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ATTORNEY GENERAL

9199-9749

November 17, 2014

Ms. Viola Robinson Faust
John de la Howe School
Director of Finance and Business Operations
192 Gettys Road
McCormick, South Carolina 29835

Dear Ms. Faust:

Thank you for your letter dated March 5, 2014 requesting the opinion of this Office regarding what you consider to be "unearned comp time and payment of salary not due" for certain staff members employed with the John de la Howe School. You specify that after becoming the "direct report" for the maintenance staff, you discovered requests to use compensatory time when approving leave requests. Your further review revealed members of the maintenance staff had been recording 7.5 hours worked when "on call" on Saturdays and Sundays. You also note that the regular workweek is Monday through Friday and when staff members are "on call" on the weekends, they do not report to campus – their headquarters – unless called.

Since your discovery of the issue, members of the maintenance staff have been told "to only record hours for when they actually work" and that you "would not approve comp time requests." You indicate that this practice did not begin until September of 2011, and prior to that date, only three instances were discovered where two former employees recorded compensatory time, which "was then recorded as call back time."

You indicate your hesitance to approve request by the maintenance staff for compensatory time in light of S.C. Code Ann. § 8-11-30 (Supp. 2013), which criminalizes a person employed by the state who issues vouchers, checks, or otherwise pays salaries or monies that are not due to a state employee. You therefore ask whether the agency has any recourse in addressing what you claim to be unearned compensatory time issued and if not, whether you can be required to approve the compensatory time on the books for these employees while remaining in compliance with S.C. Code Ann. § 8-11-30.

Law / Analysis

The John de la Howe School is a state agency providing behavioral and educational assistance to children in need. See generally S.C. Code Ann. § 59-49-100 (2004). Pursuant to S.C. Code Ann. § 8-11-15 (Supp. 2013), the "minimum full-time workweek" for state agency employees is thirty-seven and one-half hours. Furthermore, S.C. Code Ann. § 8-11-55 (Supp.

2013) states that "[a]ny state employee who is required to work overtime during any particular work week may, as a result, be given compensatory time by his agency." However, the statute makes clear that if compensatory time is granted, it "must be in accordance with the Federal Fair Labor Standards Act of 1938 as amended." Id. As your questions specifically relate to the appropriateness of approving compensatory time for certain members of the John de la Howe School's staff, we turn to the Federal Fair Labor Standard Act for analysis.

I. Fair Labor Standards Act

The Fair Labor Standards Act of 1938, as amended ("the FLSA" or "the Act") governs the payment of minimum wage and overtime for certain workers, and generally requires that employers pay their employees at least the federal minimum wage for the forty (40) hour workweek and overtime, calculated at time-and-a-half, for any hours worked in excess of the forty (40) hour workweek. See 29 U.S.C.A. §§ 206-207. The FLSA provides two independent types of coverage, individual coverage, based on the activities of the employee, and enterprise coverage, based on the activities of the employer. See Les A. Schneider and J. Larry Stine, 1 Wage and Hour Law § 4:1 Individual employee coverage (2014) (stating employee coverage extends to "employees who (1) are closely related to the shipment of goods in interstate commerce or (2) handle related interstate commerce matters on a regular or recurring basis"); see also Id. at § 4:19 Enterprise coverage (providing that enterprise coverage extends to "[a] business [and all employees therein] . . . if the business (1) constitutes [as] an enterprise and (2) has two or more employees engages in interstate commerce").

Amendments to the FLSA made from 1966 to 1985 extended FLSA coverage to states in their role as employers. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (codified as amended in scattered sections of 29 U.S.C.) (providing coverage to schools, hospitals, nursing homes, and local transit systems, including those run by states); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended in scattered sections of 29 U.S.C.) (expanding class of state employees brought within terms of Act). While the United States Supreme Court ruled that Congress did not have the constitutional authority to extended FLSA coverage to state employees in 1976, this decision was subsequently overruled. See Nat'l League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985). Specifically, in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557, 105 S.Ct. 1005 (1985), the Supreme Court held that the FLSA could be constitutionally extended to regulate state and local government, and thereafter, Congress recognized certain exceptions applicable to various classes of state employees. See Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787-91 (1985) (codified at 29 U.S.C. § 203(e)(2)(C)).

