

Note from the Attorney General's Office:

1976 Op. Att'y Gen. No. 76-001 was clarified by
1977 Op. Att'y Gen. No. 77-007.

1976 Op. Att'y Gen. No. 76-001 was modified by
1977 Op. Att'y Gen. No. 77-029.

OPINION NO. 76-001

Syllabus:

1. Time not actually worked is excluded in computing overtime for county employees under R.C. 4111.03 so that lunch hours, vacation time and sick leave time are not to be considered "hours worked". In computing overtime, such payment is to be made for all hours worked in excess of 40 per week. However, overtime may also be paid for extra hours worked where a standard work week of less than 40 hours has been established. (1975 Op. Att'y Gen. No. 75-078 approved and followed.)

2. Credit under R.C. 325.19 for vacation pay to county employees is to be computed for full time employees on the basis of service completed by pay periods, not hours actually worked; and vacation pay for part-time employees is not available, pursuant to the provisions of R.C. 325.19.

3. Sick leave credit for both part-time and full-time county employees is to be computed pursuant to R.C. 124.38, on the basis of hours worked.

To: Richard B. McQuade, Jr., Fulton County Pros. Atty., Wauseon, Ohio
By: William J. Brown, Attorney General, January 12, 1976

I have before me your request for clarification of R.C. 4111.03 regarding certain aspects of overtime pay in county government.

Initially, you inquire as to whether employee lunch periods are included in the definition of a forty hour workweek. R.C. 4111.03 provides in pertinent part:

"An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek. . ."

(Emphasis added.)

The answer to your first question depends in large part on the interpretation of "hours worked." In this regard, I refer you to 1970 Op. Att'y Gen. No. 70-110 wherein R.C. 143.11, the forerunner of now R.C. 124.18, which contains language similar to R.C. 4111.03, was interpreted in regard to overtime pay. The syllabus of that opinion reads as follows:

"Hours for which a state employee is compensated, but during which he does not actually

work because of sick leave, vacation leave, or the occurrence of a holiday, should not be computed as 'work hours' for the purpose of determining the eligibility of said employee for pay at the overtime rate prescribed by Section 143.11, Revised Code."

In excluding hours compensated for but not actually worked for the purpose of determining overtime pay, Opinion No. 70-110, *supra*, relied upon two Federal District Court interpretations of minimum wage and maximum hours amendments to the Fair Labor Standards Act, which also contain language similar to that found in R.C. 4111.03. In *Marchant v. Sands, Taylor & Wood Co.*, 75 F. Supp. 783 (D.C. Mass. 1948), sick leave hours were held not to be included in the forty hour total and in *Sawyer v. Selvig Mfg Co.*, 74 F.Supp. 319 (D.C. Mass. 1947), vacation time was held not to be properly computed in determining overtime eligibility.

Thus, whether a county employee is compensated for his lunch hour or not, it is clear that his lunch hour, which is time that he does not actually work, should not be computed as "work hours" for the purpose of determining overtime pay.

Your second question is whether vacation and sick leave time should be included in determining whether an employee is entitled to overtime. Again, I refer you to Opinion No. 70-110, *supra*, wherein the language of former R.C. 143.11, which is similar to R.C. 4111.03, was interpreted as excluding such time. See, *Marchant v. Sands, Taylor & Wood Co.*, *supra*; *Sawyer v. Selvig Mfg. Co.*, *supra*. Hence, vacation and sick leave time would not properly be included in computing a county employee's overtime. (Note that an amendment to R.C. 124.18 changes the conclusions in 1970 Op. Att'y Gen. No. 70-110 as to "state employees".)

Your next question is whether vacation and sick leave pay is based on an eight hour day, or on the number of hours in a day regularly worked.

With respect to vacation pay for county employees, R.C. 325.19 states in pertinent part:

"Each full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees, after service of one year . . . shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay . . . Such vacation leave shall accrue to the employee at the rate of 3.1 hours for each biweekly period for those entitled to 80 hours per year"

It is apparent from R.C. 325.19 that vacation leave accrues to full time county employees on the basis of pay periods, and the statute does not differentiate on the basis of hours worked.

With respect to sick leave, Section 124.38 provides in pertinent part:

"Each employee . . . in the various offices of the county . . . shall be entitled for each completed 80 hours of service to sick leave of 4.6 hours with pay."

The language indicates that, unlike vacation pay, sick leave is to accumulate on the basis of hours of service actually completed.

Your fourth question asks what is the approved method of calculating the hourly wage for a salaried employee who works less than or more than 40 hours per week.

Section 325.17 empowers the officers mentioned in R.C. 325.27 to appoint and employ various assistants and fix their compensation. That section further provides that the guidelines for salary be set by the board of county commissioners. In considering how to determine an hourly wage, I would suggest reference to Section 124.15, which sets up a pay scale for state employees. Analysis of the figures contained therein will reveal that the annual wage is the mathematical product of the hourly wage times a 40 hour week, times 52 weeks. Thus, I would advise that the same process be applied on the county level by dividing the annual salary by 52 (weeks) and by then dividing that weekly salary by the number of hours in the employer's standard work week.

In regard to county employees who work less than or in excess of forty hours as an established workweek, I direct your attention to 1975 Op. Att'y Gen. No. 75-078, the syllabus of which reads as follows:

"1. When county employees are required to work in excess of forty hours in one workweek, R.C. 4111.03 requires that such employees be paid at a rate of one and one-half times their regular rate for such extra time worked. However, county officers defined in R.C. 325.27 may, pursuant to their authority under R.C. 325.17 to fix compensation, establish a standard workweek of less than forty hours for those employed in their respective offices and may pay an overtime rate for time worked in excess of that fixed standard.

2. A county officer's determination under R.C. 325.17 of a standard workweek for purposes of overtime pay must be part of a uniform plan which applies equally to persons performing substantially the same jobs within that office."

Your last question is whether part-time employees are entitled to sick leave and vacation credit. R.C. 124.38 states that "each employee", including a county employee, is entitled to sick leave, as per the formula: 4.6 hours sick leave for each 80 hours of service. R.C. 325.19, the statute authorizing vacation leave, as amended, applies to full-time employees. In fact, one of the changes in this amended version was the deletion of that language which had previously authorized vacation leave for part-time employees. Thus, sick leave credit is authorized for part-time employees, while vacation leave is not.

Based on the foregoing it is my opinion and you are so advised that:

1. Time not actually worked is excluded in computing overtime for county employees under R.C. 4111.03 so that lunch hours, vacation time and sick leave time are not to be considered "hours worked". In computing overtime, such payment is to be made for all hours worked in excess of 40 per week. However, overtime may also be paid for extra hours worked where a standard work week of less than 40 hours has been

established. (1975 Op. Att'y Gen. No. 75-078 approved and followed.)

2. Credit under R.C. 325.19 for vacation pay to county employees is to be computed for full time employees on the basis of service completed by pay periods, not hours actually worked; and vacation pay for part-time employees is not available, pursuant to the provisions of R.C. 325.19.

3. Sick leave credit for both part-time and full-time county employees is to be computed pursuant to R.C. 124.38, on the basis of hours worked.