

Chapter 25

OTHER EXEMPTIONS

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25a LAUNDRY AND CLEANING ESTABLISHMENTS: 1961 SECTION 13(a)(3)

25a00 General provisions and 29 CFR 781.

- (a) For periods prior to 02/01/1967, section 13(a)(3) provided an exemption from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) for “any employee employed by any establishment engaged in laundering, cleaning, or repairing clothing or fabrics, more than 50 per centum of which establishment’s annual dollar volume of sales of such services is made within the [s]tate in which the establishment is located: Provided, that 75 per centum of such establishment’s annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business.”

- (b) 29 CFR 781 (WH Publication 1043) contains the interpretations by the Wage and Hour Division (WHD) Administrator of the scope and terms of this exemption.

25a01 Classification of business as manufacturing, mining, transportation, communications, or other.

- (a) WH Publication 1043: 29 CFR 781.12(a) -(d) contains examples of customers who are considered to be engaged in the “mining, manufacturing, transportation, or communications business,” for purposes of old section 13(a)(3). The following are further examples of customers who are considered to be so engaged: newspapers, tire recappers, and retail ice cream stands that process dairy products into ice cream.
- (b) Among those sales which are considered to be sales made to a customer who is *not* engaged in the “mining, manufacturing, transportation, or communications business” are sales to the following (*see* WH Publication 1043: 29 CFR 781.14): wholesale and warehouse businesses that do not manufacture but merely serve as wholesale distributors, gasoline stations (regardless of ownership), grain commission offices, and military bases such as Air Force bases, naval stations, and the like.

25a02 Minimum wage rate.

The minimum wage standard to be applied on and after 05/01/1974 is determined by testing the employment by the requirements of the FLSA as it read before the 1966 Amendments. If a particular laundry or cleaning establishment would have been exempt under old section 13(a)(3) the minimum wage standard of section 6(b) applies. On the other hand if the establishment would not have been exempt under old section 13(a)(3), the minimum wage rate of section 6(a)(1) applies to *individually* covered employment.

25b (RESERVED)

25c LOCAL BULK PETROLEUM DISTRIBUTION ENTERPRISES: SECTION 7(b)(3)

25c00 Statutory provisions and 29 CFR 794.

- (a) Section 7(b) (3) provides a partial overtime exemption for any employee employed: “by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if- (A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes; (B) more than 75 per centum of such enterprise’s annual dollar volume of sales is made within the State in which such enterprise is located; and (C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section [6], and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.”
- (b) 29 CFR 794 contains the basic interpretations of the scope and terms of the section 7(b)(3) exemption.

25c01 Failure to meet standards for excess hours.

The compensation requirements for an employee who otherwise qualifies for exemption under section 7(b)(3) are stated in the conjunctive; consequently an employee must be paid both:

- (1) at a rate not less than one and one-half times the applicable minimum wage for hours in excess of 40 and up to 56 in a workweek *and*
- (2) time and one-half his/her regular rate for hours in excess of 12 in a day or 56 in a week.

If overtime has not been paid in accordance with either or both of these standards, back wages are owed for hours worked in excess of these standards.

25c02 Independently owned and controlled: leasing of real property.

Notwithstanding the provisions of 29 CFR 794.114 -.115, WHD will not deny the section 7(b)(3) exemption if the tests are otherwise met in cases where a bulk petroleum distributor leases and does not own real property used in his business provided the lease is bona fide. A lease of valuable property owned by the oil company which the distributor represents for only a nominal or token rent will not be deemed bona fide.

25d SEAFOOD AND FISHING: SECTIONS 13(a)(5) AND 13(b)(4)

25d00 General provisions of sections 13(a)(5) and 13(b)(4) and 29 CFR 784.

- (a) Section 13(a)(5) provides an exemption from the minimum wage and overtime provisions of FLSA for “any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee.” This exemption was not changed by the 1974 Amendments.
- (b) Effective 05/01/1974 section 13(b)(4) provides an exemption from the overtime provisions of the FLSA for “any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproducts thereof and who receives compensation for employment in excess of 48 hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.”
- (c) The phrase “and who receives compensation for employment in excess of 48 hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed” was added to the FLSA by the 1974 Amendments effective 05/01/1974. Consequently, prior to 05/01/1974 employment within the terms of this exemption was completely exempt from overtime.
- (d) Effective 05/01/1975 section 13(b)(4) is amended by changing “48 hours” to “44 hours”; consequently, effective on this date overtime is due after 44 hours per week. Effective 05/01/1976 section 13(b)(4) is repealed and overtime is due after 40 hours per week.

- (e) 29 CFR 784 contains the interpretations by the WHD Administrator on the scope and terms of the FLSA sections 13(a)(5) and 13(b)(4) exemptions for periods prior to and after 05/01/1974.

25d01 **(Reserved.)**

25d02 **Fish farming.**

- (a) Fish farming is included in the term “farming in all its branches” and an employee performing such activities is engaged in agriculture within the meaning of section 3(f) (*see* FOH 20b04 and 29 CFR 780.109). It may also be necessary in some situations to consider the application of sections 13(a)(5) and 13(b)(4), or a combination or exemptions.
- (b) The applying section 13(a)(5), the activities named in the exemption and such other activities as are so functionally related to the named operations that they are, as a practical matter, necessarily and directly a part of the named operations are considered to be exempt activities. Thus, the repairing and cleaning of fish ponds, the fertilization and breeding of fish, and the sorting of fish are exempt activities. Also exempt, when performed as an integral part of the above operations (*see* 29 CFR 784.113), would be the maintenance and repair of the tools and equipment used in the above operations. The construction of new ponds or buildings is not an exempt activity under section 13(a)(5).
- (c) The principles set out in 29 CFR 784.106, 29 CFR 784.127, and 29 CFR 784.153 shall be followed in applying the sections 13(a)(5) and 13(b)(4) exemptions to clerical employees of fish farms. In this connection, the maintenance of records which are an integral part of the section 13(a)(5) exempt fish farming activities, such as the maintenance of breeding records, records of feed consumption related to fish production and the like, would be considered as exempt activities under section 13(a)(5).
- (d) A 20 percent tolerance for non-exempt work is permitted under both sections 13(a)(5) and 13(b)(4). *See* 29 CFR 784.116.

25e **FORESTRY AND LOGGING OPERATIONS**

25e00 **General provisions.**

- (a) Effective 05/01/1974, section 13(b)(28) exempts from the overtime provisions of the FLSA “any employee employed in planting or tending trees, cruising, surveying or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed *eight*” (emphasis added by italics).
- (b) For the period 02/01/1967 – 04/30/1974, the wording of old section 13 (a)(13) was identical to current section 13(b)(28); however, section 13(a)(13) was both a minimum wage and overtime exemption.
- (c) Prior to 02/01/1967 the wording of section 13(a)(15) was identical to section 13(a)(13) except that the number of employees read “does not exceed *twelve*” instead of “does not exceed *eight*” (emphasis added).

- (d) Under the FLSA as amended, the exemption continues to be in applicable in any workweek where the number of employees employed by the employer in the named operations exceeds 12. The minimum wage standard of section 6(a)(1) and overtime after 40 hours applies to such employment. Beginning 05/01/1974, in any workweek where all the tests of section 13(b)(28) are met except that the number of employees exceeds 8 but does not exceed 12, the exemption does not apply and the minimum wage standard of section 6(b) and overtime after 40 hours apply. In any workweek where all the tests of the exemption are met, the minimum wage rate of section 6(b) applies and the employment is exempt from overtime.
- (e) The principles in 29 CFR 788 shall be followed in applying section 13(b)(28) effective 05/01/1974 and old sections 13(a)(13) and 13(a)(15) prior to 05/01/1974, and for rate purposes; the number 12 shall be substituted for the number 8 as appropriate. In the same manner the principles stated in FOH 25e01 -08 are applicable for purposes of sections 13(a)(13), 13(a)(15), and 13(b)(28).

25e01 Joint individual and corporate employment of logging employees.

Where an employer operates a logging enterprise as an individual and another logging enterprise through a corporation managed and substantially owned by him/her, because of their affiliation, the individual operations and the corporate operation, although separate legal entities, are in economic reality an integrated business enterprise managed and substantially owned by the same individual person who may equally control and receive the benefit of the services of the employees of both operations. Consequently, if the total number of employees employed in a particular workweek in both the individual and corporate logging operations named in the exemption exceeds 8, (or 12 under old section 13(a)(15) prior to 02/01/1967) the exemptions are inapplicable to any of the employees for that workweek. This is so regardless of whether the two operations are conducted independently in that there is no interchange of employees or equipment.

25e02 Effect of number of employees of employer on forestry and logging exemptions.

The exemptions apply to the employees engaged in the logging operations named in the exemptions even though their employer has 9 (or 13 under old section 13(a)(15)) or more employees, so long as only 8 (or 12 under old section 13(a)(15)) or fewer of the employees are employed in the named logging operations for the particular workweek. Thus, if an employer employs only 8 (or 12 under old section 13(a)(15)) employees in the named logging operations, and employs other employees in operations not named in the exemption, such as sawmill operations, the exemptions are not defeated because of the fact that he employs more than 8 (or 12 under old section 13(a)(15)) employees altogether. The exemptions will not apply, however, to those employees employed in operations not named in the exemption. *See* 29 CFR 788.14.

25e03 Employees to be counted in applying the forestry and logging exemptions.

The forestry and logging exemptions are limited to those employees employed in the operations named in the exemptions, which operations include “the incidental activities normally performed by persons employed in them” (*see* 29 CFR 788.6). Crew supervisors (even though exempt under 29 CFR 541), cooks, kitchen helpers, bull cooks, timekeepers, and repair shop mechanics of a logging camp are engaged in such incidental activities and are the usual members of crews which go into the woods for the purpose of felling timber and preparing and transporting logs. Therefore, these employees must be counted in determining

the number of employees the employer has engaged in forestry and logging operations. If the total number of employees so engaged exceeds 8 (12 under old section 13(a)(15)) when crew supervisors, cooks, kitchen helpers, bull cooks, timekeepers, and repair shop mechanics are counted, the exemptions do not apply.

25e04 Employees in planing and sawmill operations not exempt.

- (a) Employees in a planing mill or in a sawmill, including such portable mills in the woods, are performing operations connected with the processing of logs and, therefore, are not exempt.
- (b) Employees of a mill or a contract carrier who truck logs from the woods to the mill are engaged in a named operation (transporting logs to the mill) and are within the exemptions if the other tests are met. Transporting lumber from the mill is not an exempt operation.

25e05 Construction of access logging roads and trails.

- (a) Employees engaged in building minor access roads, such as plank roads, corduroy roads, and similar relatively simple roads for the transportation of logs from the felling site to a central collection point, may be exempt. Another example is the cutting of a trail, known as a skid road, through the woods for the removal of logs dragged by a tractor or snaked out by a cable attached to a donkey engine. Such a road may require minor clearing operations, including the removal of underbrush, stumps, and trees to give the necessary access.
- (b) Exempt road building is that sort normally done by the members of a logging crew. Employees who are employed in constructing major logging roads, and employees building roads normally built by persons who specialize in building roads, are not engaged in forestry or logging operations within the meaning of the exemptions. Major logging roads are those from the central collecting points to the mill.

25e06 Forest nurseries.

Forest nurseries grow seedlings specifically for forest or woodland planting, and are distinguished from ordinary landscape nurseries by the fact that they usually make large-quantity sales of low-priced young seedlings, rather than small-quantity sales of more expensive and older trees. Generally, employees engaged in seeding new beds and transplanting seedlings in a forest tree nursery for eventual forest planting come within the forestry and logging exemptions, provided the limitation on the number of employees is met by the employer. Such employees are not engaged in agriculture.

25e07 Logging incidental to land clearing or sawmilling.

The exemptions apply to employees who felled timber or transport logs to the mill, regardless of the fact that the logging or transporting may be incidental to land clearing or sawmilling operations. However, the trees felled must be timber, that is, material for construction or processing. The exemptions do not apply, in a land clearing project, where the felled trees are burned or hauled away for dumping, nor does it apply to tree trimming along power line rights-of-way.

25e08 Non-exempt work enforcement policy.

The exemption for an employee employed in exempt work is defeated in any week in which he/she performs a substantial amount (more than 20 percent) of non-exempt work. *See* 29 CFR 788.17.

25f HOMEWORKERS MAKING WREATHS: SECTION 13(d), SECOND PART

25f00 General provisions and 29 CFR 780, subpart K.

- (a) Section 13(d), second part, exempts from the provisions of sections 6, 7, and 12 “any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).”
- (b) 29 CFR 780, subpart K contains the interpretations by the WHD Administrator of the scope and terms of the section 13(d), second part, exemption.

25f01 Wreaths.

The term “wreaths,” as used in section 13(d), includes not only the typical circular patterns but also other patterns, such as sprays and ropes.

25g (RESERVED)

25h EMPLOYEES OF HOSPITALS: FLSA SECTION 7(j)

25h00 General provisions.

- (a) The exemption from overtime provided by FLSA section 7(j) for employers engaged in the operation of a hospital is explained in section 778.601 of 29 CFR 778. This section supplements 29 CFR 778.601.
- (b) The exemption in section 7(j) applies to employees of employers engaged in the activities comprising the operation of a hospital.

(1) *Employees of the hospital entity*

Employees employed by the hospital entity may be subject to section 7(j). This includes not only the typical hospital employees who work in the hospital but may also include, for example, employees of an employer who owns and operates or operates pursuant to a contract more than one hospital, who are engaged in performing the following services for the hospitals: public relations, payroll, accounting, administrative services, engineering, architecture and planning, community relations, and personnel and labor relations and remodeling.

(2) *Employees employed in hospital operations*

Employees in the various medical laboratories and therapy services located in the hospital and operated by the employer exclusively as an integral and essential part of the hospital may be subject to section 7(j). Such employees must be employed in medically related activities connected with the operation of the hospital. On the other hand where the laboratory or therapy services are only providing a service to the

hospital and operate as an independent business which is not part of the hospital enterprise, section 7(j) will not apply to their employees because they are not deemed employed by an “employer engaged in the operation of a hospital.” Similarly, an independent contractor providing non-medically related services, such as a contractor who provides janitorial or maintenance services to a hospital, may not use section 7(j) since the contractor is not engaged in the medically related operations of a hospital.

Further, an employer engaged in the operation of a hospital may not utilize the provision to relieve himself/herself of his/her obligations under section 7(a) of the FLSA with respect to any of his/her employees who devote a substantial part of their worktime in the workweek to activities other than those in connection with the operation of the hospital, such as custodial work for other tenants who occupy leased space in the building. Such non-exempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee in the workweek.

- (c) Employees of a temporary help company working on assignments in hospitals are considered to be jointly employed by both the temporary help company and the hospital in which they are employed. For enforcement purposes, the WHD will not take exception to a claim by a hospital that section 7(j) applies during any 14-day period where the employees work *exclusively* for a single hospital provided that before performance of the work an agreement is made between the hospital and the employees to use the 14-day period in lieu of the normal workweek. This position is taken without prejudice to the rights of individual employees under section 16(b). On the other hand, section 7(j) will not apply to any employee who during a 14-day work period is employed in more than one hospital even though all such hospitals may be operating under section 7(j) with respect to their regular employees.

25h01 Use of section 7(j).

A hospital has the option of complying with the overtime provisions of section 7(a) or of utilizing section 7(j) with respect to any or all of its employees. Thus, a hospital may elect to pay certain employees overtime compensation as provided by section 7(a) and with respect to other employees, may elect to utilize section 7(j) of the FLSA.

25h02 Agreement or understanding.

An agreement or understanding may be presumed to exist for the purpose of section 7(j) with respect to any employee who accepts payment of wages pursuant to notice by the hospital that compensation will be made according to section 7(j). Posting a notice on a bulletin board or advising employees by means of payroll inserts constitutes sufficient notification for this purpose.

25h03 Application of the exemption.

- (a) The regular rate of pay for salaried employees under section 7(j) is determined in the normal manner (*see* FOH 32b04) except that the 14-day period is used rather than the workweek. Thus, for example, an employee may be paid a salary intended to compensate for up to 80 hours in a 14-day period in which case his/her regular rate would be obtained by dividing his/her biweekly salary by 80 and he/she would be due one and 1/2 times this rate for each overtime hour in the 14-day period.

- (b) Where a swing shift rotation results in an employee working 2 8-hour shifts within a 24-hour period, as defined in 29 CFR 778.601(d), the employee would be entitled to receive overtime compensation at a rate not less than 1 ½ times his/her regular rate of pay for the hours worked on the second 8-hour shift. This is true irrespective of the fact that the second 8-hour work period in the workday is a regular part of the 80 hours scheduled biweekly by the hospital or the fact that the second 8-hour shift starts the second 40-hour work period in the 14-day period. It should be noted that such premium for daily overtime may be credited towards overtime compensation due for hours in excess of 80 for that period.

25h04 Use of section 7(g)(2).

An employer who uses section 7(j) may pay overtime in accordance with the principle of section 7(g)(2). *See* FOH 32h.

25h05 Use of fluctuating workweek.

- (a) If an employee under section 7(j) is paid a salary with the understanding that it constitutes straight-time pay for all hours worked in a 14-day period, his/her regular rate (not less than the applicable minimum wage rate) would be obtained by dividing his/her biweekly salary by the number of hours worked in the 14-day period and he/she would be due additional half-time for each overtime hour worked.
- (b) An employee employed on a fluctuating workweek basis must receive his/her full biweekly salary regardless of how few hours are worked in the 14-day period. The usual rules regarding deductions apply. *See* FOH 32b04b(b).

25i NURSING HOMES AND RELATED INSTITUTIONS: OLD 1966 SECTION 13(b)(8), SECOND PART - PRESENT 1974 SECTION 7(j)

25i00 General provisions of the exemption.

- (a) Effective 05/01/1974, section 7(j) is amended by the addition of the phrase “or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises...”. Consequently, effective 05/01/1974 employment in such establishments may be subject to the special overtime provisions of section 7(j) in the same manner as hospital employment. The interpretations in 29 CFR 778.601 and FOH 25h00 -05 are applicable to such employment beginning 05/01/1974.
- (b) Prior to 05/01/1974 section 13(b)(8), second part exempted from the overtime provisions of the FLSA: “Any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.” This part of section 13(b)(8) second part was repealed effective 05/01/1974.

25i01 Institutions primarily engaged in the care of the sick, the elderly, or individuals with intellectual or developmental disabilities residing on the premises defined.

FOH 12f02 contains the definition of such institutions. This definition shall be used for purposes of section 13(b)(8), second part, prior to 05/01/1974 and section 7(j) beginning 05/01/1974.

25i02 **Section 13(a)(2) not applicable to nursing homes.**

Nursing homes are specifically excluded from exemption under section 13(a)(2).

25i03 **Laundry operations by employees of residential care institutions.**

Section 7(j) (*see* FOH 25i00) provides a partial overtime exemption for an establishment which is an “institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises.” Laundry workers of an establishment which is considered such an institution, employed by and engaged in performing the work of that establishment, may therefore qualify for the exemption.

25j **AMUSEMENT OR RECREATIONAL ESTABLISHMENT, ORGANIZED CAMP, OR RELIGIOUS OR NON-PROFIT EDUCATIONAL CONFERENCE CENTER: SECTION 13(a)(3)**

25j00 **General provisions.**

- (a) Section 13(a)(3) provides an exemption from the minimum wage and overtime provisions of the FLSA for “any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 ⅓ per centum of its average receipts for the other six months of such year.”
- (b) An organized camp characteristically provides room and board in a rustic setting over a sustained period of time. An organized camp is one with a program of activities and sustained supervision, provided for a set fee. The American Camping Association defines a “camp” as “a sustained experience which provides a creative recreational and educational opportunity in group living in the out of doors. It utilizes trained leadership and the resources of natural surroundings to contribute to each camper’s mental, physical, social, and spiritual growth.”
- (c) A “religious or non-profit educational conference center” is a meeting center providing for religious, educational, and leadership growth experiences for both youth and adults. They are usually built in secluded and scenic areas and often provide residence accommodations, meal service, and recreational facilities. Most are under the sponsorship of religious denominations and are operated on a non-profit and tax-exempt basis.

25j01 **Tests for the exemption.**

- (a) An “amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” will be exempt under section 13(a)(3) of the amended act, if it meets *either* Test (A) or Test (B) as explained in FOH 25j01(b) and (c) below.
- (b) **“(A) Does not operate for more than seven months in any calendar year”**

An amusement or recreational establishment, organized camp, or religious or non-profit educational conference center will be exempt if “it does not operate for more than seven months in any calendar year.” Whether an establishment operates during a particular month is a question of fact, and depends on whether it operates as an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center. If an establishment engages only in activities such as maintenance operations or ordering supplies during the dead season, it is not considered to be operating for purposes of the exemption.

(c) (B) 33 ⅓percent test

- (1) An amusement or recreational establishment, organized camp, or religious or non-profit educational conference center will be exempt if “during the preceding calendar year, its average receipts for any six months of such year were not more than 33 ⅓ per centum of its average receipts for the other six months of such year.” Since the language of the statute refers to receipts for any 6 months (not necessarily consecutive months), the monthly average based on total receipts for the 6 individual months in which the receipts were smallest should be tested against the monthly average for six individual months when the receipts were largest to determine whether this test is met.
- (2) To illustrate the principles in FOH 25j01(c)(1) above, consider an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center that is in a covered section 3(s)(1) enterprise as defined by the amended act. The establishment operated for 9 months in the preceding calendar year. The establishment was closed during December, January, and February. The total receipts for May, June, July, August, September, and October (the 6 months in which the receipts were largest) totaled \$260,000, a monthly average of \$43,333; the total receipts for the other 6 months totaled \$75,000, a monthly average of \$12,500. Since the average receipts of the latter 6 months were not more than 33 ⅓ percent of the average receipts for the other 6 months of the year, the section 13(a)(3) exemption will apply.

25j02 Establishments in national parks, national forests, or on lands in the National Wildlife Refuge System.

- (a) Establishments such as those selling groceries, curios, and dry goods, as well as gas stations, hotels, motels, restaurants, and the like, are generally not within the categories of establishments which are commonly recognized as inherently of an amusement or recreational character within the meaning of section 13(a)(3) of the FLSA. However, certain such establishments in national parks, forests, or the Wildlife Refuge System, are limited by policy of the Interior or Agriculture Departments to merchandising only those items and providing only those services appropriate for the public use and enjoyment of the areas administered by them. These establishments operate under an exclusive contract with these departments and only during the season when these areas are open to the public. Under these circumstances, the activities of these establishments are considered to have a sufficiently intimate relation to the operation of these recreational areas to warrant their characterization as amusement or recreational establishments.
- (b) As provided in section 13(a)(3), this exemption from minimum wage (section 6) and overtime (section 7) “does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from [section] 6, a

private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture.”

- (c) However, such employees, although subject to the minimum wage, may qualify for a partial exemption from overtime as provided in section 13(b)(29):

“any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.”

- (d) In order to qualify for exemption under section 13(b)(29), one of the seasonality tests contained in section 13(a)(3) must be met by the establishment. Moreover, the possible application of the Contract Work Hours and Safety Standards Act (CWHSSA) to mechanics and laborers employed by such an establishment should not be overlooked.

25j03 Resort hotels.

- (a) Resort hotels are generally not considered amusement or recreational establishments for purposes of section 13(a)(3). However, if a resort hotel operates a particular facility (*i.e.*, a golf course or swimming pool) as a separate establishment, employees of such an establishment might qualify for exemption under section 13(a)(3) from minimum wage and overtime if all the tests are met.
- (b) Where a resort hotel is located in a national park, national forest, or on lands in the National Wildlife Refuge System, such establishment is characterized as an “amusement or recreational” establishment (*see* FOH 25j02(a) above), and its employees would be subject to minimum wage and to overtime after 56 hours in the workweek under section 13(b)(29) (*see* FOH 25j02(c) above).

25j04 Employed by an exempt establishment.

- (a) For purposes of applying section 13(a)(3), the general principles set forth in 29 CFR 779.308 -.311 apply. Thus, an employee to be exempt must be employed by the exempt establishment. In some situations, such as an amusement park, baseball park, or racetrack, food and souvenir vendors are employed by a concessionaire on the premises. If the operations of the concessionaire constitute a separate establishment, the tests of section 13(a)(3) are applied to the concessionaire’s establishment separately without regard to the operations of the host establishment. On the other hand, if the concessionaire and host constitute a single establishment, as is usually the case, the tests apply on the basis of all the operations of the establishment, including those of the concessionaire. *See* 29 CFR 779.302 -.306.
- (b) Employment in central functions of an organization operating more than one such establishment, as in the case of employees of a central office, warehouse, garage, or commissary which serves a chain of exempt amusement or recreational establishments would not be within the exemption under section 13(a)(3).

- (c) The word “establishment” has the same meaning under section 13(a)(3) as under old section 13(a)(2) (*see* 29 CFR 779.303).

25j05 Employees at a convention.

Employees at a convention (including those employed by a concessionaire) are not within the scope of the section 13(a)(3) exemption as a convention is not considered an exempt establishment.

25j06 Country and town clubs.

- (a) A country or town club whose membership fees are nominal (*e.g.*, \$100 per year) would be considered to be open to the general public and may qualify for the section 13(a)(3) exemption if either test described in (A) or (B) is met.
- (b) However, a country or town club which is not open to the general public, but is available only to a select group of persons (or their guests) who have been specifically selected to club membership or whose membership fees are so high as to exclude the general public, is not considered an amusement or recreational establishment for purposes of the section 13(a)(3) exemption.

25j07 Marinas.

A marina is an establishment which is typically engaged in providing boat storage for rent, in selling boating supplies, fishing tackle, oil, fuel, grocery items, new and used boats, as well as providing refinishing and repair service for boats. Such an establishment is not considered an amusement or recreational establishment within the meaning of section 13(a)(3). Such an establishment is used by persons engaged in recreation but does not itself provide the recreation.

25j08 “New business”: application of Tests A and B.

- (a) Tests A and B refer to a calendar year throughout which the operations of the establishment can be tested to determine its *character* as a seasonally operated place of business. In the case of a new business, Tests A and B are to be applied as follows:

(1) *Test A*

Generally, Test A is not met by a new business establishment which has operated for no more than 7 months in a calendar year for the reason that its business operations did not start until a considerable portion of the year had elapsed. If, however, the character of the establishment is that of an “amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” whose operations are shown by acceptable evidence to be subject to seasonal factors which would require the establishment to cease operations for 5 months or more in the calendar year even if it had been in business for the entire calendar year, the new business establishment may meet the requirements of Test A so that its employees will be exempt. For example, an employer may open a new ski slope establishment in November under circumstances where it is clear that the establishment would have operated less than 7 months in the year regardless of the date it began operations. In such a case the establishment could claim the exemption under Test A.

(2) *Test B*

Test B is based on the establishment's experience "during the preceding calendar year." Generally this requires an entire year's experience to apply Test B in order to make the necessary calculation. However, in the case of a new business where there is no preceding calendar year on which to apply Test B, the WHD will apply the following criteria in determining the applicability of section 13(a)(3)(B):

- a. If the enterprise of which the new establishment is a part operates other seasonal amusement or recreational establishments, organized camps, or religious or non-profit educational conference centers of the same type in the same general area under substantially the same conditions and *all* such establishments conclusively and clearly meet the condition of Test B; *or*
 - b. If such employer does not have other such establishments but other employers operating the same type of establishment in the same general area under substantially the same conditions and manner of operation clearly are entitled to exemption under Test B.
- (b) The WHD will consider the exemption applicable in the year the new establishment begins operation if either of these tests are met *provided*, however, that in the event after a year's operation the establishment does not qualify under Test B, proper minimum wage and overtime is paid retroactively.

25j09 Summer programs of schools.

Some elementary or secondary schools or institutions of higher education which are academically accredited during the fall through spring semesters operate establishments that provide summer recreation or summer camp programs. Where such programs meet the requirements of section 13(a)(3)(A) or (B) and are not a part, continuation, or extension of the accredited academic program of the school, such an establishment may qualify as "an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center" pursuant to the exemption, even though some credit courses may be offered on a voluntary basis along with the recreational activities. The applicability of section 13(a)(3) to employees of such an establishment is not defeated by the fact that the same distinct physical place of business is for part of the year a school and for part of the year "an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center."

25j10 Application of exemption to state and local government facilities.

Golf courses, swimming pools, summer camps, ice skating rinks, and similar establishments are the type which may qualify for exemption under section 13(a)(3). Activities conducted during the summer months in a city's parks such as playground activities, arts and crafts, sports programs, and related activities which are in operation for not more than 7 months of the year may also come within this exemption. Playground counselors, arts and crafts instructors, and games leaders are the type of employees who may be exempt as long as they work solely in a park or parks in such exempt activities. Of course, as provided in FOH 25j04(b), the exemption is not applicable to central office employees of the parks or recreation department or to maintenance crews who operate out of a central facility responsible for the maintenance and cleaning of all the city's parks.

25j11 Beach and boardwalk facilities.

If the tests are met, the section 13(a)(3) exemption for amusement parks and recreational areas is applicable in the case of either private or public amusement and recreational activities *directly* related to the operation of a beach and boardwalk. Lifeguards on a beach, drivers of a motorized train along a boardwalk, and comfort station attendants at those stations operated solely for the convenience of the persons patronizing the beach come within this exemption. In the case of a public agency, those employees solely employed in the cleaning of the beach may also come within the exemption as long as they are not engaged in any work related to the cleaning of the city's streets or other parks (*see* FOH 25j04(b)).

25j12 Receipts of state or local government-operated amusement or recreational establishments.

Section 13(a)(3)(B) contains certain percentage tests for receipts of the establishment. As used here, "receipts" are fees received from admissions. A state or local government-operated amusement or recreational establishment whose operating costs are met *wholly* or *primarily* from tax funds would fail to qualify under section 13(a)(3)(B). However, such an establishment may qualify under section 13(a)(3)(A).

25j13 Employees of an exempt establishment: construction activities.

Employees of a section 13(a)(3) exempt establishment who engage in construction or reconstruction work do not qualify for the section 13(a)(3) exemption in any workweek in which they are so engaged. For example, employees of an amusement park who, in addition to their maintenance and repair work, engage in the erection of new structures, buildings, and places of entertainment designed to continue the public's interest, are not within the section 13(a)(3) exemption in any workweek that some (there is no tolerance for such non-exempt work) construction work is performed. *See* FOH 21k07.

25j14 State and county fairs.

The activities of the usual state or county fair are analogous to those of an amusement park, carnival, or circus (*i.e.*, it has rides, exhibitions, side shows, etc.) and its revenues are derived principally from selling admissions to such events. State and county fairs may thus qualify for the section 13(a)(3) exemption if the tests are met.

25j15 Campsites and campgrounds.

- (a) Campsites and campgrounds provide facilities where the general public may camp in tents, campers, recreational vehicles, travel trailers, or motor homes. They may include paved driveways and furnish water, waste and electrical outlets, picnic benches and tables, restrooms and showers, laundry facilities, ice houses, bottled gas and grocery facilities, and provide for handling mail and various recreational pursuits. The camping season usually runs from the end of May through the Labor Day weekend, but in milder climates some campgrounds have a longer season and others are open year-round.
- (b) An exempt campsite or campground operates and maintains its establishment as a functional amusement or recreational unit (*i.e.*, providing facilities for camping as a recreational activity). It may provide swimming, boating, or fishing facilities as well as facilities for various other amusement or recreational activities such as volleyball, horseshoes, miniature

golf, movies, dances, contests, bonfires, and the like. It may be located on either state or local government or private land. Such a campsite or campground may be considered an amusement or recreational establishment for the purpose of section 13(a)(3) and tested for exemption under clause (A) or (B) of that section.

- (c) On the other hand, if a campsite or campground merely provides space and parking facilities which the travelling public uses while in transit to a recreational area (as opposed to FOH 25j15(b) above), the campsite or campground is not an amusement or recreational establishment for purposes of section 13(a)(3). At such a facility the traveling public usually stays for only a short period of time such as one or two nights.

25j16 **Drive-in theaters.**

Drive-in theaters may qualify for the section 13(a)(3) exemption if either of the tests is met.

25j17 **Riverboat cruises.**

Businesses engaged in conducting riverboat cruises for sightseeing and entertainment purposes may qualify for the section 13(a)(3) exemption where the tests for the exemption are met and the majority of the firm's revenue is derived from ticket sales and entertainment, rather than food, drink, concessions, and gifts. For purposes of applying the exemption, treat riverboats, docking, and ticketing facilities as one establishment.

25k **CASUAL BABYSITTERS, AND COMPANIONS TO SENIORS OR PERSONS WITH ILLNESSES, INJURIES, OR DISABILITIES: SECTION 13(a)(15)**

[01/13/2017]

25k00 **Statutory provisions.**

- (a) Section 13(a)(15) exempts from minimum wage and overtime pay “any employee employed on a casual basis in domestic service employment to provide babysitting services or 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 by regulations of the Secretary)....”

[01/13/2017]

25k01 **Babysitting services.**

- (a) Babysitters provide care and protection for babies and young children who do not have a physical or mental disability. *See* 29 CFR 552.106. Individuals providing babysitting services are covered domestic service employees under the FLSA. *See* 29 CFR 552.3 and FOH 11d00(b). They must receive at least the FLSA minimum wage for all hours worked and any applicable overtime. Casual babysitters, however, are exempt from minimum wage and overtime under section 13(a)(15). *See* 29 CFR 552.4 -.5 and 29 CFR 552.103 -.104. Babysitters who reside in the employer's home (*i.e.*, a live-in) may be exempt from overtime pay under section 13(b)(21), but must receive at least the FLSA minimum wage for all hours worked. *See* 29 CFR 552.102.

- (b) Individuals caring for infants or young children who have an illness, injury, or disability are not considered babysitters. Such individuals, however, may be considered companions under FLSA section 13(a)(15), depending on the facts. *See* 29 CFR 552.106.

[01/13/2017]

25k02 **Companionship services.**

(a) **Third party employers**

Employees who are employed by a third party employer, whether solely or jointly, are not exempt from minimum wage and overtime pay because the third party employer cannot claim the companionship services exemption. However, an individual receiving services, or that person's family or household, even if a joint employer with a third party employer, may still claim the companionship services exemption under section 13(a)(15) provided all of the conditions of the exemption are met. *See* 29 CFR 552.109(a).

A third party employer is any employer other than the individual, or family or household member, receiving the domestic services. A third party employer could be, for example, a private company, a non-profit organization, or a public entity.

(b) **Definitions**

"[T]he term *companionship services* means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself" (29 CFR 552.6(a)). Employees providing companionship services who are employed by any employer other than the person receiving services, or that person's family or household, are not exempt from minimum wage and overtime pay. Therefore, an analysis of whether an employee's duties fall within this definition is necessary only to determine whether the person, family, or household may properly claim the exemption.

(1) *The provision of fellowship*

Providing fellowship means engaging the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events.

(2) *The provision of protection*

Providing protection means being present with the person in his or her home, or accompanying the person when outside of the home, to monitor the person's safety and well-being. Fellowship and protection also include watching TV with the person, visiting with friends and neighbors, taking walks, playing cards, and engaging the person in his or her hobbies.

(3) *The provision of care*

Companionship services "also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection, and if it does not exceed 20 percent of the total hours worked per person and per workweek" (29 CFR 552.6(b)). Providing care means assisting the person with

activities of daily living (ADLs) (*e.g.*, dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living (IADLs), which are tasks that enable a person to live independently at home (*e.g.*, meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care). Any additional care services not named in the regulation but that fit easily within the spirit of the enumerated duties also qualify as ADLs or IADLs.

a. 20 percent tolerance

If the performance of care services (*i.e.*, ADLs and IADLs) exceeds 20 percent of the total hours worked per person and per workweek, the person, family, or household may not properly claim the companionship exemption in that workweek.

Scenario:

An employee spends 30 hours per week providing personal care services to an individual with a disability. The employee spends a few hours each day watching television with the individual, but for 20 or more of her work hours, she provides assistance with bathing, dressing, toileting, and eating. Because the employee spends more than 20 percent of her workweek providing care to the individual, the individual may not properly claim the companionship services exemption.

(c) Services primarily for the benefit of other members of the household

Companionship services “does not include domestic services performed primarily for the benefit of other members of the household” (29 CFR 552.6(c)). If the employee performs work that primarily benefits other household members in any week, that employee is not performing companionship services for that workweek, and the person receiving services and that person’s family or household may not properly claim the companionship services exemption.

Washing only the laundry of other household members or cooking meals for an entire family is not considered companionship services. Light housework that only tangentially benefits others living in the household, such as dusting a bedroom the consumer shares with another, may constitute care. Whether a particular task constitutes the provision of care or is instead a service performed primarily for the benefit of others in the household is based on common sense assessment of the facts at hand.

(d) Medically related services

The term companionship services “does not include the performance of medically related services provided for the person. The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants; the determination is not based on the actual training or occupational title of the individual performing the services” (29 CFR 552.6(d)).

Job titles do not determine exempt status under the FLSA. Thus, a personal care aide, home health aide, or any home care worker who performs medically related services would not qualify for the companionship services exemption.

If a state or employer refers to a home care worker by a title other than registered nurse, licensed practical nurse, or certified nursing assistant, but the individual performs medical tasks that nurses or certified nursing assistants are trained to perform, the individual would not qualify for the companionship exemption. *See* 78 FR 60469.

Catheter care, turning and repositioning, ostomy care, tube feeding, treating bruising or bedsores, and physical therapy are medically related services typically performed by trained personnel. If the employee performs such types of or similar services during the workweek, the person receiving services or that person's family or household may not properly claim the companionship services exemption.

(1) *First aid and lifesaving activities*

The companionship services exemption excludes those home care workers who perform medically related tasks on more than isolated, emergency occasions. *See* 29 CFR 552.6(d). Therefore, the exemption will not be lost if the employer requires the home care worker to have first aid or cardiopulmonary resuscitation (CPR) training. In addition, when an emergency arises, the exemption will not be lost if the companion performs CPR or other life-saving first aid on the person, such as the Heimlich maneuver, or use of an inhaler or epinephrine auto-injector. *See* 78 FR 60473.

(2) *Trained personnel*

Trained personnel such as registered nurses, licensed practical nurses, and certified nursing assistants are not exempt under section 13(a)(15). *See* 29 CFR 552.6(d). However, registered nurses may be exempt as learned professional employees under section 13(a)(1) and 29 CFR 541.301(e)(2), depending on the facts. *See* FOH 22i36.

(e) **Joint employment**

Generally, where a joint employment relationship exists, "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act" (29 CFR 791.2(a)). Joint employment is established by applying the economic realities test, which will involve consideration of a number of relevant factors. *See*, for example, Administrator Interpretations Letter FLSA 2014-2 and Administrator Interpretations Letter FLSA 2016-1. Under 29 CFR 552.109(a), in joint employment situations the individual, family, or household employing the worker may claim the companionship services exemption, provided the employee meets the duties requirements of the exemption. The third party joint employer will not be able to claim the exemption. In this case, the individual, family, or household employing the companion would not be liable for any minimum wage or overtime pay owed by the third party employer, provided all of the other conditions of the exemptions have been met.

[01/13/2017]

25L PUBLIC EMPLOYEES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES: SECTION 7(k)

25L00 Statutory provisions.

- (a) Effective 01/01/1975, section 7(k) of the amended act provides a partial overtime exemption for any employee of a public agency engaged in fire protection activities or any employee engaged in law enforcement activities (including security personnel in correctional institutions) if:
- (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or
 - (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days (60 hours in a work period of 7 days), compensation at a rate not less than 1 ½ times the regular rate at which he is employed.
- (b) Effective 01/01/1976, overtime compensation must be paid for hours in excess of 232 in a work period of 28 days (58 hours in a work period of 7 days) or in the case of any work period between 7 and 28 days, a proportionate number of hours in such work period.
- (c) Effective 01/01/1977, overtime compensation must be paid for hours in excess of 216 in a work period of 28 days (54 hours in a work period of 7 days) or in the case of a work period between 7 and 28 days, a proportionate number of hours in such work period.
- (d) Effective 01/01/1978, overtime compensation must be paid for hours which exceed the lesser of: (A) 216 hours, or (B) the average number of hours in tours of duty during 1975 (as determined by the Secretary of Labor in a study conducted pursuant to section 6(c)(3) of the FLSA Amendments of 1974) in a work period of 28 days or in the case of a work period between 7 and 28 days, a proportionate number of hours in such work period.

25L01 Weigh station inspectors.

Weigh station inspectors, even though given certain general police powers, are not engaged in an activity within the traditional meaning of the term “law enforcement activities” and therefore do not qualify for the section 7(k) exemption.

25L02 Trading time.

The criteria for trading time on regularly scheduled tours of duty are contained in 29 CFR 553.18. It is WHD’s position that the period within which time traded must be paid back is not confined to a specific calendar or fiscal year. Each increment of traded time must, however, be paid back within 365 days (12 months) from the day the time was actually traded unless the death, severance, or retirement of the employee owed for the time occurs sooner.

25L03 Public agency security personnel handling convicts.

Any employee of any public agency who performs the duties described in 29 CFR 553.4(e) (*i.e.*, the responsibility of maintaining and controlling the custody of prisoners and guarding them) may qualify for the section 7(k) exemption. It is not necessary, for example, that the employees be employed by a department of public safety or similar public agency in order to be exempt. The employee may be employed by a highway department, recreation department, etc. Further, “security personnel in correctional institutions” need not meet the tests specified in 29 CFR 553.4(a)(1), (2) and (3) to qualify under section 7(k). A “correctional institution” is defined to mean any government facility maintained as part of the penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. “Security personnel” does not include nurses, janitors, cooks, recreational directors, etc.

25m PUBLIC EMPLOYEES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES: SECTION 13(b)(20)

25m00 Statutory provisions.

(a) Section 13(b)(20) of the amended act provides:

- (1) an exemption from overtime during the period of 05/01/1974 – 12/31/1974 for any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);
- (2) effective 01/01/1975, an exemption from overtime for any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than five employees in fire protection or law enforcement as the case may be. These provisions are separately tested and separately applied. Thus, for example, in a town that employs five employees in law enforcement activities and four employees in fire protection activities, only the fire protection employees may qualify for exemption under this provision.

25n LIVE-IN DOMESTIC SERVICE EMPLOYEES: SECTION 13(b)(21)

[01/13/2017]

25n00 Statutory and regulatory provisions.

- (a) The definition of “domestic service employment” as well as coverage rules for domestic service employees are addressed in FOH 11d.
- (b) Domestic service employees who reside in the household where they are employed (*i.e.*, live-in domestic service employees) must be paid at least the FLSA minimum wage for all hours worked. *See* 29 USC 213(b)(21) and 29 CFR 552.102. Section 13(b)(21), however, creates an overtime exemption for “any employee who is employed in domestic service in a household and who resides in such household.” Note, however, that only the individual, or their family or household member, employing the live-in domestic service employee may claim the exemption; any other employer, such as a private agency, may not and must pay the live-in domestic service worker both the minimum wage and overtime compensation for all hours worked. *See* 29 CFR 552.109.

[01/13/2017]

25n01 **Third party employers.**

- (a) Live-in domestic service employees employed by a third party employer, whether solely or jointly, are not exempt from overtime pay and, therefore, must be paid at least the FLSA minimum wage for all hours worked and overtime pay for hours worked over 40 in a workweek. *See* 29 CFR 552.109(c).
- (b) A third party employer is any employer other than the individual receiving the domestic services (or his or her family or household member). A third party employer could be, for example, a private company, a non-profit organization, or a public entity. However, the individual, family member, or household, even if considered a joint employer, may still claim the overtime pay exemption for live-in domestic service employees under FLSA section 13(b)(21) provided all of the requirements for the exemption are met.

[01/13/2017]

25n02 **Live-in domestic service employees: section 13(b)(21).**

- (a) Domestic service employees such as live-in workers are automatically covered under the FLSA because “employment of persons in domestic service in households affects commerce.” Section 13(b)(21) provides an overtime, but not minimum wage, exemption for “any employee employed in domestic service employment in a household and who resides in such household.” This includes all types of domestic service workers, such as live-in home care workers and live-in nannies. *See* 29 USC 202(a), 29 USC 207, and 29 CFR 552.102.
- (b) Live-in domestic service employees employed by a third party, whether solely or jointly, are not eligible for the live-in exemption and are entitled to at least the minimum wage and overtime compensation. However, the individual, or member of the family or household, even if considered a joint employer, is still entitled to claim the live-in domestic service employee exemption under section 13(b)(21). Third party employers such as a home care or nanny agency may not claim the live-in domestic service worker exemption from overtime under any circumstances. *See* 29 CFR 552.109(c).
- (c) In order for an employee to be considered a live-in domestic service worker, the worker must reside on the employer’s premises either permanently or for an extended period time and meet the definition of domestic service employment under 29 CFR 552.3 (*i.e.*, provide services in a private home). The live-in domestic service worker would therefore be exempt from overtime requirements if there is no third party employer. However, a consumer, family, or household may claim the domestic service exemptions. *See* 29 CFR 552.6 and 29 CFR 552.102. Consider the following to determine if a scenario qualifies as residing in a household permanently or for extended periods of time:

(1) *Permanently reside*

Employees who work and sleep at the worksite 7 days per week, and therefore have no home of their own other than the one provided by the employer, are considered to permanently reside on the employer’s premises. *See* WHD Opinion Letter FLSA 2004-7.

(2) *Extended periods of time*

Employees who work at the worksite for 5 days a week (*i.e.*, 120 hours or more) are considered to reside on the employer's premises for extended periods of time. *See* 29 CFR 785.23 and FOH 31b20.

If an employee spends less than 120 hours per week working and sleeping on the employer's premises, but works 5 consecutive days or nights, this situation would also qualify as residing on the employer's premises for extended periods of time. For example, employees who are on duty from 9:00 a.m. Monday until 5:00 p.m. Friday would also be considered to reside on the employer's premises for an extended period of time. *See* FOH 31b20.

a. Temporarily reside

Employees working on the employer's premises only temporarily (*e.g.*, for only 2 weeks) are not considered live-in domestic service workers because residing on the premises implies more than temporary activity. *See* 78 FR 60474.

b. 24-hour shifts

Employees working shifts of 24 hours or more but not residing on the employer's premises permanently or for extended periods of time as defined above, are not considered live-in domestic service workers and, thus, are not exempt from overtime pay under section 13(b)(21).

c. Respite workers

"Respite worker" is a common term for an employee hired to provide assistance when the live-in provider is unavailable or otherwise needs relief from his or her responsibilities. A respite worker in a private home should not automatically be treated as a live-in domestic service worker simply because he or she replaces a live-in worker. Note: while respite workers are likely to be entitled to FLSA minimum wage and overtime pay protections, that determination requires an assessment of the circumstances of an individual's work arrangement.

[01/13/2017]

25n03 Live-ins: special considerations.

- (a) Regardless of whether an employer may claim the live-in domestic service employee exemption (*i.e.*, whether the employer is the person receiving services, that person's family, or household, or a third party), certain special rules apply to such employees.
- (b) For a live-in domestic service employee, the employer and employee may voluntarily agree to exclude the amount of time spent during a bona fide meal period, sleep period, and off-duty time. *See* FOH 25n03, FOH 59n12, 29 CFR 552.102, 29 CFR 785.16, 29 CFR 785.19, and 29 CFR 785.23. The WHD will accept any reasonable agreement of the parties taking into consideration all of the pertinent facts. If the meal periods, sleep time, or other periods

of free time, however, are interrupted by a call to duty, the interruption must be counted as hours worked. *See* 29 CFR 785.22 -.23. For on-call employees *see* FOH 31b14.

- (c) Not all of the time spent on the premises by a live-in domestic service worker is considered working time. The employer must track and record all hours worked by domestic service employees, including live-in employees, and the employee must be compensated for all hours actually worked notwithstanding the existence of an agreement. *See* 29 CFR 516.2(a), 29 CFR 552.102, and 29 CFR 552.110.

[01/13/2017]

25n04 **Hours worked and recordkeeping.**

- (a) Generally, all of the time that a live-in domestic service employee spends on the employer's premises is not necessarily working time. Such an employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from work duties. For a live-in domestic service employee, the employer and employee may voluntarily agree to exclude the amount of time spent during a bona fide meal period, sleep period, and off-duty time. *See* 29 CFR 552.102, 29 CFR 785.16, 29 CFR 785.19, and 29 CFR 785.23. In such a case, the WHD will accept any reasonable agreement of the parties taking into consideration all of the pertinent facts. If the meal periods, sleep time, or other periods of free time are interrupted by a call to duty, however, the interruption must be counted as hours worked. An employee who is required to remain on call on the employer's premises, or so close thereto that he or she cannot use the time effectively for his or her own purposes, is considered to be working while on call and must be paid for such time. *See* 29 CFR 785.17.
- (b) Although the employer and employee may have an agreement regarding the normal schedule of work time, and they may agree to exclude sleep, meal, and other off-duty periods from hours worked, the compensation due each week is controlled by actual hours worked, not the agreement. The employer must keep a record of actual hours worked by the live-in domestic service employee to ensure that the employee is paid at least the FLSA minimum wage for all hours worked. The employer may require the employee to record the hours worked and submit such record to the employer. *See* 29 CFR 516.2(a), 29 CFR 552.102, and 29 CFR 552.110. *See* FOH 30a09 regarding the responsible party for maintaining records when there are joint employers.

[01/13/2017]

25n05 **Joint employment.**

- (a) Generally, where a joint employment relationship exists, "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act" (29 CFR 791.2(a)). Joint employment is established by applying the economic realities test, which will involve consideration of a number of relevant factors. *See*, for example, Administrator Interpretations Letter FLSA 2014-2 and Administrator Interpretations Letter FLSA 2016-1. However, under 29 CFR 552.109(c), in joint employment situations the individual, family, or household employing the live-in domestic worker will be able to claim the overtime pay exemption provided the employee satisfies the live-in worker requirements (*i.e.*, resides in the private home), but the third party employer will not be able to claim the overtime pay exemption. Therefore, in such circumstances, the individual,

family member, or household would be liable for a wage violation only in instances when the live-in domestic employee does not receive at least the FLSA minimum wage for all hours worked, because the live-in domestic service employee exemption is only an exemption from the overtime requirements of the act.

[01/13/2017]

25n06 Live-ins: application of section 3(m) of the FLSA to lodging.

(a) Requirements for taking a credit toward wages

Section 3(m) of the FLSA allows an employer to count as part of wages the reasonable cost or fair value of furnishing an employee with “board, lodging, or other facilities” if such board, lodging, or facilities is customarily furnished by similarly situated employers to their employees. However, the cost of furnishing the board, lodging, or other facilities will not be counted as part of wages if excluded under a bona fide collective bargaining agreement. *See* FOH 30c01 and Field Assistance Bulletin No. 2015-1.

Employers who wish to claim a wage credit towards their minimum wage obligation for lodging provided to live-in domestic service employees must ensure that the following five factors are met (*see* Field Assistance Bulletin No. 2015-1):

- (1) The lodging must be “furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities.” 29 CFR 531.31 and FOH 30c02(a).
- (2) Employees must voluntarily accept the lodging prior to the employer taking the credit. *See* 29 CFR 531.30 and WHD Opinion Letter FLSA (February 24, 1982).
- (3) Lodging must not be furnished in violation of any applicable federal, state, or local law. *See* 29 CFR 531.31 and FOH 30c02(b).
- (4) Lodging must be deemed primarily for the benefit of the employee and not the employer. *See* 29 CFR 531.3(d)(1), FOH 30c01(c), and FOH 30c03(a)(2).
- (5) Employers must maintain accurate records of the costs incurred in furnishing the lodging. *See* 29 CFR 516.27, 29 CFR 552.100, WHD Opinion Letter FLSA (June 1, 1994), and FOH 30c05(a).

Note: much of the information in this section is based on guidance found in Field Assistance Bulletin No. 2015-1. Please consult this field assistance bulletin for additional, detailed information.

(b) Lodging regularly provided by the employer

Employers may take advantage of section 3(m) only if the lodging is “furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities” (29 CFR 531.31 and FOH 30c02(a)).

Because live-in domestic service employees often reside at their employers' private homes without paying rent, this requirement is met for those workers.

(c) Voluntary acceptance

Employees must accept lodging voluntarily and without coercion in order for an employer to take advantage of section 3(m). *See* 29 CFR 531.30, 29 CFR 552.100(b), and WHD Opinion Letter FLSA (February 24, 1982). The WHD will normally consider the lodging as voluntarily accepted by the employee when living at or near the site of the work is necessary to performing the job. This requirement is typically met when a live-in domestic service employee and the employer have an understanding that the employee will live on the premises as a condition of employment. This presumption of voluntariness can be overcome, such as in cases involving coercion. Although such circumstances are not the norm, Wage and Hour Investigators (WHIs) are advised to be attentive to any signs that the presumption of voluntariness is not applicable in a particular case.

(d) Compliance with federal, state, and local laws

Employers may not include the cost of lodging as part of employees' wages if the lodging is "in violation of any [f]ederal, [s]tate, or local laws, ordinance or prohibition" (29 CFR 531.31 and FOH 30c02(b)). The WHD will not allow a section 3(m) credit if the lodging provided does not have or has been denied a required occupancy permit, is not zoned for residential use, is substandard, or has been deemed substandard by local jurisdictions. *See* FOH 30c02(b). Note: WHIs should be aware of and look into any suggestions that employer-provided lodging is substandard such that its condition violates law.

(e) Lodging must be deemed primarily for the benefit of the employee and not the employer

An employer may not include the cost of lodging in an employee's wages unless the employee receives the primary benefit of the lodging. Lodging is ordinarily presumed to be for the primary benefit and convenience of the employee. But this presumption is rebutted in circumstances in which lodging is of little benefit to employees, such as where an employer requires an employee to live on the employer's premises to meet some need of the employer. In particular, an employer may not claim the section 3(m) credit if the employer requires the employee to leave an existing home and live on the employer's premises to be on call to meet the needs of the employer.

- (1) WHIs must consider the nature of the employment relationship and review the specific circumstances of each case to determine whether the lodging provided is primarily for the benefit of the employee. There are scenarios in the home care context in which an employee lives with a recipient of home care services in order to provide assistance throughout the day and/or night. Although the acuity level of the recipient of services does not determine whether the lodging is for the benefit of the employer or the employee, the employer's demands on an employee's time is relevant to a determination of who primarily benefits from the employee's living at the residence.

Whether the employer has provided a live-in domestic service employee with specific time periods during which the employee is completely relieved from duty and that are long enough to enable the employee to use the time effectively for his or her own purposes (*i.e.*, has provided bona fide off-duty time) is one factor that may help

determine who primarily benefits from the living arrangement and the lodging provided.

Where the employer's demands on an employee's time are so great or constant that the employee is working or is engaged to wait while occupying the lodging, these factors would support a finding that the lodging is primarily for the employer's benefit. Thus, where a live-in domestic employee's sleep or off-duty time is regularly interrupted to perform work for the employer, not only will this time be considered as hours worked, but the lodging typically will be deemed primarily for the employer's benefit and the cost of the lodging will not be allowed to count as part of wages.

- (2) Adequate lodging is another factor that may help determine who primarily benefits from the living arrangement.
 - a. If an employer provides an employee with private living quarters such as a separate bedroom that is furnished (*e.g.*, with a bed, night table, and dresser) where the employee is able to leave his or her belongings and spend his or her off-duty time, this factor weighs in favor of a finding that the primary beneficiary of the lodging is the live-in domestic service employee. Similarly, if the employer provides the live-in domestic service employee with access to a kitchen and a private bathroom, such facilities support a finding that the lodging is primarily for the benefit of the employee. Note: such facilities are not a prerequisite for taking the section 3(m) credit. Such private quarters typically ensure that the live-in employee is able to engage in normal private pursuits as he or she would in his or her own home. Even when the employee is provided private living quarters, however, lodging will typically be deemed primarily for the employer's benefit if the live-in employee is on-call 24 hours a day or his or her sleep and off-duty time is regularly interrupted.
 - b. If a live-in domestic service employee is only provided a cot or couch to sleep on in a living space shared with the employer, this fact would suggest that the live-in employee is not provided adequate off-duty time or is unable to use such time as he or she chooses and therefore that the lodging is primarily for the benefit of the employer.

(f) Accurate recordkeeping

In order to take a wage credit under section 3(m), an employer must maintain accurate records of the costs incurred in furnishing lodging to the employee. *See* 29 CFR 516.27(a), 29 CFR 552.100(d), WHD Opinion Letter FLSA (June 1, 1994), and FOH 30c05(a). Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost or fair value and the data required to compute the amount of depreciated investment, if any. For example, records could include proof of mortgage or rental payments and utility bills.

If an employer does not provide records to support its claim of a section 3(m) lodging credit, the employer has not met this prerequisite for including lodging costs in employees' wages. Nevertheless, an employer of a live-in domestic service employee that does not provide such records may claim a certain amount, up to seven and one-half times the statutory minimum

hourly wage for each week lodging is furnished: currently \$54.38 ($7.5 \times \7.25), toward wages rather than the reasonable cost or fair value of the housing provided. See 29 CFR 552.100(d) and Field Assistance Bulletin No. 2015-1.

(g) Collective bargaining agreements

An employer may not include in an employee's wage the cost of lodging to the extent it is excluded under the terms of a bona fide collective bargaining agreement (CBA) applicable to the particular employee. The determination of whether a CBA contains an exclusion of the cost of lodging that would otherwise qualify for a section 3(m) credit will be based upon the written provisions of the CBA. See 29 CFR 531.6(a), 29 USC 203(m), and FOH 30c01(b); see also Field Assistance Bulletin No. 2015-1.

(h) Determining reasonable cost or fair value

The section 3(m) credit may not exceed the "reasonable cost" or "fair value" of the facilities furnished, whichever is less.

(1) *Reasonable cost*

In this context, the "reasonable cost" is not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees. In other words, reasonable cost *does not* include a profit to the employer. The actual cost to an employer of providing lodging to such a worker could be, for example, a portion of the monthly mortgage or rental payment as well as utility payments. See 29 CFR 531.3(a), FOH 30c05(a), and FOH 30c06(d)(2). There is no precise formula for determining the appropriate fraction of the mortgage or rental cost; instead, the employer or WHI must take into account the particular circumstances. The cost of furnishing lodging must be established based upon available records.

Scenario:

If a person receiving services owns the home in which he or she and an employee live and therefore makes no mortgage or rental payment, the section 3(m) credit could be for the cost of paying property taxes, utilities, and other necessary costs of maintaining the home.

a. Source of funds

The source of the funds the employer uses to provide the property is not relevant. The actual cost an employer pays may include money from the employer's savings or income and/or other funds provided to the employer, such as public assistance provided to certain individuals who employ home care workers. For purposes of calculating a section 3(m) credit, it is significant only that an employer, rather than the employee or another party that is not an employer, pays for the housing, not how the employer obtained the funds for such payments.

b. Reasonable approximation

The portion of the cost of the residence in which an employee lives that may be counted as part of wages must be a reasonable approximation of the worker's share of the housing. There is no formula for determining the appropriate fraction of the mortgage, rental, or other costs of the lodging that applies to a particular employee; instead, the employer or WHI must take into account the specific circumstances. *See* FOH 30c06(d)(3).

Scenario 1:

In a large house in which a family of five and a home care worker reside, the amount might most appropriately be determined based on the ratio of the square footage of the employee's bedroom to the square footage of the entire house.

Scenario 2:

In an apartment shared by a recipient of home care services and a paid roommate, where the two individuals have equal use of the kitchen and common living spaces, the appropriate amount of a section 3(m) credit might be half of the rental cost of the unit.

1. The reasonable cost is to be calculated on a workweek-by-workweek basis so it can be added to cash wages for purposes of assessing whether the employer's minimum wage obligation has been met and determining the regular rate of pay upon which any overtime compensation due must be calculated. The weekly reasonable cost can be calculated based on a monthly mortgage or rental amount by multiplying the monthly amount by 12 and dividing by 52. *See* FOH 30c06(d)(3).

WHIs should consider the specific costs for the time period covered in an investigation, based on the employer's records, although the WHI may in his or her discretion use (or accept an employer's use of) average amounts, if the approximation is reasonable.

2. The employer bears the burden of establishing the reasonable cost of lodging. Records of mortgage payments, a rental agreement and records of rent checks, or utility bills, for example, can suffice as bases for actual cost calculations. In addition, records regarding sources of public assistance to the employer used to pay for housing, such as records regarding Housing Choice Vouchers, may be among the records used to fulfill this requirement.

In the absence of records, an employer of a live-in domestic service employee is subject to an exception: the employer may credit seven and one-half times the minimum wage per week to the wages if the employee is a live-in domestic service employee. *See* 29 CFR 552.100(d).

(2) *Fair value*

Section 3(m) of the FLSA also gives the Secretary of Labor authority “to determine the ‘fair value’ of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of ‘fair value.’” *See* 29 CFR 531.2(a) and FOH 30c01(a).

If the actual cost to the employer exceeds the rental value of the lodging (*see* 29 CFR 531.3(c) and FOH 30c06(c)), or the employer otherwise establishes a reasonable cost that appears to be excessive in relation to the facilities furnished (*see* FOH 30c01(a)), the employer may only count the lower fair value of the lodging toward wages. *See* 29 USC 203(m), FOH 30c01(a), FOH 30c06(c), 29 CFR 531.2(a), 29 CFR 531.3(c), and Field Assistance Bulletin No. 2015-1. As with assessments of reasonable cost, there is no specific formula for determining fair value. The WHD may approximate the fair value of lodging by considering average rental prices in the area for similar homes.

WHIs may estimate these amounts by, for example, using fair market rent data for a particular locality as published by the United States (U.S.) Department of Housing and Urban Development (HUD) (available at the HUD Office of Policy Development and Research web site at the following address:

<http://www.huduser.org/portal/datasets/fmr.html>), searching for comparable rental units online, or requesting information from local real estate brokers or other experts. WHIs may also consider the reasonable cost of lodging claimed by similarly situated employers if such information is available.

An employer may not profit from the section 3(m) credit; an employer may only use the fair value of housing as the amount credited toward wages if that amount is equal to or lower than the amount the employer actually pays for the housing.

(i) Wage calculations

- (1) To calculate an hourly rate including the section 3(m) credit, the value of the lodging is added to cash wages (excluding overtime compensation) and divided by the hours worked in a given week. The credit goes toward the employer’s minimum wage obligation and therefore is included in the determination of the employee’s regular rate of pay for purposes of calculating any overtime compensation due. *See* 29 CFR 531.37(b) and Field Assistance Bulletin No. 2015-1.
- (2) Section 3(m) applies to lodging furnished by the employer as compensation to an employee regardless of whether the employer calculates charges for such lodging as additions to or deductions from wages. *See* 29 CFR 531.29.
 - a. Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made.
 - b. Where an employer furnishes board, lodging, or other facilities to his or her employees in addition to cash wages, the reasonable cost or the fair value per week must be added to the cash wages before the regular rate is determined. *See* FOH 30c01(c) and 29 CFR 778.116.

- (3) If an employer claims the section 3(m) credit only in overtime weeks, or in a greater amount in overtime weeks, that is cause for suspicion. *See* 29 CFR 531.37. An employer may not use the section 3(m) credit for the purpose of evading the overtime compensation requirement.

Scenario 1:

Assume a live-in domestic service employee receives \$6.00 per hour for hours worked and room and board, for which the reasonable cost is \$100.00 per week. If the employee works 30 hours in a workweek, the \$180.00 cash wages ($\6.00×30) is added to the \$100.00 in section 3(m) credit for a total of \$280.00 received in the week. This amounts to a regular rate of \$9.33 per hour ($\$280.00 \div 30$). Assuming the room and board credit is properly taken, and that the federal minimum wage is \$7.25 per hour, this payment structure complies with the federal minimum wage requirement.

Scenario 2:

If during the following workweek the same live-in domestic service employee worked for 50 hours, the employer's \$7.25 minimum wage obligation would still be met, but the employee, if not exempt from the overtime requirement, would be due overtime compensation of one and one-half times his or her regular rate of pay for each hour worked over 40. Specifically, the employee would receive \$300.00 in cash wages ($\6.00×50), plus \$100.00 in section 3(m) credit, for a total of \$400.00, which amounts to a regular rate of \$8.00 per hour ($\$400.00 \div 50$). If this live-in domestic service employee is employed by a third party employer, he or she is not exempt from the overtime provisions and would be owed an additional \$40.00 ($\$8.00 \times 0.5 \times 10$) in overtime compensation for the 10 hours worked in excess of 40 that workweek. Conversely, if the live-in domestic service employee is solely employed by the consumer or the consumer's family or household, the consumer could claim the section 13(b)(21) exemption, and the \$400.00 in compensation would suffice because the employee would be paid above the \$7.25 federal minimum wage amount for each hour worked.

- (4) The section 3(m) credit may also be the sole payment an employee receives, provided it is sufficient to cover the employer's minimum wage obligation. Deductions for board, lodging, or other facilities may be made in non-overtime workweeks even if they reduce the cash wage below the minimum wage. *See* 29 CFR 531.36(a).

Scenario:

Assume a federal minimum wage of \$7.25. A nanny at a private home who works for 15 hours per week could be compensated entirely by not being charged rent. If the reasonable cost of his or her lodging is \$500.00 per month (or \$115.38 per week, calculated by multiplying \$500.00 by 12 months and dividing by 52 weeks), and the employer has complied with the section 3(m) requirements, this arrangement complies with the FLSA minimum wage because the employee receives a regular rate of \$7.69 per hour ($\$115.38 \div 15$ hours).

- (5) When an employee is reimbursed for expenses incurred on behalf of his or her employer, such payments are not considered to be compensation for hours worked.

Such payments therefore do not count toward wages under section 3(m) and are excluded from the regular rate for purposes of overtime calculations.

- (6) Under the FLSA, a worker may be jointly employed by more than one employer. *See* FOH 59f. If it is determined, after applying the fact-specific economic realities test, that joint employment exists, then both or all employers will be jointly and severally liable for compliance with all of the applicable provisions of the FLSA, including the overtime provisions, with respect to the entire employment for the particular workweek. *See* 29 CFR 791.2(a). In discharging the joint obligation, each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers. *See* Field Assistance Bulletin No. 2015-1.

Scenario:

A family and a home care agency jointly employ a live-in home care worker. The agency pays cash wages and the family pays the rent for the residence in which the worker and the person to whom the employee provides services reside. In this case, the amount properly claimed as a section 3(m) credit and the cash wages are combined to determine the total wages received. The credit may be applied toward the agency's wage obligation even though only the agency, and not the family, would not be responsible for ensuring the live-in domestic service employee received overtime compensation. *See* Field Assistance Bulletin No. 2015-1.

[01/13/2017]

25n07 Shared living arrangements.

(a) General

This section, derived from Administrator Interpretations Letter FLSA 2014-1, discusses how longstanding FLSA principles apply to a category of home care services referred to as shared living arrangements.

(b) Shared living arrangements

- (1) Shared living arrangements are home care programs in which people with disabilities or seniors and providers of home care services live together.
- (2) Some home care programs are administered by a state or county and funded by Medicaid or other public funding; other programs are funded through private pay arrangements. For FLSA purposes a program name or categorization by Medicaid or a state is not significant. The particular facts of the arrangement between a consumer, provider (*i.e.*, person providing home care services to a consumer), and public and/or private agency administering the program (*i.e.*, third party) control whether and how the FLSA applies.
- (3) Some commonly used terms that describe shared living arrangements may include: shared living, adult foster care, supported living, paid roommate, or host home. These terms are not exhaustive nor are the structures of the living arrangements discussed below.

- a. Below are examples which illustrate the application of the economic realities test to several innovative home care programs/shared living arrangements.

1. Shared living in a provider's home

In this shared living arrangement, a provider allows a consumer to move into his or her existing home in order to integrate the individual into the shared experiences of a home and family. A home care provider could be an employee of a consumer or third party. This shared living arrangement is common in many state Medicaid systems and is often referred to as adult foster care or host home. In most shared living arrangements in a provider's home, the provider will not be an employee of the consumer. Adult foster care providers often integrate the consumer into an existing set of circumstances, rather than taking direction from the consumer. The provider makes investments in order to take on the role, whereas the consumer has not. The provider has obtained and maintains the home in which services are provided and may have made modifications to the home, such as making a bathroom accessible or transforming a first floor room into a bedroom to be permitted to become the consumer's provider. Where the provider exercises control over the conditions of the work, rather than taking directions from the consumer, and has invested in the arrangement, the provider is more like an independent business than an employee of the consumer. The provider therefore typically is not an employee under the economic realities test.

In most shared living arrangements that occur in the existing home of the provider, the provider will not be an employee of a consumer or third party. However, where a third party (*e.g.*, a case manager) is so involved in the provider's relationship with the consumer that the third party's role becomes one of direction and management of the workplace, the provider will be an employee of that third party rather than an independent contractor.

2. Shared living in a consumer's home

In this shared living arrangement, a provider moves into a consumer's home to perform services which can include personal and/or medical care, helping integrate the consumer into the community, and/or being present during nights in case of an emergency. These arrangements are sometimes called paid roommate arrangements. Typically, the provider lives rent-free in the consumer's home and may or may not receive additional payment. These arrangements are often funded by Medicaid, but may also be funded by another public program or privately.

In these circumstances, the provider will typically be the employee of the consumer. The consumer is likely to set the provider's schedule, direct the provider how and when to perform certain tasks, and otherwise control the provider's work. The provider is unlikely

to have invested in the arrangement, whereas the consumer has acquired a home in which there is sufficient space for the provider to also reside, and as the owner/lessee, has overall control of the premises where the work is performed.

3. Shared living in a new home created by the consumer and provider

It will not always be the case that either the provider or the consumer previously occupied the residence in which the arrangement occurs. For example, the two may move in together because neither previously lived in a residence that would accommodate them both. Whether these situations are more like those described in FOH 25n07(b)(3)a.1. (*i.e.*, shared living in a provider's home) or FOH 25n07(b)(3)a.2. (*i.e.*, shared living in a consumer's home) above depends upon all of the circumstances that go to who controls the residence and relationship. Factors to consider include who identified the residence, arranged to buy or lease it, furnished the common areas, maintains the residence (*e.g.*, by cleaning it and making repairs), and pays the mortgage or rent. No single factor alone is controlling. Generally, where the provider has primary control over the residence and relationship, the consumer likely does not employ the provider. *See* Administrator Interpretations Letter FLSA 2014-1.

(c) Significance of where the arrangement takes place (*i.e.*, provider's home versus consumer's home)

The place where the arrangement takes place, in terms of either the provider's home or consumer's home, is not always a definitive indicator of an employment relationship between the consumer, provider, and/or third party. In most circumstances, a provider who brings a consumer into his or her existing home will not be an employee of the consumer or the consumer's representative and, if the provider is not the employee of a third party, he or she may be considered an independent contractor. It will often, though not always, be the case that a provider who moves into the home of a consumer is the consumer's employee. No single fact is controlling when determining an employment relationship in a shared living arrangement in a new home created by the consumer and provider.

[01/13/2017]

25n08 Paid family and household care providers.

(a) Paid family/household providers

Certain Medicaid-funded and other publicly funded programs allow for arrangements in which a family or household member of the consumer is paid to provide home care services. These programs allow the consumer or the consumer's representative to select and supervise the care provider and further permit the consumer to choose a family or household member to be a paid home care worker. Under these programs the particular services to be provided and the number of hours of paid work are described in a written agreement, usually called a plan of care developed and approved by the program after an assessment of the services the

consumer requires. Such a plan will also take into account the consumer's existing supports such as unpaid assistance already provided by family or household members.

- (1) In investigations where a family or household member is a paid home care worker, it might be appropriate, under limited circumstances, to give consideration to the consumer's plan of care. Under the circumstances described in the scenarios below, the WHD will not consider a family or household member with a pre-existing close, personal relationship with the consumer to be employed beyond the plan of care.
- (2) The FLSA does not necessarily require that once a family or household member is paid to provide some home care services, all care provided by that family or household member is part of the employment relationship. The care outside of the employment relationship is often referred to as natural supports or support. *See* 78 FR 60489.

Scenario:

A familial relationship, but not an employment relationship, would exist where a father assists his adult son with a physical disability with activities of daily living in the evenings. If the son enrolled in a Medicaid-funded or other publicly funded program, and the father decided to become his son's paid care provider under a program-approved plan of care that funds 8 hours of services per day that consists of assistance with ADLs and IADLs, the father would then be in an employment relationship with his son, and perhaps the publicly funded entity, for purposes of the FLSA for those hours.

The father's employment relationship extends only to the eight hours per day of paid work contemplated in the plan of care; the assistance he provides at other times (*i.e.*, the natural supports), is not part of that employment relationship and therefore need not be counted as hours worked.

- (1) In circumstances in which a family or household member of the consumer is selected as a paid provider, the employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed with the consumer and approved by certain Medicaid-funded or certain other publicly funded home care programs only if the agreement is reasonable.
- (2) For purposes of an FLSA analysis, "reasonable" does not mean whether the amount or types of services or paid hours to be provided are appropriate for the consumer. Instead, a determination of reasonableness for FLSA purposes will take into account whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer. In other words, for FLSA purposes, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable.
 - a. If the program reduces the number of paid hours in a plan of care because the selected care provider is a family or household member, the WHD would not consider the employment relationship limited to the hours in the plan of care.
 - b. If a program requires an increase in the hours of unpaid services performed by the family or household care provider in order to reduce the number of

hours of paid services because the selected care provider is a family or household member, the WHD would not consider the employment relationship limited to the hours in the plan of care.

Scenario:

A 90-year-old woman who requires home care services enrolls in a Medicaid-funded program administered by the county in which she lives. She is assessed to need paid services for 30 hours per week beyond the existing unpaid assistance she receives from her daughter and other relatives.

Had the consumer chosen a neighbor to become her paid care provider, her plan of care would have included those 30 paid hours each week. However, the consumer elects her daughter to become her paid care provider and the county reduces the paid hours in the plan of care to 15 hours per week. In this example, the plan of care is not reasonable for FLSA purposes as it treats the family care provider unequally. For that reason, the paid hours in the plan of care will not determine the scope of the FLSA employment relationship.

This unique interpretation only applies in the home care services context, and it does not generally apply to relationships that do not involve pre-existing family ties or a pre-existing shared household. For additional discussion on “Plan of Care,” *see* 78 FR 60487.

[01/13/2017]

25o CONGLOMERATES: SECTION 13(g)

25o00 General provisions.

- (a) Effective 05/01/1974 section 13(g) provides: “The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support, the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).”
- (b) The application of this section of the FLSA is more fully explained in FOH 21 (regarding section 13(a)(2)) and FOH 20 (regarding section 13(a)(6)).

25o01 Common control under section 13(g).

Section 13(g) requires common control for an establishment to be considered part of a conglomerate (*see* FOH 25o00). The WHD will consider common control under section 3(r) to be the same for purposes of section 13(g).

25p **HOUSE PARENTS IN NON-PROFIT EDUCATIONAL INSTITUTIONS: SECTION 13(b)(24)**

25p00 **Statutory provisions.**

Effective 05/01/1974, section 13(b)(24) provides an exemption from overtime for any employee who is employed with his spouse by a non-profit educational institution to serve as the parents for children:

- (a) who are orphans or one of whose natural parents is deceased, *and*
- (b) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution and are together compensated, on a cash basis, at an annual rate of not less than \$10,000.00.

25p01 **Enforcement policy for period prior to 05/01/1974.**

The WHD Administrator will take no position with respect to alleged overtime violations in any current investigation during the period prior to 05/01/1974 where the employee is entitled to the overtime exemption on the basis of section 13(b)(24) but would have been subject to overtime previously.

25p02 **Hours worked.**

Any reasonable agreement between the parties which takes into consideration all the pertinent facts, within the meaning of 29 CFR 785.23, is permissible in determining hours worked by exempt house-parents for minimum wage compliance purposes.

Note: with regard to FOH 25p00, a word of explanation is in order. Section 13(b)(24)(A) is followed by the word “and” rather than the word “or” which appears in the FLSA as amended. The reason we have done this in the FOH is because extensive and exhaustive research has made clear that the 1974 Amendments contained an error in wording. That is, in order to remain logically consistent with all that was stated on the record concerning this exemption, it is obvious that the word “and” rather than “or” should have been printed between points (A) and (B): *see* section 17 of Pub. L. No. 93-259. Thus, it has been determined that the word “and” is correct and should be used in construing the exemption. That is why we put “and” in FOH 25p00, and also why there are no quotation marks at the beginning and end of the exemption, since it is not an exact quotation.