

JAN 25 1995

This is in response to your letter requesting an opinion as to the application of the Fair Labor Standards Act (FLSA) to employees who are allowed to leave their workplace to smoke. Specifically, you wish to know whether smoke breaks may be deducted from "hours worked" under the FLSA.

You state that your client is a resort property which prohibits smoking on the job. While it does provide uncompensated lunch breaks, it does not provide work breaks. You state that employees who are compelled to take breaks to smoke are allowed to do so by the employer provided they remove themselves from their workstation and punch out when doing so. The length of these non-work periods range from 10 to 25 minutes, and is primarily at the discretion of those employees who choose to smoke.

As indicated in 29 CFR §785.18, rest periods (or "coffee breaks") of short duration, running from 5 to 20 minutes are common in industry. They promote the efficiency of employees and are customarily paid for as working time. It is our long-standing position that such breaks must be counted as hours worked. The fact that certain employees may choose to smoke during such breaks contrary to their employer's policy would not, in our opinion, affect the compensability of such breaks. Furthermore, if the employer allows affected employees to work beyond their shifts to make up the time, the employer is incurring additional liability for such makeup time under the FLSA.

While there may be valid health reasons for prohibiting "smoking breaks", it does not follow that employee efficiency is not enhanced by such breaks as is the case with respect to "coffee breaks." In other words, we think it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc. Moreover, we think that the underlying rationale is equally valid for employees working in an office environment, or for employees working in physically demanding jobs in factories, mines or on farms.

As the court pointed out in Mitchell v. Greinetz, 235 F.2d 621, 13 WH Cases (BNA) at 7, (10th Cir. 1956), these cases must be decided in light of the particular facts and circumstances involved. Of primary consideration is whether the time involved under the conditions of employment is such that it cannot be effectively used by the employees for purposes not connected with their employment. We do not believe that the facts given indicate that the time in question is unconnected with the employees' employment. For this reason, we believe that the breaks are in fact for the benefit of the employer and fully compensable under the FLSA.

Our views should not, however, be construed to prevent an employer from adopting a policy that prohibits smoking in the workplace, or devising appropriate disciplinary procedures for violations of such policy. But an employer may not arbitrarily fail to count time spent in breaks during the workday because the employee was smoking at his or her workplace or outside thereof.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator