THE IAFF FAIR LABOR STANDARDS ACT MANUAL

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INTRODUCTION

There are few laws more important to our members than the Fair Labor Standards Act (FLSA). Since the Supreme Court's landmark 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, in which the Court ruled that state and local governments must comply with the FLSA, the IAFF has worked zealously to protect the federal wage and hour rights of career fire fighters, emergency medical service providers and other emergency responders. We have worked with members of Congress to enact legislation that improves worker protections under the FLSA and encourages public safety departments to cross-train their fire fighters to perform EMS duties. We have also worked with the U.S. Department of Labor to ensure that its FLSA regulations and opinion letters protect the federal law rights of our members.

In addition, and perhaps most importantly, the IAFF has assisted thousands of IAFF members in enforcing their FLSA rights through legal actions brought under the IAFF's FLSA Policy, a copy of which can be found in Chapter 20 of this Manual. Indeed, many of the cases referenced in this Manual were successfully pursued under the auspices of this Policy.

While the FLSA's principles are fundamental, it is still not unusual to find public safety departments in which this law is being incorrectly applied to fire fighters and other emergency responders. Determining whether this is true in your workplace requires an understanding of FLSA issues that are particular to our members. For instance, Congress has enacted FLSA provisions that apply only to public employees engaged in "fire protection activities," including special provisions governing the length of employees' work periods and their overtime thresholds. Other FLSA provisions, such as those governing the deduction of sleep or meal times, pertain only to employees who work shifts exceeding 24 hours, while still others – such as provisions allowing for the payment of compensatory time in lieu of cash overtime – apply only to public employers.

The purpose of this Manual is to assist you and the members of your IAFF affiliate in navigating this legal terrain. The Manual is organized into sections addressing these fundamental questions:

- Are You Entitled to Overtime?
- For What Hours Are You Entitled to Receive Overtime?
- How Should Your Overtime Rate be Calculated? and
- How Can You Enforce Your Rights?

The guidance set forth in each chapter focuses primarily, but not exclusively, upon cases and regulations that have applied the FLSA's statutory provisions to career fire fighters, emergency medical service providers and other emergency responders.

As you explore these topics, you should keep a few principles in mind. First, although topics covered by the FLSA may be negotiated as part of a collective bargaining agreement, neither the individual employees nor their collective bargaining representative may waive employees' substantive rights under the Act. Moreover, the FLSA specifically states that an employer must

abide by any higher wage and hour standard established under any other federal law, state law, or municipal ordinance that may apply. This means that the employer may not use the FLSA as an excuse to disregard any of its other legal obligations. For this reason, we have included a section in this Manual briefly summarizing wage and hour protections available under state laws.

You should also keep in mind that employees may enforce their FLSA rights by instituting a court action against their employer. In general, the relief that can be obtained in FLSA cases includes a court order directing the employer to stop its unlawful practices, back pay and interest or additional liquidated damages up to an amount equal to the back pay, and attorneys' fees and costs. Employees who do not individually join in the lawsuit are not entitled to damages, so it is very important to understand your rights before pursuing an FLSA claim. The IAFF is prepared to assist its affiliates with respect to all of these issues through its FLSA Policy.

This Manual is designed to be an evolving document. Courts issue new decisions related to the FLSA every day, and so we have revised this Manual in an electronic format so that it can be more easily updated to reflect the latest developments. You should feel free to assist us in this process by forwarding any relevant material – including court decisions and U.S. Department of Labor opinion letters – to our attention, care of the IAFF Legal Department.

It is only by fully understanding and vigilantly enforcing our rights under the FLSA that we can ensure that its protections will be available to our members both now and in the future. We hope that you find the information contained in this Manual useful for these purposes.



Edward A. Kelly
General President



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1. THE PARTIAL OVERTIME EXEMPTION UNDER SECTION 7(K) OF THE ACT

The FLSA contains a number of provisions that are unique to fire protection or law enforcement employees who work for public agency employers, such as special rules regarding accumulation of compensatory time, certain tour-of-duty practices, the exemption for small departments, and, most significantly, the hourly standards used to determine overtime compensation. The most far reaching of these special provisions is Section 7(k), which is the partial overtime exemption for police and fire fighters.[1]

1.1 The Section 7(k) Exemption

Generally, a government employer must pay its employees, even fire protection and law enforcement employees, overtime compensation if they work more than 40 hours in a 7-day workweek. In the amendments to the FLSA pertaining to state and local government employees, however, Congress recognized the longer tours of duty worked by most public-sector law enforcement and fire protection employees.[2] To ensure that public agencies would not be unduly burdened by the FLSA's overtime requirements, Congress enacted a partial overtime exemption for these employees, which is set forth in Section 7(k) of the Act.[3]

Section 7(k) provides a partial overtime exemption in two respects: it provides for higher hourly standards before requiring that overtime compensation be paid, and it permits overtime hours to be computed over a work period that may be longer than a workweek. Under Section 7(k), public agency employers may adopt a work period for any period of at least 7 but not more than 28 consecutive days.[4] Overtime need not be paid until the number of hours that the employees work in the work period exceeds the ratio of 212 hours to 28 days for fire protection employees and 171 hours to 28 days for law enforcement employees.[5] The following table shows the work periods between 7 and 28 days and the hourly level beyond which overtime compensation must be paid:[6]

Work Period (DAYS)	Hourly Overtime Standards	
	Fire Protection	Law Enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141

[1] 29 U.S.C. § 207(k).
[2] 29 U.S.C. § 207(k); *See* S. REP. NO. 99-159, *reprinted in* 1985 U.S.C.C.A.N. 651, 653.
[3] 29 U.S.C. § 207(k).
[4] 29 C.F.R. § 553.201(a).
[5] 29 C.F.R. § 553.230(a)-(b).
[6] 29 C.F.R. § 553.230(c).

22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	77
12	91	73
11	83	67
10	76	61
9	68	55
8.	61	49
7.	53	43

Public employers can choose to pay overtime compensation for hours worked in excess of the 40-hour level prescribed in Section 7(a) of the FLSA or the higher hourly level offered in Section 7(k) of the statute.[7]

To use the Section 7(k) exemption, a public agency employer must have an "established and regularly recurring period of work" of 7 to 28 days.[8] The employer has the burden of proving that it has adopted a work period by "clear and affirmative evidence."[9] Thus, to take advantage of the partial overtime exemption under 7(k), an employer must have both established, in actual practice, and adopted a regular and recurring work period.[10]

The work period need not coincide with the employees' pay period or duty cycle, nor must it begin on a particular day of the week.[11] However, once a beginning and ending time of an employee's work period is established, it must remain fixed for purposes of counting the number of overtime hours worked in that work period.[12] The beginning and ending of the work period may be changed, provided that the change is not intended to evade the overtime requirements of the Act.[13]

An employer need not adopt the same work period for all of its employees. The relevant DOL regulation explains that "an employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees."[14]

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[7] *Lamon v. City of Shawnee*, 972 F.2d 1145, 1150 (10th Cir. 1992)
[8] 29 C.F.R. §553.224(a).
[9] *Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992) (quoting *Donovan v. United Video*, 725 F.2d 577, 581 (10th Cir. 1984)). *But see Lamon* 972 F.2d at 1150 (proper standard is preponderance of evidence, not clear and affirmative evidence).
[10] 29 C.F.R. §553.224(a).
[11] *Id.*
[12] *Id.*
[13] *Id*.
[14] 29 C.F.R. §553.224(b).

The rules for computing the regular rate of pay for purposes of computing overtime compensation are the same for employees whose overtime is paid under either Section 7(k) or Section 7(a) of the Act.[15]

1.2 Court Cases/DOL Opinion Letters on the Adoption of Section 7(k)

1.2.1 Court Case on Private Entity Claiming 7(k) Exemption

- *Conway v. Takoma Park Volunteer Fire Department, Inc.:*[16]

The district court ruled that independent fire and rescue corporations used by the County were not public agencies and, therefore, could not take advantage of the higher hourly overtime standards under the Section 7(k) overtime exemption. Although the fire services were provided to the County and the money used to pay the fire fighters ultimately came mostly from the State, the corporations were not public agencies and therefore had to pay overtime in accordance with the 40-hour workweek standard under Section 7(a) of the Act.

The court relied, in part, on a National Labor Relations Board (NLRB) interpretation to determine whether or not the defendant corporations constituted public agencies under the FLSA and would thus be able to take advantage of the Section 7(k) overtime provision. In *NLRB v. Natural Gas Utility District* of *Hawkins County*,[17] the DOL standard for determining if an entity is a "political subdivision" was developed and accepted by the Supreme Court. An entity can be considered a political subdivision if it is either "1) created directly by the state, so as to constitute departments or administrative arms of the government or 2) administered by individuals who are responsible to public officials or to the general electorate."[18]

In *Conway,* the court found that the independent fire and rescue corporations did not meet either of the *Hawkins County* criteria for a "political subdivision". The court found that: 1) the corporations were privately incorporated and not created directly by the state; and 2) that the members of the board of directors of the corporations were not selected by county officials and, therefore, the decision-making authority was not under a significant amount of public control. Applying the *Hawkins County* criteria, the Court ruled that the corporations were not political subdivisions.[19]

1.2.2 Court Cases – Work Period Established and Adopted

- *Calvao v. Town of Framingham:*[20]

The 1st Circuit held that the Town employer had established a Section 7(k) work period because it required its police officers to work a "4-2" schedule (four consecutive days followed by two

[15] 29 C.F.R. §553.233.
[16] 666 F. Supp. 786 (D. Md. 1987), *appeal dismissed*, 838 F.2d 465 (4th Cir. 1988)
[17] 402 U.S. 600 (U.S. 1971)
[18] *Id*. at 602.
[19] *See also*, WH Opinion Letter (November 8, 2018), FLSA 2018-24 (opining that a nonprofit private volunteer fire department that contracts with the state to provide fire protection service to the general public is not a public agency and therefore is not entitled to the partial overtime exemption in section 7(k).
[20] 599 F.3d 10 (1st Cir. 2010).

days off duty) and later negotiated a "5-3" schedule (five day on duty followed by three days off duty) with the police union as part of a new collective bargaining agreement. The court noted that both schedules divided evenly into twenty-four day work periods and were thus compliant with Section7(k). The 1st Circuit held that the Town was not required to notify the affected employees before establishing a valid work period under Section 7(k).

- *Rosano v. Twp. of Teaneck:*[21]

The 3rd Circuit held that the Township qualified for the Section 7(k) exemption, even though it had not intended to adopt it. The court found that the employer's intention was "irrelevant as to whether an employer meets the requirements of" Section 7(k). The 3rd Circuit ruled that since the Township's police officers worked either a seven-day or a nine-day period on a regular basis, the Township qualified for the Section 7(k) exemption.

- *AFSCME Local 889 v. Louisiana:*[22]

The 5th Circuit held that the state's adoption of a 14-day work period was reflected by its practice of averaging the number of hours worked by corrections employees acting as "compound officers" over a two-week span. These employees worked 60 hours during the first week of the pay period and 24 hours during the second week.

- *Franklin v. City of Kettering:*[23]

The 6th Circuit found that to establish a work period under Section 7(k), the work period need not coincide with the pay period. The 6th Circuit found that the City sufficiently demonstrated that it explicitly adopted an alternative twenty-eight day work period and made its patrol officers aware of the adoption. The City offered testimony that it adopted the twenty-eight day period and informed the FOP and patrol officers of the new twenty-eight day work period at that time. Additional evidence showed that the patrol officers were aware of the work period. For example, in 1995 the patrol officers entered into an agreement with the city regarding the compensation paid to canine officers which referenced the twenty-eight day work period.

- *Barefield v. Village of Winnetka:*[24]

The 7th Circuit held that the Section 7(k) exemption applied to police officers even though the employer had adopted the work schedule before the enactment of Section 7(k). The court stated that "it is enough that Winnetka's police department met all of the factual criteria for §7(k)" and that "Winnetka need not have had the 7(k) exemption in mind when it adopted a 28-day work period."

[21] 754 F.3d 177 (3d Cir. 2014).
[22] 145 F.3d 280 (5th Cir. 1998).
[23] 246 F.3d 531 (6th Cir. 2001).
[24] 81 F.3d 704 (7th Cir. 1996).

- *Milner v. City of Hazelwood*:[25]

The 8th Circuit held that the FLSA's Section 7(k) exemption for publicly employed police officers applied, despite the fact the city manager's memorandum establishing the 28-day work period was not made public and that the city paid "daily overtime," a practice whose details are not made clear but which would arguably be inconsistent with reliance on a Section 7(k) work period. The court affirmed the district court's holding that "a city does not forfeit its §207(k) exemption by paying overtime more generously than the Secretary's regulations would require" and that "the exemption need not be established by public declaration."

- *Flores v. City of San Gabriel:*[26]

The 9th Circuit held that an employer "need not expressly identify § 207(k) when establishing a § 207(k) work period in order to qualify for the exemption." The 9th Circuit noted that an employer is only required to "show that it establish a § 207(k) work period and that the § 207(k) work period was regularly recurring. Specific reference to § 207(k) is not necessary to satisfy this standard." The court held that the City satisfied these criteria by adopting an eighty-hour/fourteen-day work period and by paying its officers in accordance with that period.

- *Lamon v. City of Shawnee:*[27]

The 10th Circuit upheld the jury's finding that the City adopted a Section 7(k) work period by creating a 28-day work period and providing overtime payment for any work over 171 hours in the 28-day cycle. The court noted that "[o]ther than adopting a specified work period, the employer is not required to restructure its overtime payment practices whatsoever." The court held that there was "evidence upon which the jury could properly have found that the City had established a 28-day work period permissible under subsection (k)."

- *Freeman v. City of Mobile:*[28]

The 11th Circuit found that the Mobile police department was entitled to an exemption under Section 7(k) of the FLSA. The employer demonstrated that the city commission had adopted a resolution "establish[ing] a Fourteen (14) Day work period for all members of the Mobile Police Department." Also, the city paid its police officers, sergeants, and lieutenants every other Friday, reflecting a 14-day pay period. Finally, the Mobile police chief had issued a memorandum in 1993 in response to police officers who sought overtime pay which stated that "[s]ince the Police Department has an established pay period of at least 7 days (ours is actually 14 days), the Department is not required to pay overtime compensation unless you work more than 86 hours during those 14 days." The court rejected the argument that the city was required to affirmatively adopt a resolution containing language explicitly referring to a 7(k) compensation plan and found that the above evidence adequately demonstrated that the city had in fact adopted a 14-day work period.

[25] 165 F.3d 1222 (8th Cir. 1999).
[26] 824 F.3d 890 (9th Cir. 2016).
[27] 972 F.2d 1145 (10th Cir. 1992).
[28] 146 F.3d 1292 (11th Cir. 1998).

- *Birdwell v. City of Gadsden:*[29]

The 11th Circuit held that the city could take advantage of the Section 7(k) exemption based on the fact that officers worked in 7-day cycles of 5 days on and 2 days off.

- *O'Brien v. City of Agawan:*[30]

The district court held that a Section 7(k) work period was established where fire fighters worked and were paid on a 5 days on, 2 days off schedule.

- *Jerzak v. City of South Bend:*[31]

The district court found that the employer met the burden of establishing a Section 7(k) work period where it had given employees written notice of the twenty-seven day work period.

- *Fraternal Order of Police Lodge 13 v. City of Smyrna:*[32]

The district court determined that, even though the City did not enact a formal resolution, a Section 7(k) work period was established where internal memoranda, policy statements, and pay period evidenced such adoption by the City.

- *Mills v. Maine:*[33]

The district court allowed the state to apply the Section 7(k) exemption in calculating damages for unpaid overtime even though it never formally complied with statutory requirements (it treated employees as totally exempt and did not attempt to pay them overtime at all) because a previous decision by the 1st Circuit held that "an employer who violates § 207(k) of the FLSA…may still calculate the overtime owes its employees in accordance with the overtime definition of subsection (k).

- *Futral v. Louisiana:*[34]

The Louisiana Court of Appeals found that a Section 7(k) work period was adopted where fire fighters were paid straight time for the first 80 hours, and compensatory time for hours 81-86.

- *Farris v. County of Riverside:*[35]

The district court held that the County established a 7(k) work period where the memorandum of

[29] 970 F.2d 805 (11th Cir. 1992).
[30] 491 F. Supp. 2d 170 (D. Mass 2007).
[31] 996 F. Supp. 840 (N.D. Ind. 1998).
[32] 862 F. Supp 351 (N.D. Ga. 1994).
[33] 853 F. Supp. 551 (D. Me. 1994).
[34] 699 So. 2d 1089 (La. Ct. App. 1997).
[35] 667 F. Supp. 2d 1151 (C.D. Cal. 2009)

understanding between the sheriff's association and the County stated that "[t]he normal work period [for all Plaintiffs] shall be 10 working days of 8 hours each. The Department Head . . . may establish or eliminate a different bi-weekly work period of 80 hours after giving one pay period written notice to the representative, if any, of the employees affected." The Court explained that that this language establishes a 14 day work period under Section 207(k), since it specifically identifies a "work period" of "10 working days," and contemplates a change to a "different bi-weekly work period."

- *Kennedy v. State of Iowa:*[36]

The Supreme Court of Iowa determined that when time sheets and recordkeeping showed a 28-day work period, the employer established a Section 7(k) work period even though there was no public declaration and it may not have had a Section 7(k) work period in mind when it adopted its scheduling.

1.2.3 Court Cases – Work Period Not Established or Adopted

- *Spradling v. City of Tulsa:*[37]

The 10th Circuit upheld the district court's ruling that the City had failed to establish its entitlement to a Section 7(k) partial exemption for Tulsa fire chiefs who worked shifts of 24 hours on duty followed by 48 hours off duty. The Tenth Circuit stated that the public employer had the burden to prove that it had established a Section 7(k) work period, either by "an appropriate public declaration of intent to adopt a work period of between 7 and 28 days" or by demonstrating that "its employees actually work a regularly recurring cycle between 7 and 28 days." The court noted that "[a]lthough the City now argues it established a nine-day work period for plaintiffs via certain provisions of the collective bargaining agreement, there is simply no indication in the record on appeal that the City made this argument in its memoranda of law or at the time of the damage hearing." Consequently, the 10th Circuit upheld the district court's ruling that the City had failed to establish a Section 7(k) exemption.

- *Crespo v. Cnty. of Monroe:*[38]

The district court held that the County failed to establish a Section 7(k) work period where the collective bargaining agreement with the members of the Sheriff's Department set forth a five day workweek and made no mention "of any other work period, of seven days or any other duration." The only evidence the County presented in support of a Section 7(k) work period was an affidavit of a human resources director who stated that the collective bargaining agreement established a seven day period for the purposes of calculating hours worked. The court noted however that the human resources director cited no evidence in support of that assertion. The district court held that the County's evidence was insufficient to raise a genuine issue of material fact about whether they had adopted a valid Section 7(k) work period and granted summary judgement to the members of the Sheriff's Department.

[36] 688 N.W.2d 473 (Iowa 1996).
[37] 95 F.3d 1492 (10th Cir. 1996).
[38] No. 10-CV-6590L, 2015 WL 2406112 (W.D.N.Y. May 20, 2015)

- *Harris v. City of Boston:*[39]

The district court found that no work period had been adopted for law enforcement employees because the employer failed to take action to adopt a work period. Specifically, the court noted that the City had stipulated, at various points during the litigation, that it had not effectively adopted a Section 7(k) exemption.

- *Ackley v. Kansas Dep't of Corrections:*[40]

The district court held that the Department of Corrections had "produced no evidence that it adopted a §207(k) workweek exemption." The court observed that the Department's "207(k) argument appears to have been raised only after suit was filed in an effort to avoid liability." The court, therefore, found that the Department failed to meet its burden of proving it adopted a Section 7(k) work period.

- *Atana v. Department of Corrections:*[41]

The district court held that defendant failed to prove that it adopted the Section 7(k) exemption, where the only evidence it submitted consisted of documents that "make clear that there was some discussion about adoption of a 28-day work period."

- *Maldonado v. Administraccion de Correccion:*[42]

The district court determined that "defendant did not choose to avail itself of the provisions of §7(k)" where the defendant "admit[ted] that it agreed to use a 40-hour work week but…was negligent in doing so since the statute requires the use of a 42.75 hour average workweek for all law enforcement personnel."

- *Raper v. State of Iowa:*[43]

The Supreme Court of Iowa held that although a public declaration of the work period was not necessary, the employer still failed to establish 14-day work period because there was no credible evidence that employees performed work on a 14-day schedule.

1.2.4 Department of Labor Opinion Letters

- January 13, 1994:[44]

The DOL responded to a request on the retroactive application of Section 7(k) of the FLSA. The DOL determined that the Section 7(k) exemption may not objectively be made retroactive. It is the

[39] 312 F. Supp. 2d 108 (D. Mass. 2004).
[40] 844 F. Supp. 680 (D. Kan. 1994).
[41] No. 92-4584-CV-C-5, 1994 BL 355 (W.D. Mo. 1994).
[42] No. 90-2186 (JP), 1993 BL 415 (D.P.R. 1993).
[43] 688 N.W.2d 29 (Iowa 2004).
[44] WH Admin. Op. (Jan. 13, 1994).

DOL's position that an employer is not relieved from Section 7(a) overtime compensation unless Section 7(k) has been claimed and affected employees have actually been paid in accordance with its provisions.

2. DETERMINING WHETHER EMPLOYEES ARE ENGAGED IN "FIRE PROTECTION ACTIVITIES"

Section 7(k) may be adopted only for employees who engage in law enforcement or fire protection activities.[45] Because it is a partial exemption to the overtime requirements of the Act, the employer bears the burden of proving that employees meet the test for Section 7(k).[46]

The determination of whether employees are engaged in law enforcement or fire protection activities is defined by regulation and, for most employees, should be straightforward. Separate regulations define the phrases "law enforcement activities"[47] and "fire protection activities."[48]

There was considerable litigation, however, regarding whether arson investigators, paramedics, emergency medical workers, and ambulance workers are employed in "law enforcement activities" or "fire protection activities" within the meaning of Section 7(k). In 1999, in response to uncertainty regarding these employees, Congress enacted section 203(y) to the FLSA for the stated purpose to "clarify the overtime exemption for employees engaged in fire protection activities."[49]

2.1 Fire Protection Activities

Section 203(y) defines the term "fire protection activities" as that term is used in section 207(k) of the Act. Section 203(y) provides:

> 'Employee in fire protection activities' means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker" who –
>
> (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
>
> (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

[45] 29 U.S.C. §207(k).
[46] *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016); *Rosano v. Twp. of Teaneck*, 754 F.3d 177(3d Cir. 2014); *Calvao v. Town of Framingham*, 599 F.3d 10 (1st Cir. 2010); *Singer v. City of Waco*, 324 F.3d 813 (5th Cir. 2003).
[47] 29 C.F.R. §553.211.
[48] 29 C.F.R. §553.210.
[49] Fair Labor Standards Act Amendment, Pub. L. No. 106-151, 113 Stat. 1731 (1999).

Since the enactment of Section 203(y), a number of courts of appeals have interpreted Section 203(y) in the context of whether cross-trained paramedics and emergency medical technicians (EMTs) are engaged in fire protection activities. The courts have had no difficulty in determining whether the paramedic/EMTs are adequately trained in fire suppression or whether they are employed by a fire department. The litigation has centered, however, around whether the paramedics/EMTs have the legal authority and responsibility to engage in fire suppression.

For instance, in *Cleveland v. City of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit applied Section 203(y) and found that dual function paramedics – paramedics who are trained in fire suppression and in advanced life support – did not have the responsibility to engage in fire suppression, and thus could not be considered employees in "fire protection activities" under Section 203(y).[50] In so ruling, the court examined the plain meaning of the term "responsibility" and concluded that its meaning in 203(y) is unambiguous. Applying the "ordinary, common-sense meaning," the court concluded that for paramedics/EMTs to have the "responsibility" to engage in fire suppression, they must have some real obligation or duty to do so. The court explained, "If a fire occurs, it must be their job to deal with it."

Similarly, in an opinion letter dated June 1, 2006 concerning dual function fire fighter/paramedics,[51] the DOL determined that Section 203(y)'s definition of "employee in fire protection activities" "superseded" the definition of the term in the then-current regulations. Relying on factors considered relevant by the Ninth Circuit in *Cleveland v. City of Los Angeles*,[52] the DOL determined that employees assume the requisite fire suppression "responsibility" only if they have "some real obligation or duty" to engage in fire suppression– specifically:

- the employees carried firefighting turnout gear and breathing apparatus;
- dispatchers assumed that at least one dual-function firefighter/paramedic is in each ambulance dispatched to a call;
- paramedic ambulances are always dispatched to fire scenes, and personnel must notify the incident commander at the scene whether they are dual-function firefighter/paramedics or single-function paramedics;
- the employees are always expected to wear fire protective gear at a fire suppression scene;
- the employees are expected to provide necessary emergency medical services as their primary responsibility, but also routinely perform fire suppression duties alongside their firefighting colleagues when not needed for medical care; and
- the employees are routinely ordered to perform fire suppression duties, attend fire suppression training, and present fire prevention awareness programs.

Accordingly, the DOL determined that the fire fighter/paramedics were engaged in "fire suppression activities" within the meaning of section 7(k).

[50] 420 F.3d 981 (9th Cir. 2005).
[51] FLSA 2006-20, WHM 99:5544.
[52] 420 F.3d 981 (9th Cir. 2005).

In 2011, the DOL revised the FLSA regulations that govern who is considered to be an "employee in fire protection activities" and could thereby be paid in accordance with the partial exemption contained in Section 7(k).[53] In issuing its final rule, the DOL noted that it "proposed to make several revisions to [the regulations governing Section 7(k)] to incorporate [section 203 (y)]."[54]

For example, the DOL amended 29 C.F.R. §553.210, which defines the term "fire protection activities" to mirror the statutory definition given in section 203(y) and deleted the four part test it previously used to define the term. The DOL also deleted language that allowed "personnel [who] form an integral part of the public agency's fire protection services" to be paid in accordance with the Section 207(k) exemption.[55] Indeed, the DOL deleted several other redundant regulations concerning privately employed firefighters since Section 203(y) now explicitly requires an "employee [to be] *employed by a fire department of a municipality, county, fire district, or State*" in order to qualify for the Section 7(k) exemption.[56]

However, the DOL left in place the regulation which specifies that the term "fire protection activities" does *not* apply to fire department employees—such as maintenance and office employees—who do not fight fires on a regular basis.[57] The DOL noted, however, that firefighters could be included within the Section 7(k) exemption regardless of their status (*i.e.* trainee, permanent, probationary etc.) or their particular specialty, job title, or assignment to certain support activities.[58]

2.1.1 Court Cases Interpreting Section 203(y)

- *Lawrence v. City of Philadelphia:*[59]

The U.S. Court of Appeals for the Third Circuit determined that paramedics employed by the City of Philadelphia Fire Department did not have the "legal authority and responsibility" for fire suppression activities within the meaning of Section 203(y) and the section 7(k) partial overtime exemption could not apply to them. The paramedics were fully trained as fire fighters and were employed by the Fire Department thereby meeting the first and third prongs of Section 203(y). In concluding that the paramedics did not have the authority and responsibility to conduct fire suppression activities the court pointed out that although they responded to fire scenes, the City's policy required them to park their vehicles in a location permitting quick egress and that they were "standing by" to provide first aid. Although the City submitted an affidavit from a Fire Commissioner stating that the paramedics were required to provide fire suppression if called to do so by an incident commander at a fire scene, the City could not cite to any instance in which a paramedic had been called upon "to enter a burning building to put out a fire, or was expected to perform any fire suppression duty other than a few marginal instances involving nothing more than moving a hose line." Finally, the court noted that the paramedics spent the overwhelming majority of their time responding directly to medical calls.

[53] Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18831 (April 5, 2011).
[54] *Id*.
[55] *Id*.
[56] *Id*. (emphasis added).
[57] *Id*.;29 C.F.R. §553.210(b).
[58] 76 Fed. Reg. 18831 (April 5, 2011).
[59] 527 F.3d 299 (3rd Cir. 2008).

The court in *Lawrence* distinguished the facts before it from the facts in the 11th Circuit's decision in *Huff v. DeKalb County*[60] (see below) by noting that in *Huff*, the cross-trained fire fighters were fully certified to perform fire fighting duties, and staffed fire fighting apparatus whereas in *Lawrence* the employees staff only ambulances. Thus, the court concluded that the key difference in *Huff* was that it involved fire fighters who were performing some paramedic job functions whereas in *Lawrence*, paramedics were simply cross-trained as fire fighters but were responsible for performing paramedic functions.

The *Lawrence* court concluded that the term "responsibility" under 203(y) requires that the person must be required to do something or be subject to a penalty, and that this must be more than a mere theoretical possibility. "In other words, a responsibility is something that is mandatory and expected to be completed as part of someone's job." The court concluded that the paramedics were not expected to fight fires – they did not do so nor did their job description even mention fire fighting. The court noted that they are not called to every fire scene and when they are called, they are expected to provide medical assistance. Finally, the court stated that the mere fact that the paramedics sign a statement that they would be responsible for fire suppression duties does not mean that the paramedics have the legal authority and responsibility to engage in fire suppression activities. The court explained that "saying something does not necessarily make it so."

- *McGavock v. City of Water Valley:*[61]

The 5th Circuit determined that employees who unquestionably were responsible for fighting fires as well as spending work time as dispatchers qualified as being engaged in fire protection activities. The sole issue was whether the fact that the employees spent more than 20% of their time engaged in non-fire fighting duties meant that they were not engaged in fire protection activities. The 5th Circuit determined that Section 203(y) supplanted the previous DOL regulations defining fire protection activities at 29 C.F.R. §§ 553.210 and 553.212. The court expressly held that the employees were engaged in fire protection activities even though they spent more than 20% of their time performing non-exempt/non-fire fighting duties.

- *Cleveland v. City of Los Angeles:*[62]

The 9th Circuit applied section 203(y) and found that dual function paramedics—paramedics who are trained in fire suppression and in advanced life support—did not have the *responsibility* to engage in fire protection when:

> (1) the paramedic ambulances do not carry firefighting equipment or breathing apparatuses;
> (2) a dispatcher does not know if he or she is sending a single or dual function paramedic to a call;

[60] 516 F.3d 1273 (11th Cir. 2008).
[61] 452 F.2d 423 (5th Cir. 2006).
[62] 420 F.3d 981 (9th Cir. 2005).

(3) paramedic ambulances are not regularly dispatched to fire scenes and are dispatched only when there is a need for advanced life support services;
(4) dual function paramedics are not expected to wear fire protective gear;
(5) dual function paramedics are dispatched to a variety of incidents where they are expected to perform only medical services; and
(6) there is no evidence that a dual function paramedic has ever been ordered to perform fire suppression.

The court determined that because the paramedics had no responsibility to engage in fire suppression, they could not be considered employees in fire protection activities under 29 C.F.R. § 553.210(a) and 29 U.S.C. § 203(y).

In so ruling, the court examined the plain meaning of the term "responsibility" and concluded that its meaning in 203(y) is unambiguous. Thus, the court concluded that it was unnecessary to review the legislative history to the statute to determine the meaning of the term.

The court explained that the word "responsibility" as used in the statute, is a "duty, obligation or burden" or where an employee is "expected or obliged to account (for something to someone), answerable, accountable and involving accountability." Quoting Webster's, the court concluded that "'[r]esponsible' applies to one who has been delegated some duty or responsibility by one in authority and who is subject to penalty in case of default… as part of one's job or role." Applying the "ordinary, common-sense meaning," the court concluded that for paramedics/EMTs to have the "responsibility" to engage in fire suppression, they must have some real obligation or duty to do so. "If a fire occurs, it must be their job to deal with it."