Even if covered under the FLSA, an employee can be exempt from its provisions if he or she falls within one of the Acts exemptions, as set forth in 29 U.S.C.A. § 213. For purposes of the maximum hour requirements, the FLSA distinguishes between nonexempt employees, to whom overtime provisions *do* apply, and exempt employees, to whom the overtime provisions *do not* apply. See 29 U.S.C.A. § 213(a); see also S.C. Code Ann. Regs. 19.707.02(D) (2011). Whether an employee classifies as an exempt or nonexempt employee is a factual question that

must be determined by the agency upon all facts and circumstances involved. Because this office is not a fact finding entity, we are not permitted to make a determination as to the status of the employees in question. See Op. S.C. Att'y Gen., 2006 WL 2849809 (Sept. 14, 2006) ([I]nvestigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court"). Nonetheless, we will generally outline the law applicable to nonexempt state employees covered by the FLSA.

In accordance with the rules imposed by the FLSA, the South Carolina Code of State Regulations provides guidance to State agencies in regards to overtime and compensatory time. See generally S.C. Code Ann. Regs. 19-707.01-19.707.02 (2011); see also S.C. Code Ann. Regs. 19-700 (defining agency as "a department, institution of higher learning, board, commission, or school that is a governmental unit of the State of South Carolina"). As to the work an employee should be compensated for, the Regulations state that:

> [h]ours worked are all hours that an employee is permitted to work for the employing agency. Hours worked include time during which an employee is necessarily required to be on the employing agency's premises, on duty, or at a prescribed work place. Hours worked do not include leave with or without pay or holidays when an employee does not actually work.

S.C. Code Ann. Regs. 19-707.02(F) (2011). Furthermore, in regards to overtime, the Regulations state, "[o]vertime is actual hours worked in excess of 40 hours in a given seven day consecutive day period as determined by the employing agency." S.C. Code Ann. Regs. 19-707.02(G) (2011).

While the Regulations point out that "[g]enerally a nonexempt employee should not incur overtime . . . overtime may be permitted when authorized by the agency." S.C. Code Ann. Regs. 19-707.02(H) (2011). If overtime is permitted, "[c]ompensatory time is an acceptable alternative to overtime compensation for employees." S.C. Code Ann. Regs. 19-707.02(I) (2011). Speaking to the amount a nonexempt employee should be paid for overtime, the Regulations clarify that:

> [n]onexempt employees shall either be paid or given compensatory time for hours worked in excess of 40 hours in a given work period of seven consecutive days. For hours worked in excess of 40 in an established workweek of seven consecutive days, payment for overtime or the accrual of compensatory time shall be at the rate of time and one-half the employee's regular rate, computed on the basis of a 40-hour workweek.

S.C. Code Ann. Regs. 19-707.02(J)(1) (2011). Certain exceptions to the overtime requirements exist for specific categories of public employment, and limits to the amount of compensatory time that can be earned are also established under the Act. See S.C. Code Ann. Regs. 19-707.02(G), (J)(2) (2011).[1]

[1] The regulations listed in this paragraph are derived from 29 U.S.C.A. § 207(o) of the FLSA, which states that:

II. "On-Call" Compensation

Identifying the general rules for overtime and compensatory time for state agency employees covered by the FLSA, we will turn to the crux of your question which involves interpretation of "on-call" pay. On-call pay has been defined as "compensation given to an employee for hours in which the employee agrees to respond should the employer call him or her to perform work." Les A. Schneider and J. Larry Stine, 1 Wage and Hour Law § 10.31 Payments not for compensation for hours worked (2014). Furthermore, the South Carolina Code of Regulations defines on-call pay as applicable to a state agency as "pay by the employing agency for classifications of employees in the entire agency or any portion of the agency to remain available to return to work within a specified period of time." S.C. Code Ann. Regs. 19-705.07(C) (2011).[2] The Regulations also state that the Office of Human Resources must approve on-call pay for employees. Id.

Difficulty in analyzing whether an employee is "on-call" has been recognized: "[a] particularly difficult situation to evaluate is when an employee is on-call. The employee is not required to be at work or engaged in a principal activity, but is required by the employer to respond when called upon." Les A. Schneider and J. Larry Stine, 1 Wage and Hour Law § 6:35 Waiting time- On-Call (2014). While on-call time has been determined to be compensatory in certain cases, the determining factor rests upon whether the employee can use the on-call time effectively for his or her own purposes. See 29 C.F.R. § 785.17 (stating that "[a]n employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call' [but alternatively] [a]n employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call").

