

## **FLSA-693**

May 11, 1984

This is in further response to your letter requesting an opinion concerning the proper method of compensating an employee for work performed while "on-call" during non-duty hours.

We have considered your inquiry under the provisions of the Fair Labor Standards Act (FLSA), the Federal law of most general application to wages and hours worked. FLSA requires that all covered and nonexempt employees be paid a minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

You are specifically requesting responses to four questions based on a situation involving a nonexempt maintenance employee who is required to respond to calls for emergency assistance at a local hospital. It should also be noted that this individual is not required to remain at his residence during non-duty hours.

Question #1: It is our interpretation of the appropriate labor laws that this employee would be entitled to compensation from the time he departs his residence until he returns to his residence. Is this a proper interpretation?

For the purpose of responding to this question, we assume that your interpretation is based upon the second sentence in section 785.36 of 29 CFR Part 785 (copy enclosed). This states that "if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers, all time spent on such travel is working time." Under these circumstances, your conclusion is correct.

Question #2: If he is "called in" on a day when he has not already worked (i.e. Saturday or Sunday) must time be counted as hours worked or only the time he actually spends performing his maintenance duties?

Our position outlined in section 785.35 concerning home to work travel applies regardless of the fact that it may occur during a day when the employee has not already worked, such as a Saturday or Sunday.

Question #3: On occasion, when he is contacted at home, he can talk the caller through standard troubleshooting procedures. The caller performs these procedures step-by-step as our employee instructs him and the malfunction can be corrected by the caller. Our employee never leaves his home but the malfunction is corrected via the telephone. Must the time our employee spends on the telephone be counted as hours worked?

The time spent by your employee in this situation is compensable as hours worked. The individual in this case is performing a service on behalf of the employer and, therefore, the time spent in this activity must be considered as hours worked under the Act.

Question #4: Assuming all(or a portion) of the hours mentioned in the previous questions are considered work time, do the labor laws consider it permissible to allow this employee an equal number of hours off in lieu of paying overtime?

Granting compensatory time off in lieu of paying premium pay for overtime hours worked by a covered and nonexempt employee will not satisfy the requirements of the Act. It is our position that an employer may not credit an employee with compensatory time (even at a time and one-half rate) for overtime earned which is to be taken at some mutually agreed date subsequent to the end of the pay period in which the overtime was earned. This is a long established principle under the law and has been upheld by the courts. The Supreme Court in Walling v. Harnischfeger, 325 U.S. 427 (1945), indicated that overtime payments must be made within the regular pay period unless for some reason delay is required to allow the employer to compute overtime payments. Where delay is unavoidable, payments must be made as soon as practicable.

It is permissible, however, for an employer to control the amount of earnings in a bi-weekly or longer pay period by controlling the number of hours worked in the pay period. For your information, a brief statement on the Time-Off plan under the Act is enclosed.

We trust this is of assistance to you. If you have any further questions, please do not hesitate to let us know.

Sincerely,

William M. Otter  
Administrator

Enclosures