



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

VIA FAX AND MAIL [REDACTED]

November 26, 2010

[REDACTED]

Re: Request for Opinion
Classification of Workers as "Companions"
File No. RO-10-0177

Dear [REDACTED]:

This letter is written in response to yours of November 17, 2010 in which you request an opinion as to the classification of workers as "companions." You state that your client is a business that has contracts with certified agencies in the home health care industry and which supplies individuals to those agencies for the purpose of supplying home health aides and personal care aides who are placed in the households of sick, convalescing or elderly people. You state that these aides are placed in homes either on a full-time basis or in twelve-hour shifts and perform various services. You ask whether these workers can be classified as "companions." Please be advised that you do not supply enough information for such a determination.

Section 651(5)(a) of the New York State Labor Law defines the term "employee" for purposes of New York State's Minimum Wage Act and excludes from that definition "someone who *lives in the home of an employer* for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose *principal duties do not include housekeeping*" (emphasis added).

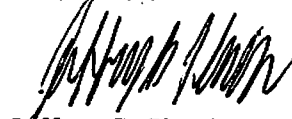
The first issue for a determination under the facts you present is whether a "companion" is living in the home of his/her "employer." You state that your client supplies individuals to certified agencies, who apparently then place these individuals in the households of sick, convalescing or elderly persons. It is not possible to determine, from the information provided, whether such an individual is employed by your client, the agency to which he/she is "supplied," the person with whom he/she is placed, or jointly by any two (or all three) of these. As you have not provided enough information for a determination that such an individual "lives in the home of an employer," it is not possible to determine that such a person is or is not a "companion."

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Also, it is not possible to determine from the facts provided whether the “principal duties” of these individuals do or do not “include housekeeping.” Although you state that these individuals are not required to “[a]ct as a cleaning service,” you also state that one of the five duties of these individuals is to “[a]ssist the elderly in bathing and *maintaining a clean living environment*” (emphasis added). As you neither describe the difference between “maintaining a clean living environment” and acting “as a cleaning service,” nor give any indication as to how much time an individual will spend performing the former duty, it is not possible to determine whether an individual’s “principal duties” will or will not “include housekeeping.” Furthermore, as it is certain that each of these sick, convalescing or elderly persons will have their own unique needs, it is possible that one or more individuals will spend a significant portion of their time “maintaining a clean living environment,” while others will not. It is therefore likely that the determination of whether the principal duties of an individual do or not include housekeeping will have to be made on a case-by-case basis.

If you provide us with the details discussed above, we would be happy to provide you with a more definitive response to your inquiry. Should you wish to do so, please feel free to send such information to my attention.

Very truly yours,



Jeffrey G. Shapiro
Associate Attorney

JGS

cc: Carmine Ruberto