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
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> (2) A public agency may provide compensatory time under paragraph (1) only--
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> (A) pursuant to--
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i) [employment by retail or service establishment], an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee. . . .

[2] Different from "on-call pay," our State's Code of Regulations also defines "call back pay." "Call back pay" is defined as "pay by the employing agency for an employee to report to work either before or after normal duty hours to perform emergency services." S.C. Code Ann. Regs. 19-705.07(D) (2011). In regards to "call-back" pay, it has been explained that:

> [o]ccasionally an employer may pay an employee extra wages as an incentive for the employee to show up or to be recalled to work (i.e., called back). For example, an employer might guarantee that an employee will be paid for five hours, even if the employer only has to work two hours. . . . The regulations provide that only the actual hours worked by the employee must be included in compensable time. The rest is treated as a bonus payment, but this bonus is included in the employee's regular rate for minimum wage and overtime purposes.

Les A. Schneider and J. Larry Stine, 1 Wage and Hour Law § 6.32 Waiting time— "Show-up" and "call-back" (2014) (citing 29 C.F.R. § 778.220(a)).

Whether an employee should be compensated for hours where he is not actively engaged in work is a factual question that can only be answered by a court of law. As this is the case, we are not permitted to draw conclusions to your specific questions, but we will provide examples of courts that have addressed this situation to help clarify the questions you raise. See Op. S.C. Att'y Gen., 2006 WL 2849809 (Sept. 14, 2006) ([I]nvestigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court").

Armour & Co. v. Wantock, 323 U.S. 126, 65 S.Ct. 165 (1944), serves as an example of a case where all hours of the period an employee was "on call" was held to be covered under the FLSA. Specifically at issue in this case was whether a private fire-fighting force whose members worked a regular 8:00 am to 5:00 p.m. shift and thereafter worked on call at the employer's premises from 5:00 p.m. to 8:00 a.m. the following day. Id. at 127, 65 S.Ct. 165-66. During the on call period the employees were required to "stay in the fire hall, to respond to any alarms, to make any temporary repairs of fire apparatus, and take care of the sprinkler system if defective or set off by mischance" but were permitted to sleep, eat, play cards, listen to the radio, and otherwise entertain themselves as they chose when it was not necessary to be engaged in work. Id. at 127-28, 65 S.Ct. at 166. The question before the Court was whether time not engaged in actual work during the 5:00 p.m. to 8:00 a.m. on-call period – when the employees were required to be on the employer's premises, to a certain degree subject to the employer's discipline, and subject to call – was considered working time for which the employees should be compensated under the Act. Id. at 128, 65 S.Ct. at 166. The Court clarified that:

> [o]f course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominately for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

Id. at 133, 65 S.Ct. at 168. In line with this reasoning, the Court concluded that considering all of the circumstances involved, although the employees "could resort to amusements provided by the employer" the time in question was held to be working time covered by the Act. Id. at 134, 65 S.Ct. at 169.

Decided on the same day as Armour & Co., the case of Skidmore v. Swift & Co., 323 U.S. 134, 135, 65 S.Ct. 161, 162 (1944) involved a similar question of whether seven employees, all working in some fire-fighting capacity, were entitled to compensation for all hours spent on call. Time spent on call was in addition to the employees' 7:00 a.m. to 3:30 p.m. five-day workweek, and required that the employees to stay on the fire hall on the Company premises, or within "hailing distance." Id. In addition, when on call, the employees were only tasked with answering fire alarms and when not doing so, they "used their time in sleep or amusement they saw fit." Id. at 135-36, 65 S.Ct. at 162. The Court pointed out that while it could not generally "lay down a legal formula," when employment involves waiting time, it clarified that

> [f]acts may show that the employee was engaged to wait, or they [m]ay show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

Id. at 137, 65 S.Ct. at 163. In light of the facts and circumstances of the case before it, the Skidmore Court remanded the case upon the finding that the employees in question could be compensated for all time spent on call and for application of the law to the facts. Id. at 140, 65 S.Ct. at 164.

Next, we point out Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) which provides an example of facts leading a court to conclude that an employee was not entitled to overtime compensation for non-working time when the employee was on call but not actually called into work. In this case, the employee in question worked a standard forty hour workweek as a biomedical equipment repair technician and was also assigned to be on call on certain occasions. Id. at 672-73. When on-call, the employee was not required to be at his place of employment or at any premises designated by his employer. Id. at 673. As the Court explained, "[h]e was free to go wherever and do whatever he wanted, subject *only* to the following three restrictions: (1) he must not be intoxicated or impaired to the degree that he could not work on medical equipment if called to the hospital, although total abstinence was not required (as it was during the daily workshift); (2) he must always be reachable by beeper; (3) and he must be able to arrive at the hospital within, in Bright's [employee's] words, 'approximately twenty minutes.'" Id. The Court distinguished the facts before it from Armour & Co. and Skidmore noting that:

> Bright's case is wholly different from *Armour* and *Skidmore* and similar cases in that Bright did not have to remain on or about his employer's place of business, or some location designated by his employer, but was free to be at his home or at any place or places he chose, without advising his employer, subject only to the restrictions that he be reachable by beeper, not be intoxicated, and be able to arrive at the hospital in 'approximately' twenty minutes. During the period in issue he actually moved his home-as Northwest knew and approved-to a location seventeen miles and twenty five or thirty minutes away from the hospital, as compared to the three miles (and some fifteen minutes) away that it had been when he started carrying his beeper. Bright was not only able to carry on his normal personal activities at his own home, but could also do normal shopping, eating at restaurants, and the like, as he chose.

Id. at 676. Thus, the Court concluded that the employee in question was not entitled to compensation for hours the employee spent on-call but when he was not called into work. Id. at 679. The lower court's grant of summary judgment in favor of the employer was therefore affirmed. Id.

Last, we mention Cleary v. ADM Milling Co., 827 F.Supp. 472 (1993). In this case, maintenance workers filed suit against their employer alleging entitlement to compensation for "off-work time in which they were 'on-call.'" Id. at 473. In addition to analyzing the ability of the employees to engage in personal activities, as the courts mentioned above did, the Cleary Court also emphasized the importance of the agreements between the parties in determining whether the employees should be compensated for all hours while on call. Id. at 476. The Court specified that the on-call compensation procedure was a direct product of two collective bargaining agreements that specifically addressed compensation for "call backs" but not on-call time. Id. at 476. Therefore, since plaintiffs were employed under collective bargaining agreements that provided for overtime compensation for call-in work but not for other off-duty time, and since the employees never filed a grievance to the Union or their employer, the Court determined that the plaintiffs implicitly accepted the terms of their employment. Id. at 476-77. The implicit consent of the employees in addition to their freedom to engage in personal activities while on call led the Court to conclude that "the undisputed evidence . . . is so one-sided that ADM [the employer] must prevail as a matter of law." Id. at 477.

As the cases addressed above illustrate, whether on-call time falls under the FLSA is highly fact specific and is a matter that can only be determined at the judicial level. However, courts generally examine the following factors in their analysis: the required response time; geographical restrictions; consequences for failure to respond; relief from on-call status; duties required while on-call; activities in which the employee may or may not participate; the agreement between the employer and the employee; and the method by which the employee is contracted. Les A. Schneider and J. Larry Stine, 1 Wage and Hour Law § 6:35 Waiting time-On-call (2014).

Conclusion

Whether a nonexempt employee covered by the FLSA is entitled to compensation for hours worked while on call despite not being actively engaged in work is highly fact specific and a matter than can only be determined by the judiciary. However, the major considerations used in determining whether an employee is on call include analysis of the employee's freedom to engage in personal activities, the agreement of the parties, among other factors, as addressed above. Also of significance is that our State's Code of Regulations provides that the State Office of Human Resources must approve on-call pay for agency employees.

Should a court find that an employee is entitled to compensation for all hours worked while on call under the FLSA, employees of a state agency are generally permitted to overtime compensation at time-and-one-half of the employee's regular rate. In addition, compensatory time is permitted in lieu of overtime compensation if agreed to by the state employer and employee and if not in excess of the maximum amount of compensatory time permitted under the Act.

As this Office is prevented from acting as a fact finding entity, we are not able to draw conclusions to the specific questions you raised in your correspondence. Please note, however, that the local office of the United States Department of Labor, Wage and Hour Division may be

of further assistance concerning administrative interpretations specific to the situation before you. The South Carolina Budget and Control Board, Human Resources Division may also be of guidance.

Very truly yours,

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

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