No. APL-2018-00038

To be argued by:
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15 minutes requested

State of New York
Court of Appeals

LILYA ANDRYEYEVA and MARINA ODRUS, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

v.

NEW YORK HEALTH CARE, INC., d/b/a/ NEW YORK HOME ATTENDANT AGENCY, and MURRAY ENGLARD,

Defendants-Appellants.

BRIEF FOR AMICUS CURIAE
NEW YORK STATE DEPARTMENT OF LABOR

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PRELIMINARY STATEMENT

For over fifty years, the New York State Department of Labor (DOL) has issued consistent guidance advising that employees who work shifts of twenty-four hours or more need not be paid for sleep or meal times during those shifts, so long as (among other requirements) the employee enjoys substantially uninterrupted sleep, is completely relieved of duty during meal breaks, and is compensated for any interruptions of these breaks. For nearly forty years, DOL has applied this guidance specifically to home health aides who stay on the premises of the client in their care for twenty-four hours or more at a time.

In these proceedings, the Appellate Division, Second Department rejected DOL's guidance as an irrational interpretation of the agency's own regulations and held that home health aides must "be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals." *Andryeyeva v. New York Health Care, Inc.*, 153 A.D.3d 1216, 1219 (2d Dep't 2017); *see also Moreno v. Future Care Health Servs., Inc.*, 153 A.D.3d 1254, 1255-56 (2d Dep't 2017). On the basis

of that holding, the Appellate Division certified plaintiff classes consisting of home health aides pursuing minimum wage and overtime claims for all twenty-four hours of their shifts.

Because the Appellate Division's decisions squarely address the validity of DOL's policies regarding compensable time for home health aides, DOL has a compelling interest in this proceeding. For the reasons given below, this Court should vacate the Appellate Division's rejection of DOL's policy but remand for a determination of whether there are alternative bases for class certification here.

The Appellate Division's decisions improperly disregarded DOL's long-established and consistent guidance governing compensation for employees who work shifts of twenty-four hours or more, including home health aides. Moreover, in displacing those rules and requiring such employees to be paid for all twenty-four hours of their shifts, the decisions below severely disrupted reasonable and settled expectations: both employers of home health aides and the State's Medicaid program, which covers the majority of spending on home health care services in New York, have long relied on DOL's sleep- and meal-time policy.

Rather than reversing the Appellate Division's orders altogether, however, this Court should remand for a determination of whether there are alternative bases for class certification here. Defendants incorrectly presume that, under DOL's policy, class actions are categorically inappropriate. To the contrary, there remain multiple alternative ways in which home health aides could seek class relief for being denied either uninterrupted sleep and meal breaks or appropriate compensation for interruptions of those breaks. Because the lower courts did not address these alternative grounds for class certification, this Court should remand for further consideration of these grounds in the first instance.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. New York's Minimum Wage Act and DOL's Wage Order

As originally enacted in 1937, the Minimum Wage Act did not itself establish a minimum wage. Instead, it authorized the Commissioner of Labor—then called the Industrial Commissioner—to set minimum wages by issuing "wage orders." *See* Ch. 276, §§ 555-557, 1937 N.Y. Laws 779, 781-83. Under that authority, the Commissioner issued wage orders for occupations in ten industries. *See* N.Y.C.R.R. Official Compilation, Thirteenth Official Supp. (1961) (wage orders in effect prior to 1959).

In 1960, the Legislature significantly revised the Minimum Wage Act to establish a statewide hourly minimum wage for "every occupation." *See* Ch. 619, § 2, 1960 N.Y. Laws 1858, 1860. The revised law provided that every employer must pay employees in every covered occupation a minimum wage of "one dollar an hour." *Id.* This provision was amended to its current form in 1978 to require payment of a minimum wage for "each hour worked." Ch. 747, § 1, 1978 N.Y. Laws 1, 1.

The Act retained the Commissioner's broad authority to set wage standards for specific occupations through wage orders. *See* Ch. 619, § 2, 1960 N.Y. Laws at 1860 Pursuant to that authority, the Commissioner in 1960 adopted the Minimum Wage Order No. 11 for Miscellaneous Industries and Occupations ("Wage Order"), which is codified at 12 N.Y.C.R.R. part 142.[1] Among other things, the Wage Order requires that an employee be paid the minimum wage for "the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer." 12 N.Y.C.R.R. § 142-2.1(b).

The Wage Order does not further clarify what it means for an employee to be "permitted to work" or "required to be available for work" in each of the diverse jobs and industries covered by the Wage Order, with one exception: the Wage Order defines hours of compensable work for a "residential employee," i.e., "one who lives on the premises of the employer." *Id.* § 142-2.1(b). For such an

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[1] This Wage Order is the applicable one for home health aides. Other, narrower wage orders cover particular industries, such as the hospitality industry, *see* 12 N.Y.C.R.R. pt. 146; or the building service industry, *see id.* pt. 141.

employee, the Wage Order provides that the employee is not deemed "permitted to work" or "required to be available for work" "during his or her normal sleeping hours solely because he is required to be on call during such hours," or "at any other time when he or she is free to leave the place of employment." *Id.*

2. DOL's treatment of workers with shifts of twenty-four hours or more

While the Wage Order includes a special sleep-time provision only for residential employees, DOL has long applied a similar policy to other employees, across diverse jobs and industries, who work shifts of twenty-four hours or more based on DOL's determination of when such employees are "required to be available for work." Because DOL derived this policy from parallel federal regulations, we discuss the federal regime first.

a. Federal treatment of sleep and meal times for workers with twenty-four-hour shifts

Like New York law, the federal Fair Labor Standards Act (FLSA) requires that employers pay a minimum wage for each hour of work but provides no specific test to determine when an employee

is working. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). To fill this gap, the federal Department of Labor has issued "interpretative bulletin[s]" and "informal rulings," rather than formally promulgated regulations, to "provide a practical guide to employers and employees as to how the office representing the public interest in enforcement will seek to apply it." *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944); *see* 29 C.F.R. § 785.2 (explaining the informal nature of the federal agency's published regulations).

At the time that DOL adopted the initial Wage Order in 1960, federal guidance provided that an employee was considered working during any time that was "given by the employee to the employer." Wage & Hour Div., U.S. Dep't of Labor, *Interpretative Bulletin No. 13: Hours Worked – Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938* ¶ 4 (July 1939) ("*Interpretative Bulletin No. 13*"). For sleep and meal times, this standard applied differently between (a) workers with shifts of fewer than twenty-four hours and (b) those with shifts of twenty-four hours or more.

For workers with shorter shifts, an employee was required to be compensated for idle time during her work shift, even time spent sleeping or eating, on the theory that "the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer." 29 C.F.R. § 785.15; *see also id.* § 785.21; 20 Fed. Reg. 9,963, 9,965 (Dec. 24, 1955). By contrast, different rules applied to employees who worked shifts of twenty-four hours or more, in recognition of the fact that such shifts would "involve[] long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, [or] to carry on a normal routine." *Interpretative Bulletin No. 13* ¶ 6.

Specifically, federal guidance provided that, when such an employee could sleep without interruption, the employee would not be considered working during those periods, and employers could exclude up to eight hours of sleep time from compensable work time. *See id.*; *see also* 20 Fed. Reg. at 9,965; 29 C.F.R. § 785.22. But sleep time could be excluded only if certain detailed conditions were met: (1) the employer and employee must agree to exclude sleep time, either expressly or implicitly; (2) adequate facilities for sleep

must be provided; (3) any interruptions must be counted as work; and (4) the employee must be able to enjoy a substantially uninterrupted night of sleep, with the entire period counted as work if the employee cannot get at least five hours of sleep in total.[2] *See* 20 Fed. Reg. at 9,965; 29 C.F.R. § 785.22.

Federal law also permitted the exclusion of "[b]ona fide meal periods" from work-time if the employee was "completely relieved from duty for the purposes of eating regular meals." 20 Fed. Reg. at 9,965; 29 C.F.R. § 785.19.

b. DOL's incorporation of federal standards

Like the federal Department of Labor, New York's DOL has also issued guidance on the treatment of sleep and meal times for workers with shifts of twenty-four hours or more. In doing so, DOL expressly incorporated existing federal guidelines on compensable time for such employees, consistent with its general approach of

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[2] Federal guidance further provided that an employee would be considered to experience substantially uninterrupted sleep if he or she was able to enjoy "5 consecutive, uninterrupted hours of sleep" more than half of the time. Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* ¶ 31b12(c)(2) (2016).

drawing on federal constructions of the FLSA when interpreting comparable language in the Wage Order and the Labor Law. DOL, *Report of the Industrial Commissioner Upon the Promulgation of Minimum Wage Order No. 11 for Miscellaneous Industries and Occupations* 3 (Sept. 29, 1960) ("*Wage Order Rep.*").

Thus, in a 1969 memorandum to enforcement staff, DOL explained that it would apply "the same criteria as the Federal government" to calculate sleep-time exclusions for employees of an ambulance service who were assigned to work twenty-four-hour shifts. DOL, Mem. from George Ostrow to Daniel A. Daly (Oct. 27, 1969) (Ostrow Mem.). DOL's enforcement memorandum referenced the same criteria for excluding sleep time that federal regulations provided: sleep time could be excluded only if (1) the employer and employee expressly or implicitly agree to exclude sleep and meal times; (2) adequate sleeping facilities are provided; (3) any interruptions to sleep by a call to duty are counted as compensable work time; and (4) the employee must usually enjoy undisturbed sleep, including at least five hours of sleep total. *See id.*

In 1972, DOL reiterated these guidelines to enforcement staff through its *Investigator's Manual of Interpretations*, a publicly accessible document that DOL's staff used to guide their enforcement of the Wage Order. Div. of Labor Standards, DOL, *Investigator's Manual of Interpretations* (rev. 1972) ("*Investigator's Manual*"). As relevant here, the *Investigator's Manual* recognized that employees "required to be on duty for a continuous period of 24 hours or more" will as a practical matter sleep and eat "on the employer's premises while on call." *Id.* at 9. The *Investigator's Manual* enumerated essentially the same criteria for excluding sleep time that existed under federal regulations, adding only the further requirement that the excludable sleep time be confined to a specified eight-hour period during the twenty-four-hour shift.[3] *See id.* The Manual also specified that "up to a maximum of three

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[3] In explaining what it meant for an employee to enjoy "an uninterrupted night's sleep," the *Investigator's Manual* advised that an employee should receive at least three hours of uninterrupted sleep. *Investigator's Manual* at 9. DOL later advised employers that at least five hours of uninterrupted sleep were required for sleep time to be excluded. *See* Letter from James J. McGowan (Oct. 27, 1998).

hours" of "bona fide meal periods" could also be excluded from working time.[4] *Id.*

3. DOL's application of its twenty-four-hour-shift policy to home health aides

In 1971, the Minimum Wage Act was amended to encompass domestic service workers who do not live in the employer's home, including home health aides. *See* Ch. 1165, § 2, 1971 N.Y. Laws 3062, 3063 (eff. Jan. 15, 1972). DOL accordingly acknowledged that the Wage Order applied to such workers. DOL, Mem. of George Ostrow, *Minimum Wage for Domestic Workers Effective January 15, 1972*, at 2 (1971).

Among other policies, DOL expressly applied its sleep- and meal-time policies to home health aides who work shifts of twenty-four hours or more in the homes of their patients. A March 1980 memorandum specifically directed that the guidelines from the

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[4] In the years since DOL provided this guidance to enforcement staff, it has applied its sleep- and meal-time policy to various industries subject to the Wage Order. *See* Letter from Joseph C. Armer to Richard Koskey (Aug. 14, 1979) (nursing home employees); Letter from Joseph C. Armer to Charles Tobin (Jan. 7, 1980) (employees working in a "children's home").

Investigator's Manual on counting compensable time during twenty-four-hour shifts, see *supra* at 11, be extended to "home health attendants working for a profitmaking institution." DOL, Mem. of Stanley J. Serocki, *Determining Working Hours Home Health Attendants* (Mar. 19, 1980).

In the decades since, DOL has repeatedly and consistently conveyed to relevant stakeholders and to the general public that home health aides who work shifts of twenty-four hours or more do not have to be paid for sleep and meal times so long as certain criteria are satisfied. For example, in extended remarks made in 1983 and 1984 to members of the home health care industry, DOL's Director of Labor Standards explained that employers could exclude sleep and meal times for home health aides under the criteria originally outlined to enforcement staff and contained in DOL's 1972 *Investigator's Manual* (which in turn were derived from federal regulations). DOL, Remarks of Joseph Armer to the New York State Association of Health Care Providers at 5 (Jan. 18, 1983); DOL, Remarks of Joseph Armer to the Home Health Care Industry Panel at 5-6 (Feb. 23, 1984).

In 1984, DOL applied its sleep- and meal-time policy in a series of closely watched enforcement actions against home health care companies. In those cases, DOL issued notices of violation based on the companies' failure to pay for at least thirteen hours of work for home health aides who worked shifts of twenty-four hours or more. *See* Mem. of Joseph C. Armer at 2 (Feb. 1, 1984); Mem. of Richard J. Polsinello at 1-2 (Oct. 5, 1989). The Industrial Board of Appeals (IBA) held that the home health care companies were the aides' employers and thus subject to the Wage Order's requirements, and the Third Department affirmed that conclusion. *See Matter of Settlement Home Care v. Industrial Bd. of Appeals of Dept. of Labor of State of N.Y.*, 151 A.D.2d 580, 581 (2d Dep't 1989). On remand from the Third Department, a union representing home health aides asserted that the aides were entitled to compensation for all twenty-four hours of their shifts, but the IBA did not disturb DOL's determination that sleep and meal times could be excluded from compensable work-time if DOL's long-established criteria were satisfied. *See* Resolution of Decision at 4-5, *Matter of*

Settlement Home Care, Inc. v. Commissioner of Labor, IBA Docket Nos. PR-32-83, PR-33-83, PR-71-83, PR-72-83 (IBA May 28, 1997).

DOL has since issued a series of opinion letters—including letters issued in 1988, 1995, 1998, 2002, 2009 and 2010—reiterating the same criteria for when sleep and meal times may be excluded from compensable work time for home health aides. For example, an opinion letter issued by the Commissioner in 1998 explained that under DOL's policy "'live-in' home health aides[] (including those workers employed on-site for 24-hour shifts)" must be paid for a minimum of thirteen hours of their twenty-four hour shifts, "provided they are afforded eight hours for sleep and actually receive five hours of uninterrupted sleep and that they are afforded three hours for meals." McGowan Letter; *see* Letter from Randolph Fauske (Aug. 25, 1988); Letter from Robert Ambaras at 3-4 (July 14, 1995); Letter from Robert Ambaras (June 25, 2002); Letter from Jeffrey G. Shapiro (Aug. 31, 2009).

The most recent expression of DOL's long-standing policy prior to the initiation of the underlying litigation was a March 11, 2010, opinion letter specifically on compensable time for home

health aides. Letter from Jeffrey G. Shapiro at 3 (Mar. 11, 2010). This opinion letter noted that the Wage Order discussed only "residential employees," but that DOL had long applied a broader policy regarding sleep and meal times to "all live-in employees." *Id.* at 4. The opinion letter then summarized the same policy that DOL has consistently stated and enforced for decades, advising that live-in home health aides "must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals." *Id.*

B. The *Andryeyeva* and *Moreno* Litigations

Andryeyeva and *Moreno* are putative class actions by home health aides against the agencies that employ them. In each action, plaintiffs allege (among other claims) that they were improperly paid for only thirteen hours of their twenty-four-hour shifts, even though they regularly worked all or substantially all of their shifts and rarely received eight hours of sleep, five hours of uninterrupted sleep, or undisturbed periods for meals, as DOL's long-standing

policy requires before sleep and meal times may be excluded. *Andryeyeva* Pls.' Br. 1-2, 5, 7, 9; *Moreno* Pls.' Br. 40-43.[5] Plaintiffs thus claim that they were entitled to be paid for all twenty-four hours of their shifts, including uninterrupted time spent sleeping or eating. *Andryeyeva* Pls.' Br. 15-17; *Moreno* Pls.' Br. 10-15.

Plaintiffs moved to certify a class in each case. Defendants opposed certification, arguing that under DOL's policy employees had to be paid during sleep or meal times only when they were actually interrupted and required to perform work, and that the question of whether and when such interruptions took place turned on employee- and shift-specific questions that made class certification inappropriate. *Andryeyeva* Defs.' Br. 21-23, 59-60; *Moreno* Defs.' Br. 13-15, 19-20. Supreme Court, Kings County granted certification in *Andryeyeva* (Demarest, J.), and denied it in *Moreno* (Schmidt, J.; Knipel, J., on reargument).

On separate appeals, the Second Department affirmed the grant of class certification in *Andryeyeva* and reversed the denial of

[5] The parties' briefs in these appeals are cited, for instance, as "*Moreno* Defs.' Br.," "*Moreno* Pls.' Br.," and "*Moreno* Defs.' Reply."

class certification in *Moreno*. In both cases, the Second Department focused exclusively on the March 2010 opinion letter as the articulation of DOL's sleep- and meal-time policy for home health aides, without mentioning the policy's long history. The court held that the March 2010 letter was not a rational interpretation of the Wage Order's requirement of compensation for all time that an employee is "required to be available for work." *See Andryeyeva v. New York Health Care, Inc.*, 153 A.D.3d 1216, 1218-19 (2d Dep't 2017). In the court's view, "[t]o interpret [DOL's] regulation to mean that the plaintiffs were not, during those [sleep and meal breaks], 'required to be available for work' simply because it turned out that they were not called upon to perform services is contrary to the plain meaning of 'available.'" *Id.*[6]

[6] In so holding, the Appellate Division departed from several federal district court rulings, which have uniformly upheld DOL's interpretation and rejected home health aides' argument that they were entitled to pay for all twenty-four hours of their shifts. *See Shillingford v. Astra Home Care, Inc.*, 293 F. Supp. 3d 401, 416-17 (S.D.N.Y. 2018); *Carrasco v. Life Care Servs., Inc.*, No. 17-cv-5617, 2017 WL 6403521, at *7 (S.D.N.Y. Dec. 15, 2017); *Bonn-Wittingham v. Project OHR, Inc.*, No. 16-cv-541, 2017 WL 2178426, at *2 (E.D.N.Y. May 17, 2017); *Severin v. Project O.H.R., Inc.*, No. 10-cv-9696, 2012 WL 2357410, at *8 (S.D.N.Y. June 20, 2012).

Because the court declined to accept DOL's sleep- and meal-time policy for home health aides, it concluded that aides who work shifts of twenty-four hours or more are "entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals." *Id.*; *see also Moreno v. Future Care Health Servs., Inc.*, 153 A.D.3d 1254, 1255-56 (2d Dep't 2017) (same). Based on that holding, the court further concluded that class certification was warranted. *See Moreno*, 153 A.D.3d at 1256; *Andryeyeva*, 153 A.D.3d at 1219.

The Second Department granted leave to appeal to this Court in each case. *See Andryeyeva v. New York Health Care, Inc.*, 2018 N.Y. Slip Op. 66203(U) (2d Dep't 2018); *Moreno v. Future Care Health Servs., Inc.*, 2018 N.Y. Slip Op. 66214(U) (2d Dep't 2018).

C. DOL's Proposed Amendments to the Wage Order

Fewer than three weeks after the Second Department issued its decisions, DOL filed a notice of emergency rulemaking to amend the Wage Order "to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home." 43 N.Y. Reg. 5, 5 (Oct. 25, 2017) (filed

Oct. 6, 2017). DOL issued the emergency regulation specifically in response to the Second Department's rulings. *Id.* The emergency regulations "codif[ied] [DOL's] longstanding and consistent interpretations that . . . meal periods and sleep times do not constitute hours worked" under the Wage Order. *Id.*[7]

In an accompanying regulatory impact statement, DOL outlined in detail the long history of its consistent policy regarding sleep and meal times for employees who work shifts of twenty-four hours or more, and its express application of the policy to home health aides after the Legislature amended the Minimum Wage Law to extend to such workers. *See id.* at 6.

DOL then issued a notice of final rulemaking to make the emergency regulation permanent and to "narrowly codify [DOL's] longstanding and consistent interpretation" that, under defined

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[7] On September 25, 2018, Supreme Court, New York County ruled that DOL's emergency regulations were invalid because "the record does not support the finding of an emergency justifying the use of [the State Administrative Procedures Act's] administrative procedures for emergency rulemaking." *Matter of Chinese Staff & Workers Assn. v. Reardon*, 2018 N.Y. Slip Op. 32391(U), at *8 (Sup. Ct. N.Y. County 2018). The court did not address the substance of the emergency regulation.

circumstances, compensable work-time may exclude sleep and meal times. 17 N.Y. Reg. 41, 45 (Apr. 5, 2018). Once the proposed rule is finalized, the Wage Order will state that its provisions "shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the [FLSA], in accordance with sections 785.19 and 785.22 of 29 C.F.R. for an employee who works a shift of 24 hours or more." *See id.* at 44 (proposing amended 12 N.Y.C.R.R. § 142-2.1(b)).

ARGUMENT

POINT I

THE APPELLATE DIVISION ERRONEOUSLY REJECTED DOL'S LONG-STANDING POLICY REGARDING SLEEP AND MEAL TIMES FOR HOME HEALTH AIDES

A. The Appellate Division Failed to Give DOL's Policy Appropriate Deference in Light of Its Long History and Consistency.

In these proceedings, the Appellate Division erroneously believed that DOL's policy regarding sleep and meal times for home health aides was contained entirely in a March 2010 opinion letter. To the contrary, as described above, DOL has long interpreted the Wage Order to allow sleep and meal times to be excluded under

certain circumstances for employees who work shifts of twenty-four hours or more, consciously borrowing from parallel federal regulations governing such employees. DOL has consistently applied that policy to home health aides, under a set of detailed criteria for when employers may permissibly exclude sleep and meal times. And DOL has now proposed to formally amend the Wage Order to codify its long-standing policy. See *supra* at 20-21.

The Appellate Division's failure to credit this history led it to give insufficient weight to DOL's guidance. Courts regularly defer to DOL's construction of the statutes and regulations it administers, *Matter of Chesterfield Assoc. v. New York State Dept. of Labor*, 4 N.Y.3d 597, 604 (2005), in recognition of the agency's "specialized knowledge and understanding of underlying operational practices," *International Union of Painters & Allied Trades, Dist. Council No. 4 v. New York State Dept. of Labor*, 32 N.Y.3d 198, 208-09 (2018) (quotation marks omitted). That deference is "especially" strong when the agency has adhered to its view for "a long period of time," *Ferraiolo v. O'Dwyer*, 302 N.Y. 371, 376 (1951), and applied that view consistently throughout that

time, *see Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). The consistency and vintage of DOL's policy to exclude sleep and meal times for home health aides under defined circumstances thus weigh heavily in favor of deference here.

Moreover, DOL's policy warrants deference even though it was expressed in opinion letters and other guidance rather than in formally promulgated regulations. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (deference "does not necessarily require an agency's exercise of express notice-and-comment rulemaking power"). Like the federal Department of Labor, *see* 29 C.F.R. § 785.2, DOL routinely issues guidance documents or other informal rulings conveying its views about the meanings of statutory or regulatory terms. *See, e.g.*, *International Union of Painters*, 32 N.Y.3d at 203-04, 209 (interpretation conveyed on DOL website); *Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460, 472 (2013) (interpretation conveyed in "a patchwork of opinion letters and a set of written guidelines dating back to 1972"). Such informal guidance is particularly common in the labor context because "all-in or all-out rules" are often less workable than "flexible solution[s]"

that take into account occupation-specific realities and the practical expectations of employers and employees across a diverse and evolving collection of industries. *Skidmore*, 323 U.S. at 138.[8]

This Court has thus not hesitated to defer to DOL's informal guidance in the past, including the agency's issuance of opinion letters similar to the ones that expressed DOL's sleep- and meal-time policy for home health aides. *See Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79-80 (2008) (deferring to interpretation in DOL opinion letters); *see also LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217, 222-23 (2009) (deferring to interpretation provided in opinion letter by Superintendent of Insurance). Such informal communications of DOL's views about the Labor Law or its implementing regulations merit deference because they reflect "how the office representing the public interest

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[8] Plaintiffs are thus wrong to assert that DOL was required to promulgate its policy as a formal regulation. *See Moreno* Pls.' Br. 22. New York law affords agencies flexibility "to evolve standards . . . on a case-by-case basis" without formally promulgating every step of this evolving process. *Matter of Roman Catholic Diocese of Albany v. New York State Dept. of Health*, 109 A.D.2d 140, 148 (3d Dep't) (Levine, J., dissenting in part), *rev'd*, 66 N.Y.2d 948 (1985) (adopting Judge Levine's dissent).

in [the law's] enforcement will seek to apply it" and thus "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 138, 140.

In any event, whatever doubts there may be about the nature or history of DOL's sleep- and meal-time policy will be resolved by proposed amendments to the Wage Order that are currently pending and that would formally codify DOL's policy. See *supra* at 20-21. Contrary to plaintiffs' suggestion (*e.g.*, *Andryeyeva* Pls.' Br. 30-34), there will be no barrier to applying those amendments to these proceedings because they merely codify preexisting policy, rather than attempting to retroactively apply a new rule. *See, e.g.*, *Brothers v. Florence*, 95 N.Y.2d 290, 299 (2000) (no retroactivity concerns when statutory amendment merely "clarify[ied] what the law was always meant to say and do" (quotation marks and emphasis omitted)). This Court reached a similar conclusion in *Barenboim*. There, during the pendency of a litigation over tip-splitting, DOL amended the applicable wage order to "clarif[y] and unif[y] the DOL's tip-splitting policies previously found in a

patchwork of opinion letters and a set of written guidelines dating back to 1972." 21 N.Y.3d at 471. This Court applied the amended wage order and "discern[ed] no retroactivity problem" in doing so because it did not "create new rights or duties" but merely "elaborate[d] upon the DOL's preexisting understanding" of the wage order. *Id.* at 472 n.4. The same will be true here under amendments to the Wage Order that codify DOL's long-standing sleep- and meal-time policy for workers with shifts of twenty-four hours or more, including home health aides.

B. DOL's Policy Is a Reasonable Interpretation of the Wage Order.

DOL's long-standing policy is a reasonable interpretation of the Wage Order's provision that workers be paid for the hours that they are "required to be available for work at a place prescribed by the employer." 12 N.Y.C.R.R. § 142-3.1(b). As the Commissioner observed in adopting the Wage Order, "[i]t is particularly difficult to compute the hours of work" in occupations where employees "are on call around the clock." *Wage Order Rep.* at 4. For several reasons,

DOL reasonably resolved this difficult problem here in allowing sleep and meal times to be excluded under defined circumstances.

For one, it was rational for DOL to conform state law to federal law in determining how to calculate hours of compensable work in the particular context of twenty-four-hour-shift employees. As explained above, the federal Department of Labor attempted to resolve the precise problem that DOL sought to address—namely, how to determine the compensability of sleep and meal breaks taken by employees working very long shifts—and adopted criteria for determining when and how to exclude those times from employees' working hours. See *supra* at 6-9. Given the similarity of the enterprise, it was rational for DOL to take guidance from the federal Department of Labor's solution to the problem, particularly when doing so would also "minimize New York employers' administrative burden in complying with two regimes." *Severin*, 2012 WL 2357410, at *9 n.6.

DOL's policy is also consistent with the plain text of the Wage Order. While an employee working a twenty-four hour shift may be "required to be . . . at a place prescribed by the employer" during

the entire shift, that fact alone does not render every hour of the shift compensable because the Wage Order further requires that the employee be "available for work" to be compensated. 12 N.Y.C.R.R. § 142-3.1(b); *see Severin*, 2012 WL 2357410, at *8 ("The phrase as a whole goes beyond simple physical location to imply as well a present ability to work."); *Shillingford*, 293 F. Supp. 3d at 416 (reading language "to mean, simply, present at the place of employment . . . would render the word 'available' surplusage"). DOL has reasonably concluded that an employee who enjoys genuine sleep and meal breaks consistent with the strict requirements of DOL's policy—i.e., regularly scheduled, substantially uninterrupted, work-free times to eat and sleep—is not meaningfully "available for work" during those breaks, precisely because DOL's criteria are intended to identify breaks that are predictably and largely free from work interruptions.

Another route to the same result is to consider whether such an employee's sleep and meal breaks are time "spent predominantly for the employer's benefit" or instead for the employee's—a traditional test for determining when an employee's time is

compensable. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). For workers with shorter shifts, idle time is generally considered compensable because such breaks "are unpredictable" and "usually of short duration"; as a result, "the employee is unable to use the time effectively for his own purposes." 29 C.F.R. § 785.15. By contrast, DOL's criteria for excludable sleep and meal times requires such breaks to be scheduled, substantial, and largely uninterrupted by work. DOL reasonably concluded that during such breaks an employee can effectively pursue purely private interests, and that such breaks thus principally benefit the employee rather than the employer.

To be sure, even during their sleep and meal breaks, employees working twenty-four hour shifts are not truly free from their employment—for example, they are generally not free to leave their employers' premises, and are expected to respond if called back to work. But DOL reasonably sought to protect such employees' ability to engage in a significant degree of personal activity during their breaks by imposing strict rules that employers must comply with if they wish to exclude such breaks from

compensable time. If an employer violates those rules—for example, by significantly disrupting an employee's sleep time, or by interrupting mealtimes at all—then the employee must be compensated for the *entirety* of her break, even idle time spent eating or sleeping. It was not unreasonable for DOL to conclude that strict compliance with these requirements would ensure that sleep and meal breaks would be excluded from compensable time only when they provided substantial personal benefit to employees. *Cf. Hultgren v. County of Lancaster*, 913 F.2d 498, 505 (8th Cir. 1990) (requiring compensation for scheduled sleep time under federal law when employees "rarely were able to obtain a full night's sleep").

The Appellate Division's ground for finding DOL's policy unreasonable is meritless. The court incorrectly viewed the March 2010 opinion letter as misapplying the Wage Order's "residential employee exception." *Moreno*, 153 A.D.3d at 1255-56. But, as explained above, DOL's policy here is not an application of the Wage Order's "residential employee" provision, but instead a parallel interpretation of "required to be available for work" under the Wage

Order and the statutory language of "hours worked" as applied to a distinct group of employees—those who work shifts of twenty-four hours or more. *See Carrasco*, 2017 WL 6403521, at *7 (holding that DOL's policy "is *not* in conflict with the [Wage Order]; rather it *expands* upon the [Wage Order], by defining what it means to be 'available for work'"). To be sure, those two sets of rules share some common underlying features. But that consistency supports rather than undermines the reasonableness of DOL's policy. Just as residential employees will "[o]rdinarily" be able to "engage in normal private pursuits," including eating and sleeping, purely by dint of the sheer length of time they spend on their employers' premises, 29 C.F.R. § 785.23 (parallel federal guidance for residential employees), so too will employees with very long shifts likely experience "long periods of inactivity" that they can use for "uninterrupted sleep" and other personal activities, *Interpretative Bulletin No. 13* ¶ 6. It was thus not unreasonable for DOL to treat these categories of employees similarly.

C. Overturning DOL's Long-Standing Policy Here Would Severely Disrupt Settled Expectations.

The case for deference is especially strong in this case because "those who have had matters before [DOL] have come to rely upon its interpretation." *Hi-Craft Clothing Co. v NLRB*, 660 F.2d 910, 916 (3d Cir. 1981); *see also Matter of Judd v. Constantine*, 153 A.D.2d 270, 273 (3d Dep't 1990) (affording deference to agency's long-standing interpretation that "induc[ed] reliance thereon").

For over forty years, DOL has repeatedly and publicly applied its sleep- and meal-time policy specifically in the context of home health aides, through enforcement actions, numerous opinion letters, and other official statements. See *supra* at 12-16. Members of the home health care industry arranged their affairs in accordance with DOL's official guidance.[9] And the State's Medicaid program set reimbursement rates for home health care services

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[9] For instance, collective bargaining agreements in the record reflected DOL's policy by providing that "sleep-in" home health aides would receive a daily rate of pay that was less than the compensation that would be given to an aide who was paid by the hour for working twenty-four hours. (*Andryeyeva* Record on Appeal 890-891, 920-921.)

specifically in reliance on DOL's long-articulated policy. *See* Dep't of Health, Managed Long-Term Care Policy 14.08 (Nov. 24, 2014).

The Second Department's decisions in these appeals upset the long-standing and settled expectations of parties subject to the Wage Order. The unusually lengthy and reasonable reliance of these parties thus weighs heavily in favor of deference to DOL's long-standing policy.

POINT II

THIS COURT SHOULD REMAND FOR THE LOWER COURTS TO CONSIDER ALTERNATIVE BASES FOR CLASS CERTIFICATION

Defendants argue that DOL's sleep- and meal-time policy necessarily makes wage-and-hour claims like the ones brought here "an inherently fact-specific inquiry" categorically inappropriate for class treatment. *Moreno* Defs.' Br. 53-54; *see also Andryeyeva* Defs.' Br. 41. Defendants are incorrect: even under DOL's policy, there may be alternative grounds for home health aides to identify common questions that predominate over individual issues, making class-wide adjudication appropriate. Because the Second Department did not address these alternative grounds for class certification, this

Court should remand for that consideration to take place. *See Matter of Dudley v. Kerwick*, 52 N.Y.2d 542, 552 (1981) (remitting to provide lower court "an opportunity to exercise its discretion" as to class certification).[10]

First, under DOL's policy, employers must provide compensation for at least thirteen hours of an employee's twenty-four hour shift. *E.g.*, March 2010 Letter at 4. Plaintiffs appear to claim that defendants here systematically failed to satisfy even this requirement. *See Moreno* Pls.' Br. 36-38. This Court's confirmation of the validity of DOL's policy would not preclude class treatment of such a claim.

Second, an employer's *policy or practice* of violating the requirements for excluding sleep or meal breaks under DOL's policy may also provide grounds for class certification. *Cf. Saunders v. Getchell Agency, Inc.*, No. 13-cv-00244, 2015 WL 1292594, at *5 (D.

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[10] Plaintiffs also argue that they have asserted other class claims that are entirely independent of their minimum wage claims and thus unaffected by this Court's resolution of the validity of DOL's sleep- and meal-time policy. *See Moreno* Pls.' Br. 31-33. DOL takes no position on whether these other claims are valid or amenable to class certification on their own.

Me. Mar. 23, 2015) (certifying class based on claim that defendant had "uniform, unlawful policy of withholding pay for overnight hours"); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (certification may be appropriate to address "a pattern of behavior that commonly affects all of the proposed class members" (quotation marks omitted)). For instance, one of the requirements under DOL's policy is that sleeping facilities must be adequate to permit uninterrupted sleep. Home health aides may be able to pursue class claims if an employer systemically failed to provide adequate sleeping facilities—for example, by requiring aides to sleep in cots in the same room as their patients under circumstances that make obtaining uninterrupted sleep difficult or impossible.[11] *See also, e.g.*, *Moreno* Pls.' Br. 40-44.

Third, even if home health aides did experience different degrees of interruption to their sleep and meal breaks, such variation would not necessarily defeat class certification. *See Viriri*

[11] *See, e.g.*, *Saunders*, 2014 WL 580153, at *4 (conditionally certifying FLSA collective action on allegations that employer failed to ensure adequate sleeping facilities for employees).

v. White Plains Hosp. Med. Ctr., 320 F.R.D. 344, 353 (S.D.N.Y. 2017). The Supreme Court has recognized, for example, that in precisely such circumstances plaintiffs may be able to rely on "representative evidence," including statistical studies, to prove that class members as a whole were not paid for all the hours they were required to be compensated, and that such representative evidence may obviate the need for "person-specific inquiries into individual work time" that would make class treatment difficult. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016); *see Perez v. Isabella Geriatric Ctr., Inc.*, No. 13-cv-7453, 2016 WL 5719802, at *4 (S.D.N.Y. Sept. 30, 2016) (certifying class of Labor Law claims based on representative evidence).

Fourth, if, as plaintiffs allege (*see Andryeyeva* Pls.' Br. 39-41; *Moreno* Pls.' Br. 33-36, 38-39), defendants have failed to maintain adequate records of the hours worked by their employees, as they are required to do under New York law, *see* Labor Law §§ 195(4), 661; 12 N.Y.C.R.R. § 142-2.6, then the burden-shifting framework that applies under such circumstances may provide a route to class certification. Specifically, when an employer fails to maintain

required wage-and-hour records, the burden shifts to the employer to *disprove* a worker's prima facie claim that he has "performed work for which he was improperly compensated." *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *see Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 472–73 (6th Cir. 1999) (applying burden-shifting to claim regarding sleep breaks for twenty-four-hour shifts); *see also Matter of Bae v. Industrial Bd. of Appeals*, 104 A.D.3d 571, 572 (1st Dep't 2013); *Matter of Ramirez v. Commissioner of Labor of State of N.Y.*, 110 A.D.3d 901, 901-02 (2d Dep't 2013) (same). When an employer cannot "come forward with evidence of the precise amount of work performed" to satisfy its burden, that failure may itself provide a common basis for class resolution of claims like the ones plaintiffs bring here. *Anderson*, 328 U.S. at 687; *see also Tyson Foods*, 136 S. Ct. at 1047 (noting that "failure of proof" on a "common question" is amenable to class treatment).

