FLSA-1328

September 9, l996

This is in response to your letter on behalf of the *** requesting clarification of the application of the Fair Labor Standards Act (FLSA) to the time spent by child care employees in training required by State regulation. You specifically request a written opinion of the application of the 29 CFR Part 785.27 criteria tot his training time. Please forgive the delay in responding.

Time spent in training programs need not be counted as hours of work if all of the four regulatory criteria are met (see 29 CFR Part 785.27). We will respond to your request by listing and discussing each criterion as it relates to unique aspects of training time in the child care industry.

(a) Attendance is outside the employee's regular working hours.

This criterion is a question of fact that must be determined on a case-by-case basis.

(b) Attendance must be voluntary.

- Where an employer (or someone acting on his or her behalf or interest) either directly or indirectly requires an employee to undergo training, the employer controls the employee's time. Attendance by the employee is thus not voluntary and is clearly hours of work.

  However, where a State requires individuals to take training as a condition of employment with any employer in the child care field -- e.g., continuing education required of an individual to be licensed to practice the profession -- attendance at such training would be voluntary and this criterion met, provided the employer does not impose additional requirements on the employee, such as taking a particular course(s).

  It is a different situation, however, where a State requires employers to provide training as a condition of the employer's license to remain open for business -- e.g., a day care center operator's license is conditional on all employees receiving a fixed number of hours of child care training each year. As the operator would typically require employees to attend such training, it would not be voluntary, and this criterion would not be met.

  (c). Training must not be directly related to the employee's job.

  Training is directly related to employee's job if it is designed to make an employee handle his/her job more effectively, as distinguished from training to for another job or a new or additional skill.

However, when the other three 29 CFR Part 785.27 criteria are met, training directly related to an employee's job need not be counted as hours worked where:

- It is secured at an independent school, college or independent trade school which employees attend on their own initiative (29 CFR Part 785.30): or

- It is established by the employer for the benefit of employees and corresponds to courses offered by independent bona fide institutions of leaning (29 CFR Part 785.31).
- As a practical matter in the child care industry, we would regard child care training to be for the benefit of the employees when it provides instruction of general applicability which enables an individual to gain or continue employment with <u>any</u> employer which provides child care services.

1. (d). <u>The employee performs no productive work during attendance</u>.

- This criterion is a question of fact that must be determined on a case-by-case basis.

We are developing a Fact Sheet which describes the application of the FLSA to the child care industry. The Fact Sheet, which will include the issues discussed above, will be provided to you as soon as it is completed. It will also be available at local Wage and Hour Division Offices and on the Department of Labor Home Page.

We trust that the above is responsive to your request. The opinion expressed herein supersedes previous Wage and Hour Division interpretations on the same topic.

Sincerely,

Maria Echaveste
Administrator