

Do you know the answer to this question from one of your members?

I think nonprofits regularly have employees work far more than is legal without overtime pay. Could you elaborate on the fact that non-exempt employees can't (I don't think) "volunteer" hours for the organizations for which they work and not get paid - a BIG issue in nonprofits. Am I correct about how this works?

This question was posed to you in our last article. Scroll down to the next page to see the answer in an Opinion letter for the Department of Labor. Just be very careful how you apply this rule. Call us if you have any questions.

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September 16, 2005

FLSA2005-33

Dear **Name***,

This is in response to the letter submitted by your predecessor concerning the application of the Fair Labor Standards Act (FLSA) to exempt and nonexempt employees who volunteer their time at the annual 5K and 10K run hosted by your employer, a 501(c)(3) nonprofit university. Specifically, you ask whether time spent on the race, such as volunteering on the race day, is considered hours worked under the FLSA or volunteer activity.

According to the inquiry, the volunteer activities performed are completely separate from the normal duties performed by "almost all the employees" who participate. The activities are performed during and after their normal working hours and include packet pickups, course marshalling, water distribution and staffing a table at the finish of the race with fruit, water, etc. Employees are notified and asked for assistance by flyer, but there are no ramifications if an employee chooses not to participate. In addition, the regular pay of exempt and nonexempt employees is not affected by the participation of the employees as volunteers at this event. Employees are paid their usual compensation for race-related activities that occur during their normal working hours.

According to FLSA section 6, an employer must pay all employees not less than the minimum wage for all hours worked. As indicated in 29 C.F.R. § 785.44 (copy enclosed), "[t]ime spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked," so long as the volunteer activities are not the same or similar to the activities the employee is employed to perform. See also Field Operations Handbook § 10b03(c) and (d) (copy enclosed). It is Wage and Hour Division policy that when employees volunteer to do the same type of work that they perform as a part of their normal work duties, the volunteer work must be included in the employees' hours worked calculations. See Opinion Letters dated July 31, 2001 and December 27, 1972 (copies enclosed). Therefore, it is our opinion that the employer must compensate employees for the hours spent volunteering during their normal working hours or when the volunteer work performed is similar to their regular duties. As for those employees at the race who perform duties that are not similar to their regular duties and that are voluntarily performed after their normal working hours, those employees' volunteer activities are not considered hours worked for the purpose of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions 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 represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. 259. See 29 C.F.R. 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

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

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator



Enclosures:

29 C.F.R. § 785.44

Field Operations Handbook § 10b03

Opinion Letters dated July 31, 2001 and December 27, 1972

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