- *Huff v. DeKalb County*.[63]

The U.S. Court of Appeals for the Eleventh Circuit ruled that a group of paramedic/fire fighters were engaged in fire suppression. The employees were fully cross-trained fire fighters/paramedics employed by a fire department. The fire fighting apparatus were staffed by paramedic/fire fighters as well as fire fighters who had not been cross-trained. All personnel were required to don fire fighting bunker gear at fire scenes. Anyone at a fire scene could be ordered to participate in fire fighting, including entering burning buildings.

- *Gonzalez v. City of Deerfield Beach:*[64]

The U.S. Court of Appeals for the Eleventh Circuit stretched the phrase "legal responsibility and authority" to engage in fire suppression beyond what had been applied previously and held that an employee had the legal authority and responsibility to engage in fire suppression even if this was merely a theoretical possibility and the employees had never actually done so. In finding that the employees were engaged in fire suppression, the court concluded that 203(y) applies not only to an employee who is "engaged in the prevention, control and extinguishment of fires, but also to one who is engaged in "response to emergency situations where life, property, or the environment is at risk." Contrary to the courts decisions in *Lawrence* and *Cleveland* (above), the

[63] 516 F.3d 1273 (11th Cir. 2008).
[64] 2008 U.S. App. LEXIS 24037 (11th Cir. 2008).

Eleventh Circuit held that the term "responsibility" does not imply actual engagement in fire suppression, but instead an employee may have the responsibility without ever engaging in it.

- Zimmerli v. City of Kansas City:[65]

The Eighth Circuit held that dual function Fire Medics had a "responsibility to engage in fire suppression" and were therefore partially exempt from the FLSA's overtime provisions under Section 207(k). The court noted that its sister circuits had "interpreted and applied the term 'responsibility to engage in fire suppression' in various contexts, creating what the parties view[ed] as a circuit split." The court found no need to weigh in the apparent circuit split because, even assuming the narrower interpretation of responsibility as expressed by the Third and Ninth Circuits, it found that the City had met its burden to demonstrate Fire Medics had the responsibility to engage in fire suppression. That is, the court concluded the Fire Medics were exempt under Section 207(k) regardless of how narrowly or broadly it defined "responsibility" under Section 203(y). Specifically, the court relied on the facts that the Fire Medics were "expected and asked to perform tasks that amount[ed] to engaging in fire suppression, including throwing rescue ladders; providing incident command; deploying, connecting, and straightening fire hoses; and participating in building evacuation." The Eighth Circuit distinguished *Lawrence* and *Cleveland* (discussed above) because the firefighter/paramedics at issue in those cases were only expected to perform medical services, were not trained in advanced firefighting, were not authorized to staff fire apparatuses, and were only called to fire scenes to provide medical care. The court found that while "the Fire Medics' responsibilities [did] not include donning fire protection gear, entering burning buildings, or dousing fires directly, their duties [were still] integral to fire suppression." The Eighth Circuit, therefore, held that the Fire Medics satisfied the requirements of the Section 207(k) exemption.

- *Diaz v. City of Plantation:*[66]

In this case, paramedics and EMTs working for the City alleged that the City improperly computed their overtime compensation under Section 207(k). The employees argued that they were not engaged in fire protection activities because they did not meet the requirements of 203(y) in that they were not trained in fire suppression. The District Court for the Southern District of Florida noted that the meaning of "trained in fire suppression" under Section 203(y) was an issue of first impression and agreed with the paramedics/EMTs that its meaning should be informed by 29 C.F.R. § 553.210(a)(2), which requires that fire fighters be trained to the extent required by state statute or local ordinance. The court found that the paramedics/EMTs did not have the requisite certification. Those employees who maintained fire certification did not have the legal authority and responsibility to engage in fire suppression as they were forbidden under local policy from entering a structure fire, were not equipped with firefighting equipment or gear, were dispatched to fire scenes only where medical services were needed, responded to purely medical calls, and were not ordered to perform fire suppression. The court dismissed as "insignificant" the City's evidence that plaintiffs on two occasions had used a fire extinguisher.

[65] 996 F.3d 857, 861 (8th Cir. 2021).
[66] 2006 U.S. Dist. LEXIS 73424 (S.D. Fla. Sept. 15, 2006).

- *Chavez v. City of Katy:*[67]

The U.S. District Court for the Southern District of Texas held that an EMS employee who was not regularly dispatched to emergencies and did not have the authority to extinguish fires was not an "employee in fire protection activities."

[67] 2005 WL 1657037 (S.D. Tex. July 14, 2005).

3. EXEMPTIONS FROM PAYMENT OF THE MINIMUM WAGE AND OVERTIME TO CERTAIN OFFICERS AND TO EMPLOYEES OF SMALL DEPARTMENTS

Section 13(a)(1) of the Fair Labor Standards Act provides a complete exemption from the minimum wage and overtime provisions of the Act for "any employee employed in a bona fide executive, administrative or professional capacity."[68] These are the so-called (and misnamed) "white collar" exemptions that have been part of the statute since its enactment. There are also provisions for "partial" exemptions from the overtime requirements for employees engaged in fire protection and law enforcement activities. Furthermore, departments which employ less than five fire fighters (the so-called "small department" exemption) do not have to comply with the FLSA. These last two exemptions are discussed in a separate chapter.

The employer does not have to obtain prior approval from any government agency to apply for the "white collar" exemption; it is self-executing. Application depends solely on whether or not an individual is employed in a bona fide executive, administrative or professional capacity. In general, application of the exemption depends on the duties performed by the particular employee and the method by which the employee is compensated. A particular title assigned to an employee's job or position is not decisive. Importantly, the burden of establishing the exempt status of the employee rests upon the employer.

The section 13(a)(1) exemptions have been called the "white collar" exemptions because the terms "executive, administrative, or professional" would seem to correspond strictly to office workers. But courts have expanded these exemptions to employees in a variety of non-office jobs such as assistant managers at fast food restaurants, construction supervisors and registered nurses.

If an employee is truly paid by the hour (and that is a more complicated issue than one might at first expect), he or she is not exempt under the "white collar" exemptions. But many employers and employees mistakenly believe that if an employee is salaried, then regardless of what the employee does, he or she is exempt. This is wrong. To qualify as an administrative, executive or professional employee, an employer must prove **both** that an employee is paid on a salaried basis **and** that the employee performs the duties of the claimed exemption. Many employees, however, who are paid on a salaried basis are entitled to overtime compensation because they do not perform the duties of an administrative, executive or professional employee.

On the other hand, some fire and EMS officers may be exempted because they are paid on a salaried basis **and** because their primary job duties include certain "executive"-like responsibilities. Fire fighters, paramedics and other EMS employees do not qualify, however,

[68] 29 U.S.C. § 213(a)(1).

for exemption under the "administrative" or "professional" exemptions. This is now well-settled, and this manual will not address the administrative or professional exemptions.[69]

3.1 The 2004 Regulations

The section 13(a)(1) exemptions have been the subject of extensive litigation. In April of 2004, the U.S. Department of Labor (DOL) issued new regulations allegedly "updating" and "streamlining" the regulations for determining whether an employee falls within these exemptions.[70] These regulations took effect in August, 2004, and have impacted all litigation since then. Furthermore, they will impact substantially the way some older cases (including those discussed in this chapter) will be interpreted by courts. Because so many older cases are still relevant, however, it is worth reviewing the terminology and structure of the old, obsolete regulations.

3.1.1 The Old Regulations

The old regulations, originally developed in the 1950s, divided employees into three groups according to a threshold level of pay received and applied a "short test" or "long test" to them. Employees who received less than $155 per work week were not exempt. For employees who received more than $155 but less than $250 per week, the "long test" was applied. Because these salary thresholds became obsolete by the 1980s, very little relevant case law relies on it. Those who received more than $250 per work week were subject to the "short test." Under this test, the executive exemption applied to any salaried employee:

- whose primary duty was the management of an enterprise or department or subdivision thereof; and
- who customarily and regularly directed the work of two or more other employees.

The term "primary duty" under the old regulations involved reviewing the percentage of time spent by an employee engaging in particular tasks. Thus, if an employee spent more than 50% of his or her time engaging in managerial tasks, that was often enough to show that his or her "primary duty" was "management" work as required for the exemption. Time alone was not always the sole test, however; employees who spent less than 50% of their time on managerial tasks might have been determined to have a "primary duty" of management if other pertinent factors supported such a conclusion. Under the 2004 regulations – with an exception for federal fire fighters – time spent on exempt activities is only one factor that is used to determine an individual's "primary duty" unless the time spent on such activities exceeds 50% of the employee's work time, in which case he or she will be considered exempt.

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[69] *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001); *West v. Anne Arundel County*, 137 F.3d 752 (4th Cir. 1998); DOL, Wage and Hour Division, Fact Sheet #17J: First Responders and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA) (rev. 09/01/2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17j_first_responders.pdf (last visited July 19, 2022).

[70] 29 C.F.R. § 541.1 et seq.

3.1.2 The 2004 Regulations

The 2004 regulations do away with the "short" and "long" tests, and substitute one test that uses a combination of the criteria from both. The new test had a substantially higher salary threshold of $455 per work week, which equals $23,660 per year. In 2016, the DOL increased the standard salary level to $913 per work week, which equals $47,476 per year; the regulations provided for automatic increases to the salary threshold every three years, beginning January 1, 2020 [71] This final rule was challenged in federal court and, on August 31, 2017, the U.S. District Court for the Eastern District of Texas invalidated the 2016 final rule because it made "overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties."[72] The Department of Justice appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit which, on November 6, 2017, granted the governments motion to hold the appeal in abeyance while the DOL undertook additional rulemaking to determine an appropriate salary threshold.[73] The 2020 amendments raised the salary threshold to $684 per work week, which equals $35,568 per year.[74] While the 2020 amendments also reaffirmed the DOL's intent to "update the earning thresholds more regularly in the future through notice-and-comment rulemaking"[75] the salary thresholds are fixed and not automatically adjusted for cost of living increases. The 2004 regulations retained the requirement that to qualify for one of the 13(a) exemptions, an employee must be paid on a salaried basis. The involvement of time percentages (*i.e.*, how much of one's time is spent doing managerial tasks) was also eliminated.

One section of the 2004 amendments contained a paragraph stating that the section 13(a)(1) exemptions do not apply to "fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level."[76] Yet while the language of § 541.3(b)(1) appears to render all frontline fire fighters (including lieutenants and captains, and other first line supervisors) non-exempt, that does not appear to be the way some courts have interpreted the language.

Unfortunately, some courts have interpreted this language as being essentially meaningless with respect to the executive exemption. These courts have ignored the language in the regulations themselves that declare that fire fighters "regardless of rank or pay level" are entitled to overtime.[77] These courts have concluded that even though there is a particular test in the 2004 541 regulations designed specifically for fire fighters and police, in reality, the test for whether fire fighters and police are exempt from the FLSA is the same as the test that applies to fast food managers, and other non-public safety employees.

[71] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg 51230, (Sep. 27, 2019).
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] 29 C.F.R. § 541.3(b)(1).
[77] 29 C.F.R. § 541.3(b)(2).

3.2 Executive Employee

The 2004 regulations set forth the general criteria for defining executive, administrative, and professional employees. Under the old regulations some lieutenants and captains, and almost all higher-ranking officers, were usually exempt from receiving overtime under the general definition of "executives." Under the 2004regulations as amended by the 2020 final rule discussed above, the new definition for the "executive" exemption states: [78]

> (a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Compensated on a salary basis pursuant to § 541.600 at a rate of not less than $684 per week;
> (2) Has a primary duty in management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
> (3) Customarily and regularly directs the work of two or more other employees; and
> (4) Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Several key phrases used in the regulation are of particular importance. These phrases have been further defined by DOL regulations as follows.

3.2.1 "Primary Duty" and "Management of the Enterprise"

A determination of whether an employee's primary duty is management must be based on all the facts in a particular case. Under the 2004 regulations, "[t]he term 'primary duty' means the principal, main, major or most important duty that the employee performs." The regulations note that the amount of time an employee spends on a particular duty is a "useful guide" but is not the "sole test" for determining if it is the "primary" duty of the employee. Some of the important factors are 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.[79]

The term "management" is also defined separately in the regulations. If any of the following activities can be said to be an employee's "primary duty," then the employer may be able to meet the requirement in 29 C.F.R. § 541.100(a)(2):

- interviewing, selecting, and training of employees;

[78] 29 C.F.R. § 541.100(a).
[79] 29 C.F.R. § 541.700(a) and (b).

- setting and adjusting their rates of pay and hours of work;
- directing the work of employees;
- appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- handling employee complaints and grievances;
- disciplining employees;
- planning the work or determining the techniques to be used;
- apportioning work among the employees;
- determining the type of materials, supplies, machinery, equipment or tools to be used
- providing for the safety and security of the employees or the property;
- planning and controlling the budget; or
- monitoring or implementing legal compliance measures.

3.2.2 Two or More Employees

To qualify as an exempt executive, the employee must manage at least two other full-time employees or the equivalent. Two part-time employees would not be sufficient. The employees being managed must be in the same department the exempt executive is managing.

An employee who manages two or more other employees only occasionally in the absence of the regular supervisor or who merely shares in the management of other employees does not meet the requirements of an exempt executive.

3.2.3 "Authority To Hire And Fire" or "Suggestions and Recommendations" Regarding Changes in Employment Status That Are Given Particular Weight

A new criterion that the employer must prove to establish the executive exemption was added in the 2004 regulations. To be exempt under the executive exemption, an employee must now have the "authority to hire or fire other employees," or the employee's "suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status must be given particular weight." The term "particular weight" is defined separately in the regulations:

> To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if

> the employee does not have authority to make the ultimate decision as to the employee's change in status.[80]

Thus, under this criterion of the test for the executive exemption, an employer must prove that it is part of an employee's job to: 1) make recommendations or suggestions regarding changes in employment status with respect to employees whom they supervise; and 2) those recommendations are given "particular weight" by the employer in deciding whether to change the supervised employees' employment status.

3.2.4 Examples of Exempt First Responders

As a general rule, the higher in the chain of command the employee is in the public sector, the greater the likelihood that he or she will be considered an executive. For example, executive status has been found for the following employees:[81]

- fire shift commanders who directed the activities of two or more fire fighters on a shift, where they were in sole charge of their assigned fire stations and had management as their primary duty;[82]
- district and battalion fire chiefs, despite claims that only a small portion of their work time was devoted to exempt work because, chiefs were in charge at the scene, supervising fire fighting and exercising discretion and independent judgment related to fire fighting operations;[83]
- police patrol lieutenants and special lieutenants,[84] police patrol sergeants, storefront operations sergeants, and narcotics unit team sergeants - despite the sergeants' claim that they were working foremen— have been found to have management as their primary duty;[85] and
- police captains and lieutenants whose primary duty was managing and operating one or more police stations in their division.[86]

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[80] 29 C.F.R. § 541.105.

[81] In an October 14, 2005 Opinion letter, the Deputy Administrator of DOL concluded that Police Lieutenants, Police Captains and Fire Battalion Chiefs were exempt from overtime under the executive exemption. However, the opinion is devoid of analysis and merely parrots the revised regulatory criteria for the exemption under 29 C.F.R. § 541.100. As a result, it is of no value in analyzing the executive exemption.

[82] *Hartman v. Arlington County*, 903 F.2d 1280 (4th Cir. 1991).

[83] *Smith v. City of Jackson*, 954 F.2d 296 (5th Cir. 1992); *Atlanta Prof'l Firefighters Ass'n v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991); *York v. City of Wichita Falls*, 944 F.2d 236, 30 WH Cases 929 (5th Cir. 1991) (battalion chiefs and captains exempt); *Aaron v. City of Wichita*, 54 F.3d 652, 2 WH Cases2d 1159 (10th Cir. 1995) (jury question whether division chiefs, battalion chiefs, and captains met executive duties test); *Holt v. City of Battle Creek*, 925 F.3d 905, 909 (6th Cir. 2019)(battalion chiefs found to be exempt); *Emmons v. City of Chesapeake*, 982 F.3d 245 (4th Cir. 2020)(battalion chiefs exempt).

[84] *Anderson v. City of Cleveland*, 90 F. Supp. 2d 906 (E.D. Tenn. 2000).

[85] *Shockley v. City of Newport News*, 997 F.2d 18, 28–29, 1 WH Cases2d 788 (4th Cir. 1993); *Raper v. State*, 688 N.W.2d 29, 10 WH Cases2d 76 (Iowa 2004).

[86] *Barner v. City of Novato*, 17 F.3d 1256, 1260, 1 WH Cases2d 1505 (9th Cir. 1994); WH Admin. Op. (May 19, 1988), Wage & Hour Manual (BNA) 99:5205–06 (sheriff's chief deputy, majors, captains, and lieutenants were executive employees, but sergeants and other deputies not exempt); WH Admin. Op. (Mar. 16, 1992), Wage & Hour Manual (BNA) 99:5265–66 (fire battalion chiefs exempt as executive employees; safety inspectors not exempt).

3.3 Salary Basis

To establish that an employee falls within one of the three white-collar exemptions set forth under Section 213 of the Act, an employer must establish that the employee performs the duties of the claimed exemption **and** is paid on a salaried basis at a rate of at least $ $684 per week. Put another way, if an employee is not paid on a "salary basis" as defined by the regulations, he or she is not exempt under the "white collar" exemptions discussed in this chapter.

An employee is considered to be paid on a salary basis if he or she regularly receives a predetermined amount each pay period where that amount (again, at least $$684 per week) constitutes all or a part of the employee's compensation. That predetermined amount should not be "subject to reduction because of variations in the quality or quantity of the work performed," and "without regard to the number of days or hours worked."[87] By contrast, an employee that is paid by the hour is not considered to be paid on a salary basis. One important way the courts have distinguished between hourly and salary employees is on whether, and how, an employer makes deductions from the employee's pay for certain reasons.

To be considered an employee paid on a salary basis, an employee must receive a full salary amount for each work period in which he or she performs work, regardless of the number of days or hours worked in that pay period, except that the employer may make the deductions listed below. Keep in mind that the permitted deductions listed here are allowed for both private *and* public sector employees; but for public sector employees, additional kinds of pay deductions are permitted.

- deductions for an absence of one day or more for personal reasons, other than sickness or disability;
- deductions for an absence of one day or more for sickness or disability if made pursuant to a bona fide sickness/disability policy or practice;
- deductions as penalties, imposed in good faith, that amount to suspensions of at least one full day for infractions of "workplace conduct rules;"
- deductions as penalties, imposed in good faith, for infractions of safety rules of "major significance;"
- deductions for unpaid leave as required by the Family and Medical Leave Act; or
- deductions for an entire workweek.

While the regulations permit deductions for absences of "one day or more," permitted deductions are allowed only in increments of a day. For example, if an exempt employee is absent for one and one-half days for a personal reason other than sickness or disability, the employer can only deduct pay equivalent to one full-day's absence – not one and one-half days' worth of pay. (However, as explained immediately, below, public employees are not subject to this same rule if a deduction based on a fraction of a day's pay is pursuant to principles of "public accountability.") Partial-day deductions are permitted only for unpaid leave as required by the FMLA or for infractions of safety rules of "major significance."

[87] 29 C.F.R. § 541.602.

3.3.1 Special Rules for Public Employees

Unlike private sector employer, public employers have additional, permitted reasons to make pay deductions without losing the ability to show that the employee is paid on a salary basis. Public employers may dock employees pay in increments of less than a day without employees being considered non-salaried so long as the deductions are done pursuant to principles of "public accountability."[88]

It is not entirely clear from the regulation what constitutes deductions made pursuant to principles of "public accountability." As a general rule, deductions made when an employee is absent for a period of time without that absence being excused are considered to be deductions made pursuant to principles of public accountability. For example, if an employee of a public agency was absent for a period of time and either did not seek permission to use accrued personal leave, or sought permission and was denied, his pay could be docked without the employer losing the exemption.

3.3.2 Prohibited Deductions Under the Salary Basis Test

Deductions for time spent in jury duty, attendance as a witness at trial, or temporary military leave are not valid deductions under the regulations. However, if any of those obligations results in an employee taking leave in increments of a day or more, then the employer is permitted to deduct pay without losing the exemption for that employee.[89]

3.3.3 Minimum Guarantee Plus Extras

A salaried employee may receive a variable amount of compensation above his guaranteed minimum. Additional compensation besides a specified salary is consistent with the salary basis. The 2004 regulations also state that, so long as the predetermined amount (of at least $$684) is provided to an employee on a regular basis, additional compensation may be provided to the employee and computed on an hourly, daily, or shift basis, so long as "a reasonable relationship exists between the guaranteed amount and the amount actually earned." This means that employers can pay overtime in addition to an employee's salary for working extra hours without losing the exemption. For example, some departments pay operations supervisors straight time pay for hours worked outside of their regularly scheduled work hours. Paying for these hours in addition to the employee's salary does not transform the employee into an hourly employee.

3.3.4 Highly Compensated Employees

The 2004 regulations created an additional basis for exempting an employee from FLSA coverage, based almost (though not entirely) on the "total annual compensation" of the employee. Under the "highly-compensated employee" exemption, an employee who "customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee [as identified elsewhere in the

[88] 29 C.F.R. § 541.710 provides a definition of "principles of public accountability."
[89] 29 C.F.R. §541.602(b)(3). The regulations are not clear that these deductions are prohibited for public sector employees; it is perhaps arguable, if unlikely to be convincing to a court, that an exempt, public employee could have pay deducted from his salary as a result of military duty because such deduction is pursuant to "principles of public accountability." This theory has not been tested in court.

regulations]" will be exempt from the FLSA if he or she has a "total annual compensation" of at least $100,000. The 2020 amendments increased this salary threshold to $107,432 per year, provided that this includes weekly payment of $684 on a salary or fee basis.[90] Non-discretionary bonuses such as contractually-owed overtime compensation count toward the "total annual compensation" figure; fringe benefits such as contributions to retirement plans or health insurance premiums do not.

This exemption only applies to employees whose "primary duty includes performing office or non-manual work." A strong argument can be made that any first responder whose primary duty includes the management of personnel on a fire or other emergency scene would therefore not be subject to this exemption.

3.3.5 Window of Correction

An employer who makes improper deductions from an employee's salary will lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salaried basis.[91] In determining the employer's intent, the DOL regulation provides that the factors to consider are the number of improper deductions made, the number of employees who had pay deducted, the geographic location of the employees and whether the employer has clearly communicated to employees that it does not reduce the pay of FLSA exempt employees.

The 2004 regulations set forth an opportunity for employers to insulate themselves from liability, at least in part, if they make deductions from an employee's pay that would otherwise transform an employee into a non-exempt, non-salaried employee.[92] If the employer has a clearly communicated policy of prohibiting deductions from salaried employees' pay, and which includes a complaint mechanism, and the employer makes a good faith commitment to comply with the rule prohibiting deductions from salaried employees, the employer will not lose the exemption for employees whose pay it has improperly docked, unless the employer willfully violates the policy by continuing to dock exempt employees' pay.

3.4 Administrative Employees

The test for administrative employees is found in the regulations and is stated below.[93] To be exempt, an employer must show each of the following elements:

> (a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Compensated on a salary or fee basis at a rate of not less than $684 per week … exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

[90] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg 51230, (Sep. 27, 2019).
[91] 29 C.F.R. § 541.603(a).
[92] 29 C.F.R. § 541.603(d).
[93] 29 C.F.R. § 541.200(a).

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The requirement that the employee's primary duty involves "office or non-manual work" generally excludes most fire fighters and other first responders. An EMS Director was found to be exempt under the administrative exemption, as were fire captains who did not work in positions devoted to fighting fires, but instead performed peripheral, office-based work.[94] On the other hand, the U.S. Department of Labor has suggested that fire prevention inspectors are not subject to the administrative exemption, and at least one court has ruled that paramedics employed in fire departments are not "administrative employees."[95]

3.5 Professional Employees

The test for professional employees is found in the regulations and is stated below.[96] To be exempt, an employer must prove that the employee is paid on a salary or fee basis of a rate of not less than $684 per week and

> Whose primary duty is the performance of work:
> (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
> (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.[97]

Although employers occasionally assert the professional exemption for paramedics and some fire science experts such as arson investigators, the 2004 regulations have clarified that such employees are not exempt from the FLSA as "professionals."[98]

3.6 Court Cases On Executive, Administrative and Professional Exemptions

- *Morrison v. Cty. of Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016)

In *Morrison*, the Fourth Circuit held that fire captains within a county fire department were not exempt executives even where they undertook management-like tasks in conjunction with their first responder duties. The court observed that while the relevant regulatory language "might naturally be read as establishing a bright-line rule that firefighters and other first responders…are non-exempt and thus entitled to overtime compensation", the first responder regulations establish the primary duty standard as the test for whether firefighters are exempt executives or administrators. The court noted that "application of either exemption require[ed] that an employee's 'primary duty' be management or management related…[and that] tasks performed

[94] *Moyer v. Board of County Commissioners*, 5 F.Supp.2d 914 (D. Kan. 1998); *Atlanta Prof. Firefighters (IAFF) Local 134 v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991).
[95] WH Admin. Op. (May 19, 1987); *Harrison v. District of Columbia,* 1991 WL 104260, 30 WH Cases 557 (D.D.C. 1991).
[96] 29 C.F.R. § 541.300(a).
[97] *Id.*
[98] The Fifth Circuit has also reached the same conclusion. *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001).

as part of or in furtherance of the Captains' first response duties are not deemed 'management' and [would] not render the Captains exempt from overtime pay requirements." In its analysis, the court relied on the following facts: the Captains' fire fighting duties were more important than any exempt duties because emergency calls took priority; that the fire captains did not have discretion as to whether to respond to calls; and, that Captains performed other duties similar to the other fire fighters in the department, such as fighting fires side-by-side with their subordinates and participating in the same physical fitness training as their subordinates at the fire station where they were all assigned to work. Based on the above, the court concluded that the Captains did not spend a significant portion of their time at the fire station on managerial or management related tasks as opposed to non-exempt work. Indeed, the court found that of the 2600 hours the Captains worked per year, less than 25 of those hours were spent on managerial tasks. Therefore, the Fourth Circuit held that "these Captains are firefighters, not managers or administrators."

- *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001)

The Fifth Circuit held, that paramedics and emergency medical technicians (EMTs) employed by the City of Houston Fire Department were not exempt under either the administrative or executive exemptions. The court found that the City had not presented sufficient evidence to determine whether the EMTs' primary duties were management or management related. The only evidence the City presented with respect to the EMTs' primary duties was the job descriptions for the EMTs who held the rank of captain or higher; each job description contained a disclaimer which stated "[a]ny one position may not include all of the tasks listed nor do the examples necessarily include all of the tasks performed." The Fifth Circuit observed that a generic job description told them nothing about each managers specific duties, the percentage of time spent on management activities, or whether the manager exercised discretion in the course of their duties. The court found that "the utter lack of probative evidence precludes us from holding that the managers fall within the executive/administrative exemption as a matter of law."

- *Emmons v. City of Chesapeake*, 982 F.3d 245 (4th Cir. 2020)

In *Emmons*, the Fourth Circuit found that the Battalion Chiefs primarily performed staffing and supervisory duties while in-station that constituted exempt managerial work. Specifically, the court focused on the fact that the Battalion Chiefs were responsible for and had discretion when it came to staffing decisions such as "where, when and how firefighters will be expected to work, what equipment, if any can be staffed short, [and] whether certain firefighters may be able to take leave…" Similarly, the court emphasized that the Battalion Chiefs were responsible for performance reviews, training, and discipline of subordinates and were responsible for making hiring and advancement recommendations. With respect to their role in emergency response, the court found that the Battalion Chiefs were not frontline fire fighters. The facts supporting this conclusion were that the Battalion Chiefs were mostly expected to remain in their command vehicles at the scene and that they had significant discretion when it came to responding to emergency calls. Specifically, Battalion Chiefs only responded on average to 10% of the incidents and could make themselves unavailable for dispatch for significant periods of time without approval of a supervisor. The court concluded that "the Battalion Chiefs of the Chesapeake Fire Department fall plainly in the managerial category."

- *Holt v. City of Battle Creek*, 925 F. 3d 905 (6th Cir. 2019)

Here, the Sixth Circuit upheld the district court's finding that the City of Battle Creek's Battalion Chiefs were exempt from the FLSA's overtime requirements because the met the criteria of the executive exemption. The Sixth Circuit affirmed the district court's ruling that the Battalion Chiefs' "primary duty was management of the City of Battle Creek fire department." The court noted that the essential job functions of the Battalion Chiefs were preparing and administering discipline, evaluating subordinate performance, and planning and coordinating shift personnel. Further, the court explained, a Battalion Chief's primary role when called to a fire was as incident commander and was expected to remain in his/her vehicle and direct fire suppression efforts. The Sixth Circuit also upheld the district court's finding that the Battalion Chief's suggestions as to hiring, firing, and promotions were given "particular weight". The court relied heavily on the testimony of the Fire Chiefs that the Battalion Chiefs issued the majority of discipline in the department, managed vacation schedules, and played a significant role in hiring decisions. The court explained that the executive exemption did not require the Battalion Chiefs' personnel recommendations to be accepted every single time, but rather required a showing that those recommendations were given particular weight – which the Battalion Chiefs had done. As such, the Sixth Circuit affirmed the district court's holding that the Battalion Chiefs were subject to the executive exemption under the FLSA.

- *Barrows v. City of Chattanooga, Tenn*., 944 F. Supp. 2d 596, 598 (E.D. Tenn. 2013)

In *Barrows*, Eastern District of Tennessee found that captains working for the City of Chattanooga Fire Department were non-exempt because the captains performed frontline fire suppression and emergency response work. The court emphasized that (1) they were frequently relieved of incident command at the scene by battalion chiefs; (2) responding to emergencies took priority over any other tasks; (3) they did not have the authority to formally discipline employees; (4) they could not control budgeting, hiring, firing, promotions, rates of pay, or hours worked by their subordinates; and (5) that the majority of their managerial duties – such as conducting training sessions, performing building walk-throughs, and assuring a constant state of preparedness – related directly to their frontline firefighting duties.

- *Knecht v. City of Redwood City*, 683 F. Supp. 1307 (N.D. Cal. 1987)

The City argued that the fire captains were exempt from the overtime provisions of the FLSA as "executive employees." The court rejected the City's argument and found that the captains were nonexempt because they were not paid on a salaried basis. The court stated that "[a] scheme of compensation in which an employer makes deductions from an otherwise predetermined amount for absences shorter than one day runs afoul of Section 541.118(a)'s requirement that the amount not be subject to reduction because of variations in the quantity of the work performed." The court also found the fire captains to be hourly paid because they had to account for every minute of the working day and because the overtime they received was calculated to the tenth of an hour.

- *Schuller v. City of Livermore*, 1987 U.S. Dist. LEXIS 14483, 28 Wage & Hour Cas. (BNA) 507 (N.D. Cal. 1987)

The court stated that fire captains should not be considered "executive" employees under the Act and were thus entitled to overtime compensation. The court stated that labeling an employee as a fire captain does not, in itself, make the employee an executive under the FLSA. The duties and responsibilities of the position and the method by which the employees are compensated must be examined. The court found that the few executive functions the captains carried out constituted less than 10 percent of their time. The court also found the employees to be paid on an hourly basis and thus they did not meet the salary basis test required of "executives."

- *Thomas v. Count, of Fairfax, VA*, 803 F. Supp. 1142 (E.D. Va. 1992)

The court found that lieutenants could not be considered exempt executives under the FLSA because the lieutenants' pay varied with the number of hours they were scheduled to work each period. Their paychecks equaled the number of hours they worked multiplied by their hourly rate of pay. The court concluded that the lieutenants were hourly paid.

The County contended that the salary only had to be a minimum guaranteed predetermined amount that did not fluctuate each pay check, and the lieutenants' overall pay did not have to be the same amount each week. The County also argued that the lieutenants could easily determine their pay for the week by knowing what shift they were on. Finally, the County stated that the employees' pay was not subject to variance by quantity or quality but by the time spent on pay status.

The court, however, rejected the argument based on the definition of the word "salary." The court treated salary as a single, non-varying amount. The court ruled that "if the lieutenants are truly executives, then there is no reason to vary their salary." The language of the Act states that an "employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." The court explained that to qualify as salary, the pay should be a single or fixed amount and should not vary based on the hours spent at work. In particular, the court noted that employees who, on the dates that changed from standard to daylight savings days and vice versa, had their pay deducted, or augmented, one hour accordingly. The court found that this practice "affronts the concept of a salaried executive."

- *Hartman v. Arlington County, VA*, 903 F.2d 290 (4th Cir. 1990)

The court found that the fire shift commanders were employees whose primary duty was the management of the fire station in which they regularly directed the work of two or more other employees and that they were salaried employees (who make more than $250.00 per week). Thus they were found to be bona fide executive employees and exempt from the overtime provisions of the FLSA.

The fire shift commanders also unsuccessfully tried to show that they were not compensated on a salary basis. However, the court found that although the employees received additional pay at an hourly rate for each hour worked beyond their regular scheduled hours, this practice is permitted

for salaried employees by Section 541.118(b). Although the captains' pay was subject to deductions for absences of less than a day, the court applied the window of correction and permitted the County to retroactively change its policy of deducting employees' pay for absences of less than a day.

- *Atlanta Professional Fire Fighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991)

Following the approach to analyzing pay deductions eventually embraced nationwide in *Auer v. Robbins*, the Court of Appeals for the Eleventh Circuit ruled that fire captains qualify as "administrative" employees and are therefore exempt from the FLSA. The court stated that the mere fact that employees are "subject to" deductions in pay for absences of less than a day does not make them hourly paid employees. Rather, the employer must have subjected employees to a policy that creates the "significant likelihood" of impermissible pay deductions, or the employees must demonstrate actual instances in which impermissible deductions occurred, in order to remove the employee from salary basis status.

- *Auer v. Robbins*, 519 U.S. 452 (1997)

The Supreme Court held that the DOL's regulations regarding disciplinary pay deductions can be reasonably applied to public sector employers. The Court held that the courts owe deference to DOL on this subject and DOL's interpretation of its own regulations is "controlling" unless plainly erroneous or inconsistent with the regulation.

However, the Court held that under the DOL's regulations the 'theoretical possibility' that an employee's pay is subject to disciplinary deductions does not cause the loss of the exemption. The Court determined that an employee will be considered to be paid on a salaried basis and the FLSA-exempt status lost if: (1) there is an actual practice of making such deductions, or (2) there is an employment policy that creates a "significant likelihood" of such deductions. The Court agreed with the DOL's position that actual deductions are not necessary, but there must be a clear policy which "effectively communicates" that pay deductions are an anticipated form of punishment for the employees in the category that is in question.

With regard to the "window of correction," the Court noted that under the DOL's regulation the exemption will not be lost where a deduction is inadvertent or is made for reasons other than a lack of work, provided the employer reimburses the employee for such deduction and promises to comply in the future.

- *Department of Labor v. City of Sapulpa, Okla.*, 30 F.3d 1285 (10th Cir. 1994)

The Tenth Circuit affirmed the lower court's finding that fire captains were not exempt executive employees. The court, citing the then-current DOL regulations, held that the primary duty of an employee is that which consumes "the major part, or over 50 percent of the employee's time." The court also noted four other factors that may be applied to determine whether management is an employee's primary duty: the relative importance of management duties as compared with other of the employee's duties; the frequency with which the employee exercises discretionary powers; the employee's relative freedom from supervision; and the relationship between the

employee's salary and the salary paid to other employees for the kind of nonexempt work performed by the supervisor employee. The court's approach to determining the plaintiffs' "primary duty" thus largely reflects the approach ostensibly taken by the new regulations.

In holding that the captains are not subject to the executive exemption, the court noted that the fire captains are not in charge of a fire scene more than 50 percent of the time; they have no authority to call additional personnel to a fire scene; they do not set work schedules for other employees; they do not participate in routine maintenance activities; and they do not earn much more than the employees whom they allegedly supervise. The court distinguished these facts from those presented in *Smith v. City of Jackson*, where the employees in question regularly assumed control of fire scenes.

- *Masters v. City of Huntington*, 800 F.Supp. 363 (S.D.W.Va. 1992)

The District Court found that fire captains were subject to the executive exemption on grounds that management-related activities constituted the primary duties of the captains. These duties included ensuring that equipment was ready for use; regulating the attendance and assignments of fire fighters within their station; maintaining the station's log book and an inventory of property and supplies; implementing and conducting training sessions; evaluating the performance of fire fighters; and imposing penalties for violations of rules. While the court noted that the captains did not have the power to hire, fire or promote, the captains were placed in charge of particular segments of a fire scene by the deputy chiefs. The court also noted that the captains' management duties were consistent with the fact that their salary was notably higher than the salaries of those whom they supervised.

The court reached the same conclusion with regard to the deputy chiefs, who had a higher rank than the captains. On the other hand, the court rejected the city's argument that its lieutenants, who sporadically assumed the role of a captain upon the captain's absence, were exempt, holding that "it is the usual or customary duties of an employee's job, rather than duties assumed on a sporadic or infrequent basis, which must be analyzed in determining whether his primary duty is management under the short test."

- *Reich v. State of New York*, 3 F.3d 581 (2nd Cir. 1993)

The Second Circuit affirmed the district court's finding that the administrative exemption of the FLSA did not apply to investigators for the New York Bureau of Criminal Investigation. The court upheld the finding that the defendant did not satisfy the "short test" related to this exemption, accepting the lower court's finding that the investigators performed the "production" activities of the police department rather than its "administrative" functions. Specifically, the court noted that the primary function of the Bureau of Criminal Investigation was to prevent and investigate violations of criminal laws, and it found that the plaintiffs' primary function was to conduct or "produce," criminal investigations, and not to administer the affairs of the Bureau. Because this function placed the plaintiffs "squarely on the production side of the line," they did not fall within the administrative exemption. The court held that this analysis, derived from the Department of Labor's interpretative regulations, properly applied to non-manufacturing settings, and to employees in the public sector.

- *Simmons v. City of Fort Worth. Tex.*, 805 F.Supp. 419 (N.D. Tex. 1992)

The district court within the Fifth Circuit found that district fire chiefs and deputy chiefs were exempt from the overtime provisions as *bona fide* executive employees. The court applying the "short test" set forth in 29 C.F.R. §§ 541.1 (f) and 541.2(e)(1), found that the chiefs and deputy chiefs were compensated on a salary basis, that their primary duty is management of the fire department and they customarily directed the work of at least two or more employees.

In support of the latter two findings, the court noted that the district chiefs were responsible for planning, organizing and directing their fire companies and for supervising between nine and thirty-seven other employees. The court also found that they could, in emergency situations, assume command over a fire scene; that they schedule and supervise drills; are responsible for the readiness of their company: and that they complete reports on these and other daily activities of the company. They also assist with preparing budgets and goals of their company.

In finding that the deputy fire chiefs are subject to the executive exemption, the court noted that they had direct and indirect supervisory and managerial authority over as many as 186 personnel, including district chiefs, are responsible for planning, organizing, directing and evaluating the work and training of personnel and are active participants in the development of fire department policies, budgets and programs.

- *Smith v. City of Jackson. Miss.* 954 F.2d 296 (5th Cir. 1992)

The Fifth Circuit upheld the district court's finding that district chief and battalion chief fire fighters are exempt from the FLSA's overtime requirements as *bona fide* executive and administrative employees. Specifically, the court noted that the employees are responsible for ensuring that each fire station had adequate fire fighters and equipment to respond to calls; are responsible for training and discipline of subordinate fire fighters; and compile employee work hours. The district chiefs assume control of fire scene operations, deciding when units and personnel may withdraw from a scene, and they evaluate the fire captains. The battalion chiefs evaluate the district chiefs and are responsible for maintaining the City's fire fighting plans for major buildings.

- *Spradling v. City of Tulsa*, 3 WH Cases 2d 824 (10th Cit. 1996)

In *Spradling*, the Tenth Circuit defined the phrase "public accountability" for purposes of applying the salary basis test to public employees. The City had argued for a very broad application of that term, as originally used in the old regulations at 29 C.F.R. § 541.5d, and claimed that its deductions policy was established pursuant to principles of public accountability merely because it paid its employees from taxes on the public, and because the Oklahoma State Constitution provides that the tax monies can be used only for "public purposes." The court rejected this argument, stating that the evidence indicates that salary deductions are discretionary with the City. The court explained that public accountability pay systems formally **require** pay deductions.

- *Carpenter v. City & County of Denver, Colo.*, 82 F.3d 353 (10th Cir. 1996)

This case addressed whether certain kinds of deductions qualified as deductions for "safety rules of major significance," as employed in the old regulations. The term largely appears unchanged in the new regulations. The Tenth Circuit held that the defendants' policy of deducting from the salaries of its police lieutenants, captains and division chiefs for the violation of rules relating to their conduct violated the salary basis test. The court found that the policy, which governed the daily conduct of officers, was not a "safety rule of major significance" within the meaning of 29 CF.R. § 541.118(a)(5). Further, the court held that merely subjecting the officers to this policy was sufficient to remove them from the executive exemption, even where the policy had never actually been applied to reduce the pay of an officer. (This holding, too, has largely been reversed.)

- *Hurley v. State of Oregon,* 27 F.34 392 (9th Cir. 1994)

In this case, the Ninth Circuit rejected the employer's argument that otherwise impermissible deductions in its police officers' salaries were consistent with the salary basis test on grounds that such deductions were "purely prospective in nature." Specifically, the defendant argued that, while it regularly deducted the salary of its officers for their failure to be "truthful" or to maintain a "polite" appearance, the officers still received their "predetermined amount" of salary because implementation of the deduction was always delayed until the end of that period (meaning that the officer's newly reduced salary became the "predetermined amount" for future pay periods only).

The court held that the predetermined salary amount, as the amount "regularly" received by the officers, was the officers' established salary as received over the course of a substantial number of pay periods.

- *Paulitz v. City of Naperville*, 781 F.Supp. 1368 (N.D.Ill. 1992)

The district court, in denying the defendant's motion for reconsideration of the court's order finding for the plaintiffs, held that the City's policy of providing "straight overtime" to sergeants for hours worked in excess of 45 per week was not inconsistent with a salaried status, insofar as this policy was better construed as a "bonus" or "incentive" scheme to reward extra commitment than as overtime. The court upheld its prior finding that the sergeants were not salaried employees, however, on grounds that the city maintained a policy that docked all personnel up to three days' pay for various, non-safety disciplinary infractions (the new regulations allow disciplinary deductions in increments of a day without losing the exemption; the old regulations permitted disciplinary deductions only in increments of a week or more without losing the exemption.)

The court rejected the City's argument that it was entitled to the "window of correction" provided by the regulations merely because it had reimbursed seven officers for impermissible suspensions. The court held that the window only applied to inadvertent violations, and that the number and degree of these suspensions made it clear that they were "far from inadvertent."

- *Monroe Firefighters Ass'n v. City of Monroe*, 600 F. Supp. 2d 790 (W.D. La. 2009)

The City sought partial summary judgment as to the claims of 19 district and deputy fire chiefs, arguing that they were exempt executive and/or administrative employees. First, the court concluded that both ranks were paid on a salary basis; the court concluded next that the deputy chiefs were exempt based on their primary duty of managing the work of the district chiefs. The court concluded that the district chiefs were exempt executives under the pre-2004 regulations, but that a genuine fact issue existed as to whether the district chiefs were exempt executives under the new regulations. However, the court next addressed the administrative exemption for the district chiefs and held that the district chiefs were exempt as administrators under the post-2004 regulations. Thus, the FLSA's overtime provisions were held not to apply to either the district chiefs or the deputy chiefs.

- *Kohl v. Woodlands Fire Dep't*, 440 F. Supp. 2d 626 (S.D. Tex. 2006)

In this case, the district court applied the old regulations but referred to the new regulations for guidance, stating that "because new relevant regulations are not inconsistent with the old, but clarify the application, they are also usefully consulted." The plaintiff worked as a "Fire and Life Safety Officer" for the Woodlands Fire Department (WFD), which classified her as an exempt administrative employee. The court, however, denied the employer's motion for summary judgment and concluded that the record was "inadequate" for it to rule on whether the exemption applied. This is primarily a job duties case, rather than salary basis (which was stipulated by the parties). The court concluded the employer had not shown that she was required to exercise discretion and independent judgment as part of primary job duty. For the most part, she taught classes and delivered standard safety messages to the public, and her safety programs had to be approved by the employer. The court pointed out further that:

> It is unclear whether Kohl's work in appearing at community events to promote the WFD fire and life safety classes, to generate good will for the WFD, and to provide such services as bicycle registration, involved discretion or independent judgment. Although the courts have recognized that an organization's public relations or media officer can enjoy significant discretion in her work, such work generally involves a wide range of responsibility to respond to inquiries from the media and public on sensitive matters and autonomy in formulating responses, which Kohl did not have.

- *Rooney v. Town of Groton*, 577 F. Supp. 2d 513 (D. Mass. 2008)

Rooney, a police lieutenant, was held to be exempt as an "executive" under the new regulations, and despite the "blue collar" language of 29 C.F.R § 541.3. Attempting to show that he was not paid on a salary basis, he pointed to detail assignments in which he was paid an hourly rate for the hours he spent working on a voluntary detail assignment. The court, citing DOL opinion letters and the 2004 regulations, rejected Rooney's assertion that these additional payments showed that the employer treated him as an hourly employee.

- *McDowell v. Cherry Hill Twp.*, 11 Wage & Hour Cas. 2d (BNA) 527 (D. N.J. 2005)

A former Chief of EMS Operations for a New Jersey township sued for overtime after being subject to a three-day suspension for an "altercation" with a co-worker. The Township argued that the plaintiff was exempt as an administrative employee, and the district court agreed. Although the plaintiff was suspended for three days, and the corresponding reduction in his pay indicated that he was paid on an hourly basis, although the deduction was made pursuant to a written disciplinary policy, and although the deduction was not portrayed as a deduction for a major safety rule violation, the court concluded that one-time event did "not create a substantial likelihood that such deductions will take place in the future." (This case was decided based on the pre-2004 regulations.)

- *Jackson v. City of San Antonio*, 2006 U.S. Dist. LEXIS 62753 (W.D. Tex. 2006)

This case acknowledged that five police officers (sergeants and lieutenants) were paid on a salary basis but disagreed with the City's argument that they met the "duties test" of the executive or administrative exemptions. In particular, the plaintiffs' roles had "some managerial aspects," such as supervising large numbers of subordinate employees, handling complaints, ensuring subordinates' safety, and directing work. However, the court concluded that a significant question existed on the subject of whether the plaintiffs had the authority "to hire or fire other employees or [whether their] suggestions and recommendations … are given particular weight." The plaintiffs had pointed out in deposition testimony that they could not hire, fire, or discipline employees, and that at most they could only recommend further investigation into a disciplinary matter, to be conducted by a different department.

- DOL Opinion Letter, 2005-40 (October 14, 2005)

In this letter, issued in 2005 by the Bush Department of Labor, the Deputy Wage and Hour Administrator declared that although police officers and firemen are typically not exempt under FLSA, Fire Battalion Chiefs, Police Lieutenants, and Police Captains can be exempt executives. Battalion Chiefs are often exempt if they are paid on a salary basis and "manage the administrative and operational functions of the assigned section while integrating the Department's goals into day-to-day operation" and engage in management duties by "enforcing and implementing rules, regulations, procedures and values of the Fire Department; directing activities of personnel; taking proper action in all emergency situations until relieved by higher ranking officer; coordinating pre-fire planning, company inspection activities, and conducting routine fire cause investigations; preparing, reviewing and processing reports and records; and assisting in necessary research and preparation of budget needs."

3.7 Small Department Exemption

Section 13(b)(20) of the Act provides an exemption from the overtime requirements of the FLSA for "any employee of a public agency who in any workweek is employed in fire protection activities or . . . law enforcement activities . . . if the public agency employs during the workweek less than 5

employees in fire protection or law enforcement activities."[99] Determining whether the exemption applies is made on a workweek basis.[100]

In determining whether the exemption applies, law enforcement and fire protection activities are considered separately.[101] Thus, if a public agency employs fewer than five employees in fire protection activities but five or more employees in law enforcement activities, it may claim the exemption for the fire protection employees but not for the law enforcement employees.

In counting the number of employees for purposes of the exemption, no distinction is made between full-time and part-time employees or between employees who are on duty and employees who are on leave.[102] "Volunteers"[103] and "elected officials"[104] are not counted as employees. In addition, all employees of the department are counted, not just those who would be subject to the Act's minimum wage and overtime protections.[105] For example, a fire chief would count as an employee for purposes of this exemption even though it is likely that he or she would be considered exempt from the FLSA as an executive employee.[106]

In *Cleveland v. City of Elmendorf*,[107] the U.S. Court of Appeals for the Fifth Circuit held that "non-paid regulars" who volunteered to work for a police department did not count in determining the number of employees for the small department exemption. The City paid three officers (a police chief and two part-time officers), and the remainder of the police force was comprised of officers commonly referred to as "non-paid regulars." Whether the paid officers were owed overtime depended on whether the City's non-paid regulars were "employees" or "volunteers" under the FLSA. The court concluded that that the non-paid regulars were volunteers, not employees, and that the police department was exempt from the overtime pay requirements.

[99] 29 U.S.C.A. §213(b)(20).
[100] 29 C.F.R. § 553.200(c).
[101] 29 C.F.R. §553.200(b).
[102] *Id.*
[103] 29 C.F.R. §553.101.
[104] 29 C.F.R. §553.11.
[105] 29 C.F.R. §553.200(b).
[106] *See* WH Admin. Op. (Aug. 27, 1986).
[107] 388 F.3d 522 (5th Cir. 2004).

4. VOLUNTEERS

The minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) are not applicable to individuals who provide volunteer services for state and local governments. Individuals who are not employed in any capacity by state or local government agencies and who donate hours of service for civic or humanitarian reasons will not lose their volunteer status under the FLSA even if they receive expenses, nominal fees and reasonable benefits.[108]

In enacting the 1985 amendments to the FLSA, Congress did not want to discourage or impede volunteer activities by individuals who work for state and local government agencies. However, it did not want any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services.

Individuals are only considered volunteers when their services are offered freely and without pressure from an employer. In no case can an individual be considered a volunteer if the individual performs the same type of work for his employer as the work that he or she is performing while volunteering.[109]

This definition does not prevent an employee from volunteering to perform his regular job duties with a public agency with which his employer has a mutual aid agreement.[110]

Only the Department of Labor or a harmed employee may enforce the volunteer provisions of the FLSA.[111] Other employees have no cause of action under these provisions and are limited to reporting violations to a state agency or the DOL. However, experience has shown that the DOL is slow to investigate public employee's complaints, and the DOL often seems more supportive of the employers than the employees in response to complaints about improper or abusive practices related to "volunteering."

4.1 "Same Public Agency" and "Same Type of Services"

Section 3(e)(4)(A)(ii) of the FLSA does not permit an individual to perform hours of volunteer services for a public agency when these hours involve the same type of duties which the individual is employed to perform for the same public agency. As a result, the employee may not volunteer to perform tasks which are within his occupational duties.[112]

In addition, the employee cannot volunteer to perform the same services for a different agency within the same state or local government public agency. The public agencies must be considered separate employers before an individual can volunteer his/her services involving the same type of duties the individual is employed to perform.

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[108] 29 C.F.R. §553.104.
[109] 29 C.F.R. §553.101.
[110] 29 C.F.R. §553.105.
[111] 29 U.S.C. §216(b) & (c).
[112] 29 C.F.R. §553.102.

The independent status of two agencies must be determined on a case-by-case basis. The Census of Governments Report issued by the Bureau of the Census may provide guidance on this issue. Although the Census of Governments Report is only one factor utilized in determining the independent status of two agencies, the independent treatment of the two agencies within the report may serve to substantiate a claim that the two agencies are, in fact, separate.[113] The Report may be found at www.census.gov.

As to the performance of the "same type of services," the DOL regulations define the term to mean similar or identical services. The U.S. DOL Wage and Hour Administrator reviews the occupational definitions contained within the Dictionary of Occupational Titles as one method of determining whether volunteer activities constitute the same type of services as employment activities. Equally important in such a determination will be the consideration of all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed or assigned to the employee.[114]

For example, a fire fighter could not volunteer to perform firefighting duties for his employer. The same fire fighter could, however, volunteer to serve as a part-time referee in a basketball league sponsored by his employer. Also, a building inspector who works for the city public works department could not volunteer to perform building inspections for the city fire department.

4.2 Payment of Expenses, Nominal Fees, and Reasonable Benefits

Expenses, reasonable benefits, or a nominal fee can be paid to persons who otherwise meet the test for a bona fide volunteer without affecting his/her status as a volunteer.[115] Examples of appropriate expenses that can be reimbursed without jeopardizing an individual's volunteer status include uniforms, out-of-pocket expenses such as meals or transportation, tuition, and supplies.[116]

The regulations specify that it is a reasonable benefit for individual volunteers to be included in a group insurance plan, a pension plan, or a "length of service" award.[117]

A nominal fee for volunteer services is permitted, as long as it is not a substitute for compensation and is not tied to productivity.[118] Whether an amount is nominal is determined by such factors as the distance traveled, time and effort expended, whether the volunteer agreed to be available around-the-clock or only during certain specified time periods, and whether the volunteer provided services "as needed" or throughout the year.[119]

In several opinion letters, the DOL has addressed whether specific individuals maintain their volunteer status despite receipt of fees or expenses. In particular, the Administrator has addressed this issue in the context of persons who volunteer to perform police and fire services.

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[113] 29 C.F.R. § 553.102.
[114] 29 C.F.R. § 553.103.
[115] 29 C.F.R. § 553.106(b)–(e).
[116] 29 C.F.R. § 553.106(b), (c).
[117] 29 C.F.R. § 553.106(d).
[118] 29 C.F.R. § 553.106(e).
[119] *Id.*

In this context, the Administrator has determined that volunteers for a municipal fire and rescue department did not lose their volunteer status because they received $100 per month to help cover personal expenses such as shoes, belts, travel, meals, books, and paper for training purposes. However, volunteers for a town's fire department who were paid $7 per hour did not qualify as volunteers. The Administrator explained that nominal amounts can be paid if they reasonably approximate expenses incurred, but an hourly rate clearly establishes an employer-employee relationship. The DOL also found that a payment of $40 for a 24 hour standby period on-call, plus additional amounts for being called in up to a maximum of $50, qualifies as a "nominal fee." However, where a volunteer's total compensation exceeds the minimum wage, the issue of volunteer status is moot.[120]

In an opinion letter issued November 10, 2005,[121] the DOL withdrew several of its prior opinion letters dealing with the interpretation of what constitutes a "nominal fee." The DOL endorsed an economic reality test that compares the amount of the stipend or fee to the amount the employer would have to pay to hire a full-time employee. The DOL explained that if the fee amount does not exceed 20 percent of the market amount, it would consider the fee nominal under the applicable regulations.

In a subsequent opinion letter dated August 7, 2006,[122] the Department concluded that most of the following forms of payment would qualify as "nominal fees" and, therefore, would not negate the fire fighter's status as a volunteer: payments made per shift, month, or year, payments based on the average number of shifts, calls, and/or hours worked by the volunteer fire fighter, additional payments made for time spent by the volunteer over the minimum time requirements, and payment increases dependent on the number of years volunteered.

The Department reiterated that although the FLSA has a specific allowance for volunteer fire fighters to be paid on a "per call" basis, the payments must still qualify as "nominal" amounts. The Department explained that a "nominal" amount is generally no more than 20 percent of the total compensation an employer would pay to employ a full-time fire fighter for performing comparable services.

The Department of Labor's change in its position and market approach to volunteering represented a significant expansion of the definition of volunteer to include individuals receiving pay and benefits.

4.3 Mutual Aid Agreement

The 1985 Amendments to the FLSA permit an employee to volunteer to serve in his regular capacity with a public agency with which his employer has a mutual aid agreement.[123] For example, Town A and Town B have entered into a mutual aid agreement related to fire

[120]WH Admin. Op. (May 17, 1999), 1999 WL 1002403.
[121]WH Opinion Letter (Nov. 10, 2005), FLSA 2005-51.
[122]WH Opinion Letter (Aug. 7, 2006), FLSA 2006-28.
[123]29 U.S.C. 203(e)(4)(B).

protection. As a result of this agreement, a fire fighter employed by Town A may serve as a volunteer in Town B. The hours the fire fighter employed by Town A serves as a volunteer in Town B are not to be considered hours worked by Town A even though the fire fighter may be dispatched to a fire call within Town A's geographical region.[124]

4.4 Court Cases on Volunteers

It is important to note that DOL opinion letters are extremely important in cases analyzing an individual's volunteer status because enforcement of the Act's volunteer provisions almost always comes from the Department.

- *Benshoff v. City of Virginia Beach:*[125]

The Fourth Circuit concluded that fire fighters could volunteer for rescue squads that ran out of the same fire stations in which the fire fighters worked as paid fire fighters for the city. Their services primarily benefited the rescue squads, not the city; therefore, the fire fighters were not volunteering for the same "public agency." The court explained that Congress did not intend Section 203(e)(4)(A) to relieve a person of the burden of demonstrating that an employment relationship exists in order to claim compensation.

- *Cleveland v. City of Elmendorf:*[126]

The Fifth Circuit applied the DOL regulations and determined that non-paid persons working as law enforcement officers qualified as volunteers even though they used their volunteer time to maintain their status as paid law enforcement officers for other employers. The court held that this benefit did not transform them into employees within the meaning of the Act.

- *Purdham v. Fairfax County School Board:*[127]

The Fourth Circuit held that a security worker was a volunteer coach, and therefore not entitled to overtime payments, where he was not coerced into taking on the extra duties, was motivated by his love of the game, and received a small stipend. In finding that his stipend was not compensation, the court noted that it was not tied to his performance and was a fixed amount regardless of the amount of time or effort he put into coaching. The court also noted that his position as a security worker was in no way tied to his coaching role – he remained free to quit coaching without any fear that it would impact his job security. Therefore, the Fourth Circuit held that the security worker was performing his role as a coach in a volunteer capacity and not entitled to overtime compensation.

[124] 29 C.F.R. § 553.105.
[125] 180 F.3d 136 (4th Cir. 1999).
[126] 388 F.3d 522 (5th Cir. 2004).
[127] 637 F.3d 421 (4th Cir. 2011).

- *Brown v. N.Y. C. Dep't of Educ.*:[128]

The Second Circuit held that a public agency volunteer was not entitled to overtime wages even where he worked for more than 40 hours a week for the three years at Banana Kelly High School, because he was not an employee. The court rejected the agency volunteer's argument that the FLSA's regulations require an individual to act *solely* for civic, charitable, or humanitarian purposes to qualify as a volunteer. The court found that the agency volunteer met the motivation requirement of the volunteer exception where he was significantly, though not solely, motivated by charitable or civic purposes to work at the school. The court also found that the agency volunteer had no reasonable expectation of receiving compensation for the time he worked at the school. The court reasoned that while he worked significant hours, he was "a recent high school graduate who, unable to find paid employment — with the exception of a part-time night job — [had] decided to use his time constructively to help others and to build his resume." the court also held that "the payments made to him [could not] be considered more than nominal" where he was occasionally given meals, metro cards, and sums of $50-60 on approximately 20 occasions by his supervisors. The Second Circuit concluded that the plaintiff was a volunteer and therefore not entitled to overtime payments.

- *Evers v. Tart:*[129]

The Eighth Circuit held that volunteer election poll workers are not covered by the Act and therefore do not need to be paid the minimum wage. The court reached this decision although the workers were paid between $35 and $50 per day for their services, plus a travel reimbursement. The court noted that in some years the poll workers did not work at all, while in other years they might work, at most, a total of 8 days during the year, depending on the number of elections. The court also noted that the poll workers did not apply for their jobs and they did not receive any benefits.

- *Todaro v. Township of Unions:*[130]

The District Court found that persons who volunteered as "special law enforcement officers" were volunteers under the Act. Volunteering as a "special law enforcement officer" qualified individuals for participation in the "jobs-in-blue" program. This program made volunteers eligible for hire by private employers as security guards. The "jobs in blue" program was discontinued. Nonetheless, with the hope that the program would be reinstituted, individuals continued volunteering as special law enforcement officers.

The Court concluded that, even if there was a mixed motivation for volunteering, including reasons other than for "civic, charitable, or humanitarian purposes," the special law enforcement officers are volunteers. The court reasoned that if one volunteers to provide services without pay, a person's expectations of future gain or benefit should not transform that person into an employee under the FLSA.

[128] 755 F.3d 154 (2d Cir. 2014).
[129] 48 F.3d 319, (8th Cir. 1995).
[130] 40 F.Supp. 2d 226 (D. N.J. 1999).

- *Rodriguez v. Township of Holiday Lakes:*[131]

The District Court found that an individual required to "volunteer" as a patrol officer in order to be classified as a full-time police officer, which was necessary to obtain paid employment as a road construction flagman in a neighboring county, was not a "volunteer" within the meaning of the Act.

- Martinez v. Ehrenberg Fire Dist.:[132]

The District Court found that "volunteer" firefighters were employees under the FLSA because they expected to receive compensation for their work, were paid more than a nominal fee, and worked more hours than a typical volunteer. The court also took judicial notice of the mean compensation for firefighters in their geographical area and found that they were compensated at a rate substantially similar to that of a full-time firefighter. The court also noted that the Ehrenberg Fire District treated the volunteers "like [] employee[s] by requiring an employment application, maintaining a personnel file, and disciplining firefighters if they do not show up for scheduled shifts."

4.5 U.S. DOL W&H Division Administrative Letter Rulings On Volunteers

- *June 13, 1986*:

Fire fighters cannot volunteer hours of service to their public employer if the services are the same type as those which they normally perform. However, fire fighters may volunteer their services for the same city in other non-related capacities, as long as "such services are not the same type of services which the individual is employed to perform for such public agency."

- *July 16, 1986*:

Fire fighters employed by a volunteer fire department cannot volunteer fire fighting activities for the same department during off-duty time.

- *November 19, 1986*:

Volunteers may be paid expenses, reasonable benefits or a nominal fee for their services without losing their status as volunteers. A city's contribution to a retirement investment fund represents a nominal benefit.

- *December 2, 1986*:

Fire fighters cannot volunteer as EMTs for the same employer since their "volunteer" work is the same as their paid duties.

[131] 866 F.Supp. 1012 (S.D. Tex. 1994).
[132] No. CV-14-00299-PHX-DGC, 2015 BL 180559 (D. Ariz. June 8, 2015).

