STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Santa Rosa Legal Section
50 D Street, Suite 360
Santa Rosa, CA 95404
(707) 576-6788

H. THOMAS CADELL, Of Counsel

December 6, 2002

Alexander Collins, Jr.
Baker, Manock & Jensen
5260 North Palm Ave., 4th Floor
Fresno, CA

Re: **Personal Attendant Under Order 15** (001222)

Dear Mr. Collins:

I have been asked to respond to your letter addressed to Al Weaver, Senior Deputy Labor Commissioner, concerning the above-referenced subject.

Specifically, you ask whether an individual who cares for a person with advanced age and physical disabilities (i.e., opens pill bottles and places pills on table for person to take, drives person to doctor appointments, cooks for person) qualifies as a personal attendant as defined in IWC Order 15, Section 2(J)?

Section 1(B)[1] of Order 15 provides:

"Except as provided in Sections 1, 2, 4, 10, and 15, the provisions of this order shall not apply to personal attendants. The provisions of this order shall not apply to any person under the age of 18 who is employed as a baby sitter for a minor child of the employer in the employer's home."

Section 2(J) of Order 15 defines a personal attendant:

"'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 'personal attendant' shall apply when no significant amount of work other than the foregoing is required."

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[1]Note that your letter incorrectly states the language in the Order.

Thus, for purposes of Order 15, covering household occupations, personal attendants (except minors babysitting another minor) must be paid minimum wages, but need not be paid premium overtime pay.

The DLSE has historically taken the position that "practical nurses are explicitly covered by Order 15 and may not be exempted as personal attendants even though many of their duties are the same. Any worker who regularly gives medication or takes temperatures or pulse or respiratory rate, regardless of the amount of time such duties take, falls within some classification of nurse, licensed or unlicensed." (Interpretive Bulletin 86-1) I make this observation only because your description of the work performed by the workers you are describing could be construed to include administering medications.

DLSE has opined that more is required to establish that the employee is engaged in nursing than that the employee hands a pill or other medication to the employer (Opinion Letter 1994.02.03). However, we have also pointed out that frequency of the giving of medication would defeat the personal attendant exemption. The DLSE position is set out more fully in O.L. 1994.02.15.

> "Initially, it must be pointed out that applicability of the FLSA and the regulations adopted by the Secretary of Labor pursuant to the Act, differ substantially from the coverage of the California IWC Orders. For instance, nurses are specifically covered under the IWC Orders while they are considered exempt under the provisions of 29 C.F.R. 541.302(e)(1) if they are licensed. Additionally, as was pointed out in [O.L. 1992.09.14] the IWC Orders do not provide any exemption categories of "domestic workers" as does the FLSA. The exemption contained in the IWC Order is only applicable to "personal attendants" as defined[2]. This definition does not comport with the definition of "companionship services" contained at 29 C.F.R. §552.6. The federal definition assumes that "meal preparation, bed making, washing of clothes, and other similar services" are an inherent part of the duties of the "companion". Those same regulations also allow the "companion" to perform "general household work: *Provided, however,* That such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked."

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[2]The federal definition excludes "baby sitter" from its definition of "companionship services" while the state includes baby sitter within the definition of "personal attendant".

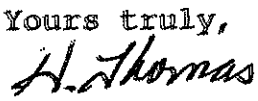
"The IWC Orders specifically provide that the exemption covers those who 'supervise, feed, or dress' the individual. The Orders then provide that the exemption shall apply 'when no significant amount of work other than the foregoing is required.' Thus, making beds, meal preparation, washing clothes and other similar services are not included in the work expected of the 'personal attendant'. However, this is not to say that such work may not be performed at all. But, if a significant amount[3] (20%) of the work the individual is performing is other than supervision, feeding or dressing the child or adult, there is no exemption for any of the work.

"The exemption, as with all exemptions from this remedial legislation, is narrowly construed. Additionally, as with all exemptions, the inquiry is fact-intensive. Thus, this Division will not attempt to give an opinion as to whether or not the workers employed by your client are exempt based upon a description of the work."

Your second question is: "Assuming an individual qualifies as a personal attendant and also lives on the premises of the physically disabled elderly person, is the personal attendant subject to the work day limitations of Section 3(A) above?"

Assuming the employee is found to be a personal attendant under Order 15, Section 1(B) of the Order limits the applicability of the order to Sections 1, 2, 4, 10 and 15; thus, none of the provisions found in Section 3 would apply.

Yours truly,



H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Acting Chief Counsel
Assistant Labor Commissioners
Regional Managers
Al Weaver, Sr. Deputy, Fresno

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[3]The DLSE has adopted the amount of 20% (the same amount used in the Federal Regulations regarding companionship services) in determining what is "significant".