U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 16, 2005 **FLSA2005-3NA**

Dear ***Name****,

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to the compensability of time spent by State employees who attend medical appointments to obtain medical verification.

You state that the ***Name**** has an attendance policy that one of its agencies may require verification of illness in the event that an employee calls in on an unscheduled absence immediately prior to the start of his/her regularly scheduled shift in order to access the benefit of receiving the day off with pay. Such calls usually occur on "high impact days" such as Thanksgiving, Christmas, New Year's Day, Super Bowl Sunday, or on days when the employee had previously sought vacation time and was denied.

The union claims that the travel time and time attending the medical appointment to obtain medical verification are hours worked under section 785.43 of 29 CFR Part 785 (copy enclosed). However, the employer does not believe such time is hours worked because the employee would be off-duty on the day he/she calls in sick, there is no direction by the employer for him/her to go to the doctor, and he/she could forego the medical verification and not utilize the benefit of the day off with pay.

The Fair Labor Standards Act requires employers to pay all covered, non-exempt employees for all hours worked at not less than the minimum wage of $5.15 per hour and not less than one and one-half times the regular rate of pay for workweek hours that exceed 40. As a general matter, when an employee's time is spent predominantly for his or her employer's benefit, it constitutes "hours worked" and is compensable under the FLSA. See, e.g., Skidmore v. Swift & Co., 323 U.S. 134 (1944).

By not requiring employers to provide any paid sick leave and instead treating the terms of a paid sick leave policy as a private matter for agreement between employers and employees, the FLSA implicitly recognizes that paid sick leave is not predominantly for the employer's benefit. See Opinion Letter of January 26, 1996 ("Medical Attention for Nonwork Injuries/Hours Worked"). Only when an employer places restrictions on an employee's sick leave-related activities – and then only to the extent that the restrictions prevent normal, everyday pursuits – can the time be considered for the benefit of the employer. See Opinion Letter of November 1, 2002. The facts included in your opinion letter request do not suggest that the State has placed any restrictions on the activities of employees who are on sick leave. As a result, time that employees spend obtaining medical verification of their illnesses so as to comply with the terms of the State's paid sick leave policy is not "hours worked" and therefore is not compensable.

The interpretative rule that both you and the union have cited, 29 CFR §785.43 ("Medical Attention"), states that time spent by an employee receiving medical attention at the direction of the employer during normal work hours constitutes hours worked. This provision, however, covers only situations in which medical attention has been sought for work-related reasons, such as a physical examination that is required as a condition of employment. See Opinion Letters of October 7, 1997 and April 4, 1974, or medical care for a workplace illness or injury; Opinion Letter of January 26, 1996. Medical verification, as outlined in your opinion letter request, is undertaken for the benefit of the employee – not the employer – because it allows the employee to be paid for sick leave that is not otherwise compensable. Under such circumstances, the medical verification cannot be considered to have been undertaken at the employer's direction. Thus, time spent seeking medical verification, including travel time, is not compensable under 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 question 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.

We trust that this information is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosure

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