STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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MILES E. LOCKER, *Chief Counsel*

November 9, 1998

Eugene C. Cole
Administrator
The Baraka Homes, Inc.
8040 Hansom Drive
Oakland, CA 94605

RE: "Sleep Shifts" and "Hours Worked" Under IWC Order 5

Dear Mr. Cole:

This is in response to your request for a legal opinion regarding the obligation to compensate employees at your facilities for time during which the employee is required to be present but is allowed to sleep.

Your letter states that you operate residential care homes for developmentally disabled adults. The employees are scheduled to work five (5) consecutive days, with 12-hour shifts each day. The workweek runs from Sunday to Saturday. The employees start their shifts on Sunday at 9:30 p.m., when they are required to be present in the facility, but are assigned no specific duties during the period from 9:30 p.m. through 6:30 a.m. the following morning. During the initial nine hour period of each shift, the employees are permitted to sleep. Duties for the period from 6:30 a.m. until 9:30 a.m. include awakening the residents and assisting them in getting to their day's activities. You do not state, but from the nature of your description, I would assume that during the overnight period, while not assigned specific duties, the employees are required to respond to emergencies or other needs of the residents. You do not state whether there are any employees on duty during the overnight periods who are not allowed to sleep.

Opinion/Hours Worked: Sleep Shifts -IWC Order

Re: Mel 2600

bcc: all DLSE Atty

Your letter states that during the overnight portion of the 12 hour shift the employees are paid minimum wage, currently $5.75 per hour. For the hours between 6:30 a.m. and 9:30 a.m., the pay rate is $7.00 per hour. Overtime is calculated using the "weighted average" method, wherein total compensation for the shift is divided by total hours worked in order to arrive at a weighted rate of $6.06. Overtime is paid at $9.09 per hour, one and one-half times the weighted rate.

Your letter further states that you attended a training class concerning California wage laws, where you were told there is no requirement under California law to pay for sleep time, but that you were subsequently told that "no pay for sleep time" applied only to "live-in" employees.

The different advice that you received reflects the factual and legal nuances that go into determining whether "sleep time" is compensable. Factors that must be considered include the occupation of the employees, residence requirements of the job, and the length of shifts. Depending on these various factors, "sleep time" may or may not be compensable as "hours worked."

As you may know, the Industrial Welfare Commission ("IWC"), the body charged by the State Legislature to establish regulations related to wages, hours and working conditions, has promulgated separate regulations for various industries in California. From the description contained in your letter, it would appear that your employees are covered by Wage Order 5-98, regulating working conditions in the Public Housekeeping Industry which includes, "hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care."

The facts set forth in your letter appear remarkably similar to those in the case of *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21. In that case, the employees who cared for a similar clientele as yours claimed compensation for "hours worked" for time they were required to be present at the employer's facility, but were allowed to sleep. The employer claimed that it was not obligated to pay its employees for that time. The Division of Labor Standards Enforcement("DLSE"), which represented the employees in the case, took the position that because the employees were subject to the control of the employer, whether required to actually work or not, the employer was required to pay the employees for the time during which the employees were

allowed to sleep. The Court of Appeals agreed with the position taken by DLSE.[1]

There are exceptions to this rule which appear not to apply in your case. If the employees were on 24 hour shifts, the *Aguilar* decision allows deduction from "hours worked" for up to three meal periods of up to one hour each, and an uninterrupted sleep period of not more than eight hours.[2] Your letter states that the employees have 12 hour shifts, so deductions from sleep time are not permitted.

In contrast, in a case involving a motel employee required to **reside and remain** on the employer's premises 24 hours a day, *Brewer*

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[1]The Court's decision in *Aguilar* primarily rested on the distinction between federal and state law. Following the *Aguilar* decision, the IWC amended the definition of "hours worked" in the "health care industry" to provide that "[w]ithin the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act." Assuming, *arguendo*, that a residential home for developmentally disabled adults is part of the "health care industry," we must now look to federal law to determine whether "sleep time" for employees of such a facility constitute "hours worked." The *Aguilar* court also analyzed this question under federal law, and rejected the "unpersuasive" opinion letters issued by the U.S. Department of Labor which had suggested that sleep time may be non-compensable without regard to the length of the employees' work shift(s). The *Aguilar* court noted that these opinion letters conflicted with the federal regulation found at 29 C.F.R. §785.21, which provides that "an employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy....It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and her time is worktime." Thus the *Aguilar* court concluded that even under federal law (which the court characterized as "less favorable" to employees than state law), the sleep time of the employees in question constitutes "hours worked" for which they were entitled to compensation.

[2]This is consistent with 29 C.F.R. 785.22. However, if an employee on duty for 24 hours or more is unable to enjoy at least 5 hours of uninterrupted sleep time, the entire sleep period must be counted as hours worked. If the employee enjoys more than 5 but less than 8 consecutive hours of sleep, the employee must be paid for all time during which sleep is interrupted by work.

v. Patel (1994) 20 Cal.App.4th 1017, the Court held that no compensation was required with respect to time during which the employee was free to sleep or engage in other personal activities. IWC Wage Order 5 expressly sets out a special definition of "hours worked" for employees who are "required to reside on the employer's premises." The dictionary definition of the term "reside" is "to live in a place for an extended or permanent period of time." As *Aguilar* made clear, providing a bed or even a room to an employee for use during his or her shift at a health care facility does not mean that the employee "resides" at the facility. In contrast, the motel manager in *Brewer v. Patel* permanently resided at the motel so as to come within the special definition of "hours worked."

Your situation appears more closely aligned with the *Aguilar* case, as it does not appear that your employees are **required** to reside on the premises, but are only required to be at the premises for certain periods. From the facts you have provided, I assume that the employees do not, in fact maintain their primary residences at the employer's facilities, but rather, that the employees actually reside in homes or apartments away from the employer's premises, or at least are free to do so. It is during the specific work periods that the employees are required to be at the employer's facility that they are subject to the employer's control. Those periods constitute "hours worked," and the employees must be paid for said hours worked.

Please note that the employees at issue in *Aguilar* were considered by the Court to be "personal attendants" within the meaning of paragraph 2(K)[3] of Wage Order 5-80 (a predecessor to Wage Order 5-98), and that at the time *Aguilar* was decided, "personal attendants" were treated differently than other employees for purposes of overtime compensation.[4] The current Wage Order

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[3]A "personal attendant" is defined by paragraph 2(K) of Wage Order 5-98 as "any person employed by a non-profit organization covered by [Wage Order 5] 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 where no significant amount of work other than the foregoing is required." It is unclear from the limited facts stated in your letter whether your employees meet this definition.

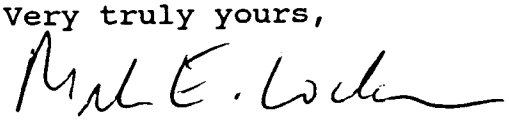
[4]Under Wage Order 5-80, employees other than "personal attendants" were entitled to overtime compensation for all hours worked in excess of 8 in one day or 40 in one workweek. These overtime provisions did not apply to "personal attendants" who did not work more than 54 hours or more than six days in any workweek.

does not treat "personal attendants" differently from other employees. That is, under Wage Order 5-98, overtime must be paid for all hours worked in excess of 40 in any workweek. The former provision allowing "personal attendants" to work for up to 54 hours in a week without overtime has been deleted. However, there is a provision in Wage Order 5-98 that allows employers engaged in the operation of a facility "primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" to establish an alternative work period for overtime purposes. Under the alternative method, a work period of 14 consecutive days may be used instead of a work week of seven consecutive days for overtime purposes. There are two important factors to consider, however, concerning this alternative method. First, the alternative method cannot be used, absent an agreement between the employer and the employee(s) entered into prior to performance of the work. Second, under the alternative method, overtime must be paid for all hours worked in excess of 8 in any workday or in excess of 80 in any 14 day work period.[5]

Finally, please note that while the "regular rate of pay" is usually derived under the "weighted average" method by dividing total hourly compensation earned in a pay period by the total hours worked in that pay period, rather than by dividing the daily compensation by the total number of hours worked that day, the facts as you set forth in your letter would appear to result in the same regular rate irrespective of the method of calculation used.

I have enclosed a copy of IWC Order 5-98 for your perusal. I trust this addresses the issues raised by your letter. Thank you for your interest in California labor law.

Very truly yours,



Miles E. Locker
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cc: Jose Millan
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[5]The alternative method is set out at paragraph 3(B) of Wage Order 5-98. Other than under this alternative method, daily overtime is not required under Order 5-98. (See paragraph 3(A)).