

WEST VIRGINIA LEGISLATURE
Joint Committee on Government and Finance

Theodford L. Shanklin, CPA, Director
Legislative Post Audit Division
Building 1, Room W-329
1900 Kanawha Blvd., E.



Area Code (304)
Phone: 347-4880
Fax: 347-4889

CHARLESTON, WEST VIRGINIA 25305-0610

MEMORANDUM

To : Legislative Post Audit Subcommittee

From: *TL*
Theodford L. Shanklin, CPA, Director
Legislative Post Audit Division

Subject: Inclusion of Meals As Time Worked
For Purposes of Determining Overtime Pay and
Allowance for Compensatory Time Under Federal Law

Date: May 11, 1999

The recently completed post audit of the West Virginia Division of Labor, for the period July 1, 1994 - June 30, 1997, was released by you during your April 1999 interim meeting. One of the issues reported on in this post audit dealt with the policy of the Division of Labor where lunch periods were included as time worked for purposes of determining employees' overtime compensation. We indicated in our report that the practice of the Division of Labor was contrary to the provisions of the Division's own rules as set forth in Title 42, Series 8, Sections 9.2 and 9.3 of the Division of Labor's Legislative Rules which state,

9.2 Nonwork time. --Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own time are not hours worked...

9.3 Work time. --The employee whose time is spent in physical or mental exertion under control and direction of the employer constitutes hours worked."

We now know the Commissioner of Labor correctly told you the provisions of Title 42, Series 8 of the Division of Labor's Legislative Rules were not the proper criteria governing the Division's treatment of lunch periods as time worked. Instead, the Division of Labor followed the requirements of the U.S. Department of Labor's "Fair Labor Standards Act" (FLSA). He further stated that counting a paid lunch break as time worked was a matter of employer policy as long as the minimum calculation is met (40 hours "actually worked"). Since, in his opinion, the Division of Labor was in compliance with the regulations of the West Virginia Division of Personnel which parallel the FLSA, he believed the Division of Labor's method of payment was correct. In light of

the Commissioner's response, we asked you and you granted us additional time to review the provisions of the Federal Fair Labor Standards Act, relevant labor laws of the State of West Virginia and any legislative rules and regulations or policies of the West Virginia Division of Personnel and the West Virginia Division of Labor pertaining to the treatment of lunch periods as time worked for purposes of calculating overtime pay and the provisions for the accrual and usage of "compensatory time". We have completed this review and our findings are as follows.

We found the introduction and overview of the U.S. Department of Labor's "Fair Labor Standards Act" states as follows:

"§440 Break Periods

Break periods under the FLSA, such as meal or rest periods, may or may not be compensable depending in large part on whether the employee is relieved from duty and the amount of time given for the activity(§§441-442).

§441 Bona Fide Meal Periods

A bona fide meal time, when the employee is completely relieved from duty, is not worktime. Whether or not an employee's meal periods can be excluded from compensable working time under the FLSA, depends upon the tests discussed below (29 C.F.R. §785.19). There also are some special rules for guards, fire, police and other public safety personnel (see end of §441).

Employee freedom meal test

Unless all of the following three conditions are met, meal periods must be counted as hours worked:

(1) The meal period generally must be at least 30 minutes, although a shorter period may qualify under special conditions.

(2) The employee must be completely relieved of all duties; for example, if the employee must sit at a desk and incidentally answer the telephone, the time would be compensable. (According to a June 23, 1986 Wage and Hour Opinion Letter, an employee who chooses to remain at his or her desk during the meal period is not working so long as he or she is completely relieved of all duties and is not *required* by the employer at the desk.)

(3) The employee must be free to leave the duty post. There is no requirement, however, that the employee be allowed to leave the premises or work site."

We met with Mr. Joe Smith, Acting Director of the West Virginia Division of Personnel. Mr. Smith shared certain information with us regarding the application of the Fair Labor Standards Act to state employees in West Virginia. He agreed with us that the provisions of the Fair Labor Standards Act do not require that meal periods be included as time worked for purposes of calculating overtime pay, except, under certain circumstances as set forth earlier in this memorandum which when not met as described above, require the time be included as time worked and, therefore, compensable. He further indicated the Division of Personnel has no written rules and regulations, nor policy which had been shared with State agencies which required employee meal periods always be counted as time worked when determining employees' entitlement to overtime compensation.

In relation to the allowance for the accrual and usage of compensatory time, Mr. Smith told us the Division of Personnel follows the provisions of the FLSA which permits State agencies to offer those employees who are covered by the FLSA, the option of receiving compensatory time off (at the rate of 1 ½ hours for each hour of overtime worked) in lieu of receiving overtime compensation. The provisions of the FLSA state that state and local government employees may generally accrue and carry as much as 240 hours of compensatory time at any time; however, certain employees engaged in "public safety", "emergency response", and "seasonal activities" may carry as much as 480 hours of compensatory time. Any employees carrying hours in excess of the aforementioned maximums must be paid overtime compensation at the rate of 1 ½ times their normal rate of compensation for any overtime hours worked above the maximums. Under the FLSA, the employee must agree to accept compensatory time off in lieu of overtime before the work is performed. According to Mr. Smith, the West Virginia Division of Personnel believes the provisions of the FLSA are more restrictive on the employer than those contained in Chapter 21 of the West Virginia Code because the employer is required to offer the covered employee the option of compensatory time off or overtime pay for actual hours worked in excess of 40 hours per work week.

CONCLUSIONS

Based on our review, we believe the practice of the West Virginia Division of Labor in allowing the counting of all employee lunch periods as time worked in determining hours worked for purposes of calculating overtime pay is representative of the common practice among State agencies. We reached this determination based on our experience regarding the practices observed in post audits of other State agencies which have previously been reported to you. We believe State agencies have incorrectly come to think that the Division of Personnel has recommended treating all lunch periods provided employees as time worked when providing advice to State agencies as to when employees' services are compensable because under the FLSA, the employees' meal period did not meet the three requirements of the "Employee freedom meal test" mentioned earlier in this memorandum. Mr. Joe Smith has confirmed to us that no such written policy or rule and regulation was ever issued by the West Virginia Division of Labor based on his knowledge of this matter.

As such, we believe State agencies should compensate employees in accordance with the requirements of the FLSA, but such agencies are under no legal obligation to go above and beyond their legal requirements under the FLSA at State taxpayer's expense. As such, State agencies should count lunch periods as time worked only when the three requirements of the FLSA's "Employee freedom meal test" are not met. Also, State agencies should pay overtime pay to all FLSA-covered employees who are carrying more than the maximum 240 hours or 480 hours as set out in the FLSA.