

## FLSA-1303

April 7, 1995

This is in further response to your inquiry relating to the exclusion of sleep time from compensable hours of work under the provisions of the Fair Labor Standards Act (FLSA) and pursuant to 29 CFR §553.222(c).

We previously advised you that under that regulation, where an employer and employee had agreed that sleep time was to be compensable, an employer could not make unilateral changes in the agreement to exclude sleep time from compensable hours of work and then consider the employee's continued employment to be acceptance of such change. Some form of uncoerced mutual assent is necessary to consider the parties' agreement validly changed.

While the regulation does not address the converse, i.e., the procedure for rendering sleep time compensable, where there was previously an express or implied agreement to exclude sleep time from compensable hours of work, the following is our analysis. An employee could unilaterally withdraw his or her consent, and the employer would then be required to compensate the employee for any future sleep time that may occur. However, the employer would not be required to agree to a continuation of the same terms and conditions of employment. The employer and employee are free to establish new conditions of employment such as rate of pay, hours of work, or reassignment.

For those employees represented by the \*\*\*, such changes in conditions or terms of employment could be addressed within the collective bargaining process by the parties. Non-represented employees regrettably do not have this option.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste  
Administrator