



FLSA2019-3

April 2, 2019

Dear **Name***:

This letter responds to your request for an opinion regarding whether an entity that operates a youth residential care facility may implement an “8 and 80” overtime pay system under section 7(j) of the Fair Labor Standards Act (FLSA). 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 client operates a private “youth residential care facility” that is staffed 24-hours a day. You represent that the county children services bureaus place adolescents in the facility. You further represent that the facility derives its “revenue ... mostly from residential county placement contracts, some Medicaid for psychotherapy counseling and various mental health and substance abuse therapeutic services.” You represent that the facility is not a traditional hospital or skilled nursing facility.

GENERAL LEGAL PRINCIPLES

Employers “engaged in the operation of a hospital [or] an institution primarily engaged in the care of the sick, the aged, or the mentally ill ... who reside on the premises of such institution” are generally subject to the FLSA’s minimum wage and overtime requirements. 29 U.S.C. § 203(s)(1)(B). However, section 7(j) permits such employers to utilize the “8 and 80” overtime system. *See* 29 U.S.C. § 207(j).

Under the “8 and 80” system, a hospital or residential care institution may, pursuant to a prior agreement or understanding with their employees, compute overtime over a consecutive 14-day period. *Id.* If the employer utilizes this method of payment, the employer must pay overtime for all hours worked that are over 8 hours in any workday and over 80 hours in a 14-day period. *Id.*; 29 C.F.R. § 778.601.

WHD’s Field Operations Handbook (FOH) defines a residential care institution—other than a hospital—as “an institution primarily engaged in (*i.e.*, more than 50 percent of the income is attributable to) providing domiciliary care to individuals who reside on the premises and who ... have a disability or, if suffering from sickness of any kind, will require only general treatment or observation of a less critical nature than that provided by a hospital.” FOH 12g02. “Such institutions ... include those institutions generally known as nursing homes, rest homes, convalescent homes, homes for the elderly, and the like.” *Id.*

Moreover, “a private institution for the residential care of emotionally disturbed persons [qualifies as a residential care institution] if more than 50 percent of its residents have been admitted by a qualified physician, psychiatrist, or psychologist,” including for “evaluations of mental or emotional disturbance.” FOH 12g12; *see* FOH 25i01. Youth residential care facilities may qualify under this definition. *See* WHD Opinion Letter FLSA-143 (May 20, 1975).

Additionally, a private youth residential care facility qualifies as a residential care institution if it retains a qualified physician, psychiatrist, or psychologist, who regularly engages in therapy with adolescents who reside at the facility, and such adolescents constitute more than 50 percent of the residents at the facility. *See Bowrin v. Catholic Guardian Society*, 417 F. Supp. 2d 449, 462–64 (S.D.N.Y. 2006); WHD Opinion Letter FLSA2005-8NA, 2005 WL 5419044, at *3 (Sept. 2, 2005).

OPINION

Based on the facts you provided, WHD is unable to determine whether your client qualifies as “an institution primarily engaged in the care of the sick, the aged, or the mentally ill ... who reside on the premises of such institution,” allowing your client to use the “8 and 80” system to compute overtime pay. *See* 29 U.S.C. §§ 203(s)(1)(B), 207(j).

You represent that your client’s revenue is primarily attributable to “*residential county placement contracts*, some Medicaid for psychotherapy counseling and various mental health and substance abuse therapeutic services.” (emphasis added). Some of these services—psychotherapy counseling, mental health services, and substance abuse therapeutic services—constitute “care of the sick ... or the mentally ill.” 29 U.S.C. § 203(s)(1)(b). However, it is unclear whether the residential county placement contracts are placing adolescents in your client’s facility primarily to receive general treatment or observation for a disability or sickness. *See* FOH 12g02. It is also unclear whether more than 50 percent of the adolescents at the facility are admitted by qualified physicians, psychiatrists, or psychologists. *See* FOH 12g12; FOH 25i01. Finally, it is unclear whether your client retains a qualified physician, psychiatrist, or psychologist to provide regular therapy to more than 50 percent of the adolescents who reside at the facility. *See Bowrin*, 417 F. Supp. 2d at 462–64; WHD Opinion Letter FLSA2005-8NA, 2005 WL 5419044, at *3.

If your client satisfies any of these three scenarios, then your client qualifies for the “8 and 80” system. Without more facts, however, WHD cannot determine whether your client is “primarily engaged in the care of the sick, the aged, or the mentally ill,” or primarily engaged in the provision of other forms of charitable services—such as providing food and shelter to healthy adolescents—that would not qualify for the “8 and 80” system.

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Sonderling', with a long horizontal flourish extending to the right.

Keith E. Sonderling
Acting Administrator

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