- *April 21, 1987*:

Fire fighters/paramedics cannot volunteer services as training instructors to conduct drills and training classes for volunteers because training volunteers is closely related to the actual duties of fire fighter/paramedics.

- *January 7, 1988*:

Fire fighters cannot perform services similar or identical to their paid duties when they respond to emergencies during off-duty time. However, a fire fighter who is employed by one jurisdiction may volunteer his or her services as a fire fighter without compensation in another jurisdiction.

- *July 15, 1988*:

Volunteer fire fighters may be paid nominal amounts which reasonably approximate any expenses incurred by the volunteers. However, an hourly rate paid for actual hours worked would establish an employer-employee relationship under Section 3(e)(4)(a)(i) of the FLSA.

- *October 18, 1988*:

A fire fighter employed by a public agency cannot be both a paid employee and an unpaid volunteer while performing the same type of services which the individual is employed to perform for his or her employer. A fire fighter may volunteer to perform services for any other public (or private) employer including one in which the employing agency has a mutual aid agreement.

- *November 10, 1988*:

Individuals cannot volunteer time to a fire district to perform the same duties for which they are paid but can volunteer services in a different capacity.

- *February 7, 1989*:

Paramedics cross-trained as fire fighters cannot volunteer as fire fighters without compensation if the same type of services are involved; however, they can volunteer to perform computer systems administrative work. Civilian supervisors of communications and civilian dispatchers and clerk typists can volunteer as fire fighters and emergency medical technicians.

- *July 16, 1991*:

The DOL determined that a county fire fighter may not volunteer to work as a fire fighter at a different fire station within the County than the one to which he is assigned. Although different volunteer fire corporations supplemented the County's fire services at various fire stations, the Department ruled that the County was impermissibly reducing its overtime expenditures by allowing or encouraging paid fire fighters to "volunteer" their services.

- *April 20, 1993*:

The DOL determined that, even where the volunteer fire company was a corporate entity, fire fighters employed by a township could not volunteer their services to the volunteer fire companies in the township without compensation. Although the volunteer companies were separate from the township, the services performed by the volunteer personnel were clearly performed for the benefit of the township and were identical to services performed by these and other township employees.

- *June 29, 1993*:

The DOL stated that whether a full-time employee of a public works department may volunteer for the fire commission as a dispatcher trainee depends on what type of job the individual holds with the public works department. For example, if the employee were employed as a laborer, truck driver, equipment operator, or in some similar capacity, he or she would not be considered to be furnishing the same type of service to the town when volunteering as a dispatcher or the fire commission. The employee could not volunteer, however, as a fire dispatcher if he or she were employed as a public works dispatcher or in a similar job.

- *October 28, 1993*:

Volunteer fire fighters do not lose volunteer status because they receive a monthly pension plan based on years of service, tax relief with respect to county vehicle licenses and personal property taxes, and other death and disability benefits.

- *November 12, 1993*:

Payment of $100 per month to help cover personal expenses such as shoes, belts, travel, meals, books, and paper for training purposes qualifies as a nominal fee.

- *May 17, 1999*:

Payment of $40 for a 24 hour standby period on-call, plus additional amounts for being called in up to a maximum of $50 qualifies as a nominal fee. Where a volunteer's total compensation exceeds the minimum wage, the issue of volunteer status is moot.

- *November 27, 2001*:

Time spent by the county's paid fire fighters volunteering for independent volunteer companies need not be counted as hours worked even though they were worked in the same county.

- *July 14, 2004*:

Fees are not nominal if they are a substitute for compensation or productivity.

- *August 7, 2006*:

The DOL concluded that most of the following forms of payment qualify as "nominal fees" and therefore do not necessarily affect an individual's status as a volunteer fire fighter: payments made per shift, month, or year, payments based on the average number of shifts, calls, and/or hours worked by the volunteer fire fighter, additional payments made for time spent by the volunteer over the minimum time requirements, and payment increases dependent on the number of years volunteered.

The DOL warned that although the FLSA has a specific allowance for volunteer fire fighters to be paid on a "per call" basis, the payments must still qualify as "nominal" amounts. A "nominal" amount is generally no more than 20 percent of the total compensation an employer would pay to employ a full-time fire fighter for performing comparable services.

In one example, volunteer fire fighters paid $15,000 per year spent at least 3,000 hours waiting or responding to calls. The Department concluded that while this scenario may qualify as "nominal" under the 20 percent rule, it is unlikely that 3,000 hours of work per year would be "volunteering" and might "arguably" constitute compensation for a full-time job, rather than a "nominal fee" for volunteering.

In another example, volunteer fire fighters were provided with personal property tax relief in the amount of $1,500 per year. The Department concluded that this relief would constitute a "reasonable benefit," which would not, by itself, negate the fire fighter's volunteer status.

- *October 20, 2006*:

To be considered "nominal," a fee should not be tied to productivity and should not exceed twenty percent of what an employer would have to pay a full-time employee for those duties.

- *December 18, 2008*:

EMTs employed by a county could volunteer to provide the same services for the local volunteer emergency crew ("crew") because the DOL found the county and the crew were not the same public agency. The DOL noted that the crew was a separate and independent nonprofit from the county. As such, the DOL found the EMTs employed by the county could volunteer to provide the same services for the crew provided that crew remained separate and independent from the county.

- *December 18, 2008*:

A paid firefighter working for a private nonprofit fire department could not volunteer to perform duties similar to their paid duties for the same fire department during off duty hours. The DOL noted that the FLSA provides for public sector employees to volunteer for their employing agency so long as they do not volunteer to provide the same or similar services for which they are employed and that the Wage and Hour Division applies this policy to employees of nonprofit organizations who donate their services as volunteers to their employers. The DOL opined that

the paid firefighters could not perform the services which they were compensated for on a volunteer basis because, under Supreme Court precedent, employees could not waive their right to compensation under the FLSA.

5. THE FEDERAL SECTOR

In 1974, the FLSA was amended to cover most federal employees, including federal fire fighters. The 1974 Amendments added a term defining a "public agency" employer, which includes "the Government of the United States."[133] The definition of "employee" was amended to include any individual employed by the Government of the United States:

- as a civilian in the military departments (as defined in section 102 of Title 5),
- in any executive agency (as defined in section 105 of such title), or
- in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces.[134]

In providing these federal employees with FLSA coverage, Congress authorized the U.S. Civil Service Commission, which is now named the Office of Personnel Management (OPM), to administer the FLSA in the federal sector.[135]

The legislative history of the 1974 Amendments indicates that this was done so that any pay entitlements provided to federal employees under Title 5 of the U.S. Code would not conflict with pay entitlements under the FLSA.[136] The pay provisions of Title 5 set forth statutory pay amounts, including overtime pay, applicable only to federal employees.[137] Federal employees who are covered by the FLSA are entitled to receive overtime pay under either Title 5 or the FLSA, whichever provides the greater amount.[138]

Pursuant to its authority under Section 4(f), the OPM has issued regulations concerning application of the FLSA in the federal sector.[139] These regulations are set forth in Title 5, Part 551, of the Code of Federal regulations.[140]

In most respects application of the FLSA in the federal sector is the same as its application to state and local government employees. Indeed, the OPM is constrained in its application of the FLSA to ensure that it is applied in a manner consistent with the DOL's administration in the private sector.[141] In *American Federation Government Employees (AFGE) v. Office of Personnel Management,* the D.C. Circuit explained:

> In promulgating regulations, OPM is nevertheless obliged to exercise its

[133] 29 U.S.C. § 203(x).
[134] 29 U.S.C. § 203(e)(2)(A).
[135] 29 U.S.C. § 204(f).
[136] H.R. REP. NO. 93-913, at 28, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837. *See American Federation of Government Employees (AFGE) v. Office of Personnel Mgmt.*, 821 F.2d 761, 769 (D.C. Cir. 1987); *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987).
[137] *See* 5 U.S.C. §§ 5541–47.
[138] 5 C.F.R. § 551.513.
[139] 29 U.S.C. § 204(f).
[140] 5 C.F.R. § 551.10, et. seq.
[141] *AFGE,* 821 F.2d at 769–71; *Lanehart,* 818 F.2d at 1578; *Roney v. United States*, 790 F. Supp. 23 (D.D.C.2).

> administrative authority in a manner that is consistent with the Secretary of Labor's implementation of the FLSA. When the civil service and FLSA systems conflict, OPM must defer to the FLSA so that any employee entitled to overtime compensation under [the] FLSA receives it under the civil service rules.[142]

Since *AFGE*, the Federal Circuit and Court of Federal Claims have addressed the degree to which OPM's regulations must be consistent with the DOL's FLSA regulations.[143] The Federal Circuit identified the decision in *AFGE* as standing for *"*the unremarkable proposition that, under the same facts, an employee in federal employment should receive the same overtime compensation as an employee in the private sector."[144]

Although the language of the OPM regulations that apply the FLSA differs somewhat from that of the DOL regulations, the OPM regulations are generally consistent with the DOL's. Those areas that the OPM or the courts have found to be unique in applying the FLSA in the federal sector are explained next.

5.1 Hours of Work

The OPM's regulations that define the hours of work that are compensable under the FLSA contain several definitions not included in the DOL's regulations.

5.1.1 Paid Leave

For purposes of computing overtime compensation, the OPM's regulation provides that paid leave, including holidays, compensatory time off, and excused absences, count as "hours of work."[145] The genesis of this regulation is derived from the Federal Circuit's decision in *Lanehart v. Horner,* where the court ruled that the "leave with pay" statutes applicable to federal employees required that federal employees not suffer a reduction in pay as a result of using their paid leave time. [146] The OPM extended this ruling to simply require that all paid leave hours count in computing federal employees' FLSA overtime compensation.

5.1.2 Activities Taking 10 Minutes or Less

Unique to the federal sector is the court's analysis of the de minimis rule set forth in OPM's regulation under which an activity is presumptively not compensable if it takes 10 minutes or less to perform.[147] For instance, in *Riggs v. United States*,[148] fire fighters at Tyndall Air Force Base sought overtime compensation for time spent at the conclusion of their shift attending a mandatory roll call, and transferring protective clothing from an assigned vehicle to their lockers.

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[142] *AFGE*, 821 F.2d 761 at 770.
[143] *Bates v. United States*, 60 Fed. Cl. 319, 322 n. 3 (2004) (finding that "it is appropriate to look to DOL regulations if OPM's regulations are unclear"); *Adams v. U.S.*, 26 Ct. Cl. 282 (1992) (explaining that the DOL regulations shed light on the FLSA statute).
[144] *Bates v. United States*, 322 F.3d 1328, 1333 (Fed. Cir.), rehearing en banc denied, 2003 U.S. App. LEXIS 10934, cert. denied sub. Nom.; *Lotz v. United States*, 124 S. Ct. 465 (2003).
[145] 5 C.F.R. § 551.401(b).
[146] 818 F.2d 1574 (Fed. Cir. 1987).
[147] 5 C.F.R. § 551.412(a)(1).
[148] 21 Cl.Ct. 664 (Cl. Ct. 1990).

Applying 5 C.F.R § 551.412(a)(1), the Court of Claims concluded that attendance at the roll call with protective equipment, as well as time spent getting protective clothing from the lockers and then walking to the roll call site is a necessary, integral part of the day's principal activities. Nevertheless, the court denied the fire fighters claim for overtime because the fire fighters failed to put forth evidence that the activities required more than 10 minutes to perform.

In *Bull v. U.S.*,[149] the Court of Federal Claims held that this rule applies to each occasion an activity is performed rather than on a weekly basis. The court rejected the government's argument that laundering and drying training towels took fewer than 50 minutes a week and should therefore be considered "de minimis" since the time spent performing this activity averaged 10 minutes per scheduled shift for the canine enforcement officers.

The OPM rule on de minimis is an antiquated rule that is contrary to more recent caselaw such as *Lindow v. U.S.*[150] in which the court determined that the proper test for whether the performance of an activity is 1) the administrative difficulty in measuring the time; 2) the aggregate amount of time at issue; and the regularity with which they occur. *Lindow* and its progeny make clear that employers are not provided with a free 10 minutes of work time each day; if employees perform a routine activity on a regular basis, regardless of how short a time it takes, the employees should be compensated for it.

Consistent with *Lindow*, at least one arbitrator has construed the OPM regulation's 10 minute rule as applying only to irregular overtime.[151]

5.1.3 Sleep Time

The OPM's regulations also differ from the DOL regulations with regard to sleep time. Unlike the DOL regulations, which only permit an employer to exclude sleep time from an employee's compensable hours of work if the employer and employee agree, the OPM regulations do not require such an agreement. In fact, OPM's regulations expressly provide that sleep time on the agency's premises is **not** compensable if the employee's shift is 24 hours or longer. However, sleep time may only be excluded if the employee receives a total of 5 hours or more of uninterrupted sleep. In addition, only a maximum of 8 hours may be excluded as work hours.[152]

In *Blanco v. U.S.*,[153] employees challenged OPM's sleep time regulation[154] to recover unpaid work hours for time spent during a period when they were restricted to a prison during a hurricane. The court rejected the employees' argument that OPM's regulation was inconsistent with DOL's sleep time regulation[155] because OPM's regulation did not require an agreement with the employees to exclude sleep time as hours work. The court ruled that OPM had the authority to issue its own sleep time regulation which did not require an agreement because this "slight" difference did not "warrant abrogation of Congress' delegated authority to OPM to

[149] 68 Fed. Cl. 212, 244 (Fed. Cl. 2005).
[150] 738 F.2d 1057 (9th Cir. 1984).
[151] *AFGE Local 171 and FTC Oklahoma City* (Scheiber, Arbitrator).
[152] 5 C.F.R. § 551.432.
[153] 433 F. Supp. 2d 190, 11 WH Cases2d 1064 (D.P.R. 2006).
[154] 5 C.F.R. § 551.432.
[155] 29 C.F.R. § 785.22.

administer the FLSA for federal employees."[156]

5.1.4 Preliminary and Postliminary Activities

Under the Portal-to-Portal Act,[157] commuting to and from work and preliminary and postliminary activities are not compensable work under the FLSA. For instance, in *Aguilar v. United States*,[158] the Court of Claims ruled that INS border patrol agents' travel time with their dogs is not compensable, even though they actually perform "work" during the commute time. The "work" alluded to was the act of transporting the dogs. The court concluded that, "employees should not be compensated for doing what they would have to do anyway—getting themselves to work."[159] To be compensable, according to the court, commute time must be an integral and indispensable part of their principal job activities and be compelled by vital considerations such as health, hygiene, and personal safety.[160]

Similarly, in *Adams v. United States*,[161] the Court of Federal Claims ruled that employees of various federal government law enforcement agencies were not entitled to compensation under the FLSA for time spent driving to and from work in government-issued vehicles. The court found that, generally, commuting time is not compensable under the FLSA. The Court further explained that there was no showing that compensable work activity occurred during the commute and that any burdens placed on the employees' commuting time were de minimis.

5.1.5 On-Call and Waiting Time

Generally, the rules regarding on-call time and waiting time that apply to federal employees are the same as those that apply to private sector and non-federal public sector employees. In some respects, however, OPM's rules concerning on-call time and waiting time are more specific to circumstances that apply to federal employees.

The majority of federal sector work situations in which on-call or waiting time issues arise involve employees who are required to work through a meal period by remaining on-call or compelled to eat at their work site, such as a desk, guard station, etc. OPM has set forth a separate regulation for time spent on standby duty or in an on-call status. OPM defines standby duty time as time:

- the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time

[156]433 F. Supp. 2d 190 at 201-02.
[157]29 U.S.C. §§ 251–262.
[158]*Aguilar v. United States*, 36 Fed. Cl. 560, 3 WH Cases2d 897 (Fed. Cl. 1996).
[159]*Id.* at 566–67 (internal quotation marks omitted; quoting *Andrews v. DuBois*, 888 F. Supp. 213, 218, 2 WH Cases 2d 1297 (D. Mass. 1995)).
[160]*Id*. at 569. *See also Adams v. Bowsher*, 946 F. Supp. 37, 133 Lab. Cas. (CCH) ¶33,531 (D.D.C. 1996) (finding that congressional intent to equate federal workers' rights to those of private sector employees regarding commuting time, based on considerations of cost and fairness, had legitimate purpose accomplished by rational means).
[161]65 Fed. Cl. 217, 10 WH Cases 2d 1000 (Fed. Cl. 2005).

effectively for his or her own purposes.[162]

Interestingly, OPM has defined the circumstances under which an employee will be considered to be "off-duty" although the employee is "on-call." This includes time:

- the employee is allowed to leave a telephone number or to carry an electronic device for purpose of being contacted even though the employee is required to remain within a reasonable call-back radius; or

- the employee is allowed to make arrangements such that any work that may arise during the on-call period will be performed by another person. [163]

The case law under the FLSA primarily concerns factual situations in which employees are permitted to go home or to leave work where they may be contacted while on-call. Nonetheless, in these cases, some of the factors that the courts assess to determine whether the standby time is compensable are set forth below:

- whether the time is spent on the employer's premises;
- any geographic restrictions on the employees;
- the frequency of the calls received during the standby time;
- how quickly the employees must respond to the calls;
- whether the employee may use a pager;
- the degree to which the employees' personal activities are restricted during the on-call shift;
- any discipline to which the employee is subject if he misses or ignores a call or responds “late”; and
- the nature of the employment involved.

No one of these factors is dispositive and this list of factors is illustrative, not exhaustive. As the courts have repeatedly stressed, all of the facts and circumstances must be examined in each case to determine whether or not on-call time is compensable.

For instance, in *Renfro v. City of Emporia*,[164] fire fighters received an average of 3-5 calls per on-call shift and they were required to respond to the fire station within 20 minutes of being called or they would be disciplined. The employees were otherwise free to do as they pleased. The 10th Circuit held that the restrictions placed on the fire fighters' personal activities were too great and they were awarded FLSA overtime pay plus liquidated (double) damages for their entire 24-hour shifts.

[162] 5 C.F.R. § 551.431.
[163] 5 C.F.R. § 551.431(b).
[164] 948 F.2d 1529 (10th Cir. 1991)

5.1.6 Time Spent Resting, Adjusting Grievances, Receiving Medical Attention, and Performing Charity Work

The OPM's regulations specify that any rest period that does not exceed 20 minutes shall constitute compensable work time.[165] In addition, time spent adjusting grievances,[166] receiving medical attention,[167] or performing charity work,[168] at the agency's direction, are all specifically considered to be compensable work time if they are performed during regular working hours.

5.2 Compensatory Time

Since the 1974 Amendments, federal agency employers have been permitted, subject to certain preconditions, to award compensatory (comp) time in lieu of cash overtime compensation to employees, including federal fire fighters and employees who fall under the Section 7(k) exemption. The rate at which the comp time may be paid is different from the rate at which comp time is paid to state and local government employees under Section 7(o). Pursuant to certain provisions of Title 5, Federal agency employers may award comp time at the straight-time rate—1 hour of comp time for each hour of overtime worked.[169]

Comp time may be awarded only at the employee's request.[170] The agency is not obligated to approve the employee's request and can pay the employee time-and-a-half overtime in cash instead; however, the agency may not require that an employee be compensated for overtime work with an equivalent amount of comp time off from the employee's tour of duty.[171] In addition, comp time may only be paid as compensation for irregular or occasional overtime hours.[172]

Unlike the rules pertaining to comp time for state and local government employees, there is no limit on the amount of comp time that a federal employee may accrue. However, the head of an agency may fix time limits for an employee to request and take compensatory time off. If the employee fails to take the time off within the established limit, he or she must be paid for overtime work at the overtime rate in effect at the time the overtime work was performed.[173]

In *Doe v. United States*,[174] employees of the Social Security Administration (SSA) alleged that SSA violated the FLSA by failing to pay them at the rate of one and one-half times their regular hourly rate for each hour of overtime worked when instead they received comp time or credit hours on an hour-for-hour basis. The court stated that although it had not previously addressed the interrelation of the FLSA and Title 5 with respect to compensatory time, when read together, the FLSA and the overtime provisions of Title 5 provide that an agency may grant comp time to a federal employee to whom Title 5 applies "on an hour-for-hour basis in lieu of overtime pay

[165] 5 C.F.R. § 551.411(b).
[166] 5 C.F.R. § 551.424.
[167] 5 C.F.R § 551.425.
[168] 5 C.F.R. § 551.426.
[169] 5 U.S.C. § 5543(a)(1).
[170] *Id.*
[171] 5 C.F.R. § 551.531.
[172] 5 U.S.C. § 5543.
[173] 5 C.F.R. § 551.531(d).
[174] 74 Fed. Cl. 592 (2007).

under the FLSA for occasional or irregular overtime work." To the extent plaintiffs worked overtime on an irregular or occasional basis, their employer was permitted to award comp time on an hour-to-hour basis without violating the FLSA. Because plaintiffs did not allege whether overtime worked was regular or occasional, the court denied defendant's motion to dismiss on the comp time claim without prejudice and asked the plaintiffs to amend their complaint.

5.3 White Collar Exemptions

On September 17, 2007, OPM issued new, final regulations regarding the white collar exemptions to "update and harmonize OPM's regulations with the Department of Labor's regulations."[175] OPM opined in the comments accompanying the new regulations that they do not anticipate changes in the exemption status of the vast majority of federal employees as a result of the regulations.[176] Despite OPM's commentary suggesting no substantive changes resulting from the new regulations, a few aspects of them are noteworthy.

Unlike the DOL regulations, there is no separate test for highly compensated employees[177] nor are there any provisions unique to public safety employees. OPM also has identified a number of positions within the federal government to which the professional exemption applies.[178]

In addition, unlike the DOL's regulations, the OPM's regulations that apply the administrative, executive, and professional exemptions do not include a salary component.[179] To establish that a federal employee meets one of these exemptions, an agency employer need only prove that the employee meets the "duties test" for the claimed exemption.

OPM has not explained why its Section 13(a)(1) exemption regulations do not include a salary basis test. However, the Federal Circuit has affirmed that to be consistent with DOL's white collar regulations, OPM need not include a salaried basis test.[180]

In *Adams v United States*, [181] the U.S. Court of Federal Claims ruled that federal supervisory firefighters were exempt from FLSA's overtime provisions as executive employees, even though 16 hours of every 24-hour shift was standby time and the supervisors passed the time sleeping or engaged in the same activities as their subordinates. The court reasoned:

> It is who they [the supervisors] are that gives plaintiffs their utility during standby time… [T]heir "work" is simply to be present, so that, in the event of an emergency, they can be activated, in their supervisory capacity, to respond to the emergency. Their "doing" consists in "being." That work cannot be performed by non-supervisory firefighters. Their presence accomplishes a different function.[182]

[175] 72 Fed. Reg. 52753 (September 17, 2007).
[176] *Id.*
[177] 5 C.F.R. § 551.101(c).
[178] 5 C.F.R. § 551.208(d-m).
[179] 5 C.F.R. §§ 551.204–.206.
[180] *Adams v. United States*, 350 F.3d 1216 (Fed. Cir. 2003); *Billings v. United States*, 322 F.3d 1328 (Fed. Cir. 2003).
[181] *Adams v. United States*, 36 Fed. Cl. 91, 3 WH Cases 2d 647 (1996).
[182] *Id.* at 100.

The OPM's exemption regulations differ from the DOL's with regard to the time period in which an exemption determination is made. The OPM's regulation provides that an exempt employee who performs nonexempt work in a temporary duty assignment shall nonetheless remain exempt unless the duty assignment exceeds 30 days.[183] This differs from the general DOL requirement that exemption determinations shall be made on a single workweek basis.[184] Interestingly, the OPM permits employees to be considered nonexempt on the basis of their duties performed during a workweek if the agency determines that an emergency situation exists that threatens the lives and safety of people or serious damage to property.[185]

5.4 Remedies Under the FLSA

Federal employees who are found to have been wrongly denied FLSA overtime compensation are entitled to recover their back pay in an amount equal to the difference between what they were paid for overtime work and what they would have been paid if they had been properly paid FLSA overtime compensation. In addition, employees are entitled to recover liquidated (double) damages or interest. Finally, employees can recover attorneys' fees and costs associated with pursuing the case.[186]

The federal government may avoid liquidated damages by establishing that it acted in good faith and on the basis of reasonable belief that it was not violating the Act.[187] Moreover, upon establishing that it acted in good faith, the federal government is not liable for prejudgment interest or liquidated damages in lieu of interest. In *Doyle v. United States,*[188] the Federal Circuit ruled that Congress has not expressly waived the federal government's sovereign immunity from suits under the FLSA for an award of interest disguised as liquidated damages. Once the federal government establishes that it acted in good faith and with reasonable belief that its conduct was lawful, liquidated damages are unavailable.

There is a two year statute of limitations applicable to FLSA cases, which is extended to three years if the government is found to have willfully violated the FLSA.[189] The statute of limitations begins to run on the day in which the employee would normally have been paid his overtime pay. Significantly, filing a claim with OPM does *not* toll the statute of limitations. This means that the statute of limitations continues to run while an employee's claim is pending at OPM.

The Courts in the Federal Court of Claims are currently split on whether interest under the Back Pay Act[190] is available in FLSA cases. Arbitrators routinely award interest in FLSA cases in the federal sector applying the Back Pay Act.

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[183] 5 C.F.R. § 551.211(b).
[184] *See* 29 C.F.R. § 778.103.
[185] 5 C.F.R. § 551.211(b).
[186] 29 U.S.C. 216(b).
[187] 29 U.S.C. §260.
[188] 931 F.2d 1546, 1550–51 (Fed. Cir. 1991).
[189] 29 U.S.C. §255(a).
[190] 5 U.S.C. § 5596.

5.5 Portal-to-Portal Good Faith Defense

Under Section 259 of the Act, an employer may escape FLSA liability for back pay if it has failed to pay FLSA overtime in good faith reliance on "any written administrative regulation, order, ruling or interpretation, of the agency of the United States specified in section (b)."[191] The term "agency" is defined as the "administrator of the Wage and Hour Division of the Department of Labor."[192]

In *Berg v. Newman,*[193] the Federal Circuit rejected the OPM's argument that the OPM Director stands in the shoes of the Wage and Hour Administrator for purposes of the Section 259 defense. The court found the language of Section 259 to be clear and unambiguous:

> Section 259 protects only those employers who rely on regulations promulgated by the "Administrator of the Wage and Hour Division of the Department of Labor." Nowhere does the statute grant the same insulating effect to [Civil Service Commission] or OPM regulations.[194]

The court also reasoned that Section 259 envisions a separation between the employer and regulator. Because a significant aspect of OPM's responsibility is to act on behalf of the employer of federal employees, and at the same time OPM has the authority to promulgate regulations that apply to them, extending Section 259 to the OPM would effectively insulate the federal employer from liability arising from its own faulty (and possibly self-interested) regulations. Federal agency employers may not use Section 259 as a defense in reliance on OPM regulations, the court said.

5.6 Title 5 and The Fire Fighter Overtime Pay Reform Act

As noted above, the pay provisions of Title 5 set forth statutory pay amounts, including overtime pay, applicable only to federal employees, including fire fighters.[195] Federal fire fighters who are covered by the FLSA are entitled to receive overtime pay under either Title 5 or the FLSA, whichever provides the greater amount.[196]

5.6.1 History of Federal Fire Fighter Overtime Pay Under Title 5

In 1998, Congress enacted the Fire Fighter Overtime Pay Reform Act (FFOPRA), which added Section 5445b to Title 5 of the United States Code. Prior to the enactment of the FFOPRA, fire fighters earned the same rate of "basic pay" that applied to General Schedule employees with a forty hour work week. Fire fighter pay calculations were complicated. "Basic pay" was calculated by dividing the employees' annual rate by 2,087.[197] Most fire fighters' tours of duty resulted in more than forty hours worked per week. Fire fighters also received "standby pay" to compensate them for

[191] 29 U.S.C. §259.
[192] *Id.*
[193] 982 F.2d 500 (Fed. Cir. 1992).
[194] *Id.* at 504.
[195] *See* 5 U.S.C. §§ 5541–47.
[196] 5 C.F.R. § 551.513.
[197] 5 U.S.C. 5504(b).

their extended tours of duty. "Standby pay" was a percentage of the fire fighter's basic pay," not to exceed twenty-five percent (25%) of the "basic pay" rate (with a cap).[198]

Non-FLSA exempt fire fighters also received overtime pay for hours worked in excess of 106 biweekly or 53 weekly.[199] Fire fighters earned a supplemental half-rate premium (in addition to their basic pay and standby pay received for regularly scheduled hours) for regularly scheduled overtime hours. For irregular or non-scheduled overtime hours, they received the FLSA-mandated time-and-one-half overtime pay.

5.6.2 Calculating Overtime Under the Fire Fighter Overtime Pay Reform Act

The FFOPRA eliminated premium pay (including standby duty pay, night pay, Sunday pay, holiday pay, and hazardous duty pay) for federal fire fighters who are classified in the GS-081 Fire Protection job classification series, who perform the work of this position and who average at least 106 hours per biweekly pay period.[200] In addition, it simplified the method used to calculate overtime for federal fire fighters.[201] Most fire fighters who work 24 hour shifts, and some supervisors (generally, those who work five eight-hour days plus one sixteen hour standby shift per week), were impacted by the FFOPRA.

Under the FFOPRA, a fire fighter who is covered by the overtime provisions of the FLSA (i.e., non-exempt from), receives overtime at a rate of one and one half times the fire fighter's basic hourly rate. [202]

The fire fighter basic hourly rate is calculated using the fire fighter's annual rate of pay, [203] and depends on the fire fighter's tour of duty. For fire fighters with a regular tour of duty that does not include a basic 40-hour workweek (e.g., fire fighters whose schedule generally consist of 24-hour shifts), the basic hourly rate is calculated by dividing the applicable annual rate of pay by 2,756 hours.[204]

For fire fighters who work a regular tour of duty that includes a basic 40-hour workweek, the basic hourly rate is calculated by dividing the applicable annual rate of basic pay by: 1) 2,087 hours for hours within the basic 40-hour workweek, and 2) 2,756 hours for any additional non-overtime hours.[205] However, for purposes of calculating the overtime rate, OPM regulations specify that the fire fighter's annual rate of pay be divided by 2,756-hour factor instead of using the 2087-hour factor.[206] Therefore, for the purposes of calculating overtime under the FFOPRA, the basic hourly

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[198] 5 U.S.C. § 5545(c)(1).
[199] *See, e.g.,* Office of Pers. Mgmt., Retirement & Ins. Serv. Benefits Admin. Letter No. 01-107 (June 19, 2001).
[200] 5 U.S.C. § 5545b. *See, e.g.,* Office of Pers. Mgmt., Retirement & Ins. Serv. Benefits Admin. Letter No. 01-107 (June 19, 2001).
[201] 5 U.S.C. § 5545b(b).
[202] *Id.*; 5 C.F.R. § 550.1304(a).
[203] 5 C.F.R. 550.1302 defines the fire fighter's annual rate as "the rate fixed under the rate schedule applicable to the position held by the fire fighter including locality pay, established by 5 U.S.C. § 5304, or a special rate, established under 5 U.S.C. § 5305, before any deductions and exclusive of additional pay of any other kind."
[204] 5 C.F.R. § 550.1303(a); *See Agee v. U.S.*, 77 Fed. Cl. 84 (2007).
[205] 5 C.F.R. § 550.1303(b).
[206] 5 C.F.R. 550.113 (e)(1).

rate for all federal fire fighters **covered by the FLSA** (including those falling under the Section 7(k) partial exemption) is calculated by dividing the fire fighter's annual rate of pay by 2,756.

The overtime rate for federal fire fighters who are **not covered** (*i.e.* completely exempt from, such as employees falling under the executive, professional, or administrative exemptions) the overtime provisions of the FLSA is calculated the same way as overtime for non-FLSA exempt fire fighters; that is, they also receive overtime at a rate of one-and-one-half-times the fire fighter's basic hourly rate of pay for all hours worked in excess of 106 hours per biweekly pay period, or over 53 hours in an administrative workweek.[207] However, for FLSA-exempt fire fighters, the time and one-half rate of an FLSA exempt fire fighter is computed by dividing the fire fighter's annual pay by 2087 hours, and comparing that to the hourly rate derived by dividing the annual pay of a GS-10, step 1 employee by 2087 hours. The overtime rate is capped at one-and-one-half times the GS-10, step 1 rate, and cannot be less than the individual's basic rate of pay.[208]

5.6.3 Remedies Available Under Title 5

In Title 5 premium pay cases, employees are entitled to receive the difference between what they were paid as Title 5 premium pay, if anything, and what they would have been paid had they been paid properly. In addition, the employees can recover interest on their backpay damages and attorneys' fees and costs.[209]

The statute of limitations in Title 5 premium pay cases is six (6) years.[210] This means that employees who are seeking back pay for premium pay that they were improperly denied can recover backpay going back 6 years from the date that their claim is filed in court. However, the FLRA has held that if an employee's claims are pursued under the FLSA, the FLSA statute of limitations applies.[211]

Employees can pursue Title 5 premium pay claims in court or, if they are represented by a union, through the negotiated grievance procedure. Claims for more than $10,000 in damages must be pursued in the U.S. Court of Federal Claims if they are pursued in court.[212] In other words, local U.S. District courts do not have jurisdiction to hear an employee's claim seeking damages in excess of $10,000.

5.6.4 Section 7(k) and Federal Fire Fighters

With one exception,[213] the FFOPRA applies only to federal fire fighters in the GS-081

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[207] 5 C.F.R. § 550.1304(b).
[208] 5 C.F.R. § 550.113(e)(2).
[209] 5 U.S.C. § 5596.
[210] 5 U.S.C. § 5596(b)(4).
[211] *IFPTE Local 529 and Army Corps of Engineers*, 57 FLRA 784 (2002)
[212] 28 U.S.C. § 1491(a).
[213] According to the OPM's June 19, 2001 Retirement and Insurance Service Benefits Administration Letter (No. 01-107), Section 2 of Public Law 106-558 amends Title 5 by authorizing an overtime rate of pay equal to one and one-half times the hourly rate of basic pay for wildland fire fighters who are exempt from the overtime provisions of the FLSA, and who are employees of the Department of the Interior or the U.S. Forest Service of the Department of Agriculture. However, this exception is only applicable to wildland fire fighters while they are engaged in wildland fire suppression activities.

classification.[214] Therefore, federal employers are required to compensate all other FLSA non-exempt employees that are not fire fighters overtime pay as provided under Title 5, i.e. for all hours of work in excess of 8 hours in a day or 40 hours in an administrative workweek, unless those individuals are partially exempt from the FLSA under Section 7(k).[215]

OPM's regulations state that the following types of employees, among others, are engaged in fire protection activities for Section 7(k) purposes, and therefore exempt from the overtime provisions of the FLSA: employees in the Fire Protection and Prevention series, employees in other series for whom fire protection functions are full-time assignments, members of rescue and ambulance crews, and any other employee who performs fire control or suppression work for 80% or more of the hours worked.[216]

However, these types of employees must also satisfy the test set forth in 5 C.F.R. § 551.215(c)(1), which requires that an employee (including a fire fighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker): (1) be trained in fire suppression, (2) have the authority and responsibility to engage in fire suppression, (3) be employed by an organization with fire suppression as a primary mission, and (4) be engaged in the prevention, control , and extinguishment of fires or response to emergency situations where life, liberty, property, or the environment is at risk.[217]

[214] *See* 5 C.F.R. § 550.1302.
[215] 5 C.F.R. § 551.541
[216] 5 C.F.R. § 551.215.
[217] 5 C.F.R. § 551.215(c)(1)(i)-(ii).

6. STATE EMPLOYEES AND CONSTITUTIONAL ISSUES

Due to Supreme Court decisions that have expansively interpreted the Tenth and Eleventh Amendments to the U.S. Constitution, in most states, employees of the state do not have a private right of action to go to court to enforce the Fair Labor Standards Act (FLSA). Instead, they must rely on the U.S. Department of Labor to enforce the law on their behalf. Employees of local governments – political subdivisions of a state - such as counties, municipalities, townships, etc. do have a private right of action to enforce the FLSA and their rights have not been affected by these decisions.

6.1 The Tenth Amendment

During the 1960s through to the early 1980s, the U.S. Supreme Court went back and forth in its interpretation of the Tenth Amendment. The Court originally ruled that the Tenth Amendment did not prevent application of the FLSA to state and local government employees. Then, in *National League of Cities v. Usery,*[218] the Court ruled that the Tenth Amendment barred application of the FLSA to state and local government employees who performed traditional governmental functions. Nine years later, the *National League of Cities* decision was reversed in *Garcia v. San Antonio Metropolitan Transit Authority.*[219] In *Garcia,* the Court found the distinction set forth in *National League of Cities* between traditional and nontraditional functions to be unsound in theory and unworkable in practice. The Court held that the FLSA could be applied to state and local government employees without implicating Tenth Amendment concerns. Though, the *Garcia* decision remains in effect, public employers continue to raise the Tenth Amendment as a defense to employees' FLSA lawsuits, apparently in the hope that *Garcia* will be reversed.

The Fourth Circuit rejected the argument that the Supreme Court's 1997 decision in *Printz v. United States*[220] justified a Tenth Amendment defense to suits against state and local governments under the FLSA.[221] Following *Garcia,* it held that the Tenth Amendment provided state and local governments with no defense to FLSA actions.[1222]

6.2 The Eleventh Amendment

The FLSA provides for concurrent jurisdiction in state and federal courts.[223] Thus, an FLSA action may be brought in either state or federal court.

The Eleventh Amendment to the Constitution, however, provides that the jurisdiction of the federal courts does not extend to suits against a state brought by a private citizen. This immunity is not

[218] 426 U.S. 833 (1976).
[219] 469 U.S. 528 (1985).
[220] 521 U.S. 898 (1997).
[221] *West v. Anne Arundel County*, 137 F.3d 752 (4th Cir. 1998).
[222] *Id.*
[223] 29 U.S.C. §216(b).

absolute: a state may consent to be sued in federal court, and state officials may be sued in their individual capacities for money damages.[224]

In a 1989 decision, *Pennsylvania v. Union Gas,*[225] the Supreme Court held that Congress could abrogate the states' Eleventh Amendment immunity by making the abrogation of immunity explicit and by exercising its authority under the Commerce Clause. In 1996, the Court reversed *Union Gas* in *Seminole Tribe v. Florida*.[226] In that case, the Court articulated a view of the Constitution that greatly reduced the power of Congress to abrogate states' Eleventh Amendment immunity. The Court held that Congress' constitutional authority to abrogate Eleventh Amendment immunity emanates only from the Fourteenth Amendment.[227]

The Court then established a two-part test to determine whether Congress has validly abrogated Eleventh Amendment immunity: (1) it must express the intent to do so, and (2) the abrogation of immunity must be pursuant to a valid exercise of power under the Constitution.

Applying this test to actions against states under the FLSA, there is little question that the first part of the test is met: the FLSA clearly expresses congressional intent to abrogate states' Eleventh Amendment immunity. The Act's definition of an employer includes "any person acting directly or indirectly in the interest of an employer in relation to an employee" and includes a public agency.[228] The definition of public agency includes "a State or political subdivision of a State."[229]

Under the second part of the test, however, Congress may abrogate Eleventh Amendment immunity only pursuant to a valid exercise of power. Congress stated that it enacted the FLSA under the Commerce Clause.[230]

In *Seminole Tribe,* the Court held that Congress could not exercise its authority to abrogate states' Eleventh Amendment immunity under the Indian Commerce Clause—which the Court found to be virtually indistinguishable from the Commerce Clause power.[231]

Several points are particularly notable regarding the impact of the *Seminole Tribe* decision on FLSA suits. First, it affects only actions brought against states; it does not apply to actions brought against their political subdivisions, such as city and county governments.[232] Second, because the FLSA provides for concurrent jurisdiction,[233] the Eleventh Amendment does not affect the right of private citizens to pursue FLSA actions against a state in state court, nor does it prohibit FLSA actions in federal court if they are brought against individual state officers for an injunction ordering the

[224] *Ex parte Young*, 209 U.S. 123 (1908).
[225] 491 U.S. 1 (1989).
[226] 517 U.S. 44 (1996).
[227] *Id.*
[228] 29 U.S.C. §203(e).
[229] *Id.* §203(x).
[230] *Id.* §202(b).
[231] 116 S. Ct. at 1126.
[232] *Seminole Tribe v. Florida*, 517 U.S. 44, 134 L.Ed.2d 252 (1996).
[233] 29 U.S.C. §216(b).

officer to comply with the FLSA. Finally, the *Seminole Tribe* decision does not affect the right of the Secretary of Labor to bring actions against a state in federal court.[234]

6.2.1 Cases Granting Eleventh Amendment Immunity

Since *Seminole Tribe v. Florida*,[235] numerous courts that have addressed the issue have ruled that state employees may not sue their states under the FLSA, because Congress did not have power, under either the Article I Commerce Clause or the enforcement clause of the Fourteenth Amendment, to abrogate states' Eleventh Amendment sovereign immunity. With respect to waiver, courts have refused to find a waiver either by implication, by application of states' general waiver statutes, or by application of Tenth Amendment jurisprudence (congressional exercise of power over states does not affect sovereign immunity).

- *Meredith-Clinevell v. Dep't of Juvenile Justice*[236]

Plaintiff's claims for monetary damages against state officers acting in their official capacity were dismissed on the ground that Eleventh Amendment immunity applied, but with respect to plaintiff's request for injunctive relief based on alleged violations of the FLSA's anti-retaliation provision, the court noted that state officers acting in their official capacity are not entitled to Eleventh Amendment protection. The employee's motion was dismissed, though, because her informal complaints of retaliation were not protected under the statute.

- *Lopez Rosario v. Puerto Rico Police Department*[237]

Civilian employees of the Puerto Rico Police Department and Security Commission brought suit against Puerto Rico and certain individuals. The court dismissed against Puerto Rico on Eleventh Amendment grounds finding that Puerto Rico is a state for purposes of Eleventh Amendment analysis. It then dismissed the individual claims finding that *Ex parte Young* suits could not be maintained because of the FLSA's detailed remedial scheme providing for injunctive relief to be available only to the Secretary, and declaratory judgment to be unavailable because its sole purpose would be to provide an "end run" around the Eleventh Amendment jurisprudence.

- *Maryland Military Department v. Cherry*[238]

Maryland's Court of Appeals ruled that the state was immune from an FLSA lawsuit by employees of the National Guard. The court held that the state had not waived its sovereign immunity for direct judicial actions under the FLSA and, instead, required that individual employees pursue overtime claims through an administrative appeals process.

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[234] *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996).
[235] 517 U.S. 44 (1996).
[236] 344 F. Supp. 2d 951 (W.D. Vir. 2004).
[237] 126 F. Supp. 2d 167 (D.P.R. 2000).
[238] 382 Md. 117, 854 A.2d 1200 (2004).

- *Commonwealth of Virginia v. Luzik*[239]

The Virginia Supreme Court held that the Commonwealth did not waive its Eleventh Amendment immunity or consent to suit for unpaid FLSA overtime by waiving its immunity for contract debt.

- *Whittington v. State of New Mexico*[240]

The New Mexico Court of Appeals ruled that state was immune from FLSA suits by state employees but noted that decision should not be interpreted as precluding employees from asserting that the written employment policy of the employing state agency may constitute a contract.

- *Lawson v. University of Tennessee*[241]

Court of Appeals of Tennessee rejected the argument that the state waived its immunity from FLSA suits for University of Tennessee employees. Although legislature's creation of the Tennessee Claims Commission, with jurisdiction over negligent deprivation of rights established under Tennessee law, constituted an express waiver of sovereign immunity, the FLSA was not a statutory right "under Tennessee law" and the waiver did not apply.

- *Cockrell v. Board of Regents*[242]

A former assistant basketball coach sued the University of New Mexico and its former athletic director for overtime wages under the FLSA. The trial court denied defendants' motion to dismiss the claim. The court of appeals held that plaintiff could assert his FLSA claims under a state statute waiving immunity for actions based on written contracts, if he could establish the existence of his own employment contract with the state. On the appeal of this decision, the New Mexico Supreme Court reversed, holding that plaintiff's FLSA claim was not based on contract and that the New Mexico statute waiving immunity for contract actions did not operate as an implied waiver of state immunity to FLSA claims, even where an employment contract exists. Consequently, the court held that the state had not waived its constitutional immunity with respect to private suits for violation of the FLSA.

6.2.2 Cases Rejecting Eleventh Amendment Immunity

The determination as to whether a state has waived its Eleventh Immunity is unique to each state.

[239] 524 S.E.2d 871 (Va. 2000).
[240] 4 P.3d 668 (N.M. Ct. App. 2000).
[241] 2000 Tenn. App. LEXIS 53 (Tenn. Ct. App. 2000).
[242] 45 P.3d 876 (N.M. 2002).

- *Robertson v. Board of County Commissioners of County of Morgan*[243]

A Colorado federal district court considered whether a political subdivision of a state is entitled to share in the immunity from suit enjoyed by the state. The court held that the board of county commissioners was not entitled to share Colorado's Eleventh Amendment immunity from FLSA suits because the board had broad powers and the state retained relatively narrow control over the board's actions.

- *Ormsby v. C.O.F. Training Services*[244]

The federal court rejected an Eleventh Amendment defense by a provider of residential home mental health services. The court noted that any damages would be paid by the employer itself, not from the state treasury. The court explained that merely because the company would have to charge the state more for its services if it lost was not relevant to constitutional analysis. The court also noted that the employer was not a creation of state law, but simply a contractor. Additionally, the state did not exercise control over the employer's day-to-day operations and simply because the employer received 80 percent of its revenues from state funds was not enough to make it an "arm of the state."

- *Ahern v. New York*[245]

The plaintiffs timely filed an action for overtime pay in federal court against the state police. The case was later dismissed on Eleventh Amendment grounds, and the plaintiffs subsequently filed suit in New York state court within 90 days of dismissal from federal court. The state court, however, applying federal tolling principles, held that the 90-day statute of limitations prescribed by state law for the filing of such claims was tolled by the timely filing of the federal suit, and the plaintiffs' suit in state court should not be dismissed for failure to file within the statute of limitations.

- *Brandon v. Blagojevich*[246]

A federal court granted the defendants' motion to dismiss FLSA claims against the Illinois governor and the Illinois Secretary of Human Services in their official capacities but denied the motion to dismiss claims against them in their individual capacities. The plaintiff, a salaried personal aide in a Department of Human Services program, sued for unpaid overtime pay on behalf of himself, and all other current and former personal aides. The plaintiff claimed that he and others were required to work in excess of 40 hours a week without being compensated at a rate of one and a half times their regular rate of pay in accordance with the requirements of the FLSA. The defendants moved to dismiss the complaint, contending that the claims against them in their official and individual capacities were only nominally against them, and that the state of Illinois was the real party. The court observed that state officials can be sued in their individual capacities if (1) the complaint states that they are being sued as individuals, and (2) the

[243] 985 F. Supp. 980 (D. Colo. 1997), *aff'd*, 166 F.3d 1222 (10th Cir. 1999).
[244] 194 F. Supp. 2d 1177, 1182–87 (D. Kan. 2002).
[245] 662 N.Y.S.2d 684 (Ct. Cl. 1997), *aff'd*, 676 N.Y.S.2d 232 (App. Div. 1998).
[246] 2004 U.S. Dist. LEXIS 19857 (N.D. Ill. Sept. 30, 2004).

defendants' personal assets and not state funds will satisfy the judgment. The district court found that the plaintiff met this two-prong threshold and went on to find that the governor was involved with the program and could be considered as an "employer" under the FLSA.

- *Hoff v. Nueces County*[247]

The Texas Supreme Court reversed and remanded an intermediate appellate court decision and affirmed the trial court's ruling which denied Nueces County sovereign immunity in an action for various FLSA violations brought by current and former employees of the county sheriff department. The court noted that federal law, not state law, controls the treatment of a county for purposes of Eleventh Amendment. The court stated a county has sufficient is distinct from the state for Eleventh Amendment purposes, when it can (1) levy taxes to pay judgments against it, (2) issue bonds payable from county taxes, (3) sell property, and (4) contract for the construction or repair of structures. Therefore, cities and counties are a "body corporate and politic," and neither are arms of the state entitled to Eleventh Amendment immunity. The Texas Supreme Court held that Nueces was not an arm of the state for purposes of Eleventh Amendment immunity, and could be sued for federal claims, including those under FLSA, in state courts.

- *Hartman v. Regents of the University of Colorado*[248]

The Colorado Court of Appeals ruled that employees of the state university could be sued individually under the FLSA and that overtime pay claims did not fall within the state's immunity statute for tort claims. The court did find that the state was immune from suit involving retaliation claims under the FLSA because these claims fell within the tort immunity statute, but that individual state employees who qualified as employers under the FLSA were not immune from retaliation suit.

- *Cash v. Granville County Board of Education*[249]

A high school secretary/bookkeeper sued the County Board of Education for unpaid overtime under the FLSA. The trial court concluded that the County Board was an "arm of the state" and dismissed the suit on Eleventh Amendment grounds. The federal appellate court reversed. The court emphasized that the most important factor in determining whether an agency is in fact an "arm of the state" is whether a judgment against the entity would have to be paid from the state's treasury. Because all the parties involved in the suit agreed that the state would not be legally obligated to satisfy a judgment against the County Board, the court held that the Board was not an "arm of the state" and was not immune from an FLSA suit.

- *Dick v. Merillat*[250]

A former member of the county sheriff's department sued the county sheriff and County Board of Commissioners alleging that he was entitled to overtime under the FLSA for the time he spent

[247] 153 S.W.3d 45 (Tex. 2004).
[248] 2000 Colo. App. 1177 (Colo. Ct. App. 2000).
[249] 242 F.3d 219 (4th Cir. 2001).
[250] 745 N.E.2d 507 (Ohio Ct. App. 2000).

after work caring for his police dog. The Court of Appeals of Ohio concluded that the Supreme Court's holding in *Alden v. Maine*, barring FLSA suits against the states on the basis of the Eleventh Amendment, did not apply in the instant case because the police officer had brought suit against the county sheriff and the county commissioners and not the state of Ohio. The court further concluded that Ohio state statutes regarding sovereign immunity did not bar the FLSA lawsuit.

- *Ogugua v. Not-For-Profit Hospital Corp.*[251]

The District Court for the District of Columbia found that the defendant was not immune to suit under the FLSA because the legislative act that created the defendant non-profit organization provided that the organization had "the power to…sue and be sued in its corporate name." The court noted that this language created a presumption in favor of finding a complete waiver of sovereign immunity. The defendant did not attempt to rebut this presumption and the court concluded that sovereign immunity did not preclude the FLSA action.

[251] 217 F. Supp. 3d 76 (D.D.C. 2016)

7. COMPENSABLE HOURS OF WORK RULES

7.1 Hours Suffered or Permitted to Work

The Fair Labor Standards Act (FLSA) requires an employee to be compensated for all hours worked. Work not requested but suffered or permitted is compensable hours of work. For example, an employee who voluntarily continues to work at the end of his shift to finish an assigned task must be compensated for such time if the employer knew of or reasonably should have known that the employee is working. The above principles are also applicable to work performed away from the employer's premises or job site.[252]

In all such cases, it is the duty of the employer to exercise control to see that work is not performed if they do not want the work to be performed. Management cannot sit back and accept the benefits of the employees' labor without compensating the employees. The mere issuance of a rule against such work is not enough. Management has the power to enforce such a rule and must make every effort to do so.[253]

There are usually few problems in determining compensable hours of work when an employee is performing his principal job duties. There are, however, many activities that are performed before and after an employee's scheduled work hours for which in some cases it is more difficult to determine whether they are compensable under the FLSA.

7.2 Early Relief

Many fire fighters report to work prior to their scheduled starting time so they may relieve fire fighters on the previous shift. Such a policy may exist pursuant to an employee agreement either expressed or implied. Early relief time will not be considered compensable hours of work for fire fighters employed under Section 7(k) where such relief is of a voluntary nature and which does not result over a period of time in a failure to receive proper compensation for all hours actually worked.[254]

On the other hand, if the practice is required by the employer and the employees routinely work extra hours, the time must be added to the employee's tour of duty and be treated as compensable hours of work.[255] To attempt to deduct sleep or meal time, the employer may attempt unilaterally to implement a change in the work schedule from exactly 24 hours or less to more than 24 hours by establishing a practice of early relief. If the employer establishes such a practice over the employees' protests as a subterfuge to avoid the overtime requirements of the

[252] 29 C.F.R. § 785.11.
[253] 29 C.F.R. § 785.13.
[254] 29 C.F.R. § 553.225.
[255] *Id.*

FLSA the practice is probably unlawful.[256]

7.3 Physicals

Time spent waiting for and receiving medical attention is usually considered compensable under the FLSA as hours worked if such attention is received during working hours.[257]

An employee need not be compensated for medical attention under the FLSA if the employee visits a doctor outside working hours even though the injury occurred while working.[258] In addition, an employee need not be compensated if he chooses to have an injury received at work treated by someone other than a doctor who has been approved by of the employer.[259]

Time spent for a physical examination required by the employer in order to continue in service is to be counted as hours worked.[260] Similarly, an employee required to take a medical exam during normal working hours as a condition of continued employment must have such time counted as hours worked.[261]

The DOL has not issued an opinion on the compensability of time spent on medical examinations required by employers after an absence due to illness or injury.

7.3.1 U.S. DOL W&H Division Administrative Letter Rulings on Physicals:

DOL Opinion Letter, DOLWH Lexis 30 (September 10, 1987)

The DOL stated that employees going to medical/paramedical appointments pursuant to industrial injuries should be released from duty on leave for the time needed. If the appointment is during a time that the employee is not on duty, no leave is necessary. Travel time to receive the medical attention is compensable if it occurs during normal working hours. Although the first visit is generally compensable, when an employee arranges for a follow-up medical visit, it is generally not compensable time under the FLSA.

7.4 Time Spent Testifying in Court

When a fire fighter or a paramedic is called to testify in court as a witness, this time is usually compensable if attendance at the proceedings was a result of the performance of official emergency work. For example, if a paramedic renders treatment at an accident he may be called to testify in court about the accident he worked. However, when an employee is called to testify in court for an accident he witnessed while on duty, but rendered no assistance, any time in court is generally not compensable because the court activities would not have resulted from any

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[256] 29 C.F.R. § 553.222; *see also*, *Fire Fighters Local 349 v. City of Rome*, 682 F. Supp. 522, 527 (N.D. Ga. 1988) ("While it cannot be disputed that the new tour of duty exceeds 24 hours, a schedule change may not be implemented merely as a subterfuge to avoid the applicability of the FLSA")
[257] 29 C.F.R. § 785.43; U.S. DOL W&H Administrative Letter Ruling dated April 4, 1974.
[258] U.S. DOL W&H Administrative Letter Rulings dated January 6 and March 6, 1942.
[259] U.S. DOL W&H Administrative Letter Ruling dated March 6, 1942.
[260] U.S. DOL Solicitor's Opinion dated March 19, 1946.
[261] U.S. DOL W&H Administrative Letter Ruling #1315 dated April 4, 1974.

official duties taken by the employee. Conversely, where an employee is called to testify in regards to an accident where he rendered assistance as part of his or her job, the time spent in court is compensable whether or not it occurred while the employee was on duty or off duty.

7.5 Showering and Changing Clothes

Whether or not an employee is entitled to payment under the FLSA for time spent while showering and changing clothes depends on the nature of his work and the existence of a contract, custom, or practice as to compensability. If the employee showers or changes clothes for his own convenience, the hours worked are not affected and no compensation is due.[262]

However, an employee must be given credit for hours worked if the time spent showering or changing clothes is required by the nature of his principal job duties by the employer's rules or by law.[263] For example, where a fire fighter returns to the fire station from an alarm that involved handling hazardous materials, the time spent working was beyond his normal shift is compensable because the time spent showering and changing clothes would be considered hours worked since contact with dangerous chemicals makes these activities necessary to safeguard the fire fighter's health.

If a contract, custom, or practice provides for pay for time spent by an employee showering or changing clothes, the employer's liability is not canceled by the Portal-to-Portal Act, even if the time would not otherwise be compensable under FLSA.[264] A custom or practice which provides pay for time spent showering or changing clothes before or after work that would be compensable under FLSA, can be excluded only by specific language in a collective bargaining agreement.[265]

In the absence of an agreement otherwise, time spent by an employee at home changing into required uniforms in the morning and out of required uniforms in the evening does not normally constitute compensable hours of work.[266]

7.5.1 Section 3(o)

Section 3(o) of the Portal to Portal Act provides that time spent changing in and out of clothes is not compensable if the union has waived the right of employees for payment for such time through a custom or practice under a collective bargaining agreement.[267] Some courts, identified in the next section, have held that if a collective bargaining agreement is silent as to the compensability of such time, the union has acquiesced to the non-payment for this time.

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[262] 29 C.F.R. § 790.7(g).
[263] 29 C.F.R. § 790.8.
[264] 29 C.F.R. § 790.9.
[265] 29 C.F.R. § 785.26.
[266] U.S. DOL W&H Administrative Letter Ruling #682 dated October 20, 1967.
[267] 29 U.S.C. § 203(o).

7.5.2 Court Cases on Showering and Changing Clothes

- *Arcadi v. Nestle Food Corporation*, 38 F.3d 672 (2nd Cir. 1994)

The court found that time spent changing into and out of uniforms was not compensable under the FLSA. In reaching this decision, the court noted that the union and the employer had an understanding that time spent by employees changing into and out of uniforms would not be compensated. This understanding arose out of contract negotiations and constituted "practice" under section of the FLSA excluding changing time if custom or practice of non-compensation exists.

- *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)

The Supreme Court reviewed two consolidated cases involving two employers, one of which operated a plant that produced fresh beef and pork and the other employer operated a poultry processing plant. Both employers were sued by their employees who sought compensation for time spent "donning and doffing" (i.e., putting on and removing) protective gear before and after their scheduled shifts, as well as for time spent walking between the locker rooms and production floor before and after those assigned shifts. The protective gear included items such as outer garments that covered the employees' clothing, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots, as well as protective equipment for their hands, arms, torsos, and legs to protect against injuries from knives and other equipment used while performing their jobs. The employers only paid the employees based on the time the employees were physically on the production floor, and not for the time the employees spent walking to and from their locker rooms where they put on and removed their protective gear.

The Supreme Court found that the time spent donning and doffing the protective equipment was "integral and indispensable" to a "principal activity" the employees were hired to perform, and since that activity took place in the locker rooms, the workday began and ended in the locker rooms. Therefore, as part of the employees' continuous workday, all time after the employees picked up the first piece of equipment, including the time spent donning and doffing and the time spent walking between the locker rooms and the production floor, was compensable time under the FLSA.

- *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009)

The Fourth Circuit reviewed a case involving an employer who operated a poultry processing plant. As in *Alvarez*, employees sued the employer seeking unpaid wages for time spent donning and doffing protective gear worn while performing their jobs. The protective gear was similar in nature to that in *Alvarez*. The issue in *Sepulveda* was whether the activity of donning and doffing protective gear constituted "changing clothes" under Section 203(o) of the FLSA. Under that section, employers and unions may agree through collective bargaining to exclude from compensable time "any time spent in changing clothes . . . at the beginning or end of each workday." There was no such provision in the agreement between the employer and union; however, donning and doffing had been the subject of collective bargaining several years before the lawsuit was filed, but the employer and union never reached final agreement on the subject.

Once bargaining ended, the employer continued its practice of not paying employees for donning and doffing time. That prior bargaining was critical in the court's analysis because the court ultimately found for the employer reasoning that the prevailing custom or practice at the plant was for the employer not to pay its employees for donning and doffing protective gear.

- *Allen v. McWane, Inc.*, 593 F.3d 449 (5th Cir. 2010)

The Fifth Circuit reviewed a case involving an employer who manufactured cast iron pipe and fittings. Employees sued the employer for unpaid wages for time the employees spent donning and doffing protective gear, which included hard hats, steel-toed boots, safety glasses, and ear plugs. The employer operated ten different plants, all of which operated under separate collective bargaining agreements. Three of the ten agreements had provisions in them which expressly excluded compensation for pre-shift and post-shift donning and doffing of protective gear. The other seven agreements did not address the subject at all. Employees from those seven plants sued for unpaid wages for the time they spent donning and doffing their protective gear. Unlike in *Sepulveda*, the employer and employees in the case never bargained over the subject of compensating employees for donning and doffing time. The court nevertheless held that "even when negotiations never included the issue of non-compensation for changing time, a policy of non-compensation for changing time that has been in effect for a prolonged period of time, and that was in effect at the time a CBA was executed, satisfies [Section] 203(o)'s requirement of 'a custom or practice under a bona fide' CBA." The court concluded that the employer established a custom or practice of not compensating employees for changing time, so the time spent by the employees donning and doffing their protective gear was not compensable.

- *Musch v. Domtar Industries, Inc.*, 587 F.3d 857 (7th Cir. 2009)

The Seventh Circuit reviewed a case involving an employer who operated a paper mill. Employees sued for unpaid wages for time spent changing clothes and showering at the end of their work shifts. The employees claimed that their clothes, skin, and hair were regularly exposed to hazardous chemicals during work, and in order to reduce exposure to the chemicals, they had to shower and change their clothes before leaving the mill each day. The employer argued that compensation was not necessary because it had a policy in place under which employees who were exposed to hazardous chemicals on the job were instructed to remove any affected clothing immediately and wash the affected area. Under the policy, employees were paid for the time spent showering and changing where the activities were necessitated by exposure to hazardous chemicals, including any exposure that occurred at the end of an employee's workday. Ultimately, the court ruled in favor of the employer, finding that the employees had not shown that post-shift activities of showering and changing clothes were integral and indispensable to the employees' employment, nor had the employees shown that the employer's policy regarding exposure to hazardous chemicals was insufficient.

- *Sandifer v. U.S. Steel Corp*., 571 U.S. 220, 234 (2014)

In *Sandifer*, steelworkers brought suit under the FLSA against their employer and argued they were entitled to be paid for the time spent donning and doffing the protective gear U.S. Steel required them to wear "because of hazards regularly encountered in steel plants." The parties collective bargaining agreement provided that, in accordance with § 203(o), time spent

"changing clothes was noncompensable." The Court initially considered the definition of clothes as used in § 203(o) and held the term to mean "items that are both designed and used to cover the body and are commonly regarded as articles of dress." The Court went on to note that "[o]ur definition leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices." The Court held that a flame-retardant jacket, hood, pair of pants, snood, wristlet, hardhat, work gloves, metatarsal boots, and leggings all met its definition of clothes under § 203(o); the court distinguished equipment and other safety gear such as safety glasses, earplugs, and respirators because they were not common articles of dress. The court also defined "changing" under § 203(o) and held that the term should be construed broadly as altering ones dress – including layering work clothes on top of personal clothing items. The Court characterized the question presented by § 203(o) as "whether the period at issue can, on the whole, be fairly characterized as time spent in changing clothes or washing" and stated that where "the vast majority of the time is spent in donning and doffing 'clothes' as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted." The Court held that the steelworkers were not entitled to compensation for their time spent changing clothes, in light of the collective bargaining agreement and its broad interpretation of the statutory terms.

