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or most recent representative annual period (§ 551.5(b)(3)) shall mean a one-year period within which such employees were so employed on a regular full-time basis by such employer (or, if such employer has not previously used such plan, by another employer using the plan under substantially the same conditions, which period shall include a calendar or fiscal quarter-year ending not more than four months prior to the date as of which the effect of such plan is to be considered, together with the three quarter-year periods immediately preceding such recently completed quarter-year; and

(2) The *average weekly hours* or *average workweek* of the full-time employees so employed during such annual period shall mean the number of hours obtained by the following computation: (i) All the hours worked during such annual period by all the full-time employees regularly employed under the plan shall be totaled; (ii) the number of workweeks worked by each such employee during such annual period under such plan shall be computed, and the totals added together; and (iii) the average weekly hours, taken in the aggregate, of all such employees shall be computed by dividing the sum resulting from computation (i) by the sum resulting from computation (ii).

§ 551.9 Recordkeeping requirements.

The records which must be kept and the computations which must be made with respect to employees for whom the overtime pay exemption under section 13(b)(11) is taken are specified in § 516.15 of this chapter.

[35 FR 17841, Nov. 20, 1970]

PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

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AUTHORITY: Secs. 13(a)(15) and 13(b)(21) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), (b)(21)), 88 Stat. 62; Sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 76), unless otherwise noted.

SOURCE: 40 FR 7405, Feb. 20, 1975, unless otherwise noted.

Subpart A—General Regulations

§ 552.1 Terms used in regulations.

(a) *Administrator* means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or the Administrator's authorized representative.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

§ 552.2 Purpose and scope.

(a) This part provides necessary rules for the application of the Act to domestic service employment in accordance with the following amendments made by the Fair Labor Standards Amendments of 1974, 88 Stat. 55, *et seq.*

(b) Section 2(a) of the Act finds that the "employment of persons in domestic service in households affects commerce." Section 6(f) extends the minimum wage protection under section 6(b) to employees employed as domestic service employees under either of the following circumstances:

(1) If the employee's compensation for such services from his/her employer would constitute wages under section 209(a)(6) of title II of the Social Security Act, that is, if the cash remuneration during a calendar year is not less than \$1,000 in 1995, or the amount designated for subsequent years pursuant

to the adjustment provision in section 3121(x) of the Internal Revenue Code of 1986; or

(2) If the employee was employed in such domestic service work by one or more employers for more than 8 hours in the aggregate in any workweek.

Section 7(1) extends generally the protection of the overtime provisions of section 7(a) to such domestic service employees. Section 13(a)(15) provides both a minimum wage and overtime exemption for “employees employed on a casual basis in domestic service employment to provide babysitting services” and for domestic service employees employed” to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.” Section 13(b)(21) provides an overtime exemption for domestic service employees who reside in the household in which they are employed.

(c) The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6.

(Sec. 29(b), 88 Stat. 76; (29 U.S.C. 206(f)); Secretary’s Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913), and Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[40 FR 7405, Feb. 20, 1975, as amended at 44 FR 37221, June 26, 1979; 60 FR 46767, 46768, Sept. 8, 1995]

§ 552.3 Domestic service employment.

The term *domestic service employment* means services of a household nature performed by an employee in or about a private home (permanent or temporary). The term includes services performed by employees such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. This listing is illustrative and not exhaustive.

[78 FR 60557, Oct. 1, 2013]

§ 552.4 Babysitting services.

As used in section 13(a)(15) of the Act, the term *babysitting services* shall mean the custodial care and protection, during any part of the 24-hour

day, of infants or children in or about the private home in which the infants or young children reside. The term “babysitting services” does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational, or practical nurses. While such trained personnel do not qualify as babysitters, this fact does not remove them from the category of a covered domestic service employee when employed in or about a private household.

§ 552.5 Casual basis.

As used in section 13(a)(15) of the Act, the term *casual basis*, when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: *Provided, however*, That such work is incidental, *i.e.*, does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

§ 552.6 Companionship services.

(a) As used in section 13(a)(15) of the Act, the term *companionship services* means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. The provision of *fellowship* means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events. The provision of *protection* means to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person’s safety and well-being.

(b) The term *companionship services* also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The provision of *care* means to assist

the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

(c) The term *companionship services* does not include domestic services performed primarily for the benefit of other members of the household.

(d) The term *companionship services* does not include the performance of medically related services provided for the person. The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants; the determination is not based on the actual training or occupational title of the individual performing the services.

[78 FR 60557, Oct. 1, 2013]

Subpart B—Interpretations

§ 552.99 Basis for coverage of domestic service employees.

