FLSA-301

May 4, 1977

Thank you for your letter dated April 1, 1977, concerning the application of the Fair Labor Standards Act to not-for-profit child care agencies. As you know, I have a strong personal interest in the welfare of these agencies, and I am disturbed by the suggestion that the application of the Fair Labor Standards Act might impede the performance of their important mission.

As I recall from our discussion, one of your principal questions is with regard to coverage by the statute. The following information may clarify the question of coverage. The statute specifically covers all employees of institutions "primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution … whether operated for profit or not for profit" (FLSA, section 3(r)(1) and 3(s)(4)). The term "primarily" as used in this context and elsewhere in the Act is held to mean more than half. Thus, an institution for the residential care of emotionally disturbed persons would come within the coverage of section 3(s)(4) of the Act if more than 50% of its residents have been admitted by a qualified physician, psychiatrist, or psychologist. The term "admitted" includes persons referred for evaluations of mental or emotional disturbance by such a qualified practitioner, either subsequent to admission to the institution or preceding admission.

It is also important to bear in mind that non-profit homes or agencies primarily caring for delinquent, dependent, or neglected children where mental illness is not a reason for admission are not covered by the Act. However, some of their employees may be covered because they are individually engaged in interstate commerce or are producing goods for interstate commerce. Similarly, the ordinary home for orphans is not covered on an overall basis where no school is operated on the premises.

With regard to the concern you expressed about the impact of the Act on covered child care institutions, you may be interested in the special provision dealing with the problems of employees who reside on their employer's premises. (See section 785.23 of the enclosed Interpretative Bulletin Part 785 on Hours Worked). This provision recognizes that employer's and employees may enter into reasonable agreements whereby such employees who reside on an employer's premises will not be considered to be working during normal periods of sleeping, eating, recreation, or other periods when they are completely relieved from duty. Where there is a reasonable agreement between employer and employee, such agreement establishes the hours the employee is considered to work. Precise recordkeeping regarding hours worked is not required. The employer should keep a record which shows the schedule adopted in the agreement and indicates that the employee's work time generally coincides with the agreement or schedule.

I appreciate your bringing this important problem to my attention. It is my sincere hope that institutions which are covered by the Act will be able to utilize the flexible

procedures described in the Interpretative Bulletin and continue their important work without impairment.

Sincerely,

Ray Marshall
Secretary of Labor

Enclosures