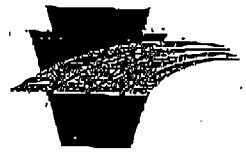




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DEPARTMENT OF
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COMMONWEALTH OF PENNSYLVANIA

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FACSIMILE TRANSMITTAL COVER SHEET

To: Bruce Ludwig, Esq. Fax: (215) 546-0942 Phone:		From: K. Mc Dermott Direct-Dial Phone No.: (717) 787-4186	
Subj.: Opinion on Home Health Aides		Date: 11/16/06 Time: 9:15	Total No. of Pages (including cover):
<input type="checkbox"/> urgent/please call upon receipt <input type="checkbox"/> via fax only <input type="checkbox"/> via fax and mail <input type="checkbox"/> enclosures via mail <input type="checkbox"/> please call to discuss <input type="checkbox"/> originals to follow via overnight mail		<input type="checkbox"/> as discussed <input type="checkbox"/> response requested <input type="checkbox"/> FYI and file/no response expected <input type="checkbox"/> per request <input type="checkbox"/> necessary action <input type="checkbox"/> for your review/ approval/ comment	
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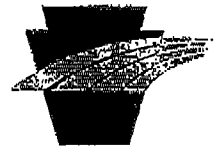
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DEPARTMENT OF
LABOR & INDUSTRY
COMMONWEALTH OF PENNSYLVANIA

Re: Pennsylvania's Minimum Wage Act
Minimum Wage/Overtime for Domestic Workers

Dear Mr. :

This is in response to your letter to Bureau of Labor Law Compliance ("Bureau") Investigator , concerning the Bureau's investigation of your client's, Inc. (" ") and its compliance with Pennsylvania's Minimum Wage Act of 1968 ("MWA"). Specifically, you suggested that overtime is not required for employees of classified as Home Based Companions ("HBCs") based upon the domestic services exemption under the MWA, 43 P.S. §§ 333.101 – 333.115 and its regulations or a joint employment arrangement with individuals under the care of HBCs employed by . You recommended that the Bureau adopt the exemptions and definitions under the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 – 209. For the following reasons, the Pennsylvania MWA does not exempt "companionship" services, as described in your letter, from the mandates of payment of minimum wages and overtime.

The FLSA interpretations and guidelines may be utilized to construe the MWA when Pennsylvania's MWA contains similar language to the FLSA. However, the MWA and the FLSA contain different language concerning domestic services. Section 5(a)(2) provides for an exemption from minimum wage and overtime for "domestic services in or about *the private home of the employer*". 43 P.S. § 333.105(a)(2). This provision was in the MWA's original 1968 enactment and has not been modified. The regulations to the MWA define "domestic services" as:

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Work in or about a private dwelling for an employer *in his capacity as a householder*, as distinguished from work in or about a private dwelling for such employer in the employer's pursuit of a trade, occupation, profession, enterprise or vocation.

34 Pa. Code § 231.1(b) (emphasis added). The MWA and the regulations require that the person providing the services has to be an employee of the householder in order to be classified as being in "domestic services." This is not the case for the HBCs of

The FLSA did not extend coverage to domestic service workers until 1974. Section 13(b)(21) of the FLSA provides for an exemption from overtime for "any employee who is employed in domestic service in a household and who resides in such household". This provision is different from the MWA, which does not require that the employee reside in the household to maintain the exemption.

Section 13(a)(15) of the FLSA provides for overtime and minimum wage exemption for "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...." Because Pennsylvania has not amended the MWA to provide for this exemption, Federal guidance in interpreting that exemption is not relevant in interpreting Pennsylvania law. In addition, Section 18 of the FLSA provides that federal law does not preempt higher state labor standards. 29 U.S.C. § 218(a). Therefore, FLSA coverage of domestic services does not divest the Commonwealth of overtime coverage over companion services, to the extent that this type of employment is exempt from overtime under federal law. Instead, coverage must be decided under Pennsylvania law which does not provide for an exemption in this case.

You indicate that a "joint employment" relationship exists between and the individual or family for whom they are providing services. However, this relationship actually does not exist based on the facts presented in your letters of the working relationship of the HBCs. For there to be a "joint employer" relationship between and the householders, there first needs to be a determination that an employer-employee relationship exists at all.

The case you cited does not adequately address this situation., *Sweet v. Pa. Labor Relations Bd.*, 457 Pa. 456, 322 A.2d 362 (1974). The Pennsylvania Supreme Court held that the judges of the Court of Common Pleas of Washington County, not a labor union, were "at least an employer of some of the employes" employed by the court in Washington County for the purpose of collective bargaining. *Id.* at 462, 322 A.2d at 365.

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This case was decided in the context of labor relations. The present situation is dissimilar from *Sweet* because it involves private employees, not public employees, and concerns the MWA, not the Pennsylvania Relations Act or the Labor Anti-Injunction Act.

The MWA defines an *employer* to include "any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employe." 43 P.S. § 333.103. An *employe* is defined in the MWA as including "any individual employed by an employer." 43 P.S. § 333.103.

Under the "economic reality" test for determining whether wage-and-hour laws apply, the relevant considerations are: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss depending upon managerial skill; (3) the worker's investment in equipment or material required for the tasks or the employment of helpers; (4) whether the service rendered requires special skill; (5) the degree of permanence of the working relationship; and, (6) the extent to which the work is an integral part of the employer's business. *Dep't of Labor & Industry v. Stuber*, 822 A.2d 870 (Pa. Cmwlth. 2003), *affirmed*, 580 Pa. 66, 859 A.2d 1253(2004).

Based on these factors, there is no employee-employer relationship between the HBCs and the individual or family for whom they provide services. The individual or family is a client of the agency. The client may have discretion in choosing HBCs. However, _____ and not the client hire the HBCs. _____ is also the one who ultimately fires a HBC. The client may release a HBC from duties in their home. However, this is not dispositive of the HBC's termination at _____. A HBC could be assigned to another client through _____.

_____ also pays the HBCs's wages. The clients may exercise a small degree of control, such as providing the materials for the HBCs to use or directing the performance of services. However, _____ controls the important aspects of the employment relationship. Additionally, the HBCs are not jointly employed by the agency and the individual or family. Accordingly, these employees would not be exempt from overtime under the MWA's regulations since the employees are not employed by the householder. 34 Pa. Code § 231.1(b).

I hope this information is helpful.

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FOR THE BUREAU OF LABOR
LAW COMPLIANCE

Kathryn J. McDermott
Assistant Counsel

KJM/