

FLSA-366

May 31, 1984

This is in further response to your letter in which you request an opinion on behalf of your client (a hospital) concerning the compensability of time spent by certain employees in testifying in legal proceedings.

You indicate that your client's nonexempt employees are subpoenaed to testify in the cases of individuals who are former patients of the hospital. The subpoenas to testify are issued for various types of actions such as criminal cases, workers compensation hearing, tort cases involving personal injuries and determinations of the competency of individuals in probate proceedings. The personnel are called to testify because of their observations of the former patients, but the hospital is not involved in the cases nor does it encourage the attendance of the employees. you state that the hospital encounters considerable hardship as a result of the required absences of the employees.

Under the Fair Labor Standards Act (FLSA), all covered and nonexempt employees must be paid not less than \$3.35 an hour for all hours worked and not less than one and one-half times their regular rate of pay for all hours worked over 40 in the workweek.

As discussed in 29 CFR Part 785, section 785.7, the Supreme Court originally stated that employees subject to the Act must be paid for all 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 or his business. (Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 128, 321 U.S. 590 (1944).

In the situation you describe, we would not consider the time spent by your client's employees in testifying as compensable hours of work. This is true since the time spent testifying (whether voluntary or mandated by the court) is neither controlled nor required by your client and since the employees' attendance at the proceedings is not intended to benefit your client.

Although we would not consider the time spent in testifying as compensable hours of work in this situation, deductions may not be made from the compensation of any employee who is paid on the salary basis which is described in 29 CFR Part 778 in section 778.114. Under the fluctuating workweek method of overtime payment as discussed in this section, an employee may be paid a fixed salary for hours that fluctuate in a workweek. If there is a mutual understanding between the employer and such employee that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek. It is our position that generally an employee paid under this method must receive his or her full salary in any week in which any work is performed.

We trust this responds to your inquiry.

Sincerely,

William M. Otter
Administrator