

MAY 14 2001

OPINION LETTER

Dear Mr.

This letter is in response to your request for an opinion under the Fair Labor Standards Act (FLSA), regarding the application of the "domestic service employment" exemption set forth in Section 13(a)(15) for home care aides working at adult homes and senior living communities.

You define "adult homes" as homes designed for individuals who are in need of assistance with certain day-to-day functions, such as meal preparation, housekeeping and medications. Each home houses more than one hundred residents and no more than two residents live together in a room. Private rooms are made available for a higher fee. You also indicate that during the residents' stay the facility is their only home. Adult homes are privately owned and operated and do not receive governmental funding including Medicare.

You define "senior communities" as communities for seniors in which residents enter into an Occupancy Agreement with the facility owner which includes an apartment lease. As per the agreement, services are provided to the residents as part of a monthly fee. Services include meal preparation, apartment maintenance, security, utilities, weekly housekeeping and social activities. Again, you indicate that the facilities are privately owned and operated with no government funding and residents are personally responsible for all costs associated with living at the facilities.

In both circumstances you inquire whether the work performed by home care aides who are not employed by the adult homes and senior communities meets the "private home" criteria set forth in 29 CFR 552.3 and 552.101. You indicate that home care aides work for an agency, your client, that provides home care services to residents desiring such services. The residents themselves (or their families) pay for the home care aides and payment is made directly from the resident to the agency.

We have considered your inquiry under the provisions of section 13(a)(15) of FLSA. This section provides a minimum wage and overtime pay exemption for employees employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.

For section 13(a)(15) of the FLSA to apply, domestic service must be performed in or about a private home. The term "private home" is discussed in Senate Report No. 90-690 on the Fair Labor Standards Amendments of 1974. On page 20 of that report it is stated that "...The domestic service must be performed in a private home which is a fixed place or abode of an individual or family. A separate and distinct dwelling maintained by an individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home ***" (emphasis supplied). See 29 C.F. R. 552.101.

You state that you believe that the "private home" criteria is satisfied by your client's home care aides because (1) they are not employed by the facilities but are retained by the residents themselves, (2) the aide services are paid by the residents (or families) and not the facilities, (3) the purpose of the exemption is to allow individuals and their families the ability to obtain home care at a reasonable cost, and (4) the facilities are not state run or funded but are more akin to apartment houses, condominiums or hotels where senior citizens live.

Based on the information provided, it is our opinion that the facilities described in your letter are not private homes for the application of the companionship exemption. First, even though the aides employed by your client are retained and paid via the agency by the residents, and not the adult and senior facilities, the work itself must be performed in or about a private home.

Second, the fact that the facilities are not state run or funded but are described as more akin to apartment houses, condominiums or hotels where senior citizens live does not preclude the fact that the facilities in which the aides are employed are more analogous to a boarding or lodging house operated for a business or commercial purpose than to a private home. Many factors distinguish the homes leased by clients in senior communities and rented rooms in adult homes from the private homes contemplated by the statute. Moreover, the fact that the home or community is the sole residence of the client is not enough to make it a private home under the Act. The determination is fact-specific and is made on a case-by-case basis. For instance, the residents in the facilities described are placed in a residence outside the family home and without the full-time, live-in care of a relative. They are housed in a residence with strangers who are also in need of long term residential care along the lines of a service provider. Moreover, facility employees, and not a family member, control their diets and daily activities (to some degree). Also, the facility sets up shared living arrangements with other elderly persons of up to two residents per room as in adult homes. The adult homes may select

the clients who will share the same residence, although the client has the right to request a private room for a higher fee and senior communities allow the lease of a room within the "senior residential retirement community." Despite the client's participation in the upkeep of the home, the provider is ultimately responsible for the maintenance of the residence. Moreover, although the arrangement provided by the facilities described may be much more preferred by clients and their families than institutionalization, these residences are not the same as private homes with respect to the objectives of the companionship exemption. Therefore, work performed by your client's home care aides at such facilities does not meet the criteria for exemption under the meaning of Section 13(a)(15) of the Act.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit 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 request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

I trust that the above information is responsive to your request. If you have any further questions, please do not hesitate to contact this office.

Sincerely,

Thomas M. Markey
Acting Administrator
