy.) Employees may not volunteer to do the same type of work that they are paid for by their employer.

There is an exception to this statement. In 1980, the author received a letter from the Department of Labor on behalf of employees of a childcare agency who periodically invited children whom they supported to come home with them on weekends and holidays. The letter stated that: *if the activity is a form of hospitality, such as any family might occasionally offer to friends or relatives, and entirely voluntarily with no coercion by the employer, no promise of advancement or no penalty for not volunteering, then we would be inclined not to consider time spent engaging in such activity as compensable "work."* (See Appendix V, pages 21 and 22.)

HOURS OF COMPENSATION

Generally, employees must be compensated for all hours during which they are required to be on duty. The only exceptions to this rule are for employees who:

- 1) Have bona fide meal periods free from duty;
- 2) Reside on the employer's premises on a permanent basis;
- 3) Reside on the employer's premises for extended periods;
- 4) Work for periods of 24 hours or more; and
- 5) Work for periods of 24 hours or more to "relieve" an employee who resides on the premises.

Workers who are compensated under rules for employees who work for periods of 24 hours or longer (29 CFR §785.22) must be on duty at the beginning and end of each 24-hour period, and be paid for all but bona fide sleep time and meal periods.

To be considered to be living on the premises "permanently" or for "extended periods of time" (§785.23) as defined in a 1988 U.S. Department of Labor enforcement policy (Appendix VI), employees must work a minimum of eight hours during each of five consecutive 24-hour periods - a 120 hour period - in each workweek, and sleep in a home-like setting. (Under this policy, requirements for the "permanent resident" provision are currently being enforced the same as for those who make a group living arrangement their temporary residence for five days in the workweek.)

Sample staffing patterns that comply with the 1988 enforcement policy appear in Appendix VII, pages 31-33.

MEAL PERIODS (§785.19)

Bona fide meal periods are not considered work time when the employee is completely relieved from duty for the purpose of eating regular meals. Ordinarily, 30 minutes to an hour is considered long enough for a bona fide meal period.

Employees are not relieved if they are required to perform any duties, whether active or inactive, while eating. The example the Department of Labor uses is of office employees who are required to eat at their desks. In the field of residential supports, an employee who eats with the people supported is considered to be on duty and must be paid, as must an employee who is the only one on duty in a group home at night, and who has a one-half hour “lunch” break but is considered to be “engaged to wait” during this period.

Despite the above statement, it is not necessary that employees be permitted to leave the premises, but they must be completely freed from duties during the meal period.

SLEEP TIME

Sleep time, which need not be compensated requires that:

1. The employee agrees in advance to the prescribed conditions of employment;
2. The employee can generally expect to sleep the entire sleep period;
3. No more than eight hours of sleep time be excluded in any 24-hour period;
4. If sleep time is interrupted by a call to duty, the time of interruption should be counted as time worked and compensated;
5. A period of duty may not begin with uncompensated sleep time;
6. Adequate sleeping facilities must be provided by the employer; and
7. The employee must get at least five hours of sleep during the scheduled sleep period. If the employee does not get at least five hours of sleep during the scheduled sleep period, the entire eight-hour sleep period must be compensated. These need not be five consecutive hours, however. (See Appendix VIII.)

TREATMENT OF ROOM AND BOARD

If furnished *for the benefit of the employee, the fair value or reasonable cost* of room and board may be deducted from the employee’s wages. When the value of room and/or board is deducted from wages, the overtime rate of pay, as well as taxes and other benefits must be computed on wages *before* such deductions are made. It is advisable to check with the Internal Revenue Service for specific rules.

When deducted from wages, the actual cost to the agency or home - not the open-market value of a room, apartment or meal - must be used (§§531.3-.5).

Meals are usually considered to be for the benefit of the employee and thus must be included in the “regular rate of pay” when computing overtime. When employees are required to eat with people they serve, the value of meals need not be considered compensation; however, they may be excluded from overtime calculations (See Appendix IX, pages 34-35).

RANDOM DEPARTMENT OF LABOR INVESTIGATIONS

The U.S. Department of Labor conducted a series of random “interventions” in group homes and “residential care facilities” across the U.S. in 1998 and 2001. The 1998 investigations revealed just 57 percent of homes were in full compliance (which contrasts with about 70 percent compliance found in nursing homes in a 1997 survey). As a general rule, smaller homes were more likely to violate requirements than were larger homes. As a result of these investigations, materials and presentations have been developed by wage and hour officials to educate operators.

WARNING: If an employer is found to be out of compliance with federal rules, the agency will be required to compensate each employee in full for the amount owed over the previous two year period. If there is evidence that the employer deliberately avoided complying with the law - a *willful violation* - the amount owed will be calculated over the prior three years and penalties of up to \$10,000 may be added.

If your agency is the subject of a wage and hour investigation, you do have some defense against orders to pay back wages.

Good faith defense: Employers have a defense against liability or punishment in any action or proceeding brought against them for failure to comply with the minimum wage and overtime provisions of the FLSA *if the act or omission complained of was in good faith in conformity with and in reliance on any administrative practice or enforcement policy...with respect to the class of employers to which (s)he belonged (§§790.13 to 790.19).*

Verify accuracy of official claims: The quality, knowledge and experience of wage and hour compliance officials vary tremendously, advises consultant and attorney Robert W. Hartland. He urges employers not to rely on the accuracy of any compliance officer’s or other governmental agent’s statement of legal obligations under the FLSA when ordered to pay back wages. “The government’s position may be right; it may also be wrong,” he states. It is therefore important to verify the accuracy of any official’s claims.

Negotiate: It is also important to negotiate claims with compliance officials. Hartland urges employers to focus solely on back wage claims, less applicable credits or offsets, and to ask that there not be any provision for interest or liquidated damages. He also advises employers to request that any agreed upon back wage payments be made in installments paid over time; to refuse to agree that when a former employee cannot be located that his or her unpaid back wages will automatically be placed in the U.S. Treasury; and to refuse to agree to any “consent judgement” unless absolutely necessary. The primary risk in signing, he says, is that many courts are likely to hold that by doing so the employer has waived the FLSA two or three year limitations period for subsequent violations.

