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

August 26, 2005 **FLSA2005-29**

Dear ***Name****,*

This is in response to your letter requesting information on the application of the overtime provisions of the Fair Labor Standards Act (FLSA) to certain employees of the **Name*** (the College), a community college district in **Name***, who work both as nonexempt employees and as teachers who may be exempt under the FLSA.

In your letter, you stated that the College employs some individuals solely to teach, but that the College also employs a small number of employees who work "full-time in nonexempt positions" and also teach classes in addition to their nonexempt duties. As an example, you mentioned a master welder who worked full-time for the College as a welder and also taught a welding course at night. The College considers full-time teachers as exempt and pays them an hourly rate for the time spent lecturing. The small number of nonexempt employees who also teach part-time are also paid by the hour for all hours worked. The nonexempt teachers are only compensated for time spent lecturing, although the College assumes that the teachers spend time outside of class time in preparation for their classes. You ask the following two questions:

> *(1) Because the employees at issue are part-time teachers, and teachers are treated as a specific class of exempt professional employees under the FLSA, are these employees exempt from overtime provisions while they are teaching and imparting knowledge?*

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 C.F.R. Part 541 of the revised overtime security regulations that took effect August 23, 2004. The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the FLSA includes any employee "with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed." 29 C.F.R. § 541.303(a), copy enclosed. There is no salary requirement for such employees. 29 C.F.R. § 541.304(d), copy enclosed. As you have pointed out, the exemption includes teachers of skilled and semi-skilled trades, such as the employees in question. 29 C.F.R. § 541.303(b).

To qualify for the exemption the employee's "primary duty" must be the performance of "teaching, tutoring, instructing or lecturing." 29 C.F.R. § 541.303(a). The term "primary duty" means the "principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a), copy enclosed. "The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, an employee who spends more than 50 percent of his or her time performing exempt work will generally satisfy the primary duty requirement." *Id.* at (b).

Based on the information provided, we must conclude that the primary duty of the employees in question is working in their full-time, nonexempt positions, rather than their part-time teaching jobs. They spend the majority of their time performing nonexempt duties in their full-time jobs. The time spent as a part-time teacher is a small portion of the time spent as a full-time employee engaged in nonexempt duties. When we consider the character of these particular employees' jobs, viewed as a whole, we must conclude that their regular, full-time nonexempt positions

provide more relative importance to the College than their part-time teaching duties. Thus, under these particular facts, the section 13(a)(1) exemption for teachers does not apply to them.

> *(2) If they must continue to be treated as nonexempt employees even while teaching, is it permissible for such employees to be paid only for the hours that they lecture, rather than also for the hours they spend preparing for lecture and tutoring (at an overtime rate, if applicable)?*

Section 3 of the FLSA defines "employee" as "any individual employed by an employer" and "employ" as including "to suffer or permit to work." 29 U.S.C. § 203(e)(1) and (g). Work not requested but suffered or permitted is work time. Thus, a teacher who does not qualify for the section 13(a)(1) exemption who spends time preparing for class or tutoring in addition to actual classroom instruction time is "suffer[ed] or permit[ted] to work" during those additional activities. *Id.* The reason for the work is immaterial. The employer knows or has reason to believe that the employee is working and the time working is time for which the employee must be compensated. 29 C.F.R. § 785.11, copy enclosed. This rule applies to work performed away from the premises or the job site, or performed at home. If the employer knows or has reason to believe that the work is being performed, the employer must count the time as hours worked. 29 C.F.R. § 785.12, copy enclosed.

However, nothing in the FLSA prohibits an employer from paying an employee at different rates for work at different times or for various types of work as long as no rate is less than the statutory minimum wage. Ordinarily when an employee in a single workweek works at two or more different types of work for which different non-overtime rates of pay have been established, his or her regular rate for that week is the weighted average of those rates. 29 C.F.R. § 778.115, copy enclosed. However, under the provisions of § 7(g)(2), no employer will be deemed to have violated the overtime pay requirements of the FLSA by employing employees for a workweek in excess of the statutory maximum applicable to them if, pursuant to a prior agreement or understanding, the overtime compensation for employees performing *two or more kinds of work* for which different straight time rates of pay have been established is computed at not less than one and one-half times the bona fide rates applicable to the same work when performed during non-overtime hours. 29 C.F.R. § 778.419. See Opinion Letter dated September 5, 1997, for information about computations using § 7(g)(2), copy enclosed.

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 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. This opinion letter is issued as an official ruling 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).

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:
FLSA §§ 13(a)(1), 3(e) and (g)
29 C.F.R. Part 541.300
29 C.F.R. § 541.700

29 C.F.R. § 785.11-.12
29 C.F.R. § 778.115
Opinion Letter Dated September 5, 1997

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