

FLSA-348

April 5, 1979

This is in reply to your letter of February 5, 1979, regarding the application of the Fair Labor Standards Act to members of the Adult Care Association which you represent.

The Act was extended, effective February 1, 1967, to all employees in a health care institution, such as a home for the aged, which has employees engaged in or producing goods for interstate commerce, or employees handling, selling, or otherwise working on goods that have been moved in or produced for such commerce by any person regardless of whether or not it is operated for profit, and without regard to its size or volume of business. Employees of your clients would be so engaged, for example, if they order, receive, or otherwise work on food, medicine, medical supplies, soaps, detergents or other supplies or materials that have been moved in or produced for commerce by any person. This is true regardless of whether such goods are received directly from out of state or from a local supplier.

In the investigation of *** , to which you refer, it was disclosed that the services provided by the facility constitute, "care" within the meaning of section 3(s)(5) of the Act; and that the employees performing such services were covered by the Act by their engagement in commerce as set out above. Employees covered by the Act must be paid a minimum wage of not less than \$2.90 an hour and not less than one and one-half times their regular rates of pay for hours worked over 40 in a workweek, unless a specific exemption applies.

Section 13(a)(15) of the Act provides a minimum wage and overtime pay exemption for any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves, as such terms are defined and delimited in Regulations, Part 552 (copy enclosed). The terms "domestic service employment" and "companionship services for the aged or infirmed" are defined in sections 552.3 and 552.6 respectively. You will note that this exemption would not apply to employees who provide such services to persons in an institution. Thus, this exemption would not be available to your clients. The extension of this exemption to employees performing companionship type services in an institution would require legislative action by the Congress.

You may be sure that we understand and sympathize with the difficulties many small businesses encounter in complying with applicable laws. However, the minimum wage and overtime standards of the Act are statutory, and they cannot be waived by private agreement between the employer and the employees or by the Department of Labor. We also feel sure that your clients are aware of the competitive advantage that can accrue to a noncomplying residential care establishment in their neighborhood. In this regard, they may be assured that the Act applies uniformly to all employers who are similarly situated.

Sincerely,

C. Lamar Johnson
Deputy Assistant Administrator
Wage and Hour Division

Xavier M. Vela
Administrator

Enclosures