Challenge Wage and Hour Division letters as hearsay: When wage and hour compliance officials believe they have found a violation and request payment of back wages allegedly due - and an employer questions that determination and refuses to pay back wages - the local wage/hour district director may send employees letters advising them that they have the right to private suit, Department of Labor officials are prohibited from testifying in court. Without their testimony, these seemingly official letters can be challenged as hearsay when they are submitted in support of the employee’s claim for back wages. Providers are advised to inform employees’ attorneys that they will challenge introduction of these letters as evidence.

FOR MORE INFORMATION

*For more in-depth information on these and other wage and hour topics that apply to community residences, we recommend purchase of the **ANCOR Wage and Hour Handbook**. This can be obtained by sending a prepaid order directly to ANCOR at 1101 King Street, Alexandria, VA 22314, phone: 703-535-7850. The 100-plus page handbooks are available to ANCOR members for \$35 per copy and to non-members for \$50 per copy.*

The Irwin Siegel Agency, Inc. (ISA) has an extensive resource library that can help you with Wage and Hour issues and other pertinent risk management topics. You can contact ISA at 800-622-8272 or visit online at www.siegelagency.com.

Further information is also available on the Wage and Hour Division Home Page at: <http://www.dol.gov/esa/whd>.

You can also contact Wage and Hour Specialist Joni Fritz directly at her home office in Colorado in the summer, by phoning 970-586-5804, fax 970-577-1473, in Arizona in the winter at 928-203-0618, fax 928-203-0615; or via e-mail jonifritz@worldnet.att.net.

Appendices

APPENDIX I

Wage and Hour Division, Labor

29 CFR Ch. V (7-1-98 Edition)

§778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates from whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of \$250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50 & 48 hours, his regular

hourly rate of pay in each of these weeks is approximately \$6.25, \$5.88, \$5 and \$5.21 respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid \$250; for the second week \$261.36 (\$250 plus 4 hours at \$2.84, or 40 hours at \$5.68 plus 4 hours at \$8.52); for the third week \$275 (\$250 plus 10 hours at \$2.50, or 40 hours at \$5 plus 10 hours at \$7.50); for the fourth week approximately \$270.88 (250 plus 8 hours at \$2.61 or 40 hours at \$5.21 plus 8 hours at \$7.82).

(c) The “fluctuating workweek” method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee’s average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the “fluctuating workweek” method of overtime payment are present, the Act, in requiring that “not less than” the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]

APPENDIX II

29 CFR Ch. V (7-1-98 Edition)

§552.3 Domestic service employment.

As used in section 13(a)(15) of the act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffers of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

§552.4 Babysitting services.

As used in section 13(a)(15) of the Act, the term *babysitting services* shall mean the custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside. The term “babysitting services” does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational or practical nurses. While such trained personnel do not qualify as babysitters, this fact does not remove them from the category of a covered domestic service employee when employed in or about a private household.

§552.5 Casual basis.

As used in section 13(a)(15) of the Act, the term *casual basis*, when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: *Provided, however*, That such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

§552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term *companionship services* under section 3(s)(1)(B) of the Act in which case the person providing the service would be required to comply with the applicable provisions of the Act.

(b) An individual in a local neighborhood who takes four or five children into his or her home, which is operated as a daycare home, and who does not have more than one employee or whose only employees are members of that individual’s immediate family is not covered by the Fair Labor Standards Act.

[40 FR 7406, Feb. 26, 1975, as amended at 80 FR 46766, Sept. 8, 1996]

§552.106 Companionship services for the aged or infirm.

The term “companionship services for the aged or infirm” is defined in §552.6. Persons who provide care and protection for babies and young children, who are not physically or mentally infirm, are considered babysitters, not companions. The companion must perform the services with respect to the aged or infirm persons and not generally to other persons. The “casual” limitation does not apply to companion services.

§552.109 Third party employment.

(a) Employees who are engaged in providing companionship services, as defined in §552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act’s minimum wage and overtime pay requirements by virtue of section 13(a)(15). Assigning such an employee to more than one household or family in the workweek would not defeat the exemption for that workweek, provided that the services rendered during each assignment come within the definition of companionship services.

(b) Employees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a “casual basis” for purposes of the section 13(a)(15) exemptions. Such employees are engaged in this occupation as a vocation.

(c) Live-in domestic service employees who are employed by an employer or agency other than the family or household using their services are exempt from the Act’s overtime requirements by virtue of section 13(b)(21). This exemption, however, will not apply where the employee works only temporarily for any one family or household, since that employee would not be “residing” on the premises of such family or household.

APPENDIX III

U.S. Department of Labor



Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Executive Director

Dear

This is in reply to your letter of July 8, 1996, concerning the application of the Fair Labor Standards Act (FLSA) to two foster care programs operated by

Basically, as we understand the situation, _____ operates foster care programs for developmentally disabled individuals under contract with the State of Arizona. One of the programs in question involves children ages 3 through 18, and the other individuals who become licensed foster care parents in compliance with State standards. These foster care parents provide homes to the children or adults that are placed in their care. The State, through _____, pays a monthly stipend to the foster care parents for the care of the individuals in their charge. You request a determination that the foster care parents in question are not employees of _____, and consequently are excluded from the minimum wage and overtime pay requirements of the FLSA, since the requisite employment relationship under FLSA does not exist.

It is our opinion that where a State or licensed private agency selects individuals who voluntarily agree to become foster care parents in accordance with State standards, where the State agency either directly or indirectly finances the care services, and where the services are provided in the foster parent's home, an employment relationship does not exist under FLSA between the individuals providing the foster care services and the governmental or private agency. Therefore, after careful review of the facts contained in your letter, it is our opinion that the foster care parents in question are not employees of _____ and need not be paid in accordance with the monetary provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maria Echavaste".

