Note from the Attorney General's Office:

1976 Op. Att'y Gen. No. 76-030 was overruled in part by 1976 Op. Att'y Gen. No. 76-054.

OPINION NO. 76-030

Syllabus:

1. When an employee works more than forty hours in a week he must be compensated for all hours worked in excess of forty at one and one-half times his regular rate of pay in order to comply with the Fair Labor Standards Act.

2. If an employee is merely in active pay status for more than forty hours, and is not working for more than forty hours, then R.C. 124.18 controls and the employee should be compensated at either one and one-half times his regular rate of pay or at a rate equivalent to Pay Range 33, Step 1, whichever is lesser.

To: Marion C. Anderson, M.D., Pres., Medical College of Ohio, Toledo, Ohio
By: William J. Brown, Attorney General, May 6, 1976

I have your request for my opinion in which you ask:

1. If an employee works more than forty hours in a week, must the employee be compensated for all hours worked in excess of forty at one and one-half times his regular rate of pay in order to comply with the Fair Labor Standards Act?

2. If an employee is in an active pay status more than forty hours in a week, must the employee be compensated for all hours in excess of forty at one and one-half times his regular rate of pay in order to comply with the Fair Labor Standards Act, or would section 124.18 of the Revised Code be the controlling authority? Under Section 124.18 the employee would be compensated at either one and one-half times his base pay or at a rate equivalent to Pay Range 33, Step 1, whichever is lower.

29 U.S.C. Section 207(a)(1) states:

"Except as otherwise provided in this section, no employer shall employ any of his employees. . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

It has been held that the Fair Labor Standards Act, as amended in 1966, is applicable to employees of state-owned hospitals and schools that are in competition with private hospitals and schools. Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 1020 (1968). Since the Medical College of Ohio at Toledo falls within the categories set out by Wirtz, supra, 29 U.S.C. Section 207 is applicable to the College's employees. Thus, whenever an employee works for more than forty hours in a week, he must be compensated at one and one-half times his regular salary for all hours in excess of forty.

As noted, 29 U.S.C. Section 207 requires the Medical College to pay its employees at a rate of time and one-half times their regular salary for hours worked in excess of forty. Your second question concerns R.C. 124.18 and its relationship to the Fair Labor Standards Act.

R.C. 124.18 provides in part:

"Forty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state. When any employee is required by an authorized administrative authority to be in an active pay status more than forty hours in any calendar week, he shall be compensated for such time over forty hours, except as otherwise provided in this section, at one and one-half times his base rate of pay, or at the rate equivalent to pay range 33, step 1, whichever is the lesser, unless the provisions of the

'Fair Labor Standards Act of 1938,' 52 Stat. 1060, 29 U.S.C. 201, as amended, are applicable."

R.C. 124.18 was interpreted in 1974 Op. Att'y Gen. No. 74-108:

> "Prior to the enactment of Am. Sub. H.B. No. 301, employees were required to work more than forty hours in a calendar week to qualify for overtime pay; now, R.C. 124.18, which was amended by that Act, requires only that employees be in active pay status for more than forty hours in a calendar week to qualify for overtime pay. Thus the General Assembly changed the requirement from hours actually worked to hours in active pay status for calculating overtime payments, thereby permitting any types of paid leave to be used in such computation."
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> (Emphasis in original)

1974 Op. Att'y Gen. No. 74-108 went on to state:

> "The standard of hours in active pay status prescribed by R.C. 124.18 is more liberal than the requirements of the Fair Labor Standards Act and is not prohibited by the Act. Therefore, I must conclude that R.C. 124.18 requires overtime compensation for all hours in excess of forty hours in active pay status in a calendar week."

Thus it is clear that R.C. 124.18 requires that an employee receive overtime compensation for all hours in excess of forty spent in active pay status in a calendar week. The question here, however, relates to an employee who has been in active pay status in excess of forty hours, but who has not worked in excess of forty hours. (For example, an employee is in active pay status for 48 hours, 8 of which consisted of sick leave.) Should he receive compensation for the excess hours at one and one-half times his regular rate of pay under 29 U.S.C. Section 207, or should he receive the lesser of that payment and payment equivalent to Pay Range 33, step 1.

