

**FLSA2020-15**

November 3, 2020

Dear **Name\***:

This letter responds to your request for an opinion regarding the compensability of time that employees spend attending voluntary training programs in various factual scenarios under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

**BACKGROUND**

Your company is a non-profit hospice care provider that employs a variety of clinical staff (nurses, social workers, health aides, and providers) who have ongoing continuing education (CEU) requirements mandated by their respective professions' licensing requirements. In addition, you employ a certain number of non-clinical support staff who do not have ongoing continuing education requirements.

You provide funds to each full and part-time employee for continuing education ("CEU funds"). The amount of an employee's CEU funds is determined by status (full or part-time) and position (leadership, provider, and all other staff), and is the same for all employees sharing the same status and position. Employees do not have to use the CEU funds, or attend any particular continuing education class; attendance is always entirely voluntary. Employees gain no work-related benefit from attending a continuing education class, nor do they incur any penalty for failing to do so.<sup>1</sup>

Presently, you count as work time any training that you mandate or require an employee to attend. When it comes to voluntary continuing education training, however, you require employees to substitute paid time off or vacation time when an employee chooses to attend such training during normal working hours. If such training occurs after hours, no compensation is provided. You represent that employee CEU funding requests are "often, but not always" motivated by a desire to maintain a professional license, where the requested training may or may not directly relate to an employee's job. In other instances, the request might be for training that directly relates to the employee's work, but has the added benefit of fulfilling a continuing education requirement.

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<sup>1</sup> These trainings are distinct from the compensable in-house training that is mandatory and paid time and conferences/seminars that certain employees attend at company expense.

Given this factual background, you request guidance regarding the compensability of six employee training time scenarios, discussed in greater detail below.

## GENERAL LEGAL PRINCIPLES

The FLSA, as a general matter, requires employers to compensate employees for their work.<sup>2</sup> *See generally* 29 U.S.C. § 201 *et seq.* The FLSA defines “employ” as including “to suffer or permit to work,” *id.* § 203(g), but does not explicitly define what constitutes “work.” The Supreme Court has determined that the compensability of an employee’s time depends on “[w]hether [it] is spent predominantly for the employer’s benefit or for the employee’s.” *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *see also, e.g., Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 64 (2d Cir. 1997) (time is compensable when employees “perform duties predominantly for the benefit of the employer”).

Generally, WHD regulations provide that “[a]ttendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met”:

- (a) Attendance is outside of the employee’s regular working hours;
- (b) Attendance is in fact voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee’s job; and
- (d) The employee does not perform any productive work during such attendance.

29 C.F.R. § 785.27. The regulations do, however, acknowledge two situations where training time may be excluded from an employee’s work time for FLSA purposes, even though the training directly relates to the employee’s job. First, the regulations contemplate that “special situations” exist in which “the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked.” *Id.* § 785.31. One such situation is where “an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.” *Id.* Second, the regulations provide that “[i]f an employee on his or her own initiative attends an independent school, college or independent trade school after hours, the time is not considered hours worked even if the courses are related to his job.” *Id.* § 785.30.

## OPINION

You have asked for guidance regarding the compensability of employee training time in six hypothetical scenarios. For all six scenarios, you have stipulated that employee participation in the training program at issue is voluntary, and that the employee does not perform any productive work during the training. Our analysis is provided below your description of each scenario.

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<sup>2</sup> The FLSA requires that covered, nonexempt employees receive at least the federal minimum wage for all hours worked, *see* 29 U.S.C. § 206(a)(1), and overtime compensation of at least one and one-half times their regular rate of pay for hours worked over 40 hours per workweek, *see id.* § 207(a)(1).

1. *Nurse W submits a request, which is approved, to use her education funds for an on-demand webinar directly related to her job and also has CEUs that can go towards her licensing [continuing education] requirement. Although she could view it anytime, she decides to do so on her off-work time. Is it permissible to treat this as unpaid time?*

Yes, because although the webinar is directly related to the nurse’s job, this scenario appears to be a “special situation” that need not be counted as compensable working time under 29 C.F.R. § 785.31. The webinar seems to correspond to courses offered by independent bona fide institutions of learning because it can satisfy a professional licensing requirement, and—as you have asked us to assume—the nurse views it outside of her regular hours, and her attendance is voluntary. *See id.* While you do not specify whether the webinar is being offered by you or another entity, that is immaterial to our analysis, as § 785.31 does not require the employer to be the one offering the webinar. *See* WHD Opinion Letter FLSA-257 (June 4, 1976) (advising that the applicability of § 785.31 is “not affected by the fact that the instruction is provided by an outside public or private organization”). The fact that the nurse *could* have viewed the webinar during work time also is immaterial; what matters is when her “attendance” did in fact occur. 29 C.F.R. § 785.31; *see also* WHD Opinion Letter (July 29, 1997) (“The fact that the employer may allow officers to attend some of the training during duty hours, *i.e.*, ‘on the clock’ does not, *per se*, control whether the training time during off-duty hours is compensable under the FLSA.”).

2. *Accounting Clerk L submits a request, which is approved, to use his education funds for an on-demand webinar directly related to his job, but has no [continuing education] component.<sup>3</sup> Although he could view it any time, he decides to do so on his off-work time. Is it permissible to treat this as unpaid time?*

The information provided is not sufficient to determine whether the clerk’s time viewing the webinar qualifies as working time for FLSA purposes. Here, you state that the webinar does not satisfy a CEU requirement. However, a specific training certainly does not *need* to fulfill a professional licensing requirement in order to be excluded from hours worked, as an employer may “establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning,” and “[v]oluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.” 29 C.F.R. § 785.31. WHD has stated that it will consider a course to correspond to a course offered by an independent bona fide institution of learning if, for example, “[t]he course content, like that of other instruction in bona fide institutions of learning, [is] not tailored to any peculiar requirements of a particular employer or of a particular job held by an individual employee” and is “such that the skill or knowledge imparted through training would enable an individual to gain or continue employment with any employer.” WHD Opinion Letter 1994 WL 1004844, at \*1 (June 28, 1994); *see also* WHD Opinion Letter 2006-5, 2006 WL 940661, at \*2 (Mar. 3, 2006) (opining that training presented in an employer’s study materials was similar to English proficiency classes offered by local community colleges and therefore satisfied the regulatory requirement).

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<sup>3</sup> In a follow-up conversation with WHD staff, you clarified that a webinar lacking a continuing education “component” means that it would not satisfy a continuing education requirement for the employee at issue.

The facts you describe here, however, do not alone suffice to establish that the webinar corresponds to such courses. As such, we do not assume that the webinar “corresponds to courses offered by independent bona fide institutions of learning.” 29 C.F.R. § 785.31. If additional facts were to demonstrate that the webinar corresponds to courses offered by independent bona fide institutions of learning, and the other regulatory requirements are met, then time spent watching the webinar would not be considered compensable hours worked.

Furthermore, if the employee attends “an independent school, college or independent trade school,” and the webinar composes part of that attendance, then the time the employee spends watching it may not need to be counted as compensable working time under 29 C.F.R. § 785.30, even if the courses are job-related.

3. *Accounting Clerk M submits a request, which is approved, to use his education funds for an on-demand webinar directly related to his job, but has no continuing education component. Although he could view it any time, he does so during his work hours. Is it permissible to require him to substitute [paid time off] for the time spent watching the webinar?*

Employee participation during regular work hours in a training program that directly relates to the employee’s job is work time for FLSA purposes. The fact that the on-demand webinars described in these examples are voluntary and could have been viewed outside of regular working hours is immaterial, because “[w]ork not requested but suffered or permitted is work time.” 29 C.F.R. § 785.11; *see also* 29 U.S.C. § 203(g). While the regulations describe two circumstances where attendance at a training program that directly relates to an employee’s job would not qualify as work time, both of those provisions address voluntary attendance that occurs “after” or “outside” of an employee’s regular work hours. *See* 29 C.F.R. §§ 785.30, 785.31.

While the viewing time described in this scenario would be work time for FLSA purposes, it is certainly within an employer’s purview to establish a policy prohibiting such viewing during regular working hours.<sup>4</sup>

4. *Accounting Clerk O submits a request, which is approved, to use his education funds for an on-demand webinar that is not directly related to his job and has no [continuing education] component. Although he could view it any time, he does so during his work hours. Is it permissible to require him to substitute [paid time off] for the time spent watching the webinar?*

Even though the webinar is not directly related to the clerk’s job, the viewing time would qualify as work time for FLSA purposes because the clerk views the webinar during his regular work hours. *See* 29 C.F.R. § 785.27(a) (advising that attendance at training programs during “the employee’s regular work hours” ordinarily count as work time); *see also id.* § 785.29 (advising that “the time [a stenographer] spends voluntarily in taking ... a bookkeeping course [which does

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<sup>4</sup> Training that occurs on days that an employee normally does not work can be considered outside of an employee’s “regular working hours” for the purposes of 29 C.F.R. §§ 785.27–785.31. *See* WHD Opinion Letter FLSA-487 (Apr. 6, 1992) (concluding that a 30-hour training program provided on two consecutive weekends would be considered outside of a teacher’s “regular working hours”).

not directly relate to her job], *outside of regular working hours*, need not be counted as working time”) (emphasis added). As with the viewing time at issue in your third scenario, you may establish a policy prohibiting such viewing during regular working hours.

5. *Nurse X submits a request, which is approved, to use her education funds for an on-demand webinar that isn't directly related to her job, but has CEUs that can go towards her licensing [continuing education] requirement. Although she could view it any time, she chooses to do so during her regular work hours. Is it permissible to require her to substitute [paid time off] for the time spent watching the webinar?*

As with the on-demand webinar discussed in the fourth scenario, the nurse's viewing time would qualify as work time for FLSA purposes because the nurse views the webinar during her regular work hours. Here again, you may establish a policy prohibiting such viewing during regular working hours.

6. *Nurse Y submits a request, which is approved, to use her education funds for an in-person, weekend conference that covers several topics, some of which directly relate to her job, but others don't. CEUs are available. She has to travel out of town to attend. Both the travel and the conference cut across her normal work hours, but the actual conference occurs on days she doesn't normally work. Does she have to be paid? If so, can we require her to substitute [paid time off] for the time spent traveling and attending?*

The nurse described in this scenario does not have to be compensated for any of her travel or training time, provided—as you have asked us to assume—that her participation in the training is voluntary and she does not perform any productive work during the trip. Significantly, time spent at the training conference itself would appear to be the sort of “special situation” described in 29 C.F.R. § 785.31 that need not count as hours worked, because the training is voluntary, occurs outside of the nurse's regular working hours, and appears to correspond to courses offered by independent bona fide institutions of learning. Having established that time spent attending the training conference would not constitute work time, all time the nurse spends traveling to reach the training conference would be similarly excludable as personal travel time. “Travel at the employee's own option and for his or her sole convenience need not be considered hours worked under the FLSA . . . even though the . . . travel was done during hours that were normally part of the employee's workday if, in fact, on the personal travel day the employee's workday had ended before the commencement of such . . . transportation.” WHD Opinion Letter FLSA2004-15NA (Sept. 21, 2004).

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink that reads "Cheryl M. Stanton". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Cheryl M. Stanton  
Administrator

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