

## **FLSA-365**

May 17, 1983

This is in reply to your letter of January 31, 1983, asking whether a particular period of time during which an employee is on your client's premises is compensable hours of work under the Fair Labor Standards Act.

You state your client employs a large number of drivers. The drivers do not drive the employer's vehicles to and from work. Each driver is scheduled in advance to work a particular shift. Due to the nature of your client's business, it is important the drivers arrive for work on time. To reinforce this requirement and due to tardiness which has occurred in the past your client established the following work rule:

If a driver is tardy five times within one year, he is subject to automatic termination.

You state that all of your client's drivers are aware of this rule. The drivers are represented by a union and an agreement was reached on the following procedure:

Where a driver reports late for his scheduled shift and no work is available for him, he has a choice. First, he may immediately leave the employer's terminal (and do whatever he chooses) in which case his record is charged with an incidence of tardiness. Second, he can choose to wait for work at the employer's terminal (for up to three hours). If he waits for three hours and no work becomes available, he is free to leave in which case he is not charged with an incidence of tardiness (nor is he paid for waiting). If he grows tired of waiting and leaves before the three hours have passed, his record is charged with an incidence of tardiness (and he is not paid for the time he waited). While waiting, the driver performs no duties for the employer. If work becomes available while he is waiting, he goes to work (i.e., begins his driving duties) and is not charged with being tardy. He is, however, only paid from the time he begins working, not from the time he waited for work to become available.

It is your client's position that a tardy driver has, in effect, voluntarily reported for work and thus his waiting time is not compensable hours worked within the meaning of the Act. Furthermore you believe that a compensable on-call situation is not created since the tardy employee is not required to remain on-call at your client's terminal. You state that the employee alone chooses to wait to get work and/or prevent an incidence of tardiness from being charged to his record. You ask whether the waiting is compensable working time.

Under the Act, an employee must be paid for all the time the employee is required to be on duty or on the employer's premises or at a prescribed work place, and all time during which the employee is suffered or permitted to work. Work which the employer does not request but permits is compensable work time, such as where an employee voluntarily works before or after a shift and the employer knows or has reason to believe the employee is working. The language of the Act and the controlling court decisions make it

clear that an employee cannot waive the statutory right to be paid in accordance with the minimum wage and overtime provisions of the Act. In Brooklyn Savings Bank v. O'Neal, 324 U.S. 607, the Supreme Court stated that "while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law was passed and so to that of the community at large."

As explained in Section 785.14 of 29 CFR Part 785, copy enclosed, whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time and all of the circumstances." Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. However, such questions "must be determined in accordance with common sense and the general concept of work in employment."

Based on the information contained in your letter of January 31, 1983, and the supplemental information which we requested, in your letter of March 8, our opinion is as follows: In your client's case, the waiting time is solely for disciplinary purposes and should, we believe, be treated no differently than where an employee is sent home early for disciplinary reasons. Further, there does not appear to be any guarantee that the employee would be offered employment after any period of time spent on the employer's premises. Therefore, it is our position that the employees are not engaged to wait, but are waiting to be engaged, and the waiting time is not compensable hours worked.

Sincerely,

William M. Otter  
Administrator

Enclosure