



November 23, 2004

FLSA2004-23

Dear *Name**,

This is in response to your letter requesting an opinion letter concerning the issue of “donating” and “exchanging” time under section 7(p)(3) of the Fair Labor Standards Act (FLSA) for firefighters employed by the *Name**. We regret the long delay in responding.

A firefighter suffered an injury and was unable to work for an extended period. Her fellow firefighters decided to work her regular shift to ensure that her pay and benefits would continue uninterrupted. The employer, after becoming aware of this practice, disallowed it, and stated that the injured firefighter would be required to repay all the donated time. A discussion between you and a member of my staff on March 9, 2004, revealed that this employee has not worked for about four months, and during that time up to nine of her co-workers voluntarily substituted in her place during her scheduled shifts. On average, each of the firefighters substituted one 24 hour shift on her behalf.

You ask whether a group of firefighters may “donate” time to another firefighter by working in her place during her regular shift schedule in order for her to receive regular pay. The FLSA does not use the terms “donate” or “exchange,” but rather uses the term “substitute.” Generally, the FLSA and the implementing regulations provide that public agency employees may agree to substitute for each other and that the pay of both the substituting and substituted employee is unaffected. These provisions would permit the scenario described in your letter as long as the “substitution” comports with the statutory and regulatory substitution requirements set out below.

Section 7(p)(3) of the FLSA provides that two individuals employed in the same capacity by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours. 29 U.S.C. §207(p)(3). It further states that the hours worked by the substituting employee shall be excluded by the public agency in the calculation of the hours for which the substituting employee is entitled to overtime compensation under the Act. The implementing regulations provide that when “one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.” 29 CFR §553.31(a).

The regulations limit the application of section 7(p)(3) to situations where the “employees’ decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ‘trade time’ with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee’s decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee’s own convenience.” 29 CFR §553.31(b).

The implementing regulations also provide guidance on satisfying the statutory requirement for a public agency to approve an agreement between employees to substitute for one another. This approval requirement is satisfied “when the employer is aware of the substitution and indicates approval in whatever manner is customary.” 29 CFR §553.31(d).

Finally, there is no provision in section 7(p)(3) or its implementing regulations that could be construed to require one individual to “repay” the other individual who agrees to a work substitution arrangement. Previous opinion letters issued by the Wage and Hour Division, dated January 2, 1987 and December 13, 1993, have stated consistently that there is no FLSA requirement that an employee substitute in turn in order to pay back the other employee. This is a matter left for the parties to resolve.

You also ask whether a firefighter may substitute shifts with more than one firefighter at any one time.



Neither section 7(p)(3) nor its implementing regulations limit the number of substitutions between employees. See January 2, 1987 opinion letter. However, as mentioned above, an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. Additionally, section 7.7 of the collective bargaining agreement between the **Name*** and the **Name*** Professional Fire Fighters Union Local 3174 is consistent with this requirement by noting that employees “may exchange shifts if advance approval is obtained from the Fire Chief, and there shall be no liability for overtime pay as a result of the shift exchange.” Thus, while both section 7(p)(3) and the collective bargaining agreement require employer approval to substitute work performed by one employee for another employee, neither prohibits a public agency from limiting the number of times work substitutions can be exchanged.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 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 the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*