

FLSA-561

December 17, 1974

We regret the delay in replying to your letter of July 26, 1974, concerning the application of the recently amended Fair Labor Standards Act to individuals providing child-care service to enrollees in the Work Incentive Program administered by the Social Service Board of ***.

You ask whether these individuals, who provide either in-home or out-of-home child-care service to the program enrollees, are "employees" of the State of *** and, as such, entitled to be paid a minimum wage of at least \$1.90 an hour (\$2.00 an hour beginning January 1, 1975). On the basis of the available information, it would be our position that if the enrollee in the Program selects, and, in fact, is free to select and deal directly with the individual who will provide the child-care service, the prerequisite employer-employee relationship would not exist for purposes of the Act as between the State of *** and the individual providing the service. The fact that the funds are provided by the State and paid (directly or through the enrollee) to the individual providing the service would not alter this position.

The above position notwithstanding, it should be pointed out that the Act's minimum wage provisions would apply to any employee performing child-care service in or about the private household of the person (enrollee) by whom he or she is employed to perform such service. Thus, in those situations where the child care service is performed in the home of the Program enrollee, the State of ***, in carrying out its statutory financial responsibility for such service, would be obligated to make payment, (directly or through the enrollee) in an amount equal to at least the minimum wage required by the Fair Labor Standards Act, i.e., \$1.90 an hour (\$2.00 an hour beginning January 1, 1975) for all hours worked in the workweek. However, the Act's wage provisions would not apply to such a domestic service employee if engaged by the enrollee to perform such service in the babysitter's own home since then the work would not be performed in or about the private household of the person (enrollee) by whom he or she is employed.

We trust that the above information is of assistance to your office.

Sincerely,

Betty Southard Murphy
Administrator
Wage and Hour Division