It is well settled that 29 U.S.C. 207(A) establishes forty hours as the maximum number of hours that an employee may be required to work without being paid at a rate of one and one-half times his regular rate of pay. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 68 S.Ct. 1186, 92 L. Ed. 1502 (1948); Overnight Transportation Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L. Ed. 1682 (1942). It has also been held that Section 207(A), supra, was designed to spread employment to more people through imposing the overtime pay requirement on the employer. Jewell Ridge Coal Corp. v. Local #6167, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945). Finally, it has been held that an employer may decrease hours free from statutory regulation, as the statutory maximum hours are significant only as requiring overtime premium pay. Bay Ridge Operating Co. v. Aaron, supra.

The view that Section 207(a), supra, merely establishes a maximum work week which can be used without paying one and one half times the regular rate as overtime to the employee for

excess hours, and does not preclude a shorter work week, is further supported by 29 U.S.C. 207(e), which states in part:

> "(e) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--
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> "(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be; . . ."
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> (Emphasis added.)

Thus, if R.C. 124.18 had been designed to shorten the standard workweek from forty hours to some lesser amount, 29 U.S.C. 207 would require that employees receive overtime compensation at a rate of one and one-half times their regular rate of pay for all hours worked in excess of the standard hours. But R.C. 124.18 does not do this; it specifically states that "Forty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state." Therefore, employees who are in active pay status--but who have not worked--for more than forty hours in a week may be paid in accordance with R.C. 124.18, i.e. the lesser of one and one-half times their regular rate of pay or the rate equivalent to Pay Range 33, Step 1. The General Assembly has not authorized a shorter work week, and so the Fair Labor Standards Act is not applicable to employees in this situation.

R.C. 124.18 was amended to liberalize the payment of overtime compensation to state employees. It no longer requires that an employee work for more than forty hours, but merely that he be in active pay status for more than forty hours to receive overtime compensation. But since R.C. 124.18 did not shorten the standard work week, the Fair Labor Standards Act does not apply to employees who have not worked in excess of forty hours, but have merely been in active pay status.

This view that the Fair Labor Standards Act is not applicable to employees who have merely been in active pay status, but have not worked, in excess of forty hours is supported by 29 U.S.C. 207(e)(2). That section, in defining what should be included in an employee's "regular rate" for purposes of computing what the overtime rate should be, specifically excludes:

> "(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; . . . ."

It has also been held that the hours taken off by an employee during his regular working hours because of illness cannot be used to compute overtime hours in a particular week, even though no deduction was made from his salary because of the

absences. Boll v. Federal Reserve Bank of St. Louis, 365 F. Supp. 637 (E.D. Mo. 1973); Marchant v. Sands Taylor and Wood Co. 75 F. Supp. 783 (D. Mass. 1948); Sawyer v. Selig Mfg. Co., 74 F. Supp. (D. Mass. 319 1947); Keen v. Mid-Continent Petroleum Corp. 63 F. Supp. 120 (N.D. Iowa 1945). Neither will overtime compensation be allowed for time spent on vacation. Boll v. Federal Reserve Bank of St. Louis, supra; Marchant v. Sands Taylor and Wood Co. supra; Sawyer v. Selig Mfg. Co., supra. Thus, it seems to be well settled that an employee may not use sick leave or vacation time in order to compute the amount of hours he has worked in a week. The Fair Labor Standards Act only authorizes overtime compensation at a rate of one and one-half times the regular rate of pay for employees who work in excess of the standard work week.

It is, therefore, my opinion and you are so advised that:

1. When an employee works more than forty hours in a week he must be compensated for all hours worked in excess of forty at one and one-half times his regular rate of pay in order to comply with the Fair Labor Standards Act.

2. If an employee was in active pay status for more than forty hours, and has not actually worked for more than forty hours, then R.C. 124.18 controls and the employee is to be compensated at either one and one-half times his regular rate of pay or at a rate equivalent to Pay Range 33, Step 1, whichever is lesser.