



WHD-OL-1996-0005

December 2, 1996

Dear Mr. **NAME***

This is in response to your letter requesting an opinion regarding the application of the Fair Labor Standards Act (FLSA) to certain employee who are allowed, at their request, to leave their work station to smoke for three or four minutes at a time, not to exceed 15 minutes per day. You wish to know whether these smoke breaks, which are in excess of the number of breaks allowed to other employees, may be excluded from "hours worked" under the FLSA. Please forgive our delay in responding.

Employees have always taken short work breaks, with pay, for a myriad of non-work purposes – a visit to the bathroom, a drink of coffee, a call to check the children, attending to a medical necessity, a cigarette break, etc. The Department has consistently held for over 46 years that such breaks are hours worked under the FLSA, without evaluating the relative merits of an employee's activities. This position, found at 29 C.F.R. 785.18, is based squarely in the premise that short breaks are common in industry, promote the efficiency of employees and are customarily treated as work time by employers.

The compensability of short breaks by workers has seldom, if ever, been questioned. Any modification of the Department's long held position to accommodate your request would require a series of tests to evaluate the relative benefit provided to employee and employer and the impact on employee efficiency of each and every small work break ever taken by any employee.

We believe that such tests would be an undesirable regulatory intrusion in the workplace with the potential to seriously disrupt many employer-employee relationships. Further, it would be difficult, if not impossible, to design practical tests applicable to all workplace circumstances.

While we fully appreciate the extraordinary difficulties presented to employers by smoking in the workplace, we believe that the government should not be in the business of determining what employees do on short work breaks, much less attempting to evaluate which short breaks merit or do not merit compensation. We strongly believe that employers and employees are best served by the bright line time test currently provided in Section 785.18.

We are unwilling, for these reasons cited above, to modify the existing position. The FLSA does not require an employer to provide its employees with rest periods or breaks. If the employer decides to permit short breaks, however, the time is compensable hours worked. Even if the employees agree to forego compensation for the break time, the time is still compensable, because employees may not waive their statutory rights through an agreement with the employer.

If the employer permits its employees to take a series of short breaks, the employees must be compensated for their time,

We trust that the above information is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

cc:

*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b) (7).