Putney

Putney, Twombly, Hall & Hirson LLP |*Counselors at Law*
521 Fifth Avenue | New York, NY 10175 | (212) 682-0020 | putneylaw.com


MARCH 18, 2019

# U.S. DOL Issues Opinion Letter Addressing State Law Exemption for "Supers"

On March 14, 2019, the United States Department of Labor ("DOL") issued an opinion letter concerning minimum wage and overtime pay requirements for residential janitors, or live-in superintendents (i.e., "supers"), under the Fair Labor Standards Act ("FLSA") and state law. Specifically, the opinion letter addresses: (1) whether the FLSA guarantees minimum wage and overtime pay to residential janitors despite their exemption from similar state law requirements; (2) whether an employer's noncompliance with the FLSA in reliance on this state law exemption demonstrates "good faith," allowing the employer to avoid liquidated damages or the FLSA's three-year back wage liability period; and (3) how an employer may track and record a residential janitor's hours worked.

Even though New York State law exempts residential janitors from state minimum wage and overtime requirements, it is the DOL's opinion that residential janitors are not exempt from the FLSA's minimum wage and overtime requirements because the FLSA does not include an exemption for residential janitors or similar employees. Moreover, the DOL opines that relying on a state law exemption from state law minimum wage and overtime requirements is not a good faith defense to noncompliance with the FLSA. Lastly, the DOL states that employers may reach a reasonable agreement with residential janitors to establish which hours they are and are not working. Accordingly, employer time records need not be precise, but they should reasonably coincide with that agreement.

When a federal, state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with both laws and meet the standard of whichever law gives the employee the greater protection. Thus, although New York expressly provides a limited exemption from its overtime laws for residential superintendents, employers must nevertheless comply with the FLSA in compensating such employees.

## Takeaway for Employers

Employers should remember that compliance with state law does not excuse noncompliance with the FLSA. Additionally, an employee who resides on an employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises.

* * *

If you have any questions regarding the DOL opinion letter or exemptions under state or federal wage and hour laws, please do not hesitate to contact us.

PUTNEY, TWOMBLY, HALL & HIRSON LLP