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

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 14, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-7. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings 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). Wage and Hour Opinion Letter FLSA2009-7 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement

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

FLSA2009-7

This Opinion Letter is withdrawn.

January 14, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether "on-call" hours of ambulance personnel constitute hours worked under the Fair Labor Standards Act (FLSA).* It is our opinion that the ambulance personnel's on-call hours are not compensable under the FLSA.

Your client, a county ambulance service, schedules its employees for various hours of on-call time each week. The county does not have a written on-call policy, but employees understand that, if called, they should arrive at the ambulance garage within five minutes. The county ambulance service is located in a small city with a population of approximately 4,000 people and driving within the city limits "takes only a few minutes." The county does not discipline employees who fail to respond within five minutes. Indeed, "[s]ometimes an employee can respond in less than 5 minutes and at other times, depending on the circumstances, an employee responds in 6, 7, or 8 minutes."

The county does not require employees to remain at or around the ambulance garage or at home during on-call hours, but requires them to carry pagers. The employees must respond wearing their uniform, consisting of trousers and a shirt with embroidered identification, and must abstain from alcohol and other substances while on call. Based on a two-month study, the county ambulance service calls back an on-call employee an average of 12 to 13 times per month -- an average of three times per week. The county ambulance service director stated that ambulance personnel are typically on duty 30 hours per week (3-4 work days) and on call approximately 40 hours per week (4-5 days), and that call-backs average one hour. For purposes of this response, we assume that employees are paid for time spent on call-backs pursuant to the FLSA. The county and the union, who have a collective bargaining agreement, wish to maintain the current work schedule -- "It has been mutually agreed to by the parties and is considered to work well . . . ."

Whether time spent on call is compensable is determined by the particular factual context of each case. Under 29 C.F.R. §§ 553.221(c) and (d) and 785.17, an on-call employee not required to remain on the employer's premises, but required to notify the employer where he or she may be reached, is not working compensable hours under the FLSA so long as the employee is not prevented from effectively using the time to engage in personal pursuits. Employees are considered to be able to use time effectively for their own purposes even when they must carry a pager and are required to report to work

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

within a reasonable time period, unless the restrictions are so burdensome and the call-backs so frequent as to prevent the free use of their time. *See* Wage and Hour Opinion Letter September 3, 1999 (copy enclosed); *see also* 29 C.F.R. § 553.221(c) ("Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work." 29 C.F.R. § 553.221(d) ("Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits.").

In *Andrews v. Town of Skiatook*, 123 F.3d 1327 (10th Cir. 1997), the court concluded that on-call time spent at home or in locations chosen by the employee was not compensable, despite requirements to remain clean and appropriately attired, refrain from drinking alcohol, and monitor and respond to pages within a reasonable time. The court set out the requisite response time:

> [While] there was not an official policy . . . requiring on-call EMTs to respond . . . within five minutes of receiving the page[,] . . . . there was an established practice . . . which required on-call EMTs to respond to a page . . . promptly and that this practice resulted in a practical requirement that on-call EMTs respond to a page . . . within five to ten minutes of receiving the page.

Andrews, 123 F.3d at 1330. The call-backs occurred an average of 16 to 23 percent of the time. *Id.* at 1331. The court, noting that "the critical issue in cases of this kind as being whether the employee can use the [on-call] time effectively for his or her own purposes[,]" stated that "[t]he five to ten minute requirement gave [the employee] access to all of the small town of Skiatook." *Id.* at 1332 (internal quotation marks omitted).

By contrast, in *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, 503 U.S. 915 (1992), the court concluded that the firefighters' on-call time was compensable because they responded to an average of three to five call-backs per on-call shift, and were called back as many as 13 times in one shift, thereby preventing them from using the time for personal pursuits. In *Andrews*, the court stressed that "the number of times [the employee] was called back as compared to the firefighters in *Renfro* clearly distinguishes the present case from *Renfro* . . . ." 123 F.3d at 1331.

Therefore, the *number* of call-backs where the employee must return to the work premises is relevant in determining whether the on-call period is compensable under the FLSA. *See* Wage and Hour Opinion Letter July 12, 1999 (copy enclosed); Wage and Hour Opinion Letter August 12, 1997 (copy enclosed); Wage and Hour Opinion Letter December 10, 1987 (copy enclosed). As the Wage and Hour Opinion Letter July 12, 1999 states, "if calls are so frequent or the on-call time conditions so restrictive that the employee cannot effectively use on-call time for his or her own purposes, the on-call waiting time would be counted as hours worked."

Looking at all the facts, is our opinion that the requirements imposed by the county are not so restrictive as to convert the on-call time into hours worked under the FLSA. Specifically, the five-minute response time is not a significant hindrance in this particular

situation because travel within city limits here takes only a few minutes and, significantly, the county does not discipline employees who fail to respond within five minutes -- it can take up to eight minutes for employees to respond. Thus, the ambulance personnel could presumably use their time to travel anywhere within the city and still be able to timely report to the ambulance garage. Moreover, the call-backs are so relatively infrequent -- averaging three per week -- that the employee can effectively use the on-call time for personal purposes. Accordingly, we conclude that the on-call periods in this instance are not compensable under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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 letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues 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 letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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