FLSA-104

January 17, 1995

This is in response to your request for an opinion letter concerning the provisions in 29 CFR §553.222(c) relating to the exclusion of sleep time from compensable hours of work of police officers and firefighters subject to the overtime provisions of the Fair Labor Standards Act, 29 USC 201 et seq. (FLSA). We regret the delay in responding to your inquiry.

The question concerns the existence of an existence of an express or implied agreement between employer and employee to exclude sleep time from compensable hours of work in light of recent cases construing that provision. As a general matter, an employee's statutory rights under the FLSA cannot be waived by an agreement between the employee and his or her employer, but the Supreme Court has held that an agreement between the parties is a factor to be considered in determining if sleep time is compensable worktime. Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944). Generally, when an individual accepts employment he becomes subject to the conditions proposed by the employer and the employee may be subject to termination for not abiding by those conditions.

More specifically, you have inquired about the situation of employees, not previously subject to a policy of excluding sleep time from hours worked, who have their shifts unilaterally expanded to 24 hours and 15 minutes (without any additional pay for the 15 minutes), and are told that from that time forward their sleep time will be excluded from hours worked. They continue in their employment, with or without protest, depending on their fear of possible coercion.

As you point out, the question arises in part as a result of the decision in Bodie v. City of Columbia, S.C., 934 F2d 561 (4th Cir. 1991), in which an employee who said nothing and continued to receive a paycheck when told by his employer that he had to agree to sleep time exclusion or be fired was held to have agreed to the exclusion. As you also point out, the Department filed an amicus brief in that case supporting the employee's position, and the Department continues to take the position that no agreement came into existence in that case as a result of the employer's use of overweening bargaining power.

However, Bodie, and the case of Johnson v. City of Columbia, S.C., 949 F.2d 127 (4th Cir. 1991), establish that where the employee actively and affirmatively protests the employer's actions and makes known his objections to the new policy of sleep time being treated as noncompensable work time, the employer cannot show that an agreement exists. Bodie, 934 F.2d at 567; Johnson, 949 F.2d at 130, 131. Thus, we agree with your conclusion that an employee is not deemed to have agreed for all time to the exclusion of sleep time merely by continuing to work under a new system instituted by the employer.

And the employer cannot rely on agreements signed by the employee "under duress." Johnson, supra, 949 F.2d at 130.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator