U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

MAY 15 2008

Mr. Paul J. Siegel
Jackson Lewis LLP
58 South Service Road, Suite 410
Melville, New York 11747

Dear Mr. Siegel:

This is in response to your request for an opinion regarding an employer's break and meal policy under the Fair Labor Standards Act (FLSA).*

Your client has written policies regarding break and meal periods which provide:

- The company may offer employees a 15-minute break during each shift of six or more hours. There are normally no guaranteed break periods when the employee is working overtime. Break periods begin as soon as the employee has removed himself or herself from the scheduled daily work routine.

- All employees working six or more hours in a shift must receive a 30-minute, uninterrupted, and unpaid meal period. The meal period requirements cannot be waived by the employee nor substituted for any other time.

- There may be instances when, because of staffing or workloads, a meal period may not be available to all staff members. If any non-exempt employee does not take a meal period as required by the New York State Department of Labor, that employee should notify his or her manager and note this on the timecard so he or she will be compensated for the time.

- Unused break periods or meal periods cannot accumulate nor can they be combined.

In light of this policy, your client presents six questions. We answer the questions in the order in which you present them in your letter.

Q1: "If an employee fails to take a meal break and does not notify the manager that he did so in direct violation of the policy, is additional straight time compensation due if less than 40 hours were worked (assuming minimum wage still was received)?"

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

A1: "Work not requested but suffered or permitted is work time." 29 C.F.R. § 785.11. Thus, the employer must compensate the employee for all hours worked including the time worked during the missed meal period. In a workweek in which no overtime hours have been worked, however, an employee subject to section 6 of the FLSA is considered to be paid in compliance with the FLSA if the employee's total wages for the workweek divided by the compensable hours worked equal or exceed the applicable minimum wage. Thus, in the situation described above, if the employee receives at least the minimum wage for all the hours worked (including the time worked because of a missed meal period), no additional compensation is due.

Please note that 29 C.F.R. § 516.2(a)(7) requires accurate recordkeeping of hours worked each workday and total hours worked each workweek for covered and nonexempt employees.

Q2: "Is the 'missed meal' period considered work time for purposes of determining overtime compensation?"

A2: The time worked because of a missed meal period is hours worked for purposes of determining overtime compensation. *See* Wage and Hour Opinion Letter FLSA2007-1NA (May 14, 2007). The employee must be paid for all hours worked at the agreed rate plus the overtime premium (one half the regular rate) for all hours worked over 40 in a workweek. Before an employee can be said to be paid statutory overtime compensation due, the employee must first be paid all straight time wages due for all hours worked under any express or implied contract or under an applicable statute. *See* 29 C.F.R. § 778.315; s*ee also* Wage and Hour Opinion Letter FLSA2004-8NA (Aug. 12, 2004).

Q3: "Assume that an employee is regularly scheduled to work 35 hours per week. If he or she begins work early or works after the regular finishing time, is additional straight time compensation due (assuming that, even with these unrecorded, extra hours the worker received the minimum wage for all hours of work and also assume that a published policy prohibits all forms of off-the-clock work)?"

A3: See A1. Also, as indicated in A2 above, if the additional hours worked result in the employee working in excess of 40 hours in a workweek, the regular rate of pay must be paid for all hours worked and the one-half time overtime premium for all hours over 40. The overtime premium "cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid." 29 C.F.R. § 778.315.

Q4: "Would the Department of Labor change its response to Q3 if the employee was advised in writing not to work any unrecorded work hours at any time and was subject to disciplinary action?"

A4: We do not have enough information to determine whether the response to Q3 would change even if the employee was advised in writing not to work unrecorded hours and was subject to disciplinary action. Such determinations are fact-specific and must be made on a case-by-case basis. See e.g., Chao v. Gotham Registry, Inc., 514 F.3d 280(2d Cir.2008). In general, "it is the duty of the management to exercise its control and see that the work is not performed if it does

not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough." 29 C.F.R. § 785.13.

Q5: "If an employee receives premium pay that is not otherwise due (*e.g.*, time and one-half for working over 8 hours in a day) is that an off-set against any straight-time pay or overtime pay that may be due in that workweek?"

A5: Under sections 7(e)(5), (6), and (7) of the FLSA, certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums. In such situations, the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for the purpose of computing overtime compensation. Moreover, under section 7(h) of the FLSA that extra compensation described in sections 7(e)(5), (6), or (7) may be credited toward the overtime compensation payments. *See* 29 C.F.R. § 778.201.

For example, if an employee's employment contract requires him or her to be paid time and one half the base rate for working in excess of eight hours in a day, "the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act." 29 C.F.R. § 778.202.

Q6: "Does the Department of Labor have a guideline for time that is de minimis or subject to rounding off? The employer utilizes electronic time clocks that record 'punched time' in one-minute increments."

A6: As noted in 29 C.F.R. § 785.48(b), for enforcement purposes, the payment of wages based on recording and computing time to the nearest five minutes, or the nearest one tenth or quarter of an hour, will be accepted provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. *See* Wage and Hour Opinion Letter November 7, 1994 (copy enclosed); *see also* Field Operation Handbook § 30a02(b).

As explained in 29 C.F.R. § 785.47, in recording working time, insubstantial or insignificant periods of time outside the scheduled working hours that cannot practically be precisely recorded may be disregarded. The courts have held that such periods of time are de minimis. This rule applies only where a few seconds or minutes of work are involved and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time. Where an employer fails to pay an employee for any part of the employee's fixed or regular working time, however small, it would be considered a violation of the FLSA. *See* FLSA2004-8NA; *see also* Field Operation Handbook § 30a02(a).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your

letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private 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.

We trust that this letter is responsive to your inquiry.

Sincerely,

Monty Navarro

Monty Navarro
Office of Enforcement Policy
Fair Labor Standards Team

Enclosure:
Wage and Hour Opinion Letter September 7, 1994

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
November 7, 1994

This is in response to your letter requesting an opinion concerning "rounding practices" as discussed under 29 CFR 785.48(b).

You state that the employees in question are drivers who are subject to the overtime requirements in Section 7(a) of the Fair Labor Standards Act (FLSA). The drivers' time starts at a fixed time in the morning, and at the end of the day they punch out and their time is adjusted to the nearest half hour.

You further state that for purposes of this opinion request, we are to assume that the time punched on the time card is an accurate representation of the time worked, i.e., that the time spent in walking from the last principal activity to the time clock is negligible. For example, from 1-14 minutes beyond the hour, the time is disregarded. If 15-44 minutes are punched, the employee receives one-half hour time. From 45 minutes to 1 hour, he/she receives credit for one hour's time. In other words, the employer rounds the quitting time to the nearest half-hour, i.e., 0-14 minutes goes back to the prior half-hour or hour, and 15-29 minutes goes forward to the next half-hour or hour.

As you know, the FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 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. Sections 785.47 and 785.48 of the Regulations indicate that there is no requirement in the FLSA for recording an employee's time "down to the minute." The employer may, of course, elect to do so. However, payment of wages based on recording and computing time to the nearest five minutes, or the nearest one-tenth or quarter of an hour is an acceptable practice provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

It has been our policy to disregard insubstantial and insignificant periods of time outside the scheduled working hours. This policy applies only when a few minutes are involved and where the failure to count such time as hours worked is due to conditions justified by industrial realities. It should be noted, however, that where an employer arbitrarily fails to pay an employee for any part of the employee's fixed or regular working time, however small, this would be considered a violation of the FLSA.

Although section 785.48(b) refers to the more common practice of rounding to the nearest five minutes, or to the nearest one-tenth or a quarter of an hour, we do not believe we should question the practice of rounding to the nearest one-half hour providing such practice is more beneficial to the employee, and he/she is compensated for all the time worked. Based on the information provided, it is our opinion that a practice of rounding to the nearest one-half hour, as you stated, would not be inconsistent with the practices outlined in section 785.48(b) of Regulations, Part 785. Our acceptance of this rounding practice rests on the assumption that the rounding averages out so that these drivers are fully compensated for all the time they actually work.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit 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 question 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 also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,
Maria Echaveste
Administrator