



FLSA2019-1

March 14, 2019

Dear **Name\***:

This letter responds to your request for an opinion concerning: (1) whether the Fair Labor Standards Act (FLSA) guarantees minimum wage and overtime pay to residential janitors despite their exemption from similar state law requirements; (2) whether an employer's noncompliance with the FLSA in reliance on this state law exemption demonstrates "good faith," allowing the employer to avoid liquidated damages or the FLSA's three-year back wage liability period; and (3) how an employer may track and record a residential janitor's hours worked. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

## **BACKGROUND**

Your clients are real estate managing entities and landlords in the state of New York. You represent that several of your clients employ a live-in superintendent or "residential janitor" to handle building care and maintenance in certain multi-unit residential buildings. You state that New York law expressly excludes these residential janitors from state minimum wage and overtime requirements. You recognize that the FLSA does not have a similar exemption.

## **GENERAL LEGAL PRINCIPLES**

When a federal, state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with both laws and meet the standard of whichever law gives the employee the greatest protection. *See* 29 U.S.C. § 218(a); 29 C.F.R. § 778.5 ("Compliance with other applicable legislation does not excuse noncompliance with the Fair Labor Standards Act.").

The Portal-to-Portal Act generally establishes a two-year statute of limitations for an FLSA minimum wage, overtime, or liquidated damages claim, and a three-year limitation for an FLSA claim involving a willful violation. *See* 29 U.S.C. § 255(a). A willful violation occurs "where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements" of the FLSA, including situations where "the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry." 29 C.F.R. § 578.3(c). If an employer shows that it acted in "good faith," having had "reasonable grounds for believing that his act or omission was not a violation" of the FLSA, a court may, in its discretion, deny liquidated damages. 29 U.S.C. § 260.

"An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." 29 C.F.R. § 785.23. The employee's "normal private pursuits" on the premises, such as "eating, sleeping,

entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own,” are not hours worked. *Id.*<sup>1</sup> Because it is difficult to determine when the employee is actually working, the parties may establish a “reasonable agreement” that determines which hours on the premises are hours worked. *Id.*<sup>2</sup> This agreement must “take[ ] into consideration all of the pertinent facts.” 29 C.F.R. § 785.23. Once this agreement is in effect, “precise recordkeeping” of the employee’s hours worked is not required. FOH 31b18. The employer’s time records will be sufficient so long as they “generally coincide[ ] with the agreement.” *Id.* If the parties find that the recorded hours significantly deviate from the initial agreement, they should establish a new agreement reflecting the actual facts. *Id.*

## OPINION

Based on the facts you have provided, your clients’ residential janitors are not exempt from the FLSA’s minimum wage and overtime requirements, because the FLSA does not include an exemption for residential janitors or similar employees. *See* 29 U.S.C. §§ 206, 207; *see also* 29 C.F.R. § 541.3 (“[N]on-management employees in maintenance ... such as carpenters, electricians, mechanics, [and] plumbers ... are not exempt ....”). This is true notwithstanding New York state law which expressly exempts your clients’ residential janitors from state minimum wage and overtime requirements. Compliance with state law does not excuse noncompliance with the FLSA. *See* 29 U.S.C. § 218(a); 29 C.F.R. § 778.5.

Moreover, WHD does not believe that relying on a state law exemption from state law minimum wage and overtime requirements is a good faith defense to noncompliance with the FLSA, but a court retains discretion to make that determination on a case-by-case basis. *See* 29 U.S.C. § 260.

Since the residential janitors you describe in your letter reside in multiunit buildings managed or owned by your clients, your clients may reach a reasonable agreement with the janitors to establish which hours they are and are not working. *See* 29 C.F.R. § 785.23. Your client’s time records need not be precise, but they should “generally coincide[ ] with the agreement.” *See* FOH 31b18.

We trust that this letter is responsive to your inquiry.

Sincerely,



Keith E. Sonderling  
Acting Administrator

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<sup>1</sup> Whether an employee is free to use time for personal pursuits will depend on the facts of each case, notwithstanding the provisions of any written agreement. Field Operations Handbook (FOH) 31b18.

<sup>2</sup> A “reasonable agreement” is, of course, a contract between the employer and employee, not a “unilateral decision by the employer.” FOH 31b18. While WHD does not require the employer and employee to reduce this agreement to writing, WHD encourages them to do so in order to avoid any misunderstandings. *Id.*

**\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**