Maria Echavaste
Administrator

APPENDIX IV

**A. Computation of Overtime When an Employee is Paid
Two Different Rates for Different Jobs**

When employees are paid two different rates for two separate jobs for the same employer, generally overtime pay is computed on the basis of one and one-half times the weighted average (29 CFR Section 778.115). For example, if an employee who has worked 30 hours during the workweek at a job that pays \$6.00 per hour, and 20 hours at a second job that pays \$5.15 per hour, overtime would be computed as follows:

$$\begin{array}{r} 30 \text{ hrs} \times \$6.00 = \$180 \\ 20 \text{ hrs} \times \$5.15 = \$103 \\ \hline \$283 \text{ (hourly pay due for all 50 hours worked)} \end{array}$$

$$\$283 \div 50 = \$5.66 \text{ (average hourly rate of pay for this workweek)}$$

$$\$5.66 \div 2 = \$2.83 \text{ (half-time overtime hourly rate)}$$

$$\$2.83 \times 10 \text{ hours (number of overtime hours worked)} = \$28.30 \text{ (overtime due)}$$

$$\$283 \text{ (hourly pay)} + \$28.30 \text{ (overtime pay)} = \$311.30 \text{ total wages due}$$

**B. Computation of Overtime When An Employee
Receives Extra Pay as a Stipend**

The same general procedure is used when computing overtime for a workweek in which an employee receives additional compensation that must be added to the usual hourly wage rate when computing overtime. The following example illustrates how overtime should be computed for an employee who works 50 hours in a workweek for which she receives \$6 per hour, plus \$10 per day for carrying a paging device (beeper) for five (5) days to respond to emergencies. In this case, wages due would be computed as follows:

$$\begin{array}{r} 50 \text{ hrs} \times \$6 = \$300 \\ 5 \text{ days} \times \$10 = +50 \\ \hline \$350 \text{ (hourly wages due + premium pay for carrying beeper)} \end{array}$$

$$\$350 \div 50 = \$7 \text{ ("regular" hourly rate of pay in this workweek)}$$

$$\$7 \div 2 = \$3.50 \text{ (half-time overtime hourly premium pay rate)}$$

$$\$3.50 \times 10 \text{ hrs (number of overtime hours)} = \$35 \text{ (overtime pay due)}$$

$$\$350 + \$35 = \$385 \text{ total wages due}$$

APPENDIX V

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210



Ms. Joni Fritz
Executive Director
National Association of Private Residential Facilities for the Mentally Retarded
6269 Leesburg Pike, Suite B-5
Falls Church, Virginia 22044

Dear Joni:

This refers to your letter of February 27, 1980, with which you enclosed a copy of a letter addressed to Dr. _____, Administrator, The _____, Inc. Ohio. The letter to Dr. _____ contained an opinion from the Cleveland Regional Solicitor's office, regarding employees who volunteer to take children from the Foundation into their homes for weekend visits.

The response to the issues contained in the letter to Dr. _____ has been reviewed. We are concerned, however, that Dr. _____ letter of May 23, 1978 presents insufficient facts upon which to base a final determination.

The issue is whether "home visiting" which is offered to the children on a voluntary basis by employees of the _____, is an activity of the same general nature that is provided for the children while on the premises, or whether it is essentially a form of private hospitality. If the "home visiting" represents a continuation of the same services that are provided for the children while on the premises of the institution, and if the visits represent a substantial expenditure of time by the employees on a regular or recurrent basis, then we would consider such time spent as compensable under the Act. On the other hand, if the activity is a form of hospitality, such as any family might occasionally offer to friends or relatives, and entirely voluntary with no coercion by the employer, no promise of advancement or no penalty for not volunteering, then we would be inclined not to consider time spent engaging in such activity as compensable "work."

In view of the above, we have requested the Cleveland Regional Solicitor's Office to respond further to the issues raised in Dr. _____ letter.

We are responding by separate letter to the issues regarding compensable hours for overnight staff in community residential care facilities.

Sincerely,

A handwritten signature in black ink that reads "Herbert J. Cohen". The signature is written in a cursive, flowing style.

Herbert J Cohen
Assistant Administrator

APPENDIX VI

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



WAGE AND HOUR MEMORANDUM - 88.48

MEMORANDUM FOR ALL ASSISTANT REGIONAL ADMINISTRATORS
Wage and Hour Division

FROM: PAULA V. SMITH
Administrator

SUBJECT: Community Residence (Group Homes) for the Mentally Retarded and
similar residential care facilities - Enforcement Policy

WH memorandum 88.02, dated January 4, 1988, temporarily suspended investigations of group homes in which hours worked are at issue. The suspension was implemented to allow time for a review of certain group home investigations. This review has now been completed, and we have concluded that further guidance on hours-worked issues in group homes is necessary. In addition, we are proposing a consistent enforcement policy to be followed in completing these investigations. The attached enforcement policy may be provided to employers, employees and other interested parties for their guidance.

Attachment

Cc: RAs
NO Executive Staff
Monica Gallagher

US Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Hours Worked in Residential Care (Group Home) Establishments - Sleep Time and Related Issues - Enforcement Policy

A major concern of employers operating residential care (group home) facilities continues to be the issue of what constitutes working time (hours worked) for their employees who are subject to the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA). The duties of most employees of such residential care facilities require them to remain on their employer's premises overnight. Although permitted to sleep, group home employees are required to remain on the premises to be available to clients in case of emergencies or personal crises. The employees are often provided with private quarters and other amenities, which together can be characterized as constituting a home-like environment.

The following enforcement policy statement is intended to assist employers and employees by restating and clarifying the position of the Wage and Hour (WH) Division with respect to certain sleep time and other hours worked issues. This statement will provide further clarification and guidance as to the conditions under which WH, in its enforcement of the FLSA, will not require that sleep time of such employees be compensated.

Background and Summary

Since 1981, WH has issued a number of letters to representatives of the residential care (group home) industry in response to their questions regarding sleep time. Employers were advised that a special position with regard to sleep time had been adopted which is a departure from the normal rules stated in Interpretive Bulletin, 29 CFR Part 785, sections 785.20 through 785.23.

