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MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND  
DISTRICT DIRECTORS

FROM: Dr. David Weil  
Wage and Hour Administrator

SUBJECT: Exclusion of Sleep Time from Hours Worked by  
Domestic Service Employees

This memorandum provides guidance to Wage and Hour Division (WHD) field staff regarding the exclusion of sleep time from the hours worked of domestic service employees. Specifically, it describes the broadly applicable rules governing under what circumstances an employer may exclude sleep time from an employee's hours worked under the FLSA and, if exclusion is permissible, how many hours may be excluded, with explanations and examples from the domestic service context.

## **I. Background**

The Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 201 *et seq.*, is the federal law that requires covered employers to pay nonexempt employees at least the federal minimum wage for all hours worked and overtime compensation for all hours worked over 40 in a workweek. To comply with the FLSA's requirements, therefore, an employer must determine what time constitutes "hours worked."

Under most circumstances, time spent at a worksite (especially time during which an employee is required to be at the worksite) is considered hours worked under the FLSA. 29 C.F.R. 785.7 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). In some circumstances, however, an employer may exclude time an employee spends sleeping at the worksite, even if the employee is required to be there, from the time for which an employee must be paid. 29 C.F.R. 785.20. The exclusion of sleep time from hours worked can be appropriate in any industry, and indeed has been the subject of previous guidance issued by the Wage and Hour Division regarding, for example, firefighters and care providers at residential facilities. *See, e.g.*, Wage & Hour Division Opinion Letter FLSA 2002-6, 2002 WL 3206596 (Aug. 13, 2002) (firefighters); Wage & Hour Memorandum – 88. 48 (June 30, 1988) ("1988 Memo") (residential care providers). This document focuses on domestic service, and in particular home care,

because the Application of the Fair Labor Standards Act to Domestic Service; Final Rule, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (“Home Care Final Rule”) extended FLSA protections to most home care workers in the United States, and therefore made the FLSA’s sleep time rules newly applicable in the home care context.<sup>1</sup> The Home Care Final Rule did not alter any of the Department’s longstanding guidance concerning sleep time. The sleep time rules described below apply to all employees, including home care workers (often referred to as “providers”), though the Department notes that the examples included below are specific to the home care context. In all circumstances, “whether sleep time is work time ‘is a question of fact,’ which must be determined ‘in accordance with common sense.’” *Hultgren v. Cnty. of Lancaster, Neb.*, 913 F.2d 498, 504 (8th Cir. 1990) (quoting *Cent. Mo. Tel. Co. v. Conwell*, 170 F.2d 641, 646 (8th Cir. 1948)).

## II. Requirements for Excluding an Employee’s Sleep Time from Hours Worked

The exclusion of sleep time from an employee’s hours worked is only appropriate in certain circumstances. In describing these circumstances, the relevant regulations place employees into three categories: those who reside at the worksite (“live-in” employees); those who work shifts of 24 hours or more; and those who work shifts of less than 24 hours. *See* 29 C.F.R. 785.21-.23 (regulations regarding sleep time that apply broadly to all employees and distinguish between the three categories); *see also* 29 C.F.R. 552.102(a) (regulation addressing sleep time for live-in domestic service employees specifically).<sup>2</sup>

### *Live-in employees*

Certain sleep time rules apply to “live-in” employees, *i.e.*, employees who reside at their worksites, and in particular, live-in domestic service employees, *i.e.*, employees who reside at the private homes in or about which they provide household services. An employee is deemed to reside at her worksite if she lives there on a “permanent basis,” *i.e.*, stays there seven nights a week and has no other home, or for “extended periods of time,” *i.e.*, works and sleeps there for

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<sup>1</sup> The Final Rule narrowed the definition of “companionship services,” a category of work that is exempt from FLSA protections, and prohibited third party employers from claiming the companionship services exemption regardless of a worker’s duties. 78 Fed. Reg. 60,557 (codified at 29 C.F.R. 552.6, .109(a)). It also prohibited third party employers of live-in domestic service employees from claiming the exemption from the Act’s overtime compensation requirement that recipients of domestic services and their families or households may claim. *Id.* (codified at 29 C.F.R. 552.109(c)). These exemptions are relevant only in the context of domestic service employment, *i.e.*, services of a household nature that are performed in or about a private home. *See* 29 C.F.R. 552.3. Detailed information about the Final Rule, including the regulatory changes it made and the meaning of terms used in this FAB, including “private home,” is available at <http://www.dol.gov/whd/homecare/>.

<sup>2</sup> Another regulatory provision, 29 C.F.R. 553.222, addresses the sleep time of employees in fire protection activities. This memorandum does not address, and has no effect on, the portions of that provision that create slightly different sleep time rules only for such employees.

five days a week (120 hours or more) or five consecutive days or nights (regardless of the total number of hours). 78 Fed. Reg. 60,474; *see also* Field Operations Handbook (“FOH”) § 31b20.

Employers of live-in employees, including live-in domestic service employees, may exclude sleep time from those employees’ hours worked provided certain conditions are met: (1) the employer and employee have a reasonable agreement to exclude sleep time, 29 C.F.R. 785.23, and (2) the employer provides the employee “private quarters in a homelike environment,” 1988 Memo.

*Reasonable agreement.* First, to exclude a live-in employee’s sleep time from her hours worked, the employer and employee must have a reasonable agreement to exclude sleep time. 29 C.F.R. 785.23; 29 C.F.R. 552.102.<sup>3</sup> The reasonable agreement “must be an employer-employee agreement and not a unilateral decision by the employer,” and it “should normally be in writing in order to preclude any possible misunderstanding of the terms and conditions of an individual’s employment.” FOH § 31b18(b). WHD will accept “any reasonable agreement of the parties which takes into consideration all of the pertinent facts.” 29 C.F.R. 785.23. In other words, the reasonable agreement should reflect the realities of the particular situation; sleep time may only reasonably be excluded, for example, if a home care employee regularly has the opportunity to sleep overnight, rather than if the employee is present to actively provide around-the-clock care.

*Private quarters in a homelike environment.* Additionally, to exclude a live-in employee’s sleep time from her hours worked, an employer of a live-in domestic service employee must provide “private quarters in a homelike environment.” *See* 1988 Memo (explaining this requirement in the residential care, rather than domestic service, context). “Private quarters” are a living and sleeping space that is separate from the person receiving services (often referred to as the “consumer”) or any other employees. *See id.*; *see also* *Chao v. Jasmine Hall Care Homes, Inc.*, No. 2:05-cv-1306, 2005 WL 4591438, at \*2-3 (E.D. Cal. Dec. 28, 2007) (deferring to WHD’s guidance in prohibiting the employer of live-in workers in residential care facilities from excluding the employees’ sleep time because the employees shared bedrooms). Although in most cases, “private quarters” will mean a separate bedroom, the sleep time requirements call for consideration of the particular circumstances of the case. For example, if the provider is a family or household member with whom the consumer already shared a residence before becoming a

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<sup>3</sup> This is the same reasonable agreement discussed in Administrator’s Interpretation 2014-1 regarding shared living arrangements, available at [http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014\\_1.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_1.pdf), which may exclude from paid time “normal private pursuits,” not limited to sleeping, but also including, if the employer and employee so determine, “eating, . . . entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own.” 29 C.F.R. 785.23; *see also* 29 C.F.R. 552.102 (explaining that a live-in domestic service “employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits”; noting that to exclude off-duty time other than meal and sleep time, it must be “of sufficient duration to enable the employee to make effective use of the time”; and citing 29 C.F.R. 785.23).

paid caregiver, such as a spouse or domestic partner, the provider's existing arrangement will be considered private quarters. Or, solely in the context of a private home as opposed to at the site of a business operation, if a home care worker provides live-in services to an individual who does not have a residence with enough space to give the worker her own bedroom but the home is arranged in a manner designed to give the employee as much privacy as reasonably possible, that arrangement could fulfill this requirement. This space must be furnished with, at minimum, a bed, lighting, and a dresser and/or closet in which to store clothing and other belongings. *See* 1988 Memo. The employee must be able to leave her belongings in this room during on-duty and off-duty periods. *See id.* A "homelike environment" is a space that includes, in addition to the private quarters, facilities for cooking and eating, a bathroom, and a space for recreation. *See id.* These additional facilities may be shared by the provider and consumer and/or other household members. Wage & Hour Division Opinion Letter FLSA-1120 at 2 (June 25, 1990).

