

FLSA - 1197

October 1, 1987

This is in response to your letter of September 1 with enclosures on behalf of *** Superintendent of *** County School District No. 55 in *** concerning the application of the Fair Labor Standards Act (FLSA).

*** is concerned about the application of the minimum wage and overtime pay provisions of FLSA to employees of the school district who work as teacher aides and who desire to drive school buses to supplement their income. *** in his letter to your office, requested a waiver from the overtime pay provisions of the FLSA for employees who voluntarily take a second job with a school district, specifically driving a school bus, which is totally unrelated to his or her primary job.

The Wage and Hour Division (the Division) is responsible for the administration of FLSA, the Federal law of most general application regarding wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the 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. The monetary provisions of the FLSA apply to all covered employees except those who are specifically excluded in section 3(e)(2)(c) of FLSA and those who may qualify for exemption from the minimum wage and/or overtime pay provisions of the FLSA.

On January 16, the Department of Labor (the Department) published final regulations, 29 CFR Part 553, which implement the Fair Labor Standards Amendments of 1985. These regulations contain rules concerning certain statutory exclusions and exemptions, recordkeeping requirements, and compensatory time provisions which apply to State and local government workers in general, in addition to specific rules for volunteers and for fire protection and law enforcement employees. A copy of the regulations is enclosed for your information.

Section 7(p)(2) of FLSA provides that State and local government employees may, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employments, and the hours worked in the different jobs need not be combined for the purpose of determining overtime liability under FLSA. The term "occasional or sporadic" means infrequent, irregular or occurring in scattered instances. See section 553.30 of Part 553.

Under the circumstances *** describes, it is the opinion of the Division that the teacher aides, when performing the different job of driving a bus, are not employed on an occasional or sporadic basis within the meaning of section 7(p)(2) of the FLSA. Consequently, the hours worked by these aides in driving a bus must be combined with the hours worked in their primary jobs for the purpose of computing proper overtime compensation due them under FLSA. It should be noted that an employee's right to receive the statutory minimum wage and overtime premium pay required by FLSA cannot be waived.

We would also like to point out alternative methods of computing overtime pay for nonexempt employees whose part-time employment is not occasional or sporadic. Where such an employee works at two or more different types of work for which different nonovertime rates of pay have been established, the employee's regular rate for that week is the weighted average of such rates. See section 778.115 of 29 CFR Part 778 (copy enclosed). An alternative method of overtime compensation provided in section 7(g)(2) of FLSA is discussed in sections 778.415 through 778.421 of Part 778.

In addition, the Amendments provide that employees may be furnished compensatory time off in lieu of overtime payment in cash for hours worked in excess of statutory standards. See sections 553.20 through 553.28 of the regulations.

*** should also be advised that any change in the FLSA as it relates to the issues raised in his letter would, of course, require congressional action.

We trust that the above is responsive to our inquiry. If I can be of any further assistance in this matter, please do not hesitate to contact me.

Sincerely,

Paula V. Smith
Administrator