In short, the viability of plaintiffs' class actions do not necessarily stand or fall on the validity of DOL's long-standing policy regarding sleep and meal times for home health aides. DOL

takes seriously the interests of employees who work shifts of twenty-four hours or more and are denied either sleep and meal breaks or appropriate compensation for work they perform during those breaks. Strict enforcement of DOL's policy would help to protect those interests. And under that policy, class actions remain a robust and available procedural mechanism to protect workers' rights.

CONCLUSION

This Court should vacate the Second Department's orders and remand for further consideration of plaintiff's motions for class certification.

Dated: New York, New York
January 2, 2019

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Philip V. Tisne, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,000 words, which complies with the limitations stated in § 500.13(c)(1).

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Philip V. Tisne

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INTERPRETATIVE BULLETIN

No. 13

Hours Worked

Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938

July 1939

UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

OFFICE OF THE GENERAL COUNSEL

ADD2

Interpretative Bulletin No. 13—

Determination of Hours for Which Employees Are Entitled to Compensation Under the Fair Labor Standards Act of 1938

General

1. The accurate determination of what constitutes hours worked is essential in order to establish whether the minimum wage and maximum hours requirements of sections 6 and 7 of the act have been satisfied. This bulletin is intended to indicate the course which the Administrator will follow with respect to the determination of employees' hours of work in the performance of his administrative duties under the act, unless he is directed otherwise by the authoritative rulings of the courts or unless he shall subsequently decide that his interpretation is incorrect. The manner of computing minimum wages and overtime compensation which is discussed in Interpretative Bulletin No. 4 is not within the scope of this bulletin.

2. The act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards. As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include, in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.[1] The following specific problems with respect to the determination of hours worked which have been presented for our consideration are not sufficiently answered by this formula, however, and more detailed discussions of these problems are, therefore, set out in the following paragraphs.

Time Clocks

3. Neither the statute nor Regulations, Part 516 (Requirements for Keeping Records) require that time clocks be used or specify the man-

[1] No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hours worked.

ner in which an employer has to keep a record of the number of hours worked by his employees. Time clocks where used will be an appropriate basis for recording hours worked only when they accurately reflect the period worked by the employee. Whether or not time clocks accurately reflect the period worked by the employee is to be determined by the formula in the preceding paragraph. It should be noted also that if the employer requires the employees to punch a time clock and the employee is required to be present for a considerable period of time before doing so, such time will be considered hours worked.

Waiting Time and Employees Subject to Call

4. Many inquiries have been received with respect to periods of inactivity due to the break-down of machinery and time spent in waiting for materials to be furnished or waiting for the loading or unloading of railroad cars or other vehicles of transportation. Generally, the time during which an employee is inactive by reason of interruptions in his work beyond his control should be included in computing hours worked either if the imminence of the resumption of work requires the employee's presence at the place of employment *or* if the interval is too brief to be utilized effectively in the employeee's own interest. This result would not be affected by the fact that the employer tells his employees that they are free to leave the premises. Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer even though part of the time may be spent in idleness.

5. Many inquiries have likewise been received regarding employments, the very nature of which involve periods of inactivity for varying lengths of time. Ordinarily such periods of inactivity during which employees are on duty should be considered hours worked. Thus, for example, messenger boys who sit around in the office and wait for messages to be routed out should be considered as working not only when they are actually delivering messages but also while waiting for such messages to be assigned. Similarly, a chauffeur who is required to drive officials of a company engaged in the production of goods for commerce should be considered as working not only when he is actually driving such officials but also during the time he is obliged to hold himself in readiness to drive. In these cases the employee engages in active work intermittently, but his time is not his own while he remains conveniently available to carry out the instructions of his employer.

6. In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon the degree to which the

ADD3

employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i. e., the frequency with which the employee is called upon to engage in work. In these cases, the nature of the employee's work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer only a few calls between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified.

7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division.

8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked. If, on the other hand, the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place, such time need not ordinarily be considered hours worked. The employee, however, should be considered as working at any time during which he is actually making a call and his hours worked would include all time traveling to and from such a call.

Travel Time

9. The problem of travel time, in relation to hours worked, arises in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; if the time spent by an employee in traveling is reasonably to be described as "all in a day's work," such time should be considered hours worked under the act.

10. As a general rule it may be stated that an employer should treat time spent by an employee during regular working hours in traveling pursuant to the employer's instructions as hours worked. If an employer requests his employee to do a job during regular working hours which requires the employee to leave the place of business, the traveling time of the employee should be included in hours worked, and this is true whether or not the particular job is within the employee's regular duties.

11. In many cases travel time outside of regular working hours is considered "part of the day's work" and, accordingly, should be treated as hours worked. Thus, an employee whose normal working day extends from 8 a. m. to 5 p. m. may be requested by his employer at 5 p. m. to make one more outside call which involves 2 hours of traveling time (to get to the place where the work is to be performed and report back to the office) and active labor of 1 hour. In such case the employer may not disregard the travel time in computing the number of hours worked by the particular employee; the employee's working day would extend from 8 a. m. to 8 p. m. In this case the employee engages in active labor for his employer after the close of his regular working day and prior to the commencement of his next regular working day, and his activities between 5 p. m. and 8 p. m. are, under the circumstances, reasonably to be considered as a continuation or extension of his normal working day. The same results, of course, would be reached if the employer requested his employee to report for work 2 hours earlier in the morning in order to make the one extra call.

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12. If a crew of workers is required to report for work at a designated place at a specified hour and all the employees are then driven to the place where they are to perform work, the time spent in riding to such place should be considered hours worked. Similarly, the time spent returning from the place at the close of the day's work should be considered hours worked. In some cases, however, the employer requests his employees to report for work at a specified hour at the place where the work is to be performed instead of at the employer's place of business. In these cases the employee's working time may be considered to begin at the time he reports for work, unless the traveling time required in order to reach the place where the productive work is to be performed is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer. No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for purposes of the act.

13. In some cases an employee is required to travel continuously for more than a full working day during which time the employee is not engaged in actual productive work for his employer. For example, an employee whose regular working hours extend from 8 a. m. to 5 p. m. may be required to spend 2 or 3 days and nights of continuous travel to reach a place where he is to perform assigned work. In such case, as indicated generally in paragraph 10, time spent traveling during the regular working hours should be considered hours worked. Travel time outside of regular working hours need not ordinarily be considered hours worked. If, however, the employee is required to travel on Saturdays, Sundays, and holidays, he should be considered as working on those days for the number of traveling hours between his established starting and stopping time on other days of the week. In determining whether the foregoing is applicable, factors such as the length of time required to reach the place where the assigned work is to be performed, whether the employee is given adequate time for sleeping and relaxation, the time that the employee is required to report for actual productive labor, etc., are very important.

14. Inquiries have been received with respect to employees who are required to travel continuously for several days and who perform active labor while traveling. Thus, for example, when cattle or poultry, etc., are sent to market by rail, an employee of the shipper is required to travel on the train in order to water and feed the stock en route. In other cases an employer who ships machinery by train to a distant customer requires an employee to oil the machinery en route

and otherwise to see that it arrives in perfect condition. The employee generally rides in the caboose with the train crew. In each of the foregoing cases, the employees are subject to call for 24 hours a day, but time required for active work by such employees would ordinarily be much less. The employee generally has a substantial amount of time for sleeping, eating, relaxation, etc.[3] No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by custom and usage which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call for 24 hours a day, will be respected by this Division in its enforcement policy.

Meetings and Lectures

15. Time spent in attending meetings and lectures sponsored by the employer (whether or not attendance is voluntary) should be considered time worked if such meetings and lectures are related to the employee's work, as, for example, meetings and lectures for the purpose of teaching the employee the use of new types of machinery on his job, mine rescue, fire prevention and control. In addition, time spent in attending any meetings and lectures should be considered hours worked if attendance is not wholly voluntary.

Employees Having More Than One Job

16. Many inquiries have been received with respect to employees who work for two or more companies. Thus, for example, company A and company B may arrange to employ a common watchman, the employee having the duty of watching the property of both companies concurrently for a specified number of hours each night. In this case A and B are not each required to pay the minimum rate required under the statute for all hours worked by the watchman (i. e., 25 cents an hour each) but A and B should be considered as a joint employer for purposes of the act.

17. In some cases, however, an employee may work 40 hours for company A and 15 additional hours during the same week on a different job for company B. In this case it would seem that if A and B are acting entirely independently of each other with respect to the employment of the particular employee, both A and B, in ascertaining their obligations under the act, would be privileged to disregard all work performed by the employee for the other company. If, on the other hand, the employment by A is not completely disassociated

[3] The question is obviously one of degree. No opinion is expressed in the case of the relief truck driver. As to the exemption provided by sec. 13 (b) (1) from the hours provision of the act, see Interpretative Bulletin No. 9.

from the employment by B, the entire employment of the employee for both A and B should be considered as a whole for the purposes of the statute. Whether the employment by A and B are completely disassociated depends, of course, upon the facts in the particular case. This Division will scrutinize all cases involving more than one employment and, at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.

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REPORT OF THE INDUSTRIAL COMMISSIONER UPON THE PROMULGATION OF THE REGULATIONS APPLICABLE TO NON-PROFITMAKING INSTITUTIONS WHICH CERTIFY THAT THEY WILL PAY $1.00 AN HOUR TO EACH EMPLOYEE, IN LIEU OF BEING COVERED UNDER A MINIMUM WAGE ORDER

In addition to other important extensions and changes, the Minimum Wage Act, L. 1960, Ch. 619, extends minimum wage coverage to "any corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual." The law further provides that such non-profitmaking institutions which certify under oath to the Industrial Commissioner on or before September 1, 1960, that on and after October 1, 1960 they will pay $1.00 per hour, exclusive of allowances, to each of their employees in every occupation are exempt from wage order coverage.

The Industrial Commissioner, pursuant to Section 652, subd. 5b of the Minimum Wage Act, proposed regulations for such certification by non-profitmaking institutions and, pursuant to Section 651, subd. 5, proposed regulations defining exclusions from the term employee. Regulations were also proposed relative to the definition of the terms an hour of work and allowances. Further regulations were proposed concerning revocation of the exemption of non-profitmaking institutions and relating to the maintenance of personnel and payroll records for non-profitmaking institutions.

Public hearings were held on these proposals in Buffalo on July 21, in Albany on July 22, and in New York City on July 25. In addition, representatives of non-profitmaking organizations also attended public hearings on the proposed Minimum Wage Order No. 11, which will apply to such non-profitmaking organizations in the event that they do not elect to become exempt from wage order coverage. Public hearings on proposed Minimum Wage Order No. 11 were held in Buffalo on July 21, in Albany on July 22 and in New York City on

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July 26.

A. Definitions of Exclusions From the Term "Employee"

1. Definition of

a. domestic service

b. labor on a farm

c. professional capacity

d. outside salesman

e. taxicab driver

f. sexton, and

g. work in return for charitable aid

were based upon dictionary meanings and upon the definitions evolved under the old New York State Minimum Wage Law and under such other statutes as the Federal Fair Labor Standards Act and the New York State Unemployment Insurance Law whenever these definitions were appropriate. No substantial objections were made to these proposed definitions and they have been incorporated into the regulations without change.

2. The following proposed definitions were challenged at the public hearing.

a. volunteer

It was contended that the term volunteer should be defined to include persons who work for non-profitmaking institutions and who are paid a small salary, but whose motivation in working is to perform services for the non-profitmaking institution out of sympathy for the purposes of such institution. It is found that such a change in the definition could lead to abuse in that many employees of non-profitmaking institutions who are dependent upon their salary from these institutions would come within the

terms of this definition and that this would be contrary to the intent of the statute. Consequently, the definition as originally proposed has been adopted.

b. if the earning capacity is impaired

It was contended that the term impairment of earning capacity because of age should be defined to include young persons as well as those over 65. It is found that this would be contrary to the intent of the statute as there is nothing found in the statute or in its legislative history to suggest that youth was contemplated as impairing earning capacity. There is specific provision in the statute for a lower wage for students and this provision would be redundant if the legislature had contemplated that the exemption for persons whose earning capacity is impaired by age were to be defined to include young persons.

3. The proposed definitions of "executive, administrative, ... capacity" were adapted from the Fair Labor Standards Act. The Fair Labor Standards Act has defined "executive and administrative" employees as individuals who, among other things, earned more than $65.00 per week. The reason for this is that administrative and executive status connotes a degree of economic success in addition to the duties that are inherent in such positions. The proposed definition of the Industrial Commissioner had proposed the minimum salary at $90.00 per week, exclusive of allowances. The higher figure was set because the State Minimum Wage Law covers a higher proportion of persons working in service industries and the hours of work in these service industries are longer than the hours of work of most of the employees covered by the Fair Labor Standards Act.

As a result of the hearings it is found that some persons whose

duties meet all the specifications attributable to executives or administrators earn less than $90.00 per week. Furthermore, it is determined that salaries in service industries are generally lower than the salaries in the industries covered by the Fair Labor Standards Act and that the salaries of executive and administrative employees are proportionately lower. Therefore, the definition of "executive and administrative" employees is modified to include all persons otherwise qualified, who earn $80.00 per week or more, inclusive of allowances.

4. a. The proposed definition of learner was modified to extend the learning period from six to ten weeks. This was done because testimony disclosed that in-service and allied training programs in many institutions normally ran beyond six weeks.

b. The proposed definition of a staff counselor learner which had been limited to staff counselors with less than 24 weeks' experience was modified to be extended to staff counselors with three seasons' experience in any counselor staff occupation where organized instruction and supervision is provided. This modification was made because it is found that camp seasons vary in their length.

5. The proposed definition of religious order was modified by the elimination of the phrase "bound by vows." This phrase is deemed to be too restrictive. Many persons who are dedicated to their performance of religious duties in concert with other individuals simiarly dedicated are not bound by vows.

6. The proposed definition of a student was modified to include persons who, in order to fulfill the curriculum requirements of their school are required to obtain supervised and directed vocational experience in another establishment. It is found that when a student

is obtaining such vocational experience he is not an employee of such other establishment and that it is not the intent of the statute to interfere with such relationships. The proposed definition of student was further clarified to indicate that it includes graduate students.

7. The proposed definition for apprentice was modified to exclude the requirement that the wage paid over the period of apprenticeship must average 50% of the journeyman's rate because it seemed unnecessary to go beyond the requirements of a bona fide apprenticeship agreement. It is found that a financial floor is not appropriate to the definition of apprentice.

B. Employer Personnel Records Requirements for Non-Profitmaking Institutions

1. Proposals relative to the employer personnel records requirements for non-profitmaking institutions were modified to eliminate the necessity for keeping such records for volunteers and sextons. It was found that this requirement was unnecessary because volunteers and sextons are exempted from minimum wage coverage.

2. The phrase "other competent authority" was inserted in the requirement for a report from a doctor in situations where an individual's earning capacity is impaired by age, physical or mental deficiency or injury. This was done because testimony indicated that it is occasionally important to have testimony from authorities other than doctors.

C. Employer Payroll Records

Proposals were modified to permit payroll records for each payroll period rather than requiring them to be kept by the week. It is found that many non-profitmaking institutions do not operate on a weekly payroll system and that the institution of a requirement of weekly

payroll records would impose an undue burden upon such organizations which are subject to minimum wage regulations for the first time.

D. An Hour

One of the most difficult problems confronting the Industrial Commissioner has been the establishment of a definition of hours of work for residential employees. It is particularly difficult to compute the hours of work in such occupations as house mothers, camp counselors and maintenance employees who are on call around the clock. Furthermore, it is found that the setting of the work day at 24-hours would cause an unintended hardship.

The proposed definition included all on call time except for those hours during normal sleeping time when an employee is permitted to sleep. There was strong objection to this definition as subjecting employees to an unreasonable burden as well as many questions regarding its anticipated application. Although it is found that the definition cannot be relaxed and still provide employees with wages of $1.00 an hour the definition was modified for the purpose of clarification. It is now clearly stated that time when an employee is free to leave the place of employment is not covered by the statute.

E. Allowances

Questions asked by representatives of non-profitmaking institutions indicated that they plan to certify that they were paying $1.00 an hour, exclusive of allowances, and then charge their employees for meals, for lodging and for various other services. Labor representatives objected that this was a circumvention of the law.

The proposed definition of the term allowances has been modified to include any charge or deduction for meals, lodging or other services

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provided by an employer to his employees if the employee must avail himself of these items as a condition of employment. It is found that where an employee has the opportunity to accept or reject these items that their provision and the charge therefor is not an allowance as the term is used in the statute. Where, because of restrictions imposed by the employer, the employee does not have the opportunity of accepting or rejecting these items, then any charge therefor would be an allowance.

F. Other Changes

Certain other changes were made in the regulations applicable to non-profitmaking institutions electing exemption from wage order coverage. However, such changes were not substantive in nature and were merely for clarification.

G. Statement and Certification

The Statement and Certification of non-profitmaking institutions electing exemption from wage order coverage were modified to clarify and simplify the form.

PURSUANT to the authority vested in me by Article 19 of the Labor Law, I, Martin P. Catherwood, Industrial Commissioner of the State of New York, do hereby issue this report and promulgate, effective immediately, the following

REGULATIONS OF THE INDUSTRIAL COMMISSIONER APPLICABLE TO EACH NON-PROFITMAKING INSTITUTION WHICH CERTIFIES IT WILL PAY $1.00 AN HOUR ON AND AFTER OCTOBER 1, 1960, TO EACH EMPLOYEE IN LIEU OF BEING COVERED UNDER A MINIMUM WAGE ORDER.

Witness my hand and the seal of the Department of Labor this 26th day of August, 1960.

/s/ MARTIN P. CATHERWOOD
Martin P. Catherwood
Industrial Commissioner

REPORT OF THE INDUSTRIAL COMMISSIONER UPON THE PROMULGATION OF MINIMUM WAGE ORDER NO. 11 FOR MISCELLANEOUS INDUSTRIES AND OCCUPATIONS

The Minimum Wage Act, L. 1960, C. 619, provides that on and after October 1, 1960, every employer shall pay to each of his employees in every occupation a wage of not less than $1.00 an hour.

Under Section 652, subd. 2 of the new Minimum Wage Act, effective October 1, 1960 the Industrial Commissioner shall issue a minimum wage order providing for a minimum wage of $1.00 an hour applicable to any occupation or occupations in which, on the effective date of this article, there is no existing minimum wage order. Exceptions include employees,

(a) covered by the Fair Labor Standards Act;

(b) specifically excluded under the new law; and

(c) of non-profitmaking organizations that are exclusively religious, charitable, or educational, and that exempt wage order coverage by selecting an alternative established by law.

In promulgating such an order, the Commissioner also is directed to:

(a) determine the amount, if any, of allowances that may be offset against the minimum. These allowances include gratuities that employees may receive from patrons or customers and, when furnished by the employer to his employees, the value of meals, lodging, apparel, and other such items, services and facilities;

(b) issue regulations relating to allowances from the minimum wage;

(c) issue such regulations as are deemed to be necessary or appropriate to carry out the purposes of the law and to safeguard the minimum wage of $1.00 an hour; and

(d) issue such regulations as are deemed to be necessary to prevent curtailment of employment opportunities for learners,

apprentices, students in resort hotels and camps that are open not more than six months of the year, and of persons whose earning capacity is impaired by age or by physical or mental deficiency or injury.

Under Section 652, subd. 4 of the statute, the determination of allowances and regulations by the Commissioner must be made after public hearings. The Industrial Commissioner issued a proposed Minimum Wage Order No. 11 for miscellaneous industries and occupations. Copies of the proposed wage order were mailed to representative management and labor organizations and were made available to interested parties prior to the public hearings. Public hearings were held in Buffalo on July 21, in Albany on July 22, and in New York City on July 26. Notice of these public hearings was published in advance in 14 newspapers throughout the state. Notices also were mailed to representative management and labor organizations.

The hearings were attended by employer and employee representatives of both profitmaking and non-profitmaking organizations. It should be noted that non-profitmaking organizations participated in those hearings in part to have a clearer understanding of the options of coverage available and, thereby, help them to determine the type of coverage they would elect. Under Section 652, subd. 3 of the law, non-profitmaking institutions that are exclusively religious, charitable or educational have the option of two types of minimum wage coverage:

(a) Under option 1, they may elect to certify to the Industrial Commissioner on or before September 1, 1960 that beginning with October 1, 1960 they will pay to each employee at least $1.00 an hour, exclusive of allowances and, thereby, be exempt from a minimum wage order or,

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(b) Under option 2 they may choose to be covered by the appropriate minimum wage orders.

In evaluating the testimony of non-profitmaking organizations at these hearings, the Commissioner also considered testimony of the same and similar organizations at earlier public hearings held in relation to the proposed regulations for non-profitmaking organizations which elect exemption from minimum wage order coverage.

In establishing the standards and regulations that were contained in his proposed minimum wage order, the Industrial Commissioner first considered the specific provisions of the minimum wage law including the statement of public policy therein. In order to assist him in amplifying and clarifying these provisions, he considered the standards and regulations which were evolved under the prior New York State Minimum Wage Law, under the Federal Fair Labor Standards Act, and under the minimum wage laws of other states, as well as under the New York State Unemployment Insurance Law.

In modifying the proposals, and issuing his final order, he again considered all the above mentioned sources as well as such information as he obtained from testimony, or briefs that were provided as a result of the public hearings.

I. THE MINIMUM WAGE OF $1.00 AN HOUR

There was objection on the part of non-profitmaking institutions to being covered by a minimum wage and many of these institutions requested that a minimum wage be set at less than $1.00 an hour because a minimum wage of $1.00 an hour would severely curtail the activities of some of these non-profitmaking institutions. It is found that the Industrial Commissioner is not authorized to permit a non-profitmaking institution to pay its employees a wage of less than $1.00 an hour.

One of the most difficult problems confronting the Industrial Commissioner in this context has been the establishment of a definition of hours of work for residential employees. It is particularly difficult to compute the hours of work in such occupations as housemothers, camp counselors and maintenance employees where persons are on all around the clock. Since the setting of a work day at 24 hours would cause unintended hardship, the proposed definition, which included on all time, excepted for residential employees those hours during normal sleeping time when the employee is permitted to sleep.

Some employers considered the proposed definition of an hour to be unreasonable as it would impose a severe financial burden and asked many questions regarding its anticipated application. Although it is found that the definition cannot be relaxed and still provide employees with wages of $1.00 an hour, the definition is modified for the purpose of clarification. Where the proposed definition merely referred to the time an employee is required to be available for work at a place prescribed by the employer, the definition is now expanded to clarify the Commissioner's interpretation of the statute, and states that time when an employee is free to leave the place of employment is not covered.

II. ALLOWANCES

A. <u>Allowances for Meals</u> (except for those employees working in non-profit-making children's camps.)

The proposed order provided an allowance of 25 cents per meal. Employer representatives contended that this figure was unrealistic in terms of the cost of raw food and the preparation and service thereof. To support their contentions many employers estimated their raw food costs per employee per meal. These estimates ranged between 32 cents and 42 cents

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a meal. In the opinion of many of the employers the cost of preparation and serving of food was as high as the cost of raw food itself. Employer representatives, therefore, asked that the allowance for meals be raised accordingly.

Employee representatives maintained, on the other hand, that the allowance for meals should not be directly related to its cost to the employer nor to the cost of a comparable meal to the employee. They argued that the meals were provided by the employer at and for his own convenience and that their value to the employee was considerably less than the cost figures would indicate. It was urged that the meals should not be valued at a figure higher than that which an employee might be expected to spend on the type of substitute meal which he could afford in the light of the minimum wage of $1.00 an hour. For these reasons they asked that the value of the allowances for meals not be increased above those contained in the proposed order.

In answer to the allegations of several employers that the proposals for allowances would force many of them to curtail their operations, union contracts applicable to hospitals and nursing homes were introduced by employee groups to show that some employers were now paying a minimum wage of at least $1.00 an hour exclusive of allowances.

In view of the evidence presented, the Commissioner has determined that an allowance of 45 cents per meal for all employees except those working in children's camps to be appropriate and reasonable.

B. <u>Allowance for Lodging</u> (except for those employees working in non-profitmaking children's camps.)

The proposed order provided an allowance of 40 cents per day for lodging, with the maximum of $2.50 per week. Provision was made permitting

a greater allowance when an apartment is provided, such allowance not to exceed the value of the prevailing rental for such apartments.

Employer representatives contended that this figure was unrealistic in terms of the cost of the maintenance of lodging to the employer or in terms of the cost of equivalent lodging in the community to the employee. Employer estimates of the value of the lodging provided ranged between $12.00 and $25.00 a month.

Employee representatives maintained, on the other hand, that the allowance for lodging should not be directly related to its cost to the employer, nor to the cost of comparable lodging to the employees. They argued that lodging was provided by the employer at and for his own convenience, and that this must be considered in determining the proportion of lodging costs that an employer should be permitted to deduct from the minimum wage. Employee representatives were also concerned about the quality of the lodging provided, and claimed that the nature of the lodging provided often was such as to entitle the employer to no allowance. Finally, it was urged by employee representatives that a ceiling should be placed upon the value which could be set for an apartment for the purposes of lodging allowances, as even the finest apartment must be evaluated within the context of the minimum wage.

In view of the evidence presented, the Commissioner has determined that an allowance of 45 cents per day with a ceiling of $1.30 per day to cover those instances that come under the provision relating to apartments is appropriate and reasonable.

C. <u>Allowance for Meals and Lodging in Non-profitmaking Children's Camps</u>

The proposed order had a separate allowance structure for staff counselors in non-profitmaking children's camps. This structure was derived from existing Minimum Wage Order No. 10, which applies to staff

counselors in profitmaking children's camps.

Existing Order No. 10 has no allowance structure as such. It has, however, a weekly rate for residential employees of $25.00 as compared with the weekly rate of non-residential employees who work a seven-day week of $37.50. This is a difference of one-third and is explained by the fact that the residential employees receive meals and lodging. By applying this reduction of one-third for meals and lodging to the new statutory minimum wage of $1.00 an hour allowances for meals and lodging in the aggregate were set at 33 cents per day. The proportional allocation of 33 cents as between meals and lodging has been based upon the proportion worked out by the last hotel board for resort hotel employees.

Employer representatives urged that the schedule of allowances proposed for staff counselors be applied to all other employees at children's camps. No substantial objections were made to other aspects of these proposed allowances. It is determined that the allowance applicable to staff counselors should apply to all employees of non-profitmaking children's camps, and that the proposed allowances should be adopted.

D. Allowances for Tips

The proposed wage order provided an allowance of 30 cents an hour for tips for those employees who normally receive more than 30 cents an hour for tips. This is based upon the distinction made in some of the other minimum wage orders between service and non-service wage rates. No wage board in New York State had ever recommended a greater tip allowance than 30 cents an hour even in high tip industries. An allowance of 15 cents an hour for tips was proposed for employees who receive more than 15 cents an hour in tips, but less than 30 cents an hour. This additional figure was proposed because the many different types of industries that are subject to this wage order suggest a need for greater flexibility. No provision was

made for tipping allowances for employees who normally receive less than 15 cents an hour in tips nor were any other tipping allowance levels set because the establishment of additional tipping allowance levels would unreasonably burden the administration of the order. No tipping allowance was proposed for staff counselors in non-profitmaking children's camps. This is based upon the wage order applying to profitmaking children's camps in which a tipping allowance is prohibited.

With regard to non-profitmaking institutions, there was some controversy concerning the prevalence and amounts of tips received, but the preponderance of evidence is that employees in non-profitmaking institutions do not receive tips. Accordingly, the proposal for a tipping allowance is deleted from the section applying to non-profitmaking institutions.

The tipping allowance provided for profitmaking institutions subject to this order was not challenged, and it is found that the tip allowance levels are appropriate and no additional tip allowance levels need be set.

E. Students Allowance for Non-profitmaking Children's Camps

The statute permits an allowance for students who work at camps open less than six months a year in order to prevent the curtailment of employment of such students. A proposed deduction of 10 percent from the net wage after allowances was presented. This proposal was not based upon any specific information, but was made in order to form a basis for testimony at the hearings.

Testimony at the hearings was forthcoming and it is found that students form an overwhelming proportion of the employees of non-profitmaking children's camps. Should the financial impact of this order force some non-profitmaking children's camps to close, it would have a direct and substantial

bearing upon the employment of students. It was indicated at the hearings that the financial impact of this order on such camps would be severe and that an increase in the student allowance was appropriate. The student allowance has, therefore, been raised to 20 percent of the net wage after allowances.

F. Allowances for Uniforms and Other Items, Services and Facilities

There was no allowance in the proposed order for anything other than meals, lodging and tips and for students who work in camps open less than six months a year. Except for the student allowance this is based on recommendations of wage boards in existing minimum wage orders. Little testimony was offered at the hearings suggesting that any change should be made in this provision and it has been incorporated into Minimum Wage Order No. 11 without change.

III. ORGANIZATION OF MINIMUM WAGE ORDER NO. 11

As originally proposed, Minimum Wage Order No. 11 consisted of two sections; one was applicable to all industries and occupations, except for non-profitmaking children's camps. The second was applicable to non-profitmaking children's camps only. There was testimony at the hearings to the effect that it would not be appropriate to include profitmaking and non-profitmaking organizations within the same section of the minimum wage order as there are substantial differences in record keeping requirements and in the conditions of employment of persons who work for them. The minimum wage order has been redrafted accordingly, with non-profitmaking children's camps a subdivision of a separate non-profitmaking section.

IV. REGULATIONS

A. Exclusions from the Term "Employee"

Some of the exclusions from the term "employee" apply to all employers while others apply only to non-profitmaking institutions. Exceptions for learners, apprentices, and persons whose earning capacity is impaired apply to both profitmaking and non-profitmaking institutions. Profitmaking employers may be permitted a lower minimum wage as specified in the minimum wage order for such persons, while such persons are excluded from coverage when they are in the employ of religious, charitable or educational non-profitmaking institutions. Learners, apprentices and persons whose earning capacity is impaired may be permitted to be paid less than $1.00 an hour by a profitmaking employer, but such wage may not be less than 75 percent of the applicable minimum wage after allowances. The reason for permitting a lower rate is to prevent the curtailment of employment of such persons. (Section 652, subd. 3).

This provision is based upon the administrative procedures developed in enforcing the handicapped worker provision of the old Minimum Wage Law. That provision was also justified as preventing the curtailment of employment while safeguarding the minimum wage and a 75 percent minimum wage rate has been found to have been effective in effectuating this policy. No substantial objections were made to these proposed rates and they have been incorporated into the regulations without change. The reduced rate for a student who works at a non-profitmaking children's camp has been discussed in section II E of this report.

1. The following proposed definitions were subject to no substantial challenge at the public hearings:

   a. domestic service

   b. labor on a farm

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c. professional capacity

d. outside salesmen

e. taxicab driver

f. sexton (non-profitmaking institution only), and

g. work in return for charitable aid (non-profitmaking institution only)

These definitions were based upon dictionary meanings and upon the definitions evolved under the old New York State Minimum Wage Law and under such other statutes as the Federal Fair Labor Standards Act and the New York State Unemployment Insurance Law whenever those definitions were appropriate.

They have been incorporated into the regulations without change.

2. The following proposed definitions were challenged at the public hearings, but were not changed:

a. volunteer (non-profitmaking institution only)

It was contended that the term "volunteer" should be defined to include persons who work for non-profitmaking institutions and who are paid a small salary, but whose motivation in working is to perform services for the non-profitmaking institution out of sympathy for the purposes of such institution. Such a change in the definition could lead to abuse in that many employees of non-profitmaking institutions who are dependent upon their salary from these institutions would come within the terms of this definition and that this would be contrary to the intent of the statute. Consequently, the definition as originally proposed has been adopted.

b. impaired earning capacity

It was contended that the term "impairment of earning capacity" because of age should be defined to include young persons as well as those over 65. The Commissioner has determined that this would

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be contrary to the intent of the statute as there is nothing found in the statute or in its legislative history to suggest that the factor of youth was contemplated as impairing earning capacity. There is specific provision in the statute for a lower wage for students and this provision would be redundant if the legislature had contemplated that the exemption for persons whose earning capacity is impaired by age were to be defined to include young persons.

8. The following proposed definitions were challenged at the public hearings and changes were made:

   a. Executive, administrative

      The proposed definitions of "executive, administrative, ... capacity" were adapted from the Fair Labor Standards Act. The Fair Labor Standards Act has defined "executive and administrative" employees as individuals who, under certain conditions, earned more than $88.00 per week. The reason for this is that administrative and executive status connotes a degree of economic success in addition to the duties that are inherent in such positions. The proposed definition of the Industrial Commissioner had included the minimum salary at $90.00 per week, exclusive of allowances. The higher figure was proposed because the State Minimum Wage Law covers a higher proportion of persons working in service industries where the hours of work tend to be considerably longer than the hours of work of most of the employees covered by the Fair Labor Standards Act.

      As a result of the hearings it is found that some persons whose duties meet all the specifications attributable to executives or administrators earn less than $90.00 per week. Furthermore, it is determined that salaries in service industries are generally lower

than the salaries in the industries covered by the Fair Labor Standards Act and that the salaries of executive and administrative employees are proportionately lower. Therefore, the definition of "executive and administrative" employees is modified to include all persons otherwise qualified, who earn $80.00 per week or more, inclusive of allowances.

b. Learner

i. The proposed definition of learner was modified to extend the learning period from six to ten weeks. This was done because testimony disclosed that in-service and allied training programs in many institutions normally ran beyond six weeks.

ii. The proposed definition of a staff counselor learner which had been limited to staff counselors with less than 24 weeks' experience was modified to be extended to staff counselors with three seasons' experience in any counselor staff occupation where organized instruction and supervision is provided. This modification was made because it is found that camp seasons vary in their length.

c. Religious order (non-profitmaking institution only)

The proposed definition of religious order was modified by the elimination of the phrase "bound by vows." This phrase is deemed to be too restrictive. Many persons who are dedicated to their performance of religious duties in concert with other individuals similarly dedicated are not bound by vows.

d. Student

The proposed definition of a student was modified to include persons who, in order to fulfill the curriculum requirements of their school are required to obtain supervised and directed

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vocational experience in another establishment subject to this order. It is found that when a student is obtaining such vocational experience he has not been deemed an employee of such other establishment and it is not the intent of the statute to interfere with such relationships. It is understood that this exemption for students does not extend to employers who are not subject to this wage order as such students have heretofore been treated as employees by them.

The proposed definition of student was further clarified to indicate that it includes graduate students.

e. Apprentice

The proposed definition for apprentice was modified to exclude the requirement that the wage paid over the period of apprenticeship must average 80 percent of the journeyman's rate because it seemed unnecessary to go beyond the requirements of a bona fide apprenticeship agreement. It is found that a financial floor is not appropriate to the definition of apprentice.

B. <u>Record Keeping</u>

1. Non-profitmaking institutions.

Proposals relative to employer personnel records requirements for non-profitmaking institutions were modified to eliminate the necessity for keeping such records for volunteers and sextons. This requirement is determined to be unnecessary because volunteers and sextons are exempted from minimum wage coverage.

2. The phrase "other competent authority" was inserted in the requirement that a doctor's report be kept among the personnel records in situations where an individual's earning capacity is impaired by age, physical or mental deficiency or injury. This is done because it is

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found that it is necessary at times to have testimony from authorities other than doctors.

8. Proposals relative to payroll records for non-profitmaking institutions were modified to permit such payroll records to be maintained for each payroll period rather than requiring them to be kept by the week. It was contended that many non-profitmaking institutions did not operate on a weekly payroll system and that requiring weekly payroll records would impose an undue burden upon such organizations who are subject to minimum wage regulations for the first time.

Similar contentions were made on behalf of profitmaking institutions subject to this order. The evidence, however, was not conclusive enough to warrant a change in this procedure for profitmaking institutions.

PURSUANT to the authority vested in me by Article 19 of the Labor Law, I, Martin P. Catherwood, Industrial Commissioner of the State of New York, do hereby issue this report and promulgate, effective October 1, 1960, the following

MINIMUM WAGE ORDER NUMBER 11 FOR
MISCELLANEOUS INDUSTRIES AND OCCUPATIONS
(EFFECTIVE OCTOBER 1, 1960)

Witness my hand and the seal of the Department of Labor this 29th day of September, 1960.

