FLSA 1267

June 16, 1994

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to employees who are permitted to leave their workplace to smoke. You ask whether smoke-breaks may be deducted from "hours worked" under the FLSA.

You state that the facts involve hourly paid white-collar employees in a general office environment, who work in a building in which smoking is not permitted by local ordinance. The employer does not have a policy of formal rest periods. Employees are paid for the brief time that they may take to obtain coffee or soft drinks, or to go to the restroom.

The employer adopted a non-smoking-policy prior to the application of the ordinance and began to assist, through counselling, those employees who wanted to stop smoking. Those employees that chose not to do so began leaving the building to smoke. Such breaks tend to last 5-10 minutes. Because of complaints by non-smoking employees, the employer began not paying smoking employees for their smoke breaks. Subsequently, the employer became aware of 29 CFR $785.18 because of a smoker's complaint.

As indicated in 29 CFR $785.18, rest periods (or "coffee breaks") of short duration, running from 5 to about 20 minutes, are common in industry. They promote the efficiency of employees and are customarily paid for as working time. It is our long-standing position that such breaks must be counted as hours worked. The fact that certain employees may choose to smoke during such breaks contrary to their employer's policy would not, in our opinion, affect the compensability of such breaks. Further, if the employer allows affected employees to work beyond their shifts to make up the time, the employer is incurring additional liability for such makeup time under the FLSA.

While there may be valid health reasons for prohibiting "smoking breaks," it does not follow that employee efficiency is not enhanced by such breaks as is the case with respect to "coffee breaks." In other words, we think it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc. Moreover, we think that the underlying rationale is equally valid for employees working in an office environment, or for employees working in physically demanding jobs in factories, mines or on farms.

As the court pointed out in Mitchell v. Greinetz, 235 F.2d 621,13 WH Cases (BNA) at 7, (10th Cir. 1956), these cases must be decided in light of the particular facts and circumstances involved. of primary consideration is whether the time involved under the conditions of employment is such that it cannot be effectively used by the employees for purposes not connected with their employment. We do not believe that the facts given indicate that the time in question is unconnected with the employees' employment. For this reason, we believe that the breaks are in fact for the benefit of the employer and fully compensable under the FLSA.

Our views should not, however, be construed to prevent an employer from adopting a policy that prohibits smoking in the workplace, or devising appropriate disciplinary procedures for violations of such policy. But an employer may not arbitrarily fail to count time spent in breaks during the workday because the employee was smoking at his or her workplace or outside thereof.

With regard to the discipline and/or discharge policies, you may wish to consult with the Equal Employment opportunity Commission concerning the impact of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., and 29 CFR 1630 on such policies. We call this to your attention in light of Food and Drug Commissioner David A. Kessler's testimony on March 25th before the House Subcommittee on Health and Environment concerning the addictive nature of nicotine and the possible regulation of tobacco products by the Food and Drug Administration.

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 that 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 that is under investigation by the Wage and Hour Division, or that 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 is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator