



November 3, 2015

Dear Employer,

The Alaska Department of Labor and Workforce Development, Wage and Hour Administration is responding to an increase in complaints concerning caregivers hired by assisted living homes (ALH). For the purpose of education, this letter is being sent as an industry-wide notice to address multiple issues that appear to be subject to widespread misunderstanding throughout the industry. Among the issues that have been the focus of the complaints and subsequent enforcement activities are:

- the absence of written hiring agreements between the employer and the employee;
- changes to the rate of pay without the required written notice;
- payment of wages and overtime inconsistent with the *Alaska Wage and Hour Act*;
- nonpayment of wages for all hours worked;
- insufficient or non-existent records of all daily and weekly hours worked by every employee;
- nonpayment or insufficient payment for time spent in travel and other work-related duties;
- employees being incorrectly classified as independent contractors or volunteers;
- employees not being paid for overtime when their employers enter into a joint-employer relationship, and
- employees subjected to unlawful deductions from wages, the withholding of paychecks, or who are being compelled to reimburse employers for room and board above statutory limits and without written authorization.

We will address each of these issues in this letter and we are always available to discuss any follow-up questions you may have.

Written Hiring Agreements and Changes in the Rate of Pay

Under Alaska law, employers must provide all employees a written notice of their rate of pay, where they will be receiving payment, and the established pay day (weekly, bi-weekly, monthly) before the employee starts work. Any time the employer wants to make a change to any of these items, they must provide the employee with another written notification no later than on the payday before the time of change. The change cannot be made in the middle of a pay period and cannot be retroactive.¹

Minimum Wage and Overtime

Except as otherwise provided for in law, an employer shall pay to each employee a minimum wage, for all hours worked in a pay period, whether the work is measured by time, piece, commission or otherwise. The current minimum wage is \$8.75 per hour and it will increase again to a rate of \$9.75 per hour on January 1, 2016. Barring any allowable exemptions, an employee who works over 8 hours in a day and/or more than 40 straight-time hours in a week must be paid 1.5 times their *regular rate*² of pay (this requirement of the law is referred to as “overtime”).³ Furthermore, if an employee is paid at more than one rate of pay for work performed during a workweek the overtime is to be calculated by using a *weighted average* formula.

Time spent working is compensable time, even if an employee’s CPR license or other certifications have lapsed. If the work is directed by *or allowed* by the employer or if the employer has reason to suspect that the employee worked, the time spent working is compensable.⁴ An accurate record of all daily and weekly hours worked must be kept, and most importantly, the employee must be paid correctly for all these hours.

Salary

Payment on a salary basis does not eliminate overtime requirements. Individuals receiving payment on a non-exempt salary basis must be paid in a manner consistent with the minimum wage and overtime requirements of the *Alaska Wage and Hour Act*.

Caregivers in assisted living facilities are not specifically exempt from overtime requirements and must be paid time-and-a-half for work performed in excess of 8 hours per day and/or 40 straight-time hours in a work week. Payment on a salary basis does not eliminate overtime pay obligations. If a fixed and recurring pay rate (salary) has been established, “the applicable compensation basis must be converted to an hourly rate when determining the regular rate for computing overtime compensation and a written contract must be provided showing the hourly rate, the overtime rate, and the fixed number of hours worked each week to arrive at the specified, fixed salary amount. If the contract fails to establish a fixed number of daily and weekly hours that the salary is intended to compensate, or if the actual hours of work deviate from the hours specified in the contract without a corresponding adjustment in hourly pay, the salary will be considered to be compensation for an eight-hour workday and 40-hour workweek, and overtime will be computed on that basis.”⁵

Note: To determine if an employee meets the exemptions from Alaska’s minimum wage and overtime requirements, based on work in a bona fide executive, administrative, or professional capacity, consult the *Code of Federal Regulations 29 C.F.R. § 541, Alaska Statute 23.10.055, and Alaska Administrative Code 8 AAC 15.908*, or contact the Wage and Hour office in your region.

¹ AS 23.05.160

² 8 AAC 15.100

³ AS 23.10.060

⁴ 29 C.F.R. § 785.11 (2013)

⁵ 8 AAC 15.100

Accurate Record of Hours Worked

An employer shall keep an accurate record of all the daily and weekly hours worked by each person.⁶ A mere record of hours spent only in providing care to the recipient of services may not be sufficient to account for all the hours actually worked by the employee. The time worked may also include, but is not limited to, time spent in preparing to deliver services to the recipient and time spent on post-provision duties (such as preparing records or cleaning at the end of the shift, travelling between facilities, doctor's appointments for clients, trips to the store to purchase items for the assisted living home, etc.).

Travel Time

The employer must determine whether time spent in travel is working time. In contrast to regular home to work travel, which is not compensable, if time spent in travel is part of the principle activity of the employee's work day, such as taking a client to a doctor's appointment, the time is considered work and must be counted as hours worked.⁷ When an employee has been directed to provide services at one facility and is then assigned to provide services at a second facility, the time spent in travel between the two sites is also compensable time. Put simply, travel from job site to job site during the workday must be counted as hours worked.

Independent Contractor, Volunteer, or Employee?

Frequent calls to the Wage and Hour Administration have also raised the issue of the caregiver's being an independent contractor rather than an employee. When determining whether or not the relationship between the business and the alleged employee is subject to the *Alaska Wage and Hour Act* and the *Fair Labor Standards Act* (FLSA), it must be determined "whether the worker is dependent upon finding employment in the business of others. If the facts show such a dependency, the worker is an employee."⁸ Employers are encouraged to review the factors established by the Alaska Supreme Court (see footnote #8). In general, all caregivers should be treated as employees to avoid issues with agencies such as Wage and Hour, Worker's Compensation, Unemployment Insurance taxes, and IRS taxes, unless the alleged employer can clearly demonstrate that a worker is an independent contractor. The mere possession of an Alaska business license is not enough to substantiate independent contractor status.

With regard to volunteers, a for-profit business is barred from using volunteer labor.⁹

Joint-Employer Relationship

A single individual may be an employee of two or more employers at the same time. A determination of whether the employment by two or more employers is to be considered joint employment or separate and distinct employment depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer(s). On the other hand, if the facts establish that the employee is employed jointly by two or more employers (i.e., that the employment by one employer is not completely disassociated from the employment by the other employer(s)) all of the employee's work for all of the joint employers during the

⁶ AS 23.05.080

⁷ 29 C.F.R. § 785.38 (2013)

⁸ *Jeffcoat v. State, Dept. of Labor*, Sup. Ct. Op. No. 3162 (File No. S-1444), 732 P.2d 1073 (1987).

⁹ AS 23.10.055 (6)

workweek is considered as one employment. In this event, all joint employers are responsible, both individually and jointly, for compliance with Alaska's overtime and minimum wage requirements with respect to the entire employment for the particular workweek and pay period.

With regard to assisted living facilities, the mere fact that each facility is a separately licensed business, is owned by a relative, or maintains separate payrolls is immaterial. If the employee performs work which simultaneously benefits two or more employers, a joint employment relationship likely exists. In situations where there is an arrangement between the employers to share the employee's services, or where one employer is acting directly or indirectly in the interest of the other employer(s), a joint employment relationship would exist.

Employees Living in the ALH

Assisted living facilities often hire employees who reside in the assisted living home on a permanent basis or for extended periods of time. Ordinarily, the employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties, such as time when they may leave the premises for their own purposes.¹⁰ Though an employee may live in the assisted living home, not all of the time spent on the premises needs to be counted as work time. However, if an employer indicates to the employee that hours are to be worked, and the hours are actually worked, those hours worked must be paid. If an employee is engaged to wait¹¹ by the employer, and cannot use their time effectively for their own purposes, the employee is expected to be paid for their time spent waiting.

If an employee is completely relieved from all duties for 20 minutes or more during which the employee may use the time effectively for his/her own purposes, then the periods need not be counted as time worked.¹² Again, the employer is expected to keep an accurate record of the daily and weekly hours worked by each employee to assure proper payment for the time worked.

Room and Board

When an employee lives at the assisted living home, the employer is allowed to deduct an amount from the employee's wages for the reasonable cost of room and board. The amount of this deduction must be reasonable and without profit to the employer and based on a *written agreement signed by the employee*. Use of the facilities must be voluntarily, and no deduction for room and board is lawful in any situation in which an employer requires an employee to use the employer-provided facilities. Hiring or firing of employees based upon the employee's willingness to authorize deductions for room and board costs from their check is not considered voluntary.¹³

Furthermore, unless the employer and the employee have a *written agreement* signed by the employee, before the deduction, the employer is prohibited from seeking to retroactively deduct the cost of room and board from their wages at the time of termination. A deduction of \$15.00 per day or less is the established maximum allowable deduction for the cost of room and board. Any amount more than this would require a special determination made by the Wage and Hour Administration.¹⁴

¹⁰ 29 C.F.R. § 785.23 (2013)

¹¹ 29 C.F.R. § 785.15 (2013)

¹² 29 C.F.R. § 785.18 (2013)

¹³ 8AAC 15.160

¹⁴ 8AAC 15.160(f)

Sleep Time

If an employee is required to be on duty for a 24-hour period of time, the employer and the employee may agree (preferably in writing) to exclude designated meal periods (no less than 20 minutes) and regularly scheduled sleeping time of up to 8 hours from hours worked, provided *adequate* sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period consists of more than 8 hours, only 8 hours will be credited. If there is no agreement in place, the 8 hours of sleeping time and lunch periods are to be counted as hours worked.

If the sleeping period is interrupted by work, this time is compensable. If the period is interrupted to such an extent that the employee cannot get at least 5 hours of uninterrupted sleep, the entire period must be counted as hours worked.¹⁵

Workers' Compensation Coverage

An Alaska business with even one part-time employee is required to carry workers' compensation insurance under *Alaska Statute 23.30.075*. Family members and friends who work for the business must be covered by workers' compensation insurance even if they are not paid wages. For the purposes of determining workers' compensation coverage, employee status is determined under *Alaska Administrative Code 8 AAC 45.890*. Penalties for not having coverage are severe. If you have questions regarding workers' compensation requirements, please contact the Division of Workers' Compensation at (907) 269-4002.

Resources

In conclusion, a business that is involved in practices that are not consistent with Alaska wage and hour laws must correct the discrepancies immediately to avoid future enforcement actions. We hope that your organization will take this opportunity to conduct an internal review and voluntarily make any wage adjustments. We have noted several applicable statutes and regulations for your review. Employers are encouraged to conduct a complete review of Alaska's wage and hour laws and regulations as published in the *Pamphlet 100* publication, which can be found at: <http://labor.alaska.gov/lss/forms/pam100.pdf>.

The Wage and Hour Administration provides a cost-free counseling service to Alaska employers, and we invite you to take advantage of this service. A regular, monthly seminar is offered to the employers and employees concerning wage and hour laws. This seminar is offered at each of our four locations in Anchorage, Wasilla, Fairbanks, and Juneau. Check our website for the time and location of each seminar, or contact our office at (907) 269-4900. In addition, an investigator is on duty each business day from 8:00 a.m. to 5:00 p.m. to answer any questions you may have.

Our website can be found at: <http://labor.alaska.gov/lss/whhome.htm>.

Alternatively, you may wish to contact a private attorney. The Alaska Lawyer Referral Service may be able to assist you with locating an attorney to address your specific concerns. You may contact this office at 1-800-770-9999 or visit the following website for additional information:

https://www.alaskabar.org/servlet/content/lawyer_referral_serv.html

¹⁵ 29 C.F.R. § 785.22 (a)(b) (2013)