

# The State of South Carolina



## Office of the Attorney General

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November 9, 1989

The Honorable Alex Harvin, III  
The Majority Leader Emeritus  
House of Representatives  
Post Office Box 266  
Summerton, South Carolina 29148

Dear Representative Harvin:

As you know, your letter dated October 18, 1989, to Attorney General Medlock, was referred to me for response. That letter states:

I received a question recently from friends who are employed by the South Carolina Public Service Commission. There were utilized for guard duty during the aftermath of the recent hurricane "Hugo." These officers worked twelve hour shifts for which they were given credit or comp time. However, they were told by the Executive Director that they would not be given comp time for the driving time they spent in uniform traveling from their home posts many miles away to their station of duty in the Grand Strand area. They feel legally they were working during these driving hours and were, in fact, covered by state insurance and acting under the color of law, and these should be counted as duty hours. Would you please give me your opinion on this subject.

This Office has previously noted:

The minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§201-219, made expressly applicable to

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all State and municipal employees in Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985), set specific compensation requirements when certain employees' workweeks exceed a maximum of forty hours. Cf. S.C. Code Ann. §8-11-55 (1976 & 1988 Cum. Supp.) ("Compensatory time, if granted, must be in accordance with the Fair Labor Standards Act of 1938 as amended.").

S.C. Att'y Gen. Op. (Apr. 25, 1989)(footnote 2).

According to the regulations promulgated by the Wage and Hour Division of the Department of Labor concerning the Fair Labor Standards Act ["Act"]:

Under the Act an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include: (a) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining "on call", traveling on the employer's business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in Part 785 of this chapter (interpretative bulletin on "hours worked") and Part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947)....

Overtime Compensation, 29 C.F.R. §778.223 (1988) ("Pay for non-productive hours distinguished."). These regulations<sup>1</sup>

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<sup>1</sup> The regulations of the Wage and Hour Division of the Department of Labor also discuss the interaction of the Fair Labor Standards Act 29 U.S.C. §§201-219, and the Portal-to-Portal Act of 1947, 29 U.S.C. 251-262. E.g., 29 C.F.R. §§778.223 & 785.34 (1988).

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also acknowledge that "whether or not time spent in travel is working time depend[s] upon the kind of travel involved." Traveltime (General), 29 C.F.R. §785.33 (1988). These regulations concerning Traveltime state that "[n]ormal travel from home to work is not worktime." Traveltime, 29 C.F.R. §785.35 (1988)("Home to work; ordinary situation."). Traveltime, 29 C.F.R. §785.36 (1988)("Home to work in emergency situations.") provides:

There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

Similarly, these regulations provide:

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, D.C., with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in §785.36), or like travel that is all in the day's work (see §785.38). All the time involved, however, need not be counted.

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Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible.

Traveltime, 29 C.F.R. §785.37 (1988) ("Home to work on special one-day assignment in another city."). These regulations also state that "[t]ime spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the work day, must be counted as hours worked." Traveltime, 29 C.F.R. §785.38 (1988) ("Travel that is all in the day's work.").

Thus, while normal travel from home to work is not worktime under the Act, the regulations do clearly recognize that, under certain circumstances, travel from home to work does constitute overtime. Therefore, the specific facts and circumstances involved, including whether the employee is an exempt or nonexempt employee under the Act,<sup>2</sup> are critical to determine whether or not the traveltime is working time under the Act. Your letter does not provide sufficient facts for such a determination. Furthermore, this Office does not have the authority of a court or other fact-finding body in a legal opinion to adjudicate or investigate factual questions. S.C. Att'y Gen. Op. (June 15, 1989). Please note, however, that the local office of the Wage and Hour Division may be of further assistance to you concerning administrative interpretations of the Act and regulations.

I hope the above will be of assistance to you.

Sincerely,



Samuel L. Wilkins  
Assistant Attorney General

SLW/fg

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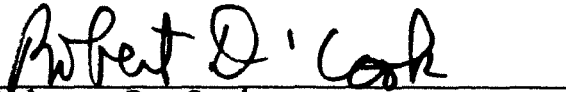
<sup>2</sup> The South Carolina State Budget and Control Board's regulations concerning overtime discuss the differences between exempt and non-exempt employees. S.C. Code Ann. R 19-703.04 (1976 & 1988 Cum. Supp.).

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REVIEWED AND APPROVED BY:

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Edwin E. Evans  
Chief Deputy Attorney General

A handwritten signature in cursive script, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook  
Executive Assistant for Opinions