7.6 On-Call Time

Sections 553.221 and 785.17 of the DOL regulations specifically state hours spent "away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work."[268] As a result of the principles contained in those sections, it must be demonstrated that the employee cannot effectively use his time while on-call. Factors to be considered include whether the employer requires a specific response time, how frequently employees are required to come back to work while on standby, and whether employees are disciplined for not responding within any designated time limits for doing so.

Under existing caselaw, it is not enough merely to be required to respond to a pager when called or being forbidden from drinking alcohol while on-call to prevail in an on-call case. Other factors would need to be explored to determine whether the time was compensable such as whether there are restrictions on how quickly the employee must respond when called, how frequently the employees are called, whether they must respond in uniform and the totality of the circumstances of the on-call policy must be examined. In fact, a number of courts have found that firefighters and other emergency response workers are not entitled to compensation for on call time where they have "significant freedom to move about inside and outside of the homes."[269]

[268] 29 C.F.R. §§ 553.221 and 785.17.

[269] *No. 91-2725 Section "K", 1993 BL 185, at *8 (E.D. La. Mar. 30, 1993)*; *see also*, *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 724-26 (8th Cir. 2001) (holding that nurses were not entitled to compensation for their on call time where they were required to remain reachable by beeper or cellphone, prohibited from imbibing alcohol or mind altering drugs or medications, and be able to report to the hospital within 20 minutes of receiving a call.)

7.6.1 Court Cases Addressing the Compensability of On-Call Time

- *Armour & Co. v. Wantock*, 323 U.S. 126 (1944)

The Supreme Court stated that "time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." The employer hired the fire fighters to stay at the station and wait for something to happen. Because the fire fighters were not at liberty to leave the station while on call and they had to be in a state of readiness, the court ruled that they were actually on duty during this time and deserved compensation. In short, the fire fighters' time was strictly for the benefit of the employer and not for the personal benefit of the employees.

- *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988)

The Tenth Circuit ruled that van drivers should not be compensated for the time they spent on call because they were not so sufficiently limited as to their personal activities. A paging device allowed the drivers enough freedom to pursue their personal activities. Drivers also had the option to "go unavailable" or drop to the bottom of the driving list, thus decreasing the probability of a call back. The on-call periods lasted only eight hours.

- *Boehm v. Kansas City Power & Light Company*, 868 F.2d 1182 (10th Cir. 1989)

The Tenth Circuit ruled, as in *Norton*, that although the employees had to answer one-third of all call backs, the employer's call back policy was not so restrictive that the time the employees spent on call was predominantly for the employer's benefit. The employees only had to answer one of three calls and if they missed an entire on-call shift, it counted only as missing one call.

- *Renfro v. City of Emporia, KS*, 948 F.2d 1529 (10th Cir. 1991)

The Tenth Circuit reviewed and affirmed the district court's decision that 24-hour shifts, where certain Emporia fire fighters had to be on-call, should be considered compensable overtime hours. Using the applicable legal test, the court determined that the employer's restrictions during the on-call time prevented the fire fighters from utilizing the time effectively for their own personal pursuits, and thus, the on-call time was predominantly for the employer's benefit. The court's decision was based on the following factors:

- call-ins averaged three to five per day;
- on-call fire fighters had to be able to reach the fire station within twenty minutes;
- on-call fire fighters who missed (or were late for) a call-back were subject to discipline;
- employees could not leave town on trips or for other reasons;
- fire fighters' opportunities for secondary employment were restricted; and
- many fire fighters were hesitant to engage in group activities or activities requiring expenditure of money because they might be called at any time.

Significantly, the court distinguished its decisions in *Norton* and *Boehm* based, in part, on the nature of the fire fighters' employment. The court reasoned "[f]ire fighters must be alert, and the time spent lying in wait for emergencies could be considered a benefit to the employer and thus compensable under FLSA."

- *Birdwell v. Gadsden, AL*, 970 F.2d 802 (11th Cir. 1992)

The Eleventh Circuit found that time spent by plainclothes private detectives, both on-call and waiting for possible use during a strike of other city employees, was not compensable under the FLSA. The detectives contended that they should be compensated for time spent on-call because they could not carry on leisure activities such as leaving town or drinking and were required to remain near the telephone or carry a beeper. In reaching this decision, the court noted that the detectives' off-time was not so restricted that it was not used predominately for their benefit. The detectives could do anything they normally did so long as they were able to respond to a call promptly and sober. The court also noted that unlike the firefighters in the *Renfro* case, the detectives were "never called, and they never had reason to expect to be called."

- *Burnison v. Memorial Hospital, Inc.*, 820 F. Supp. 549 (D. Kan. 1993)

The court found that time spent on-call by emergency medical technicians and paramedics was not compensable under the FLSA. In reaching this decision, the court noted that on-call time of emergency medical technicians and paramedics employed by the hospital was predominantly their own. Factors cited in this decision are as follows: the frequency of call backs translated to between 1.1 and 1.4 calls every four days, a rate lower than that encountered by the plaintiffs in *Renfro*, and employees were not required to remain at the hospital while on-call; although the five minute response time as short, the city was relatively small and driving time and distance to the hospital generally would be within response time; employees were given pagers and were notified when on duty crew had responded to the call, resulting in some warning which served to lessen restrictions imposed by five-minute call back; the hospital allowed trading of on-call time; although the plaintiffs had to abstain from alcohol during their on-call period, they could still engage in activities such as watching television, housework, running errands, and reading.

- *Gilligan v. Emporia, KS*, 986 F.2d 410 (10th Cir. 1993)

The Tenth Circuit found that time spent on-call by employees of the water and sewer department was not compensable under the FLSA. The plaintiffs were required to wear a beeper; to respond to a call within as little as thirty minutes; could not consume alcohol; and were required to stay within the limits of the pager. In reaching this decision, the court noted the low frequency of calls (an average of less than one per day), and the fact that restrictions were not so prohibitive that on-call time was spent predominantly for the employer's benefit. The court found that employees were free to pursue personal activities with little interference while waiting to be called.

- *Bettis v. City of Camas, WA*, (case settled – no citation)

The City agreed to settle this on-call case brought by IAFF Local 2444. Under the settlement,

fire fighters received two years of back pay for their entire 24-hour shifts while on call. The City had a policy of requiring fire fighters to respond within five minutes of being called. Fire fighters responded directly to some emergency calls and received, on the average, two to three calls per shift.

- *Oliver v. Mercy Medical Center, Inc.*, 695 F.2d 379 (9th Cir. 1982)

The Ninth Circuit determined that on-call time was working time because Oliver, an ambulance attendant, had to remain in telephone or radio contact with the station and had to be able to respond to calls within three minutes during his on-call time.

- *Clay v. City of Winona*, 753 F.Supp. 624 (ND Miss. 1990)

Fire fighters in this rural area were denied on-call pay where they had to respond within five minutes but only received on average one call every two shifts.

- *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951)

The Tenth Circuit ordered overtime compensation for on-call time for an oil field pumper required by an employment agreement to operate oil pumps seven days a week and to be in a state of readiness during much of the time he was not actually operating the pumps.

- *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994)

The Ninth Circuit held that the on-call time of coroners was not compensable under the FLSA. The court reached this decision by applying a two-part test which examines: (1) the degree to which the employee is free to engage in personal activities and (2) the characterization of the on-call time by any agreements between the parties. The overall inquiry—characterized by the court as whether the employee is so restricted during on-call hours as to be effectively "engaged to wait"—focuses on a non-exhaustive list of factors derived from the regulations governing this issue set forth at 29 C.F.R. § 785.17 and 553.221. These factors include whether the on-call duties are similar to and as demanding as regular duties; the required response time when called; whether a pager is used; the ability to trade calls; whether excessive geographic restrictions are in place, such as requiring the employees to live on the premises; the frequency of calls; and whether the employee has actually engaged in personal activities during on-call time. The court also noted the nature of the employment. Whereas it is imperative that fire fighters, paramedics and EMTs respond as quickly as possible to calls due to the nature of their jobs, how rapidly coroners respond is not as important.

Applying these tests, the court noted that the parties' agreements failed to compensate the plaintiffs for their on-call time, a fact that weighed against finding the time compensable under the FLSA. The court also noted that the coroners were required only to answer a page by telephone within fifteen minutes of receiving the page; had no required response time by which to report to the scene; were not subject to discipline; had no difficulty trading shifts; had no difficulty maintaining secondary employment; had no geographical restrictions; and that the nature of the coroners' job did not require immediate responses.

- *Paniagua v. City of Galveston, TX*, 995 F.2d 1310 (5th Cir. 1993)

The Fifth Circuit ruled that time spent by plant mechanics while on-call was not compensable under the FLSA. In reaching this decision, the court noted that evidence supported the finding that the on-call provision of the city's personnel rules and regulations constituted a term of employee's contract. In addition, the fact that the mechanics were interrupted several times a week did not interfere with their ability to and otherwise travel within a thirty-mile radius. The city's agreement to pay the mechanics five and one-half hours overtime for each week spent on-call did not alter the court's decision.

- *Pfister v. New Orleans*, 1993 U.S. Dist. Lexis 4298; 1 Wage & Hour Cas. (BNA) 559 (1993)

The district court found that time spent on-call by fire arson investigators and a police arson detective was not compensable under the FLSA. In this case, fire arson investigators were required to be on-call every fifth day for 48 hours and to respond within 30 to 45 minutes to a call. The police arson detective was required to be on-call for a two-year period and to respond within a reasonable time. Further, both groups of employees were required to dress appropriately and to remain sober. In reaching this decision, the court noted that the employees had significant freedom to move about inside and outside of their homes. The limitations created by their on-call status were not so cumbersome as to warrant compensation under the FLSA.

7.6.2 U.S. DOL W&H Division Administrative Letter Ruling On On-Call Time

DOL Opinion Letter, 1992-__ (November 3, 1992); 1992 DOLWH Lexis 34; WHM 99:5232

The DOL responded to a request relating to the compensability of time spent on-call under the FLSA. The employer was planning to adopt a policy wherein fire fighters would be required to carry pagers and would have to respond to their assigned fire stations with 15 minutes of being paged. Fire fighters would not be required to respond in uniform but be prepared to assume normal work duties upon arrival at their respective fire stations. No other restrictions would be placed on the fire fighters during the on-call period.

The DOL determined that if employees are free to use on-call time for their own benefit, such time is not compensable under the FLSA unless or until they actually respond to a call. If calls to duty are so frequent that employees cannot use their off-duty time effectively for their own benefit, the entire on-call period would be compensable.

7.7 Rest Periods (Coffee Breaks)

Although the FLSA does not require rest periods, the employer must give employees rest periods if such periods are mandated by a more advantageous municipal, state, or federal law or collective bargaining agreement. DOL regulations have established two categories of rest periods, which are discussed below.

7.7.1 Rest Periods of Under 20 Minutes in Length

DOL regulations require that rest periods under twenty minutes are counted as hours worked. The DOL found that rest periods of short duration, running from five to twenty minutes, are common in the workplace and promote the efficiency of employees. In addition, they are normally considered compensable.[270]

7.7.2 Rest Periods of More Than 20 Minute in Length

The compensability of rest periods and coffee breaks longer than twenty minutes depends upon the freedom of the employee during the period and the nature of the job. If the criteria below are met, the employer need not count the time spent on rest periods as compensable hours of work:

- the employee must be free to leave the work premises and go wherever he pleases;
- the rest period must be long enough to allow the employee freedom of action and an opportunity to relax; and
- there must not be a deliberate attempt to evade the FLSA.[271]

7.8 Travel Time

Home-to-work travel indicative of normal employment (i.e., driving to work in the morning and home in the evening) does not constitute compensable hours of work. This practice is true regardless of whether the employee works at a fixed location or at different job sites.[272]

Time spent by an employee in travel as part of his principal activity (i.e., travel from job site to job site) during the workday must be counted as hours worked. For example, if an employee is required to report or perform work at an alternate location, the travel from the designated place to the alternate location is part of a day's work. This time must be counted as compensable hours of work regardless of contract custom or practice.[273] For example, a fire fighter works a 24-hour shift which begins and ends at 7 a.m. Upon completion of the 24-hour shift, the fire fighter is asked to go to another station to assist in completion of unfinished work. Although the work is completed at 10 a.m., the fire fighter is required to report to his regular station before going home. The fire fighter does not arrive at his regular station until 10:30 a.m., and the time between 7 a.m. and 10:30 a.m. is considered working time. If the employee went home instead of returning to his regular station, the travel after 10 a.m. would be considered home-to-work travel and not hours of work.

Overnight travel away from home is work time when it occurs during the employee's scheduled work day. The employee is simply substituting travel for other duties. This rule also applies to travel time which occurs during normal working hours on non-working days. For example, a fire

[270] 29 C.F.R. § 785.18.
[271] U.S. DOL W&H Release #4-837, dated June 10, 1940; U.S. DOL Administrative Letter Ruling, dated August 13, 1944.
[272] 29 U.S.C. § 254(a); 29 C.F.R. § 785.34.
[273] 29 C.F.R. § 785.38.

inspector is scheduled to work from 9 a.m. until 5 p.m., Monday through Friday. The fire inspector is scheduled to attend a seminar out of town and must travel from 9 a.m. to 11 a.m. on Saturday in order to reach his destination. Such travel time is considered compensable hours of work because it cuts through the normal 9 a.m. to 5 p.m. working hours on a non-working day.

Time spent in travel away from home outside of working hours is not compensable. For example, if the fire inspector mentioned above traveled from 7 a.m. to 9 p.m. on Friday he would not have been compensated for such time because it did not cut through the normal working day.[274]

Any work that an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride as an assistant or helper, is working while riding. This point holds true except during bona fide meal periods or when an employee is permitted to sleep in adequate facilities furnished by the employer.[275]

7.8.1 Court Cases and DOL Wage and Hour Division Opinion Letters on Travel Time

- *Anderson v. City of Bristol, Tenn.*, 6 F.3d 1168 (6th Cir. 1993)

Fire fighters' time spent moving firefighting clothing and bedding from one station to another is compensable since the move takes between fifteen and thirty minutes.

- *Knowles v. United States*, 29 Fed. Cl. 393 (1993)

The Court of Federal Claims found that employees of the Army Corps of Engineers were entitled to overtime pay under the Federal Employees Pay Act for time spent driving themselves and other employees to and from work sites. In reaching this decision, the court noted that refusal to act as a designated driver would have violated orders and employees' duties exceeded routine transportation.

- *Singh v. New York*, 524 F.3d 361, 367 (2d Cir. 2008).

The Second Circuit held that fire alarm inspectors who were required to "carry and keep safe inspection documents during their commutes," were not entitled to compensation for their travel time. The fire alarm inspectors used public transportation to return home from inspection sites and argued that the requirement to carry and keep safe the inspection documents imposed significant burdens on their commute and, therefore, it should be compensable. The alarm inspectors were required to choose circuitous routes to accommodate the bulk of the briefcases the documents were contained in, missed trains or buses because they could not move quickly with the documents, and the requirement to keep the inspection documents safe meant they had to decline social invitations. The Second Circuit analyzed the question of whether the commute time was compensable using the primary benefit test – e.g. examining whether the primary

[274] 29 C.F.R. § 785.39.
[275] 29 C.F.R. § 785.41.

benefit of the activity at issue goes to the employer or the employee. The court reasoned that the burden placed on the employees was relatively minor and that they were primary beneficiaries of the commute time. The court noted the alarm inspectors were largely able to use their commute time in the same manner as when they did not have the briefcases. As such, the Second Circuit held the commute time was not compensable because the primary benefit of the activity went to the employee, not the employer.

7.9 Training Time

As a general rule, employee attendance at lectures, meetings and training programs given by the employer are hours worked under the FLSA unless the following criteria are met:

- Attendance must be outside employee's regular working hours. (Where an employee scheduled to work Monday through Friday 9 a.m. until 4:30 p.m. attends a training seminar on Monday from 9 a.m. to 11 a.m., the attendance is not outside regular working hours);
- Attendance must be voluntary. (Where attendance is required by the employer, or if the employee is led to believe that his present working conditions or employment would be adversely affected if he did not attend, attendance would not be considered voluntary);
- The course, lecture, or meeting is not directly related to employee's job; and
- An employee must not perform any productive work during training time.[276]

7.9.1 Apprenticeship Training

Time spent in an organized training program of related, supplemental instruction by employees working under bona fide apprenticeship programs need not be counted as hours worked if the following criteria are met:

- The apprentice is employed under a written apprenticeship agreement or program which meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and
- Such time does not involve productive work or performance of the apprentice's regular duties.

Apprenticeship training will only be considered hours of work where a written agreement specifically provides for compensation. It is important to note that payment or an agreement to pay for apprenticeship training does not constitute an agreement that such time is to be considered hours of work.[277]

7.9.2 Independent Training

If an employee attends classes offered at an independent institution after work hours, the time

[276] 29 C.F.R. § 785.27, 785.28, 785.29.
[277] 29 C.F.R. § 785.32.

spent is not considered compensable hours of work. This principle would apply even though classes are directly related to the employer's job.[278]

There are special situations in which time spent attending classes on the employer's premises is not considered compensable hours of work. For instance, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions. Voluntary attendance by the employee at such courses outside of working hours would not be considered compensable hours of work. This principle would apply even though the classes are directly related to the employee's job.[279]

7.9.3 Fire and Police Academy Training

Attendance at a bona fide fire or police academy required by the employer is compensable hours of work under Section 7(k) of the FLSA when the employee is considered to be employed in fire or law enforcement activities as defined in Sections 553.210 and 553.211 of the DOL regulations. In this instance, basic training and advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.[280]

Fire fighters and police officers in attendance at a fire or police academy are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits.[281]

7.9.4 Specialized and Follow-Up Training

While time spent in attending training required by an employer is normally considered compensable hours of work, the following are situations in which time spent by public sector employees in required training is considered to be non-compensable:

- Attendance outside of regular working hours at specialized or follow-up training which is required by law for certification of public and private sector employees is not compensable hours of work for public employees within that jurisdiction. An example would be a city ordinance requiring recertification of public and private emergency rescue workers. This ordinance would render recertification training outside of regular hours of work non-compensable hours of work;
- Attendance outside of regular working hours at specialized or follow-up training which is required for certification of employees of a governmental jurisdiction by law of a higher level of government is not compensable hours of work. An example would be a state or county law which imposes a training obligation on city employees; and
- Time spent in the training described in 1 or 2 is not compensable, even if all or part of the training cost is paid by the employer.

[278] 29 C.F.R. § 785.30.
[279] 29 C.F.R. § 785.31.
[280] 29 C.F.R. § 553.214.
[281] 29 C.F.R. § 553.226.

8. SLEEP AND MEAL TIME REGULATIONS

The U.S. Department of Labor has established two sets of regulations regarding the deduction of sleep and meal time as non-compensable hours under the FLSA for purposes of computing employees' entitlement to overtime pay. One set of regulations applies to Section 7(k) employees – i.e., those defined employees engaged in "fire protection" or "law enforcement" activities.[282] The other set of regulations apply to Section 7(a) employees, including private sector employees.[283] The most significant difference is that under Section 7(a) sleep and meal time may be deducted if the employees' shift is 24 hours or longer. In the case of Section 7(k) employees, sleep and meal time cannot be deducted from fire or law enforcement employees unless the shift *exceeds* 24 hours. Otherwise, as explained below, the rules applicable to Section 7(a) and 7(k) employees are similar.

8.1 Meal Time Deductions

To deduct "on duty" meal periods, the employer must establish that the employees have received "bona fide meal period, and that there is an express or implied agreement between the employer and the employee to deduct meal time. Meal time will be considered hours worked in the absence of an employer/employee agreement or if the meal period is not bona fide.

The phrase "bona fide meal period" has been interpreted in two different ways. Applying the Department of Labor regulations, some courts have held that before meal time can be deducted, the employee must be completely relieved of his job duties for the purpose of eating a regular meal. Under this test, an employee is not considered to be relieved if he is required to perform any duties, whether they are active or inactive, while eating. For example, an office employee who is required to be at his desk for the duration of the meal period is not considered to be relieved of his duties. An alternative test that some courts have applied to determine whether a bona fide meal period exists, is called the "predominant beneficiary test." Under this test, the court must determine whether the employee or the employer is the predominant beneficiary of the meal time.[284]

Regardless of which of these two tests applies, it is difficult to conceive of any situation involving fire fighters at a fire station in which a meal period would be considered to be "bona fide." During their meal periods, fire fighters are still on standby, waiting to respond to emergencies. They are not considered relieved from duty and, due to the nature of their job, the employer is the predominant beneficiary of having a group of fire fighters at the station, on-call and ready to immediately respond to emergencies.

Not surprisingly, several court decisions have adopted a bright-line rule that meal periods for fire fighters are compensable under the FLSA if the firefighters are confined to the station and are

[282] 29 CFR §§ 553.222 and .223.
[283] 29 CFR §§ 785.18 through .23.
[284] See, e.g., *Bernard v. IBP,* 154 F.3d 259 (5th Cir. 1998); *Reich v. Southern New Eng. Telecomms. Corp.,* 121 F.3d 58 (2d Cir. 1997); *Barefiled v. Village of Winnetka*, 81 F.3d 704 (7th Cir. 1996).

obligated to answer emergency fire and rescue calls during the meal period.[285]

Assuming an employer could establish that a fire fighter or paramedic's meal period was bona fide, the employer must also establish that an express or implied agreement exists to exclude such time from overtime pay calculations. "Express agreements" between the employer and employees could include a provision in an employee handbook, a written agreement between the employee and employer, or a provision in the collective bargaining agreement. One court found that an "implied agreement" can arise from an employee's failure to rescind acquiescence to the arrangement.[286] However, in all cases, the agreement must be voluntary.[287]

8.1.1 Local Union's Role in Meal Time Deductions

Local unions who wish to be involved in the negotiations of a meal time agreement would be well advised to obtain the employees' written consent before executing the agreement on behalf of the employees. Obtaining the written consent of the employees provides the union protection in the event that a disgruntled employee later contends that the local union violated the duty of fair representation by excluding meal time without his consent. As noted above, however, it is unlikely that fire fighters who are on duty during meal breaks would be considered to have received a bona fide meal period under any circumstances.

8.1.2 Unilateral Deduction of Meal Time By The Employer

If employees wish to bring an end, prospectively, to meal time exclusions, local officers should collect and send signed letters of protest, or a petition of the membership, as soon as possible. The letter should state that the fire fighters do not agree with the deduction of meal time and are working under duress. This letter should prevent the employer from later claiming it had an implied agreement with the fire fighters to exclude meal time because the fire fighters continued working after the change was made.

8.2 Sleep Time Deductions

Sleep time may be deducted from the total hours worked for both 7(a) and 7(k) employees if all applicable criteria in the DOL regulations are followed. These deductions are permissible only if an express or implied agreement exists between the employer and the employees, as discussed above, adequate sleeping facilities are provided and the employee can get an adequate night's sleep.

As a result of the requirement of an employer/employee agreement local unions should be involved in any negotiations concerning a sleep time agreement if the employer raises the issue. The local union should obtain the written consent of the employees before executing the agreement on the employees' behalf. Should a sleep time agreement be reached, the employer is obligated to follow DOL guidelines on the compensation of interrupted sleep time.

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[285] *Kohlheim v. Glynn County*, 915 F.2d 1473, 29 WH Cases 1673 (11th Cir. 1990); *Johnson v. City of Columbia*, 949 F.2d 127, 130 (4th Cir. 1991) (en banc).
[286] *Bodie v. City of Columbia*, 934 F.2d 561, 30 WH Cases 584 (4th Cir. 1991); *Rotondo v. City of Georgetown*, 869 F. Supp. 369, 2 WH Cases2d 946 (D.S.C. 1994).
[287] *Johnson,* 949 F.2d at 130.

To be deductible from hours worked, the sleep period must be regularly scheduled. The maximum sleep time deduction is 8 hours. In addition, the employer must furnish adequate sleeping facilities, and the employees must have received a total of at least 5 hours of sleep during each tour of duty.

8.2.1 Interruption Of Sleep Time And Its Effect On Overtime

If sleep time is to be deducted from hours worked under the FLSA, interruption of the sleep time must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted as hours worked. The DOL regulations state that the employee should get at least 5 hours of sleep during the night; otherwise, the entirety of the designated sleep time must be counted as hours of work. The 5 hours need not be continuous or uninterrupted hours of sleep.

8.2.2 Local Union's Role In Sleep Time Deductions

As with meal time agreements, local unions who become involved in the negotiation of a sleep time agreement would be well advised to obtain the employees' written consent before executing the agreement on behalf of the employees. Obtaining the written consent of the employees provides the union protection in the event that a disgruntled employee later contends that the local union violated the duty of fair representation by excluding sleep time without his consent. If the employer has been deducting sleep time, the union can have the employees sign a petition demanding that sleep time no longer be deducted, thereby withdrawing their "agreement" to have sleep time deducted from compensable hours of work.

8.2.3 Unilateral Deduction Of Sleep Time By The Employer

Employees should immediately sign and send the employer a letter or petition of protest if sleep time is unilaterally deducted from hours of work. The letter should state that the fire fighters do not agree with the deduction of sleep time and are working under duress. This letter should prevent the employer from claiming it had an implied agreement with the fire fighters to exclude sleep time because the fire fighters continued working after the change was made.

8.3 Court Cases On Sleep And Meal Time

- *Hultgren v. Lancaster County*, 913 F.2d 498, 29 WH Cases 1569 (8th Cir. 1990)

Sleep time of employees of county residence for mentally challenged persons was held to compensable where the time was usually interrupted by the needs to care for the residents, and employees did not voluntarily agree to forgo compensation.

- *Beebe v. United States*, 226 Ct. Cl. 308, 640 F.2d 1283, 24 WH Cases 1189 (Ct. Claims 1981)

The Court ruled that the employees' mere acceptance of their paychecks (providing pay which excluded sleep and meal time from hours worked) did not constitute an implied agreement.

Although the employees accepted their paychecks, the union filed grievances voicing the fire fighters' disagreement with the exclusions. The fact that the fire fighters actively protested the exclusion shows that they did not consent and thus a meeting of the minds did not occur that would allow the employer to exclude sleep and meal time.

- *Bodie v. City of Columbia, SC*, 934 F.2d 561, 30 WH Cases 584 (4th Cir. 1991)

A fire fighter who never stated his objection to the employer's exclusion of his sleep time was found to have an implied agreement with the employer because he kept working. The employee did not protest because he knew that other fire fighters who protested were told they either "agreed" to the exclusion of sleep and meal time or they would be fired. Surprisingly, the issue of duress was not discussed in the decision.

The case was distinguished from *Beebe v. United States* because in *Beebe* the employees stated their opposition to the sleep and meal time exclusions; whereas in this case, the plaintiff voiced no objection. This case demonstrates the importance of submitting objections or protests to the exclusion of sleep and meal time, even when the employees know that the protest or objection is futile.

- *Johnson v. City of Columbia, SC*, 949 F.2d 127, 30 WH Cases 1027 (4th Cir. 1991)

The Fourth Circuit ruled that a written statement agreeing to the exclusion of sleep time signed under the duress of losing one's job is not a valid agreement. Although the plaintiff signed two separate statements of agreement, the employee showed that it was done under a real threat of losing his job. The employee's continued protests and the subsequent lawsuit are evidence that a meeting of the minds had not occurred and that the employee did not agree to the exclusion of sleep time. The City's reliance on state law and its claim that it was not using duress were rejected. In addition, the Court ruled that a fire fighter's meal time cannot be excluded unless they are completely relieved of the obligation to answer calls.

- *Brewer v. City of Waukesha, WI*, 691 F. Supp. 160, 28 WH Cases 1402 (E.D. Wis. 1988)

The Court ruled that impasse arbitration available under state law cannot be used to obtain an implied or expressed agreement that excludes sleep and meal time. The FLSA was designed to provide specific protections to workers that could only be given up by individual voluntary agreement with the employer. A third party cannot impose a policy on employees that preempts the FLSA. Even if the union agreed to arbitration and an arbitrator rules in interest arbitration that sleep and meal time should be excluded, no valid or binding agreement exists under the FLSA. Significantly, the individual fire fighters submitted a petition protesting the employer's plan to exclude sleep and meal time.

- *IAFF Local 2961 v. City of Jacksonville, NC*, 685 F. Supp. 513, 28 WH Cases 1204 (E.D.N.C. 1987)

The Court ruled that an agreement to exclude sleep time from hours worked did not exist, and thus the employer could not deduct the time from hours worked. Although the City welcomed

comments on the new exclusion before it was implemented and the employees continued to work, the fire fighters filed a petition objecting to the sleep time exclusion within days of its posting. The Court ruled that this protest demonstrated there was no "express or implied agreement."

Under these circumstances, the Court stated that for the fire fighters to show their disagreement with the sleep time exclusion they would have had to quit. Therefore, they were placed in a no-win situation where they would have had to accept the exclusion or quit to show their disagreement. The forced acceptance and the petition protesting the sleep time exclusion indicated that no meeting of the minds or mutual consent occurred that would indicate an implied consent.

- *Kohlheim v. Glynn County*, 915 F.2d 1473, 29 WH Cases 1673 (11th Cir. 1990)

The Court of Appeals for the Eleventh Circuit ruled that fire fighters' meal times without "complete relief from duty" are to be included as hours worked for overtime purposes under the FLSA. Although meal times may be exchanged for shifts of over 24 hours, the fire fighters must be completely relieved of duty. In this case, the fire fighters were required to remain at the station and were subject to emergency call, so that the fire fighters' time was clearly for the benefit of the County and thus compensable under the FLSA overtime regulations.

- *Burgess v. Catawba County*, 805 F. Supp. 341, 2 WH Cases2d 1559 (W.D.N.C. 1992)

The district court found that the County could not deduct the meal time of its EMS employees on grounds that the employees were not relieved of "substantial responsibilities" during their meal times. The court found that the employees were subject to calls to which they were required to respond to during this time. It concluded that the employer's policy, which resulted in frequent interruption of meal times, inured to the benefit of the County, as it was able to maintain a pool of EMS employees prepared to respond to emergencies during these periods.

The court also held that the County could not properly deduct the employees' uninterrupted sleep and meal time pursuant to an express or implied agreement insofar as no such agreement existed. It rejected the County's argument that its personnel policy in place allowed for such deductions, and it noted that EMS employees had consistently complained about the deductions.

- *Holb v. City of Beaufort, SC*, 996 F.2d 1211, 1993 U.S. App. LEXIS 15166 (4th Cir. 1993)

The Court of Appeals found that eight fire fighters formerly employed by the City had implicitly agreed to the exclusion of sleep time from compensable hours of work under the Fair Labor Standards Act.

Five employees were hired after the new pay system which excluded sleep time was implemented and they elected to continue working for the City. Even if complaints were voiced the court determined that the employees implicitly agreed to the system when they continued in their employment after discovering the exclusions. In addition, one employee who was employed

when the new pay system was established never complained about the pay system until the end of his employment which occurred more than three and a half years after the changes were affected. As a result, the court found that the employee had also implicitly agreed to the pay system.

