FLSA-908

September 18, 1975

This is in reply to your letter of November 14, 1974, regarding the application of the Fair Labor Standards Act to employees of your client. We regret that the volume of correspondence received in connection with the 1974 Amendments to the Fair Labor Standards Act did not enable us to respond sooner.

Your client is engaged in the management of apartment complexes and has no ownership interest in the apartments. Resident managers employed by your client are paid a cash weekly salary and the customers of the client owner provide the client's resident managers a rent free apartment. Your client's fee is a percentage of the rentals, consequently the fee is reduced to the extent the resident managers do not pay rent. You ask if the amount of fee lost because the resident managers do not pay rent may be considered as a facility furnished the resident managers and thus be considered part of the employee's wages under the Fair Labor Standards Act.

In answer to your question, the management company would be considered a joint employer of the resident managers along with the apartment owners. Under section 3(d) of the Act an employer is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Section 3(e) defines employee to include "any individual employed by an employer." In view of the expansiveness of the Act's definition of employer and the extent of the management company's managerial responsibilities, which give it substantial control of the terms and conditions of the work of the employees, the management company is an employer of the resident managers (see Falk v. Brennan, 414 U.S. 190). Therefore, the reasonable cost or fair value of the facilities they furnish the resident managers would be considered part of the wages of the employees. Thus, that portion of the fee lost by the management company because the resident managers do not pay rent, excluding therefrom the portion of the fee which represent a profit to the management firm, may be considered a facility within the meaning of section 3(m) of the Act and consequently may be included as part of the wages paid the resident managers. As pointed out in section 531.3(b) of the enclosed 29 CFR Part 531, "reasonable cost" does not include a profit to the employer or to any affiliated person.

You state that your client pays for the utilities used by the resident managers in occupying the rent free quarters. You ask if the cost of the utilities paid by your client must be included in their regular rate of pay. The answer is yes. Section 7(e) of the Act requires inclusion in the "regular rate" of all remuneration for employment paid to, or on behalf of, the employee except payments specifically excluded by paragraphs (1) through (7) of section 7(e).

Your client proposes to enter into a reasonable agreement with its resident managers establishing an hourly wage and agreed upon number of hours to be worked, pursuant to section 785.23 of Interpretative Bulletin, Part 785. The principles stated in this section

pertain to employees who are on an "on-call" basis while living in their homes. Where an employee is on-call at home and has long periods of uninterrupted leisure during which the employee can engage in the normal activities of living, the Department of Labor will accept any reasonable agreement of the parties for determining the number of hours worked during the on-call time. This agreement should take into account some allowance for the restriction on the employee's freedom to engage in personal activities while being on-call.

If you would like further information concerning the application of the Act to your client's operations, you may wish to contact the Wage-Hour Division office at 486 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103, telephone: 901-5343418. The people there will be pleased to assist you in any way they can.

Sincerely,

Warren Landis
Acting Administrator
Wage and Hour Division

Enclosure