

## FLSA-369

September 27, 1984

This is in further reply to your letter in which you request an opinion under the Fair Labor Standards Act (FLSA) as to whether the hours spent by a client hospital's nurses in a training program are compensable under the Act.

The hospital is concerned about upgrading and maintaining the quality of its nursing care. It plans to implement the Slater Scale of Nursing Competencies to measure the competency of its nurses. This scale can specifically identify nurses' strengths and weaknesses. The scale will be used in conjunction with an evaluation of each nurse by the head nurse to identify deficiencies in the performance of the nurse by area.

The hospital will expect the nurses to improve their performance in any area of deficiency prior to the time they are evaluated.

The hospital will suggest a variety of resources to assist the nurses in improving the quality of their care and their employment capacity. These would include: (1) self-instruction or modules targeted to areas of deficiency; (2) audio-visual materials, journals, or books in the hospital's library; (3) reading from personal journals and texts; (4) consultation with staff members or nursing school faculty; and (5) consultation with an assigned resource person. All of these resources will be offered to each nurse on a voluntary basis, but it will be made clear that his/her performance will be re-evaluated and that continued employment will be in significant part dependent on improved performance. It is possible that a nurse will be excused from part or all of the normal workday to make use of any of the available resources. However, this is not promised by the employer. Thus, it is probable that the nurse will be engaged in these training activities on his/her own time.

You ask whether the time spent by an employee is considered hours worked under FMLA:

(1) When the employee is going to the library, studying, attending classes, or reading on his/her own time, and

(2) When the employee is engaged in such activities during normal working time.

The Department of Labor's Interpretative Bulletin on Hours Worked, 29 CFR Part 785, defines, in sections 785.27 through 785.32, the circumstances under which time spent by employees in training programs need not be counted as compensable hours of work under FLSA. Generally, as stated in section 785.27, four criteria must be met: (a) participation in the training is outside of the employee's regular working hours; (b) participation is in fact voluntary; (c) the training is not directly related to the employee's job; and (d) the employee does not perform any productive work during such training.

We shall now discuss the four criteria in section 785.27 as they apply to your client's training program.

In view of criterion (a), it is clear that any time spent by a nurse in the employee developmental activities proposed by the hospital, during the regular working hours of the normal working day must be counted as hours worked under FLSA and compensated accordingly.

As for criterion (b), your letter states that the training activities are voluntary and that a nurse may choose to do nothing upon being advised of a deficiency in one or more areas. However, you also state that "continued employment will be in significant part dependent upon her improved performance." It is our opinion that, in this instance, since a nurse's continued employment may be in jeopardy, participation in the training activities is not voluntary. In such a case, the time spent during regular working hours, as well as outside of regular working hours, would be considered as compensable hours of work which the employer may not disregard in determining the employee's compensation (see section 785.28).

Time spent in reading or studying at home would not be compensable hours of work if time is allotted during regular working hours but some employees voluntarily do extra work at home on their own to bolster their ability. Whether criterion (c) is met can only be determined on a case-by-case basis by applying it to an individual employee engaged in a particular training activity. If the training is directly related to an employee's job to the extent that it is designed to make the employee perform his/her job more effectively, as distinguished from training him/her for another job, the time spent by the employee in such training would constitute compensable hours of work under the Act. Conversely, if the training is unrelated to the employee's job, the hours spent in such training would not be considered hours worked under the Act (see section 785.29). It seems clear that in this situation the training is directly related to the nurses' jobs.

Whether criterion (d) is met is a simple question of fact.

Based on the information in your letter and the principles discussed above, it is our opinion that time spent by the nurses in your client's proposed training program constitutes compensable hours of work under the Act.

We trust the above is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us again.

Sincerely,

Nancy M. Flynn  
Deputy Assistant Administrator/OPO

William H. Otter  
Administrator

Enclosure