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OPINION LETTER

This letter is in response to your request for an opinion concerning the application of the Fair Labor Standards Act, 29 U.S.C. 201 et seq. (FLSA), to employees of the

The specific question is whether the time an employee is required to remain at his or her residence while on paid sick leave is considered compensable hours worked which must be included in the computation of overtime under the FLSA.

Under the sick leave policy in question, employees who are granted the use of sick leave are required to remain at home for the entire duration of their assigned shift and are required to remain available for telephone contact. During this time, the employer does not consider the employee available by telephone if the employee uses call forwarding, answering machines, or beepers or if the employer experiences repeated busy signals upon attempting to contact the employee. Employees who are granted sick leave are required to contact their employer prior to leaving home while on sick leave. The policy expressly provides that these employees are permitted to leave home to see a licensed physician or obtain prescription medicine from a local pharmacy.

Under the FLSA, when an employee is placed in an "on call" situation, at home or at another location, such time is compensable where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits. In Armour & Co. v. Wantock, 323 U.S. 126 (1944), and Skidmore v. Swift & Co., 323 U.S. 134 (1944), the Supreme Court explained that whether the time is compensable depends on whether the restrictions on the employee's activities are so significant that the time is being spent predominantly for the employer's benefit. This determination depends on all the circumstances of the case. An employment relationship may contemplate that an employee so restricted has been hired to spend time waiting to respond to the employer's needs, in which case the employee is traditionally described as having been "engaged to wait," and such time constitutes compensable hours of work. Wantock, *supra*, 323 U.S. at 133. See also 29 C.F.R. 785.16-17 (Regulations addressing off-duty and on-call time) (copies attached). On the other hand, where the restrictions on employees' activities while on call do not prevent them from pursuing their normal pursuits, such employees are described as "waiting to be engaged," and such time is not compensable. Skidmore, *supra*, 323 U.S. at 139.

Your inquiry presents a special case, whereby an employee chooses to enter paid sick leave status because of an illness or injury which makes the employee unable to work, and the employer's policy requires the employee to remain at home under the circumstances described above. A number of courts have considered whether an employee's time on sick leave under similar circumstances constitutes hours worked under the FLSA. In Aiken v. City of Memphis, Tennessee, 190 F.3d 753, 760-61 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000), Debraska v. City of Milwaukee, 189 F.3d 650, 651-52 (7th Cir. 1999), and Capasso v. Metropolitan Transportation Authority of the State of New York, 198 F. Supp. 2d 452, 460 (S.D.N.Y. 2002), employees on paid sick leave were required to remain at home unless granted permission to leave by their supervisor. Such permission was readily granted so that the employee could visit a physician, pick up prescription medicine, obtain food, exercise under medical direction, and attend to other personal business, such as attending religious services. In these cases, the courts found that the employees were free to use their time at home as they pleased, consistent with their employers' sick leave policies, and that such time was not spent predominantly for the benefit of their employers. As a result, the employees were not considered to have been "engaged to wait," and the time at home while on sick leave did not have to be included in hours worked when overtime was computed. The _____ policy is analogous to the policies at issue in Aiken, Debraska, and Capasso. Accordingly, by the terms of the _____ policy, employees' time spent at home on sick leave is not considered hours worked for FLSA purposes and is not to be included in the computation for overtime.

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 facts and circumstances which would be pertinent to our consideration of the question presented. Existence of 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 that 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 satisfactorily responds to your inquiry.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosure