

## FLSA-124

December 21, 1978

This is in reply to your letter of September 18, 1978, requesting an opinion concerning the application of the Fair Labor Standards Act to the greenhouse operations of a non-profit residential treatment facility for drug abusers. We regret the delay in responding however, your correspondence was only recently received in this office.

The Fair Labor Standards Act is the Federal law of most general application concerning wages and hours of work. The major provisions of this law concerning residential care facilities are contained in the enclosed WH Publication 1326.

Section 3(s)(5) of the Act extends its coverage to among others, an enterprise engaged in the operation of a private institution primarily engaged in the care of the sick who reside on the premises of such institution. All nonexempt employees of such an institution must be paid a minimum wage of at least \$2.65 an hour and overtime premium pay of not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek. Under section 7(j) of the Act, however, overtime premium pay may be paid to covered nonexempt employees of certain residential care institutions after 8 hours in a day or 80 hours in a 14-consecutive day period, provided certain conditions described on pages 6 and 7 of WH Publication 1326 are met.

The Supreme Court has held that persons who, without any expressed or implied compensation agreement, may work for their own advantage on the premises of another, are not necessarily employees. Whether trainees or students are employees under the Act will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the criteria described on page 3 of the enclosed WH Publication 1297 are met, trainees are not considered employees within the meaning of the Act. However, the information provided in your correspondence indicates that the trainees are paid a stipend of \$50 a month (plus incentive increments above the stipend level based on merit and increased industry responsibility) from the generated revenues of the greenhouse. Also, the information you present implies that the greenhouse will be in competition with commercial greenhouses in the area. Therefore, it appears there would be an employer-employee relationship between the workers in the greenhouse and your drug treatment center.

Section 13(a)(6) of the Act provides a complete exemption from the minimum wage and overtime pay provisions for any employee employed in agriculture as defined in section 3(f) of the Act (discussed below) if such employee is employed by an employer who did not, during any calendar quarter of the preceding calendar year, use more than 500 man-days of agricultural labor. A "man-day" is defined as any day during which an employee performs agricultural labor for not less than one hour. Five hundred man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter. (See section 780.305 of the enclosed copy of 29 CFR Part 780.)

Section 3(f) of the Act defines "agriculture" to include farming in all its branches, and among other things, includes the cultivation and tillage of the soil, and the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. Employment in such agriculture is within the definition regardless of where the work is performed, and includes the growing of agricultural or horticultural commodities in greenhouses. Thus, employees of a greenhouse are employed in agriculture, as further explained in sections 780.106 and 780.205 through 780.209 of Part 780.

Accordingly, if a greenhouse employed more than 500 man-days of agricultural labor in any quarter of the preceding calendar year, the Act requires the payment of at least the applicable minimum wage as stated above for all hours worked during the entire following calendar year. Section 13(b)(12) provides an exemption from the overtime pay requirements of the law for agricultural workers.

The child labor provisions of the Act with respect to minors employed in agriculture are discussed in the enclosed copy of Child Labor Bulletin No. 102.

You also state it is your understanding that the performing of routine maintenance and housekeeping chores by residents of drug abuse centers does not constitute an employment relationship. This is correct only in those situations where a residential care program seeks to establish a "family setting" for treatment of persons with drug problems and (1) The work performed by the residents is that which is ordinarily carried on a daily basis in a private home and is solely for the mutual benefit of the occupants of the home (institution); (2) residents do not perform work activities which would ordinarily be performed by full-time employees of the institution so that there is no displacement of regular full-time employees through substitution of resident workers; (3) residence in the institution and performance of activities by the occupants is short term (usually no more than a year) as opposed to generally long term occupancy in such institutions as those concerned with, for example, the mentally ill or the mentally retarded and (4) the institution is relatively small, houses a limited number of residents, and has no paid staff other than counselors.

For those residents engage in work activities that constitute an employment relationship, a residential facility may obtain a certificate which allows payment of special lower minimum wages to residents whose earning or productive capacity is impaired by their disabilities to the extent that they are unable to earn at least the minimum wage. A copy of the applicable regulations (29 CFR Part 529) is enclosed.

If you desire any further information, you may wish to contact our Regional Office at 1371 Peachtree Street, N.E., Room 331, Atlanta, Georgia 30309 (telephone (404) 881-7045). The people in that office will be pleased to assist you in any way possible.

Finally, irrespective of the application of this Act as discussed above, we wish to note that the Comprehensive Employment and Training Act generally stipulates that

employees directly funded under its provisions must be paid a minimum wage of not less than the minimum wage set by the Fair Labor Standards Act.

Sincerely,

Herbert J. Cohen  
Assistant Administrator

Enclosures