*Examples.* For example, an employee who provides home care services (such as a home health aide or personal care attendant) who has no other home and a consumer could live together in a two-bedroom apartment with a living room, kitchen with dining space, and bathroom. The consumer uses one of the bedrooms, and the provider uses the other, meaning she sleeps there and stores some of her personal possessions there. The provider's bedroom contains a bed, night table, dresser, two lamps, and a desk and chair. Both the consumer and provider use the living room, kitchen, and bathroom. The provider, consumer, and a third party home care agency that paired the two individuals and supervises the provider's work all signed a written agreement that, among other things, provides that the employee's hours worked will not include the hours between 11:00pm and 7:00am, when she sleeps except on the rare occasions the consumer needs assistance during the night. In these circumstances, because the employee has private quarters in a homelike environment and a reasonable agreement with her employers regarding the exclusion of sleep time, the consumer and the agency may (with the caveats explained below) exclude from the home care worker's hours worked the eight hours per night between 11:00pm and 7:00am.

In another example, an employee who provides home care services could spend five nights a week at the consumer's home, which is a one-bedroom apartment with a living room, kitchen and dining area, and bathroom. The provider and consumer did not know each other before the provider began providing services to the consumer. The provider, consumer, and a third party home care agency that paired the two individuals and supervises the provider's work all signed a written agreement that, among other things, provides that the employee's hours worked will not include the hours between 11:00pm and 7:00am, when she sleeps except on the rare occasions the consumer needs assistance during the night. If the employee sleeps on a pull-out couch in the living room while the consumer sleeps in her bedroom, keeps her bedding and belongings in a set of drawers that the consumer does not use, and has joint use of the kitchen and dining area and bathroom, the arrangement would likely qualify as providing the employee with private quarters in a homelike environment, and exclusion of sleep time would therefore be permissible (subject to the caveats explained below). But assume instead that the provider slept in a second bed in the consumer's bedroom because the consumer asked that rather than use separate space in the living room, the employee be close by to assist the consumer with toileting or medical tasks during the night. In that case, the provider would not have private quarters (and, depending on how frequently the consumer needed the provider's assistance during the night, the agreement

might not be reasonable), meaning the requirements for excluding sleep time would not be met, and the overnight hours would be compensable hours worked despite the parties' agreement.

### *Shifts of 24 hours or more*

Some employees who do not qualify as “live-in” employees under the FLSA work for shifts of 24 hours or more. As to those employees, including domestic service employees who work at private homes for shifts of 24 hours or more, an employer may exclude the employee’s sleep time from hours worked if certain requirements—similar to but distinct from those for live-in employees—are met.<sup>4</sup> These requirements are that (1) the employee be provided “adequate sleeping facilities,” (2) she “can usually enjoy an uninterrupted night’s sleep,” and (3) the parties have an “expressed or implied agreement” to exclude the sleep time. 29 C.F.R. 785.22(a); *see also* FOH § 31b12(a).

*Adequate sleeping facilities.* Although what constitutes “adequate sleeping facilities” for purposes of the first requirement of 29 C.F.R. 785.22(a) depends on the facts and circumstances of a particular living arrangement, an employer will have provided “adequate sleeping facilities” to a domestic service employee if the employee has access to basic sleeping amenities, such as a bed and linens; reasonable standards of comfort; and basic bathroom and kitchen facilities (which may be shared). *Cf., e.g., Bridgeman v. Ford, Bacon & Davis*, 161 F. 2d 962, 963 (8th Cir. 1947) (noting that employees as to whom sleep time could be excluded lived in a building with “a dormitory, kitchen, toilet and shower room,” “[t]he buildings were steam-heated and equipped with electric fans,” the employees received “[c]omfortable beds, blankets, bed linens, and laundry service,” and “[t]he kitchen was equipped with an electric refrigerator, range, sink, and utensils”); *Bowers v. Remington Rand*, 159 F. 2d 114, 115 (7th Cir. 1946) (noting that employees as to whom sleep time could be excluded were provided sleeping quarters that “consisted of large rooms with wooden or iron beds and mattresses” as well as “cooking facilities and utensils, bathing and toilet facilities, bedding and laundry service”).<sup>5</sup>

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<sup>4</sup> The regulatory provisions regarding a reasonable agreement to exclude sleep time, meal time, and other periods when an employee is engaged in private pursuits, 29 C.F.R. 785.23; 29 C.F.R. 552.102, apply only to live-in employees, not those who work 24-hour or longer shifts but do not reside at the worksite. In other words, the regulations contemplate one category of employees who reside at the worksite and are regularly present at it but not working, and another category that are typically working while present at the worksite but who work sufficiently long shifts that a sleep time exception to the FLSA’s typical hours worked rules may apply.

<sup>5</sup> Context is important in making assessments such as whether sleeping facilities are adequate. In the home care context, in which employees work at residences, this description of what constitutes such facilities is apt. But this description does not foreclose the possibility that in other contexts—such as, for example, if an employee leads overnight camping excursions—different types of facilities could be adequate. *See Wage & Hour Opinion Letter*, 1987 WL 1369134 (February 20, 1987) (concluding that the exclusion of sleep time from hours worked was appropriate for leaders of two- to four-day camping trips who slept in tents).

Unlike for live-in domestic service employees, the sleeping area for employees who work shifts of 24 hours or more but do not qualify as live-in employees need not be private to meet the requirements for a sleep time exclusion from hours worked. For example, a domestic service employee who lives in the home of her employer must be afforded private quarters if the employer wishes to exclude her sleep time from her hours worked, but the employer of a domestic service employee who works two 24-hour shifts at the home weekly need not provide the employee with private quarters in order to exclude her sleep time from hours worked. This distinction reflects the importance of ensuring that an employee who lives and engages in personal pursuits at the worksite has sufficient amounts of privacy in order to appropriately treat some of her time there as non-compensable.

*Usually enjoy an uninterrupted night's sleep.* The second requirement in 29 C.F.R. 785.22(a) for excluding the sleep time of an employee who works shifts of 24 hours or more is whether that employee “can usually enjoy an uninterrupted night’s sleep.” This requirement is intended to limit the sleep time exception to those employees who are not required to perform work during a reasonable sleeping period the majority of the time. As a reminder, WHD’s sleep time regulations are an exception to the well-established general hours worked principles.

In this context, therefore, “an uninterrupted night’s sleep” means at least five consecutive hours of sleep. *Accord Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 546 (4th Cir. 1998); *Bouchard v. Reg'l Governing Bd. of Region 5 Mental Retardation Servs.*, 939 F.2d 1323, 1332 (8th Cir. 1991). WHD believes this interpretation allows employers flexibility because it does not require that an employee have eight hours of uninterrupted time to consider the night “uninterrupted” but reflects the reality that a worker who is not permitted at least five hours in a row of uninterrupted time cannot be said to have gotten a meaningful night’s sleep.<sup>6</sup>

An employee can “usually” get an uninterrupted night’s sleep if an employer’s interruptions that prevent her from getting five consecutive uninterrupted hours of sleep occur less than half the time. *Compare Hultgren*, 913 F.2d at 506 (explaining that employees who slept at the residences of clients who were “prone to being up at night, often frequently, and on a consistent basis over time” did not usually enjoy an uninterrupted night’s sleep); *with Rokey v. Day & Zimmerman*,

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<sup>6</sup> Under 29 C.F.R. 785.22(a), the five hours of sleep must be continuous, whereas under 29 C.F.R. 785.22(b), described in more detail below, the five hours need not be continuous but rather may be the cumulative total of “reasonable periods” of sleep. This distinction reflects the different purposes of these two provisions. The standard in 29 C.F.R. 785.22(a) regards whether as a general matter the employee in question has a job in which the hours worked exception for sleep time can appropriately be applied, which is in part a question of whether the employee is typically able to sleep enough that it is generally reasonable to consider up to eight overnight hours as outside of her work time. As to that issue, WHD believes five consecutive hours of sleep without interruption constitutes a meaningful night’s sleep. 29 C.F.R. 785.22(b), on the other hand, addresses whether if the requirements of 29 C.F.R. 785.22(a) are met such that an employee’s sleep time is usually excluded from her hours worked, on any particular night, that employee has gotten enough sleep to reasonably permit the exclusion of any portion of her regular sleeping period from her hours worked *on that night*. As to individual nights rather than usual circumstances over time, WHD applies a less stringent standard, as described below.

157 F. 2d 736, 736 (8th Cir. 1946) (explaining, in allowing the exclusion of sleep time, that interruptions “[d]uring the [employees’] designated rest period” were “infrequent,” *i.e.*, “there was on average less than one call per three months period for each” employee). In other words, interruptions to an employee’s five consecutive hours of sleep time by the employer that occur during half or more than half of an employee’s shifts are too frequent to meet the requirement. For example, if a home health aide is hired to work three 24-hour shifts each week for a consumer who needs regular monitoring at all times, including overnight, then it would not be appropriate for the employer to exclude any sleep the employee manages to get from her compensable hours worked. On the other hand, if a home health aide works three 24-hour shifts for a particular consumer each week and the consumer wakes the aide for assistance on average during only one out of every three shifts, the requirement would be met.<sup>7</sup>

*Express or implied agreement.* The third requirement of 29 C.F.R. 785.22(a), that the employer of an employee who works shifts of 24 hours or more and the employee have an “expressed or implied agreement” regarding the exclusion of sleep time, is not burdensome, because an agreement can be implied by the parties’ conduct. Wage and Hour Investigators should take into account, however, any evidence that the employee has objected to the exclusion of sleep time from her hours worked, which would indicate that there was no such agreement.

*Examples.* Examples illustrate these principles. A personal care attendant could be assigned by a home care agency to provide home care services to a consumer in the consumer’s home from 7:00pm on Fridays until 9:00pm on Sundays. The employee sleeps in a second bed in the consumer’s bedroom, and she has use of the rest of the apartment, including the kitchen and bathroom. During the six months this employee has worked for this consumer, the consumer has woken the employee up on both nights each weekend for assistance going to the bathroom, usually once around 1:00am and again around 3:00am. Based on the agency’s usual practice, the employee is not paid for the hours between 11:00pm and 6:00am, which are considered sleep time, and the employee has never objected to the exclusion of sleep time. In these circumstances, sleep time is not properly excluded from the provider’s hours worked. The employee does not qualify as a live-in domestic service employee because she is only at the home for 50 hours per week over the course of three days and two nights. Instead, she is a worker who is on duty for a shift of more than 24 hours. Although her situation meets some of the threshold requirements for the exclusion of sleep time for such a worker—she has adequate sleeping facilities and the employer and employee have an implied agreement to exclude sleep time—because the employee is woken up every night she works such that she does not get five consecutive hours of sleep, she does not usually get an uninterrupted night’s sleep. Therefore, the agency and consumer may not exclude her sleep time from her hours worked despite their agreement to do so. Because the circumstances do not meet the requirements for the exclusion

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<sup>7</sup> In situations involving joint employment, *i.e.*, where a single employer sends a worker to 24-hour or longer shifts at multiple worksites, the joint employer must consider all of an employee’s shifts together in assessing whether an employee can usually enjoy an uninterrupted night’s sleep. For example, if a home care worker provides services to more than one consumer on behalf of a single home care agency, the agency must consider all of the employee’s shifts in aggregate in determining if this requirement is met.

of sleep time, none of the employee's time spent sleeping may be excluded from her hours worked, even on nights when the employee's sleep is not interrupted.

If instead the personal care attendant's job is as described but over the six months of employment, the consumer has woken the provider up for assistance going to the bathroom every other night around midnight, which usually takes about 15 minutes, the result would be different. In that case, the provider would "usually enjoy an uninterrupted night's sleep" because she gets at least five consecutive hours of sleep (at least 1:00am to 6:00am) during each shift.

### ***Shifts of fewer than 24 hours***

As to an employee who does not live at her worksite and works shifts of fewer than 24 hours, an employer may not exclude any sleep time from hours worked, even if the employee is permitted to sleep while on duty. 29 C.F.R. 785.21; *see also Hultgren*, 913 F.2d at 506 (explaining that an employer of employees who were not on duty and not on call for six hours of their allegedly 24-hour shifts could not exclude sleep time from those employees' hours worked). This general principle applies to domestic service employees, including home care workers.

For example, if a personal care attendant provides services to a consumer two nights a week from 7:00pm to 7:00am, even if the employee sleeps for some or most of that time, all of the time (two 12-hour shifts, for a total of 24 hours each workweek) must be treated as compensable hours worked.

## **III. How Much Sleep Time Can Be Excluded**

If the exclusion of sleep time is permissible as to a particular employee, the next question is the amount of sleep time that can be properly excluded from that employee's hours worked, in general and on any particular night.

### **A. Maximum number of hours**

#### ***Live-in employees, extended periods of time***

An employer of a live-in home care worker who meets the definition of a "live-in" because she resides at the home for extended periods of time (and meets the additional requirements for the exclusion of sleep time as described above) may exclude from hours worked up to eight hours per night of sleep time as long as the employee is paid for at least eight hours during the relevant 24-hour period. *See* 1988 Memo; Administrator's Interpretation 2014-1 at 17 n.22. This position, which WHD has long held in the residential care context, applies equally in the domestic service context. An employee who resides at her worksite fewer than seven nights a week almost certainly has another home and in the majority of cases therefore stays at the worksite in significant part for the employer's benefit. Although some principles applicable to live-in employees who do not have another home (*i.e.*, who live at the worksite permanently) are still relevant, WHD believes that it should not be permissible for employers of domestic service employees who reside at the home for extended periods of time to treat no or only a small amount of time employees spend at the worksite as compensable hours worked.



For example, a home care provider could work and sleep at a private home from Monday through Friday each week. Because the consumer to whom she provides services attends a day program, the provider is off duty between 8:30am and 3:30pm. She and the family of the consumer have a written agreement regarding this off-duty time and under which the provider's sleep time, from 10:00pm to 6:00am, is excluded from hours worked. Her work time would therefore be nine hours per day (two and a half hours from 6:00am to 8:30am and six and a half hours from 3:30pm to 10:00pm). Because she is paid for more than eight hours in each 24-hour period, assuming the threshold requirements for excluding sleep time are met, the family can exclude all eight hours of the provider's sleep time (subject to the limitations described below).

The provider's schedule could change such that she did not begin her evening shift until 5:30pm and her sleeping period was for six hours, between 11:00pm and 6:00am. In that case, her work time would be eight hours per day (two and a half hours from 6:00am to 8:30am and five and a half hours from 5:30pm to 11:00pm). Because the provider is paid for eight hours in each 24-hour period, the family may exclude the six hours of sleep time (subject to the limitations described below).

There could be circumstances in which a provider who lives at the home for extended periods of time is on duty for eight hours or less in each 24-hour period, and the time is overnight and the employee usually sleeps during the shift. Because the employee must have at least eight hours worked before the exclusion of sleep time is permissible, in these circumstances, the employer may not exclude any sleep time hours from hours worked. *Cf.* Wage & Hour Division Opinion Letter FLSA-1120 at 1-2 (June 25, 1990); *see also* Administrator's Interpretation 2014-1 at 17 n.22.

### ***Live-in employees, permanent***

An employer of a live-in home care worker who meets the definition of a "live-in" because she resides at the home permanently (and meets the additional requirements for the exclusion of sleep time as described above) may exclude up to eight hours of sleep time each night as long as the employee is paid for some other hours during the workweek. Wage & Hour Division Opinion Letter FLSA 2004-7 at 3 (July 27, 2004). Administrator's Interpretation 2014-1 further explained this concept:

Although the Department has not set a specific number of hours that must be compensated in order to permit the exclusion of the sleep time of an employee who resides on the premises permanently, the circumstances must be such that the agreement regarding work and non-work time is reasonable. A variety of agreements might meet this standard; providers' schedules will vary based on the particular arrangement and needs of the consumer, and there is no particular schedule necessary to make an agreement reasonable. For example, if a shared living provider and her employer agree to exclude eight hours of sleep time per night and the provider is paid an hourly rate for services she performs between the hours of 8:00pm and 10:00pm each evening and 6:00am and 8:00am each morning, that agreement would typically be reasonable. Or if a provider's sole responsibility is to be at the residence five nights a week from 10:00pm to

8:00am, it will likely be reasonable to agree to treat two of those ten hours as hours worked and exclude the remaining eight hours as sleep time. Similarly, it will typically be reasonable to exclude sleep time during weeknights if the provider and employer agree that four hours per day spent in the residence on two weekdays and each weekend day are hours worked that must be compensated. On the other hand, if a provider's sole responsibility is to be at the residence for eight hours each night, an agreement to exclude all time the provider is required to be on the premises will not be reasonable, nor would an agreement to consider one hour per day to be hours worked.

Administrator's Interpretation 2014-1 at 17-18. WHD has not set a specific number of hours that must be compensated for live-in employees who reside at the home permanently (in contrast to live-in employees who only reside at the worksite for extended periods of time) in recognition of the differences between employment arrangements of employees who reside permanently and entirely at the worksite and those of employees who spend a significant amount of time at the worksite but who have another home elsewhere. An employee who resides permanently at her worksite, and therefore does not have another home, is more likely to spend time at the worksite engaged in purely personal pursuits than an employee who has another home to return to but nonetheless spends significant amounts of time at the worksite.

Regardless of the details of the arrangement, sleep time excluded from the hours worked of a home care worker who resides permanently at the home where she provides services must be during normal sleeping hours, *i.e.*, overnight rather than during the daytime. *Id.* at 18.

### ***Shifts of 24 hours or more***

An employer of an employee who does not reside at the worksite but works shifts of 24 hours or longer (and meets the additional requirements for the exclusion of sleep time as described above) may exclude from the employee's hours worked no more than eight hours of sleep time in each 24-hour period. 29 C.F.R. 785.22(a). These eight hours need not be at night, but they must occur during a fixed window. *Id.* (providing that sleep time must be "bona fide" and "regularly scheduled"); FOH § 31b12(a) (referring to a "bona fide regularly scheduled sleeping period"); Wage & Hour Division Opinion Letter, 1987 WL 1369157, at \*2 (Sept. 11, 1987) (explaining in providing information about the exclusion of sleep time for employees who work shifts of more than 24 hours that "[t]here is no specific requirement that the sleeping period must be after dark and before daylight"); *see also H.W. Ariens v. Olin Mathieson Chemical Corp.*, 382 F.2d 192, 197-98 (6th Cir. 1967) (explaining that for 24-hour shifts, sleep time need not be overnight).

For example, if a home health aide provides home care services to a consumer in the consumer's home from 7:00pm on Fridays until 9:00pm on Sundays, assuming the threshold requirements for excluding sleep time are met, his employer could exclude from his hours worked a sleeping period from 11:00pm to 5:30am (for a six-and-a-half hour sleeping period) or from 10:00pm to 6:00am (for an eight-hour sleeping period), but not from 10:00pm to 7:00am (for a nine-hour sleeping period) or for eight-hour periods that vary each weekend.

### *Shifts of fewer than 24 hours*

Employees to whom the FLSA applies who work shifts of less than 24 hours must be paid for all hours worked during the shift. 29 C.F.R. 785.21. No sleep time may be excluded even if the worker sleeps during the shift. *Id.*

#### **B. Limitations**

Even when an employer is generally permitted to exclude an employee's sleep time from hours worked, there are certain limitations on an employer's ability to exclude all or part of sleep time during a particular sleeping period. These limitations apply in circumstances involving both live-in employees and employees who work shifts of 24 hours or more.

*Any interruption.* First, any interruption of what might otherwise be properly excluded sleep time by a call to duty must be treated as hours worked. 29 C.F.R. 785.22(b); 29 C.F.R. 552.102(a); *see also* 1988 Memo.

For example, if during a provider's sleeping period, a consumer calls out for a home care worker to assist him with going to the bathroom and the employee provides assistance for 20 minutes, those 20 minutes must be treated as paid time. Similarly, if a consumer is sick and the provider tends to her for two hours in the middle of the night, those two hours are hours worked even if they are within the provider's usual sleep time.

*Reasonable periods of sleep totaling five hours.* Second, if on a particular night the employee does not get reasonable periods of uninterrupted sleep totaling at least five hours, no sleep time may be excluded. 29 C.F.R. 785.22(b); 1988 Memo. Specifically, the WHD's longstanding position is that if an employee cannot get at least five hours of sleep in a sleeping period, the entire period must be counted as hours worked. *Id.*; *see also, e.g.*, Wage & Hour Division Opinion Letter FLSA 2002-6, 2002 WL 32406596, at \*2 (Aug. 13, 2002); Wage & Hour Division Opinion Letter, 1998 WL 852808, at \*1 (Mar 12, 1998); Wage & Hour Division Opinion Letter, 1993 WL 901151, at \*1 (March 1, 1993). These five hours need not be continuous, but interruptions must not be so frequent as to prevent reasonable periods of sleep that add up to at least five hours. FOH § 31b12(b); *see also, e.g.*, Wage & Hour Opinion Letter, 1987 WL 1369158, at \*1 (Sept. 11, 1987).<sup>8</sup>

For example, a live-in home care worker's regular sleep time could be from 11:00pm to 7:00am. If the consumer for whom she works wakes her up once at 4:30am for assistance taking medication, an interruption that lasts half an hour, those 30 minutes must be paid, but the remainder of the time—the five and a half hours from 11:00pm to 4:30am and the two hours from 5:00am to 7:00am—may be excluded as usual because the employee got reasonable periods of sleep totaling more than five hours. Similarly, if the consumer wakes the employee up at

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<sup>8</sup> It is this interpretation of 29 C.F.R. 785.22(b)—that the five hours of sleep need not be continuous but can be the total of reasonable periods of sleep—that is not to be confused with the interpretation of 29 C.F.R. 785.22(a) that for purposes of that provision, an uninterrupted night's sleep means five consecutive hours. *See* footnote 6.

2:00am for assistance going to the bathroom, an interruption that lasts 15 minutes, those 15 minutes must be paid, but the remainder of the time—the three hours between 11:00pm and 2:00am and the four hours, 45 minutes hours between 2:15am and 7:00am—may be excluded from hours worked as usual because the employee got reasonable periods of sleep totaling more than five hours, even though no single period of five hours or more was uninterrupted. In circumstances in which interruptions are more frequent, such as if the consumer needs the employee's services at 12:30am, 2:00am, 4:00am, 5:00am, and 6:00am for twenty minutes each time, the periods between interruptions are not reasonable periods of sleep, and the five-hour threshold will not be considered met.

#### **IV. Conclusion**

It is often permissible for an employer of a home care worker who stays overnight in the home of the person receiving services to exclude the employee's sleep time from her hours worked, but the employer may only do so if the threshold requirements are met and to the extent described.

Please contact Derrick Witherspoon, Chief, Branch of FLSA/Child Labor at (202) 693-0715 with any questions.

The following chart summarizes the information contained in FAB 2016-1.

**Exclusion of Sleep Time from Hours Worked by Domestic Service Employees**

|  | Live-in employee  |  | Shifts of 24 hours or more  | Shifts of fewer than 24 hours  |
|--|---|--|---|--------------------------------|
|  | Extended periods of time  | Permanent  |   |                                |
| <b>Requirements for excluding an employee's sleep time from hours worked</b> | <ul style="list-style-type: none"> <li>• Reasonable agreement to exclude sleep time</li> <li>• Employer must provide private quarters in a homelike environment</li> </ul>  |  | <ul style="list-style-type: none"> <li>• Employer provides adequate sleeping facilities</li> <li>• Employee can usually enjoy an uninterrupted night's sleep (5 consecutive hours)</li> <li>• Express or implied agreement to exclude sleep time</li> </ul> | Sleep time may not be excluded |
| <b>Maximum number of hours that can be excluded</b>                          | Up to 8 hours per night as long as the employee is paid for at least 8 hours during the 24-hour period  | Up to 8 hours per night as long as the employee is paid for some other hours during the workweek | Up to 8 hours, in a fixed period, in each 24-hour shift   | Sleep time may not be excluded |
| <b>Limitations on exclusion on a particular night</b>                        | <ul style="list-style-type: none"> <li>• Any interruption to sleep time must be paid</li> <li>• If during any night the employee does not get reasonable periods of uninterrupted sleep totaling at least 5 hours, the employer may not exclude any sleep time</li> </ul> |  |   |                                |