This special position allows "relief" employees who are provided with private quarters in a home-like environment to be treated the same as "full-time" employees (i.e. those who either reside on the employer's premises permanently or for "extended periods of time") whom they relieve with respect to deducting sleep time. This special position was developed out of concern for the apparent inequities of requiring compensation for sleep time for relief employees but not for full-time employees being relieved who work under identical conditions at the same facility.

An essential requirement for this special position is that a group home have one or more full-time employees who either reside on the premises permanently or "for extended periods of time" (IB 29 CFR 785.23). In a 1981 letter, WH took the position that residing on the employer's premises 120 hours a week or 5 consecutive days or nights, would qualify an employee as residing on the premises for extended periods of time within the meaning of IB section 785.23. Examples were given to illustrate what was meant by extended periods of time: 9:00 am Monday to 5:00pm Friday; or 9:00pm Monday until 9:00 am Saturday (ignoring short periods of off-duty time during the day). Based upon a review of recent compliance actions by WH it has become clear that further guidance is necessary for employers and employees in the industry.

Enforcement Policy

The following terms which are used in the enforcement policy statement set forth below have caused some difficulty and are being defined for further guidance:

“day” - (except in the phrase “days and nights”) means a 24-hour period during which an employee works (is compensated for) at least eight hours

“workweek” - means seven consecutive 24 hour periods (29 CFR 778.105)

“on-duty” - means the period of time the employee is required to be on the employer’s premises or otherwise working for the employer.

“off-duty” - means time period during which the employee is completely relieved from duty and is free to leave the employer’s premises or otherwise use the time for his or her benefit.

“private quarters” - means living quarters that are furnished; are separate from the “clients” and from any other staff members; have as a minimum the same furnishings available to the clients (e.g. bed, table, chair, lamp, dresser, closet, etc.) and in which the employee is able to leave his or her belongings during on- and off-duty periods.

“home-like environment” - means facilities including “private quarters” as above and also including on the same premises facilities for cooking and eating; for bathing in private; and for recreation (such as TV). The amenities and quarters must be suitable for long-term residence by individuals and must be similar to those found in a typical private residence or apartment, rather than those found in institutional facilities such as dormitories, barracks, and short-term facilities for travelers.

Under circumstances where an employee does not maintain his or her permanent residence on the premises and does not otherwise reside on the premises 7 days a week, WH will consider an environment, to reside on the premises for an extended period of time within the meaning of IB 785.23 if the employee resides on the premises for a period of at least 120 hours in a workweek.

WH is refining and restating the minimum conditions required to meet this rule. An employee will be found to reside on the premises for extended periods of time if:

- 1) The employee is on duty at the group home and is compensated for at least eight hours in each of five consecutive 24-hour periods; and
- 2) The employee sleeps on the premises for all sleep periods between the beginning and the end of this 120-hour period.

-3-

Any 24-hour period can be utilized, and the eight compensated hours per 24-hour period need not be consecutive. Thus, an employee who is on duty and compensated for the period 5:00pm to 10:00pm Monday, 6:00am to 9:00am and 3:00pm to 10:00pm Tuesday through Friday, and 6:00am to 9:00am Saturday, and who sleeps on the premises (10:00pm to 6:00am) for all sleep periods from Monday night through Friday night, has been compensated for at least eight hours in five consecutive 24-hour periods between 5:00pm Monday and 5:00pm Saturday. The employee would also have slept five consecutive nights on the premises. Provided the other conditions were met, this would be considered to be residing on the premises for an extended period of time. Similarly, an employee who is on duty and is compensated from 6:00am to 9:00am and 5:00pm to 10:00pm, Monday through Friday, and who sleeps Monday through Thursday nights on the premises, would be considered to reside on the premises for extended periods of time. For convenience, these employees are called “full-time” employees.

Where one or more employees meet the “full-time” employee/residing on the premises test, WH, as an enforcement policy, will likewise apply the provisions of IB 785.23 to one or more “relief” employees who reside on the premises for one to three nights, provided these employees are on duty and are compensated for at least eight hours in each 24-hour period in question and sleep on the premises all intervening nights. Although as a general matter it is anticipated that there will be no more than one relief employee for each full-time employee, it is possible that there may be more than one. However, to come within the provisions of this special enforcement policy, the relief employee must be relieving a full-time employee. That is, the full-time employee and the employee(s) relieving that employee may not be on duty for more than a combined total of seven days and seven nights in each workweek. Furthermore, a part-time employee will not be considered a relief employee if that employee and the full-time employee being relieved are on duty simultaneously for more than one hour a day.

In order to deduct sleep time for full-time and relief employees, such employees must be provided private quarters in a homelike environment. Further, a reasonable agreement must be reached, in advance, regarding compensable time. The employer and the employee may agree to exclude up to eight hours per night of uninterrupted sleep time. They may also agree to exclude a period of off-duty time during the day when the employee is completely relieved of all responsibilities. These exclusions must be the result of an employee-employer agreement and not a unilateral decision of the employer. Such an agreement should normally be in writing to preclude any possible misunderstanding of the terms and conditions of an individual’s employment.

Where sleep time is to be deducted, the employer should determine if the following criteria are met:

- 1) The employer and the employee have reached agreement in advance that sleep time is being deducted;
- 2) Adequate sleeping facilities with private quarters (see above) were furnished;

-4-

- 3) If interruptions occurred, employees in fact got at least five hours of sleep during the scheduled sleeping period;
- 4) Employees are in fact compensated for any interruptions in sleep; and
- 5) No more than eight hours of sleep time is deducted for each full 24-hour on-duty period.

Sleep time may not be deducted for “relief” or other part-time employees who are not relieving a “full-time” employee (as defined above), unless such employees are themselves on duty for 24 hours or more as provided in IB 785.22. It should again be noted that an off-duty period (free-time) during a weekday for such employees “breaks” an on-duty period from 5:00pm of one day to 5:00pm the following day, during which an employee has uncompensated free time between 9:00am and 3:00pm of the on-duty period, is not considered to be a 24-hour duty period.