The remaining two employees were employed when the new pay system was established, but the Court determined that they failed to "formally" complain about the pay system. In particular, the court noted that the employees failed to file a grievance (although complaints regarding pay and benefits are not grievable under South Carolina law). In addition, they could not point to any threats made by the City, only subjective feelings of unease as their basis for not pursuing the complaints. Further, the City did not threaten the fire fighters with termination but rather responded to complaints by holding staff meetings. As a result of these factors, the court determined that the remaining two employees did not produce any evidence that their continued employment was anything other than an implicit agreement with the City about the pay system. Significantly, the court apparently was unaware that South Carolina law did not permit grievances to be filed regarding matters related to compensation.

- *Rotondo v. Georgetown. SC*, 869 F. Supp. 369, 2 WH Cases2d 946 (D.S.C. 1994)

The district court found that the City's extension of the tour of duty of fire fighters by 15 minutes, to the 24 hours and 15 minutes, was lawful and was not discriminatory even if done solely to evade the Fair Labor Standards Act overtime requirements. In addition, the court found that fire fighters were required during their meal time to remain at the station and were subject to respond to emergency calls. Applying the lenient "completely relieved of duty" test set forth by the Fourth Circuit in *Johnson v. City of Columbia*, the court held that the fire fighters' meal time was compensable under the Act.

Addressing the employer's exclusion of sleep time from hours worked for all fire fighters, the Court divided the fire fighters into two categories (1) those hired prior to the exclusion of sleep time and (2) those hired after the exclusion of sleep time. With regard to the first group of employees, the court held that the fire fighters' continuance of their employment could constitute an implied acceptance of the exception of their meal and sleep time, but only if the evidence shows that they did not voice sufficient complaints regarding their condition.

The court also found that an implied agreement existed between the City and the second group of fire fighters. In reaching this decision, the district court noted that there was no evidence of misrepresentation by the city, insofar as the fire fighters were informed of their annual salary and they would be working 24 hour and 15 minute shifts. Even if they were unaware of the sleep exclusions when they negotiated terms of their jobs, the court found that they became aware of the exclusion shortly after they received their first paychecks, and that they manifested acceptance of this condition by continuing to accept their paychecks after this date.

This same principle was held not to apply, however, to the exclusion of *meal* times of those plaintiffs in the second group. The court held that even if these plaintiffs had implicitly agreed to this exclusion, the meal periods were not properly exempted by the agreement insofar as they were not "bona fide" under the "completely relieved of duty" test. The court held that, unlike the

sleep time requirement, for meal periods to be excluded there must be both an agreement to do so and the periods must be bona fide, citing 29 CFR §§ 553.233(d), 785.101 and 785.22.

- *Carter v. Charleston*, 4 WH Cases2d 448 (D.S.C. 1997)

The City failed to show that firefighters' tours of duty were for more than 24 hours, even though it had a written policy establishing firefighters' shift as 24 hours and 15 minutes; as a result, the plaintiffs were entitled to compensation for their sleep time. The City's policy was not implemented or enforced, and evidence showed that fire fighters had been assigned to tours of duty of exactly 24 hours; fire house time records showed 24-hour shifts; job advertisements stated that the work schedule was 24 hours on duty and 48 hours off duty; and an internal memo from the fire chief directed that, going forward, fire department employees were to be placed on tours of duty of 24 hours and 15 minutes.

- *Allen v. City of Greenville*, 1999 U.S. Dist. LEXIS 20207, 6 WH Cases.2d 1167 (N.D. Miss. 1999)

The court rejected claims by fire fighters, finding that they worked tours of duty in excess of 24 hours, and that their continued employment constituted an implied agreement to the sleep time rules. However, the court raised the possibility that the sleep time deductions might be lost if the condition of sleeping facilities had deteriorated such that they were "inadequate."

8.4 U.S. DOL Wage & Hour Division Letter Rulings

- *December 1, 1987*:

An expressed or implied agreement must exist between the employer and the employees in order to deduct sleep time. A contract cannot be implied where one party has expressly disavowed all intention to contract. Mere acceptance of their paychecks does not establish an agreement. The City must point to some statement act or deed **beyond acceptance of a reduced paycheck**, to establish an implied agreement to exclude sleep or meal time.

- *January 17, 1995*:

The Department of Labor responded to a request relating to the exclusion of sleep time from compensable hours of work of police officer and fire fighters subject to the overtime provisions of the Fair Labor Standards Act. An employee is not deemed to have agreed to the exclusion of sleep time merely by continuing to work under a new system instituted by the employer. Furthermore, the employer cannot rely on agreements signed by the employee "under duress." Thus, implied agreements to exclude sleep time can be rescinded by employees.

The Department of Labor also stated that where there was previously an express or implied agreement to exclude sleep time from compensable hours of work, an employee could unilaterally withdraw his or her consent to such agreement, and the employer would then be required to compensate the employee for any future sleep time that may occur. The employer would not, however, be required to agree to a continuation of the same terms and conditions of

employment. The employer and the employee are free to establish new conditions of employment such as rate of pay, hours of work or reassignment.

- *April 7, 1995*:

Following an employee's withdrawal of consent to the deduction of sleep time, the "employer and employee are free to establish new conditions of employment such as rate of pay, hours of work, or reassignment."

9. SECTION 7(P)(3) SUBSTITUTIONS

Section 7(p)(3) of the FLSA provides that any individual employed in any capacity by a public agency may agree to substitute, during scheduled work hours, for another employee without it affecting the employer's liability for overtime pay.[288] This can take the form not only of trading hours, but of Employee A paying Employee B to work in Employee A's place, or even of Employee B "covering" for Employee A without any quid pro quo. Employees may work substitution schedules where the employees voluntarily agree to substitute for one another, and the employer approves of the substitution.

Traded time will is not considered by the public agency when calculating hours for which an employee is entitled to overtime compensation. In effect, even though a substitution has taken place, each employee will be considered to have worked his or her normal schedule.[289] Where an employee trades hours, each employee is credited as if he or she had worked his or her normal schedule for that shift.[290] Under the DOL regulations, the nonworking employee is credited with the hours worked by the substitute. In addition, the employer is not required to keep a record of the hours of substituted work.[291]

There is no FLSA requirement that the nonworking employee later work in place of the substitute, but the parties may agree to that arrangement.[292] In certain situations, the practice has developed where employees do not trade shifts pursuant to Section 7(p)(3), but instead one employee pays another to work all or part of the employee's shift. The DOL has determined that Section 7(p)(3) leaves the arrangement regarding substitution of time between the two employees. Thus, it is the prerogative of the employees how the substituted employee will pay back the substituted employee. The DOL has determined that it is consistent with the provisions of Section 7(p)(3) for the pay back to be a cash payment.[293]

It is important to note that the substitution provisions apply only when the employee's decision to substitute is made freely and without direct or implied coercion.[294] An employee's decision to substitute will be deemed to have been made freely where it is made without fear of reprisal or promise of reward by the employer and is exclusively for the employee's own convenience.[295]

In *Senger v. City of Aberdeen, S.D.*,[296] the Eighth Circuit addressed whether a public employer could avoid counting substituted hours of work by either employee as work hours for purposes of computing overtime compensation. In that case, fire fighters were regularly scheduled to work

[288] 29 U.S.C. §207(p)(3).
[289] 29 C.F.R. §553.31.
[290] *Id*.
[291] 29 U.S.C. §211(c); 29 C.F.R. §553.31(c).
[292] WH Admin. Op. (Jan. 2, 1987), Wage & Hour Manual (BNA) 99:5153–54.
[293] WH Admin. Op. (Dec. 13, 1993), Wage & Hour Manual (BNA) 99:5285.
[294] 29 C.F.R. §553.31(b).
[295] *Id*.
[296] 466 F.3d 670 (8th Cir. 2006).

more hours than the FLSA permits an employee to work without receiving overtime pay. On occasion, the fire fighters would ask other employees to work shifts on their behalf by trading shifts. When trading of time among fire fighters occurred, the city paid the fire fighters straight time for their substituted shifts but, for FLSA purposes, would not count the time as hours worked by either the substituting fire fighter or the fire fighter originally scheduled to work. The Eighth Circuit held that Section 7(p)(3) requires the city to pay the scheduled employee as if he or she had worked the scheduled shift, including all the overtime compensation to which the employee would otherwise have been entitled. In so holding, the Court of Appeals adopted DOL's interpretation of its own regulation,[297] which provides "that when one employee substitutes for another, the hours worked are 'excluded' from the hours 'for which the substituting employee would otherwise be entitled to overtime compensation,' and 'each employee will be credited as if he or she had worked his or her normal work schedule for that shift.'"[298]

In an opinion letter issued November 4, 2005,[299] DOL determined that the proposed practice of respiratory therapists at a state university hospital of substituting shifts with other employees so that they could work straight 12-hour shifts was consistent with Section 7(p)(3) of the FLSA. The hospital was willing to permit the practice only if it did not add to compensatory or overtime costs. The DOL stated that under 29 U.S.C. §207(p)(3), "[a]n employee may substitute for another employee if their employer, which is a public agency, approves of the substitution and the substitution is solely at the option of the employees involved in the substitution. If these requirements are met, the employer is not required to pay overtime for the additional hours worked for which the employee was not originally scheduled to work." In order to be "solely at the option of the employee" there must be no negative or positive repercussions by the employer based on whether an employee decides to substitute shifts. There is also no limit on when or how many substitutions occur since the agreement to substitute is entirely between employees and does not involve the employer.[300] Finally, there are no record-keeping requirements for documenting the voluntary nature of the substitutions and therefore an employer may use its customary method.

[297] 466 F.3d at 674.
[298] *Id*. at 672 (quoting 29 C.F.R. §553.31(a)).
[299] WH Opinion Letter FLSA 2005-49 (Nov. 4, 2005).
[300] The DOL clarified one point, however, in an opinion letter issued in 2008 in which it explained "the employer does not have to directly compensate the substituting employee except in the rare instance where the substituting employee has worked so many substitute shifts that his or her wages for all hours worked in the workweek otherwise would fall below the minimum wage." WH Opinion Letter FLSA 2008-2 (March 17, 2008).

10. SECTION 7(P)(1) SPECIAL DETAIL WORK

10.1 Statutory Provisions

Section 7(p)(1) sets forth a special exemption for special detail work by fire protection employees and law enforcement employees of public agencies, so that the hours spent on special details need not be combined with an employee's other work hours for purposes of calculating their overtime compensation.[301] For this partial overtime exemption to apply, the employment must be solely at the individual's option and the individual must agree to be employed on a special detail by a separate and independent employer in fire protection, law enforcement or related activities. If these conditions are met, the hours worked for the independent employer do not count toward the employer's FLSA overtime liability for the employee even though the public agency employer —

> (A) requires that its employees be hired by a separate and independent employer to perform the special detail;
>
> (B) facilitates the employment of such employees by a separate and independent employer; or
>
> (C) otherwise affects the condition of employment of such employees by a separate and independent employer.[302]

10.2 Provisions In The Regulations

The decision as to whether an employer is separate from the employee's primary employer must be made on a case-by-case basis. DOL's regulation on outside employment specifies, however, that the primary employer "may facilitate employment or affect the conditions of employment of such employees."[303] For example, the primary employer may maintain a roster of employees who wish to volunteer for the work, and it may select the employees who will work, negotiate their pay, and retain a fee for administrative expenses. The primary employer may even require the employees to observe its standards of conduct while working for the separate, outside employer.[304]

In the regulation pertaining to outside employment, the DOL provides examples of assignments that fail to qualify as outside employment under Section 7(p)(1).[305] The DOL states that assignments of police officers outside of their normal work hours to perform crowd control at a parade do not qualify where the assignments are not solely at the police officers' option. The DOL notes that this would be true even if the parade organizers reimbursed the public agency for these services.

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[301] 29 U.S.C. § 207(p)(1).
[302] 29 U.S.C. § 207(p)(1)(A)-(C).
[303] 29 C.F.R. §553.227(d).
[304] WH Admin. Op. (Mar. 22, 1989), Wage & Hour Manual (BNA) 99:5228–29.
[305] 29 C.F.R. §553.227(g).

10.3 Decisions Interpreting The Statute and Regulations

In *Barajas v. Unified Government*,[306] the court established a six-factor test to determine whether separate employers exist. The factors are (1) whether the entities maintain separate payrolls, (2) whether they have separate budgets, (3) whether they maintain arm's-length dealings regarding employment, (4) whether the entities participate in separate retirement systems, (5) whether they are independent entities under state law, and (6) whether they can sue or be sued. The court determined that these factors were to be considered separately and that not all of the factors needed to be met for the entities to be considered separate for purposes of Section 7(p)(1).

In *Nolan v. City of Chicago*,[307] the court applied the six factors when it addressed whether the Chicago Transit Authority (CTA) and the Chicago Housing Authority (CHA) constituted separate entities from the City of Chicago under a City of Chicago program entitled the "Voluntary Special Employment Program." The court concluded that the CHA and CTA were separate entities from the city. Each was established separately under state law; they each had the authority to issue tax notes; they could each pass ordinances and promulgate regulations; and they could each be sued or sue on their own behalf. Accordingly, the court ruled that the police officers' time spent working for the CHA and CTA constituted outside employment under Section 207(p)(1); therefore, the police officers' hours did not need to be combined with their time spent working for the City of Chicago when computing their entitlement to FLSA overtime pay.

Conversely, in *Cox v. Town of Poughkeepsie*,[308] the court determined that police officers' work as court security officers was for the same employer, rather than "separate and independent" employers. The court explained that the officers were paid by the town for both their police services and their court security services, the town computed all of the hours worked by the plaintiff officers on the same payroll and paid each officer for his or her combined police and court hours on the same paycheck.

In *Cahill v. City of New Brunswick*, [309] the court held that police officers were not independent contractors but city employees where the city administered control over the "extra jobs" program, received a cut of the pay received, applied its workers compensation program to participating employees, and considered the employees to be on-duty for purposes of answering calls for the City.

In *McGrath v. City of Somerville,*[310]the court found that work performed by two police officers – who were employed by the City of Somerville – for the DEA and FBI was excludable under the special detail exemption. The court employed a six part test similar to the factors in the *Nolan* test: "(1) whether the agencies maintained separate payrolls; (2) whether the entities had arms-length dealings regarding employment; (3) whether the agencies had separate budgets; (4) whether the employees of the entities participate in separate retirement programs; (5) whether they are

[306] 87 F. Supp. 2d 1201, 1204 (D. Kan. 2000).
[307] 125 F. Supp. 2d 324 (N.D. Ill. 2000).
[308] 209 F. Supp. 2d 319 (S.D.N.Y. 2002).
[309] 99 F. Supp. 2d 464, 7 WH Cases2d 988 (D.N.J. 2000).
[310] 419 F. Supp. 3d 233 (D. Mass. 2019).

independent entities under state statute; and (6) whether they can both sue and be sued." The court found that all of these factors strongly suggested that the DEA and FBI were separate and independent entities from the City. Specifically, the court noted they were created under federal law, had separate budgets, did not depend on the City for funding or budget approval, maintained separate payrolls, and could sue and be sued separately from the City. The court also found that the police officers performed the work solely at their option, even where they did not have the unilateral authority to accept a detail over their employers objection, because they voluntarily chose to accept the special detail.

In *Specht v. City of Sioux Falls*,[311] the Eighth Circuit reversed and remanded the decision of the District Court that found the City's firefighters were exempted from overtime pay under the special detail regulations while they fought wildfires pursuant to an agreement with the State of South Dakota. The City argued that the firefighters' hours spent fighting wildfires were voluntary and that the firefighters were State employees at the time they performed these duties. The Eighth Circuit agreed that the hours were voluntary, even though the City could hypothetically require a firefighter's deployment to fight the wildfires. The court was persuaded the hours were voluntary because several firefighters declined the additional duty and suffered no repercussions. The Eighth Circuit found, however, that there were genuine disputes of material fact concerning whether the firefighters were employed by the State and not the City. The court noted that the firefighters were fighting the wildfires for the State during their regular shifts and not their off-duty hours, that the City agreed to pay the firefighters their full salary even if they did not meet their monthly quota while working for the State, and the agreement between the City and the State explicitly stated that the State was not a party to any employment contract between the City and *its personnel*. The Eighth Circuit found that all these facts could reasonably be viewed as establishing the City as the firefighter's employer and, therefore, reversed and remanded the District Court's ruling that the special detail exemption applied.

In an opinion letter dated April 28, 2006,[312] the DOL considered whether Section 7(p)(1)'s special detail partial overtime exemption applied to police officers providing security for a third-party private employer at a city-owned sports complex. The Department concluded that the exemption applied because the city and the third-party contractor were separate legal entities, their dealings with each other fell within the scope of permissible activities set out in Section 7(p)(1) and 29 C.F.R. § 553.227, and the officers' decision to work for the third party was completely voluntary.

Similarly, in an opinion letter dated December 31, 2007,[313] the DOL concluded that the exemption applied to police officers employed by a city who provided security at the city's convention center, which was operated by a private, non-profit convention center authority organized under state law. The DOL determined that the city and the convention center authority were separate and independent employers for the application of Section 7(p)(1) of the FLSA. Consequently, the city did not have to pay the officers overtime for the hours that the officers were working for the convention center authority.

[311] 639 F.3d 814, 815 (8th Cir. 2011)
[312] WH Admin. Op. FLSA 2006-13 (April 28, 2006).
[313] WH Admin. Op. FLSA 2007-12 (December 31, 2007).

However, in an earlier opinion letter, the DOL analyzed whether certain time worked by state police troopers constituted "outside employment" under the regulation.[314] The state police had an agreement with an aviation administration that required the state police to be responsible for all law enforcement and public safety duties at an airport. The troopers were permitted to "volunteer" for this duty at their normal pay rates. The DOL determined that this time was merely an extension of the troopers' normal duties and did not constitute "outside employment" for a separate employer.

[314] WH Admin. Op. (June 20, 1986), Wage & Hour Manual (BNA) 99:5123–24.

11. CHARITABLE ACTIVITIES

Time spent by employees on public or charitable activities counts as compensable hours worked if:

- the employer requests the work;
- the employer directs or controls the work; ***or***
- the employee is required to be on the employer's premises.

On the other hand, such time need not be counted as hours worked if:

- the employee voluntarily devotes time to the activity; ***and***
- the activity is performed outside the employee's normal working hours.[315]

For example, the employer would not be liable for hours spent by a fire fighter in his/her employ who was voluntarily teaching first aid classes for the Red Cross outside the normal working hours. In contrast, the employer would be liable for hours spent by a fire fighter who, at the request of the employer, gave lectures to children on fire prevention during fire prevention week.[316]

[315] 29 C.F.R. § 785.44.
[316] *Id.*; *See also Sapphos v. Gross Pointe Development Company, Inc.*, 2008 U.S. Dist. Lexis 29182 (M.D. Fla. 2008).

12. CALCULATING OVERTIME PAY

The general overtime pay standard in Section 7(a) of the Fair Labor Standards Act (FLSA) requires that overtime must be compensated at a rate not less than one and one-half times the employee's regular rate of pay for hours in excess of 40 in a week.[317] As explained below, however, the hourly standards at which the FLSA requires overtime to be paid to employees "engaged in fire protection" are much higher and the time periods that employers can use to determine whether overtime compensation must be paid can be longer than 7 days.

The "regular rate" of pay at which the employee is employed may not be less than the statutory minimum wage. If the employee's regular rate is higher than the statutory minimum, the overtime compensation must be calculated at not less than one and one-half times the higher rate.

12.1 Computation of Overtime Pay

12.1.1 Fire Fighter Coverage

Public agencies are required to pay overtime compensation to their fire protection employees on a workweek basis as required by Section 7(a) of the Act, unless they elect to take advantage of the partial overtime exemption provided under Section 7(k)[318] which applies on a work period basis. Under this provision, an employer may adopt and establish a work period of 7 to 28 consecutive days for the purpose of paying overtime compensation. Where the employer establishes a 7-day work period, overtime compensation must be paid to the employee for time worked beyond 53 hours. If the maximum 28-day work period is used, overtime pay is due for each hour worked in excess of 212 hours.[319]

The following table shows the work periods between 7 and 28 days and the hourly level beyond which overtime compensation must be paid.[320]

WORK PERIOD (DAYS)	HOURLY LEVEL
7	53
8	61
9	68
10	76
11	83
12	91
13	98
14	106
15	114
16	121

[317] 29 U.S.C. § 207(a).
[318] 29 U.S.C. § 207(k).
[319] 29 C.F.R. § 553.230.
[320] *Id.*

17	129
18	136
19	144
20	151
21	159
22	167
23	174
24	182
25	189
26	197
27	204
28	212

Public employers have the option of choosing to pay overtime compensation for hours worked in excess of the 40-hour level prescribed in Section 7(a) of the FLSA or, if they adopt and establish a work period of between 7 and 28 days, they can use the higher hourly levels offered in Section 7(k) of the statute, and which are set forth above.

12.1.2 Regular Rate of Pay

An employee entitled to overtime compensation under Section 7(a) or Section 7(k) of the FLSA must be paid one and one-half times the "regular rate" for each hour of overtime worked. The U.S. Supreme Court has described the regular rate as the hourly rate actually paid an employee for the normal, non-overtime workweek for which he is employed.[321] An employee's overtime pay must be based on a regular rate derived from actual earnings and hours worked. The FLSA defines the regular rate to include all remuneration for employment paid to an employee except specifically designated payments referred to as "statutory exclusions." Unless the sum paid to an employee for employment falls in one of the statutory exclusions, it must be included in the regular rate.[322]

There is a statutory presumption that any form of remuneration must be included in the regular rate, unless it squarely falls within one of the specific statutory exclusions.[323] Payments which come under the statutory exclusions and may be excluded from the regular rate of pay are defined in the FLSA as:

- Sums paid as gifts, such as those made during the holidays or other special occasions, as rewards for service. Such amounts cannot be measured by or be dependent on hours worked, production, or efficiency.[324]

- Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of employer to provide sufficient work, or other similar cases; reasonable payments made for traveling expenses or other expenses incurred by an

[321] *Walling v. Youngerman-Reynolds Hardwood* Co., 325 U.S. 419 (1945).
[322] 29 C.F.R. § 778.108.
[323] E. Kearns, The Fair Labor Standards Act, 10-15 (3d ed. 2018).
[324] 29 C.F.R. § 778.212.

employee in the furtherance of the employer's interests which have been properly reimbursed by the employer;[325] and any other similar payments to an employee which have not been made as compensation for hours of employment.[326]

- Sums paid in recognition of services performed during a given period if both the fact that the payment is to be made and the amount of the payment are determined solely at the discretion of the employer. Such payments cannot be pursuant to any prior contract, agreement, or promise which causes the employee to expect such payments regularly.[327]

- Sums paid in recognition of services performed during a given period, which are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan. Such payments must be made without regard to hours of work, production, or efficiency.[328]

- Contributions irrevocably made by an employer to a third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees.[329]

- 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 (8) in a day or in excess of the maximum workweek applicable to such employee.[330]

- Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest or on the sixth or seventh day of the workweek. Such premium rate cannot be less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days.[331] These extra payments must be at an hourly rate. They cannot be lump sum premium payments.

- Extra compensation provided by a premium rate paid to the employee pursuant to an applicable employment contract or collective bargaining agreement for work outside the hours established by the contract or agreement as the regular workday or workweek, Such premium pay cannot be less than one and one-half times the rate established by the contract or agreement for like work performed during such workdays or workweeks.[332] These payments also cannot be lump sum payments.

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[325] Examples of such expenses include cell phone plans, membership dues in a professional organization, and credentialing exam fees. Expenses do not need to be incurred "solely" for the employer's benefit to be excluded. 29 C.F.R. §778.218.
[326] Examples of such "perks" include gym memberships, wellness programs, smoking cessation programs, tuition payments, and adoption assistance. 29 C.F.R. §778.216.
[327] 29 C.F.R. § 778.200(a)(3).
[328] *Id.*
[329] 29 C.F.R. § 778.214.
[330] 29 C.F.R. § 778.201.
[331] 29 C.F.R. § 778.203.
[332] 29 C.F.R. § 778.201(a).

- The actual or reasonably approximate amount expended by an employee in laundering or repairing uniforms or special clothing which the employee is required to wear.[333]

Payments made to increase productivity or as recognition of service such as some types of educational incentive pay or longevity pay must be included in the regular rate of pay.[334] Step-up pay must also be included in the regular rate.[335] Certain types of "special duty pay," such as additional pay for being certified as an EMT, must also be included in the regular rate of pay.[336] The right to overtime based on an employee's regular rate of pay is a statutory right that cannot be waived by a statement in a collective bargaining agreement that a specific bonus is not to be included in an employee's base pay.

In the case of a sick leave buy back, when an employer pays an employee for unused sick leave at the end of a period of time, the payments should be included in an employee's regular rate if the employee has a reasonable expectation that the payments will be made. For example, if the payments were promised to the employee upon being hired, they are included in the parties' labor agreement or the employer has a history of making the payments.[337]

12.1.3 Regular Rate is an Hourly Rate

The regular rate of pay under the FLSA is a rate per hour. An employer, though, is not required to compensate an employee on an hourly basis. Earnings may be determined on a piece rate, salary, commission, or other basis. In all cases the overtime compensation due to an employee must be computed on the basis of the hourly rate derived from the employee's earnings; therefore, it is necessary to compute the employee's regular hourly rate during each work period subject to the rules set forth below. Such an hourly rate is determined by dividing the total remuneration for employment (except statutory exclusions, as discussed previously) in any work period by the total number of hours for which such payments were made.[338] When a bonus is paid that covers more than one pay period, such as a lump sum longevity bonus, it must be apportioned across the time period to which is pertains.[339] If it is unclear as to how many pay periods a bonus is to be applied to, an employer can wait to apply the bonus to the employee's rate of pay for overtime purposes until it can determine the length of time for which it is paid. At this point, the employer must apportion back the bonus payment and determine if an employee is due any additional overtime pay.[340]

12.1.4 Fixed Salary for Regularly Scheduled Hours

In an administrative letter ruling issued November 19, 1986, the U.S. Department of Labor Wage and Hour Administrator made it clear that fire fighters working a fixed or scheduled number of hours (*i.e.* 24 hours on duty followed by 48 hours off duty) are paid their salary with the intent

[333] 29 C.F.R. § 778.217(b)(2).
[334] *O'Brien v. Town of Agawam*, 350 F.3d 279, 296-97 (1st Cir. 2003).
[335] *See* 29 C.F.R. §§ 778.115, 209.
[336] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Sept. 30, 1999).
[337] *See Acton v. City of Columbia*, 436 F.3d 969 (8th Cir. 2006); 29 C.F.R. § 778.211(c).
[338] 29 C.F.R. § 778.109.
[339] 29 C.F.R. § 778.209(a).
[340] *Id.*

that it covers only those fixed or scheduled hours.[341] The Department of Labor determined that the regular rate of pay for fire fighters working on this basis is computed by reducing the annual salary to its work period equivalent and then dividing that amount by the number of hours for which it is intended to compensate the fire fighters.[342]

To illustrate the proper method of calculating overtime compensation due under the FLSA in this situation, the Department of Labor used examples in which a fire fighter was on duty 24 hours followed by 48 hours off duty. This results in a three-work-period cycle of 240, 216, and 216 hours per pay period before the cycle repeated itself. The annual salary used in the examples is $20,800. The work period equivalent is $1,595.62, computed as follows:

28 ÷ 365 = 0.0767
.0767 x $20,800 = $1,595.62

The regular rate for three consecutive 28-day work periods was computed as follows:

Work Period #1: $1,595.62 ÷ 240 hours = $6.65 (regular rate)
Work Period #2: $1,595.62 ÷ 216 hours = $7.39 (regular rate)
Work Period #3: $1,595.62 ÷ 216 hours = $7.39 (regular rate)

The amount of $1,595.62 is straight-time compensation for the scheduled hours of work in the work period. The maximum-hours standard under the FLSA for a 28-day work period is 212 hours. Therefore, additional compensation is due at a rate of one-half times the regular rate for hours worked between 212 and either 216 or 240, depending on the pay period. The U.S. Department of Labor computed these amounts in the following manner:

Work Period #1: $6.65 x 0.5 x 28 (overtime hours worked) = $93.10
Work Period #2: $7.39 x 0.5 x 4 (overtime hours worked) = $14.78
Work Period #3: $7.39 x 0.5 x 4 (overtime hours worked) = $14.78

When a fire fighter works more hours than are regularly scheduled in the 28-day work period, he must be compensated at a rate not less than one and one-half the regular rate of pay for that particular work period. For example, the DOL determined that if a fire fighter was called to duty for an additional 12 hours during Work Period #1 above, he should be paid a total of $1,808.48. This was computed in the following manner:

Work period salary equivalent:	$1,595.62
$6.65 x 0.5 x 28 (regularly scheduled overtime hours):	$93.10
$6.65 x 1.5 x 12 (unscheduled overtime hours):	$119.76
(straight time + overtime):	$1,808.48

12.1.3 Fluctuating Workweek Method of Computing Overtime

Under the fluctuating workweek method, nonexempt employees receive a set weekly salary no

[341] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Nov. 19, 1986).
[342] *Id.*

matter how many hours they work, plus additional overtime pay when they work more than 40 hours in one workweek.[343] This means an employee's weekly salary does not change whether they work 30 hours or 40 hours, but in weeks where the employee works more than 40 hours, they will receive overtime pay for each hour of work over 40.

To utilize this method, five conditions must be met:[344]

- The employee works hours that fluctuate from week to week;
- The employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many;
- The amount of the employee's fixed salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest;
- The employee and the employer have a clear and mutual understanding that the fixed salary is compensation for the total hours worked each workweek regardless of the number of hours; and
- The employee receives overtime compensation, in addition to such fixed salary and any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind, for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay for that workweek.

This method cannot be used if the employee's salary is understood to be compensation for a specific, fixed number of hours per workweek. This would not apply to fire fighters who receive a salary for working specific, fixed hours within a work period.

Under the fluctuating workweek method, overtime pay is based on the average hourly rate produced by dividing the employee's fixed salary and any non-excludable additional pay (e.g., commissions, bonuses, or hazard pay) by the number of hours actually worked in a specific workweek.[345] The average hourly rate will change from week to week depending on how many hours the employee actually worked. The employee then receives an additional 0.5 times (or additional "half time") of that rate for each hour worked beyond 40 in the workweek.[346]

Employers can pay bonuses or other incentive-based pay, such as hazard pay, above and beyond workers' fixed salaries.[347] Such payments must be included when calculating the regular rate unless they are excludable.

12.1.4 Overtime Computation for Overlapping Work Periods

When the beginning of the work period is changed and there are hours of work which fall within both "old" and "new" work periods, the following procedures must be followed to determine overtime liability due under the FLSA.

[343] 29 C.F.R. § 778.114.
[344] 29 C.F.R. § 778.114(a).
[345] 29 C.F.R. § 778.114(a)(5).
[346] 29 C.F.R. § 778.114(c).
[347] 29 C.F.R. § 778.114(a)(5).

1. Compute the straight-time and overtime compensation due for both the old and new work periods counting the overlapping days as hours worked in the "old" work period. Total the two sums;
2. Then compute the straight-time and overtime compensation due for both the old and new work periods counting the overlapping hours in the "new" work period. Total the two sums; and
3. Pay the employee the greater of the two amounts computed in 1 and 2.[348]

The following example illustrates this point:

> A fire fighter is paid $10 per hour and is assigned to Work Period A. Work Period A began on November 15 and ended December 11. During the course of this 27-day work period, the fire fighter is transferred from Work Period A to Work Period B. Work Period B began on November 21 and ended December 17. The chart of hours worked provided below will be useful in determining overtime due under the FLSA.

