

FLSA-140

November 18, 1974

We regret the delay in responding to your letter of July 1, 1974, requesting an opinion on the application of the recently amended Fair Labor Standards Act in the following situations: (1) to individuals who provide child-care services in their own homes under agreement with the Division of Family Services, and (2) to foster parents who, under agreement with the Division, raise a child in their own home.

As concerns situation (1) above, if the "client" is free to select (from a list furnished by the Division of Family Services) and the "client" does, in fact, make the selection and deal with the individual whom she has chosen to care for her child, with the Division merely agreeing to reimburse the child-care "operator" so designated, in our opinion the prerequisite employer-employee relationship would not exist for purposes of the Act as between the Division of Family Services and the individual providing the child-care services. However, the activities of such a day care home may be covered by the Act and the operator responsible for compliance with the law's monetary provisions in regard to any employees employed in connection with the operation of the child-care center.

On the other hand, if, in fact, such freedom of choice does not exist, but rather the client is told to which individual she must take her child for such service, and the Division of Family Services controls and directs the day care operator in performing the duties in rendering child care services, an employer-employee relationship would exist as between the individual day-care operator and the Division of Family Services. As an "employer" the Division would then be responsible for compliance with the law's monetary provisions with respect to these operators. If the Division of Family Services utilizes volunteers as day care operators over whom no control is exercised, and the monetary payment is simply to reimburse the operator for his or her expenses, no employment relationship would exist, and the Act is inapplicable.

Certain day care homes are not covered such as in the situation where a mother who is already caring for her own children will care for other parents' children in her residence without the aid of any regular employees other than her immediate family. Such residences are excluded from the Act's coverage notwithstanding that they may be in some way affiliated with a covered enterprise.

In regard to situation (2) where a husband and wife agree to become foster parents on a voluntary basis and take a child into their home to be raised as one of their own it is our opinion the prerequisite employer-employee relationship would not exist as between the parents and the Division of Family Services where the payment is primarily a reimbursement of expenses for rearing the child.

Sincerely,

Betty Southard Murphy
Administrator
Wage and Hour Division