

## Opinion No. 59-51

May 21, 1959

**BY:** FRANK B. ZINN, Attorney General

**TO:** Mr. Paul G. Gallegos Superintendent Girls' Welfare Home Box 6038, Station B  
Albuquerque, New Mexico

The meals and lodging furnished employees of Girls' Welfare Home do not constitute "wages" under Social Security Act.

### OPINION

{\*78} This is written in reply to your recent request for an opinion on the following question:

Do the meals and lodging furnished employees of the Girls' Welfare Home constitute "wages" under the Social Security Act?

It is my opinion that the meals and lodging furnished the Girls' Welfare Home employees do not constitute "wages" nor "remuneration paid in any medium other than cash" as provided for by the Social Security Act.

Reviewing your letter of inquiry and the attached correspondence, it appears that certain of the people employed by the Girls' Welfare " \* \* \* receive meals and lodging as a condition of their employment".

The law controlling in this instance is compiled as Title 42, U.S.C.A., § 409, which provides in part as follows:

"For the purposes of this subchapter, the term 'wages' means -- remuneration paid after 1950 for employment, including the cash value of all except that, in the case of remuneration paid after 1950, such term shall not include -- (g) (1) Remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business \* \* \*;"

With passage of the new section 409(g) of the Social Security Act in 1950, however, there came into existence a specific exemption from wages of remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business. Remuneration in any medium other than cash includes, for example, lodging, food, clothing, agricultural or horticultural commodities, or car tokens or weekly transportation passes. This is borne out by the following federal regulations, Sec. 31.3121(a)(7)-1(a)(1), Employment Taxes, Fed. Tax Regs. 1957:

"The term 'services not in the course of the employer's trade or business, includes services that do not promote or advance the trade or business of the employer.

\* \*

(b) The term 'wages' does not include remuneration paid in any medium other than cash (1) for service not in the course of the employer's trade or business, \* \* \*. Cash remuneration includes checks and other monetary media or exchange. Remuneration paid in any medium other than cash, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, for service not in the course of the employer's trade or business \* \* \* does not constitute wages."

And by Sec. 31.3401(a)-1(9), Employment Taxes, Fed. Tax Regs. 1959:

"The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals and lodging {\*79} is excludable from the gross income of the employee. See the Income Tax Regulations (Part 1 of this chapter) under Sec. 119."

Sec. 119 provides:

#### "§ 1.119-1 MEALS AND LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER

(a) Meals. (1) The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. Ordinarily, meals furnished to the employee during the working day will be deemed furnished for the convenience of the employer. Likewise, meals furnished immediately preceding or immediately following working hours of the employee will be deemed to be for the convenience of the employer if the furnishing of such meals serves a business purpose of the employer other than providing additional or indirect compensation to the employee. Meals furnished on non-working days, or at times when the employee's presence on the employer's business premises does not serve a business purpose of the employer, do not qualify for the exclusion. If the employee is required to occupy living quarters on the business premises of his employer as a condition of his employment (as defined in paragraph (b) of this section), the exclusion applies to the value of any meals furnished to the employee on such premises. There is no requirement that the employee accept such meals as a condition of employment to qualify for the exclusion.

(b) Lodging. The value of lodging furnished to an employee by his employer shall be excluded from the employee's gross income if three tests are met: (1) The lodging is furnished on the business premises of the employer, (2) the lodging is furnished for the convenience of the employer, and (3) the employee is required to accept such lodging as a condition of his employment. The phrase 'required as a condition of his employment' means required in order for the employee to perform properly the duties of his employment. The exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such lodging is furnished as compensation."

Based upon these regulations, it is my opinion that meals and lodging furnished employees of the Girls' Welfare Home do not constitute wages under the Social Security Act.

Hilton A. Dickson, Jr.

Assistant Attorney General