



January 27, 2006

FLSA2006-4

Dear **Name***:

This is in response to your letter inquiring whether your client's incentive based pay plan (the Plan), which includes civic and charitable volunteer activities, complies with the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), or whether your client must treat the hours the employees spend on such volunteer activities as compensable working time. As long as the plan complies with the standards described herein, the volunteer activities are not compensable.

You represent an energy utility that has a pay plan that includes "results pay awards" or bonuses that are based on a work group's performance. The work group's performance bonus is calculated using a rewards matrix. This matrix, which differs by work group, awards varying amounts of points based on several categories of activities and performance standards. One of these categories, "Community Participation via Volunteer Efforts" (such as working with Habitat for Humanity or the United Way), accounts for approximately 10% of the total points the group could achieve under the plan. The rewards matrices are designed so that an employee group can reach the highest award level without performing any volunteer activities.

You present several scenarios involving work group employees volunteering and ask whether under the FLSA these activities may be performed without compensation, or whether the employer must pay the non-exempt employees for these activities. The employer never requires the employees to volunteer but does actively promote participation in the volunteer activities. The right or expectation of continued employment is not affected by an employee's decision to participate or not participate in any such civic or charitable activities. The volunteer work in question is performed outside of normal working hours. If the employees were to perform volunteer work during normal working hours, with prior approval, they would be compensated for this time.

Section 3(g) of the FLSA (copy enclosed) defines the term "employ" as "to suffer or permit to work." To suffer or permit to work means that if an employer requires or allows employees to work, the time spent is generally counted as hours worked. Time spent "in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" must be paid in accordance with the minimum wage and overtime requirements of the FLSA. *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

It is also important to note that the FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes. The Wage and Hour Division has recognized that a person may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA. Such a person will ordinarily not be considered an employee for FLSA purposes if the individual volunteers freely for such organizations without contemplation or receipt of compensation. Typically, such volunteers serve on a part-time basis and do not displace paid workers or perform work that would otherwise be performed by employees. Field Operations Handbook § 10b03(c); WH Opinion Letter October 7, 2002 (copy enclosed).

However, when an employer directs an employee to volunteer, that time is compensable. The regulations state:

Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

29 C.F.R. § 785.44 (copy enclosed). Therefore, we caution that volunteer activities "must be truly voluntary and any coercion or pressure, whether direct or indirect by the [employer] to participate in this program outside of [] duty hours would negate the voluntary nature of the program." WH Opinion Letter



January 29, 1999 (copy enclosed). As explained below, employers may encourage their employees to volunteer their services for public or charitable purposes outside of normal working hours without incurring an obligation to treat that time as hours worked so long as participation is optional and non-participation will not adversely affect working conditions or employment prospects.

Therefore, the employer need not compensate an employee for time spent volunteering for charitable purposes if the work is performed outside of normal working hours and the employee is truly volunteering, not performing the volunteer work as a result of coercion or pressure by the employer. Thus, employees who volunteer in a fundraising project of a local charity that is not connected with the employer need not be compensated for the time volunteered, provided they are not performing duties relating to their employment. See WH Opinion Letters June 20, 1983 and July 31, 2001 (copies enclosed). However, while the employer may occasionally sponsor a Habitat for Humanity project or a blood drive, if there is a significant connection between the employer and the charity, they may be found to be a single enterprise under FLSA section 3(r). In that case, the hours worked for the charity must be combined with the hours worked for the employer and compensated. With this framework in mind, we will now address each of your questions specifically.

Question 1: Does the employer have a duty to compensate non-exempt employees for the time they spend volunteering on a Habitat for Humanity project outside of normal working hours?

Scenario 1: This scenario involves a Habitat for Humanity project sponsored by the employer. The manager of Work Group A e-mailed the members of the work group encouraging them to participate in the event and advising them how many volunteers were needed to complete the house on schedule. The manager sent a follow-up e-mail to the group informing them that, without a full crew, the workday may be longer or put the project behind schedule. A full crew for the event was assembled, and no employees were compensated for the time spent working, which was not on a normal work day. However, the project was added to the work group's performance under the reward matrix.