Interim Nonenforcement Policy

With respect to suspended investigations of group homes, which were commenced before the date of this policy statement, WH is adopting a nonenforcement policy with regard to the payment of back wages resulting only from unpaid sleep time. This policy is being adopted in light of the apparent confusion and/or misunderstanding on the part of the industry with regard to the WH position on the compensability of sleep time for employees employed in residential care facilities.

The employees involved in such suspended investigations will be advised of this limited nonenforcement policy. This limited nonenforcement policy will not be followed with respect to back wages resulting from any other violations of FLSA. WH will follow normal procedures with respect to other violations of FLSA.

WH will not initiate any new investigations of residential care facilities which involve only an assertion that improper sleep time deductions are being made by a group home employer until 90 days from the date of this enforcement policy statement.

This nonenforcement policy will not apply to any cases that the Department of Labor is currently litigating. Furthermore, nothing in this entire enforcement policy statement is intended to affect any employee’s independent right under section 16(b) of FLSA to assert that sleep time is compensable.

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



WAGE AND HOUR MEMORANDUM 88-

MEMORANDUM FOR ALL ASSISTANT REGIONAL ADMINISTRATORS

FROM: PAULA V. SMITH
Administrator

SUBJECT: Clarification of the Group Home Enforcement Policy
of June 30, 1988 (WH Memorandum 88.48)

The attached letter of August 18 was sent to the National Association of Private Residential Resources. The letter clarifies certain provisions of the Enforcement Policy of June 30 and reiterates that “full-time” and “relief” employees of residential care facilities meeting the conditions outlined in the Enforcement Policy are to be treated the same with respect to hours worked.

This letter should be attached to the Enforcement Policy for additional staff guidance and should be enclosed with the Enforcement Policy whenever the policy is furnished to employers, employees, or other interested parties.

Attachment

cc: RAs
NO Executive Staff
Monical Gallagher

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



Dear Ms. Fritz:

This is in response to your letter of June 29 concerning the application of the Fair Labor Standards Act to employees of residential care facilities. You request clarification regarding certain provisions of the “Sleep Time and Related Issues Enforcement Policy.”

In light of your comments, we have reviewed the Enforcement Policy as it pertains to the requirement for an employee to sleep “on the premises for all sleep periods between the beginning and end of the 120-hour period” and the example given of the employee who “sleeps Monday through Thursday nights on the premises.” As you were advised during the meeting with members of my staff on June 28, these two statements are not inconsistent and do not represent a departure from the 120-hour requirement. As explained at the briefing, under the special circumstances where the 120-hour period ends with an off-duty period instead of a regularly scheduled sleep period and the employee has the option to leave the premises and chooses to do so, we would consider the conditions of the rule to be met.

Thus, in the case of an employee who sleeps on the premises Monday through Thursday nights, the employer and the employee may agree that the employee will be off-duty Friday night rather than be required to remain on the premises. Under these conditions, the final 8-hour period is really “off-duty” time rather than “sleep time.”

These same principles would apply in the case of a “relief” employee whose duty period ends with “off-duty” time. As we reiterated during the briefing, it is our intent that “full-time” and “relief” employees of residential care facilities be treated the same under the special enforcement policy we have adopted. Relief employees, of course, must meet all of the conditions outlined on pages 4 and 5 of the Enforcement Policy.

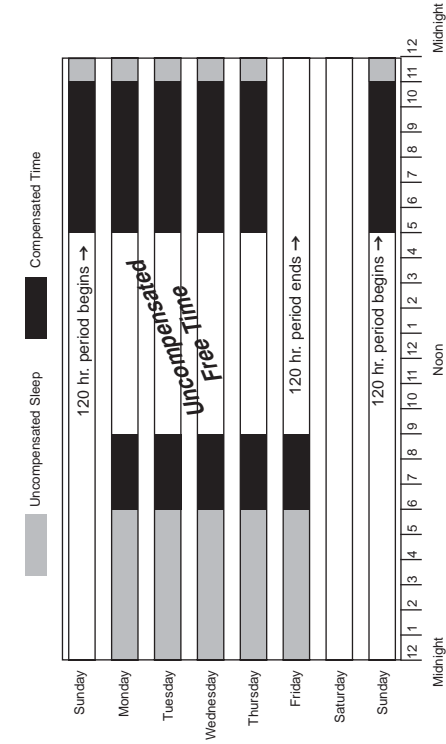
We trust that the above discussion is responsive to your inquiry.

Sincerely,

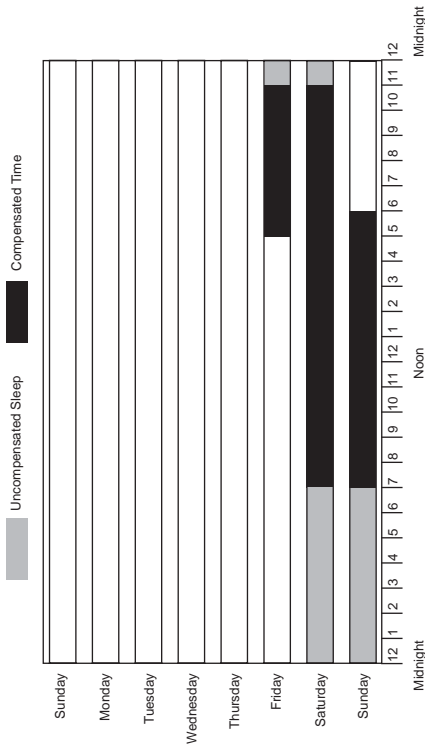
Paula V. Smith
Administrator

APPENDIX VII

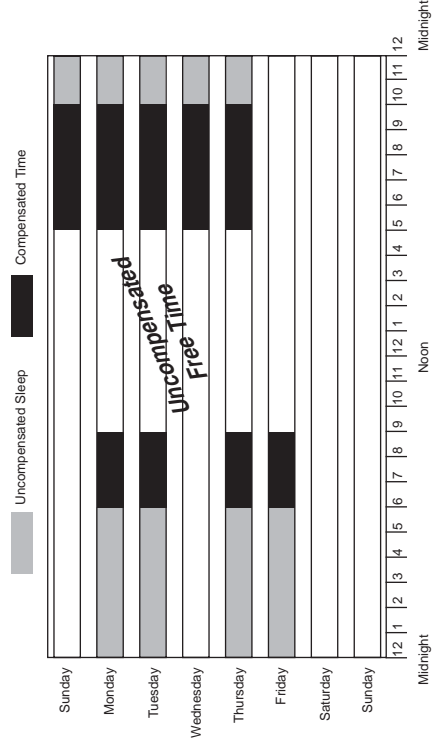
#2. Example of staffing pattern that meets U.S. Department of Labor 6-30-88 enforcement policy requirement for an individual who is "residing on the premises for an extended period of time" under 785.23. Duty covers a 120-hour period within a 160-hour workweek, with eight hours of work in each of five consecutive 24-hour periods. It overlaps weekend "relief" employee by just one hour on Sunday evening.