Martin P Catherwood

Martin P. Catherwood
Industrial Commissioner

THIRTEENTH OFFICIAL SUPPLEMENT

TO THE

OFFICIAL COMPILATION

OF

CODES, RULES AND REGULATIONS

OF THE

STATE OF NEW YORK

January 1, 1957 to December 31, 1958, Inclusive

CAROLINE K. SIMON

Secretary of State

VOLUME 1

1961

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lule *supersedes* the schedule heretofore established
ruary 1, 1957, *and is applicable in new cases arising*
and after March 1, 1959. The appropriate provi-
dical fee schedule shall continue to be effective in

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ANGELA R. PARISI
Chairman
Workmen's Compensation Board

dule for Podiatry Treatment and Care the Volunteer Firemen's Benefit Law

1957; effective March 1, 1957; filed February
ry authority §§16, 57 and 58, Volunteer
Firemen's Benefit Law.)

ORDER OF THE CHAIRMAN

ority vested in me by sections 16, 57 and 58 of
s Benefit Law, I, Angela R. Parisi, chairman of
sation Board, hereby **establish** as the *Podiatry*
y treatment and care rendered under the Volun-
aw, the schedule of fees for podiatry treatment
kmen's Compensation Law* of the state of New
chairman and filed in the office of the secretary
953.
ffect on March 1, 1957.

ANGELA R. PARISI
Chairman
Workmen's Compensation Board

lement.

DIVISION OF INDUSTRIAL RELATIONS, WOMEN IN INDUSTRY AND MINIMUM WAGE

Minimum Wage Order No. 1-c—Governing Minimum Wage Standards in the Laundry Industry and Occupations

(Adopted February 14, 1957; effective April 15, 1957; filed February 20, 1957. Statutory authority article 19, Labor Law.)

A. Minimum Wage Standards

1. Minimum wage rates.

a. *Full-time employees.* Basic minimum hourly rate for full-time employees—90 cents from the date the order is promulgated; $1 on October 1, 1958.

A full-time employee is one who works more than 30 hours per week.

b. *Part-time employees.* Basic minimum hourly rate for part-time employees—95 cents from the date the order is promulgated; $1.05 on October 1, 1958.

A part-time employee is one who works less than and up to 30 hours per week.

2. Minimum weekly wage. a. Basic minimum weekly wage for a full-time employee—$33.60 on promulgation of the order; and $37.33 on and after October 1, 1958.

b. In no event shall an employee be paid less than his or her actual earnings if such hourly earnings exceed the minimum weekly guarantee.

Exceptions to minimum weekly wage. The obligation to pay the guaranteed wages in accordance with the foregoing rules shall not apply in the following cases:

(a) *Voluntary absence.* An employee, in case of voluntary absence in any week, whose normal working time is more than 30 hours, shall be paid at the rate of not less than the basic minimum hourly rate of 90 cents on promulgation of the order and $1 on and after October 1, 1958 for the number of hours of working time.

(b) *Total stoppage.* The minimum weekly wage need not be paid to an employee in any week in which there is a total stoppage of the whole plant in excess of six hours in a day because of a legal holiday, riot, general breakdown or act of God. In such event, employees shall be paid not less than the basic minimum hourly rate for the number of hours of working time.

(c) *New employee.* The minimum weekly wage need not be paid to an employee during the first week of employment if hired after the beginning of the week or dismissed as unsatisfactory before the end of the week. Such new employee shall be paid not less than the basic minimum hourly rate for the number of hours of working time.

3. Overtime. Overtime shall begin after the 40th hour in each week. The overtime rate per hour for full-time employees follows:

On promulgation of order	$1.35
On and after October 1, 1958	1.50

4. Minimum call-in pay. An employee who by request or permission of the employer reports for duty on any day shall be paid for at least four hours at the applicable minimum wage. Students who regularly attend a

full-time school are exempt from this provision on days when school is in session.

5. Uniforms. a. Where uniforms are required by the employer, the actual cost of the uniform shall be shared equally by the employer and employee. The employer shall launder such uniforms without charge to the employees.

b. A "required uniform" shall include any item of clothing, decoration or ornament that an employee wears at work at the suggestion, request or direction of the employer or his agent, or to comply with any state, city or local law, rule or regulation, and which is not ordinarily worn by a person as part of a normal wardrobe.

6. Allowances for meals and lodging. a. Meals and lodging actually furnished by an employer to an employee may be considered a part of the minimum wage, but shall be valued at not more than:

Meals—25 cents per meal, $5.25 per week
Lodging—40 cents per day, $2.50 per week
Meals and lodging—$7.75 per week

b. A "meal" shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of foods from all four of the following groups: (1) fruits or vegetables; (2) cereals, bread or potatoes; (3) eggs, meat, fish or poultry; or (4) milk, tea or coffee, except that for breakfast, group (3) may be omitted if both cereal and bread are offered in group (2).

B. Regulations

1. Method of wage payment. Each employee shall be paid for each week not less than the applicable minimum wage, regardless of the basis of payment, whether commission, bonus, piece rate, or any other basis.

2. No deductions. The minimum wage of employees shall be subject to no deductions other than those authorized or required by law.

3. Diversified employment. a. An employee in the laundry industry who works at an occupation governed by another New York State minimum wage order

(1) for one hour or more during any one day; or
(2) for six or more hours in any one week

shall be paid for all his hours of working time for that day or week at the rates contained in the minimum wage order for such other industry or the laundry industry, whichever is greater. Such employee shall be entitled to all of the benefits under any minimum wage order of either the laundry industry or the other applicable industry covering the said date period, whichever is greater.

b. An employee in the laundry industry who works in any week solely at an occupation or in an industry governed by another New York State minimum wage order shall be covered by such order for such week.

4. Learner or apprentice rates. Learners and apprentices shall be paid at not less than the minimum wage herein provided.

5. Required records. a. Every employer subject to this order shall establish, maintain, and make available for inspection at the place of employment for not less than two years, daily and weekly payroll records which shall include for each employee: name, address, social security account number, and age of males under 21, cash wages paid, the value of any additions to cash earnings, and daily and weekly hours worked.

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per day, $2.50 per week
$7.75 per week

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b. Each employer shall also make available for inspection such other records as may be kept by the employer to determine the employee's wages or income.

c. Time cards, time sheets, and other original time records, if any, shall be kept for at least two years and be made available for inspection.

6. Statement to employee. Every employer subject to this order shall furnish a statement to each of his employees with every weekly payment of wages listing hours worked, rates paid, and total earnings.

7. Posting. A notice issued by the Department of Labor, setting forth the provisions and regulations of this order, shall be posted in every establishment in the laundry industry in a conspicuous place where employees can read it.

C. Definitions

1. Industry. The term *"laundry industry and occupations"* includes:

a. The washing of fabrics or textiles of any kind whatsoever and the ironing, pressing, repairing or processing incidental to such washing;

b. The soliciting, collection, distribution or rental at wholesale or retail of the articles so processed;

c. The engaging in any of the processes mentioned in (a)* or (b)* above for their own use by business establishments, clubs or institutions except where the processing is incidental to the manufacture or sale of a commodity;

d. All occupations, operations and services in connection with or incidental to the processes mentioned above.

The term *"laundry industry and occupations"* shall also include launderettes and automatic and coin-operated laundries. The term *"laundry industry and occupations"* excludes laundries owned, and operated and used solely in connection with religious or charitable activities by nonprofit institutions organized exclusively for religious or charitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

2. Employee. *"Employee"* means a women 21 years of age and over, and any person under the age of 21 years employed in the laundry industry. (Pursuant to section 663-a of article 19 of the Labor Law all of the provisions of a minimum wage order apply also to males 21 years of age and over.)

3. Working time. *"Working time"* means time worked or time of permitted attendance, including waiting time, whether or not work is provided, and time spent in traveling as part of the duties of the employee.

4. Voluntary absence. *"Voluntary absence"* includes any absence from work not directed by the employer or his agent and not designed or planned by the employer or the employee to evade minimum wage standards. "Voluntary absence" does not include any absence contemplated in the employment contract; or incurred as a condition of continued employment; or at the direction or suggestion of the employer or his agent; or recurrent or periodic absence, except such absence for medical treatment under a doctor's care.

Effective date. This order shall take effect April 15, 1957.

* a. and b., our designations.

Minimum Wage Order No. 2-c—Governing Minimum Wage Standards in the Beauty Service Industry

(Adopted November 7, 1957; effective January 6, 1958; filed November 8, 1957. Statutory authority article 19, Labor Law.)

I. Minimum Wage Standards

1. Minimum wage rates.

a. *All employees except maids, cleaning women, and porters.*

(1) Minimum full-time hourly rate—$1.05.

A full-time employee is one who works more than 28 hours a week.

At least the minimum full-time hourly rate shall be paid whenever the minimum part-time hourly rate, the minimum weekly wage, the minimum overtime rate, or minimum call-in pay is not required to be paid.

(2) Minimum part-time hourly rate—$1.35.

A part-time employee is one whose total working time is 28 hours or less in any week.

(3) Minimum weekly wage—$42.

For each week in which an employee's working time is more than 28 hours, but not more than 40 hours (except in cases of voluntary absence.)

(4) Minimum overtime hourly rate—$1.58 after 40 hours.

The minimum overtime hourly rate is one and one-half times the minimum full-time hourly rate.

(5) Minimum call-in pay for part-time employees.

A part-time employee who, by request or permission of the employer, reports for duty on any day shall be paid for at least four hours for that day, at the applicable minimum wage rate.

b. *Maids, cleaning women, and porters.* Rate—$1.05 per hour.

2. Exceptions to the minimum weekly wage.

a. *Voluntary absence.* Any full-time employee who is voluntarily absent from her full-time assigned work schedule shall be paid not less than the full-time basic minimum hourly rate for each hour of working time.

b. The minimum weekly wage shall not be required to be paid in any week in which there is a total stoppage of business in excess of six hours in a day because of a legal holiday, riot, general breakdown or act of God. In such event, full-time employees shall be paid not less than the full-time basic minimum hourly rate for each hour of working time.

c. Upon the hiring of a new full-time employee, during the first week of employment the minimum weekly wage shall not be required to be paid to such new employee who was hired after the beginning of the week, or dismissed as unsatisfactory before the end of the week. But such new employee shall be paid not less than the full-time basic minimum hourly rate for each hour of working time.

II. Regulations to Safeguard Minimum Wage Standards

1. Tips. Tips or gratuities shall not be counted as part of the minimum wage.

2. Uniforms. a. If a required uniform is sold by the employer to the employee, the charge therefor may not exceed the actual cost to the employer, and the deduction from the employee's wages, in any one week, may not exceed the amount of earned wage over and above the minimum weekly rate.

r No. 2-c—Covering Minimum Wage
the Beauty Service Industry

7, 1957; effective January 6, 1958; filed
itutory authority article 19, Labor Law.)

nimum Wage Standards

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b. A *"required uniform"* shall include any item of clothing, decoration, or ornament that an employee wears at work at the suggestion, request, or direction of the employer or his agent, or to comply with any state, city, or local law, rule, or regulation, and which is not ordinarily worn by a person as part of a normal wardrobe.

3. Supplies and implements. The employer shall furnish to the employee cosmetics and supplies, including but not limited to emery boards, orangewood sticks, combs, hairbrushes, nets, permanent wave rods and protectors, and linens.

4. Method of wage payment. Each employee shall be paid for each week not less than the applicable minimum wage, regardless of the basis of payment, whether commission, bonus, piece rate, or any other basis.

5. Deductions. The minimum wage of employees shall be subject to no deductions other than those authorized or required by law.

6. Diversified employment.

a. An employee in the beauty service industry who works for the same employer at an occupation governed by another New York State minimum wage order

(1) for one hour or more during any one day, or
(2) for six or more hours in any one week

shall be paid for all his hours of working time for that day or week at the rates contained in the minimum wage order for such other industry or the beauty service industry, whichever is greater. Such employee shall be entitled to all of the benefits under any minimum wage order of either the beauty service industry or the other applicable industry covering the said date period, whichever is greater.

b. An employee in the beauty service industry who works in any week solely at an occupation or in an industry governed by another New York State minimum wage order shall be covered by such order for such week.

7. Required records. Every employer subject to this order shall establish, maintain, and make available for inspection at the place of employment for not less than two years, weekly payroll records which shall include for each employee: name, address, social security account number, and age of males under 21, occupational classification, cash wages paid, the gross and net amount of wages, the value of any additions to cash wages, and daily and weekly hours worked. Time cards, time sheets, and other original time records, if any, shall be kept for at least two years and be made available for inspection.

8. Statement to employee. Every employer subject to this order shall furnish a statement to each of his employees with every weekly payment of wages listing hours worked, rates paid, and total earnings.

9. Posting. A notice issued by the Department of Labor, setting forth the provisions and regulations of this order, shall be posted at all times in every establishment in the beauty service industry in a conspicuous place where employees can read it.

III. Definitions

1. Beauty service industry. The term *"beauty service industry"* shall include all establishments which perform services or operations in the care, cleansing or beautification of the skin, scalp, nails or hair, or in the enhancement of personal appearance, and also services or operations in connection therewith or incidental thereto. All occupations including but not limited to maids, cloakroom attendants, cleaning women, cashiers, receptionists, appointment clerks and clerical workers are covered by this

definition. Barbers, manicurists and other workers in barber shops which perform services primarily for men are excluded.

2. Employee. a. "*Employee*" means a woman 21 years of age and over, and any person under the age of 21 employed in the beauty service industry. (Pursuant to section 663-a of article 19 of the Labor Law all of the provisions of a minimum wage order apply also to males 21 years of age and over.)

b. A bona fide booth renter shall not be deemed an employee.

3. Booth renter. A "*booth renter*" is one who leases or rents space in an establishment or shop and who, in fact, operates as an owner or an independent contractor. If one or more of the following conditions exist, such person shall be deemed an employee and not a booth renter:

(a) The employer, landlord, or his agent receives fees from customers for the services of such woman or minor, even though such fees be returned in whole or in part to the woman or minor.

(b) The employer, landlord, or his agent exercises control over the general conduct, working hours, method of work, prices charged for service.

(c) The woman or minor is held out to customers or to the public as an employee, through advertising, signs, verbal statements or otherwise.

(d) The employer, landlord, or his agent, supplies such woman or minor with cosmetics, soaps, lotions, pins, linens, instruments, tools, machinery supplies or other equipment.

4. Working time. "*Working time*" means time worked or time of permitted attendance, including waiting time, whether or not work is provided, and time spent in traveling as part of the duties of the employee.

5. Voluntary absence. "*Voluntary absence*" includes any absence from work not directed by the employer or his agent and not designed or planned by the employer or the employee to evade minimum wage standards. "Voluntary absence" does not include any absence contemplated in the employment contract, or incurred as a condition of continued employment, or at the direction or suggestion of the employer or his agent, or recurrent or periodic absence, except such absence for medical treatment under a doctor's care.

Effective date. This order shall take effect January 6, 1958.

Minimum Wage Order No. 4-c—Governing Minimum Wage Standards in the Cleaning and Dyeing Industry

(Adopted February 14, 1957; effective April 15, 1957; filed February 20, 1957. Statutory authority article 19, Labor Law.)

I. Minimum Wage Standards

1. Basic minimum hourly rate. a. The basic minimum hourly rate shall be not less than

90 cents an hour for all employees until September 30, 1958 (no apprentice and learner rate permitted);

$1 an hour for all employees other than apprentices and learners beginning October 1, 1958;

95 cents an hour for apprentices and learners beginning October 1, 1958 until September 30, 1959. No apprentice and learner rate shall be permitted after September 30, 1959.

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No. 4-c—Governing Minimum Wage [...] Cleaning and Dyeing Industry

[...]1, 1957; effective April 15, 1957; filed [...]tutory authority article 19, Labor Law.)

[...]imum Wage Standards

[...] rate. a. The basic minimum hourly rate

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[...]nployees other than apprentices and learners [...]ber 1, 1958;

[...] apprentices and learners beginning October [...]ptember 30, 1959. No apprentice and learner [...]mitted after September 30, 1959.

b. At least the basic minimum hourly rate shall be paid whenever the minimum weekly wage, part-time rate or overtime rate are not required by the provisions below.

2. Minimum weekly wage. The minimum weekly wage for each week in which the working time is not less than 24 hours but not more than 40 hours shall be except as hereinafter provided:

$27 for all employees until September 30, 1958;
$30 for all employees other than apprentices and learners beginning October 1, 1958;
$28.50 for apprentices and learners beginning October 1, 1958 until September 30, 1959.

Exceptions to the minimum weekly wage.

a. *Voluntary absence.* An employee assigned to work 24 or more hours in any week who is voluntarily absent in such week shall be paid not less than the applicable basic minimum hourly rate for the number of hours of working time.

b. *New employee.* The minimum weekly wage need not be paid to any new employee never heretofore employed until such new employee shall have completed one calendar week of work, irrespective of the number of hours worked in such first week. Such new employee shall be paid not less than the applicable basic minimum hourly rate for the number of hours of working time.

c. *Total stoppage.* The minimum weekly wage need not be paid to an employee in any week in which there is a total stoppage of the whole plant in excess of six hours in a day because of a legal holiday, riot, general breakdown, storm, act of God, or any other act that is not the fault of the employer. In such event, employees shall be paid not less than the applicable basic minimum hourly rate for the number of hours of working time.

d. Any minor whose hours are limited by law to fewer than 30 hours a week. Such minor shall be paid not less than the applicable basic minimum hourly rate for the number of hours of working time. In no event shall such minor's earnings for working time of 24 or more hours in any week be less than the maximum amount that may be earned at the applicable part-time rate for working time of less than 24 hours in any week.

3. Basic work week. 40 hours per week.

4. Overtime rate. The minimum overtime hourly rate for all hours exceeding 40 hours in any week shall be time and a half of the basic minimum hourly rate as follows:

$1.35 an hour for all employees until September 30, 1958;
$1.50 an hour for all employees other than apprentices and learners beginning October 1, 1958;
$1.42½ an hour for apprentices and learners beginning October 1, 1958 until September 30, 1959.

5. Part-time rate. The minimum hourly rate for part-time employees for working time of less than 24 hours in any week shall be

95 cents an hour for all employees until September 30, 1958;
$1.05 an hour for all employees other than apprentices and learners beginning October 1, 1958;
$1 an hour for apprentices and learners beginning October 1, 1958 until September 30, 1959.

6. Wage rates for split-shift days. Time and a half of the applicable

basic minimum hourly wage for each hour of work on any day in which there is a split shift. The rate shall be

$1.35 an hour for all employees until September 30, 1958;
$1.50 an hour for all employees other than apprentices and learners beginning October 1, 1958;
$1.42½ an hour for apprentices and learners beginning October 1, 1958 until September 30, 1959.

7. Minimum daily rate. a. Any employee, except as hereinafter provided, who by request or permission of the employer, reports for duty on any day shall be paid for at least four hours at the applicable minimum wage rate for any period of four hours or less of attendance whether or not such employee is assigned to actual work.

b. Any student other than a delivery boy who regularly attends a full-time school shall be paid for at least three hours at the applicable minimum wage rate on any day when school is in session.

c. A delivery boy who regularly attends a full-time school need not be paid a minimum daily wage but shall be paid not less than the applicable minimum wage rate for the number of hours worked on any day when school is in session.

d. The minimum daily wage shall not apply to the first day of employment of a worker never theretofore employed by the employer.

II. Administrative Regulations

1. Required records. a. Every employer subject to this order shall establish, maintain, and make available for inspection at the place of employment for not less than two years, daily and weekly payroll records which shall include for each employee: name, address, social security account number, ages of males under 21, and the exact time of arrival and departure of each employee working a split shift.

b. Each employer shall also make available for inspection such other records as may be kept by the employer to determine the employee's wages or income.

c. Time cards, time sheets, and other original time records, if any, shall be kept for at least two years and be made available for inspection.

d. The employer shall, on demand, submit a sworn statement of such records to the commissioner or his representative, together with such information as the commissioner may, in his discretion, deem material and necessary.

2. Statement to employee. Every employer subject to this order shall furnish a statement to each of his employees with every weekly payment of wages listing hours worked, rates paid, and total earnings.

3. Posting. A notice issued by the Department of Labor, setting forth a summary of the provisions and regulations of this order, shall be posted in every establishment in the cleaning and dyeing industry in a conspicuous place where employees can read it.

4. Method of wage payment. Each employee shall be paid for each week not less than the applicable minimum wage, regardless of the basis of payment, whether commission, bonus, piece rate, or any other basis.

5. No deductions. The minimum wage of employees shall be subject to no deductions other than those authorized or required by law.

6. Travel expenses. An employee who is required by the employer to travel as part of his duties shall be reimbursed for actual travel expenses incurred.

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7. Tips. Tips or gratuities shall not be counted as part of the minimum wage.

8. Diversified employment. a. An employee in the cleaning and dyeing industry who works for the same employer at an occupation governed by another New York State minimum wage order

(1) for one hour or more during any one day,
(2) for six or more hours in any one week,

shall be paid for all his hours of working time for that day or week at the rates contained in the minimum wage order for such other industry or the cleaning and dyeing industry, whichever is greater.

b. An employee in the cleaning and dyeing industry who works in any work solely at an occupation or in an industry governed by another New York State minimum wage order shall be covered by such order for such week.

9. Furnishing and maintenance of required uniforms. a. The employer shall supply the first required uniform and the first replacement required after each two-year period. Where an employee purchases a required uniform, he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages.

b. The employer shall maintain and launder required uniforms. Where the employer does not provide for the laundering or maintenance of any employee's required uniform, he shall pay such an employee $1.50 per week if he works more than 30 hours weekly or $1 per week if he works 30 hours or less per week, in addition to the minimum wage prescribed therein.

c. A "*required uniform*" shall include any item of clothing, decoration, or ornament that an employee wears at work at the suggestion, request, or direction of the employer or his agent, or to comply with any state, city, or local law, rule or regulation, and which is not ordinarily worn by a person as part of a normal wardrobe.

10. Allowances for meals and lodging. Meals and lodging actually furnished by an employer to an employee may be considered a part of the minimum wage, but shall be valued at not more than:

Meals—25 cents per meal, $5.25 per week.
Lodging—40 cents per day, $2.50 per week.
Meals and lodging—$7.75 per week.

A "meal" shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of foods from all four of the following groups: (1) fruits or vegetables; (2) cereals, bread or potatoes; (3) eggs, meat, fish or poultry; or (4) milk, tea or coffee, except that for breakfast, group (3) may be omitted if both cereal and bread are offered in group (2).

III. Definitions

1. Cleaning and dyeing industry. a. All types of cleaning, dyeing, pressing, or processing incidental thereto including mending and altering in connection therewith, of materials belonging to the ultimate consumer, i.e., clothing, hats, household furnishing*, rugs, textiles, furs, leather, upholstered goods, or fabrics of any kind whatsoever;

b. The soliciting, collecting, selling, reselling, or distributing at retail or wholesale of cleaning, dyeing, and pressing services;

c. All office, clerical, packing or other occupations (including plant

*So in original. Apparently should be "furnishings".

maintenance) incidental or related to the processes described in subdivision a. and b. above.

d. Cleaning, dyeing or pressing when a process in the manufacture of new materials or of second-hand materials being processed for resale shall be excluded, as well as establishments insofar as they are covered by the minimum wage order governing laundry occupations.

2. Employee. *"Employee"* means a woman 21 years of age and over, and any person under the age of 21 years employed in the cleaning and dyeing industry. (Pursuant to section 663-a of article 19 of the Labor Law all of the provisions of a minimum wage order apply also to males 21 years of age and over.)

3. Apprentices and learners. a. The term *"apprentice and learner"* shall mean an employee never heretofore employed in the cleaning and dyeing industry in any occupation whatsoever.

b. No employee shall be considered an apprentice or learner after such employee has been employed in any occupation in the cleaning and dyeing industry during four calendar weeks regardless of the number of hours worked in each of these weeks.

4. Full-time employee. A *"full-time employee"* is one who works 24 hours or more in any one week.

5. Part-time employee. A *"part-time employee"* is one who is assigned to and works less than 24 hours in any one week.

6. Working time. *"Working time"* means time worked or time of permitted attendance, including waiting time, whether or not work is provided, and time spent in traveling as part of the duties of the employee.

7. Voluntary absence. *"Voluntary absence"* includes any absence from work not directed by the employer or his agent and not designed or planned by the employer or the employee to evade minimum wage standards. "Voluntary absence" does not include any absence contemplated in the employment contract; or incurred as a condition of continued employment; or at the direction or suggestion of the employer or his agent; or recurrent or periodic absence, except such absence for medical treatment under a doctor's care.

8. Split shift. A *"split shift"* is a schedule of daily hours in which the hours of work required or permitted are not consecutive. Interruption of working hours for a lunch period of one hour or less does not constitute a split shift. If there shall be practical difficulties or unnecessary hardships in carrying out the definition of a split shift, the industrial commissioner may, after proper investigation make a variation from such provision if the intent of the order and the Minimum Wage Law, article 19 of the Labor Law, shall be observed. Any person affected by such provision, or the agent of such person, may petition the commissioner for such variation, stating in writing the ground therefor. The commissioner shall cause an investigation to be made, and if he deems it advisable, may hold a hearing on such petition. A record of all variations shall be kept in the office of the Department of Labor.

Effective date. This order shall take effect April 15, 1957.

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Minimum Wage Order No. 5-c—Governing Minimum Wage Standards in the Restaurant Industry

(Adopted July 19, 1957; effective September 17, 1957; filed July 30, 1957. Statutory authority article 19, Labor Law.)

A. Minimum Wage Standards

1. Basic full-time rates. A full-time employee is one who works more than 30 hours in any week.

Until May 31, 1958	*Without Meals*	*With Meals*
Service employees	62 cents per hour	52 cents per hour
Non-service employees	86 cents per hour	76 cents per hour
Effective June 1, 1958	*Without Meals*	*With Meals*
Service employees	70 cents per hour	60 cents per hour
Non-service employees	$1.00 per hour	90 cents per hour

2. Part-time rates. A part-time employee is one who works 30 hours or less in any week. The part-time rate shall not apply to employees who work 30 hours or less in any week as the result of voluntary absence. In no event shall the earnings for total hours worked in excess of 30 in any week be less than the total that may be earned at the part-time rate for 30 hours in any such week.

Until May 31, 1958	*Without Meals*	*With Meals*
Service employees	67 cents per hour	57 cents per hour
Non-service employees	91 cents per hour	81 cents per hour
Effective June 1, 1958	*Without Meals*	*With Meals*
Service employees	75 cents per hour	65 cents per hour
Non-service employees	$1.05 per hour	95 cents per hour

3. Overtime rates. The minimum overtime rate shall be one and one-half times the applicable full time "with meals" rate, plus 10 cents hourly where meals are not furnished.

Until May 31, 1958	*Without Meals*	*With Meals*
Service employees	88 cents per hour	78 cents per hour
Non-service employees	$1.24 per hour	$1.14 per hour
Effective June 1, 1958	*Without Meals*	*With Meals*
Service employees	$1.00 per hour	90 cents per hour
Non-service employees	$1.45 per hour	$1.35 per hour

Overtime rate shall be paid for all hours in excess of 40 hours in any one week.

4. Additional rate for split shift and spread of hours. a. An employee shall be paid an additional $1, in addition to the minimum wages otherwise required herein, for any day in which (1) the spread of hours exceeds 10, or (2) in which there is more than one interval off duty (excluding any meal period of one hour or less), or (3) in which both situations occur.

b. A *"split-shift"* is a schedule of daily hours in which the working hours required or permitted of an employee are not consecutive. No meal period of one hour or less shall be considered an interruption of consecutive hours.

c. The *"spread of hours"* is the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty.

d. An *"interval off duty"* is time during the workday other than work-

ing time, waiting time, travel time, and time off duty for any meal period of one hour or less.

5. Minimum call-in pay. a. An employee who by request or permission of the employer reports for duty on any day shall be paid at the applicable minimum wage rate

a. for at least three hours for one shift of three consecutive hours or less,
b. for at least six hours for two shifts totaling six hours or less,
c. for at least eight hours for three shifts totaling eight hours or less.

b. Students who regularly attend a full-time school are exempt from this provision on days when school is in session.

B. Regulations

1. Tips. Tips or gratuities shall not be counted as part of the minimum wage.

2. Furnishing and maintenance of required uniforms. a. The employer shall supply, maintain, and launder required uniforms except that (1) where an employee purchases a required uniform he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages; and (2) where the employer does not provide for the laundering or maintenance of any employee's required uniform, he shall pay such an employee four cents per hour in addition to the minimum wage prescribed herein.

b. A *"required uniform"* shall include any item of clothing, decoration, or ornament that an employee wears at work at the suggestion, request, or direction of the employer or his agent, or to comply with any state, city, or local law, rule, or regulation, and which is not ordinarily worn by a person as part of a normal wardrobe.

3. Meals. a. An employer who pays the "with meals" rate shall furnish one meal a day to each employee who works less than five hours on any day and two meals a day to any employee working five hours or more on any day. An employee working on a split-shift on any day shall receive one meal for each shift worked.

b. No charge shall be made by an employer for any meal furnished.

c. A *"meal"* shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of foods from all four of the following groups: (1) fruits or vegetables; (2) cereals, bread or potatoes; (3) eggs, meat, fish or poultry; (4) milk, tea or coffee; except that for breakfast, group (3) may be omitted if both cereal and bread are offered in group (2).

4. Allowance for lodging. Lodging actually furnished by an employer to an employee may be considered a part of the minimum wage, but shall be valued at not more than:

Lodging for the full week	$2.50
Daily lodging	.40

5. No deductions. The minimum wage of employees shall be subject to no deductions other than those authorized or required by law.

6. Travel expense. An employee who is required by the employer to travel as part of his duties shall be reimbursed for actual travel expenses incurred.

7. Learner or apprentice rates. Learners and apprentices shall be paid at not less than the minimum wage herein provided.

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hours for one shift of three consecutive hours

urs for two shifts totaling six hours or less,
hours for three shifts totaling eight hours or

ly attend a full-time school are exempt from this
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B. Regulations

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shall include any item of clothing, decoration,
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or his agent, or to comply with any state, city,
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yer who pays the "with meals" rate shall
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orking on a split-shift on any day shall receive
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le by an employer for any meal furnished.
adequate portions of a variety of wholesome,
iclude at least one of the types of foods from
oups: (1) fruits or vegetables; (2) cereals,
meat, fish or poultry; (4) milk, tea or coffee;
roup (3) may be omitted if both cereal and
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g. Lodging actually furnished by an em-
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inimum wage of employees shall be subject
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rates. Learners and apprentices shall be
imum wage herein provided.

8. Diversified employment. a. An employee in the restaurant industry who works at an occupation governed by another New York State minimum wage order

(1) for one hour or more during any one day, or
(2) for six or more hours in any one week

shall be paid for all his hours of working time for that day or week at the rates contained in the minimum wage order for such other industry or the restaurant industry, whichever is greater. Such employee shall be entitled to all of the benefits under any minimum wage order of either the restaurant industry or the other applicable industry covering the said date period, whichever is greater.

b. An employee in the restaurant industry who works in any week solely at an occupation or in an industry governed by another New York State minimum wage order shall be covered by such order for such week.

9. Required records. a. Every employer subject to this order shall establish, maintain, and make available for inspection at the place of employment for not less than two years, weekly payroll records which shall include for each employee: name, address, social security account number, age of males under 21, occupational classification, cash wages paid, and daily and weekly hours worked, including the exact time of arrival and departure on each shift on any day in which a split shift is worked or in which the spread of hours exceeds 10. The records shall also indicate whether employees receive meals and have uniforms laundered, cleaned, or maintained by the employer.

b. Each employer shall also make available for inspection such other records as may be kept by the employer to determine the employee's wages or income.

c. Time cards, time sheets, and other original time records, if any, shall be kept for at least two years and be made available for inspection.

10. Statement to employee. Every employer subject to this order shall furnish a statement to each of his employees with every weekly payment of wages listing hours worked, rates paid, and total earnings.

11. Posting. A notice issued by the Department of Labor, setting forth the provisions and regulations of this order, shall be posted in every establishment in the restaurant industry in a conspicuous place where employees can read it.

C. Definitions

1. Restaurant industry. The term "*restaurant industry*" includes:

a. Any eating or drinking place which prepares and offers food or beverage for human consumption either on any of its premises or by such service as catering, banquet, box lunch, or curb or counter service, to the public, to employees or to members or guests of members, and services in connection therewith or incidental thereto.

The industry includes but is not limited to service restaurants, cafeterias, commissaries, automats, bars and grills, taverns, coffee shops, luncheonettes, diners, sandwich shops, tea rooms, ice cream parlors, night clubs and cabarets; restaurant concessions in hotels; restaurants operated by, or as concessions in, department and variety stores, drug stores, candy stores, bakeries, delicatessens, places of amusement or recreation, other commercial and industrial establishments, and social, fraternal and professional clubs and similar organizations; caterers and banquet halls; restaurants, cafeterias, snack bars, and canteens in institutions catering to visitors and guests; concessions in restaurants and night clubs such as hat and coat check rooms, cigarette girls, photographers

and their assistants; frozen custard stands, frankfurter stands, and refreshment stands which qualify as restaurants under the foregoing term "*restaurant industry*".

b. The term "*restaurant industry*" excludes eating or drinking places operated by establishments customarily offering lodging accommodations of five or more rooms to the public, to employees or to members or guests of members, and also establishments where the service of food or beverage is not available to the public but is incidental to instruction, medical care, religious observance, or the care of handicapped or destitute persons or other public charges.

2. Employee. "*Employee*" means a woman 21 years of age and over and any person under the age of 21 years employed in the restaurant industry. (Pursuant to section 663-a of article 19 of the Labor Law all of the provisions of a minimum wage order apply also to males 21 years of age and over.)

3. Service employee. "*Service employee*" shall mean any employee who receives gratuities in an amount equal to or greater than the difference between the minimum wage at the "service" employee rate and the minimum wage at the "non-service" employee rate.

a. Classification as a "service" or "non-service employee" shall be on a weekly basis except that an employee may not be classified as a "service employee" on any day of such week in which he or she has been assigned to work at which gratuities are not customarily received.

b. The employer shall have the burden of proof that an employee receives sufficient gratuities to entitle him to classify such employee as a "service employee".

4. Non-service employee. "*Non-service employee*" means all employees except service employees.

5. Working time. "*Working time*" means time worked or time of permitted attendance, including waiting time, whether or not work is provided, and time spent in traveling as part of the duties of the employee.

6. Voluntary absence. "*Voluntary absence*" includes any absence from work not directed by the employer or his agent and not designed or planned by the employer or the employee to evade minimum wage standards. "Voluntary absence" does not include any absence contemplated in the employment contract; or incurred as a condition of continued employment; or at the direction or suggestion of the employer or his agent; or recurrent or periodic absence, except such absence for medical treatment under a doctor's care.

Effective date. This order shall take effect September 17, 1957.

Minimum Wage Order No. 6-d—Governing Minimum Wage Standards in the Hotel Industry

(Adopted November 14, 1957; effective January 13, 1958; filed November 18, 1957. Statutory authority article 19, Labor Law)

1. The following minimum wage standards shall apply to all-year hotels:

a. *Nonresidential employees.*

(1) *Minimum full-time hourly rate.*

(a) *New York City.* The minimum full-time hourly rate for em-

frozen custard stands, frankfurter stands, and re-
:h qualify as restaurants under the foregoing term

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No. 6-d—Governing Minimum Wage ls in the Hotel Industry

4, 1957; effective January 13, 1958; filed
atutory authority article 19, Labor Law)

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hourly rate.
The minimum full-time hourly rate for em-

ployees whose working time is more than 30 hours but not more than 40 hours in any week shall be as follows:

(1) Non-service employees $1.00 an hour
(2) Service employees .70 an hour

(b) *Remainder of the state.* The minimum full-time hourly rate for employees whose working time is more than 30 hours but not more than 42 hours in any week shall be as follows:

(1) Non-service employees:

From January 13, 1958 through July 12, 1958	$.85 an hour
From July 13, 1958 through October 15, 1958	.90 an hour
On October 16, 1958 and thereafter	1.00 an hour

(2) Service employees .70 an hour

(2) *The minimum part-time hourly rate.*

(a) Any employee whose working time is 30 hours or less in any week at the direction of the employer, shall receive five cents per hour more than the minimum full-time hourly rate for each hour worked up to and including 30 hours.

(b) In no event shall the earnings for hours worked totaling more than 30 hours in any week be less than the total amount that may be earned at the part-time rate for 30 hours in any such week.

(c) The part-time hourly rate shall not apply to full-time employees who voluntarily absent themselves for any period during a week.

(3) *Minimum overtime hourly rate.* The minimum overtime hourly rate for employees in (a) *New York City* for work in excess of 40 hours in any week, and (b) *the remainder of the state* for work in excess of 42 hours in any week shall be one and one-half times the minimum full-time hourly rate applicable to the classification of the employee taking into account the number of meals received.

(4) *Additional rate—split shift and spread of hours.* On any day (a) in which the spread of hours exceeds 10, or (b) in which there is more than one interval off duty, excluding any meal period of one hour or less, or in which both situations occur, an employee shall receive $1 in addition to the hourly wages earned.