Answer 1: When the employees volunteer for Habitat for Humanity outside their normal working hours, the employer neither controls nor requires the volunteer work, nor receives any benefit from it. Therefore, the definition of "employ," discussed above, is not met. The employer is merely trying to encourage employees to donate their time to others in this scenario and is not obligated to treat the volunteer hours as compensable time worked under the FLSA. See WH Opinion Letter April 20, 1984 (copy enclosed). Consideration of volunteer service, such as Habitat for Humanity, in the determination of a group bonus does not change this conclusion, provided no employees are denied any part of the bonus for failure to participate in volunteer activity or led to believe that their work conditions or employment prospects would be affected by non-participation, such as would occur if the group could not qualify for the full bonus without performing volunteer work. In the employer's performance pay plan, volunteer work accounts for only 10% of the total points available. The employees in this situation would have no expectation of compensation for their volunteer work because, among other things, they would have no way to know whether the group ultimately will meet its rewards goal for the year or whether the group will achieve the maximum award even without any employee's volunteer service.

Question 2: Does the employer have a duty to compensate non-exempt employees for the time they spend volunteering on any of the projects described in Scenarios 2, 2.1, or 2.2 outside of normal working hours?

Scenario 2: This scenario involves the reward matrix of Work Group B, which provides that for volunteer activity to count towards the reward matrix, it must be done with only one specifically identified community service agency. Volunteer work is, at most, 10% of the group's overall goal matrix. Additionally, rewards are not based on the number of hours worked but rather on the average number of projects in which group employees participate. In this scenario, there is no communication from management to the employees soliciting participation in the volunteer program.

Answer 2: The answer to Scenario 1 applies to this scenario.



Scenario 2.1: This scenario involves a different matrix scheme. Under this matrix, volunteer work is only one eighth of one goal under the matrix, and thus is far less than 10% of the total points in the matrix. Additionally, given the structure of the matrix, it is possible to receive the maximum number of points under the plan without volunteering.

Answer 2.1: The answer to Scenario 1 also applies to this scenario.

Scenario 2.2: This scheme is similar to Scenarios 2 and 2.1 except that it requires that all members of the work group participate in the activity for the work to count toward the reward matrix. All members of the group are required to work 12 hours outside of normal work hours for a qualifying 501(c)(3) organization of their choice to fulfill the volunteer work section of the matrix. If this requirement is met, the employer will in turn donate \$100-\$200 to the organization.

Answer 2.2: The answer to Scenario 1 also applies to this scenario.

Question 3: Does the employer have a duty to compensate non-exempt employees for the time they spend volunteering for the weatherization program outside normal working hours?

Scenario 3: The employer operates a program to "weatherize" the homes of low-income families. Employees who volunteer spend one Saturday per year weather-proofing area homes. The entire program is sponsored and run by the employer. While participation is voluntary, the employer does send an e-mail from the Community Affairs Department and a memo from the CEO to the employees to encourage them to participate.

Answer 3: The answer to Scenario 1 also applies to this scenario. We note that employees who participate receive promotional items and sufficient materials to weatherize their own homes. We assume that the materials received are of such minimal value that they could not be considered compensation. In that situation, the employer is merely trying to encourage employees to volunteer their time for a charitable purpose and need not count such time as compensable hours worked. See WH Opinion Letter July 31, 2001; FLSA § 3(e)(5) (copy enclosed) (recognizing that individuals who volunteer to a non-profit food bank for humanitarian purposes are not employees even if they receive groceries).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending 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. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:

FLSA § 3(e) and (g)

Field Operations Handbook § 10b03(c)

29 C.F.R. § 785.44

WH Opinion Letters October 7, 2002, January 29, 1999, June 20, 1983, July 31, 2001, and April 20, 1984.



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