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*

April 23, 2003

Steven Kesten
Kesten, Colton & Brandt
3100 Kerner Blvd., Suite B-2
San Rafael, CA 94901

Re: **Resident Employees** (906)

Dear Mr. Kesten:

Your letter of February 13, 2003, has been forwarded to this office for response on behalf of the Division of Labor Standards Enforcement. Please excuse the delay in responding to your previous correspondence but staff commitments have made it impossible to keep up with the number of inquiries received.

Your letter states that your firm represents a small residential care facility in Marin County. As is common in residential care facilities, some of the residents require 24-hour monitoring while others need only occasional oversight during the nighttime hours.

Your questions involve employees who you describe as resident employees. Your letter gives no further information regarding these employees and the enclosure you indicate was contained in the June 11, 2002, was not contained in your latest correspondence. We note that you state that the workers are not required to remain on the premises and this letter will accept that fact as controlling.

Wage Order 5-2003 (as updated), covering the Public Housekeeping Industry, is the wage order which would apply (See Order 5, Sec. 2(P)(4) defining Public Housekeeping). Your client would also be part of the Healthcare Industry as that term is defined at Section 2(J) of Order 5-2003. As such, the residential care facility would be subject to the more limited federal definition of "hours worked" (See Order 5-2003, Section 2(K)[1]

[1]"(K)'Hours worked'...Within 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

Consequently, for purposes of this analysis, we must look to the federal equivalent of the term "hours worked". First, it is necessary to recognize that, in fact, there is no federal definition of the term "hours worked"[2]. However, as the California Supreme Court noted:

> "However, the FLSA specifically defines the term '[e]mploy,' which 'includes to suffer or permit to work.' (29 U.S.C. 203(g).) Federal regulations implementing the FLSA define 'hours worked' to include: '(a)[A]ll time during which an employee is required to be on duty <u>or to be on the employer's premises</u>[3] or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so.' (29 C.F.R. 778.223 (1998); see also 29 C.F.R. 553.221(b), 785.7 (1998).)" (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 589) (Emphasis added)

With this admonition from the California Supreme Court, you can clearly understand why it is imperative that we view this response in light of the fact that, as you state, the employees are not required to remain on the premises. "Resident employees are not 'at work' all the time they reside on premises, nor are they on call during all the time they reside on premises but may, on occasion, be called to service as needed."

You also state, "Resident employees also agree to work two hours per day to pay for their room and board.[4]" Since, as you say, the employees are paying for both room and board, we must

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with the provisions of the Fair Labor Standards Act."

[2]*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 588. ["First, we recognize that the FLSA does not include an express definition of "hours worked," except "in the form of a limited exception for clothes-changing and wash-up time" under 29 United States Code section 203(o). (29 C.F.R. 785.6 (1998)"

[3]It must be noted at this point that Order 5 has a unique definition of the term "hours worked" which includes "...in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked." However, the definition of hours worked for employees in the Healthcare Industry is specific to those employees and requires the application of the federal definition despite the fact that the Healthcare Industry workers may also be required to reside on the premises.

[4]Employees may not be charged more than the amounts set out in IWC Order 5-2003, Section 10, Meals and Lodging. We can make no determination regarding the appropriateness of the charge inasmuch as we do not know the type of housing or the number of meals the employees consumes. Also, we do not address the tax liabilities of the parties. Section 10 of the Order provides the amount which may be charged either against the minimum wage obligation or as a separate charge. Note, the lodging must provide for <u>full time occupancy</u>.

assume that the employees are full time residents of the facility. This would be necessary before the employer could charge for the "lodging" portion of the "room and board". (See definition of "Lodging" at Section 10(B) of Order 5-2003)

Your first question is:

> "If a resident employee is required to be at work less than 24 consecutive hours, can sleep time be considered 'off duty' or is it necessary for the employee to be on duty for 24 consecutive hours before sleep time can be considered 'off duty' time?

Your second question is:

> "Can an employer provide an employee who works less than 24 consecutive hours with sleeping accommodations as a matter of convenience to the employee without sleep time being regarded as time for which the employee must be compensated?"

The federal regulations at 29 C.F.R. § 785.22[5] provide an exemption from the obligation of the employer to pay regular wages or overtime for any employee "required to be on duty for 24 hours or more..." during "bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours..."

Since, in neither your first nor second question is the employee on duty for 24 hours or more, the answer to both questions is that sleep time may not be excluded.

Next you ask:

> "If an employee resides on the premises of our client's residential care facility, and is not working a 24 consecutive hour shift, and is not required to be on premises, but from time to time when the employee is on premises, the employee is awakened to assist other staff with a client's needs, is the employer required to compensate the employee only actual time worked, or is the employer obligated to pay for the entire time spent sleeping as though the employee were actually on duty?"

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[5]The California Industrial Welfare Commission Orders provides a similar exemption, but in only two Wage Orders (5 and 9). The IWC limits the exemption to ambulance drivers and attendants. The DLSE has historically allowed the exemption for private duty firefighters who may be involved in para-medic work if those workers are covered by Order 5 and mortuary removal service employees if those workers are covered by Order 9. The workers must be covered by either Order 5 or 9 and work in a capacity similar to ambulance drivers and attendants in order to be considered for the exemption.

We assume, again, that the employee is a full-time occupant of the residence facilities and that those facilities meet the requirements of Order 5, Section 10(B). Given the specific facts you state, the employee would not be entitled to any additional pay for his or her sleep time. The employee would, however, be entitled to Reporting Time pay (See Section 5 of the Orders.)

Your next question is:

> "Is it possible to lease the space to an employee in exchange for a credit against the employee's earnings or is it necessary to have a separate rental agreement for which the employee directly compensates the employer?"

Again, we must advise you that any charge made by the employer for lodging (or meals) must comply with the provisions of Section 10 of the Orders. Section 10, in pertinent part, reads as follows:

> "(B)'Lodging' means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.
>
> "(C) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:
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> ...
>
> [The Orders contain the maximum amounts allowed for meals and lodging]
>
> ...
>
> "(D) Meals evaluated, as part of the minimum wage, must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.
>
> "(E) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein[6]."

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[6]It should be noted that Labor Code § 450 prohibits any employer from forcing an employee to purchase anything of value from the employer and Labor Code § 221 forbids an employer from collecting back from an employee any sum

It is unclear from your letter what the employee's rate of pay is. Consequently, we cannot be specific as to the charges which may be made. In any event, the charge made for living arrangements must be for "full-time occupancy" and any amount charged to the employee which impacts on the minimum wage obligation owed to the employee may not exceed the sums set out in the Orders. In addition, if the employee is required to reside on the premises the charge made for the full-time occupancy may not exceed the amounts set out in the Orders.

Your next question also relates to the lodging offered by your client and again raises questions regarding sleep time:

> "If an employee resides on the premises of our client's residential care facility, how separate, self contained and distinct from the employer's business must the employee's accommodations be to regard sleep time as time for which an employee need not be compensated despite working less than 24 consecutive hours and occasionally being awakened to assist with the employer's business."

There is nothing in the Orders which would require that the accommodations be "separate" or "self-contained and distinct" from the employer's business. The accommodations must be "adequate, decent and sanitary" according to "usual and customary standards." Adequate bath and toilet facilities are required, of course. The facilities must afford privacy, but need not be removed from the employer's premises. Since the accommodations must be available full time, adequate storage space would also be required.

The requirements for paying an employee who is not <u>required</u> to remain on the premises have been discussed above and we will not repeat that discussion here. We would, however, caution that the employee would not be entitled to wages only for time when he or she is not required (implicitly or explicitly) to remain on the premises. If, on the other hand, the employee is required – in any manner – to be available on the premises of the employer, the employee is entitled to be compensated. The federal rules in this regard are clear; the U.S. supreme Court has discussed the difference between whether this is work time or not.

> "Whether in a concrete case such time falls within or without the [FLSA] is a question of fact to be resolved by appropriate

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theretofore paid to the employee. In addition, Labor Code § 224 forbids any deduction from either the contract or statutory wage owed to the employee. This provision of the IWC Orders is considered by the DLSE to be a narrow exception to those provisions. As an exception, the language of Section 10 of the Orders is read very narrowly.

> findings of the trial court. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Skidmore v. Swift & Co.* 323 U.S. 134 at 136-37 (1944).

The critical question, the Supreme Court has suggested, is "whether time is spent predominantly for the employer's benefit or for the employee's." *Roy v. County of Lexington,* 141 F.3d 533, 544 (4th Cir.1998)

Your next question also involves sleep time and, again, raises the issue of reporting time pay:

> "Can the employer have employees reside on-site and work three 24-hour shifts per week during which the employee will not be compensated for sleep time unless the employee is unable to enjoy the legally required amount of sleep per night to qualify for non-payment of wages. If such employee resides on premises during the balance of the week while they are not working, if they are called into service on an emergency basis, can they be paid only for hours actually worked, or is there a requirement that they be paid some additional sum?"

As stated above, if the employee in the healthcare industry under Order 5 is assigned a shift of 24 hours or more but is allowed a regularly-scheduled eight hours of uninterrupted sleep (See discussion regarding this phrase at 29 C.F.R. § 785.22) that sleep time may be deducted despite the fact that the employee is required to remain on the employer's premises. Any additional time the employee may work during the remainder of the week would be subject to the usual regulations in the IWC Orders. Thus, if the employee is called to work at a time when the employee is not scheduled to work, he or she would be entitled to reporting time pay.

You may also wish to review the provisions of 29 C.F.R. § 785.23 which would be applicable because of the unique definition of "hours worked" in connection with employees in the healthcare industry. That federal regulation provides that where the employee resides on his employer's premises on a permanent basis or for extended periods of time (at least five days per week, see *Bouchard v. Regional Governing Board, et al.* (8th Cir.1991) 939 F.2d 1323, 1329) the employer and employee may enter into a reasonable agreement regarding time worked. *Caveat*, the requirement that the agreement be reasonable – that is that the number of hours the employee actually works is accurately reflected – must be present.

Any additional hours (such as what you refer to in your letter) would have to be in addition to the agreed hours.

Additionally, Order 5-2003, Section 3(D) provides that in the operation of a hospital 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, the employer and employee may enter into an agreement or understanding, before the performance of the work, which provides a work period of fourteen (14) consecutive days in lieu of the workweek of seven consecutive days for the purposes of overtime computation and the employee receives compensation of time and one-half (1½) times the employee's regular rate of pay for all hours in excess of eighty (80) hours in the 14-day period or more than eight hours in any one workday. (The double time provisions would also be applicable.)

You may wish to review the issues discussed in this letter by referring to the DLSE Enforcement and Interpretations Manual which may be accessed online at:

http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf

We hope this adequately addresses the many questions you raised in your letter. We are sorry we cannot review the "rental agreement" which you did not attach. We can only caution that you carefully review the provisions of Section 10 of Order 5-2003 as explained in this letter.

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, Chief Counsel
Assistant Labor Commissioners
Regional Managers

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