(5) *Minimum daily rates.*

(a) An employee who, by request or permission of the employer, reports for duty on any day, whether or not assigned to actual work, shall be paid for at least three hours, at the rate applicable to the classification of the employee for the time actually worked and at the non-service rate for the balance of the three hours.

(b) An employee who, by request or permission of the employer, reports for duty twice on any day, whether or not assigned to actual work, shall be paid for at least six hours, at the rate applicable to the classification of the employee for the time actually worked and at the non-service rate for the balance of the six hours.

(c) An employee who, by request or permission of the employer reports for duty three times on any day, whether or not assigned to actual work, shall be paid for at least eight hours, at the rate applicable to the classification of the employee for the time actually worked and at the non-service rate for the balance of the eight hours.

(d) Payment shall be made at the minimum hourly rate applicable to the number of meals received and the total number of hours of working time for that week.

(e) This regulation shall not apply to an employee who is a student under 18 years of age, on a work day when he or she is required to

attend school, but such an employee shall be paid for each hour or fraction thereof of actual work or permitted attendance, not less than the minimum hourly rate applicable to such an employee.

(6) *Meals.* The following deductions may be made from the full-time or part-time hourly rate for employees who receive meals furnished by the employer:

Employees who receive one meal per day	6 cents per hour
Employees who receive two meals per day	12 cents per hour

Where an employee who works five or more hours on any day receives a third meal on such day, the employer may be allowed an additional credit of 40 cents for such day but with no effect upon the wage rate.

(7) *Rate for waiting time.* Waiting time, other than time off duty for split shift, during which an employee is required or permitted to wait during the work day while no work is provided by the employer, shall be counted as working time. Such waiting time shall be paid for at not less than the minimum hourly non-service rate applicable to the number of meals received, and the total number of hours of working time for that week.

b. *Residential employees.*

(1) *Minimum weekly rate.* The minimum weekly rate for residential employees who work 44 hours or less in any week shall be as follows:

Employees who receive lodging but no meals	$35 per week
Employees who receive lodging and meals	27 per week

(2) *Exceptions to weekly rates.*

(a) The minimum weekly rate shall be prorated during the first week of employment of new employees who have been hired after the beginning of such week; for employees whose employment has terminated before the end of the week; for employees who voluntarily absent themselves during such week; and for employees who are prevented for more than six successive hours in any week from rendering service because of riot, act of God, or stoppage due to general breakdown of equipment.

(b) An employee working 14 hours or less per week and not "on call" at other times, whose lodging on the premises is not necessary to the performance of his duties, shall not be deemed a residential employee for the purposes of this classification and shall be paid not less than the applicable nonresidential rate.

(3) *Overtime rate.* The minimum hourly rate for work in excess of 44 hours in any week shall be one and one-half times the minimum weekly rate applicable to the employee based on a 44-hour week.

2. The following regulations to safeguard these minimum wage standards in all-year hotels shall apply to all employees, except as otherwise provided:

a. *Uniforms.* The employer is to furnish and to launder, clean and maintain uniforms for all employees. However, if the employee shall have furnished such uniforms at the request or direction of the employer, or as a condition of employment, the employer shall reimburse the employee for the cost thereof not later than one week after the furnishing of such uniforms or the time of the next payment of wages, whichever comes later and regardless of whether the employee leaves his employment within such period or not. If the employee leaves within such period he shall be reimbursed for the cost of the uniform at or before leaving. The employer may elect to pay regularly to employees an additional five cents per hour in lieu of laundering, cleaning and maintaining uniforms.

such an employee shall be paid for each hour or actual work or permitted attendance, not less than ly rate applicable to such an employee.

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:eive two meals per day	12 cents per hour

vho works five or more hours on any day receives ı day, the employer may be allowed an additional such day but with no effect upon the wage rate. *ing time.* Waiting time, other than time off duty g which an employee is required or permitted to day while no work is provided by the employer, vorking time. Such waiting time shall be paid for minimum hourly non-service rate applicable to the eived, and the total number of hours of working

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:ly rate. The minimum weekly rate for residential 14 hours or less in any week shall be as follows:

:eive lodging but no meals	$35 per week
:eive lodging and meals	27 per week

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m weekly rate shall be prorated during the first t of new employees who have been hired after the veek; for employees whose employment has termi- l of the week; for employees who voluntarily absent such week; and for employees who are prevented xcessive hours in any week from rendering service of God, or stoppage due to general breakdown of

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loyer is to furnish and to launder, clean and main- ployees. However, if the employee shall have furn- the request or direction of the employer, or as a , the employer shall reimburse the employee for than one week after the furnishing of such uni- next payment of wages, whichever comes later r the employee leaves his employment within such ployee leaves within such period he shall be reim- uniform at or before leaving. The employer may employees an additional five cents per hour in ing and maintaining uniforms.

b. *Lodging and meals.* (1) No charge shall be made by an employer for lodging or for any meal furnished by the employer to an employee whose compensation is predicated on the inclusion of lodging and meals except as herein indicated. A nonresidential employee in an all-year hotel, working less than five hours on any day and receiving meals, shall be paid not less than the hourly rate for employees who receive one meal per day.

(2) A residential employee receiving meals shall receive three meals per day for six days a week and lodging for the entire week. In no event shall the employer charge for meals if supplied on the seventh day. Nothing herein contained shall prevent such employees purchasing from the employer, or the employer selling to the employee, meals at other times or places than those provided as part of their compensation.

c. *Travel time and expense.* Any nonresidential employee in an all-year hotel required or permitted to travel from one establishment to another of the same employer after the beginning or before the close of the working day shall be compensated for travel time at the non-service rate and shall be reimbursed for carfare.

3. The following minimum wage standards shall apply to resort hotels*:

* These provisions are a continuation of Minimum Wage Order No. 6-c.

a. *Minimum full-time weekly rate.* The minimum weekly rate for employees in resort hotels who work 48 hours or less in any week but more than three days or 24 hours shall be as follows:

(1) *Service employees.*

Employees who receive three meals per day and lodging	$ 8 per week
Employees who receive three meals per day but no lodging	$13 per week
Employees who receive lodging but no meals	$15 per week
Employees who receive neither meals nor lodging	$20 per week

(2) *Chambermaids.*

Employees who receive three meals per day and lodging	$12 per week
Employees who receive three meals per day but no lodging	$17 per week
Employees who receive lodging but no meals	$19 per week
Employees who receive neither meals nor lodging	$24 per week

(3) *Non-service employees.*

Employees who receive three meals per day and lodging	$16 per week
Employees who receive three meals per day but no lodging	$21 per week
Employees who receive lodging but no meals	$23 per week
Employees who receive neither meals nor lodging	$28 per week

b. *Exception to weekly rate.* The minimum weekly rate shall be prorated during the first week of employment of new employees who have been hired after the beginning of the week; for employees who have been dis-

missed as unsatisfactory or whose employment has terminated before the end of the week; for employees who voluntarily absent themselves; and for employees who are prevented from rendering services for more than six successive hours because of riot, act of God, or stoppage due to general breakdown of equipment.

c. *Part-time hourly rate.* The minimum hourly rate for employees who work three days or less or 24 hours or less in any week shall be one-fortieth of the applicable weekly rate.

d. *Overtime rate.* The minimum hourly rate for employees who work in excess of 48 hours in any week shall be time and one-half the basic minimum rate applicable to the classification of the employee based on a 48-hour week. The minimum hourly rate for employees who work on the seventh consecutive day in any week shall be time and one-half of the basic minimum rate applicable to the classification of the employee for the hours worked on such seventh consecutive day.

e. *Minimum daily rate.* An employee employed at the part-time hourly rate who, by request or permission of the employer, reports for duty at the beginning of his or her work shift, regardless of whether he or she is assigned to actual work for the full three hours, shall be paid for a* least three hours on any shift at the minimum hourly rate applicable to that employee.

f. *Rate for waiting time.* Waiting time other than time off duty for split shift, during which an employee, employed at the part-time hourly rate, is required or permitted to wait during the work day while no work is provided by the employer, shall be counted as working time. Such waiting time shall be paid for at not less than the minimum hourly rate applicable to that employee.

4. *__The following regulations to safeguard these minimum wage standards in resort hotels shall apply to all employees, except as otherwise provided:__*

* These provisions are a continuation of Minimum Wage Order No. 6-c.

a. *Uniforms.* (1) The employer is to furnish and to launder, clean and maintain uniforms for all employees. However, if the employee shall have furnished such uniforms at the request or direction of the employer, or as a condition of employment, the employer shall reimburse the employee for the cost thereof not later than one week after the furnishing of such uniforms or the time of the next payment of wages, whichever comes later and regardless of whether the employee leaves his employment within such period or not. If the employee leaves within such period he shall be reinbursed** for the cost of the uniform at or before leaving.

(2) The employer may elect to pay regularly to employees an additional three cents per hour, but not to exceed $1.44 in any week, in lieu of laundering, cleaning and maintaining uniforms.

b. *Lodging and meals.* (1) No charge shall be made by an employer for lodging or for any meal furnished by the employer to an employee whose compensation is predicated on the inclusion of lodging and meals except as herein indicated. An employee in a resort hotel receiving meals, who is employed at the part-time hourly rate and who works less than five hours on any day shall receive one meal on such day. Such employee working five hours or more on any day shall receive two meals on such day. In any

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(2) Nothing herein contained shall prevent such employees purchasing from the employer, or the employer selling to the employee, food in addition to meals provided as part of their compensation.

5. The following regulations to safeguard the minimum wage standards in all-year and resort hotels shall apply to all employees:

a. *Gratuities.* In no event shall gratuities from patrons or others be considered as part of the minimum wage.

b. *Deductions.* The minimum wage shall be subject to no deductions whatsoever except as authorized by statute.

c. *Apprentices and learners.* Learners and apprentices shall be paid not less than the minimum wage. This provision has no application to handicapped workers or students in hotel administration courses in universities, colleges, junior colleges, high schools or institutes as elsewhere covered in this order.

d. *Handicapped workers.* No employee whose earning capacity has been impaired may be paid less than the minimum wage, until a special license, issued in accordance with the provisions of section 658 of the Labor Law, has been obtained by the employer from the Division of Industrial Relations, Women in Industry and Minimum Wage.

e. *Diversified employment.* An employee who works at diversified employment shall be paid the minimum rate for the highest paid occupation at which she works for each day of such diversified employment under this order, provided that she works for two hours or more at the higher paid occupation.

f. *Employment under other minimum wage orders.* An employee of a hotel establishment who works for a period of one week solely at an occupation or in an industry governed by another New York State minimum wage order, shall not be covered by this order, but shall for that week be covered by such other minimum wage order.

6. The following administrative regulations shall apply to all-year hotels and resort hotels.

a. *Statement to employee.* With every wage payment to each employee subject to Minimum Wage Order No. 6-d, there shall be given a statement specifying the rates, earnings (gross and net), deductions, and hours worked.

b. *Records.* (1) Every employer shall keep and make available for inspection at each establishment and branch of the establishment for at least two years a record of each employee, including the name, address, age of male under 21, social security number, occupational classification, cash wages paid, and daily and weekly hours worked, including the exact time of arrival and departure on each shift on any day in which a split shift is worked or in which the spread of hours exceeds 10. The records shall also indicate whether employees receive meals and have uniforms laundered, cleaned or maintained by the employer.

(2) Such records shall be kept on the premises in each establishment for a period of at least two years, and the employer shall on demand submit a sworn copy of such records to the commissioner or his representative together with such information as the commissioner in his discretion may deem necessary.

(3) Time cards, time sheets, or other original time records, where used, shall be kept for at least two years.

c. *Posting.* A summary of the provisions of Minimum Wage Order No. 6-d and Administrative Regulations issued by the Department of Labor shall be posted in a conspicuous place where employees can read it.

7. Definitions.

a. *Hotel industry.*

The term *"hotel industry"* includes any establishment which, as a whole or part of its business activities offers lodging accommodations for hire to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto.

The industry includes but is not limited to commercial hotels, apartment hotels, resort hotels, lodging houses, boarding houses, furnished room houses, children's camps, adult camps, tourist camps, tourist homes, auto camps, residence clubs, membership clubs, dude ranches, Turkish baths and Russian baths.

The term *"hotel industry"* excludes:

Eating or drinking places customarily offering lodging accommodations of less than five rooms to the public, to employees, or to members or guests of members.

Establishments in which lodging accommodation is not available to the public, or to members or to guests of members, but is incidental to instruction, medical care, religious observance, or to the care of handicapped or destitute persons or other public charges.

(1) *Resort hotel**. A *"resort hotel"* (see definition of "hotel industry") is one which offers lodging accommodations of a vacational nature to the public or to members or guests of members and which

(a) operates for not more than seven months in any calendar year, or

(b) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee work days (including adult males) during any consecutive four-week period by at least 100 percent over the number of employee work days (including adult males) in any other consecutive four-week period within the preceding calendar year, or

(c) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during any consecutive four-week period by at least 100 percent over the number of guest days in any other consecutive four-week period in the preceding calendar year.

* This provision is a continuation of Minimum Wage Order No. 6-c.

(2) *All-year hotels. "All-year hotels"* shall be all other hotels not qualifying as "resort hotels" under the foregoing definition.

(3) *Motor courts, motels, cabins, tourist homes and other establishments* serving similar purposes shall be classified as all-year hotels unless they specifically qualify as a resort hotel in accordance with the foregoing definition thereof.

b. *Employee. "Employee"* shall mean a woman 21 years of age and over and all workers of either sex under the age of 21 years employed in the hotel industry by the operator of the establishment or by any other employer. (*Note:* No male 21 years of age or over may be paid less than the rates fixed for women and minors; other requirements of this order also apply.)

(1) *Caddies.* Caddies shall be excluded from this definition. This exclusion shall not be deemed to exclude caddies from another minimum wage order which covers such employees.

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ntinuation of Minimum Wage Order No. 6-c.
'All-year hotels" shall be all other hotels not
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' shall mean a woman 21 years of age and over
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such employees.

(2) *Camp counselors and employees in children's camps.* Camp counselors and employees in children's camps who assist in guidance or instruction of campers and who themselves receive supervision and training from a camp counselor as part of their compensation whether called junior aide or by some other title, shall be excluded from this definition. This exclusion shall not be deemed to exclude camp counselors and employees in children's camps who assist camp counselors from another minimum wage order which covers such employees.

(3) A camper who works no more than four hours a day for a children's camp and at all other times enjoys the same privileges, facilities and accommodations as regular campers in such camp, shall be known as a "camper-worker" for the purpose of the order and shall not be deemed an employee within the meaning of the order.

(4) A person while a regularly enrolled student in a department of hotel administration in a recognized college, university, junior college or institute and is required by it to acquire experience in hotel problems by accepting employment in a hotel, shall be exempt from this definition. Such college or university shall submit a list each year of such students and their places of employment and the probable duration of their employment to the Division of Industrial Relations, Women in Industry and Minimum Wage. Thereupon, the division shall issue a special certificate of exemption for each such student. Such certificate shall be delivered to the student who shall turn it over to the employer. The employer shall keep such certificate on file.

(5) A person who while a regularly enrolled student in a vocational high school or other high school is required by such high school to acquire experience in hotel problems by accepting employment in a hotel, shall be known as a student worker for a period of employment not to exceed a total of three months. Such vocational high school shall submit a list of such and their places of employment and the probable duration of their employment to the Division of Industrial Relations, Women in Industry and Minimum Wage. Thereupon, the division shall issue a special certificate of exemption for each such student. Such certificate shall be delivered to the student who shall turn it over to the employer. The employer shall keep such certificate on file.

(6) Turkish bath employees employed by hotels are to be considered employees under this order. This order is not intended to cover Turkish bath workers employed by concessionaires in hotels or by Turkish baths operated independently of hotels, except that employees of such Turkish baths shall be considered employees under this order if they are employed in connection with the lodging facilities of the establishment.

c. *Minors.* "*Minors*" shall mean all male and female workers under 21 years of age.

d. *Chambermaid.* "*Chambermaid*" means any employee whose duties relate solely to the cleaning and servicing of guest rooms.

e. *Service employee.* "*Service employee*" shall mean any employee, regardless of sex who customarily receives gratuities in excess of the difference between the service and non-service rates of pay. It shall be presumed that employees whose duties relate solely to any of the following services are "service employees":

(1) The service of food or beverage to patrons seated at tables and the performance of duties incidental thereto.
(2) Bellmen.
(3) Baggage porters.
(4) Package-room messengers or delivery boys.

(5) Doormen and footmen.
(6) Busboys in resort hotels.
(7) Page boys.

It shall be presumed that all employees other than those mentioned above are "non-service employees". Substantial proof must be presented to the Department of Labor to rebut this presumption.

f. *Non-service employee.* (1) *"Non-service employee"* means all employees except service employees.

In resort hotels a chambermaid shall not be deemed a non-service employee unless she fails to receive gratuities in excess of the difference between the chambermaid and non-service rates.

g. *Camp counselor.* A *"camp counselor"* is one who has personal charge of a bungalow, tent, or other structure used by campers or who is responsible for the activity of a group of campers, or for their care, guidance or instruction in a camp catering exclusively to children.

h. *Residential employee. "Residential employee"* shall mean an employee who receives lodging accommodations from his or her employer as part of his or her wage and for whom such accommodations are regularly available at all times. This provision shall apply to all-year hotels and resort hotels.

i. *Working time. "Working time"* means actual service or time of permitted attendance at the establishment, and time spent in traveling at the request of the employer from one of his establishments to another. This does not apply to residential employees.

j. *Split shift.* (1) A *"split shift"* is a schedule of daily hours in which the hours of work required or permitted are not consecutive. Interruption of working hours for any meal period of one hour or less does not constitute a split shift.

(2) An *"interval off duty"* is time during the work day other than working time, waiting time, travel time, and time off duty for any meal period of one hour or less.

k. *Spread of hours.* The *"spread of hours"* is the interval between the beginning and end of the work day. The spread of hours for any day shall include working time plus time off for meals plus time off duty.

l. *Uniform.* The term *"uniform"* includes any garment such as dress, apron, collar, cuffs, or headdress, which is worn by the employer either at the direction of the employer or as a condition of employment. It shall be a presumption that the employer has required his employee to wear uniforms if such garments are of a similar design, color or material or form part of the decorative pattern of the establishment. However, items of clothing that usually and commonly are worn by a person as part of a normal wardrobe are not to be considered part of a uniform.

m. *Meal.* A *"meal"* shall provide adequate portions of a variety of wholesome, nutritious foods. As a standard it should include at least one of the types of foods from all four of the following groups:

(1) Fruits or vegetables;
(2) Cereals, bread or potatoes;
(3) Eggs, meat, fish or poultry;
(4) Milk, tea or coffee;

except that for breakfast group (3) may be omitted if both cereal and bread are offered in group (2).

A meal shall be deemed to be furnished by an employer to an employee whose compensation is predicated on the inclusion of meals, or who is entitled to meals under this regulation, when the meal is made available to the employee during reasonable meal periods.

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n. *Lodging.* *"Lodging"* means living accommodations which are adequate, decent, and sanitary according to usual and customary standards.
o. *Diversified employment.* The term *"diversified employment"* means employment in an all-year hotel of any employee who is required or permitted to perform the duties of a service employee, as well as those of a non-service employee and the employment in a resort hotel of an employee who is required or permitted to perform either the duties of a service employee as well as those of a chambermaid or the duties of a chambermaid as well as those of a non-service employee, or the duties of a service employee as well as those of a non-service employee.
p. *Voluntary absence.* *"Voluntary absence"* means an absence which is not designed or planned by the employee and the employer to evade the minimum wage standards. Recurrent or periodic absence is not voluntary absence except for medical treatment under a doctor's care.

Effective date. This order shall take effect January 13, 1958.

Minimum Wage Order No. 6-e—Governing Minimum Wage Standards in the Hotel Industry*

*Provisions relating to all-year hotels are a continuation of Minimum Wage Order No. 6-d.

(Adopted April 21, 1958; effective June 20, 1958; filed April 28, 1958. Statutory authority article 19, Labor Law.)

1. The following minimum wage standards shall apply to all-year hotels:

a. *Nonresidential employees.*
(1) *Minimum full-time hourly rate.*
(a) *New York City.* The minimum full-time hourly rate for employees whose working time is more than 30 hours but not more than 40 hours in any week shall be as follows:

(1) Non-service employees	$1.00 an hour
(2) Service employees	.70 an hour

(b) *Remainder of the state.* The minimum full-time hourly rate for employees whose working time is more than 30 hours but not more than 42 hours in any week shall be as follows:

(1) Non-service employees:	
From June 20, 1958 through July 12, 1958	$ .85 an hour
From July 13, 1958 through October 15, 1958	.90 an hour
On October 16, 1958 and thereafter	1.00 an hour
(2) Service employees	.70 an hour

(2) *Minimum part-time hourly rate.* (a) Any employee whose working time is 30 hours or less in any week at the direction of the employer, shall receive five cents per hour more than the minimum full-time hourly rate for each hour worked up to and including 30 hours.
(b) In no event shall the earnings for hours worked totaling more than 30 hours in any week be less than the total amount that may be earned at the part-time rate for 30 hours in any such week.
(c) The part-time hourly rate shall not apply to full-time employees who voluntarily absent themselves for any period during a week.
(3) *Minimum overtime hourly rate.* The minimum overtime hourly rate for employees in (a) *New York City* for work in excess of 40 hours in any week, and (b) *the remainder of the state* for work in excess of

42 hours in any week shall be one and one-half times the minimum full-time hourly rate applicable to the classification of the employee taking into account the number of meals received.

(4) *Additional rate—split shift and spread of hours.* On any day (a) in which the spread of hours exceeds 10, or (b) in which there is more than one interval off duty, excluding any meal period of one hour or less, or in which both situations occur, an employee shall receive $1 in addition to the hourly wages earned.

(5) *Minimum daily rates.* (a) An employee who, by request or permission of the employer, reports for duty on any day, whether or not assigned to actual work, shall be paid for at least three hours, at the rate applicable to the classification of the employee for the time actually worked and at the non-service rate for the balance of the three hours.

(b) An employee who, by request or permission of the employer, reports for duty twice on any day, whether or not assigned to actual work, shall be paid for at least six hours, at the rate applicable to the classification of the employee for the time actually worked and at the non-service rate for the balance of the six hours.

(c) An employee who, by request or permission of the employer reports for duty three times on any day, whether or not assigned to actual work, shall be paid for at least eight hours, at the rate applicable to the classification of the employee for the time actually worked and at the non-service rate for the balance of the eight hours.

(d) Payment shall be made at the minimum hourly rate applicable to the number of meals received and the total number of hours of working time for that week.

(e) This regulation shall not apply to an employee who is a student under 18 years of age, on a work day when he or she is required to attend school, but such an employee shall be paid for each hour or fraction thereof of actual work or permitted attendance, not less than the minimum hourly rate applicable to such an employee.

(6) *Meals.* The following deductions may be made from the full-time or part-time hourly rate for employees who receive meals furnished by the employer:

Employees who receive one meal per day	6 cents per hour
Employees who receive two meals per day	12 cents per hour

Where an employee who works five or more hours on any day receives a third meal on such day, the employer may be allowed an additional credit of 40 cents for such day but with no effect upon the wage rate.

(7) *Rate for waiting time.* Waiting time, other than time off duty for split shift, during which an employee is required or permitted to wait during the work day while no work is provided by the employer, shall be counted as working time. Such waiting time shall be paid for at not less than the minimum hourly non-service rate applicable to the number of meals received, and the total number of hours of working time for that week.

b. *Residential employees.*

(1) *Minimum weekly rate.* The minimum weekly rate for residential employees who work 44 hours or less in any week shall be as follows:

Employees who receive lodging but no meals	$35 per week
Employees who receive lodging and meals	$27 per week

(2) *Exceptions to weekly rates.* (a) The minimum weekly rate shall be prorated during the first week of employment of new employees who

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have been hired after the beginning of such week; for employees whose employment has terminated before the end of the week; for employees who voluntarily absent themselves during such week; and for employees who are prevented for more than six successive hours in any week from rendering service because of riot, act of God, or stoppage due to general breakdown of equipment.

(b) An employee working 14 hours or less per week and not "on call" at other times, whose lodging on the premises is not necessary to the performance of his duties, shall not be deemed a residential employee for the purposes of this classification and shall be paid not less than the applicable nonresidential rate.

(3) *Overtime rate.* The minimum hourly rate for work in excess of 44 hours in any week shall be one and one-half times one-forty-fourth of the minimum weekly rate applicable to the employee.

2. The following regulations to safeguard these minimum wage standards in all-year hotels shall apply to all employees, except as otherwise provided:

a. *Uniforms.* The employer is to furnish and to launder, clean and maintain uniforms for all employees. However, if the employer shall have furnished such uniforms at the request or direction of the employer, or as a condition of employment, the employer shall reimburse the employee for the cost thereof not later than one week after the furnishing of such uniforms or the time of the next payment of wages, whichever comes later and regardless of whether the employee leaves his employment within such period or not. If the employee leaves within such period he shall be reimbursed for the cost of the uniform at or before leaving. The employer may elect to pay regularly to employees an additional five cents per hour in lieu of laundering, cleaning and maintaining uniforms.

b. *Lodging and meals.* (1) No charge shall be made by an employer for lodging or for any meal furnished by the employer to an employee whose compensation is predicated on the inclusion or lodging and meals except as herein indicated. A nonresidential employee in an all-year hotel, working less than five hours on any day and receiving meals, shall be paid not less than the hourly rate for employees who receive one meal per day.

(2) A residential employee receiving meals shall receive three meals per day for six days a week and lodging for the entire week. In no event shall the employer charge for meals if supplied on the seventh day. Nothing herein contained shall prevent such employees purchasing from the employer, or the employer selling to the employee, meals at other times or places than those provided as part of their compensation.

c. *Travel time and expense.* Any nonresidential employee in an all-year hotel required or permitted to travel from one establishment to another of the same employer after the beginning or before the close of the working day shall be compensated for travel time at the non-service rate and shall be reimbursed for carfare.

3. The following minimum wage standards shall apply to resort hotels:

a. *Minimum full-time weekly rate.* The minimum weekly rate for employees in resort hotels who work 48 hours or less in any week but more than three days or 24 hours shall be as follows:

(1) *Service employees.*

Employees who receive three meals per day and lodging	$12 per week
Employees who receive three meals per day but no lodging	17 per week
Employees who receive lodging but no meals	20 per week
Employees who receive neither meals nor lodging	25 per week

(2) *Chambermaids.*

Employees who receive three meals per day and lodging	$17 per week
Employees who receive three meals per day but no lodging	22 per week
Employees who receive lodging but no meals	25 per week
Employees who receive neither meals nor lodging	30 per week

(3) *Non-service employees.*

Employees who receive three meals per day and lodging	$22 per week
Employees who receive three meals per day but no lodging	27 per week
Employees who receive lodging but no meals	30 per week
Employees who receive neither meals nor lodging	35 per week

b. *Exception to weekly rate.* The minimum weekly rate shall be pro-rated during the first week of employment of new employees who have been hired after the beginning of the week; for employees who have been dismissed as unsatisfactory or whose employment has terminated before the end of the week; for employees who voluntarily absent themselves, and for employees who are prevented from rendering service for more than six successive hours because of riot, act of God, or stoppage due to general breakdown of equipment.

c. *Part-time hourly rate.* The minimum hourly rate for employees who work three days or less or 24 hours or less in any week shall be one-fortieth of the applicable weekly rate.

d. *Overtime rate.* The minimum hourly rate for employees who work in excess of 48 hours in any week shall be time and one-half the basic minimum rate applicable to the classification of the employee based on a 48-hour week. The minimum hourly rate for employees who work on the seventh consecutive day in any week shall be time and one-half of the basic minimum rate applicable to the classification of the employee for the hours worked on such seventh consecutive day.

e. *Minimum daily rate.* An employee employed at the part-time hourly rate who, by request or permission of the employer, reports for duty at the beginning of his or her work shift, regardless of whether he or she is assigned to actual work for the full three hours, shall be paid for at least three hours on any shift at the minimum hourly non-service rate applicable to that employee.

f. *Rate for waiting time.* Waiting time (other than time off duty for split shift) during which an employee, employed at the part-time hourly rate, is required or permitted to wait during the work day while no work is provided by the employer, shall be counted as working time. Such waiting time shall be paid for at not less than the minimum hourly non-service rate applicable to that employee.

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4. The following regulations to safeguard these minimum wage standards in resort hotels shall apply to all employees, except as otherwise provided:

a. *Uniforms.* (1) The employer is to furnish and to launder, clean and maintain uniforms for all employees. However, if the employee shall have furnished such uniforms at the request or direction of the employer, or as a condition of employment, the employer shall reimburse the employee for the cost thereof not later than one week after the furnishing of such uniforms or the time of the next payment of wages, whichever comes later and regardless of whether the employee leaves his employment within such period or not. If the employee leaves within such period he shall be reimbursed for the cost of the uniform at or before leaving.

(2) The employer may elect to pay regularly to employees an additional five cents per hour, but not to exceed $2.40 in any week, in lieu of laundering, cleaning and maintaining uniforms.

b. *Lodging and meals.* (1) No charge shall be made by an employer for lodging or for any meal furnished by the employer to an employee whose compensation is predicated on the inclusion of lodging and meals except as herein indicated. An employee in a resort hotel receiving meals, who is employed at the part-time hourly rate and who works less than five hours on any day shall receive one meal on such day. Such employee working five hours or more on any day shall receive two meals on such day. In any case such employee working on split shift on any day shall receive one meal for each consecutive period of hours worked on that day.

(2) Nothing herein contained shall prevent such employees purchasing from the employer, or the employer selling to the employee, food in addition to meals provided as part of their compensation.

5. The following regulations to safeguard the minimum wage standards in all-year and resort hotels shall apply to all employees:

a. *Gratuities.* In no event shall gratuities from patrons or others be considered as part of the minimum wage.

b. *Deductions.* The minimum wage shall be subject to no deductions whatsoever except as authorized by statute.

c. *Apprentices and learners.* Learners and apprentices shall be paid not less than the minimum wage. This provision has no application to handicapped workers or students in hotel administration courses in universities, colleges, junior colleges, high schools or institutes as elsewhere covered in this order.

d. *Handicapped workers.* No employee whose earning capacity has been impaired may be paid less than the minimum wage, until a special license, issued in accordance with the provisions of section 658 of the Labor Law, has been obtained by the employer from the Division of Industrial Relations, Women in Industry and Minimum Wage.

e. *Diversified employment.* An employee who works at diversified employment shall be paid the minimum rate for the highest paid occupation at which she works for each day of such diversified employment under this order, provided that she works for two hours or more at the higher paid occupation.

f. *Employment under other minimum wage orders.* An employee of a hotel establishment who works for a period of one week solely at an occupation or in an industry governed by another New York State minimum wage order, shall not be covered by this order, but shall for that week be covered by such other minimum wage order.

6. The following administrative regulations shall apply to all-year hotels and resort hotels:

a. *Statement to employee.* With every wage payment to each employee subject to Minimum Wage Order No. 6-e, there shall be given a statement specifying the rates, earnings (gross and net), deductions, and hours worked.

b. *Records.* (1) Every employer shall keep and make available for inspection at each establishment and branch of the establishment for at least two years a record of each employee, including the name, address, age of male under 21, social security number, occupational classification, cash wages paid, and daily and weekly hours worked, including the exact time of arrival and departure on each shift on any day in which a split shift is worked or in which the spread of hours exceeds 10. The records shall also indicate whether employees receive meals and have uniforms laundered, cleaned or maintained by the employer.

(2) Such records shall be kept on the premises in each establishment for a period of at least two years, and the employer shall on demand submit a sworn copy of such records to the commissioner or his representative together with such information as the commissioner in his discretion may deem necessary.

(3) Time cards, time sheets, or other original time records, where used, shall be kept for at least two years.

c. *Posting.* A summary of the provisions of Minimum Wage Order No. 6-e and administrative regulations issued by the Department of Labor shall be posted in a conspicuous place where employees can read it.

7. Definitions.

a. *Hotel industry.*

The term "*hotel industry*" includes any establishment which, as a whole or part of its business activities offers lodging accommodations for hire to the public, to employees, or to members or guest of members, and services in connection therewith or incidental thereto.

The industry includes but is not limited to commercial hotels, apartment hotels, resort hotels, lodging houses, boarding houses, furnished room houses, children's camps, adult camps, tourist camps, tourist homes, auto camps, residence clubs, membership clubs, dude ranches, Turkish baths and Russian baths.

The term "*hotel industry*" excludes:

Eating or drinking places customarily offering lodging accommodations of less than five rooms to the public, to employees, or to members or guests of members.

Establishments in which lodging accommodation is not available to the public, or to members or to guests of members, but is incidental to instruction, medical care, religious observance, or to the care of handicapped or destitute persons or other public charges.

(1) *Resort hotel.* A "*resort hotel*" is one which offers lodging accommodations of a vacational nature to the public or to members or guests of members and which

(a) operates for not more than seven months in any calendar year, or

(b) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee work days (including adult males) during any consecutive four-week period by at least 100 percent over the number of employee work days (including adult males) in any other consecutive four-week period within the preceding calendar year, or

(c) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during

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, increased its number of guest days during

any consecutive four-week period by at least 100 percent over the number of guest days in any other consecutive four-week period in the preceding calendar year.

(2) *All-year hotels.* "*All-year hotels*" shall be all other hotels not qualifying as resort hotels under the foregoing definition.

(3) *Motor courts, motels, cabins, tourist homes and other establishments* serving similar purposes shall be classified as all-year hotels unless they specifically qualify as a resort hotel in accordance with the foregoing definition thereof.

b. *Employee.* "*Employee*" shall mean a woman 21 years of age and over and all workers of either sex under the age of 21 years employed in the hotel industry by the operator of the establishment or by any other employer.

(1) *Caddies.* Caddies shall be excluded from this definition. This exclusion shall not be deemed to exclude caddies from another minimum wage order which covers such employees.

(2) *Camp counselors and employees in children's camps.* Camp counselors and employees in children's camps who assist in guidance or instruction of campers and who themselves receive supervision and training from a camp counselor as part of their compensation whether called junior aide or by some other title, shall be excluded from this definition. This exclusion shall not be deemed to exclude camp counselors and employees in children's camps who assist camp counselors from another minimum wage order which covers such employees.

(3) A camper who works no more than four hours a day for a children's camp and at all other times enjoys the same privileges, facilities and accommodations as regular campers in such camp, shall be known as a "camper-worker" for the purpose of the order and shall not be deemed an employee within the meaning of the order.

(4) A person while a regularly enrolled student in a department of hotel administration in a recognized college, university, junior college or institute and is required by it to acquire experience in hotel problems by accepting employment in a hotel, shall be exempt from this definition. Such college or university shall submit a list each year of such students and their places of employment and the probable duration of their employment to the Division of Industrial Relations, Women in Industry and Minimum Wage. Thereupon, the division shall issue a special certificate of exemption for each such student. Such certificate shall be delivered to the student who shall turn it over to the employer. The employer shall keep such certificate on file.

(5) A person who while a regularly enrolled student in a vocational high school or other high school is required by such high school to acquire experience in hotel problems by accepting employment in a hotel, shall be known as a student worker for a period of employment not to exceed a total of three months. Such vocational high school shall submit a list of such students and their places of employment and the probable duration of their employment to the Division of Industrial Relations, Women in Industry and Minimum Wage. Thereupon, the division shall issue a special certificate of exemption for each such student. Such certificate shall be delivered to the student who shall turn it over to the employer. The employer shall keep such certificate on file.

(6) Turkish bath employees employed by hotels are to be considered employees under this order. This order is not intended to cover Turkish bath workers employed by concessionaires in hotels or by Turkish baths operated independently of hotels, except that employees of such Turkish

baths shall be considered employees under this order if they are employed in connection with the lodging facilities of the establishment.

c. *Minors.* "*Minors*" shall mean all male and female workers under 21 years of age.

d. *Chambermaid.* "*Chambermaid*" means any employee whose duties relate solely to the cleaning and servicing of guest rooms.

e. *Service employee.* "*Service employee*" shall mean any employee, regardless of sex who customarily receives gratuities in excess of the difference between the service and non-service rates of pay. It shall be presumed that employees whose duties relate solely to any of the following services are "service employees":

(1) The service of food or beverage to patrons seated at tables and the performance of duties incidental thereto.
(2) Bellmen.
(3) Baggage porters.
(4) Package-room messengers or delivery boys.
(5) Doormen and footmen.
(6) Busboys in resort hotels.
(7) Page boys.

It shall be presumed that all employees other than those mentioned above are "non-service employees". Substantial proof must be presented to the Department of Labor to rebut this presumption.

f. *Non-service employee.* "*Non-service employee*" means all employees except service employees.

In resort hotels a chambermaid shall not be deemed a non-service employee unless she fails to receive gratuities in excess of the difference between the chambermaid and non-service rates.

g. *Camp counselor.* A "*camp counselor*" is one who has personal charge of a bungalow, tent, or other structure used by campers or who is responsible for the activity of a group of campers, or for their care, guidance or instruction in a camp catering exclusively to children.

h. *Residential employee.* "*Residential employee*" shall mean an employee who receives lodging accommodations from his or her employer as part of his or her wage and for whom such accommodations are regularly available at all times. This provision shall apply to all-year hotels and resort hotels.

i. *Working time.* "*Working time*" means actual service or time of permitted attendance at the establishment, and time spent in traveling at the request of the employer from one of his establishments to another. This does not apply to residential employees.

j. *Split shift.* (1) A "*split shift*" is a schedule of daily hours in which the hours of work required or permitted are not consecutive. Interruption of working hours for any meal period of one hour or less does not constitute a split shift.

(2) An "*interval off duty*" is time during the work day other than working time, waiting time, travel time, and time off duty for any meal period of one hour or less.

k. *Spread of hours.* The "*spread of hours*" is the interval between the beginning and end of the work day. The spread of hours for any day shall include working time plus time off for meals plus time off duty.

l. *Uniform.* The term "*uniform*" includes any garment such as dress, apron, collar, cuffs or headdress, which is worn by the employee either at the direction of the employer or as a condition of employment. It shall be a presumption that the employer has required his employee to wear uni-

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forms if such garments are of a similar design, color or material or form part of the decorative pattern of the establishment. However, items of clothing that usually and commonly are worn by a person as part of a normal wardrobe are not to be considered part of a uniform.

m. *Meal.* A *"meal"* shall provide adequate portions of a variety of wholesome, nutritious foods. As a standard it should include at least one of the types of food from all four of the following groups:

(1) Fruits or vegetables;
(2) Cereals, bread or potatoes;
(3) Eggs, meat, fish or poultry;
(4) Milk, tea or coffee;

except that for breakfast group (3) may be omitted if both cereal and bread are offered in group (2).

A meal shall be deemed to be furnished by an employer to an employee whose compensation is predicated on the inclusion of meals, or who is entitled to meals under this regulation, when the meal is made available to the employee during reasonable meal periods.

n. *Lodging.* *"Lodging"* means living accommodations which are adequate, decent, and sanitary according to usual and customary standards.

o. *Diversified employment.* The term *"diversified employment"* means employment in an all-year hotel of any employee who is required or permitted to perform the duties of a service employee, as well as those of a non-service employee and the employment in a resort hotel of an employee who is required or permitted to perform either the duties of a service employee as well as those of a chambermaid or the duties of a chambermaid as well as those of a non-service employee, or the duties of a service employee as well as those of a non-service employee.

p. *Voluntary absence.* *"Voluntary absence"* means an absence which is not designed or planned by the employee and the employer to evade the minimum wage standards. Recurrent or periodic absence is not voluntary absence except for medical treatment under a doctor's care.

Effective date. This order shall take effect June 20, 1958.

Minimum Wage Order No. 7-b—Governing Minimum Wage Standards in the Retail Trade Industry

(Adopted December 21, 1956; effective February 15, 1957; filed March 13, 1957. Statutory authority article 19, Labor Law.)

1. Minimum wage standards.

a. *Zones.* The minimum wage rates prescribed herein shall be based upon the geographical location of the establishment in which the worker is employed.

Zone 1. All cities, villages, and unincorporated communities, having a population of 10,000 or more according to the latest United States census; and the counties of Nassau, Suffolk and Westchester.

Zone 2. The remainder of the state. Zone 2 shall continue until January 1, 1958, and thereafter the rates established for Zone 1 shall be paid throughout the state.

b. *Minimum wage rates.*

(1) *Minimum hourly rate.*

Zone 1—$1.00
Zone 2—$ .90

At least the basic minimum hourly rate shall be paid whenever the minimum weekly wage, minimum call-in pay, or the overtime rate is not required to be paid.

(2) *Minimum weekly wage.* For each week in which the working time is more than 30 hours but not more than 37½ hours, except in cases of voluntary absence:

Zone 1—$37.50
Zone 2—$33.75

(3) *Minimum overtime rate.* The minimum overtime rate shall be time and one-half of the minimum hourly rate as follows:

Zone 1—$1.50 after 40 hours
Zone 2—$1.35 after 45 hours

(4) *Minimum call-in pay.* An employee who by request or permission of the employer reports for duty on any day shall be paid for at least four hours at the applicable minimum wage rate, except

(a) students who regularly attend a full time school, on days of required school attendance;

(b) employees of an establishment open for fewer than four hours on any day; provided, that they shall be paid not less than the applicable minimum wage rate for the total number of hours that the establishment is open on such day.

(5) *Additional rate for split shift and spread of hours.* An employee shall be paid for one additional hour at the applicable minimum hourly rate, in addition to the minimum wages otherwise required herein, for any day in which (a) the spread of hours exceeds 10, or (b) in which there is a split shift, or (c) in which both situations occur.

This provision shall not apply to a student who regularly attends a full time school on any day when hours of school attendance intervene between work shifts.

2. Regulations to safeguard minimum wage standards.

a. *Voluntary absence.* In case of voluntary absence, the minimum hourly rate shall be paid for all hours of actual work by the employee.

b. *Required uniforms.* The employer shall supply, maintain, and launder required uniforms except that (1) where an employee purchases a required uniform he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages; and (2) where the employer does not provide for the laundering or maintenance of any employee's required uniform, he shall pay such an employee $1.50 per week if he works more than 30 hours weekly or $1 per week if he works 30 hours or less per week, in addition to the minimum wage prescribed herein.

c. *Payment of wages.* Each employee shall be paid for each week not less than the applicable minimum wage, regardless of the basis of payment, whether commission, bonus, or otherwise.

d. *Allowances for meals and lodging.* Meals and lodging actually furnished by an employer to an employee may be considered a part of the minimum wage, but shall be valued at not more than:

Meals —25 cents per meal,	$5.25 per week
Lodging—40 cents per day,	$2.50 per week
Meals and lodging,	$7.75 per week

e. *Travel expenses.* An employee who is required by the employer to travel as part of his duties shall be reimbursed for actual travel expenses incurred.

f. *Deductions.* The minimum wage of employees shall be subject to no deductions other than those authorized or required by law.

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-$1.35 after 45 hours

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ıthorized or required by law.

g. *Tips.* Tips or gratuities shall not be counted as part of the minimum wage.

h. *Diversified employment.*

(1) An employee of the retail trade industry who works at an occupation governed by another New York State minimum wage order: (a) for one hour or more during any one day, or (b) for six or more hours in any one week shall be paid for all his hours of working time for that day or week at the rates contained in the minimum wage order for such other industry or the retail trade industry, whichever are greater. Such employee shall be entitled to all of the benefits for such day or week period provided by the minimum wage order of either the retail trade industry or of the other applicable industry, whichever are greater.

(2) An employee of the retail trade industry who works in any week solely at an occupation or in an industry governed by another New York State minimum wage order shall be covered by such order for such week.

i. *Learner of apprentice rates.* No learners or apprentices shall be paid less than the minimum rates prescribed herein.

3. Administrative regulations.

a. *Required records.* Every employer subject to this order shall establish, maintain, and make available for inspection at the place of employment for not less than two years, weekly payroll records which shall include for each employee: name; address; social security account number; age of males under 21; the number of hours worked daily and weekly, including the times of arrival and departure of each employee working a split shift or spread of hours exceeding 10; gross wages, including allocated commissions and bonuses; itemized deductions from gross wages including value of meals and lodging, if provided; money paid in cash.

Each employer shall also make available for inspection such other records as may be kept by the employer to determine the employee's wages or income.

Time cards, time sheets, and other original time records, if any, shall be kept for at least two years and be made available for inspection.

b. *Statement to employee.* Every employer subject to this order shall furnish a statement to each of his employees with every weekly payment of wages listing hours worked, rates paid, and total earnings.

c. *Posting.* A notice issued by the Department of Labor, setting forth the provisions and regulations of this order, shall be posted in every establishment in the retail trade industry in a conspicuous place where employees can read it.

4. Definitions.

a. *Industry.* The "*retail trade industry*" includes selling or offering for sale at retail and/or wholesale any goods, wares, merchandise, articles or things, and all occupations, operations and services in connection therewith or incidental thereto.

The "retail trade industry" does not include an establishment which is engaged solely in the wholesale trade; or employment exclusively at wholesale in an establishment engaged in both wholesale and retail trade, which realizes less than 25 percent of its gross annual receipts from its retail sales.

b. *Employee.* "*Employee*" means a woman 21 years of age and over, and any person under the age of 21 years employed in the retail trade industry. "Employee" does not include outside salesmen employed on a commission basis, at a place other than a fixed location, whose working time, efforts, activities, mode of operation and process of effecting sales are not in a material manner managed, regulated, supervised, directed, controlled or prescribed by the employer.

c. *Working time.* "*Working time*" means time worked or time of permitted attendance, including waiting time, whether or not work is provided, and time spent in traveling as part of the duties of the employee.

d. *Voluntary absence.* "*Voluntary absence*" includes any absence from work not directed by the employer or his agent and not designed or planned by the employer or the employee to evade minimum wage standards. "Voluntary absence" does not include any absence contemplated in the employment contract; or incurred as a condition of continued employment; or at the direction or suggestion of the employer or his agent; or recurrent or periodic absence, except such absence for medical treatment under a doctor's care.

e. *Split shift.* A "*split shift*" is a schedule of daily hours in which the required or permitted working hours of an employee are not consecutive. No meal period of one and one-half hours or less shall be considered an interruption of consecutive hours.

f. *Spread of hours.* The "*spread of hours*" is the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty.

g. *Required uniform.* A "*required uniform*" shall include any item of clothing, decoration, or ornament that an employee wears at work at the suggestion, request, or direction of the employer or his agent, or to comply with any state, city, or local law, rule, or regulation, and which is not ordinarily worn by a person as part of a normal wardrobe.

Effective date. This order shall take effect February 15, 1957.

Minimum Wage Order No. 8-a—Governing Minimum Wage Standards in the Amusement and Recreation Industry

(Adopted December 31, 1958; effective March 1, 1959; filed January 2, 1959. Statutory authority article 19, Labor Law.)

1. Minimum wage standards.

a. *Minimum hourly rate.*

(1) All employees, except as indicated below:

$1 an hour, through September 30, 1959

$1.05 an hour, effective October 1, 1959

(2) Occupations in motion-picture theatres:

(a) Cashiers, cleaners, porters, and matrons (other than children's matrons) in motion-picture theatres:

Effective through February 29, 1960:

90 cents an hour throughout the state.

Effective March 1, 1960:

$1 an hour throughout the state.

(b) Ticket-takers and doormen in motion-picture theatres:

Effective through February 29, 1960:

85 cents an hour throughout the state.

Effective March 1, 1960:

$1 an hour throughout the state.

(c) Ushers, children's matrons, ramp and checkroom attendants, other unclassified service staff workers, and messengers in motion-picture theatres:

75 cents an hour throughout the state.

(3) Beach chair and umbrella attendants, cabana boys, and locker-room attendants at beaches and pools:

75 cents an hour throughout the state.

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"*Voluntary absence*" includes any absence from employer or his agent and not designed or planned nployee to evade minimum wage standards. "Vol- include any absence contemplated in the employ- d as a condition of continued employment; or at n of the employer or his agent; or recurrent or uch absence for medical treatment under a doc-

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No. 8-a—Governing Minimum Wage musement and Recreation Industry

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(4) Pinsetters:
13 cents a line throughout the state.

(5) Ushers at sports exhibitions:
$4 per event throughout the state.

(6) Golf caddies:
$1.25 per bag for each round of nine holes or less throughout the state.
$2.25 per bag for each round of 10 to 18 holes throughout the state.

b. *Minimum call-in pay.* Motion picture theatre ushers required to report for duty on any day, whether or not assigned to actual work, shall be paid for at least four hours, except that the guarantee shall be two hours on those days on which a theatre is open only in the evenings from 6 P.M. on.

c. *Additional rate for spread of hours.* An employee shall be paid for one additional hour at time and a half the applicable minimum hourly rate, in addition to the minimum wages otherwise required herein, for any day in which the spread of hours exceeds 11.

The "*spread of hours*" is the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty.

2. Regulations.

a. *Uniforms.* The employer shall supply, maintain, and launder required uniforms except that (1) where an employee purchases a required uniform he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages; and (2) where the employer does not provide for the laundering or maintenance of any employee's required uniform, he shall pay such an employee $1.50 per week if he works more than 30 hours weekly or $1 per week if he works 30 hours or less per week, in addition to the minimum wage prescribed therein.

A "*required uniform*" shall include any item of clothing, decoration, or ornament that an employee wears at work at the suggestion, request, or direction of the employer or his agent, or to comply with any state, city or local law, rule, or regulation, and which is not ordinarily worn by a person as part of a normal wordrobe.

b. *Lodging and meals.* Meals and lodging actually furnished by an employer to an employee may be considered a part of the minimum wage, but shall be valued at not more than:

Meals—25 cents per meal, $5.25 per week
Lodging—40 cents per day, $2.50 per week
Meals and lodging—$7.75 per week

A "*meal*" shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of foods from all four of the following groups: (1) fruits or vegetables; (2) cereals, bread or potatoes; (3) eggs, meat, fish or poultry; or (4) milk, tea or coffee, except that for breakfast, group (3) may be omitted if both cereal and bread are offered in group (2).

c. *Travel expenses.* An employee who is required by the employer to travel as part of his duties shall be reimbursed for actual travel expenses incurred.

d. *Wage payment.* Each employee shall be paid for each week not less than the applicable minimum wage, regardless of the basis of payment, whether commission, bonus, piece rate, or any other basis.

e. *No deductions.* The minimum wage of employees shall be subject to no deductions other than those authorized or required by law.

f. *Tips.* Tips or gratuities or compulsory service charges shall not be counted as part of the minimum wage.

g. *Diversified employment.* (1) An employee in the amusement and recreation industry who works at an occupation governed by another New York State minimum wage order (a) for one hour or more during any one day, or (b) for six or more hours in any one week shall be paid for all his hours of working time for that day or week at the rates contained in the minimum wage order for such other industry or the amusement and recreation industry, whichever is greater. Such employee shall be entitled to all of the benefits under any minimum wage order of either the amusement and recreation industry or the other applicable industry covering the said date period, whichever is greater.

(2) An employee in the amusement and recreation industry who works in any week solely at an occupation or in an industry governed by another New York State minimum wage order shall be covered by such order for such week.

(3) An employee who works at two or more amusement and recreation occupations for which different minimum wage rates have been prescribed (a) for one hour or more during any one day, or (b) for 10 or more hours in any one week shall be paid for all his hours of working time for that day or week at the higher paid occupation.

h. *Learner or apprentice rates.* Learners and apprentices shall be paid at not less than the minimum wage herein provided.

i. *Required records.* Every employer subject to this order shall establish, maintain, and make available for inspection at the place of employment for not less than two years, weekly payroll records which shall include for each employee: name, address, social security account number, age of males under 21, occupational classification, cash wages paid, and daily and weekly hours worked, including the exact time of arrival and departure on any day in which the spread of hours exceeds 11. In the case of pinsetters, caddies, and ushers at sports exhibitions, a record of the number of lines set, or the number of rounds caddied, or the number of events worked, shall be kept in place of the records of hours worked.

Each employer shall also make available for inspection such other records as may be kept by the employer to determine the employee's wages or income.

Time cards, time sheets, and other original time records, if any, shall be kept for at least two years and made available for inspection.

j. *Statement to employee.* Every employer subject to this order shall furnish a statement to each of his employees with every weekly payment of wages listing hours worked, rates paid, and total earnings. In the case of pinsetters, caddies, and ushers at sports events the number of lines set, or the number of rounds caddied, or the number of events worked shall be recorded in place of hours worked.

k. *Posting.* A notice issued by the Department of Labor, setting forth the provisions and regulations of this order, shall be posted in every establishment in the amusement and recreation industry in a conspicuous place where employees can read it.

3. Definitions.

a. *Amusement and recreation industry.* The "*amusement and recreation industry*" is defined to include all establishments whose primary service is to provide amusement, entertainment, or recreation, including establishments which produce and distribute motion pictures and services allied to this such as casting and rental or motion picture film or equipment. The industry also includes owners, lessees, and concessionaires whose business

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services as are allied therewith.
The industry includes but is not limited to motion picture and other
theatres, dance halls and studios, ballrooms, bowling alleys, billiard parlors,
skating rinks, riding academies, race tracks and stables, amusement parks
and centers, penny arcades and other coin-operated amusement-device par-
lors, athletic fields, arenas, ball parks and stadiums, swimming pools,
beaches, gymnasiums and slenderizing salons, golf courses, tennis courts,
carnivals, circuses, boathouses, card clubs, and other similar establish-
ments, as well as play-producing or other entertainment-producing com-
panies, theatrical agents, ticket brokers, and professional sports pro-
moters. The industry also includes allied services operated in connection
with amusement and recreation establishments, such as check rooms and
parking lots.
The industry excludes (1) establishments engaged in the operation of
radio and television broadcasting stations, and, (2) nonprofit organiza-
tions organized exclusively for religious, charitable, or educational
purposes.

b. *Employee.* "*Employee*" means a woman 21 years of age and over, and
any person under the age of 21 years employed in the amusement and rec-
reation industry. Summer theatre apprentice actors, actors employed in
New York City theatres with less than 300 seats, and rolling chair pushers
shall be excluded from this definition. (Pursuant to section 663-a of article
19 of the Labor Law all of the provisions of a minimum wage order apply
also to males 21 years of age and over.)

c. *Working time.* "*Working time*" means time worked or time of re-
quired attendance, including waiting time, whether or not work is provided,
and time spent in traveling as part of the duties of the employee. This
provision shall not apply to pinsetters, caddies, and ushers at sports
exhibitions.

d. *Motion picture service staff employee.* An employee in a motion pic-
ture theatre whose duties involve the performance of services for patrons
and require direct contact with patrons.

Effective date. This order shall take effect March 1, 1959.

DEPARTMENT OF LABOR - INTER-OFFICE MEMORANDUM

Date: October 27, 1969

To: Mr. Daniel A. Daly
Office:

From: George Ostrow
Office:

RECEIVED
DEPARTMENT OF LABOR
OCT
ADMINISTRATION
LABOR STANDARDS

Subject: Superior Ambulance Service Inc.
239 Water Street
Binghamton, N. Y. 13901

I have read Mr. Saraceno's memorandum concerning the above case along with your comments on the question of whether sleeping time is working time when employees are required to be on duty for a 24 hour period.

We have previously ruled in a similar case involving detective agency guards that such sleeping time should not be included as working time.

As you suggest we should apply the same criteria as the Federal government in allowing up to 8 hours sleeping time in such situations. We still consider sleeping time for these employees as not being hours worked when all the following conditions exist:

(1) An express or implied agreement excluding sleeping time exists;

(2) Adequate sleeping facilities for an uninterrupted night's sleep are furnished;

(3) At least 5 hours' sleep is possible during scheduled sleeping periods; (If the employees do not obtain at least 5 hours of sleep during the scheduled sleep periods all hours will be considered hours worked)

(4) Interruptions to perform duties are considered hours worked.

Please notify your supervisors of this decision.

GO:vr

GA-109 (2-65)

DEPARTMENT OF LABOR - INTER-OFFICE MEMORANDUM

Date: December 10, 1971

To: Staff

Office:

From: George Ostrow

Office:

Subject: Minimum Wage for Domestic Workers

The minimum wage for domestic workers becomes effective January 15 ,1972. Attached is a manual containing guidelines for enforcement of the minimum wage provisions which are under the Minimum Wage Order for Miscellaneous Industries and Occupations.

Some of the interpretations in the manual are of a tentative nature based on our present knowledge of the situation. As we gain experience with the order, we will be in a better position to assess whether any of these interpretations warrant revision.

Any problems encountered during enforcement of the order, particularly in the early stages, should be reported by supervisors to their Chiefs in order that we may broaden our understanding of the industry and give consideration to any changes in interpretation or emphasis that are called for.

GO:TK
Att.

cc: Commr. Dunn
Asst. Commissioners
Hearing Unit Supervisors

GA-109 (2-62)

Minimum Wage for Domestic Workers
Effective January 15, 1972

The New York State Legislature during the 1971 session extended minimum wage coverage to domestic workers, effective January 15, 1972. This new coverage was effected by amending Section 651.5(a) of the Minimum Wage Law to delete the general exemption for "domestic service in the home of the employer", as follows:

> Sec. 651.5 "Employee" includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: (a) in service AS PART TIME BABY SITTER in the home of the employer; OR SOMEONE WHO LIVES IN THE HOME OF AN EMPLOYER FOR THE PURPOSE OF SERVING AS A COMPANION TO A SICK, CONVALESCING OR ELDERLY PERSON, AND WHOSE PRINCIPAL DUTIES DO NOT INCLUDE HOUSEKEEPING."

As indicated, the exemption for domestic workers is partially continued only for part-time baby sitters and for live-in companions, as described. We have no definition for these exclusions, but based on information from employment agencies and state employment services we shall use the following guidelines which have been cleared with the Legal Unit:

PART-TIME BABY SITTERS

A part-time baby sitter will be considered one who works no more than three days per week with the same employer. Under this definition, baby sitters who work for several employers during the same week would still be exempt for each specific employer with whom they work no more than three days. Shifts that go beyond midnight, overlapping two days, should be considered as one day for the purpose of the definition.

Baby sitters working for temporary help agencies are not exempt because their work is not performed in the home of the employer, who in this case is the temporary help agency. On the other hand, part-time baby sitters referred by an employment agency would be exempt because they are employed by the householder.

Other charisteristics of part-time baby sitters are that they do not live in and that they usually work by the hour. We will have to distinguish baby sitters from persons who have care of children, such as nursemaids and governesses. Baby sitters are usually employed by several employers on a casual basis for short periods at times when the family is not at home whereas those who have care of children probably work more than three days weekly on a steady or regular basis with the same family. A baby sitter does not have other household chores as might a domestic with care of children; those caring for children usually are paid on a weekly or monthly basis. Doubtful cases should be submitted for review.

Companions To a Sick, Convalescing or Elderly Person - This exemption appears to clearly specify its applicability and should not present any significant problems. We would consider a sick person as one who is under a doctor's care; a convalescent, one who is recovering from a recent illness; and an elderly person, one in his 60's or older and who requires care in getting around in the home. To qualify for the exemption, the principal duties of these persons may not include housekeeping chores.

Other Excluded Occupations - Registered nurses are exempt as professionals under the Minimum Wage Law. (Practical nurses are not exempt.)

COVERED OCCUPATIONS under domestic coverage will include such household workers as maids, cooks, mother's helpers, cleaning women, window washers, private gardeners and helpers, snow shovelers, handyman, and all others employed in the home of the employer. Prior to this year's amendment, only persons employed in a home in connection with the employer's pursuit of a trade, occupation, profession, etc., were covered by the Miscellaneous Order - now the other occupations are covered also.

Questions may arise about independent contractors. Garderers, household cleaning companies, etc., employing their own workers have been subject in the past to the Miscellaneous Wage Order and will continue to be covered. Concerning others who do not employ help, such as itinerant handymen, casual workers who shovel snow, mow lawns, etc., the following information should be obtained and submitted for review: age of worker; student status; approximate number of families serviced; frequency and regularity of service; tools, equipment, and material used, and by whom furnished; business registrations, if any; rate of compensation - flat amount, by day, by hour, etc.; total time spent during the week at such activities; and any other pertinent information. Generally, minors under 18 years of age would not be considered independent contractors.

MINIMUM WAGE PROVISIONS FOR DOMESTIC WORKERS

Starting January 15, 1972, all the provisions of the Miscellaneous Wage Order are applicable to domestic workers. Whenever unusual problems arise, special reports should be submitted for review. If our experience warrants it, we may request a wage board for the purpose of establishing appropriate standards for household employment.

Following guidelines concerning the significant provisions of the Miscellaneous Wage Order:

HOURLY MINIMUM WAGE

The hourly rate of $1.85 should not present any unusual problems concerning day workers. Recent studies have indicated that wages for day workers are usually at or above the minimum wage; in upstate areas, wage levels may be lower.

Live-in maids have lower earnings. Studies have indicated that weekly wages for inexperienced live-in workers may range from $50 to $70. The weekly minimum wage for a live-in maid working 48 hours a week with allowances for 18 meals on six days, and seven days lodging would total $73.60.

We should carefully review working time for live-in maids due to the "on-call" nature of the job. The wage order specifies that the time an employee is available for work at a place prescribed by the employer is working time, except for the normal sleeping time of resident-employees, and except for the time an employee is free to leave the place of employment. Many domestic workers may not be free to leave the home but may have free time in their private room or quarters. Such free time shall not be considered working time. In some instances the domestic employee's duties may be a guide in determining "free time". For instance, a cook would most likely be free of duty such time that she is watching TV in the recreation room.

Some domestics work alternate short and long weeks - they may be scheduled to get extra time off every second week. Under such schedules, we will average the two-week period when computing wage compliance.

ALLOWANCES

We may expect employers will request a variety of allowances due to the personal relationships which develop with domestic workers.

Meals - Usually both the day workers and live-in maids receive meals. Most day workers receive lunch on work days, while live-ins receive three meals a day in addition to lodging. The prescribed meal allowance of 65¢ per meal should be permitted. When meal allowances are claimed, investigators should see that adequate meals approximating the "meal" defined in other wage orders are furnished.

In many instances, day workers are hired at a specific hourly rate plus free lunches. When computing minimum wage compliance, allowances should be permitted for these lunches.

Questions may arise as to the number of meals to be allowed for live-ins when employees go out for their meals on their days off. We should follow our regular policy and allow the number of scheduled meals which the employee has agreed upon, including those on non-working days. No allowance should be permitted without the employee's consent for meals not included on the schedule. However, where the employee skips a meal now and then, allowances should be permitted for the usual number that she consumes under her schedule.

Lodging - Generally, lodging allowances should be permitted for live-ins for all seven days of the week. Some variation may be necessary where an employee has a specific arrangement to sleep out on one or more nights a week but if the employer insists on a seven day allowance, a full report should be submitted for clearance with the Chief's office.

Other Allowances - Payments in kind or charges may present problems. No allowance will be permitted for second-hand clothing and other sundries which have been given to an employee.

Telephone toll charges for calls made by the employee should be permitted when claimed by the employer if the employee acknowledges making the call. Telephone bills should be examined when necessary to verify or establish the cost of the call. No allowance is to be permitted for local calls.

Transportation is frequently furnished or paid for by the employer for day workers. No allowance should be permitted where transportation was furnished pursuant to an agreement to do so free of charge. If there was no agreement to furnish free transportation, an allowance may be permitted for payments made by employers.

Special reports should be submitted concerning disputed amounts or other allowances not discussed.

(See Fringe Benefit Section.)

Uniforms - All the provisions of the Miscellaneous Wage Order concerning required uniforms are applicable. Should special problems arise, they should be submitted for review.

RECORDS

Household employers will, no doubt, be concerned about record-keeping requirements. Whatever records an employer maintains for wages such as check stubs, receipt books, etc. should be accepted. For the time being, we will also accept quarterly social security reports if the employer will write the hourly or weekly wage rates on the copy.

For an hours record, the employer may note the regular schedule for each day of the week with starting and finishing time (showing split shifts) in a notebook, receipt book, checkbook, or social security record - a notebook is preferable. One entry will be adequate except that variations should be recorded, particularly for overtime. Investigation reports should describe exactly the type of record keeping maintained.

WAGE STATEMENTS

Until further notice, notices of statement violations should not be issued but employers should be notified and encouraged to issue statements. A page from a receipt book could be used for this purpose.

Investigation reports should indicate any wage statement violation with oral notice.

POSTING

Generally, no postings will be required. Short printed summaries will be available for distribution to employers and employees.

PERMITS FOR LOWER RATES

Permits for learners, youths under 18, and handicapped persons will be issued pursuant to our regular standards.

COVERAGE UNDER OTHER LAWS

Child Labor - The child labor provisions apply to domestic workers. All domestics under 18 years of age require an employment certificate, except for baby sitters and children employed at casual employment. (However, minors 14 to 16 years of age who operate power driven lawn mowers must obtain a certificate). Minors under 14 years of age are not permitted to work as domestics. The children of household employers are not subject to the child labor provisions.

Hours of Work - Sections 170 and 171 apply to domestic workers under 16 years of age and to 16 year old students. No posting schedules will be required.

Prohibited Occupations - The provisions of Section 133 are applicable for any prohibited occupations around the home - exterior painting, construction work, etc.

Day of Rest - Generally, the provisions of Section 161 are not applicable to domestic workers. Technically, there is coverage for watchmen, engineers, firemen, janitors, etc., in "dwellings". Violations involving such employment should be submitted for review. However, domestics under 16 and 16-year old students may not work more than six days a week pursuant to Sections 170 and 171.

Meal Periods - Section 162 applies to domestic workers. However, since we have had few, if any, complaints from domestics, we can assume that satisfactory arrangements are usually agreed upon. We should not disturb existing arrangements except for specific complaints about meal periods.

Wage Payment Laws - The Wage Payment Laws are applicable to domestic workers. Domestics may file claims for unpaid wages and for unpaid fringe benefits.

Frequency of Payment - Domestic workers are considered manual laborers and therefore required to be paid weekly (or every two weeks in full - Sec. 191.1a). Commonly, day workers are paid on a daily basis - see Sec. 191.3 which requires payment on the regular pay day for terminated employees.

Cash Payment Provisions of Section 192 are applicable. However, a permit to pay by check will not be required except on complaint or where NG checks, check cashing costs, or lack of check cashing facilities are involved.

Deductions - We are aware that some employers make deductions with the employee's approval for employment agency fees, advances for transportation from long distances, and long distance telephone calls. There may be others we are not aware of. Wage deductions for employment agency fees, visas (overseas domestics) and other costs necessary for obtaining domestic employment are considered as being for the benefit of employees and therefore are permissible under Sec. 193. (It should be noted that this interpretation does not apply to other occupations except for placements at resort hotels).

Generally, deductions should not exceed 10% of wages which limitation applies to garnishees and wage assignments. However, concerning out-of-state persons placed by employment agencies the deductions, as provided by the Employment Agency Law, may be permitted to repay the total amount owed in four equal weekly payments for out-of-state domestic workers and in six equal monthly payments for persons recruited from outside the continental United States. For verification of the amount owed, investigators should examine the employment statements required by the Employment Agency Law which set forth terms of repayment. Any questions about such placements should be referred to the Employment Agecny Unit.

In the absence of a complaint, violations should not be reported but the employer should be informed of the provisions of Sec. 193, concerning the need for written authorization and the 10% limitation, as discussed in the preceding paragraph.

Fringe Benefits Provisions of 198-c are applicable for benefits agreed upon between employee and employer.

Where other benefits are agreed upon such as sick leave, holiday pay, vacation pay, free transportation for day workers, etc., payments for such benefits may not be used to offset the minimum wage. Where there is no agreement to provide such benefits, credit may be permitted during the payroll period in which the payment is made.

However, allowances for meals and lodging furnished by an employer may be permitted even under an agreement to provide such benefits - see "Allowances".

Unemployment Insurance - Coverage is limited to those employers who pay more than $500 in a calendar Quarter for household services.

Workmen's Compensation - Domestics who work for the same employer at least 48 hours a week are covered. (Before July 1, 1970, coverage applied only in cities or villages of 40,000 or more.)

Social Security Law - Any domestic paid $50 or more in cash wages by one employer in a calendar quarter is covered.

INSPECTION PROCEDURES

Minimum Wage inspections for domestic workers will be made only on complaint.

Generally, complaints will be assigned for a field visit. However, before visiting a home, a letter should be sent to notify the household employer about the complaint and to request the employer to telephone us to arrange an appointment.

If the employer responds and is willing to pay the claimant in full or come to the office with payrolls, a home visit will not be necessary.

Where a claim is handled and completed at the office and an underpayment is reported, Item 62 "time for Investigation" etc., of the IR-129 inspection report should be marked "office". The information concerning the time for investigation should be shown in "Remarks", under Item 60. If no underpayment is reported and the complaint was handled over the phone only, no IR-129 should be prepared; if handled with the employer in the office and records were examined or collateral visits are made, an IR-129 report should be submitted whether or not an underpayment is reported.

If the employer does not cooperate and refuses to make an appointment and an underpayment is reported, the case should be referred for a hearing after obtaining appropriate evidence.

When making an inspection, our regular procedures should be followed except that notices of violation should not be served. The employer should be notified orally of violations and all violations should be reported.

IR-129's should be completed, indicating "private household" as the industry. All reports should contain a description of the records, if any, maintained by the employer. In all cases the investigator should try to obtain the business addresses of employers, both husband and wife.

Since we are inspecting only on complaint, it is not likely that we will have difficulty interviewing the person who made the complaint. However, if the complainant is still employed and the employer refuses to permit employee interviews in the home, a letter or telephone call to the complainant should be used to arrange an appointment with the complainant off the premises on her day off or on her free time. The same procedures should be followed for any other domestics who should be interviewed.

Questions may arise as to whether the husband or wife is the employer. Usually, the one who personally hired, supervised, and paid the employee should be considered

as the employer. Where these responsibilities are divided between husband and wife, a description of responsibilities for each should be described; each case will be reviewed to establish the responsible person and, if necessary, we may hold both husband and wife as the employer. If wages are paid by check, we should know who signs the check, the name of the bank, etc.

In some instances, even though we may consider the wife as the employer, she may refer us to her husband. We should comply with her request but try to get information on the spot from the wife.

Where employment is denied, we should obtain from the complainant the name and address of any witnesses who had knowledge of her employment and of the person who referred her to the job.

NEW YORK STATE DEPARTMENT OF LABOR

DIVISION OF LABOR STANDARDS

INVESTIGATOR'S MANUAL

OF

INTERPRETATIONS

MINIMUM WAGE ORDER FOR THE MISCELLANEOUS INDUSTRIES AND OCCUPATIONS (OTHER THAN NON-PROFITMAKING INSTITUTIONS)

PART 142 OF OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS

EFFECTIVE JULY 1, 1970

(ISSUED DECEMBER, 1972 WITH UPDATED MATERIAL)

INTRODUCTION

A 1970 legislative amendment to the New York State Minimum Wage Act increased the minimum wage rate from $1.60 an hour to $1.85 an hour effective July 1, 1970. The amendment also provided for proportionate increases in all other wage order rates and allowances.

Listed below are the rates and allowances of the Minimum Wage Order for Miscellaneous Industries and Occupations, Part 142 of Title 12 of the Official Compilation of Codes, Rules and Regulations effective January 1, 1967 and the rates and allowances in the new order effective July 1, 1970, for other than non-profitmaking institutions.

	January 1, 1967	July 1, 1970
Basic Hourly Rate	1.50 per hour (1/1/67) 1.60 per hour (2/1/68)	$1.85 an hour
Overtime Rate	Non-res / Res. $2.25 (1/1/67) 44 hrs / 48 hrs 2.40 (2/1/68) 42 hrs / 46 hrs " (2/1/69) 40 hrs / 44 hrs	Non-Res. / Res. 2.77 1/2 - 40 hrs / 44 hrs
Tip Allowance	20¢ and 30¢ (1/1/67) 25¢ and 40¢ (2/1/68)	30¢ and 45¢
Meal Allowance	55¢ per meal	65¢ per meal
Lodging Allowance	65¢ per day Apt - $1.30 per day	75¢ per day Apt - $1.50 per day
Uniform Maintenance Rate		
More than 30 hours	$2.00 per week	$2.30 per week
21-30 hours	$1.50 per week	$1.75 per week
20 hours or less	$1.00 per week	$1.15 per week
Youth Rate	25¢ per hour less	30¢ per hour less
Executive and Administrative Exemption	$120 per week	$138.75 per week

SUB-PART 142-1 COVERAGE

The minimum wage order for Miscellaneous Industries and Occupations applies to all employees not covered by another wage order and not exempted by statute. It applies to all industries and establishments not covered by another wage order. (Note also, that employees who are covered under the Federal Fair Labor Standards Act are also fully covered under the applicable State wage orders).

Listed below are some of the industries covered by the Miscellaneous wage order - although not necessarily included in our regular inspection program.

- Miscellaneous Personal Services
  - proprietary hospitals and nursing homes
  - nursery schools and day camps
  - barber shops
  - Shoe repair and shoe shine parlors
  - parking lots, garages, car wash
  - funeral parlors
  - garment alteration and repair
  - custom made shops
  - tuxedo and dress for hire
  - car rentals
  - medical and dental labs
  - offices of physicians, dentists, chiropractors, optometrists, etc.
- Miscellaneous Business Services
  - detective and guard agencies
  - employment agencies
  - temporary help agencies
  - legal and accounting offices
  - addressing and mailing services
  - messenger service
  - photostat and duplicating services
  - commercial art
  - trucking and delivery
  - taxicab services
- Finance and Insurance
- Manufacturing
- Mining, construction, public utilities
- Newspaper, radio, television, publishing, communications, etc.

Some occupations are covered by the Miscellaneous order because they have been excluded from other wage order coverage, either by specific provision in the other wage order, or by administrative decision. For example, all employees of a day camp - food service, amusement, etc. - administratively are to be covered under the Miscellaneous order. All employees of a bungalow colony - maintenance, lifeguards, etc. - are to be covered under the Miscellaneous order. Also, all employees of detective and guard agencies and temporary help agencies will be covered under the Miscellaneous Order on a general basis, subject to review in specific instances, even through technically there could be coverage under another order or under several orders during a single week. Covered by the Miscellaneous order by virture of specific exemptions from other orders are the following:

Excluded from Amusement and Recreation Order

Summer theatre apprentice actors (covered by Miscellaneous Wage Order only for time spent at non-professional work)

Rolling Chair pushers

Excluded from Beauty Service Order

Barbers, manicurists and other workers in barber shops which perform services primarily for men

Excluded from Building Service Order

Building trades contractors engaged exclusively in the field of construction.

Employees of an owner or lessee of a building occupying the entire building for his own use, if they work exclusively in that building. (Coverage under other wage orders may be possible in some instances).

Excluded from Laundry-Cleaning & Dyeing Order

Cleaning, dyeing or processing occupations incidental to the manufacture of new garments or second hand material processed for resale

Excluded from Hotel Industry Order

Employees in establishments in which lodging accommodation is not available to the public or to members or guests of members but is incidental to instruction, medical care, religious observance or to the care of handicapped or destitute persons or other public charges.

Excluded from Restaurant Order

Employees in eating and drinking places operated by establishments where the service of food or beverage is not available to the public but is incidental to instruction, medical care, religious observance, or the care of handicapped or destitute persons or other charges. (Coverage under the Miscellaneous Order also applies to outside contractors which provide such services in non-profit educational institutions. (Legal Decision)

MINIMUM WAGE RATES AND ALLOWANCES

This wage order calls for a basic hourly rate, an overtime rate, and a uniform maintenance rate. It has no provision for daily call-in, part-time, weekly, spread of hours, or split shift rates.

142-2.1 Basic Hourly Rate

On and after July 1, 1970 - $1.85

"Working Time" defined in this sub-part is discussed at the end of the MINIMUM WAGE RATES AND ALLOWANCES section.

142-2.2 Overtime Hourly Rate

The overtime rate is one and one half times the basic minimum hourly rate before allowances for meals and lodging but after allowance, if any, for tips. It is applied for working time after 40 hours in a week for non-residential employees, and after 44 hours in a week for residential employees.

Example: A non-residential, non-tipped employee works six days, 9:00 A.M. to 5:30 P.M. with one hour meal period, for a total of 45 hours. The minimum wage is computed as follows:

40 hours	x	$1.85 =	$74.00
5 hours	x	2.77½ =	13.88
			$87.88

For examples of the overtime rate where allowances are part of the minimum wage, see "Allowances" section which follows.

142-2.3 Allowances

(a) Allowances for Meals, Lodging and Utilities

Meals - Meals furnished by an employer to his employees may be considered part of the minimum wage but shall be valued at not more than 65¢ per meal. Although not defined in the wage order, a "meal" shall provide adequate portions of a variety of wholesome foods. Meals shall be deemed to be furnished to an employee when customarily eaten by the employee. The mere availability of the meals is not a sufficient basis in itself to permit the employer an allowance for meals. However, where an employee misses, on occasion, a customarily eaten meal, the employer may be granted the allowance for the missed meal.

Where members of an employee's family receive meals, the 65¢ per meal allowance for such meals will administratively also be permitted as part of the minimum wage.

<u>Lodging</u> - Lodging furnished by an employer to an employee may be considered part of the minimum wage but shall be valued at not more than 75¢ per day.

"Lodging" means living accommodations which meet generally accepted standards of adequacy and sanitation. The mere availability of the lodging accommodation in itself shall not be the criteria for granting of an allowance. The lodging accommodation must be actually used by the employee. Residential employees generally live on the premises of the employer for a full week. Where the employee has the exclusive use of the lodging accommodation for the full week, lodging allowance may be permitted for 7 days.

The value of an apartment and utilities furnished an employee shall be \$1.50 per day, or the value of prevailing rentals in the community for similar apartments, whichever is lower. No "apartment" allowance may be granted unless it contains cooking and refrigeration facilities. In the case of an apartment furnished an employee and occupied by the employee and his family, the allowance shall be \$1.50 per day for each occupant, but the total allowance shall not exceed the rental value prevailing in the locality for comparable apartments.

(b) <u>Allowances for Tips</u>

Tips may be considered a part of the minimum wage if the particular occupation is one in which tips are usually given (barbers, bootblacks, etc.); there is substantial evidence that the employee received in tips at least the amount of the allowance claimed (e.g. statement signed by employee); and the allowance is recorded on a weekly basis in the payroll records.

Allowances for tips shall be:

30¢ an hour - where weekly average of tips is between 30¢ through 44¢ an hour
45¢ an hour - where weekly average of tips is 45¢ per hour or more.

No allowance for tips shall be permitted for an employee whose weekly average of tips is less than 30¢ an hour. Note that under this order tips are averaged on a weekly basis, as distinguished from some wage orders where the tip allowance is not permitted on nonservice days.

<u>Examples:</u>

A non-residential, non-tipped, employee works six days, 45 hours a week. He receives one meal a day. The minimum wage is:

40 hours x \$1.85	=	\$74.00
5 hours x 2.77½	=	13.88
		\$87.88
Meals - 6 x 65¢	=	3.90
S.M.W.		\$83.98

A parking lot attendant, working 54 hours a week, earns an average of $50 a week in tips. He receives six meals a week. (Note that no matter how high tip earnings may be, allowance may not exceed 45¢ an hour. Applicable basic rate is $1.85 less 45¢ or $1.40)

40 hours x $1.40	=	$56.00
14 hours x $2.10	=	29.40
		$85.40
Meals - 6 x 65¢	=	3.90
S.M.W.		$81.50

An attendant at a private nursing home works six days, 48 hours a week. He receives lodging and three meals a day for the entire week. He earns an average of $10.00 a week in tips. (Note that no tip allowance may be granted where tips do not average at least 30¢ an hour).

44 hours x $1.85	=	$81.40	
4 hours x $2.77½	=	11.10	
			$92.50
Meals - 21 x 65¢	=	$13.65	
Lodg. 7 x 75¢	=	5.25	
Total allowances			18.90
			$73.60

Appropriation of Tips - Under Section 196-d of the Labor Law, no employer or his agent may demand or accept, directly or indirectly, any part of the gratuities received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for any employee. See the Tip Appropriation section in the Restaurant Manual for further details of Departmental guidelines relating to this subject.

(c) Required Uniforms

No allowance for the supply, maintenance or laundering of required uniforms shall be permitted as part of the minimum wage. Where an employee purchases a required uniform he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages. Where the employer fails to launder or maintain a required uniform for any employee, he shall pay such employee $2.30 per week if the employee works more than 30 hours weekly, or $1.75 per week for more than 20 to 30 hours per week, or $1.15 per week for 20 hours or less per week, in addition to the minimum wage otherwise due the employee.

Example: a guard maintains a required uniform which his employer has provided. He works 48 hours a week.

40 hours x $1.85	=	$74.00
8 hours x $2.77½	=	22.20
		$96.20
Uniform Maint.		2.30
Minimum Wage		$98.50

In accordance with our new policy on required uniforms as outlined in memo to supervisors dated May 25, 1971, employers are responsible for the cost and maintenance of required uniforms for all employees, even where such costs if borne by the employee would not depress the minimum wage. Deductions from wages for the cost or maintenance of required uniforms, or charges for such a purpose in a separate transaction are deemed to be in violation of Section 193 of the Labor Law.

If a uniform is not required either by the employer or by law or regulation, the employer has no responsibility for its supply, or maintenance.

Working Time

Section 142-2.1 (b) of the wage order requires that minimum wages be paid for "time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee."

Example:

Employee reports for work as instructed at 9:00 A.M. No work is provided but he is told to wait. At 10:00 A.M. he is assigned to work. Employee must be paid for the hour from 9 to 10 because he was required to be available for work. During that hour he was "on call".

In othersituations, it will be necessary to distinguish between "on call" and "subject to call" time. In general, when an employee is subject to call, only the hours actually worked are considered to be working time; when an employee is on call, the total hours of work plus required waiting time are considered working time. More specifically --

On call time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties. They are considered to be working all the hours that they are confined to the workplace.

Subject to call time is that time during which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities. In some cases, arrangements are made for employees to be available for assignments by leaving word as to where they can be reached. Sometimes, they may be restricted to a specified area, to be reachable by telephone or otherwise, to report for the work assignment within 15 to 30 minutes, etc. For such persons, working time starts when they are actually ordered to a specific assignment.

<u>Example</u>:

An ambulance driver for a proprietary hospital works from 6 A.M. to 3 P.M. with one hour for lunch. From 3 P.M. to 7 P.M. he is free to be anywhere on hospital grounds or he may leave the grounds if he can be reached and become available within 30 minutes. From 7 P.M. to 9 P.M. he is required to be available in the emergency room to answer emergency calls.

Working time is as follows:

From 6 A.M. to 3 P.M. (1 hour lunch)	8 hours
From 3 P.M. to 7 P.M. (Subject to call time) Working time only if called upon and only for actual time spent working. If not called upon	0 hours
From 7 P.M. to 9 P.M. (on call time)	2 hours
Total working time	10 hours,

plus any time actually worked during "subject to call time".

The above distinctions have particular significance with regard to a residential employee. The wage order provides that "a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work: (a) during the <u>normal sleeping hours</u> solely because he is required to be on call during such hours, and (b) at any other time when he is <u>free to leave</u> the place of employment."

<u>Normal sleeping hours</u> shall be presumed to be 8 hours a day. Where a variance from 8 hours is claimed, any reasonable agreement of the parties shall be accepted.

<u>Free to leave</u> is that period of time when an employee may engage in private pursuits such as meal periods, shopping, or any other period of complete freedom from his duties, when he may leave the premises for purposes of his own. For this purpose, "premises" is construed to be that place or area in which the employee is required to perform his duties. As shown above, it does not necessarily mean the entire confines of the establishment.

<u>Example</u>:

A resident employee in an undertaking parlor does porter work from 8 A.M. to 5 P.M. with one hour for lunch. From 5 P.M. to 8 P.M. he is free to leave the premises. From 8 P.M. to 8 A.M. he is required to remain on the premises to take phone calls and messages.

Working time is as follows:

From 8 A.M. to 5 P.M. - one hour for lunch	8 hours
From 5 P.M. to 8 P.M. - free time	
From 8 P.M. to 8 A.M. - deducting 8 hours for sleeping time and one hour for dressing, breakfast etc. the balance of "on call" time is	3 hours
Total working time	11 hours

Some employees, such as ambulance drivers, are required to be on duty for a continuous period of 24 hours or more, and although they are not "residential" employees, they are able to sleep on the employer's premises while on call. In such circumstances, sleeping time may be excluded from working time under the following conditions: (Administrative guidelines)

1. The employer and the employee agree to exclude from working time a bona fide, regularly scheduled "sleeping period" of not more than 8 hours. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.

2. Adequate sleeping facilities are provided.

3. During a given 24 hours on duty, the scheduled sleeping period is confined to a specified period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period, will not be excluded from working time.

4. If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.

5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

In similar fashion, where the employer and employees agree to exclude bona fide meal periods, such meal period time, up to a maximum of three hours during the 24 hour period, may be excluded from working time.

Waiting Time in Grading Houses

For minimum wage purposes, all waiting time at grading house of one hour or less is considered as working time. Where more than one hour of waiting time is involved, a detailed report is to be submitted for a determination. The report should include such information as the reason for the stoppage of work; the amount of waiting time incurred; a description of the work site as distinguished form the grading house premises or other premises where employees worked; what instructions if any were given to workers as to the time they should report back to work; what limitations, if any, were placed on their leaving the work site; how the employees used the time, etc.

Training programs

In some cases, employers have attempted to set up "pre-employment" training programs claiming the trainees were not employees subject to the minimum wage law. Our counsel has held that generally trainees are deemed individuals "employed or permitted to work by an employer in any occupation" within the framework of Section 651 of the Labor Law.

When investigating the status of training programs, one of the key issues is whether the work in the training program is productive for the firm. Other questions that should be answered by the investigator are: Is this training for a specific job? If not, why does the company give the course. The investigator should give a detailed description of the firm's operation and of the training course including the equipment, materials, and premises used for such training. Why do people take the course except if there are jobs with the company upon completion of the course. How does the company recruit its trainees for the course? Are there jobs available with the company upon completion of the course. All of this information should be reported by the investigator at the time of investigation.

Where the trainees are deemed to be "employees" and the training course is of two weeks duration or more, the employer may be eligible to apply for learners certificates which authorize payment of specified sub-minimum wages for the specified learning period. See page13for further discussion of learners.

REGULATIONS

42-2.4 Employer Records

Every employer shall establish, maintain and preserve for not less than six years weekly records which shall show for each employee: name and address; social security number; daily and weekly hours; gross wages; deductions and allowances; and cash wages paid. Records shall also indicate handicapped, learner, apprentice and student status, where certificates have been issued, and shall contain statement from school when student status is claimed.

For staff counselors in a childrens' camp, and for executive, administrative and professional employees, the records shall show the employee's name and address, social security number, description of occupation; wages for each payroll period, and allowances, if any, except that wages and allowances need not be shown for professional employees.

Employers, including those who maintain their records containing the information required at a place outside of New York State, shall make such records, or sworn certified copies thereof, available upon request of the commissioner at the place of employment.

For recording allowances, payroll records should be deemed adequate where they are maintained in accordance with the requirements of another agency, so long as sufficient information is available to make a minimum wage determination.

142-2.5 Statement to Employees

This wage order requires an employer to furnish a statement with every payment of wages to his employees listing period covered, hours worked, rates paid, gross wages, allowances if any, all deduction and net wages.

The investigator is to accept, upon the initial visit to an establishment, any statement that the employer uses in attempting to meet this requirement. He is to instruct the employer that full compliance in the future will be required.

142 2.6 Posting

A "Summary of Laws" including the provisions and regulations of this order must be posted in a conspicuous place for employees to read. An employer must also post any certificates issued by the Commissioner for employment of learners at wages lower than the prescribed minimum.

142 2.7 Basis of Wage Payment

The minimum wage provided by this order shall be required for each week of work regardless of the frequency of payment, whether the wage is on a commission, bonus, piece rate, or any other basis.

This regulation requires the prompt payment of minimum wages - not later than an employee's next regular pay day. (Under Section 191.1, manual workers must be paid weekly, not later than 7 days after the end of the week in which wages are earned. Payment every two weeks is permitted if it includes all wages earned through pay day. Commission salesmen must be paid in accordance with the agreed terms of employment but not less frequently than once a month. Other employees must be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.)

We have had some problems in determining minimum wage compliance in employment agencies where placement employees are paid on a commission basis. Since commissions are not deemed "earned" until the agency receives the placement fees, some time may elapse between the placement and the required payment of commissions to the employee. While there is no requirement in the law that placement managers must be paid weekly, it is our policy - as with automobile salesmen - to instruct the employer to set up a "weekly draw" against commissions in the amount of the minimum wage, to assure compliance with the minimum wage law.

Where an employer either by established practice or express agreement provides "fringe benefit" payments such as for hospitalization and group insurance, or vacation pay, or holiday pay, or a Christmas bonus, or other similar supplement pay, he is required to pay both the minimum wage and the agreed benefits, without any offset of the supplement pay against any minimum wage underpayment. However, where no agreement exists, and the wage supplement is discretionary with the employer, credit for supplement pay may be allowed in the week that such monies are paid to the employee, but any excess credit may not be prorated beyond such week of payment.

142-2.8 Deductions and Expenses

The minimum wage of employees shall be subject to no deductions other than those authorized by law or for allowances permitted by this order. The minimum wage shall not be reduced by expenses incurred by an employee in carrying out duties assigned by his employer. For example, an employee who is required by an employer to travel as part of his duties must be reimbursed for any travel expenses to the extent that the expense depresses the wage below the minimum.

Deductions from wages which are voluntary and for the direct benefit of the employee are permissible, such as savings bonds, union dues, group insurance, and contributions to charities. Permissible deductions also includes taxes, wages assignments for the benefit of a third part, and garnishees.

Some examples of prohibited deductions are deductions for spoilage or breakage; deductions for cash shortages or losses, or errors on checks or unpaid checks, fines or penalties for lateness, misconduct or quitting by an employee without notice.

Deductions from wages for such items also are prohibited under Section 193 of the Labor Law, which is applicable to all employees including those who earn more than the minimum wage. Under departmental policy, as described in memo to Supervisors dated February 8, 1972, we have extended the statutory prohibition to so called voluntary repayment arrangements by transactions separate and distinct from the payment of wages - since in effect such arrangements enable the employer to accomplish indirectly what the law directly prohibits.

Accordingly, any deduction - or separate repayment by the employee - for cash shortages, breakage, or other similar items which reduces the minimum wage is to be computed as a minimum wage underpayment. Where such deductions or separate repayments do not depress the minimum wage, they will be deemed violations of Section 193 and the amounts involved are collectible by the Department as illegal deductions.

142-2.9 and 2.10 Learners and Apprentices

Under provisions of Section 655 of the Minimum Wage Act, the Industrial Commissioner, upon recommendations of a Wage Board, may issue regulations regarding sub-minimum rates for learners and apprentices, and certain other categories of workers, e.g. handicapped workers.

Regulations authorizing employment of learners and apprentices at subminimum rates are contained only in the wage order for Miscellaneous Industries and Occupations. All other industry wage orders specifically prohibit lower rates for learners and apprentices.

142-2.9 Learner

The term "learner" means a person who is participating in a bona fide training program with formal instruction and supervision for an occupation in which he is employed, the required training period for which is recognized to be at least two weeks.

An employer who wishes to employ learners at less than the minimum wage must file application for a certificate with the Commissioner concerning: occupation for learners; duration of learning period; nature and extent of instruction and supervision; and such other information as may be required. An investigation is generally made upon such application. Investigations may not be necessary when sufficient experience and standards have been developed concerning the occupation involved. However, investigation is mandatory when a learning period of more than ten weeks is requested.

The certificate issued will contain name and address of employer, number of permitted learners, and rate of pay for the learners. This may not be less than 75% of the basic hourly rate after allowances. The certificate must be retained by the employer for a period of six years.

Certificates have been issued for the following classifications of learners:

X-ray Technicians

First year of employment as a learner - 75% of minimum rates
Second year of employment as a learner - 85% of minimum rates

Funeral Director Trainees

After completion of one year at a school for funeral director:

First six months of training (employment as "learner")	-	85% of minimum
Next six months	-	90% of minimum
First six months	-	75% of minimum
Second six months	-	80% " "
Third six months	-	85% " "
Fourth six months	-	90% " "

Learners certificates have also been issued for Nurses Aides (75%-80% for up to eight weeks); shoe repairman (75% for 10 weeks); and dental assistants (75% for ten weeks.) Certificates have also been issued for an advertising lay out assistant, chiropractic assistant, architect's assistant, window trimmer trainee, weaver trainee, and others.

142-2.10 Apprentice

The term "apprentice" means a person whose work at an establishment is in an apprenticeable trade or occupation and is part of a bona fide training program leading to qualification as a journeyman in the trade or occupation, such training program requiring at least two years (4000 hours).

An employer to qualify for a certificate to employ apprentices must file an application with the Commissioner listing all required information. The certificate issued will contain name and address of employer, specified occupation, length of apprentice periods and rate of pay for each period. (Rate of pay for starting period may not be less than 75% of the minimum hourly rate after allowances.) It must be retained by the employer for a period of six years.

Certificates have been issued for the following classifications of apprentice:

Barbers

Barber School Graduate Apprentices:

First six months of apprentice employment	- 75% of minimum
Second six months	- 85% " "
Third six months	- 95% " "

Non-School Apprentices:

First year	- 75% " "
Next six months	- 85% " "
Following six months	- 95% " "

Television Repairmen

First 1,000 hours	- 75%
Second 1,000 hours	- 83 1/3%
Third 1,000	- 93 1/2%

Certificates have also been issued for auto mechanics, commercial photographers, opticians, plumber's apprentice, printers, dental mechanics, upholsterers and others.

142-2.11 Student

The term "student" means a person who is enrolled in and regularly attends during the daytime a course of instruction leading to a degree, certificate, or diploma offered at an institution of learning, or who is completing residence requirements for a degree. A person is deemed to be a student during the time that school is not in session if he was a student during the preceding semester.

A. In a camp

(For profitmaking camps which offer lodging, see Hotel Order. Also note, all employees of a day camp are covered under Miscellaneous Order by administrative decision.)

An employer to qualify for a certificate to employ students must file an application with the Commissioner concerning:

a. length of time the camp is opened
b. occupations for students
c. period of employment of students. The length of employment cannot exceed 17 consecutive weeks in a year.

The certificate issued will contain name and address of employer and authorization to employ students at a wage 20% lower than the minimum hourly rate after allowances for tips, meals, and lodging.

B. Obtaining vocational experience

A student enrolled and regularly attending a non-profitmaking religious, charitable or educational institution shall not be deemed an employee if he works for this institution in any capacity, or for an establishment covered by this order, if under the curriculum requirements of his institution he is required to obtain vocational experience in another establishment. The establishment shall maintain evidence that the "student" is fulfilling curriculum requirements by having a letter from the institution stating name of student, length of service required and type of experience. (There is no rate of pay established for such students).

142-2.12 Impairment of Earning Capacity

"Impairment of earning capacity" may be either by age (at least 65 years), or by physical or mental deficiency, or injury.

A person whose performance in the duties assigned to him, is hindered by reason of age, mental or physical deficiency or injury, comes within the definition. Such a person is deemed to be a "handicapped worker".

An employer to qualify for a certificate in this classification must have an application completed, signed by the employer and employee, and filed with the commissioner. A special investigation will have to be made. (In New York City, applications and special investigations for a handicap certificate are handled by the Permit Unit). Minimum wage inspections should not be completed, or underpayment computed, until a determination has been made.

The handicap certificate when issued will contain the name and address of the employer, name of employee, occupation at which handicapped worker is to be employed; reasons why such handicap impairs earning capacity, rate to be paid employee (the rate of pay may not be less than 75 per cent of the basic hourly rate after allowances, although the commissioner may authorize a payment at a lower wage where the employment is part of a rehabilitation program).

The certificate shall be retained for six years after termination of the period during which the handicapped worker was employed at a sub-minimum wage.

Example: An employer has been issued a certificate for his handicapped worker authorizing payment at not less than 75% of the hourly rate, after allowances. The employee works 40 hours a week and receives 5 meals a week. The minimum wage (7/1/70) for this worker is:

40 hours x $1.85 = $74.00
5 meals x 65¢ = -3.25
$70.75 x 75% = $53.06 S.M.W.

142-2.13 Minimum Wage for Youth under 18 years of age

The youth rate provision, designed to prevent curtailment of opportunities for employment of youths, was introduced in the wage order effective January 1, 1967. Under those orders, an employer to whom a youth rate certificate was issued, was permitted under prescribed conditions to pay a limited number of youths under 18 years of age 25¢ an hour less than the applicable wage order minimum.

Under the new orders which became effective July 1, 1970, the youth rate was changed from 25¢ to 30¢; all other regulations were unchanged. (Certificates which were issued under the previous order at the 25¢ rate will remain valid for the 30¢ rate. Employers need not apply for a new certificate.)

The following guidelines will apply to enforcement of the youth rate:

Quota - The youth rate may be paid to no more than two employees on any day, or more than 10% of the total number of employees, whichever is greater. If 10% of the total number of employees results in a fraction of ½ or more, the faction will be recognized as an additional eligible youth. Where an employer applies the youth rate to more than his quota of youths, he shall select the employees who are subject to the underpayment. If the employer fails to make a selection, the investigator should choose the employees (s) producing the smallest underpayment.

Legal Employment - The youth rate may not be applied during any period when the youth is illegally employed, e.g. without an employment certificate, in a prohibited occupation, or during prohibited hours. In the latter case, the youth rate would be applied for all legal hours so far as they can be ascertained. The illegal hours worked shall be paid at the regular rate.

Verification of qualified youth - For each youth employed under the youth rate, the employer is required to keep on file with his records proof of age as certified by the school of last attendance or the date of birth and the number which appears on the youth's employment certificate. Those records must be kept and made available for inspection for a period of not less than six years from the date of issuance. Where the required information is not provided, the employer may be granted a reasonable time to produce proof of age.

Other Certificate - Administratively, we will not permit the youth rate to be applied to an employee for whom another certificate has been issued (e.g. Handicapped Certificate) authorizing payment of less than the minimum rate.

FLSA coverage - Federally covered employees are also covered by all provisions of the State wage orders. In any employment covered by both State and Federal laws the higher standards govern. Although the employer may be entitled to pay the State youth rate, this does not excuse non-compliance with the Federal requirements. In situations, therefore, where the $1.60 Federal rate is applicable, the employer will not be able to take full advantage of the State youth rate, now $1.55 per hour.

Rate - The youth rate provisions authorizes employment at a minimum wage which is 30¢ an hour less than the applicable minimum wage specified in the order.

Examples:

Basic rate of $1.85 becomes $1.55. A youth who works 40 hours a week must be paid at least $62.00 (40 x $1.55).

Overtime rate of $2.77½ becomes $2.47½. A youth who works 48 hours a week must be paid at least $81.80 (40 hours x $1.55 = $62.00 plus 8 hours at $2.47½ = $19.80 for a total of $81.80).

142-2.14 - Seasonal Workers in the Establishment of a Canner or Freezer

Under a special certificate, canners or freezers may employ seasonal workers during first processing, canning or freezing of perishable fruits or vegetables at $1.70 an hour. Although the wage order defines a seasonal worker as one employed for not more than seven months beginning with June 1 and ending on December 31, administratively we will apply the definition to a worker who is employed not more than 30 weeks during a calendar year. The 30 weeks need not be continuous. An employee who works more than 30 weeks in the calendar year must be paid $1.85 per hour plus the applicable overtime for all hours worked in all weeks in the calendar year.

Note also that under Sec. 655.5(b) certificates have been issued allowing special overtime standards for employees of a canner or freezer for 20 weeks in the year.

Employment Covered by More than One Wage Order

This order contains no regulation regarding employment covered by the Miscellaneous Order and by another industry wage order. In the event of such diversification of employment, the provisions of Regulation "Employment Covered by More than One Wage Order" under the other wage order shall apply.

142-2.15 Employee

"Employee" means any individual permitted to work by an employer. In certain occupations, there have been cases of alleged independent contractor status. The mere label of "independent contractor" does not necessarily remove someone from the category of a worker. However -

Where barbers, bootblacks, and manicurists in barber shops alleged to be independent contractors, earn well over the minimum wages from all sources of income, including gratuities, we will administratively accept the situation without spending time to secure legal clearance on whether an employer/employee relationship exists. Where earnings are borderline, and a record of hours worked essential to a finding of future compliance, the investigator will proceed to secure a determination of an employer-employee relationship. Some of the factors to be considered in making such a determination are: the degree of supervision, direction and control over the work performed; who furnishes supplies; the amount and kinds of payments to the owner for the use of shop equipment and supplies; the owner's authority to fix hours of work; who carries the public liability and other insurance; gratuities; and other similar considerations.

Certain individuals are exempt from the definition of "employee" by the statute. Among these are individuals employed by a federal, state or municipal government or political subdivision, and the following:

(1) Part-Time baby sitters in the home of the employer, or someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping.

Prior to January 15, 1972 an exemption was provided for "domestic service in the home of the employer" -- work in or about the domocile of an employer in his capacity as a householder. An amendment effective January 15, 1972 enacted by the 1971 Legislature removed this exemption and substituted the above, thus extending minimum wage coverage for the first time to all domestic workers, except part-time baby sitters and live-in companions to the sick or elderly. Domestic workers are covered under this wage order. A separate manual dated 12/10/71, contains guidelines for enforcement of the minimum wage provisions for domestic workers.

(2) Labor on a Farm

The term "farm" includes stock, dairy, poultry, fur-bearing animal, fruit, and truck farms, plantations, orchards, nurseries, greenhouses, or other similar structures, used primarily for the raising of agricultural or horticultural commodities.

The term "labor on a farm" includes the service of any person permitted to work on a farm by an employer in connection with:

(a) cultivating the soil;
(b) raising or harvesting any agricultural or horticultural commodity, including the raising or hatching of poultry, the raising, shearing, feeding, caring for, training, and management of livestock, bees, fur-bearing animals, and wildlife;
(c) the production or harvesting of maple syrup or maple sugar;
(d) the operation, management, conservation, improvement, or maintenance of a farm and its tools and equipment;
(e) the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for removing, supplying, and storing water for farming purposes;
(f) the handling, planting, drying, packing, packaging, processing, freezing, grzding storing or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity.

Persons employed in "labor on a farm" as defined above are exempt from coverage under the Minimum Wage Order for Miscellaneous Industries and Occupations. A separate minimum wage law (Article 19-A) was enacted for farm workers by the 1969 Legislature, and a separate wage order, Part 190, effective October 1, 1969 applies to farm workers employed on farms subject to the law.

Questions have arisen from time to time as to the applicability of the minimum wage orders to a farmer's fruit and vegetable processing plant where the plant is located off the farm or where products grown on other farms are processed. The following is our ruling on these questions: (1) For a plant on the farm which handles only products grown by the farmer, the farm minimum wage order applies. (2) For a plant which is off the normal geographic limits of the farm and in which only the farmer's products are handled, the farm minimum wage order applies. (3) For a plant also handling products grown on other farms, regardless of where the plant is located, the Miscellaneous Wage order applies only when processing products grown on other farms.

Another question has concerned coverage for employees engaged in landscaping work for private homes and other buildings. Such employment is covered under the Miscellaneous Wage Order regardless of whether the employer also operates a greenhouse. Where an employee works in the greenhouse and also does outside landscaping, both wage orders apply -- the farm wage order for the time spent in farm work, and the Miscellaneous Wage Order for the time spent in outside landscaping.

(3) Executive, Administrative, or Professional Capacity

Persons employed in a bona fide executive or administrative capacity are exempt from minimum wage coverage if they meet the duties tests described below and are paid a salary of at least $138.75 weekly. Professionals also must qualify on a duties basis, but there is no minimum salary requirement for this category.

Executive

To be exempt, an executive must meet these tests: His primary duty must be management of the enterprise, or of a recognized department or subdivision (as a general rule, "primary" means that over 50% of the time is spent in management); he must regularly direct the work of at least two or more employees; he must have the authority to hire or fire, or recommend hiring and firing, or whose recommendation on these and other actions affecting employees is given weight; he must regularly exercise discretionary powers; and he must be paid a salary of not less than $138.75 per week, inclusive of board, lodging, other allowances and facilities.

Examples: Store manager, department manager, branch office manager. However, a "trainee" manager is not exempt unless all specifications listed above are met. (In most instances, trainees do not have authority to hire or fire other employees.)

Administrative

To be exempt, an administrative employee must meet these tests: His primary duty must be responsible office or nonmanual field work directly related to management policies or general business operations; he must customarily and regularly exercise discretion and independent judgment; he must regularly and directly assist an employer or a bona fide executive or administrative employee; or he must perform work under only general supervision along specialized or technical lines requiring special training, experience or knowledge; and his salary is not less than $138.75 weekly.

Examples: Executive and administrative assistants, such as assistant to general manager, assistant buyers; advisory specialists for management such as tax experts,systems analysts, investment consultants, credit managers, purchasing agents, personnel directors, labor relations directors. An executive secretary may meet these specifications but the average private secretary would not. An administrative "trainee" is not exempt as he would not be expected to customarily and regularly exercise discretion and independent judgment.

Few problems have arisen in the interpretation of an executive or administrative employee since the minimum salary standard tends to exceed the State minimum wage

requirements for the number of hours worked. ($138.75 would be sufficient for up to 63 hours.) However questionable cases should be referred to the supervisor.

Professional

To be exempt, the person employed in a professional capacity must meet these tests: His primary duty must be either work requiring knowledge or an advanced type in a field of science of learning, usually obtained by a prolonged course of specialized instruction and study; or work that is original and creative in character in a recognized field of artistic endeavor and the result of which depends primarily on his invention, imagination and talent. He must consistently exercise discretion and judgment and he must do work that is mainly intellectual and varied, as distinguished from routine or mechanical.

No salary scale is set for persons employed in professional work. In general, a college degree or certificate in a specialized field of endeavor is acceptable for a professional classification. The individual would have to be employed in the field in which he obtained the degree, i.e. a law clerk in a law office.

Examples: lawyer, doctor, registered nurse, accountant, engineer, architect, teacher, pharmacist, physicist, chemist, medical technologist. Also, musician, composer, painter, creative writer, designer, actor. Not exempt: draftsman, skilled craftsman, practical nurse, laboratory technician, x-ray technician, computer programmer. In questionable cases, full details concerning type of training, education, etc. should be reported to the supervisor.

(4) Outside Salesman

The term "outside salesman" means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of: making sales, or selling and delivering articles or goods, or obtaining orders or contracts for service or for the use of facilities.

Some salesmen spend time at the employer's office. A real estate salesman, for example, who customarily and predominantly is engaged away from the employer's premises is not to be considered covered for minimum wage merely because he appears at an office to collect names of prospects or information about property, or to make some phone calls. However, when a considerable amount of working time (e.g. 2 hours or more a day) is spent at the place of employment, either in making phone calls or in preparatory work necessary to making outside contacts, he is subject to minimum wage coverage. When an undeterminable amount of time is spent away from the employer's premises, in addition to a considerable amount of working time at the place of employment, the minimum wage is required only for time worked at the employer's premises. (Note, real estate salesmen are covered under the Building Service Wage Order).

Regarding questions on this which have arisen in the past, we have notified the New York State Automobile Dealers Inc. that an automobile salesman who spends part of his working time at his place of employment and part in the field is considered subject to minimum wage coverage only when working on the premises of the employer. (Automobile salesmen are covered under the Retail and Wholesale Trade Wage Order). We have also notified the Association of Stock Exchange Firms that a securities salesman who is regularly employed at a fixed location during normal business hours and continues his sales efforts when at home by telephoning present and prospective customers is considered subject to minimum wage coverage only when working on the premises of the employer or under the employer's express direction. (Stock salesmen are covered under the Miscellaneous Wage Order.)

(5) Taxicab Driver

The term "driver engaged in operating a taxi-cab" means an individual employed to drive an automobile equipped to carry no more than seven passengers, which is used in the business of carrying or transporting passengers for hire on a zone or meter fare basis, and the use of which is generally limited to a community's local transportation needs and which is not operated over fixed routes, or between fixed terminals, or under contract.

The exemption would apply to drivers of New York City medallioned cabs, licensed or unlicensed "gypsy" cabs and limousine services with no fixed routes and other local taxicab services. It does not apply to drivers or airport limousines operated over fixed routes.

Note the exemption applies only to the taxicab driver. All other employees of the industry such as dispatchers, mechanics, clerical help, etc. are covered under the minimum wage order.

(6) Student in or for a College or University Fraternity, Sorority, Student Association, or Faculty Association

A student is not deemed to be an employee if he is permitted to work in or for a college or university fraternity, sorority, student association or faculty association, no part of the net earnings of which insures to the benefit of any private shareholder or individual, and which is recognized by such college or university.

(7) Staff Counselor in a Children's Camp

A "staff counselor" is a person whose duties primarily relate to the guidance and care of campers in a children's camp. "Children's camp" means an establishment which is engaged in offering children, on a residential or nonresident basis, recreational programs of supervised play or organized activity in such fields as sports, nature lore, and arts and crafts, whether known as camps, play groups, play schools, or by any other name. This definition would cover the typical sleep-away camp or day camp. Note however, in an investigation of a cabana club, we did not permit the "counselor" exemption for persons employed to supervise the children because there was no organized program as described above.

The term "children's camp" does not include an establishment which is open for a period exceeding 17 consecutive weeks during the year.

142-2.16 Impairment of Earning Capacity

The phrase "earning capacity is ....impaired by ....age, or by physical or mental deficiency or injury," applies to a person whose earning capacity for the work he is assigned to perform is impaired by age, or by physical or mental deficiency or injury; but a person's earning capacity may not be deemed impaired by age until his 65th birthday. See Regulation on page 15.

142-2.17 <u>Required Uniforms and Protective Garments</u>

A required uniform includes any item of clothing, decoration, or ornament that an employee wears at work at the request or direction of the employer, or to comply with any state, city, or local law, rule or regulation, and which is not ordinarily used outside of employment. Protective garments include apparel such as gloves, goggles, boots, or aprons necessary to safeguard or prevent injury to the employee or required for sanitary purposes.

142-2.18 <u>Tips</u>

Tip, or gratuities, shall mean a voluntary contribution received by the employee from a guest, patron, customer, or other person for services rendered. No gratuities or tips shall be deemed received for the purposes of this order if their acceptance is prohibited by the employer or prohibited by law.

142-2.19 <u>Student</u>

The term "student" means an individual who is enrolled in and regularly attends during the daytime a course of instruction leading to a degree, certificate, or diploma, offered at an institution of learning, or who is completing residence requirements for a degree. A person is deemed to be a student during the time that school is not in session if he was a student during the preceding semester. See Regulation on page 14.

<u>Meal</u>

There is no definition of "meal" contained in this wage order. When meal allowances are claimed, investigators should see that adequate meals approximating the "meal" defined in other wage orders are furnished.

August 14, 1979

Mr. Richard Koskey
Pattison, Koskey & Lawrence
Certified Public Accountants
502 Union Street
Hudson, New York 12534

Dear Mr. Koskey:

Industrial Commissioner Philip Ross has asked me to reply to your recent correspondence as to the application of the New York State minimum wage for a nursing home employee.

I am enclosing a copy of the current New York State Minimum Wage Order for Miscellaneous Industries and Occupations which applies to privately owned nursing homes. You will note the present minimum wage rate is $2.90 per hour and time and one-half of the minimum hourly rate is required as shown on page 2 of the Wage Order.

An employee must receive minimum wage for all required work time. Sleeping time may be excluded from working time for non-residential employees under the following conditions:

1. The employer and the employee agree to exclude from working time a bona fide, regularly scheduled "sleeping period" of not more than 8 hours. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.

2. Adequate sleeping facilities are provided.

3. During a given 24 hours on duty, the scheduled sleeping period is confined to a specified period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period, will not be excluded from working time.

4. If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.

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LABOR STANDARDS

5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

In similar fashion, where the employer and employees agree to exclude bona fide meal periods, such meal period time, up to a maximum of three hours during the 24 hour period, may be exluded from working time.

I hope that this information will be of assistance. If you have any further questions, please feel free to contact me.

Sincerely,

Joseph C. Armer
Director

JCA:pz
Encl.

bcc: Mr. Polsinello
Mr. Mrozak

RECEIVED
DEPARTMENT OF LABOR
ALBANY, N. Y.
JAN 11 1980
ADMINISTRATION
LABOR STANDARDS

January 7, 1980

Mr. Charles Tobin
Tobin & Dempf
100 State Street
Albany, New York

Dear Mr. Tobin:

Your recent inquiry concerned the exclusion of sleeping time from paid work time for relief house parents in a children's home.

Some employees, such as relief house parents are required to be on duty for a continuous period although they are not "residential" employees. They are able to sleep on the employer's premises while on call. In such circumstances sleeping time may be excluded from working time under the following conditions:

1. The employer and the employee agree to exclude from working time a bona fide regularly scheduled "sleeping period" of not more than 8 hours per day. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.

2. Adequate sleeping facilities are provided.

3. During a given 24 hours on duty the scheduled sleeping period is confined to a specific period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period will not be excluded from working time.

4. If the scheduled sleeping period is interrupted by a call to duty the interruption will be considered time worked.

5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

In similar fashion, where the employer and employee agree to exclude bona fide meal periods, such meal period time, up to a maximum of 3 hours during the 24 hour period may be excluded from working time.

I hope this information is helpful to you. In our phone conversation, we discussed the possibility of minimum wage coverage under the Federal Fair Labor

Standards Act. Apparently the question of Fair Labor Standards Act coverage, if coverage exists, is complicated. If you wish to pursue the Federal Fair Labor Standards Act question, I suggest you contact Mr. Sam Weitman, Regional Director, Wage & Hour Division, U. S. Department of Labor. His office is in the Leo W. Obrien Federal Building in Albany. His phone number is Albany 472-3596.

Sincerely,

Joseph C. Armer
Director
Division of Labor Standards

JCA/jd
cc: Comr. O'Toole
Comr. Dreizen

NEW YORK STATE DEPARTMENT OF LABOR (1)

INTER-OFFICE MEMORANDUM

Date: March 19, 1980
Office:

To: Staff of the INformation Room

From: Stanley J. Serocki, Supervisor ASU

Office:

Subject: Determining Working Hours
Home Health Attendants

Attached are excerpts from the Manual of Interpretations for the Miscellaneous Industries and Occupations. The exceepts deal with the determination of working time when employees work 24 hour shifts, when they are on call or when they are subject to call.

These excerpts will become increasingly more important as references since we are receiving many complaints form home health attendants working for a profitmaking institutéon..

Please also review the attached narrative concerning coverage. In order to be exempt from minimum wage coverage, the companion must work in the home of the employer.

SS:s
Atts.

cc: Mrs. Blanche Cohen
Mr. Sol Friedman,
Mr. Fred Unger
Mr. Nat Ferster
Mr. Morton Oken
Mr. Martin Finn
Ms. RIcki Kershnar

(2)

142-2.15 Employee

"Employee" means any individual permitted to work by an employer. In certain occupations, there have been cases of alleged independent contractor status. The mere label of "independent contractor" does not necessarily remove someone from the category of a worker. However -

Where barbers, bootblacks, and manicurists in barber shops alleged to be independent contractors, earn well over the minimum wages from all sources of income, including gratuities, we will administratively accept the situation without spending time to secure legal clearance on whether an employer/employee relationship exists. Where earnings are borderline, and a record of hours worked essential to a finding of future compliance, the investigator will proceed to secure a determination of an employer-employee relationship. Some of the factors to be considered in making such a determination are: the degree of supervision, direction and control over the work performed; who furnishes supplies; the amount and kinds of payments to the owner for the use of shop equipment and supplies; the owner's authority to fix hours of work; who carries the public liability and other insurance; gratuities; and other similar considerations.

Certain individuals are exempt from the definition of "employee" by the statute. Among these are individuals employed by a federal, state or municipal government or political subdivision, and the following:

(1) Part-Time baby sitters in the home of the employer, or someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping.

Prior to January 15, 1972 an exemption was provided for "domestic service in the home of the employer" -- work in or about the domocile of an employer in his capacity as a householder. An amendment effective January 15, 1972 enacted by the 1971 Legislature removed this exemption and substituted the above, thus extending minimum wage coverage for the first time to all domestic workers, except part-time baby sitters and live-in companions to the sick or elderly. Domestic workers are covered under this wage order. A separate manual dated 12/10/71, contains guidelines for enforcement of the minimum wage provisions for domestic workers.

(2) Labor on a Farm

The term "farm" includes stock, dairy, poultry, fur-bearing animal, fruit, and truck farms, plantations, orchards, nurseries, greenhouses, or other similar structures, used primarily for the raising of agricultural or horticultural commodities.

In accordance with our new policy on required uniforms as outlined in memo to supervisors dated May 25, 1971, employers are responsible for the cost and maintenance of required uniforms for all employees, even where such costs if borne by the employee would not depress the minimum wage. Deductions from wages for the cost or maintenance of required uniforms, or charges for such a purpose in a separate transaction are deemed to be in violation of Section 193 of the Labor Law.

If a uniform is not required either by the employer or by law or regulation, the employer has no responsibility for its supply, or maintenance.

Working Time

Section 142-2.1 (b) of the wage order requires that minimum wages be paid for "time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee."

Example:

Employee reports for work as instructed at 9:00 A.M. No work is provided but he is told to wait. At 10:00 A.M. he is assigned to work. Employee must be paid for the hour from 9 to 10 because he was required to be available for work. During that hour he was "on call".

In othersituations, it will be necessary to distinguish between "on call" and "subject to call" time. In general, when an employee is subject to call, only the hours actually worked are considered to be working time; when an employee is on call, the total hours of work plus required waiting time are considered working time. More specifically --

On call time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties. They are considered to be working all the hours that they are confined to the workplace.

Subject to call time is that time during which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities. In some cases, arrangements are made for employees to be available for assignments by leaving word as to where they can be reached. Sometimes, they may be restricted to a specified area, to be reachable by telephone or otherwise, to report for the work assignment within 15 to 30 minutes, etc. For such persons, working time starts when they are actually ordered to a specific assignment.

4

Example:

An ambulance driver for a proprietary hospital works from 6 A.M. to 3 P.M. with one hour for lunch. From 3 P.M. to 7 P.M. he is free to be anywhere on hospital grounds or he may leave the grounds if he can be reached and become available within 30 minutes. From 7 P.M. to 9 P.M. he is required to be available in the emergency room to answer emergency calls.

Working time is as follows:

From 6 A.M. to 3 P.M. (1 hour lunch)	8 hours
From 3 P.M. to 7 P.M. (Subject to call time) Working time only if called upon and only for actual time spent working. If not called upon	0 hours
From 7 P.M. to 9 P.M. (on call time)	2 hours
Total working time	10 hours,

plus any time actually worked during "subject to call time".

The above distinctions have particular significance with regard to a residential employee. The wage order provides that "a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work: (a) during the normal sleeping hours solely because he is required to be on call during such hours, and (b) at any other time when he is free to leave the place of employment."

Normal sleeping hours shall be presumed to be 8 hours a day. Where a variance from 8 hours is claimed, any reasonable agreement of the parties shall be accepted.

Free to leave is that period of time when an employee may engage in private pursuits such as meal periods, shopping, or any other period of complete freedom from his duties, when he may leave the premises for purposes of his own. For this purpose, "premises" is construed to be that place or area in which the employee is required to perform his duties. As shown above, it does not necessarily mean the entire confines of the establishment.

Example:

A resident employee in an undertaking parlor does porter work from 8 A.M. to 5 P.M. with one hour for lunch. From 5 P.M. to 8 P.M. he is free to leave the premises. From 8 P.M. to 8 A.M. he is required to remain on the premises to take phone calls and messages.

Working time is as follows:

From 8 A.M. to 5 P.M. - one hour for lunch	8 hours
From 5 P.M. to 8 P.M. - free time	
From 8 P.M. to 8 A.M. - deducting 8 hours for sleeping time and one hour for dressing, breakfast etc. the balance of "on call" time is	3 hours
Total working time	11 hours

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(5)

Some employees, such as ambulance drivers, are required to be on duty for a continuous period of 24 hours or more, and although they are not "residential" employees, they are able to sleep on the employer's premises while on call. In such circumstances, sleeping time may be excluded from working time under the following conditions: (Administrative guidelines)

1. The employer and the employee agree to exclude from working time a bona fide, regularly scheduled "sleeping period" of not more than 8 hours. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.

2. Adequate sleeping facilities are provided.

3. During a given 24 hours on duty, the scheduled sleeping period is confined to a specified period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period, will not be excluded from working time.

4. If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.

5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

In similar fashion, where the employer and employees agree to exclude bona fide meal periods, such meal period time, up to a maximum of three hours during the 24 hour period, may be excluded from working time.

Waiting Time in Grading Houses

For minimum wage purposes, all waiting time at grading house of one hour or less is considered as working time. Where more than one hour of waiting time is involved, a detailed report is to be submitted for a determination. The report should include such information as the reason for the stoppage of work; the amount of waiting time incurred; a description of the work site as distinguished form the grading house premises or other premises where employees worked; what instructions if any were given to workers as to the time they should report back to work; what limitations, if any, were placed on their leaving the work site; how the employees used the time, etc.

Training programs

In some cases, employers have attempted to set up "pre-employment" training programs claiming the trainees were not employees subject to the minimum wage law. Our counsel has held that generally trainees are deemed individuals "employed or permitted to work by an employer in any occupation" within the framework of Section 651 of the Labor Law.

STATE OF NEW YORK - DEPARTMENT OF LABOR
DIVISION OF LABOR STANDARDS

REMARKS PREPARED FOR DELIVERY BY JOSEPH ARMER, DIRECTOR OF LABOR STANDARDS, TO NEW YORK STATE ASSOCIATION OF HEALTH CARE PROVIDERS, INC., ROCHESTER, NY, JANUARY 18, 1983

Thank you for your invitation to speak to the New York State Association of Health Care Providers. As Director of the Division of Labor Standards, I am answerable to the Commissioner of Labor Lillian Roberts for two basic responsibilities. One is to oversee and administer the enforcement of New York State Labor Laws concerning minimum wage, hours of work, child labor, payment of wages and wage supplements, industrial homework, and migrant farm labor. The other, equally important, is to communicate with employers, employees and the public about the Division's role and functions, to educate and inform about the labor law and regulations - and the policies and interpretations which, when consistently and reasonably applied, take on the force of law.

As employers in New York State, all of you are subject to the provisions of the New York State Labor Law. Before I get into the topic of minimum wage, I will outline some of the general requirements which apply to all employers.

Manual workers must be paid wages weekly and not later than seven calendar days after the end of the week in which the wages are earned. Aides providing personal services at the residence of the patient would be considered manual workers. However, a manual worker employed by a non-profitmaking organization may be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly. Clerical employees and executive, administrative or professional employees earning $300.00 a week or less must be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer. No employee, whether clerical, manual, or other worker, may be required as a condition of employment to accept wages at periods other than provided by the law. At the time of hire, the employee must be advised of the regular pay day and subsequently of any changes in the pay days prior to the time of such changes.

No deductions may be made from wages except deductions authorized by law, or which are authorized in writing by the employee and are for the employee's benefit. Authorized deductions include payments for insurance premiums, pension, contributions to charitable organizations, payments for U.S. bonds, union dues, and similar payments for the benefit of the employee.

An employer may not make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages. Examples of illegal deductions or charges include payments by the employee for spillage, breakage, cash shortages or losses, and cost and maintenance of required uniforms.

Every employer must notify employees at the time of hiring of the rate of pay, and with every payment of wages furnish each employee with a statement of wages listing gross wages, deductions and net wages. Upon the request of an employee, the employer must furnish an explanation of how such wages were computed.

Under New York State minimum wage regulations, employers must also indicate on the wage statement the number of hours worked, the rates paid, and allowances, if any, claimed as part of the minimum wage.

Employees must be paid in cash unless the employer receives a permit from the Commissioner of Labor to pay their wages by check. In order to obtain the permit, the employer must show satisfactory proof of financial responsibility; also facilities must exist for employees to cash their checks for the full amount and without difficulty or expense.

The cash payment requirement does not apply to employees working on a farm not connected with a factory; nor to executive, administrative, and professional employees whose earnings are in excess of $300 weekly.

Employers may also deposit an employee's net wages in a bank or other financial institution but only with the advance written consent of the employee.

An employer is required to notify employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.

While there is no requirement in the law that an employer provide fringe benefits or wage supplements such as vacation, holiday or sick pay or health, welfare and retirement benefits, if an employer agrees to provide such benefits it is a violation of the law to fail to live up to the agreement.

Such agreements may be changed but employees must be notified of the changes in writing or by publicly posting in advance of the change. An employee may not be deprived of benefits already earned and vested under a previous agreement.

No minor fourteen to eighteen may be employed when attendance upon instruction is required by the Education Law. A minor may be employed at times when attendance at school is not required if he or she presents a valid employment certificate. Employment certificates or working papers are issued by local school districts, even during vacation, a copy of the employment certificate must be kept on file by the employer.

Minors under sixteen years of age may not operate washing, grinding, cutting, slicing or mixing machinery.

Minors under sixteen are limited to 3 hours of work on a school day, eight hours on any day when school is not in session, twenty-three hours a week, six days a week. They may not work after 7 in the evening or before seven in the morning. During school vacation 14 and 15 year old minors may work eight hours a day, up to forty hours a week and up to six days a week.

Sixteen year old minors may work four hours on a school day, eight hours on a non-school day, twenty eight hours and six days a week. There is no restriction of the hours sixteen year olds may work during school vacation, nor of hours for seventeen year olds at any time of the year, in the type of occupation we are concerned with here.

Employers are required to permit a noon day meal period of at least 30 minutes and an additional meal period of at least 20 minutes between 5 and 7 p.m. if the employee starts work before noon and works later than seven. Such meal periods must be free of duty. I will get back to meal periods in the discussion of minimum wage.

I would like to point out to you, first, that minimum wage regulations are not uniform for all Health Care Providers.

Proprietary agencies - private, for profit, individuals, partnerships or corporations, like yourselves, are subject to the provisions of Part 142.2 of Title 12 of the Official Compilation of Codes, Rules and Regulations. That is the Minimum Wage Order for Miscellaneous Industries and Occupations.

Non-profitmaking Institutions which have not elected to be exempt from coverage under a minimum wage order are regulated by Subpart 142-3. The provisions for non-profitmaking institutions differ from those for profit-making employers mainly in the definition of employees who must be paid the minimum wage. Excluded from minimum wage requirements in non-profitmaking institutions are students, learners participating in a bona-fide training program, and volunteers, as well as a number of other categories not relevant to this discussion. Non-profitmaking institutions enjoy a higher lodging allowance, have different record-keeping requirements and are allowed to figure the minimum wage on a payroll period, as opposed to weekly, basis.

Part 143 of Title 12 is a regulation which applies to another type of Non-profitmaking Institution - one which has elected the option to pay the statutory wage exclusive of allowances in lieu of wage order coverage. Such an agency has certified to the Commissioner of Labor within 6 months of the day it was organized or hired its first employee, that it intends to exercise this option. Exempt non-profits pay $3.35 an hour even for hours worked over 40 in a week but may not take credit for meals and lodging provided to the employee.

Although the regulations for personal care service providers are different according to the situations I have outlined, they are all explicit, particularly in defining working time for which the minimum wage must be paid. In all cases, it is the time an employee is "permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee - one who lives on the premises of the employer - shall not be deemed to be permitted to work or required to be available for work: (1) during his normal sleeping hours solely because he is required to be on call during such hours; (2) at any other time when he is free to leave the place of employment."

When this definition was developed in 1960, there were not systems of health care providers as there are today. Residential employees provided services in the home of the employer. Now the employer is distinct from the person to whom the service is provided and the patient's home is a "place prescribed by the employer". We did have a policy, however, for excluding sleeping time from hours worked for the purpose of computing minimum wage for employees required to be on duty for a continuous period of 24 hours or more who, although they are not "residential employees", are able to sleep on the premises while on call. It has been in effect for ambulance drivers and we have extended it to cover employees who provide personal services in the home of the patient. Policies and interpretations are subject to review by the Commissioner of Labor, the Industrial Board of Appeals, and the courts. We cannot guarantee that it will continue to prevail but we have implemented the policy as follows:

Employees who are required to provide 24 hour personal care in the home of the recipient, as specified by the employer, shall be paid the New York State minimum wage for all hours except normal sleeping hours, meal periods and time when the employee is free to leave the place of employment for personal business.

Normal sleeping hours shall be presumed to be 8 hours a day designated by the employer, subject to the following conditions:

(1) During a given 24 hours on duty, the scheduled sleeping period is confined to a specified continuous period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period will not be excluded from working time.

(2) Adequate sleeping facilities shall be provided.

(3) If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.

(4) There must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Meal Periods may be excluded up to one hour for each meal and a maximum of three hours in the 24 hour period. If the meal period is not free of duty, even if the employee manages to eat, the hour may not be subtracted from paid time.

The wage order requires payment of $3.35 an hour for all hours remaining after the aforementioned exclusions have been applied up to 44 hours in a payroll week. Hours worked by residential employees over 44 in that week must be paid at the rate of $5.02½ an hour. Residential employees generally live on the premises for a tour of duty extending over several consecutive 24 hour periods. Non-residential employees must be paid at the overtime rate for work over 40 hours in a week. When the total weekly wage due has been computed, the employer may deduct $1.15 for each meal furnished to the employee and $1.40 per day for lodging. The meals and lodging must meet reasonable standards of adequacy and sanitation. If a uniform is required, it must be furnished by the employer. Time spent washing and otherwise maintaining the uniform should be paid time; otherwise the uniform maintenance allowance must be added to the weekly wage.

Subpart 142.2 provides for a tip allowance, however it can be applied only when the employee is engaged in a particular occupation in which tips have

customarily and usually constituted a part of the employee's remuneration, consequently it would not appear to be relevant to the situations we are discussing.

If the employee reports to the office of the employer to be assigned to work at varying locations, payment for travel time to the home of the patient is not required if the employment understanding clearly is that the pay or time of the employee begins at the home of the patient. This would be true even if the employee may be reassigned to work at the same home for more than one day.

Training time must be paid at the minimum wage rate unless the trainee is a student fulfilling the curriculum requirements of the non-profitmaking institution which he or she attends and is required to obtain supervised vocational experience under the direction of a home care agency. If an employee, who is not a student in a non-profitmaking institution, is participating in a bona fide training program for the occupation in which he or she is employed, the employer may apply to the Department of Labor for a certificate to pay 75% of the applicable minimum wage. The criteria for a bona fide training program are outlined in the wage order.

I have brought with me today a number of copies of the relevant wage order. Each of you is welcome to one, as well as a copy of my prepared remarks.

There are district offices of the Division of Labor Standards in all the regions of the State. The addresses and phone numbers are listed in the materials provided to you.

Albany 12240, State Office Bldg. Campus	(518) 457-2730
Binghamton 13901, 15 Henry Street	(607) 773-7801
Buffalo 14202, 65 Court Street	(716) 847-7147
Hempstead 11550, 175 Fulton Street	(516) 481-6064
New York City 10047, Two World Trade Center	(212) 488-7700
Rochester 14614, 155 South Main Street	(716) 454-3710
White Plains 10603, 30 Glenn Street	(914) 997-9521

Please feel free to call the office nearest you if any questions about the application of the Labor Law come up in the future. If the Association wishes to resolve any issues as a group, I am available to work with you.

Commissioner of Labor Lillian Roberts has asked me, while I am speaking to you today, to bring you up-to-date on recent amendments to the Federal Targeted Jobs Tax Credit Legislation.

First, the program has been extended for two years so that an employer is now eligible to claim the full two years of tax credits allowed for any eligible individual who begins work before January 1, 1985.

Second, the time requirement for filing a written request for the tax credit certification has now been eased by one day. The law now reads that the certification may be requested on or before the day on which the eligible individual begins work (this used to read before the day).

Third, the amendments add a new targeted group "Summer Youth Employee". A summer youth employee "is a young person who is 16 or 17; who first begins work for the employer between May 1 and September 15, and is a member of an economically disadvantaged family. For this target group the employer is eligible to claim a credit on his or her Federal tax return of 85% of the first $3,000 in wages paid for any 90 day period between May 1 and September 15.

I wanted to bring these changes to your attention because I know that there are a great many of you who are taking advantage of the substantial tax savings provided under the program. For those of you who are still unfamiliar with it, the TJTC Program provides an employer with a Federal tax credit equal to 50% (except for the new Summer Youth Employee Tax Group) of the first $6,000 in wages paid to each eligible employee during the first year of employment and 25% of the first $6,000 in wages paid to each eligible employee during the second year of employment.

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The eligibility of workers to qualify you for these tax credits is determined by the local offices of the New York State Job Service. For information on how you may take advantage of this program contact your nearest Job Service Local Office, or call 518-457-6823.

JCA:jm
1/10/83

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FILE

DEPARTMENT OF LABOR - INTER-OFFICE MEMORANDUM

update

		Date:	February 1, 1984
To:	ALL SUPERVISORS	Office:	Labor Standards
From:	Joseph C. Armer	Office:	Labor Standards

Subject: Minimum Wage Status - Home Health Attendants who Reside in the Homes of Medicaid Clients and are Employed by Profit-making or Non-Profit Making Establishments.

Several Home Attendant cases are now before the Industrial Board of Appeals. These cases involve employees of profit-making or non-profit-making establishments who reside in the homes of Medicaid clients for the purpose of providing care and assistance to homebound individuals. The critical issues in these cases appear to be (1) are these employees exempted from Minimum Wage coverage under Section 651.5(a) of the Labor Law; (2) is the employer entitled to credit for sleeping time as non-working time for Minimum Wage purposes; and (3) is the employer entitled to take credit for on-premises meal periods as non-working time.

1. Are these employees exempted from Minimum Wage coverage under Section 651.5(a) of the Labor Law?

   651.5(a) - - - employee does not - - - include:- individual - - - "in service as a part-time baby-sitter in the home of the employer; or someone who lives in the home of ~~the~~ (an) employer for the purpose of serving as a companion to a sick, convalescent or elderly person and whose principal duties do not include housekeeping."

To be exempted from Minimum Wage coverage the individuals must serve as a companion to a sick, convalescent or elderly person and must live in the home of the employer. We would consider a sick person as one who is under a doctor's care; a convalescent one who is recovering from a recent illness; and an elderly person, one in his 60's or older and who requires care in getting around in the home. To qualify for the exemption, the principal duties of these persons may not include housekeeping chores. (We would accept 20% housekeeping time for the sick, convalescent or elderly -- NOTE: housekeeping time for other non-eligible family members could void the exemption). We would apply a strict interpretation to the requirement that an exempt employee be someone who lives in the home of the employer. We are supported in our interpretation by a 1969 Decision of the Board of Standards and Appeals - at that time domestics in the home of the employer were exempt from Minimum Wage coverage). Smithfield Services, Inc., a temporary help agency for domestic workers claimed that the domestic workers were employees of its respective clients (householders) to whom they were referred by it and for whom the domestics performed services. Smithfield contended these workers were, therefore, exempt from the pertinent sections of the Minimum Wage Law and Minimum Wage Order. The Board of Standards and Appeals rejected the Smithfield arguments and held that the employees did not perform their services in the home of the petitioner (Smithfield) and were covered by the Minimum Wage Law. The similarities between Smithfield and our home attendant cases are obvious. We will, therefore, not exempt these home attendants from Minimum Wage coverage under Section 651.5(a).

GA 6.8 (4-74)

To: All Supervisors February 1, 1984

2. <u>Is the Employer Entitled to Credit for Sleeping Time as Non-Working time for Minimum Wage Purposes?</u>

The Home Attendants who sleep in the home of the client are not residential employees sleeping in the home of the employer. Rather, they are employees who are permitted to utilize sleeping facilities provided by clients of the employer. The Division of Labor Standards has consistently held that sleeping time for a non-residential employee who is required to be on duty for a continuous period of 24 hours or more may be excluded from working time if the following conditions are met:

1. The employer and the employee agree to exclude from working time a bona fide, regularly scheduled "sleeping period" of not more than 8 hours. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.

2. Adequate sleeping facilities are provided.

3. During a given 24 hours on duty, the scheduled sleeping period is confined to a specified period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period, will not be excluded from working time.

4. If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.

5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Our limited experience with the home attendant cases indicates that the attendants were engaged with the understanding that they would not be paid for sleeping time. We feel this constitutes tacit agreement; sleeping time, subject to the conditions listed above, is not working time for Minimum Wage purposes.

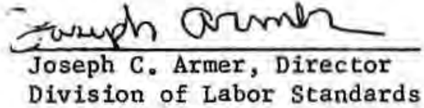
3. <u>Is the Employer entitled to Take Credit for On-Premises Meal Periods for Employees who are Required to be On Duty for a Continuous Period of 24 Hours or More?</u>

To my knowledge, this question has not progressed to a decision in any Industrial Board of Appeals case. Federal Court Decisions, however, indicate that an employer may require a continuous duty employee to remain on the premises during bona fide meal periods. Accordingly, it is the position of the Division of Labor Standards that bona fide meal periods for employees on duty for 24 hours or more may be excluded from work time up to a maximum of three hours during the 24 hour period.

To: All Supervisors February 1, 1984

Please share the content of this memorandum with your Labor Standards Investigators and Senior Labor Standards Investigators.

I will keep you advised of any decisions that may be forthcoming from the Industrial Board of Appeals or the Courts.



Joseph C. Armer, Director
Division of Labor Standards

cc: Comm. Maher
Comm. Smith
Assistant Directors
Chiefs

JCA:jm

STATE OF NEW YORK - DEPARTMENT OF LABOR

REMARKS PREPARED FOR DELIVERY BY JOSEPH ARMER, DIRECTOR OF LABOR STANDARDS, TO HOME HEALTH CARE INDUSTRY PANEL, 625 DELAWARE AVENUE, BUFFALO, NEW YORK
FEBRUARY 23, 1984

Thank you for your invitation to speak to this Home Health Care Industry Panel. As Director of the Division of Labor Standards, I am answerable to the Commissioner of Labor Lillian Roberts for two basic responsibilities. One is to oversee and administer the enforcement of New York State Labor Laws concerning minimum wage, hours of work, child labor, payment of wages and wage supplements, industrial homework, and migrant farm labor. The other, equally important, is to communicate with employers, employees and the public about the Division's role and functions, to educate and inform about the labor law and regulations - and the policies and interpretations which, when consistently and reasonably applied, take on the force of law.

As employers in New York State, all of you are subject to the provisions of the New York State Labor Law. Before I get into the topic of minimum wage, I will outline some of the general requirements which apply to all employers.

Manual workers must be paid wages weekly and not later than seven calendar days after the end of the week in which the wages are earned. Aides providing personal services at the residence of the patient would be considered manual workers. However, a manual worker employed by a non-profitmaking organization may be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly. Clerical employees and executive, administrative or professional employees earning $300.00 a week or less must be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer. No employee, whether clerical, manual, or other worker, may be required as a condition of employment to accept wages at periods other than provided by the law. At the time of hire, the employee must be advised of the regular pay day and subsequently of any changes in the pay days prior to the time of such changes.

No deductions may be made from wages except deductions authorized by law, or which are authorized in writing by the employee and are for the employee's benefit. Authorized deductions include payments for insurance premiums, pension, contributions to charitable organizations, payments for U.S. bonds, union dues, and similar payments for the benefit of the employee.

An employer may not make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages. Examples of illegal deductions or charges include payments by the employee for spillage, breakage, cash shortages or losses, and cost and maintenance of required uniforms.

Every employer must notify employees at the time of hiring of the rate of pay, and with every payment of wages furnish each employee with a statement of wages listing gross wages, deductions and net wages. Upon the request of an employee, the employer must furnish an explanation of how such wages were computed.

Under New York State minimum wage regulations, employers must also indicate on the wage statement the number of hours worked, the rates paid, and allowances, if any, claimed as part of the minimum wage.

Employees must be paid in cash unless the employer receives a permit from the Commissioner of Labor to pay their wages by check. In order to obtain the permit, the employer must show satisfactory oroof of financial responsibility; also facilities must exist for employees to cash their checks for the full amount and without difficulty or expense.

The cash payment requirement does not apply to employees working on a farm not connected with a factory; nor to executive, administrative, and professional employees whose earnings are in excess of $300 weekly.

Employers may also deposit an employee's net wages in a bank or other financial institution but only with the advance written consent of the employee.

An employer is required to notify employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.

While there is no requirement in the law that an employer provide fringe benefits or wage supplements such as vacation, holiday or sick pay or health, welfare and retirement benefits, if an employer agrees to provide such benefits it is a violation of the law to fail to live up to the agreement.

Such agreements may be changed but employees must be notified of the changes in writing or by publicly posting in advance of the change. An employee may not be deprived of benefits already earned and vested under a previous agreement.

No minor fourteen to eighteen may be employed when attendance upon instruction is required by the Education Law. A minor may be employed at times when attendance at school is not required if he or she presents a valid employment certificate. Employment certificates or working papers are issued by local school districts, even during vacation, a copy of the employment certificate must be kept on file by the employer.

Minors under sixteen years of age may not operate washing, grinding, cutting, slicing or mixing machinery.

Minors under sixteen are limited to 3 hours of work on a school day, eight hours on any day when school is not in session, twenty-three hours a week, six days a week. They may not work after 7 in the evening or before seven in the morning. During school vacation 14 and 15 year old minors may work eight hours a day, up to forty hours a week and up to six days a week.

Sixteen year old minors may work four hours on a school day, eight hours on a non-school day, twenty eight hours and six days a week. There is no restriction of the hours sixteen year olds may work during school vacation, nor of hours for seventeen year olds at any time of the year, in the type of occupation we are concerned with here.

Employers are required to permit a noon day meal period of at least 30 minutes and an additional meal period of at least 20 minutes between 5 and 7 p.m. if the employee starts work before noon and works later than seven. Such meal periods must be free of duty. I will get back to meal periods in the discussion of minimum wage.

I would like to point out to you, first, that minimum wage regulations are not uniform for all Health Care Providers.

Proprietary agencies - private, for profit, individuals, partnerships or corporations, like yourselves, are subject to the provisions of Part 142.2 of Title 12 of the Official Compilation of Codes, Rules and Regulations. That is the Minimum Wage Order for Miscellaneous Industries and Occupations.

Non-profitmaking Institutions which have not elected to be exempt from coverage under a minimum wage order are regulated by Subpart 142-3. The provisions for non-profitmaking institutions differ from those for profit-making employers mainly in the definition of employees who must be paid the minimum wage. Excluded from minimum wage requirements in non-profitmaking institutions are students, learners participating in a bona-fide training program, and volunteers, as well as a number of other categories not relevant to this discussion. Non-profitmaking institutions enjoy a higher lodging allowance, have different record-keeping requirements and are allowed to figure the minimum wage on a payroll period, as opposed to weekly, basis.

Part 143 of Title 12 is a regulation which applies to another type of Non-profitmaking Institution - one which has elected the option to pay the statutory wage exclusive of allowances in lieu of wage order coverage. Such an agency has certified to the Commissioner of Labor within 6 months of the day it was organized or hired its first employee, that it intends to exercise this option. Exempt non-profits pay $3.35 an hour even for hours worked over 40 in a week but may not take credit for meals and lodging provided to the employee.

Although the regulations for personal care service providers are different according to the situations I have outlined, they are all explicit, particularly in defining working time for which the minimum wage must be paid. In all cases, it is the time an employee is "permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee - one who lives on the premises of the employer - shall not be deemed to be permitted to work or required to be available for work: (1) during his normal sleeping hours solely because he is required to be on call during such hours; (2) at any other time when he is free to leave the place of employment."

When this definition was developed in 1960, there were not systems of health care providers as there are today. Residential employees provided services in the home of the employer. Now the employer is distinct from the person to whom the service is provided and the patient's home is a "place prescribed by the employer". We did have a policy, however, for excluding sleeping time from hours worked for the purpose of computing minimum wage for employees required to be on duty for a continuous period of 24 hours or more who, although they are not "residential employees", are able to sleep on the premises while on call. It has been in effect for ambulance drivers and we have extended it to cover employees who provide personal services in the home of the patient. Policies and interpretations are subject to review by the Commissioner of Labor, the Industrial Board of Appeals, and the courts. We cannot guarantee that it will continue to prevail but we have implemented the policy as follows:

Employees who are required to provide 24 hour personal care in the home of the recipient, as specified by the employer, shall be paid the New York State minimum wage for all hours except normal sleeping hours, meal periods and time when the employee is free to leave the place of employment for personal business.

Normal sleeping hours shall be presumed to be 8 hours a day designated by the employer, subject to the following conditions:

(1) During a given 24 hours on duty, the scheduled sleeping period is confined to a specified continuous period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period will not be excluded from working time.

(2) Adequate sleeping facilities shall be provided.

(3) If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.

(4) There must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Meal Periods may be excluded up to one hour for each meal and a maximum of three hours in the 24 hour period. If the meal period is not free of duty, even if the employee manages to eat, the hour may not be subtracted from paid time.

The wage order requires payment of $3.35 an hour for all hours remaining after the aforementioned exclusions have been applied up to 44 hours in a payroll week. Hours worked by residential employees over 44 in that week must be paid at the rate of $5.02½ an hour. Residential employees generally live on the premises for a tour of duty extending over several consecutive 24 hour periods. Non-residential employees must be paid at the overtime rate for work over 40 hours in a week. When the total weekly wage due has been computed, the employer may deduct $1.15 for each meal furnished to the employee and $1.40 per day for lodging. The meals and lodging must meet reasonable standards of adequacy and sanitation. If a uniform is required, it must be furnished by the employer. Time spent washing and otherwise maintaining the uniform should be paid time; otherwise the uniform maintenance allowance must be added to the weekly wage.

Subpart 142.2 provides for a tip allowance, however it can be applied only when the employee is engaged in a particular occupation in which tips have

customarily and usually constituted a part of the employee's remuneration, consequently it would not appear to be relevant to the situations we are discussing.

If the employee reports to the office of the employer to be assigned to work at varying locations, payment for travel time to the home of the patient is not required if the employment understanding clearly is that the pay or time of the employee begins at the home of the patient. This would be true even if the employee may be reassigned to work at the same home for more than one day.

Training time must be paid at the minimum wage rate unless the trainee is a student fulfilling the curriculum requirements of the non-profitmaking institution which he or she attends and is required to obtain supervised vocational experience under the direction of a home care agency. If an employee, who is not a student in a non-profitmaking institution, is participating in a bona fide training program for the occupation in which he or she is employed, the employer may apply to the Department of Labor for a certificate to pay 75% of the applicable minimum wage. The criteria for a bona fide training program are outlined in the wage order.

