

MEMORANDUM

TO: FEA Member Organizations

FROM: Todd M. Nierman, Baker & Daniels

DATE: September 16, 2004

SUBJECT: House Directors under the Fair Labor Standards Act

Introduction

This Memorandum supplements our August 16, 2004 Memorandum in which we outlined the applicability of the Fair Labor Standards Act (FLSA) to FEA member organizations. In that Memorandum, we discussed specifically whether Chapter Consultants are entitled to overtime under the FLSA. This Memorandum discusses the status of House Directors.

Coverage under the FLSA

Recall that FLSA coverage is triggered when the "employer" has annual gross receipts of \$500,000 or more from commercial activities – sales of goods, rental income, fees from room and board, and interest income. Most local chapters will not likely meet this threshold. On the other hand, a national organization might. Thus, to determine whether a House Director is covered under the FLSA in the first place, one needs to first answer the question, "Who is the employer?"

Determining by whom an individual is employed may or may not be a simple task. Even if nominally the local chapter is the employer, the answer to the question could be that the local chapter (or housing corporation) *and* the national organization jointly employ the House Director. The issue turns on the degree of control exercised by the national organization. Ideally (for FLSA and other employment law issues), the national organization is removed from the day-to-day control of the House Director's employment.

If we presume that the local chapter or housing corporation is the employer, and that it does not have sufficient revenue to be deemed a covered enterprise under the FLSA, the analysis under the FLSA ends. The House Director is *not* entitled to overtime under the FLSA. However, employees of entities not covered by the FLSA may be covered by the overtime laws of the states in which they are employed. For example, a House Director at an Indiana college

employed by a local chapter or housing corporation with less than \$500,000 in annual revenue, would be "covered" by Indiana's overtime law.

As noted in this and the prior Memorandum, "coverage" and "exempt status" are two different concepts. If it is determined that either the FLSA or state law "covers" the House Director, the next question is whether the House Director is exempt from the overtime requirements of either the federal or state law under which he or she is covered.

Exempt Status of House Directors

Your attention is directed to our August 16 Memorandum for a discussion of the overtime exemptions under the FLSA. While each case must be reviewed individually, the primary duties of a House Director (managing the affairs of a house, including purchasing food and other resources; and operating within an established budget utilizing discretion and judgment to do so) would generally appear to fit within the administrative exemption. In some houses, the House Director may even fit within the executive exemption. While most state overtime laws adopt these same exemptions in one form or another, it is advised that individual state laws be reviewed before an organization concludes exempt status exists.

Of course, as we stated in the August 16 Memorandum, job duties alone do not establish exempt status. Under both federal and state laws, there exists a requirement that to be exempt, an employee must be paid a minimum salary. Under the FLSA, the minimum weekly salary is \$455. State law minimum salaries vary.

If an organization determines that state, not federal, law applies, then the organization must look to the minimum salary required for exemption under that state's overtime law. For example, in Indiana, the minimum weekly salary for exempt status is \$150.

This is why the coverage question, i.e., "Who is the employer," is so important. A House Director at an Indiana college is exempt from overtime if he or she is paid a weekly salary of \$150, provided his or her employer has gross revenues of less than \$500,000 per annum (i.e., the local chapter). The same House Director must be paid \$455 per week if his or her employer has gross receipts in excess of \$500,000 (i.e., a national organization).

Some organizations have asked whether they may take credit for reimbursement to exempt employees for room and board. The answer is "no." To the extent either a Chapter Consultant or House Director is viewed as an exempt employee, the \$455 salary (or a lower salary to the extent state law covers) must be paid in cash. The minimum salary cannot be met by the payment of room and board. This is contrasted to the situation described below, where an employer may take credit for certain expenses toward minimum wage for a non-exempt employee.

Transitioning to Non-Exempt Status

If a House Director is covered under state or federal law, and if a decision is made to treat the individual as a non-exempt employee, the individual must be paid overtime for hours worked in excess of 40 in a work week and must receive the applicable minimum wage (\$5.15

under the FLSA). The August 16 Memorandum discussed tracking hours worked and alternatives for paying overtime.

An additional note with regard to House Directors is in order. To the extent an individual is deemed non-exempt, the employer *may* be able to take credit towards its minimum wage obligation for the reasonable cost of providing room and board to the House Director. This is an issue beyond the scope of this Memorandum, but about which an organization may want to inquire.

This same notion, however, could not be applied to a non-exempt Chapter Consultant. Reimbursed expenses for employee travel on behalf of an employer are generally not viewed as the type of payments for which credit can be taken under any circumstance. They are properly viewed as employer expenses, *not* employee expenses. In the context of a House Director, however, the employee is not traveling on behalf of his or her employer. In that circumstance, the reasonable costs of providing room and board arguably may be credited toward the minimum wage obligation for a non-exempt employee. Overtime would be calculated based on the rate of pay that includes the room and board credit.