U.S. Department of Labor

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

AUG 16 2002

Dear

This is in response to your inquiry regarding the "companionship services" exemption provided by Section 13(a)(15) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(15). You asked whether employees engaged in companionship services, as defined in 29 C.F.R. § 552.6, and who are employed by an employer or agency other than the household using their services, but who are not jointly employed by such household, are nevertheless considered exempt from minimum wage and overtime requirements under the FLSA's companionship services exemption.

Your inquiry is based on your review of two prior letters issued by the Wage and Hour Division's Office of Enforcement Policy, Fair Labor Standards Team, dated January 6, 1999, and May 20, 1999. These two letters appear to indicate that employees of a third party employer working as domestic service employees in private homes may not qualify for the Section 13(a)(15) exemption unless they are jointly employed by the third party employer and the household where they are employed. You stated that neither the statute, the interpretive regulations at 29 C.F.R. § 552.109, nor any of the interpretive case law you reviewed in published court decisions on the scope of the companionship services exemption, discuss a requirement for joint employment as a prerequisite for this exemption being available to a third party employer.

As you noted, Section 13(a)(15) of the FLSA provides an exemption from minimum wage and overtime requirements for:

> "[A]ny employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves ..."

29 U.S.C. § 213(a)(15). Our interpretation of this statutory provision is reflected in the Department of Labor's interpretive regulation at 29 C.F.R. § 552.109(a), which states:

"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)."

The interpretation of the Section 13(a)(15) exemption reflected in 29 C.F.R § 552.109(a) has been upheld by federal courts. See, e.g., Johnston v. Volunteers of America, Inc., 213 F.3d 559, 561-62 (10th Cir. 2000), and cases cited therein. In Johnston, the court rejected the argument that Section 552.109(a) is in any way limited by the language in 29 C.F.R. § 552.3, defining domestic service employment. 213 F.3d at 562 ("We hold that the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption.")

The Department of Labor proposed revising 29 C.F.R. § 552.109 to add a joint employment requirement in December 1993, and reopened and extended the public comment period on that proposal in September 1995. No final rule was ever issued in connection with that proposal. On January 19, 2001, the Department issued additional proposed revisions to these regulations (see 66 FR 5481 (Jan. 19, 2001) and 66 FR 20411 (Apr. 23, 2001)). However, the Department published a notice in the Federal Register on April 8, 2002, withdrawing the proposed regulations and terminating the rulemaking proceeding. Enclosed is a copy of the Federal Register notice.

Consequently, Section 552.109 of the regulations has not been revised to add a joint employment requirement as a condition for companionship services exemption. Thus, under 29 C.F.R. § 552.109(a), an employee who is engaged in providing companionship services in private homes and who is employed by a third party employer other than the family or household receiving the worker's services is exempt from the minimum wage and overtime requirements under Section 13(a)(15) of the Fair Labor Standards Act. All prior opinions issued by this agency expressing a contrary view, including those of January 6, 1999, and May 20, 1999, are hereby rescinded and withdrawn.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosure