



Headquarters

P.O. Box 420603
San Francisco, CA 94142
Tel: (415) 703-4810
Fax: (415) 703-4807

Donna M. Dell

*State Labor Commissioner & Chief,
Division of Labor Standards Enforcement*

November 23, 2005

Ms. Barbara Biglieri, Director of Policy
California Association for Health Services at Home
3870 Rosin Court, Suite 190
Sacramento, California 95834

Re: Interpretation of IWC Wage Order 15: Definition of “personal attendant”.

Dear Ms. Biglieri,

I am in receipt of your letter dated October 3, 2005 asking for further clarification of the scope of the duties that fall within the definition of the “personal attendant” exemption, as it is referred to in the Industrial Welfare Commission (IWC or “the Commission”) Wage Order 15¹.

Specifically, I understand that the California Association for Health Services at Home (CAHSAH) represents more than 500 providers of home health, private personal custodial care, hospice and other vendors of home care services. You have indicated that your members properly recognize their workers as employees, rather than independent contractors, but are confused about the application of the definition of “personal attendant” as stated in prior Division of Labor Standards Enforcement (DLSE or “the Division”) opinion letters dated April 24, 1991, October 3, 1994 and December 6, 2002².

“Personal attendant” is defined in section 2 (I) of IWC Wage Order 15, as follows:

“Personal attendant” includes baby sitters and means any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. The status of

¹ The California Supreme Court, in *Tidewater Marine, Inc. v Bradshaw* (1996) 14 Cal 4th 557, at 571, upheld the Labor Commissioner’s authority to “provide parties with advice letters which are not subject to the rulemaking provisions of the APA”. Courts may accord deference to such letters under the limited standard set out in *Yamaha Corp. v State Board of Equalization* (1998) 19 Cal 4th 1.

² This letter cites an earlier DLSE opinion letter which erroneously deems 20% of the work an individual is performing as a “significant amount” rather than *exceeding* 20%.

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“personal attendant” shall apply when no significant³ amount of work other than the foregoing is required.

It is informative to review the Statement as to the Basis for the most recent amendment to Section 2 of IWC Wage Order 15, adopted on January 17, 1986, wherein the Commission stated:

“After three public hearings in December, 1985, the Commission redefined the occupation personal attendant, to provide equity for those personal attendants employed and dispatched to private households by third parties in the health care industry. The Commission recognized that such personal attendants classified under orders other than (15) typically work for businesses accustomed to normal payroll practices, such as paying employment taxes and keeping records, that private householders needing personal attendants often are unable to attend adequately to such matters, and that requiring overtime pay for third party employees would discourage employment under more stable conditions. By redefining personal attendants and thus reclassifying those formerly classified by other orders under Order 15, the Commission intended to provide equity for personal attendants, increase continuity of employment and benefits for these employees, and ensure ease of enforcement of the regulations surrounding them. The Commission retained the language “when no significant amount of work other than the foregoing is required” so that the definition of personal attendant could not be construed to apply to other classifications of employees working in households.”

In its deliberations the IWC acknowledged a public policy argument in favor of encouraging legitimate businesses to employ persons who provide personal services to the aged and infirm. We support that policy. Employer compliance is the goal of the Labor Commissioner. As such we have a strong interest in providing information and clarity to the Division and the public to support that goal.

In his DLSE Opinion Letter dated April 24, 1991, then DLSE Chief Counsel, Thomas Cadell, addressing the distinction between practical nurses and personal attendants, stated:

“Much of the other work which you describe such as bathing and dressing the client or taking the person on an outing would obviously be described as personal attendant work.”

As stated above, former Chief Counsel Cadell recognized that “supervision” would necessarily include certain efforts that are essential for independent living other than feeding and dressing (including isolated instances where assistance with medications is provided⁴). We agree with that interpretation.

A determination that an individual is a personal attendant has the effect of exempting that person from the protections of the IWC Order, except for minimum wage⁵. Accordingly, we must continue to stress, as has been emphasized in every prior DLSE communication on this topic, that such a determination is fact intensive and must be narrowly construed on a case-by-case basis.

³ The DLSE has historically adopted a standard that “does not exceed 20 percent of total weekly hours worked” (as used in the Federal regulations regarding companionship services. 29 CFR 552.6) in determining what is “significant”. Accordingly, 20% or less of total weekly hours worked will not be deemed to be significant.

⁴ Reference Cadell Opinion Letter 1994.02.03-2

⁵ Prior to 2001, a classification as “personal attendant” would have also excluded minimum wage.

We cannot provide you with a comprehensive list of acceptable duties for a personal attendant. However it is instructional, and not inconsistent with the long standing DLSE position, to consider those duties included by the U.S. Department of Health and Human Services National Center for Health Statistics' definitions for activities of daily living. Such activities relate to personal care and include, but are not limited to, such duties as bathing, showering, getting in or out of a bed or chair and using a toilet. "Supervising" may also include assistance in obtaining medical care, preparing meals, managing money, shopping for groceries or personal items, using a telephone or performing housework when such activities are related to the independent living of the person and cannot be performed by him or herself alone due to a health or age limitation. It must be noted, however, that any general housekeeping duties performed should not exceed 20% of the weekly working time spent by the personal attendant to maintain his or her exemption under IWC Wage Order 15.

While I do not believe that this opinion addresses all of the concerns you have raised, I hope it will provide clarification of those interpretations by the Division that you have found to be confusing or inconsistent. This letter specifically supersedes DLSE Opinion Letter 2002.12.06. Further clarification may require additional action by the IWC or through the regulatory process.

Thank you for giving us the opportunity to review this important issue.

Sincerely,

/s/ Donna M. DeI I

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