I have brought with me today a number of copies of the relevant wage order. Each of you is welcome to one, as well as a copy of my prepared remarks.

There are district offices of the Division of Labor Standards in all the regions of the State. The addresses and phone numbers are listed in the materials provided to you.

Albany 12240, State Office Bldg. Campus	(518) 457-2730
Binghamton 13901, 15 Henry Street	(607) 773-7801
Buffalo 14202, 65 Court Street	(716) 847-7147
Hempstead 11550, 175 Fulton Street	(516) 481-6064
New York City 10047, Two World Trade Center	(212) 488-7700
Rochester 14614, 155 South Main Street	(716) 454-3710
White Plains 10603, 30 Glenn Street	(914) 997-9521

STATE OF NEW YORK
DEPARTMENT OF LABOR
Division of Labor Standards
ONE MAIN STREET
BROOKLYN, NY 11201

August 25, 1988

Mr. William M. O'Connor
Foyen & Peri
250 Park Avenue
New York, N.Y. 10177

Dear Mr. O'Connor:

I have reviewed your letter of June 22, 1988, concerning the hours of work for sleep-in nurses aides and companions placed by temporary agencies. I had responded to your letter by phone to Gina D'Atrile of your officeon June 24. This letter is pursuant to her recent request for a written reply.

The working time for sleep-in employees depends upon the actual hours the employee works and is on call at the place of employment. In the case of 24 hour a day assignments, we would deduct the time for normal uninterrupted sleep hours, meal periods and incidental time attributable to preparing for bed and rising. As a rule of thumb, 8 hours will be considered normal sleeping hours and 3 hours credited for meal periods and incidental time. Deducting this from a 24 hour day leaves 13 hours as the normal standard for working time in these employment situations.

If the employee is free to leave the employer's premises for his or her own purposes; the time away would be deducted from the hours worked. Of course, if the employee's sleeping time or meal periods is interrupted in order to work, the 13 hours considered as working time would be increased accordingly.

I trust that this has been responsive to your inquiry. If you have any further questions, please feel free to contact me at my office; phone number (718) 797-7399.

Very truly yours,

Randolph Fauske

Randolph Fauske, Supervisor
Administrative Services Unit

RF:tm

NEW YORK STATE DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

To: ALL SUPERVISORS

Date: October 5, 1989
Office: STATEWIDE

From: Richard J. Polsinello

Office: Labor Standards

Subject: Home Attendant Cases - Settlement Home Care, Inc., et al

Recently, the Appellate Division ruled in favor of the Division's minimum wage position regarding sleep-in home attendants. These live-in home attendant cases started in 1983, as a result of a complaint made by Local 32B-32J Service Employees International Union. The complaint was that sleep-in home attendants employed by non-profit organizations under a vendor program with the City of New York Human Resources Administration were assigned for 24 hour duty at the client's home and were not paid for all of their actual work hours at the required minimum wage.

After investigation, the Division computed underpayments against three representative vendor agencies; Settlement Home Care, Inc., Christian Community In Action, Inc. and Cabs Home Attendants Service, Inc. The computations generally were based on 13 hours of work per day, arrived at by deducting from the 24 hours, 8 hours of sleep time and 3 hours for meals and rest. We then served recapitulation sheets and notices of violation.

The three vendor agencies and the New York City Human Resources Administration appealed the notices of violation to the Industrial Board of Appeals primarily on jurisdictional grounds--that the employees were excluded under Labor Law Section 651.5(2) "someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping."

The Industrial Board of Appeals and all parties (which also included the union as intervenor) agreed to separate the hearings into two parts. The initial hearings would address the jurisdictional issues only. After extensive hearings the Board issued a decision on February, 19, 1987, affirming our Notice of Violation with respect to the jurisdictional issues. It held that the vendor agency and not the client was the employer; that the sleep-in attendant was not in the home of the client "for the purpose of serving as a companion;" and that the principal duties of the home attendant included houskeeping.

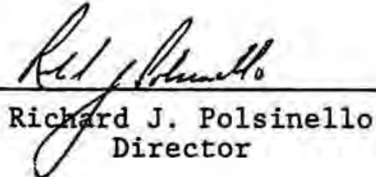
In April, 1987, the Human Resources Administration and the vendor agencies appealed the IBA Decision to the courts under an Article 78 proceeding. The Appellate Division has recently rendered a finding affirming the IBA determination in all respects

GA 658 (9-77)

regarding the jurisdictional issues. The HRA and the agencies now have requested the court for permission to appeal the Appellate Court decision to the Court of Appeals.

Should the results of any further appeal continue to support the IBA Decision, the Industrial Board of Appeals then will hold hearings on the second part of the cases - the monetary computations.

Please notify your staff accordingly.



Richard J. Polsinello
Director

RJP:mac
cc: Comr. O'Connell
Assistant Directors
Chief Investigators
Mr. Durski
Mr. Bermudez

COUNSEL'S OFFICE

STATE OF NEW YORK
DEPARTMENT OF LABOR
ONE MAIN STREET
BROOKLYN, NY 11201
(718) 797-7388

July 14, 1995

RECEIVED
DIV. OF LABOR STANDARDS
JUL 20 1995
NEW YORK CITY OFFICE

Berenice V. Figueredo, Esq.
Jackson, Lewis, Schnitzler & Krupman
Courthouse Plaza
60 Washington Street
Morristown, New Jersey 07960-6844

Re: Request for Opinion
Compensation of Home Health Aides

Dear Ms. Figueredo:

Your June 26, 1995 letter to Nancy G. Groenwegen, former Deputy Commissioner of Labor for Legal Affairs and Counsel, requests an opinion regarding various legal issues involved in the compensation of persons employed by your client to provide home health care services to persons with disabilities, who reside in the homes of such disabled persons. Some of these employees are foster care providers who provide services to a disabled individual residing in such employees' homes. Your letter assumes that all the employees described therein are exempted from minimum wage and overtime coverage under the Fair Labor Standards Act, pursuant to 29 U.S.C. §213(a)(15), as employees employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves, as such terms are defined at 29 CFR Part 552.

You ask, first, whether New York "recognizes" the above-cited exemption under the Fair Labor Standards Act. The Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR §142-2.2, which covers, inter alia, the home health care industry, provides, in pertinent part, as follows:

> An employer shall pay an employee for overtime at a wage rate of $1\frac{1}{2}$ times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 USC 201 et seq., the Fair Labor Standards Act of 1938, as amended; provided, however, that the exemptions set forth in

> section 13(a)(2) and (a)(4) of such act shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to section 13(a)(2) and (a)(4) of such act, overtime at a wage rate of 1½ times the basic minimum hourly rate. [...]

Accordingly, persons subject to the above-cited exemption need not be paid for overtime at a wage rate of one and one-half their regular rate; however, such persons, if they come within the definition of "employee" as set forth in Section 651(5) of the Labor Law and 12 NYCRR §142-2.16, must be paid at least $4.25 per hour for regular hours worked and for overtime at a wage rate of one and one-half times the basic minimum hourly rate, i.e., $6.375.

You ask, next, whether New York follows the current enforcement practice of the United States Department of Labor with respect to the provisions of 29 CFR Part 552 in requiring that the home care agency and the disabled person who is the recipient of the home health care services be joint employers of the home health aide in order for such employee to come within the exemption set forth at 29 U.S.C. §213(a)(15). In determining whether an employee comes within an exemption from coverage under the Fair Labor Standards Act, New York defers to the policies and interpretations followed by the United States Department of Labor.

In connection with your inquiry, you should be aware that, pursuant to Section 651(5)(a) of the Labor Law and 12 NYCRR §142-2.16(c)(ii), persons who live in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping, are excluded from the definition of the term "employee" under the Minimum Wage Act and Orders, and are, accordingly, entirely exempted from minimum wage and overtime coverage under New York law. However, in a case involving home health aides employed by home care agencies under contract with the New York City Human Resources Administration to provide services to Medicaid recipients, the Supreme Court, Appellate Division, Second Department held that such persons are not subject to the above-cited New York "companion" exemption, as the Medicaid recipients in whose homes they lived were not "employers", they were not "companions", and their principal duties included housekeeping. [See, Settlement Home Care, Inc. v. Industrial Board of Appeals of the Department of Labor of the State of New York, 151 A.D.2d 580 (2d Dept. 1989).] The employees in issue in that case had been determined by the United States Department of Labor to come within the exemption set forth at 29 U.S.C. §213(a)15). Therefore, the fact that an employee comes within this exemption is not determinative of whether that employee comes within the analogous New York exemption.

Accordingly, in further response to your questions regarding the existence of a joint employment relationship between the home care agency and the recipient of services (as employers) and the home health aide (as employee), New York does not consider the recipient of services in the circumstances set forth in your letter to be an "employer", and, therefore, the home health aide would be covered by New York minimum wage and overtime requirements. This is also partially responsive to your inquiry whether the home health aide can be excluded from the definition of "employee" under the New York Labor Law and Minimum Wage Orders if the home care agency is "merely the facilitator of the foster care relationship between the person with the disability and the home care worker". If the home care agency acts as the home health aide's employer and pays his or her wages, then such agency is not "merely a facilitator" and the home health aide is its employee. If, on the other hand, the home care agency is a licensed employment agency and places the home health aide in the home of the person with the disability (who pays the home health aide's wages and acts alone as his or her employer), then the home health aide is that person's employee and may be excluded from the definition of "employee" if the home health aide is a "companion" as defined under New York law and his or her principal duties do not include housekeeping.

You also ask a number of questions regarding the manner in which home health aides must be compensated. With regard to "live-in" home health aides, who reside in the home of the recipient of services, to the extent that such persons are required to remain "on call" in the recipient's home on a 24-hour-per-day basis, it is the policy of the New York State Department of Labor that such persons must be paid for no less than 13 hours for each such 24-hour period, provided that they are afforded eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If a "live-in" home health aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable, and the home health aide must be paid for all eight hours in question. Similarly, if a "live-in" home health aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable. If a "live-in" home heath aide is relieved of his or her duties for a defined period of time, whether by another home health aide or a relative of the disabled person, or because of the absence of the disabled person, and is free to leave the home of the disabled person, that home health aide need not be compensated for any such period. However, with the exception of the aforementioned sleep and meal period exclusions, a "live-in" home health aide must be compensated for all hours he or she is required to remain "on call" in the home of the disabled person, regardless of the amount of time spent in performing concretely defined tasks. The Department of Labor does not consider it feasible to record "actual hours of work" under these circumstances. A "live-in" home health aide must be paid at least $4.25 per hour for all hours deemed to be worked up to 44 hours in a workweek, and at least $6.375 per hour for all additional

hours worked in a workweek. [The Department of Labor applies the 44-hour overtime threshold, set forth in 12 NYCRR §142-2.2 for a "residential employee" (defined at 12 NYCRR §142-2.1(d) as "one who lives on the premises of the employer") even though the disabled recipient of service is generally not the home health aide's employer.] The foregoing policies also apply to "live-in" home health aides who reside in the disabled person's home only on a particular weekend. With regard to non-"live-in" home health aides, who do not reside in the home of the disabled recipient of services, such persons must be paid at least $4.25 per hour for all hours up to 40 hours in a workweek, and at least $6.375 per hour for all additional hours in a workweek, during which such persons are required to remain "on call" in the recipient's home, regardless of the amount of time spent in performing concretely defined tasks, with the exception of time actually afforded for sleeping and eating.

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (718) 797-7310.

Very truly yours,

Robert Ambaras
Senior Attorney

RA:ee

Acc: Mr. Mrozek
Chief Investigators
Mr. Fauske
Ms. Durgerian

RECEIVED
DEPARTMENT OF LABOR
DIVISION OF LABOR STANDARDS
ALBANY NY 12240
JUL 18 1995
DIRECTOR'S OFFICE

221-6X DIF (2/14/95)

Evelyn C. Heady
Chairman

Dr. Marie Johnson Wittek - Member
Robert L. Marinelli - Member
Clifford M. Barber - Member

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

Peter Crotty
Counsel

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May 30, 1997

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Re: Matter of Petitions of:
Settlement Home Care, Inc. & Human Resources Administration of the City of New York and the City of New York; Christian Community Action, Inc. & Human Resources Administration of the City of New York and the City of New York; Cabs Home Attendants Services, Inc. & Human Resources Administration of the City of New York and the City of New York
Docket Nos. PR-32-83 & PR-33-83; PR-71-83 & PR-72-83; PR-4-84 & PR-PR-5-84

Gentlemen:

Enclosed please find a certified copy of the Board's Resolution of Decision in the above entitled matter.

Sincerely,

Peter Crotty (sp)
Peter Crotty
Counsel

PC:slp
cc: Jerome A. Tracy, Esq.
Robert Ambaras, Esq.
Richard Polsinello
Kevin Lamberson, Esq.

40% Pre-Consumer Content, 10% Post Consumer Content

Evelyn C. Heady
Chairman

Dr. Marie Johnson Wittek - Member
Robert L. Marinelli - Member
Clifford M. Barber - Member

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

Peter Crotty
Counsel

EMPIRE STATE PLAZA
AGENCY BUILDING 2, 20TH FLOOR
ALBANY, NEW YORK 12223

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
SETTLEMENT HOME CARE, INC. and	Docket No. PR-32-83
HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK,	Docket No. PR-33-83
CHRISTIAN COMMUNITY ACTION, INC. and	Docket No. PR-71-83
HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK,	Docket No. PR-72-83
CABS HOME ATTENDANTS SERVICES, INC. and	Docket No. PR-4-84
HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK,	Docket No. PR-5-84
Petitioners,	
-against-	
THE COMMISSIONER OF LABOR,	
Respondent,	
-and-	
LOCAL 32B-32J-144, SERVICE EMPLOYEES INTERNATIONAL UNION, ALF-CIO,	
Intervenor.	

RESOLUTION OF DECISION

WHEREAS:

1. The above proceedings were duly commenced by the filing of Petitions for review with the Board pursuant to Labor Law Section 101 and Respondent's Answers thereto was duly served and filed; and

2. Pursuant to Board Rule 65.7, Leave to Intervene as a party herein was granted by the Board to Local 32-B-32J-144, Service Employees International Union, AFL-CIO; and

3. Pursuant to Board Rule 65.44, and upon the Board's own motion the proceedings were consolidated for purposes of hearing and determination; and

4. Upon notice by the Board to the parties, a consolidated hearing was scheduled and held in the Board's New York City Offices;

5. The parties were present during the course of the consolidated hearing and were provided sufficient opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues in the proceeding; and

6. The Notices of Violation under Review herein were issued by Respondent to Petitioners, Settlement Home Care, Inc., ("SHC"), Christian Community in Action, Inc., ("CCA") and CABS Home Attendants Services, Inc. ("CABS") and allege a failure to pay minimum wages in amounts claimed due to named employees. In addition, the Notices affirmatively assert that the named employees, employed by the vendor Petitioners as sleep-in home attendants, are not excluded under Labor Law Section 651.5(a).

Petitioners, City of New York ("NYC") and Human Resources Administration of the City of New York ("HRA") are responsible for administration of a vendor program providing, among other home care services, sleep-in home attendants to Medicaid eligible clients and petitioned the Board for review of the Notices issued to SHC, CCA and CABS; and

7. The parties and the Board agreed to a bi-furcation so that initial hearings and an adjudication by the Board would address the jurisdictional issue raised concerning coverage of the sleep-in home attendants under Labor Law Section 651.5(a).

By Resolution of the Board, dated February 19, 1987, the subject notices were affirmed solely with respect to the jurisdictional issued raised and such determination was affirmed upon judicial review in July 1989. The bi-furcated proceeding resumed before the Board with respect to the remaining issues presented herein and this Resolution of Decision addresses the Board's determination thereon, and

8. The Board having given due consideration to the pleadings, the documents and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39);

a) The Notices of Violation at issue herein were issued upon a determination by Respondent that certain of the vendor Petitioner's employees were assigned to twenty-four hour duty shifts as sleep-in home attendants and that they were not being paid in accordance with the Minimum Wage Act. Specifically, Respondent determined the violations based upon the employees having been compensated for twelve-hours of work while being in the homes of the Medicare recipients to whom they were assigned on a twenty four hour basis. Respondent computed a minimum wage underpayment set-forth in schedules attached to the Notices on the basis of a thirteen or in some cases a fourteen and one-half hour work day, allowing the Petitioners credit for eight-hours sleep time and three or three and one-half hours meal time per duty shift.

Certain modifications and corrections to the alleged amount of wage underpayment were made and stipulated to by Respondent during the course of this proceeding.

b) The Petitioners herein challenge the validity and reasonableness of the subject Notices and the nature and scope of the underlying investigation conducted by Respondent.

In relevant summary, the Petitioners deny that any minimum wage underpayment is due to the sleep-in home attendants and contend that the said employees were not assigned or required to work more than the twelve-hours per day for which they were paid.

Petitioners further contend that there exists no proper or reasonable basis for Respondent's determination that the named employees were entitled to compensation for a thirteenth or fourteenth hour of employment per shift.

Intervenor likewise challenges Respondent's investigation and determination. In relevant summary, Intervenor contends herein that sleep-in home attendants are required to be compensated for each hour they are on duty and that they must be compensated for twenty four hours of work per day.

Respondent contends that the Notices of Violation and the minimum wage computation, as modified herein, are proper and reasonable in all respects.

c) We find that this record fails to establish any factual or legal support for the Notices of Violations or the minimum wage computations set forth therein.

1. This record discloses that Respondents admittedly limited investigation and use of estimations in establishing an industry-wide formula fails on a number of grounds. No direct evidence is presented herein establishing that a discernable employment pattern was either disclosed or utilized as a result of the underlying investigation. Virtually no industry input was afforded or considered and no record exists that Respondent undertook any direct employer/employee interviews prior to reaching a conclusion. Respondent appears to have relied almost exclusively upon a narrow and limited questionnaire mailing to home care attendants (many of whom were not sleep-in home attendants) and this record casts serious doubt on whether even that process was utilized in reaching the resultant determination.

2. As with the underlying investigation, we also find that the weight of acceptable evidence presented herein fails to establish a discernable work pattern for the sleep-in home attendants.

   At the hearings held herein, a fairly representative number of sleep-in home attendants were called to testify concerning their day-to-day work experiences. In light of the almost limitless array of circumstances presented concerning the individuals and working environments involved, it is not surprising that the said evidence established wide and broad ranging points of view. We are unable to discern any work pattern from such testimony and respectfully conclude that it may just not be possible to do so.

3. Given the residential setting and the demonstrated dedication of service with in which certain sleep-in home attendants performed their duties, it appears that from time-to-time such employees would have performed services beyond the twelve-hours allotted to the program.

   However, based upon the cumulative weight of the body of evidence presented herein, we do not find that this record sustains the subject violations. Rather, this record demonstrates and we so find, that the subject employees were hired, expected and required to work at an agreed rate for twelve-hour shifts per day; that the assignments under this program were made and monitored to assure that no more than twelve-hours were required; that no medical monitoring or other medically related services were required or permitted to be performed by the subject attendants; that the subject attendants were not required to remain continuously present to the care and attention of the client and that they were permitted and had uninterrupted sleep, meal and free time. As regards these factors, we note that where the condition of the client required a higher level of care, with a correspondingly higher level of time and attention required, a split-shift of two attendants on a twelve-hour basis was used in place of a sleep-in home attendant.

4. Lastly, we reject Intervenor's contentions that the subject sleep-in home attendants were required to work and should be compensated on a twenty-four hour per shift basis. In addition to failing to find sufficient basis therefor in this record, we find and hold as a matter of law that the Board is precluding from making such determination in this proceeding.

   Within the statutory language of Labor Law Section 101, the Board's jurisdiction in this proceeding extends to a review and determination concerning the validity and reasonableness of the subject Notices of Violation issued by Respondent.

Intervenor did not Petition the Board for a review of the subject Notices. Accordingly, we lack jurisdiction to review and make a determination beyond the subject Notices and Intervenor is barred from independently raising issues in this proceeding.

d) For the reasons stated above, we conclude that the Notices of Violation under review herein should be revoked in all respects. The Petitions for review filed herein should be granted on the merits.

NOW, THEREFORE, IT IS HEREBY

RESOLVED:

That the Notices of Violation under review herein be and the same hereby are revoked in all respects. The Petitions for review are granted on the merits.

/s/ Evelyn C. Heady
Evelyn C. Heady, Chairman

/s/ Robert L. Marinelli
Robert L. Marinelli, Member

/s/ Clifford M. Barber
Clifford M. Barber, Member

Dated and Filed in the Office
of the Industrial Board of
Appeals, at Albany, New York,
on May 28, 1997.

STATE OF NEW YORK
DEPARTMENT OF LABOR
Governor W. Averell Harriman
State Office Building Campus
Albany, New York 12240

JAMES J. McGOWAN
Commissioner of Labor

October 27, 1998

Ms. Marian J. Massie
253 Glenwood Avenue
Syracuse, New York 13207

Dear Ms. Massie:

This is in response to your letter of August 24, 1998, forwarded to me by State Senator John A. DeFrancisco concerning your employment by Options for Independent Living.

The Minimum Wage Order for Miscellaneous Industries and Occupations, a set of regulations governing the field in which you are employed, states that

> "a residential employee – one who lives on the premises of the employer – shall not be deemed to be permitted to work or required to be available for work . . . during his normal sleeping hours solely because he is required to be on call during such hours . . ."

This means that, generally, for residential employees, sleep time is not considered working time. "Normal sleeping hours" is presumed to be eight hours a day.

With regard to "live-in" home health aides; (including those workers employed on-site for 24-hour shifts), it is the policy of the Department of Labor that such persons must be paid for no less than 13 hours of each 24-hour day they are required to remain "on call" in the home of the person receiving their services – provided that they are afforded eight hours for sleep and actually receive five hours of uninterrupted sleep and that they are afforded three hours for meals. If a "live-in" home health aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable, and the home health aide must be paid for all eight hours in question. Similarly, if a "live-in" home health aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.

cc: J. Mrozak
H. Aloisi
J. Jakubowski
E. Davidow

Telephone (518) 457-2741

Fax (518) 457-6908

In order for us to investigate the specific circumstances of your employment and make a determination as to whether the amount of compensation you receive represents a violation of law, I have requested Supervising Labor Standards Investigator Joseph V. Jakubowski, New York State Department of Labor, Division of Labor Standards, 333 East Washington Street, Syracuse, New York 13202, telephone (315) 428-4642, to contact you for the purpose of obtaining additional information.

I trust this course of action will address your concerns.

Sincerely,

James J. McGowan
Commissioner of Labor

cc: Senator John A. DeFrancisco
Joseph Jakubowski

STATE OF NEW YORK
DEPARTMENT OF LABOR
Counsel's Office
345 Hudson Street – Room 8001
New York, New York 10014-0673

June 25, 2002

Leon Greenberg, P.C.
225 Broadway, Suite 612
New York, New York 10007

Re: Request for Opinion
29 CFR §§ 785.21 & 785.22
Hours Worked by Sleep-In
Home Health Care Attendant

Dear Mr. Greenberg:

Your June 14, 2002 letter asks how the Department of Labor computes the hours worked for minimum wage and overtime purposes by your client, a sleep-in home health care attendant. Your client's duty was to care for all of the needs of an individual in his or her home for two or more consecutive 24-hour periods. She was required to remain in the individual's home at all times during her assignment and had to be available at all times to assist the individual with his or her needs. She was allowed to sleep, but her sleep was frequently interrupted by the need to respond to the individual's needs. She was paid at the rate of $70.00 per day.

You refer in your letter to 29 CFR §§ 785.21 and 785.22, which address the issue of hours worked by employees who are permitted to sleep while on duty. Section 785.22, which addresses situations where an employee is required to be on duty for 24 hours or more, applies to your client's situation. That regulation provides that an employer and an employee may agree to exclude bona fide sleeping time of up to eight hours from hours worked, provided that the employer furnishes adequate sleeping facilities and the employee can usually enjoy an uninterrupted night's sleep. It provides, however, that, in the absence of such an agreement, all hours of sleeping time constitute hours worked. It further provides that, if sleeping time is interrupted by a call to duty, the interruption must be counted as hours worked, and that, if the employee cannot get a reasonable night's sleep (*i.e.*, five hours), all hours are counted as hours worked. The New York State Department of Labor follows the principles set forth in this regulation in computing the hours worked by a sleep-in home health care attendant such as your client under New York minimum wage and overtime law (Labor Law, Article 19, Section 652, and 12 NYCRR § 142-2.2).

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (212) 352-6655.

Telephone (212) 352-6655 **usbrca@labor.state.ny.us** **Fax (212) 352-6565**

Very truly yours,

Robert Ambaras

Robert Ambaras
Associate Attorney

RECEIVED NEW YORK STATE DEPARTMENT OF LABOR
2002
DIV OF LABOR STANDARDS ALBANY CENTRAL OFFICE

H. Aloisi
T. Glubiak
B. Simonetti
M. Burkard
E. Davidow
D. Fiano
C. Ruberto

RECEIVED
NEW YORK STATE
DEPARTMENT OF LABOR

JUN 27 2002

DIV OF LABOR STANDARDS
ALBANY CENTRAL OFFICE

New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

August 31, 2009

Douglas Hutter
Nassau County Office of the Comptroller
340 Old Country Road
Mineola, New York 11501

Re: Request for Opinion
Live-in Personal Care Aides
RO-09-0112

Dear Mr. Hutter:

This letter is written in response to your letter of August 5, 2009 in which you request clarification as to the number of hours live-in personal care aides are required to be paid under the New York State Labor Law. Your letter states that your office audits vendors that do business with Nassau County to ensure that they comply with the Nassau County Living Wage Law. Some of those audits, your letter states, have uncovered that live-in personal care aides working twenty-four hours per day are being paid inconsistently by their employers; some being paid for a thirteen hour workday, while others are paid for a ten hour workday despite working the same twenty-four hour shift.

In order to respond to your question it is necessary to distinguish between "on call" and "subject to call" time as employees must be paid for all time spent "on call." "On call" time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties. Employees who are "on call" are considered to be working during all the hours that they are confined to the workplace including those hours in which they do not actually perform their duties. "Subject to call" time is that time in which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities. In some cases, employees who are "subject to call" may be restricted to a specified area, to be reachable by telephone or otherwise, to report to the work assignments within 15 to 30 minutes, etc. In cases in which an employee is "subject to call," working time starts when they are actually ordered to a specific assignment or at the time in which they perform work for the employer.

Regulation 12 NYCRR §142-2.1 provides that the minimum wage shall be paid to employees for the time an employee is permitted to work or is required to be available to work at

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W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

www.labor.state.ny.us bcejjs@labor.state.ny.us

a place prescribed by the employer. However, that regulation provides that "residential employees," those who live on the premises of their employer, are not deemed to be working during normal sleeping hours merely because the employee is "on call" for those hours or at any time the employee is free to leave the place of employment.

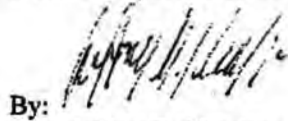
It is worth noting that live-in personal care aides who work for agencies that send them to the homes of the agencies' clients are not "residential employees," since the premises on which they live is not that of the employer, rather it is that of the employer's client. Since your letter does not state the nature of the premises in which the aides in question are living, a definitive determination as to whether the individuals fall within that definition cannot be made. While this distinction is important for the purposes of determining the number of hours at which overtime is owed (44 for residential employees vs. 40 for non-residential employees), the Department applies the same test for determining the number of hours worked by all live-in employees.

In interpreting these provisions, it is the opinion and policy of this Department that live-in care aides must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable. Additionally, an aide need not be compensated for any time in which the employee is completely relieved of his or her duties for a defined period of time and is free to leave the residence.

This opinion is based on the information provided in your letter of August 5, 2009. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel



By:

Jeffrey G. Shapiro
Associate Attorney

JGS:mp
cc: Carmine Ruberto

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Howard S. Weitzman
Comptroller

Elizabeth Botwin
Chief Deputy Comptroller

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Deputy Comptroller
for Audit & Special Projects

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dhutter@nassaucountyny.gov

Ms. Maria Colavito
Counsel to the New York State Department of Labor
Division of Labor Standards
Building 12, Room 509
W. Averell Harriman State Office Building Campus
Albany, NY 12240

DEPARTMENT OF LABOR
RECEIVED
AUG 07 2009
COUNSEL'S OFFICE

August 5, 2009

Re: Standard Workday for Live-in Personal Care Aides

Dear Ms. Colavito:

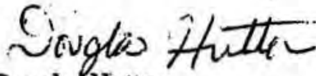
The Nassau County Comptroller's Office audits vendors that do business with the County to ensure that they comply with Nassau County's Living Wage Law. Our recent audits have identified that live-in personal care aides working 24 hours a day are being compensated inconsistently by their employers. Some employees are being paid for a 13-hour workday while others are being paid for only a 10-hour workday, despite working the same 24-hour shifts.

Our office reached out to Carmine Ruberto, Director of the Division of Labor Standards, for clarification as to the number of hours' pay the aides were entitled to, for each 24-hour shift. We were informed that the aides should be paid for 13 hours, based on the standard that they worked all but an eight-hour sleep period and three one-hour meal breaks. We inquired if there was anything in writing, which we could cite in our audit reports as evidence of this standard, and were told to reach out to you and request a letter clarifying the 13-hour workday as standard work hours for live-in positions.

We would like to notify affected agencies of this requirement as soon as possible so they can comply with the applicable standards. We therefore are requesting something in writing to confirm our understanding of the 13-hour standard.

If you need additional clarification, please call me at (516) 571-1145. Thank you in advance for your assistance.

Sincerely yours,



Douglas Hutter
Field Audit Supervisor

cc: Carmine Ruberto, Director, Division of Labor Standards
Aline Khatchadourian, Deputy Comptroller for Audit & Special Projects

New York State Department of Labor
David A. Paterson, *Governor*
Colleen Gardner, *Commissioner*

March 11, 2010

Re: Request for Opinion
Live-In Companions
RO-09-0169

Dear [redacted]:

I have been asked to respond to your letter dated November 23, 2009, in which you ask several questions regarding employees providing "companionship services" within the meaning of the federal Fair Labor Standards Act (FLSA) exemption for such services. Your letter asks four questions for which you request that it be assumed that your client's employees are within the FLSA companionship exemption. Each of your questions is discussed individually below.

1. *Under New York State Law, must my client pay these home health aides overtime? If so, after how many hours of work during a particular week does that obligation obtain, and under which state statute/regulation(s)?*

The New York State Minimum Wage Act, which contains the State minimum wage and overtime provisions, generally applies to all individuals who fall within its definition of "employee." (*see*, Labor Law §651 *et seq.*) Section 651(5) defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories of workers from that definition. (*see*, Labor Law §651(5)(a-o).) Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all "employees" must be paid at a rate not less than one and one half times their regular rate of pay in accordance with the provisions and exceptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime at a rate not less than one and one half times the minimum wage. In short, "exempt" employees under Section 13 of the FLSA must be paid at a rate of not less than one and one half times the minimum wage for overtime hours worked unless such employees fall outside of the New York Minimum Wage Act's definition of "employee."

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Your letter requests that the Department assume that the employees in question fit within the "companionship services" exemption of the FLSA. Since that exemption is contained in Section 13 of the FLSA (29 USC §213(a)(15)), the employees described in your letter are required to be paid not less than one and one half times the minimum wage rate for all hours worked in excess of forty hours per workweek should such individuals be non-residential employees, and forty-four hours per workweek should they be residential employees.[1] However, it is worth noting that such employees are nevertheless subject to the remaining provisions of the Minimum Wage Orders including, for example, the requirement that employees be paid not less than the minimum wage, for spread of hours pay, call-in pay, and split-shift pay.

It is worth noting that Article 19 of the New York State Labor Law [Minimum Wage Act] excludes "companions" from its definition of "employee," and therefore from the coverage of the Minimum Wage Orders. (Labor Law §651(5)(a).) That provision provides that "someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping" is excluded from the definition of the term "employee." (Id.) In *Settlement Home Care v. Industrial Board of Appeals*, 151 A.D.2d 580, 581 (2d Dep't 1989), the Third Department affirmed a decision of the Industrial Board of Appeals holding that "sleep-in home attendants" did not fall within the exception contained in Section 651(5)(a) and noted that the exemption may not be found applicable unless "*all* of the statutory requirements have been established." (*Id.* at 582 [Emphasis added]). The Court set forth three mandatory requirements, which it derived directly from Section 651(5)(a), to determine whether an employee fits within the "companionship exception": (1) the individual must "live in the home of an employer," (2) the individual must be employed "for the purpose of serving as a companion to a sick, convalescing or elderly person," and (3) that the individual's "principle duties do not include housekeeping." (*Id* at 582-583.) Since your letter does not request an evaluation of the applicability of that exception, or sufficient facts upon which to make such an evaluation, no opinion is offered as to its applicability at this time.

2. *Would your answer to "1," above, change if the home health care aide's hourly wage exceeded the New York State minimum wage?*

As the answer to the question above states, the employees described in your letter are not exempted from the requirement that the minimum wage be paid as no exception to the applicability of the State Minimum Wage Act has been shown to apply. However, should the employees be paid in excess of one and one half times the minimum wage rate, no premium payment is required for any overtime hours worked.

3. *Would your answer to "1," above, change if the home health aide was a licensed practical nurse?*

[1] Residential employee is defined by 12 NYCRR §142-2.1 as "one who lives on the premises of the employer." For further discussion of "residential employees," please see the decision of the Second Department in *Settlement Home Care v. Industrial Bd. of Appeals of Dep't of Labor*, 151 A.D.2d 580 (1989).

Please be advised that licensed practical nurses do not fit within the "companionship services" exemption to the FLSA and, as such, such individuals would be subject to the overtime provisions in both the FLSA and the New York State Labor Law. (See, 29 USC §213(a)(15); 29 CFR Part 541; FLSA Fact Sheet No. 25.)

4. *Under New York State law, must my client pay the "spread" set forth at 12 NYCRR Section 142-2.4 when an aide's work exceeds 10 hours?*

Regulation 12 NYCRR §142-2.4(1) states that "[a]n employee shall receive one hour's pay at the minimum hourly wage rate, in addition to the minimum wage required by this part for any day in which: (a) the spread of hours exceeds 10 hours..." The term "spread of hours" is defined by 12 NYCRR §142-1.28 as "the interval between the beginning and end of an employee's workday. The spread of hours includes working time plus time off for meals plus intervals off duty." The "spread of hours" regulation applies to all "employees" defined in 12 NYCRR §142-2.14 regardless of whether such employees fit with a FLSA exemption for overtime pay (except those persons exempted from the definition of "employee" as set forth in Section 651(5) of the Labor Law). It is important to note that the "spread of hours" regulation does not require all employees to be paid for an additional hour, but merely that the total wages paid be equal to or greater than the total due for all hours at the minimum wage and overtime rate, plus one additional hour at the minimum wage for each day in which a "spread" is required to be paid.

As stated above, since nothing in your letter provides a basis to exclude the employees in question from the requirement of the Minimum Wage Orders, it appears that your client is required to pay the "spread" set forth in the Minimum Wage Orders as described above.

5. *Under New York State law, if a home health care aide "lives in," what hours count towards calculating a ten hour day?*

To answer this question, it is necessary to determine the number of hours worked by a live-in employee. To do so, we must distinguish between "on call" and "subject to call" time as employees must be paid for all time spent "on call." "On call" time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties. Employees who are "on call" are considered to be working during all the hours that they are confined to the workplace including those hours in which they do not actually perform their duties. "Subject to call" time is that time in which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities. In some cases, employees who are "subject to call" may be restricted to a specified area, to be reachable by telephone or otherwise, to report to the work assignments within 15 to 30 minutes, etc. In cases in which an employee is "subject to call," working time starts when they are actually ordered to a specific assignment or at the time in which they perform work for the employer.

Regulation 12 NYCRR §142-2.1 provides that the minimum wage shall be paid to employees for the time an employee is permitted to work or is required to be available to work at

a place prescribed by the employer. However, that regulation provides that "residential employees," those who live on the premises of their employer, are not deemed to be working during normal sleeping hours merely because the employee is "on call" for those hours or at any time the employee is free to leave the place of employment. Since your letter does not state the nature of the premises in which the aides in question are living, a definitive determination as to whether the individuals fall within that definition cannot be made. While this distinction is important for the purposes of determining the number of hours at which overtime is owed (44 for residential employees vs. 40 for non-residential employees), the Department applies the same test for determining the number of hours worked by all live-in employees.

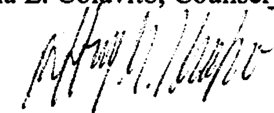
In interpreting these provisions, it is the opinion and policy of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.

Therefore, a live-in employee is required to be paid "spread of hours" pay for all days in which he or she works as a live-in employee since such employee is deemed to work, at a minimum under the rubric described above, thirteen hours per day.

This opinion is based on the information provided in your letter dated November, 23 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: 
Jeffery G. Shapiro
Associate Attorney

JGS:mp
cc: Carmine Ruberto