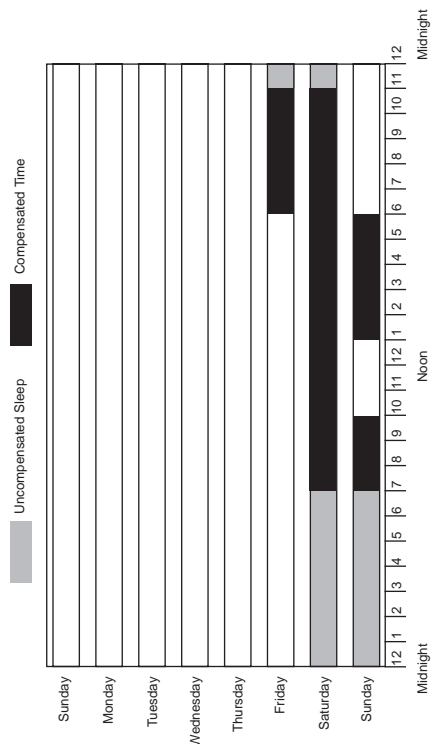
#1. Duty of 24 hours or more under 785.22, and/or "relief" under 6-30-88 U.S. Department of Labor enforcement policy. This schedule overlaps duty of the "full-time employee residing on the premises" by one hour on Sunday evening.



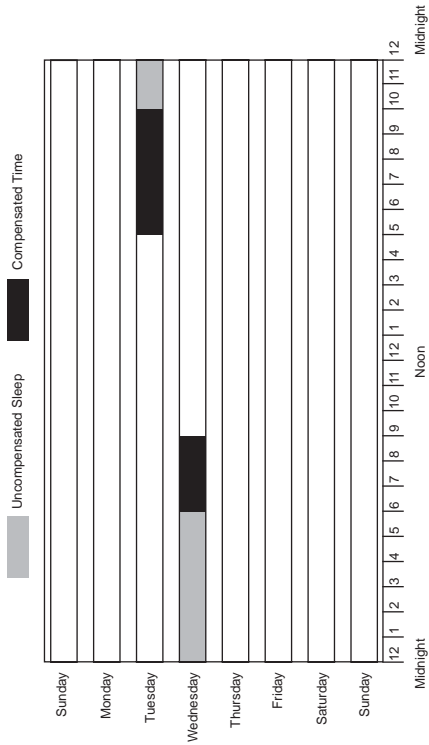
#4. Treatment of sick leave for "full-time extended period" employee. Example shows off-duty period in the middle of the workweek from 9 a.m. Tuesday to 5 p.m. Wednesday.



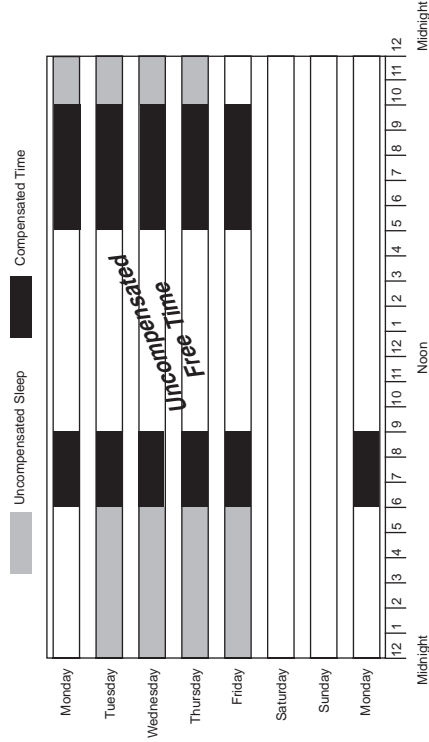
#3. Duty of 24 hours or more as a "relief" employee under 6-30-88 U.S. Department of Labor enforcement policy. This schedule overlaps 120-hour period of "full-time employee residing on the premises" by one hour on Sunday evening; and provides for a three-hour period of off-duty uncompensated free time mid-day Sunday.



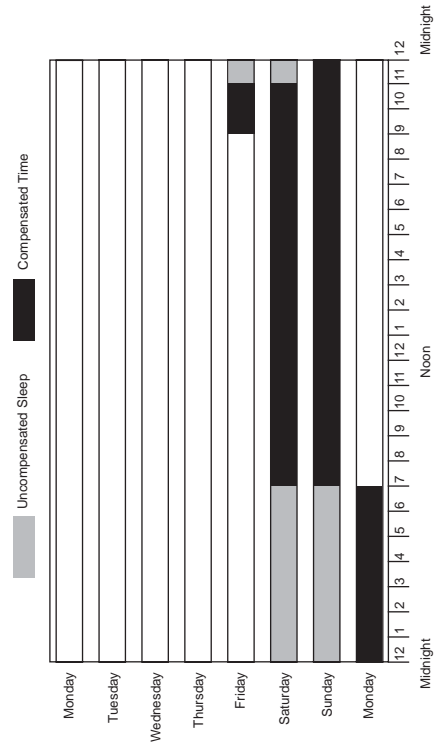
#5. "Relief" of full-time extended period employee who is sick mid-week. This "relief" employee is paid for a minimum of eight hours of work in a 24-hour period. (A home cannot be scheduled this way every week.)



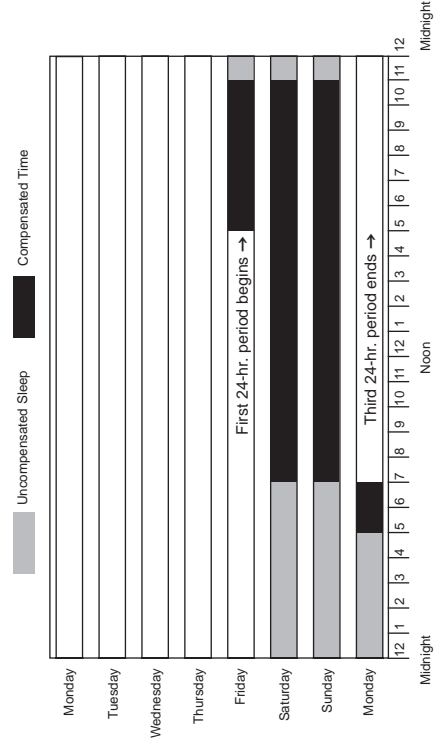
#6. Alternative method of complying with Department of Labor "full-time extended period" requirements. This pattern includes eight hours of work in five consecutive 24-hour periods as described in the enforcement policy of 6-30-88, page 4.



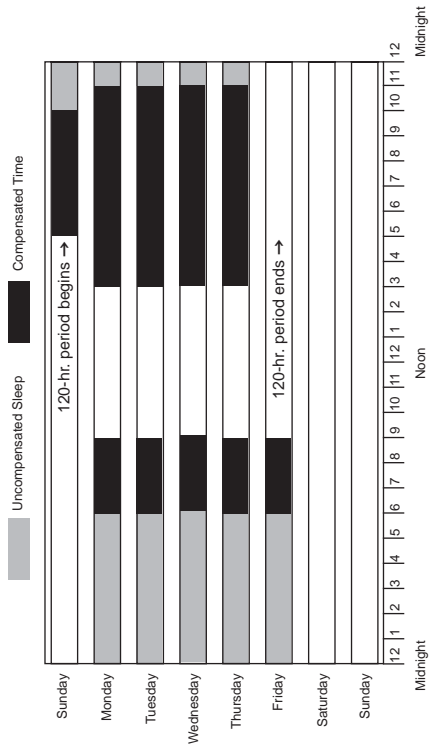
#7. Providing substitute coverage for staffing pattern in Overhead #6. This weekend substitute employee is on duty for more than 24 hours under 785.22, but not for three 24-hour periods. Nor is he or she working a minimum of eight hours in the third 24-hour period as required under the 1988 policy. Thus he or she must be paid for the third sleep period.



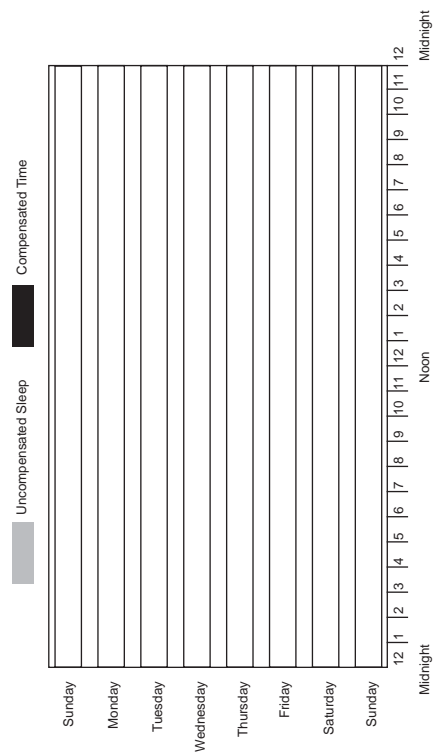
#8. In this example, the "relief" employee works under the 1988 enforcement policy. This schedule has work during Saturday and Sunday that overlaps two 24-hour periods, and also has free time at the beginning and end of the three 24-hour periods of duty.



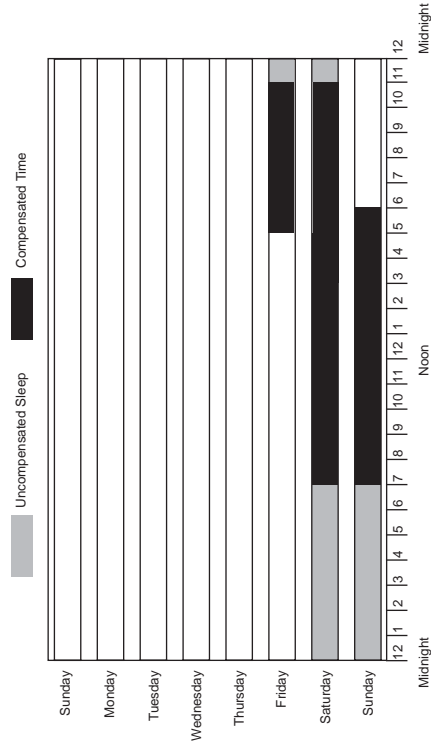
#9. Example of alternative staffing pattern that meets U.S. Department of Labor 6:30-88 enforcement policy requirement for an individual who is "residing" on the premises for an extended period of time under 785.23. Duty covers a 120-hour period within a 160-hour workweek, with at least eight hours of work in each of five consecutive 24-hour periods. Each 24-hour period goes from 5:00 p.m. one day to 5:00 p.m. the next, with the result that the afternoon duty occurs during two different 24-hour periods on Monday through Thursday. It is important to note that this represents a 46-hour workweek with six hours of overtime pay due.



