June 23, 2006 **FLSA2006-13NA**

Dear ***Name****:

This is in further response to your request for an opinion asking how the companionship services exemption under section 13(a)(15) of the Fair Labor Standards Act (FLSA) (copy enclosed) applies to agency employees working in supported living homes for developmentally disabled individuals that are operated by private community agencies in your state.

According to your letter, private agencies operate supported living homes for developmentally disabled individuals. The companion is an employee of the sponsoring agency, which pays the salary, benefits, and housing costs for the employee. Neither the individuals living at the home nor their families pay the companion directly or indirectly. Employees of these agencies live in the homes as companions caring for the individuals with disabilities. Usually, the supported living homes are occupied by multiple, unrelated individuals with developmental disabilities for whom companionship services are provided.

In a telephone conversation with a member of your staff, we received additional information regarding the operation of the homes. Financial support for the developmentally disabled individuals comes from sources such as Medicare payments, federal and state Medicaid payments, and Supplemental Security Income payments. Generally, up to three developmentally disabled individuals live in the homes. They often are placed in a home after leaving a state institution, typically with other individuals also leaving the institution. They may have some choice in selecting housemates, in that the providers attempt to ensure that the residents will be compatible; however, their choices are limited. There is at least one staff member present in the home at all times, and perhaps additional staff members and/or supervisors depending upon the level of disability of the residents. Meals are furnished to the residents, and residents may have some input in the selection of the meals at some homes, although some providers have fixed weekly menus. Often the service provider owns the home and leases it to the residents, although other types of arrangements also exist. Some providers are for-profit companies, while others are not-for-profit entities. Although the residents may assist with keeping the house clean if they are able, the provider has overall responsibility for maintenance and upkeep of the home.

To qualify for the section 13(a)(15) companionship services exemption, the work itself must qualify as domestic service employment, which means that it must be performed in or about a private home. 29 C.F.R. § 552.101(a) (copy enclosed). Employees working in dwelling places that are primarily rooming or boarding houses do not qualify for the exemption, because the places they work are not private homes; rather they are business establishments. 29 C.F.R. § 552.101(b). Based on the information provided and the factors the courts have considered when evaluating whether similar supported living facilities were the private homes of the disabled individuals, it is our opinion that the facilities you describe are not private homes for purposes of the exemption. Whether a living arrangement qualifies as a private home is a fact-specific determination, and we base this conclusion on the facts of this case. *See* Wage and Hour Opinion Letter February 9, 2001 (copy enclosed). To the extent that any particular home varies from that description, a different determination might result.

The legislative history of this exemption states that “a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is *not* a private home.” S. Rep. No. 93-690, at 20 (1974). The Senate Report also discusses the term “private home,” noting that “the domestic service must be performed in a private home which is a fixed place of abode of an *individual* or *family*. A separate and distinct dwelling maintained by an

individual or *family* in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home . . . ." *Id.* (emphasis added). *See also Johnston v. Volunteers of Am.*, 213 F.3d 559 (10th Cir. 2000), *cert*. *denied*, 531 U.S. 1072 (2001); *Madison v. Resources for Human Development, Inc*., 233 F.3d 175 (3d Cir. 2000); Wage and Hour Opinion Letters May 14, 2001 and November 25, 1975 (copies enclosed).

The court in *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004), identified six factors that it and other courts have considered relevant in evaluating whether a residence is a private home. The court stated that the overall inquiry focuses on "who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services." *Id*. at 1219. The first factor is whether the client lived there before beginning to receive services from the provider, because if the individual would live there independently of the receipt of services that is a "powerful indicator that the residence is a private home." *Id*. The second factor is who owns the living unit, because if the service provider owns the unit "that is a significant indicator that it is not a private home." *Id*. The third factor is who manages and is ultimately responsible for maintaining the residence, such as by paying the mortgage or rent, paying utilities, providing clean linens and providing food, because if the service provider has control over such essentials of daily living, "that weighs strongly in favor of it not being a private home." *Id*. at 1219-20. The fourth factor is whether the client could live in the unit if the client were not contracting with the provider for services. The fifth factor is the relative difference in the cost/value of the services provided and the total cost of maintaining the living unit, and the sixth factor is whether the service provider uses any part of the residence for its own purposes such as an office for employees.

Other courts have looked at additional factors, emphasizing that all relevant factors must be considered. Those factors include: whether significant public funding is involved; who determines who lives together in the home; whether residents live together for treatment purposes as part of an overall care program; the number of residents; whether the clients can come and go freely; whether the employer or the client acquires the furniture; who has keys and access to the home; and whether the provider is a for profit or not for profit entity. *See*, *e.g.*, *Johnston v. Volunteers of Am.*, 213 F.3d at 563-65; *Linn v. Developmental Services of Tulsa, Inc.*, 891 F. Supp. 574 (N.D. Okla. 1995); *Lott v. Rigby*, 746 F. Supp. 1084 (N.D. Ga. 1990).

Thus, the fact that the home is the sole residence of the client is not enough to make it a private home under the FLSA. For instance, in this situation, the residents in the homes described are placed in a residence outside their family home and without the full-time, live-in care of a relative. They are housed in a residence with strangers who are also in need of the care being provided, and they are housed together for the purpose of providing needed services. The service provider often owns the residence, and the clients did not live there prior to moving there to receive services. The clients' choices of what to eat and with whom to live are circumscribed. Although the residents may assist with the upkeep of the home, the provider is ultimately responsible for the maintenance and upkeep of the residence. Government funding is a revenue source and, given the high ratio of staff to clients, it appears that the cost of the services likely is a significant portion of the cost of the residence. Therefore, these residences are not private homes, and the work performed by private agency companions at such facilities would not come within the scope of the exemption provided by section 13(a)(15) of the FLSA. *See* Wage and Hour Opinion Letter May 14, 2001.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that

this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures

Section 13(a)(15) of the Fair Labor Standards Act
29 C.F.R. § 552.101
WH Opinion Letter February 9, 2001
WH Opinion Letter May 14, 2001
WH Opinion Letter November 25, 1975

**** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).***