



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2008-2

March 17, 2008

Dear **Name***:

This is in response to your request for an opinion regarding the substitution provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(p)(3).^{*} Your client is a public agency employer that allows employees of the same classification to substitute shifts for one another. You have asked us to assume that both of the employees will be paid in accordance with their normal schedule. You ask whether the substituting employee must be paid direct compensation of at least minimum wage for the hours worked as a substitute. As explained below, it is our opinion that the employer does not have to directly compensate the substituting employee except in the rare instance where the substituting employee has worked so many substitute shifts that his or her wages for all hours worked in the workweek otherwise would fall below the minimum wage. *See* Field Operations Handbook § [30b02](#) (in workweeks in which overtime provisions do not apply, employee subject to section 6 of FLSA is considered to be paid in compliance with minimum wage provisions “if the overall earnings for the [workweek] equal or exceed the amount due at the applicable [minimum wage].”); *see also United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960) (FLSA’s minimum wage requirements met if employee’s weekly wages, when divided by hours worked, exceed minimum wage).

Public agency employees may, under certain circumstances, substitute for one another without changing the employer’s overtime wage payment obligation to either employee. A statutory exception to the FLSA’s general overtime provision states:

If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

^{*} Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

29 U.S.C. § 207(p)(3). Therefore, an employee may substitute for another employee if the employee's public agency employer approves the substitution and the substitution is solely at the option of the involved employees. If these requirements are met, the employer is not required to pay overtime for the additional hours worked for which the substituting employee was not originally scheduled to work. See Wage and Hour Opinion Letter [FLSA2005-49](#) (Nov. 4, 2005).

The Department's regulations interpreting section 7(p)(3)'s exception to the Act's general overtime provision state that "[w]here one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift." [29 C.F.R. § 553.31\(a\)](#). Additionally, a public agency "is not required to keep a record of the hours of the substitute work," *id.* at (c), and payment for the substituted hours is a matter of agreement between the two employees involved in the substitution. Accordingly, as a general matter, when an employee substitutes for another employee, "the pay of both the substituting and substituted employee is unaffected." Wage and Hour Opinion Letter [FLSA2004-23](#) (Nov. 23, 2004). Therefore, the employer need not pay the substituting employee overtime compensation for the substituted shift and generally must pay the employees for only their normal working hours. See generally *Senger v. City of Aberdeen*, 466 F.3d 670 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007).

In an unusual situation, a substituting employee might seek to work so many substitute shifts that his or her hourly wage would fall below the minimum wage, after dividing the employee's total weekly earnings by the total hours worked. Because section 7(p)(3) is an exception to the overtime, but not minimum wage, provision of the FLSA, it does not exempt an employer from its requirement to pay minimum wages to the substitute employee under the Act. This unusual situation of an employee working numerous substitute shifts could not arise without the employer's knowledge, because shift substitutions are only authorized under section 7(p)(3) when an employer has approved the substitution and is fully aware "what work is being done, by whom it is being done, and where and when it is being done." 29 C.F.R. § 553.31(d). Therefore, the employer can remain in compliance with the minimum wage provision without paying any additional wages by denying any shift substitution requests that might drop the substitute employee's hourly wages below the minimum wage.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**