U.S. Department of Labor Wage and Hour Division
Washington, D.C. 20210

WHD-OL-1997

July 19, 1997

Name*

This is in further response to your inquiry concerning the application of the minimum wage requirements of the Fair Labor Standards Act (FLSA) to the employment of *au pair* child care worker. An *au pair* is subject to the Exchange Visitor Program regulations, 22 CFR §514, of the U.S. Information Agency (USIA).

You have petitioned the Wage and Hour Division pursuant to 29 CFR §531.4 and seek credit against the FLSA minimum wage requirement for the cost of educational expenses, two weeks paid vacation, and credit for the "personal" use of the family automobile by the *au pair*. For the reasons discussed below, it is our opinion that an *au pair* employer may not take credit in meeting its minimum wage obligations for any of the three items.

EDUCATIONAL EXPENSES

Although the Department has previously ruled that the cost of tuition may be credited against the minimum wage under certain circumstances, the Department has specifically ruled in a February 28, 1997 opinion that an *au pair* employer may not take credit for educational expenses. Credit for facilities under 29 CFR §531.32 is conditioned by 29 CFR §531.30, which requires that the employee's acceptance of such facilities by voluntary and uncoerced. Section 531.32 was that not intended to address situations where an employer is required, as a condition of participation in a federal program, to provide the employee the facility for which the employer wants to take credit. In the present situation, an *au pair* employer is required by USIA regulations at 22 CFR §514.31(k) to pay for an employee's tuition. Therefore, an *au pair* employer may not take credit for tuition payments. A copy of the February 28, 1997 ruling with a more detailed discussion is enclosed for your information.

PAID VACATION

As stated in 29 CFR §531.29, the legislative history of section 3(m) of the FLSA, which permits an employer to take credit against the minimum wage of board, lodging or other facilities customarily furnished to the employee, "clearly indicate(s) that [it] was intended to apply to all facilities furnished by the employer as compensation to the employee . . ." emphasis added. Consistent with section 7(e)(2) of the FLSA, the Department's regulations at 29 CFR §778.216 and §778.218 provides that payments made for occasional periods when no work is performed, such as those for vacation, cannot be considered compensation. Since such payments for hours not worked are not compensation, they cannot be "other facilities" for purposes for the FLSA. Thus, an *au pair* employer may not take credit against the minimum wage for two weeks paid vacation. We note that, in any event, a cash payment is not a "facility". Even if a paid vacation

were considered "other facilities," as discussed above, an employer may not take credit for facilities which the employer is required by law or regulation to provide. Since a two-week paid vacation is specifically required by USIA regulations at 22 CFR §514.31(j)(4), no deduction or credit against the minimum wage would be permissible.

USE OF AUTOMOBILE

The Department has consistently ruled that an employer may not take credit for the personal use of an automobile where such automobile is incident of and necessary to the employment. This view was clearly approved by the court in Brennan v. Modern Chevrolet Co. 363 F. Supp. 327 (N.D. Tex. 1973), affd 491 F.2d 1271 (5th Cir. 1975), in which a company automobile used by a car salesman was found not to be a facility, and therefore credit for its cost could not be taken to meet the minimum wage, despite the fact that 90% of the car's use by the salesman was personal. In the present case, the *au pair* employer is required by 22 CFR §531.4(k) to "facilitate the enrollment and attendance of the *au pair*" in an accredited post-secondary institution. If the *au pair* uses automobile, even occasionally, to attend such institution or to transport the child being provided care for any reason, credit for the automobile's use, whether personal or work-related, is inappropriate. A copy of the Modern Chevrolet decision with a more detailed discussion is enclosed for your information.

HOURS PER WEEK

You also inquire about the amount of the stipend an *au pair* employer must pay in situations where the *au pair* works less than the minimum 45 hours per week. The FLSA only requires payment of the minimum wage for hours worked. However, the Department has no authority to lower the amount of the minimum stipend where the *au pair* works less than the maximum. USIA regulations assure that, without a specified maximum limit, an *au pair* would work more than 45 hours per week. This assumption is reflected in USIA regulations at 22 CFR §514.31(b)(2) and §514.31(j)(1), which requires, respectively, that an *au pair* work no more than 45 hours per week and that an au pair be provided a stipend of not less than $115.00 per week (which reflects the minimum wage times 45 hours, minus deductions). You should direct your inquiry regarding this 45-hour issue to the USIA, as the Department of Labor has no involvement with these regulatory provisions.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures

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