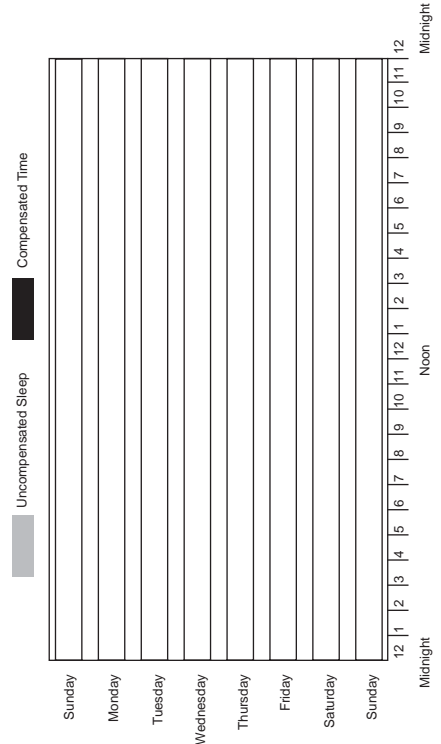
#11. NOTE: Blank forms that can be used to develop alternative staffing patterns for an agency.



#10. Weekend staffing for a home using the pattern demonstrated in example #8, which complies with 785.22, duty of 24 hours or more.



#12. NOTE: Blank forms that can be used to develop alternative staffing patterns for an agency.



APPENDIX VIII

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



Ms. Joni Fritz
Executive Director
National Association of Private Residential Facilities for the Mentally Retarded
6269 Leesburg Pike, Suite B-5
Falls Church, Virginia 22044

Dear Ms. Fritz:

This is in further reply to your letter of April 30 in which you ask two questions on whether time spent sleeping is compensable hours worked under the Fair Labor Standards Act (FLSA). You are also concerned with the status of a previous letter on the application of FLSA to individuals who provide foster care to mentally retarded children and adults.

You ask the following questions on time spent sleeping.

Q. 1) In order to exclude time spent sleeping from compensable hours of work under FLSA, must the 5 hours of sleep discussed in section 785.22 of Interpretive Bulletin, Part 785, be 5 consecutive uninterrupted hours?

A.1) As stated in section 785.22(b) of the bulletin, the Wage and Hour Division has adopted the rule that if the employee cannot get at least 5 hours of sleep during the scheduled sleep period, the entire sleep period is working time. Your understanding is correct that the 5 hours of sleep need not be 5 consecutive hours of uninterrupted sleep. However, if interruptions are so frequent as to prevent reasonable periods of sleep totalling not less than 5 hours, the entire period would be considered hours worked.

Q.2) Does an individual who sleeps for 5 hours at the beginning of the sleep period have to be paid for the remaining 3 hours if the interruption occurs after 5 hours of sleep?

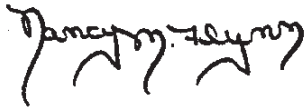
A.2) As stated in section 785.22(b) of the bulletin, if the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. Therefore, if the employee is interrupted after 5 hours of sleep, the time he or she spends on duty is hours worked. If the call to duty lasts for 3 hours, all 3 hours must be counted as hours worked. If the call to duty is less than 3 hours, only the time the employee is on duty must be counted as hours worked.

With regard to your earlier correspondence, there is not enough detailed information in your letter for us to make definitive determinations of the application of FLSA to the foster care programs you have in mind. In order to make such determinations, descriptions of actual foster care situations are required. In addition to the kinds of information provided in your letter,

these descriptions should include detailed discussions of the arrangements between the individuals providing the foster care and the residential care facilities with whom they are associated. Also of assistance to us would be descriptions of the arrangements between those providing the foster care and the individuals who assist them in caring for the mentally retarded; from whom and for what purposes do the individual who provide the foster care receive extra compensation in addition to the costs they incur for caring for the mentally retarded; whether or not those providing foster care are husband and wife or other related or unrelated individuals; and whether or not the individuals providing the foster care do so in their own homes or in other types of residential care settings.

Upon receipt of this kind of information, we will be pleased to consider, on a case-by-case basis, your request for an opinion on the application of FLSA to individuals who provide foster care to the mentally retarded.

Sincerely,

A handwritten signature in black ink, appearing to read "William M. Otter". The signature is written in a cursive style with some loops and flourishes.

William M. Otter
Administrator

Enclosure

APPENDIX IX

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



Joni Fritz
Executive Director
National Association of Private Residential Facilities for the Mentally Retarded
6269 Leesburg Pike
Suite B-5
Falls Church, Virginia 22044

Dear Ms. Fritz:

Thank you for your letter in which you indicate your concern about the inclusion of the reasonable cost or fair value of a meal in the regular rate of pay when computing overtime pay under the Fair Labor Standards Act.

You state the staff of many residential programs are required to eat with residents. This is to provide continuity in the program and to serve as a role model at mealtime as well as to offer general supervision and guidance in appropriate eating behavior. It is your opinion that such meals are actually consumed at the instruction of (and therefore, the benefit of) the employer and the cost value need not be considered part of an employee's compensation.

Under the above circumstances, we assume that time spent in eating such meals is counted as compensable hours of work. As explained in section 531.3 (d) (1) of 29 CFR Part 531, copy enclosed, the cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Section 531.32 C states that meals are always regarded as primarily for the benefit and convenience of the employee. However, in the unusual situation you present where an employee is providing general supervision, guidance and serving as a role model to his or her wards as an integral part of the employment, and is required to eat the meal, it is our opinion that under such circumstances, the meals are primarily for the convenience of the employer.

Accordingly, since such meals are not remuneration for employment, the "regular rate" of pay is not increased by the reasonable cost of the meals furnished to the employees.

A thorough review of the wage and hour guidelines which you prepared and submitted for review, indicates they are technically correct. However, you may wish to cross reference some of the points presented to prevent any misunderstanding by your clientele. For example, point 3 might be cross referenced to point 16 and point 10 might be cross referenced to points 11 and 12.

In addition, you may wish to add the following after the first sentence of point 9. Employees who reside on the employer's premises five days a week may be considered as residing on the employer's premises for extended periods of time. Where less than 120 hours are spent residing on the employer's premises five consecutive days or nights would also qualify as residing on the premises for extended periods of time.

Sincerely,

A handwritten signature in black ink that reads "Herbert J. Cohen". The signature is written in a cursive style with a large, looping initial "H".

Herbert J. Cohen
Assistant Administrator

Enclosure

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