Congress in section 2(a) of the Act specifically found that the employment of persons in domestic service in households affects commerce. In the legislative history it was pointed out that employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce (S. Rep. 93–690, pp. 21–22). The Senate Committee on Labor and Public Welfare “took note of the expanded use of the interstate commerce clause by the Supreme Court in numerous recent cases (particularly *Katzenbach v. McClung*, 379 U.S. 294 (1964)),” and concluded “that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act” (S. Rep. 93–690, pp. 21–22).

§ 552.100 Application of minimum wage and overtime provisions.

(a)(1) Domestic service employees must receive for employment in any household a minimum wage of not less than that required by section 6(a) of the Fair Labor Standards Act.

(2) In addition, domestic service employees who work more than 40 hours in any one workweek for the same employer must be paid overtime compensation at a rate not less than one and one-half times the employee’s regular rate of pay for such excess hours, unless the employee is one who resides in the employer’s household. In the case of employees who reside in the household where they are employed, section 13(b)(21) of the Act provides an overtime, but not a minimum wage, exemption. See § 552.102.

(b) In meeting the wage responsibilities imposed by the Act, employers may take appropriate credit for the reasonable cost or fair value, as determined by the Administrator, of food, lodging and other facilities customarily furnished to the employee by the employer such as drugs, cosmetics, drycleaning, etc. See S. Rep. 93–690, p. 19, and section 3(m) of the Act. Credit may be taken for the reasonable cost or fair value of these facilities only when the employee’s acceptance of them is voluntary and uncoerced. See regulations, part 531. Where uniforms are required by the employer, the cost of the uniforms and their care may not be included in such credit.

(c) For enforcement purposes, the Administrator will accept a credit taken by the employer of up to 37.5 percent of the statutory minimum hourly wage for a breakfast (if furnished), up to 50 percent of the statutory minimum hourly wage for a lunch (if furnished), and up to 62.5 percent of the statutory minimum hourly wage for a dinner (if furnished), which meal credits when combined do not in total exceed 150 percent of the statutory minimum hourly wage for any day. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing meals, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair value is different from the meal credits specified above:

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Provided, however, that employers keep, maintain and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures.

(d) In the case of lodging furnished to live-in domestic service employees, the Administrator will accept a credit taken by the employer of up to seven and one-half times the statutory minimum hourly wage for each week lodging is furnished. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing lodging, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair value is different from the amount specified above, *provided, however,* that employers keep, maintain, and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures. In determining reasonable cost or fair value, the regulations and rulings in 29 CFR part 531 are applicable.

(Sec. 29(b), 88 Stat. 76; (29 U.S.C. 206(f)); Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913), and Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[40 FR 7405, Feb. 20, 1975, as amended at 44 FR 6716, Feb. 2, 1979; 60 FR 46768, Sept. 8, 1995]

§ 552.101 Domestic service employment.

(a) The definition of *domestic service employment* contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from "the generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See. S. Rep. 93-690, p. 20. The domestic service must be performed in or about a private home whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

(b) Employees employed in dwelling places which are primarily rooming or boarding houses are not considered domestic service employees. The places

where they work are not private homes but commercial or business establishments. Likewise, employees employed in connection with a business or professional service which is conducted in a home (such as a real estate, doctor's, dentist's or lawyer's office) are not domestic service employees.

(c) In determining the total hours worked, the employer must include all time the employee is required to be on the premises or on duty and all time the employee is suffered or permitted to work. Special rules for live-in domestic service employees are set forth in § 552.102.

[40 FR 7405, Feb. 20, 1975, as amended at 60 FR 46768, Sept. 8, 1995; 78 FR 60557, Oct. 1, 2013]

§ 552.102 Live-in domestic service employees.

(a) Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day. However, section 13(b)(21) provides an exemption from the Act's overtime requirements for domestic service employees who reside in the household where employed. But this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in worker, the 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. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. See regulations part 785, § 785.23.

(b) If it is found by the parties that there is a significant deviation from the initial agreement, the parties

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should reach a new agreement that reflects the actual facts of the hours worked by the employee.

[40 FR 7405, Feb. 20, 1975, as amended at 78 FR 60557, Oct. 1, 2013]

§ 552.103 Babysitting services in general.

The term “babysitting services” is defined in § 552.4. Babysitting is a form of domestic service, and babysitters other than those working on a casual basis are entitled to the same benefits under the Act as other domestic service employees.

§ 552.104 Babysitting services performed on a casual basis.

(a) Employees performing babysitting services on a casual basis, as defined in § 552.5 are excluded from the minimum wage and overtime provisions of the Act. The rationale for this exclusion is that such persons are usually not dependent upon the income from rendering such services for their livelihood. Such services are often provided by (1) Teenagers during non-school hours or for a short period after completing high school but prior to entering other employment as a vocation, or (2) older persons whose main source of livelihood is from other means.

(b) Employment in babysitting services would usually be on a “casual basis,” whether performed for one or more employees, if such employment by all such employers does not exceed 20 hours per week in the aggregate. Employment in excess of these hours may still be on a “casual basis” if the excessive hours of employment are without regularity or are for irregular or intermittent periods. Employment in babysitting services shall also be deemed to be on a “casual basis” (regardless of the number of weekly hours worked by the babysitter) in the case of individuals whose vocations are not domestic service who accompany families for a vacation period to take care of the children if the duration of such employment does not exceed 6 weeks.

(c) If the individual performing babysitting services on a “casual basis” devotes more than 20 percent of his or her time to household work during a babysitting assignment, the exemption for “babysitting services on a casual

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basis” does not apply during that assignment and the individual must be paid in accordance with the Act’s minimum wage and overtime requirements. This does not affect the application of the exemption for previous or subsequent babysitting assignments where the 20 percent tolerance is not exceeded.

(d) Individuals who engage in babysitting as a full-time occupation are not employed on a “casual basis.”

[40 FR 7405, Feb. 20, 1975, as amended at 60 FR 46768, Sept. 8, 1995]

§ 552.105 Individuals performing babysitting services in their own homes.

(a) It is clear from the legislative history that the Act’s new coverage of domestic service employees is limited to those persons who perform such services in or about the private household of the employer. Accordingly, if such services are performed away from the employer’s permanent, or temporary household there is no coverage under sections 6(f) and 7(1) of the Act. A typical example would be an individual who cares for the children of others in her own home. This type of operation, however, could, depending on the particular facts, qualify as a preschool or day care center and thus be covered under section 3(s)(1)(B) of the Act in which case the person providing the service would be required to comply with the applicable provisions of the Act.

(b) An individual in a local neighborhood who takes four or five children into his or her home, which is operated as a day care home, and who does not have more than one employee or whose only employees are members of that individual’s immediate family is not covered by the Fair Labor Standards Act.

[40 FR 7405, Feb. 20, 1975, as amended at 60 FR 46768, Sept. 8, 1995]

§ 552.106 Companionship services.

The term “companionship services” is defined in § 552.6. Persons who provide care and protection for babies and young children who do not have illnesses, injuries, or disabilities are considered babysitters, not companions. The companion must perform the services with respect to the elderly person

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or person with an illness, injury, or disability and not generally to other persons. The “casual” limitation does not apply to companion services.

[78 FR 60557, Oct. 1, 2013]

§ 552.107 Yard maintenance workers.

Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as independent contractors who are not covered by the Act as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors.

§ 552.108 Child labor provisions.

Congress made no change in section 12 as regards domestic service employees. Accordingly, the child labor provisions of the Act do not apply unless the underaged minor (a) is individually engaged in commerce or in the production of goods for commerce, or (b) is employed by an enterprise meeting the coverage tests of sections 3(r) and 3(s)(1) of the Act, or (c) is employed in or about a home where work in the production of goods for commerce is performed.

§ 552.109 Third party employment.

(a) Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption, if the employee meets all of the requirements of § 552.6.

(b) Employees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a “casual basis” for purposes of the section 13(a)(15) exemption. Such em-

ployees are engaged in this occupation as a vocation.

(c) Third party employers of employees engaged in live-in domestic service employment within the meaning of § 552.102 may not avail themselves of the overtime exemption provided by section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption.

[40 FR 7405, Feb. 20, 1975, as amended at 78 FR 60557, Oct. 1, 2013]

§ 552.110 Recordkeeping requirements.

(a) The general recordkeeping regulations are found in part 516 of this chapter and they require that every employer having covered domestic service employees shall keep records which show for each such employee: (1) Name in full, (2) social security number, (3) address in full, including zip code, (4) total hours worked each week by the employee for the employer, (5) total cash wages paid each week to the employee by the employer, (6) weekly sums claimed by the employer for board, lodging or other facilities, and (7) extra pay for weekly hours worked in excess of 40 by the employee for the employer. No particular form of records is required, so long as the above information is recorded and the record is maintained and preserved for a period of 3 years.

(b) In the case of an employee who resides on the premises, the employer shall keep a copy of the agreement specified by § 552.102 and make, keep, and preserve a record showing the exact number of hours worked by the live-in domestic service employee. The provisions of § 516.2(c) of this chapter shall not apply to live-in domestic service employees.

(c) With the exception of live-in domestic service employees, where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may:

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(1) Indicate by check marks, statement or other method that such hours were actually worked; and

(2) When more or less than the scheduled hours are worked, show the exact number of hours worked.

(d) The employer is required to maintain records of hours worked by each covered domestic service employee. However, the employer may require the domestic service employee to record the hours worked and submit such record to the employer.

(e) No records are required for casual babysitters.

[40 FR 7405, Feb. 20, 1975, as amended at 78 FR 60557, Oct. 1, 2013]

PART 553—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

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