	Work Period A	Work Period B
November 15	W	
16		
17	W	
18		
19	W	
20		
21		
22		
23		
24	W	W
25		
26	W	W
27		
28		
29		
30	W	W
December 1		
2	W	W
3		
4	W	W
5		
6		
7		
8		
9	W	W
10		

[348] 29 C.F.R. 778.302(a).

11	W	W
12		
13		W
14		
15		
16		
17		

METHOD I
Overlap Time Counted as Hours Worked in "Old" Work Period

WORK PERIOD A
(November 15 - December11)

Straight Time
240 hours (includes 7 overlap days - November 24, 26 & 30; December 2, 4, 9 & 11)

240 x $10 per hour = $2,400

Overtime
FLSA Limit: 204
Hours Worked: 240
36 hrs. x $5 = $180

TOTAL
$2,580

WORK PERIOD B
(November 21 - December 17)

Straight Time
24 hours (excludes 7 overlap days- November 24, 26 & 30; December 2, 4, 9 & 11)

24 x $10 per hour = $240

Overtime
FLSA Limit: 204
Hours Worked: 24
NO OVERTIME DUE

TOTAL
$240

TOTAL THE TWO SUMS: $2,820

METHOD 2
Overlap Time counted as Hours Worked in "New" Work Period

WORK PERIOD A
(November 15 – December 11)

Straight Time
72 hours (includes November 15, 17, & 19; excludes 7 overlap days November 24, 26 & 30; December 2, 4, 9 & 11)

72 x $10 per hour = $720

WORK PERIOD B
(November 21 - December 17)

Straight Time
192 hours (includes 7 overlap days - November 24, 26 & 30; December 2, 4, 9, & 11)

192 x $10 per hour = $1,920

NO OVERTIME DUE	NO OVERTIME DUE
TOTAL	TOTAL
$720	$1,920

TOTAL THE TWO SUMS: $2,640

Conclusion:

Using Method 1, the fire fighter is entitled to $2,820. Under Method 2, the fire fighter would receive $2,640. Since Section 778.302(3) of the DOL regulations requires the employer to pay the employee the greater of these two amounts the fire fighter must be compensated under Method 1.

12.2 Cases

- *Featsent v. City of Youngstown*[349]

A group of police officers sued the City of Youngstown, Ohio seeking, among other things, the inclusion of longevity pay and education incentive pay in their regular rate of pay. The City contended that such payments were excluded from the regular rate under the exclusions provided in 7(e). Noting that the regular rate of pay is to include all remuneration for employment, except for certain specified exceptions, the U.S. Court of Appeals for the Sixth Circuit held that the City violated the wage and hour law by failing to include the officers' longevity pay and education incentive pay in their overtime calculations.

- *Balestrieri v. Menlo Park Fire Protection District*[350]

Buy back payments for firefighters and emergency personnel for annual leave, which included both sick and vacation leave, need not be included in the regular rate. As found in *Featsent*, sick leave buy back falls under the 7(e) exclusion for "periods where no work is performed due to illness." Some sick leave buy back programs could function like an attendance bonus and therefore require inclusion in the regular rate, but the annual leave bought back in this case did not differentiate between sick leave and vacation leave. As a result, any portion of the annual leave that could be attributed to sick leave did not function as an attendance bonus.

- *Acton v. City of Columbia*[351]

Lump sum payments made at the end of the calendar year for unused sick leave must be included in the regular rate of pay for purposes of computing the fire fighters' overtime during the preceding year. The court found that such payments did not fall within one of the statutory exclusions to the regular rate.

[349] 70 F.3d 900 (6th Cir. 1995).
[350] 800 F.3d 1094 (9th Cir. 2015).
[351] 436 F.3d 969 (8th Cir. 2006)

- *Chavez v. City of Albuquerque*[352]

City was required to include sick leave buy back in calculation or the regular rate, but not required to include vacation buy back. Sick buy backs are generally the same as attendance bonuses, which count as part of the regular rate, because of employers' incentives to reduce unscheduled leave that burdens an employer with finding a replacement. An employee has a duty not to abuse sick days, whereas there is no corresponding duty not to use vacation days. Vacation days are more analogous to holiday work premiums or bonuses for working particularly undesirable days, which can be excluded.

- *Local 246, Utility Workers v. Southern Calif. Edison Co.*[353]

Supplemental payments to partially disabled workers paid at the rate the workers had been paid prior to becoming disabled were found not to be within the FLSA's exclusion from the regular rate for payments not made as compensation for hours of employment. The payments then had to be included within the regular rate for the partially disabled workers.

- *Minizza v. Stone Container Corp.*[354]

Two lump sums paid to select employees to induce them to agree to a collective bargaining agreement were excludable as an "other similar payment" because they were not compensation for hours worked or services rendered. The court's decision that these payments were not compensation for employment rested in part on the fact that the "eligibility requirements were not meant to serve as compensation for service, but rather to reduce the employers' costs," and also in part on the fact that "the eligibility terms themselves [for the lump sums] [did] not require specific service"—it did "not matter how many hours an employee worked during that period, nor how many hours he might work in the future."

[352] 630 F.3d 1300 (10th Cir. 2011).
[353] 83 F.3d 292 (9th Cir. 1996).
[354] 842 F.2d 1456 (3d Cir. 1988).

13. PREMIUM RATES

The Fair Labor Standards Act (FLSA) does not require the employer to pay premium rates for hours worked in excess of normal or regular working hours unless the employee actually works hours in excess of the FLSA's hourly overtime standards.[355] In addition, the FLSA does not require the employer to pay premium rates for hours worked on Saturdays, Sundays, or holidays.[356] As a result, Section 7(e)(5-7) of the Act permits the employer to exclude the certain premiums from the regular rate[357] and under Section 7(h) the employer may, in some instances, credit the premium pay to overtime compensation due under the FLSA.[358] These types of premium need not be made pursuant to a written contract or agreement. A written or unwritten contract, agreement, understanding, handbook, policy, or practice will suffice.[359] However, as explained below, this is only permitted if the premium is equal to or exceeds one and one-half times the employee's regular rate of pay.

13.1 To Be Excluded from the Regular Rate and to be Used as an Offset to FLSA Overtime Pay, the Premium Rate Must Equal or Exceed One and One-Half Times the Regular Rate of Pay

Premium Rates that are paid that do not equal one and one-half times the regular rate of pay must be *included* in the regular rate of pay for purposes of computing overtime compensation and may *not* be used by the employer to offset its FLSA overtime pay liability. For example, some employees receive an additional 10 percent premium pay for working at night or will receive extra pay of 25 percent per hour if they work on a Sunday. Since these amounts are less than 1.5 times the employee's regular rate of pay, these amounts must be included in the employee's remuneration when calculating the employee's regular rate of pay for purposes of calculating FLSA overtime compensation.

13.2 Hours Worked in Excess of Normal or Regular Working Hours

If premium pay is received for hours worked beyond the hours of the overtime standard under the FLSA, and these payments equal or exceed the amount of one and one-half times the regular rate, these payments may be used to offset overtime due under the Act.[360] The following is an example that illustrates this principle:

> **Under a contract, a fire fighter is paid $10 an hour for 240 scheduled hours of work and receives a premium rate of $12.50 per hour for all hours above 212 in a 28-day work period. This premium rate paid under the contract must be included in the calculation of the rate at which overtime**

[355] 29 C.F.R. § 778.201(a).
[356] 29 C.F.R. § 778.102.
[357] 29 U.S.C. § 207(e)(5) – (7).
[358] 29 U.S.C. § 207(h).
[359] 29 C.F.R. §§ 778.202, 203, 205.
[360] 29 C.F.R. § 778.201(a).

compensation is due under the FLSA. Premium rate compensation due under the contract and the FLSA must be calculated in order to determine the amount of additional overtime compensation due the employee.

The fire fighter in our example is scheduled to work 216 hours in a 28-day work period and receives premium pay for hours above 212. During the work period in question, the fire fighter works an additional 24 hours for a total of 240 hours in the work period.

Contract	
Straight-time compensation for 240 hours	**$2,400**
Premium rate compensation for hours between 212-240 (additional $2.50 per hour x 28 hours)	**$70**
TOTAL COMPENSATION	**$2,470**

FLSA	
Straight-time compensation for 240 hours	**$2,400**
Premium rate compensation for hours between 212-240 (additional $5 per hour x 28 hours)	**$70**
TOTAL COMPENSATION	**$2,470**

Overtime Rate = $2,470 ÷ 240 = Regular rate of $10.29
Overtime must be paid at 1.5 x $10.29 = $15.43

Because the fire fighter received a $70 premium payment under the contract his or her overtime rate increased from $15 per hour to $15.43 per hour.

Accordingly, "shift differential" payments are included in an employee's regular rate as long as the employee was regularly scheduled to work the shift and the differential is less than the time and one-half rate for the more desirable shift.[361]

13.3 Hours Worked on Weekends and Holidays

Premium rate payment at the time and one-half rate for hours worked on weekends and holidays may be credited to overtime compensation due under the FLSA.[362] Premium rates of less than the time and one-half rate for such work must be included in regular rate computation due under the FLSA.[363] Contracts which provide a rate of time and one-half for holidays whether worked

[361] 29 C.F.R. § 778.204.
[362] 29 C.F.R. § 778.203.
[363] *Id.*

or not may not offset overtime compensation due under FLSA.[364] The only exception to this rule is for premium payments below the time and one-half rate for hours worked in excess of normal or regular working hours.[365] The following example serves to illustrate this point:

> **Under a contract, a fire fighter receives straight-time compensation of $10 an hour for all holiday shifts he is not scheduled to work. If a fire fighter works a holiday, the contract provides compensation at time and one-half the hourly rate. In this case, a fire fighter would be entitled to $15 an hour for all holiday hours worked.**
>
> **The fire fighter in our example works 216 hours during a 28-day work period. The 216 hours of work is inclusive of a 24-hour shift worked on a holiday. Since the premium for holiday work in the contract is at the time and one-half rate such premium pay may be credited toward overtime pay due under the FLSA. Premium rate compensation paid under the contract and the FLSA are calculated in order to determine the amount of compensation due the employee under the FLSA.**

Contract	
Straight-time compensation for 216 hours	**$2,160**
Holiday premium rate for 24 hours (additional $5 per hour x 24 hours)	**$120**
TOTAL COMPENSATION	**$2,280**

FLSA	
Straight-time compensation for 216 hours	**$2,160**
Premium rate compensation for hours between 212-216 (additional $5 per hour x 4 hours)	**$20**
TOTAL COMPENSATION	**$2,180**

The fire fighter received a premium payment of $120 under the contract and $20 is required under the FLSA. As a result, no additional monies must be paid since the contract more than satisfies the premium pay requirement contained within the FLSA. The fire fighter would not be entitled to the additional holiday pay of $120 and FLSA overtime compensation of $20. Language can be added to the collective bargaining agreement to prohibit the employer from using holiday premium pay as a credit towards FLSA overtime. This would ensure that the fire fighter receives the full holiday premium and FLSA overtime compensation.

[364] 29 C.F.R. § 778.219(a).
[365] 29 C.F.R. § 778.219(b).

14. BONUSES, GIFTS, AND EMPLOYEE BENEFIT PLANS

All remuneration for employment must be included in the regular rate of pay except for seven specified statutory exclusions (see Chapter 12, Section 12.1.2). Included in these excludable payments are discretionary bonuses, payments in the nature of gifts on special occasions and employer contributions to certain welfare plans, profit-sharing plans and thrift and savings plans. Bonuses that do not qualify for exclusion as one of these types must be included in computing the regular rate on which overtime pay must be based. Bonuses are payments made in addition to the regular earnings of the employee.[366]

14.1 Bonuses – Discretionary or Non-Discretionary

Bonuses are considered discretionary and, therefore, excludable under Section 7(e)(3)(a) of the Act only if:

- the employer retains complete discretion both as to the decision to pay the bonuses and as to the amount of the bonus;
- the employer retains complete discretion as to this decision until a time at or near the end of the period for which the bonus is to be paid; and
- the bonus is **not** paid pursuant to any prior contract agreement or promise causing employees to expect such payments regularly.

Furthermore, amounts may not be credited toward overtime compensation due under the Act. The label an employer gives a bonus does not determine whether it is discretionary or not; instead, the determination will turn on the terms of the statute and facts specific to the bonus at issue.[367]

An example of a bonus which would be excluded from the regular rate of pay is if an employer announced to the employees in January that a bonus would be paid in June. The employer, in this case, has abandoned his discretion to pay the bonus far in advance of payment. Also, a bonus promised upon hiring or the result of collective bargaining would not be excludable under this section of the Act. A bonus which is announced to employees to induce them to work more rapidly or more efficiently or to retain them in their employ is regarded as part of the regular rate of pay. The DOL Regulations give the following examples of bonuses in this category which **must be included in the regular rate of pay**:

- attendance bonuses;
- individual or group production bonuses;

[366] 29 C.F.R. §778.208.
[367] 29 C.F.R. §778.211(d).

- bonuses for quality and accuracy of work;
- some sign-on bonuses; and
- bonuses contingent on the employee's continued employment (longevity bonuses).

14.2 Gifts - Christmas and Special Occasions

Section 7(e)(i) of the FLSA provides that sums paid as a gift shall not be included in the regular rate of pay. Such sums would include payments made at Christmas time or on other special occasions as a reward for service. In addition, sums of this type which are paid may not be credited toward overtime compensation due under the Act. To qualify as an exclusion under Section 7(e)(1), the bonus must be actually a gift or in the nature of a gift. If the bonus is measured by hours worked, productivity or efficiency, it will be considered as wages and hours and, as such, must be included in the regular rate of pay. Also, a payment so substantial that it can be assumed the employee considers it as part of the wages for which he worked will not be considered in the nature of a gift. Bonuses paid pursuant to a contract are also considered not in the nature of a gift and, therefore, must be included in the regular rate of pay.[368]

The 2019 Regular Rate Rule provides additional examples of excludable gifts, which include, but are not limited to: coffee, snacks, coffee cups, t-shirts, raffle prizes, certain longevity bonuses, and certain sign-on bonuses.[369]

14.3 Longevity Pay

When a bonus is considered to be part of the regular rate, it must be included in computing the employee's regular hourly rate of pay and overtime compensation. When the bonus covers only one work period, the hourly rate is computed by adding the bonus to the other wages of the employee and dividing by the number of hours regularly scheduled to be worked. However, longevity bonuses, and other bonuses which are often deferred over a period of time longer than one work period, must be apportioned back over the work periods during which the bonus is actually paid.[370]

In line with the principles explained in 14.1, some courts have drawn a distinction between longevity payments that are required by contract or city ordinance and those that are purely discretionary. Longevity payments required by contract or city ordinance are required to be included in the regular rate while those that are purely discretionary are not.[371]

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[368] 29 C.F.R. §778.212.
[369] *See id*.
[370] 29 C.F.R. §778.209.
[371] *See Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995))(finding longevity payments required by law are part of an employee's regular earnings, and so are not excludable as gifts); *Moreau v. Klevenhagen*, 956 F.2d 516, 521 (5th Cir. 1992) (distinguishing longevity payments that are excluded as gifts from "longevity payments made pursuant to a city ordinance … [that] must be included in a 'regular rate of pay'"); *see also* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (March 26, 2020).

14.4 Sign-on Bonuses

Determining whether a sign-on bonus is included in the regular rate requires an understanding of the particular factual circumstances. In brief, sign-on bonuses with no clawback provision[372] are excludable from the regular rate, as are sign-on bonuses with a clawback provision that are ***not*** made pursuant to a CBA, city ordinance, or other policy. However, sign-on bonuses with a clawback provision made pursuant to a CBA or other policy must be included in the regular rate.

A sign-on bonus with no clawback provision is excludable from the regular rate under 7(e)(2), that exempts periods where no work is performed. In *Minizza v. Stone Container Corp*., the Third Circuit held that lump sum payments to employees to induce ratification of a CBA were excludable under 7(e)(2) as "other similar payment" because such payments were not related to hours of employment or work performed.[373] If an employer offers a sign-on bonus with no clawback provision, and grants the bonus before any work is performed, the employer can argue that *Minizza* applies and the sum is exempt from the regular rate under 7(e)(2).

A sign-on bonus with a clawback provision is not included in the regular rate unless it is made pursuant to a CBA or other similar policy. The DOL has reasoned that "a sign-on bonus with a clawback provision is essentially a longevity bonus" and as such it cannot fall within the 7(e)(2) exemption.[374]

However, some longevity bonuses, and thus sign-on bonuses, may be excluded under 7(e)(1) as sums paid as gifts. Longevity payments required by contract or city ordinance must be included in the regular rate while those that are purely discretionary need not. It follows that sign-on bonuses similarly can be excluded from the regular rate when they are discretionary as laid out in 14.1.

14.5 Profit-Sharing, Thrift, Savings and Benefit Plans

Employer contributions to bona fide thrift, savings or benefit plans need not be included within the employee's regular rate if the applicable plan meets the following requirements set forth in the DOL regulations:

14.5.1 Thrift and Savings Plans

- The thrift or savings plan is a program or arrangement in writing adopted by the employer or by contract as a result of collective bargaining and made available to the employees, which is established and maintained in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain case savings for a reasonable period of

[372] A clawback provision allows—under a prescribed set of circumstances—an employer to reclaim bonus funds previously paid to an employee. For example, if the sign-on bonus requires a two-year service commitment, and the fire fighter leaves before the allotted time, a clawback provision would allow the employer to reclaim the amount of the sign-on bonus.
[373] 842 F.2d 1456, 1461-62 (3d Cir. 1988).
[374] Regular Rate Under the Fair Labor Standards Act, 84 FR 68739, 68751 (proposed December 16, 2019) (to be codified at 29 C.F.R. pt. 548 & 778); *Featsent v. City of Youngstown*, 70 F.3d 900, 902 n.3, 905 (6th Cir. 1995).

time or to save through the regular purchase of public or private securities.

- The plan must give the categories of employees participating and the basis of their eligibility. Eligibility cannot be based on such factors as hours of work, production or employee efficiency. Hours of work may only be used when determining the eligibility of part-time or casual employees.

- The amount an employee may save must be specified in the plan or determined under a formula specified in the plan. The formula may be based on factors such as straight-time earnings, total earnings, base rate of pay or length of service.

- The employer's total yearly contribution may not exceed 15 percent of the participating employee's total earnings that year. The employer's total contribution in any year may not exceed the total amount saved or invested by the participating employee during that year. If the plan meets all of the above requirements, the employer may submit plans calling for greater employer contributions to the DOL Wage and Hour Division for approval. [375]

A plan will be disallowed if:

- employee participation is not voluntary;

- employee wages or salaries are dependent or influenced by the existence of the plan; and

- the amounts saved under the plan are based on the employees' hours of work, production, or efficiency.[376]

14.5.2 Benefit Plans

Employer contributions to a trustee or third person under a bona fide plan providing for old age, retirement, life, accident or health insurance, or similar benefits to their employees may be excluded from the regular rate computation if the following criteria are met:

- The contributions must be made pursuant to a specific plan or program adopted by the employer, or by the contract as a result of collective bargaining and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan;

- The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization and the like;

[375] 29 C.F.R. § 547.1.
[376] 29 C.F.R. § 547.2.

- As to the amounts of employer contributions and of employee benefits, the plan itself must set out one of the following:
    - benefits must be specified or definitely determinable on an actuarial basis;
    - there must be both a definite formula for determining the benefits for each of the participating employees; or
    - there must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purpose of the plan.
- The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. A trustee must assume the usual fiduciary responsibilities imposed upon trustees by law. Recapture or diversion of the funds by the employer is forbidden, but this does not prevent the return to him of excess amounts which he has paid in error or by reason of overestimation of costs. It should be noted that any payroll deductions for employee contributions to contributory plans which cut into the required minimum or overtime pay may constitute violations of the statute insofar as wage payments are concerned. If the employee contributions are paid to a third person or to a trustee unaffiliated with the employer, there is no danger of violations; and
- Employees must not have the right to assign their benefits nor the option to receive any part of the employer's contribution in cash instead of benefits. However, amounts standing to the employees' credit may, without disqualifying the plan, be paid when employment is severed for causes other than retirement, disability, or death when the plan is terminated or during the course of employment under terms specified in the plan which are not inconsistent with FLSA.[377]

Plans which satisfactorily meet the requirements of Section 401(a) of the Internal Revenue Code will also fulfill the requirements outlined in points 1, 4 and 5.[378]

[377] 29 C.F.R. §778.215.
[378] 29 C.F.R. §778.215(b).

15. HOLIDAY, VACATION AND PAID LEAVE

The FLSA provides that the regular rate shall not include payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or for some other similar reason.[379] These payments have no effect on the regular rate of pay since they are not made as compensation for actual hours worked in the work period. Since these payments are not paid for hours worked, no part of these payments can be credited toward overtime compensation due under the Act.[380]

The U.S. Department of Labor Regulations include a catch-all category under the title "other similar cause."[381] These are payments made for absences due to situations that are similar to holidays, vacations, sickness and failure of the employer to provide work. Examples given in the DOL regulations are absences due to jury services, reporting to a draft board, attending a funeral of a family member and inability to reach the workplace because of weather conditions. This does not include regular absences such as lunch periods or regularly scheduled days of rest. The definition of holiday is one commonly used to refer to those days customarily observed in the community in celebration of some historical or religious occasion. The term holiday does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.[382] Only absences of a non-routine character which are infrequent or sporadic or unpredictable are included. Since these payments are not compensation for hours of work, they may not be included in the regular rate of pay nor used to offset overtime compensation due under the Act.[383]

15.1 Holiday and Vacation Leave

As explained above, certain payments made to an employee for periods in which they perform no work because of a holiday, vacation, or illness are not required to be included in the regular rate because they are not regarded as compensation for working.[384] This exclusion also applies when an employee who is entitled to paid leave forgoes its use and instead receives a payment that is the approximate equivalent to the employee's normal earnings for a similar period of working time. This payment is excludable regardless of whether it is paid during the same pay period in which previously scheduled leave is foregone or during a subsequent pay period as a lump sum.

15.2 Lump Sum Holiday Pay

Some collective bargaining agreements or city ordinances mandate holiday pay for all members, regardless of whether the employee actually works on the holiday. This negotiated lump sum can be paid out monthly, quarterly, or even annually. Depending on the circumstances, these types of

[379] 29 U.S.C. §207(e)(2).
[380] 29 C.F.R. §778.216.
[381] 29 C.F.R. §778.218.
[382] 29 C.F.R. §778.218(b).
[383] 29 C.F.R. §778.218(d).
[384] 29 C.F.R. §778.219.

payments may be included for purposes of calculating the regular rate of pay under the FLSA. However, if payment is contingent on an employee voluntarily choosing to forgo a holiday (often referred to as a "holiday in lieu" payment) it can permissibly be excluded from the regular rate.

Courts have held lump sum holiday pay arrangements paid out regardless of whether the employee worked to be part of the regular rate calculation, primarily on the basis that the Section 7(e)(2) exemption for periods where no work is performed "due to . . . holiday" does not apply.[385] Despite some favorable case law discussed below, it is likely that employers will seek to exclude holiday pay as part of its regular rate calculation based on Section 778.219 (a) of FLSA regulations which provides that:

> **(a)** ***Sums payable whether employee works or not.*** As explained in § 778.218, certain payments made to an employee for periods during which he performs no work because of a holiday, vacation, or illness are not required to be included in the regular rate because they are not regarded as compensation for working. When an employee who is entitled to such paid leave forgoes the use of leave and instead receives a payment that is the approximate equivalent to the employees' normal earnings for a similar period of working time, and is in addition to the employee's normal compensation for hours worked, the sum allocable to the forgone leave may be excluded from the regular rate. Such payments may be excluded whether paid out during the pay period in which the holiday or prescheduled leave is forgone or as a lump sum at a later point in time. Since it is not compensation for work, pay for unused leave may not be credited toward overtime compensation due under the Act.

This provision addresses specifically the scenario of "holiday-in-lieu" payments and expressly permits them to be excluded. This is distinguishable from the negotiated lump sums described above because the payment is only triggered if an employee voluntarily chooses to forego the use of holiday leave.

In short, whether an employer can successfully exclude lump sum holiday pay as part of a fire fighter's regular rate calculation, or the Union can demonstrate that it should be included will depend on the facts of the particular case – and whether the matter is similar enough to existing case law discussed below that such payments should be included.

15.3 Premium Rate for Holiday Hours Worked

The following scenario describes the typical situation in which an employee receives holiday pay when he or she works on a holiday. Assume that an employee is entitled by contract to 24 hours pay at the rate of $10 per hour for certain named holidays when no work is performed. If however, the employee is required to work on these days, the employee does not receive the idle holiday pay. Instead, the contract provides the employee will receive a premium rate of $15

[385] *See, e.g. Lewis v. County of Colusa*, 2018 BL 117382b (E.D. Cal. 2018); *White v. Publix Super Mkts. Inc.*, 2015 BL 267679 (M.D. Tenn. 2015); *Padilla v. City of Richmond*, 509 F. Supp. 3d 1168 (N.D. Cal. 2020); *McKinnon v. City of Merced*, 2018 BL (E.D. Cal. 2018)(holding holiday pay not included in the exemption where police officers received pay equal to their "straight time" hourly rate as "pay equal to and in lieu of time off" when a holiday fell on a normally assigned day off or when the officer was scheduled to work that day).

(time and one-half) for each hour worked on the holiday. If 24 hours were worked on the holiday and a total of 216 hours in the 28-day work period, the employee would be owed, under the contract $360 (24 x $15) for the holiday worked and $1,920 for the other 192 hours worked in the 28 days for a total of $2,280. Under the FLSA (which does not require holiday premium pay for a holiday), the employee is owed $2,180 for working 216 hours in a 28-day cycle at a rate of $10 per hour (216 hours x $10 plus 4 FLSA overtime hours x $5). Since the holiday premium rate paid under the contract is at least one and one-half times the contractual rate it does not increase the regular rate because it qualifies as an overtime premium under Section 7(e)(6). Therefore, the employer may apply it toward the statutory overtime compensation due and no additional compensation is due the employee for the 4 hours worked in excess of 212 in the 28-day cycle.

15.4 Federal Fire Fighters' Leave

Federal fire fighters leave hours are counted as hours of work for purposes of computing FLSA overtime compensation. This is pursuant to a federal regulation that applies only to employees of the federal government.[386] It does not apply to employees of state and local governments.

15.5 Court Cases on Paid Leave

- *Roland Electrical Company v. Black, et al.:*[387]

The Fourth Circuit Court of Appeals held that payments in excess of the amount required by the statute to an employee for work done in certain weeks do not relieve the employer from the obligation to compensate the employee for deficiencies in other weeks. The Court stated that money paid in another period for another purpose could not be used as compensation for overtime work. Bonuses could not be considered as overtime pay either. They were paid as compensation for services previously rendered in order to allow employees to share in the profits of the business and to incite them to further efforts on the company's behalf. The bonuses were additions to regular pay, not substitutes for overtime.

- *Dunlop v. Gray-Goto, Inc.:*[388]

The Court of Appeals in the Tenth Circuit ruled that fringe benefits such as paid vacations and holidays, bi-annual bonuses, and the extension of an insurance program are not included in computing an employee's regular rate of pay. These benefits also cannot be credited toward overtime compensation due under the Act.

Even if the employees and the employer had reached an understanding that the fringe benefits would be received in lieu of overtime cash payments, employees are still entitled to overtime pay because the FLSA requires that overtime be paid in cash. The FLSA does not permit waiver of one's rights to overtime compensation.

[386] 5 CFR § 551.401(b).
[387] 163 F.2d 417 (4th Cir. 1947).
[388] 528 F.2d 792 (9th Cir. 1976).

- *Lewis v. County of Colusa:*[389]

The county was required to include biannual lump sum holiday payments in calculation of the regular rate of pay for safety officers and dispatchers. Because the payments were the same whether the employee happened to work on the holiday or not, they did not bear any relation to whether work was performed or not, and thus did not fall within the 7(e)(2) exemption for periods where not work is performed due to holiday.

- *White v. Publix Super Mkts. Inc:*[390]

A holiday pay plan in which employees received a lump sum for six holidays contingent on work attendance before and after the holiday did not fall within the 7(e)(2) exemption and was thus included in regular rate. The court reasoned that the payment was not made for a period where work was not performed due to a holiday, because to the contrary many employees were scheduled and required to work; thus it did not fall within the narrowly construed 7(e)(2) exemption. Additionally, receipt of the holiday pay was contingent on an employee working a certain number of hours/days before and after the holiday.

- *Padilla v. City of Richmond:*[391]

A payment arrangement in which fire fighters were paid for thirteen holidays in two biannual lump sums did not clearly fall in the 7(e)(2) exemption It was plausible that the fire fighters were being compensated biannually for the inconvenience of working a schedule in which they may not be entitled to time off on holidays, which lacks the causal connection required by 7(e)(2).

[389]2018 BL 117382 (E.D. Cal. 2018).
[390]2015 BL 267679 (M.D. Tenn. 2015).
[391]509 F. Supp. 3d 1168 (N.D. Cal. 2020)

16. SECTION 7(O) – COMPENSATORY TIME

Section 7(o) of the FLSA was added by the 1985 Amendments and provides state and local government employees with the option of receiving compensatory time in lieu of cash for overtime worked under the Act.

In order for compensatory time to be awarded to employees, the employer and the employees must first reach an agreement or understanding. After a compensatory time agreement is reached, the employer is obligated to follow Section 7(o) guidelines on the rate, accrual, and usage of compensatory time earned under the FLSA.

The manner in which the compensatory time provision is applied depends on whether the employees have designated a "representative' to enter into a compensatory time agreement on their behalf or are considered unrepresented. The employees who have organized and designated a representative have greater rights and opportunities available.

16.1 Statutory Provisions

Compensatory time as compensation for overtime work is not permitted in the private sector. In the 1985 Amendments, Congress sought to address the concerns of state and local government employers regarding the costs of compliance with the FLSA, while still protecting employees who worked overtime, by permitting state and local governments to agree with their employees that overtime work would be rewarded with compensatory time off (comp time) in lieu of monetary payment.[392] The 1985 Amendments require that comp time be awarded at a rate of at least 1.5 hours for each hour of overtime work, similar to the Section 7(a) requirement that an employer pay 1.5 times an employee's regular wage rate for overtime.[393] The 1985 Amendments also placed a cap on the amount of comp time that could be accrued and set forth specific requirements on the preservation, use, and "cashing out" of accrued comp time.[394]

Comp time consists of hours that an employee was scheduled to work but does not work and for which the employee is nonetheless paid. It is similar to paid leave. As with paid leave hours, comp time hours are not counted as hours of work for purposes of computing overtime compensation. The employee is required, however, to be paid at the regular rate when he or she takes comp time.[395]

An employer may, at its sole option, substitute monetary compensation at any time in lieu of providing comp time.[396] Any such monetary compensation for overtime work must otherwise meet the requirements of overtime compensation, i.e., it must equal 1.5 times the employee's regular rate.

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[392] Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §2(o), 99 Stat. 787–89 (codified at 29 U.S.C. §207(o)).
[393] 29 U.S.C. §207(o)(1); 29 C.F.R. §553.20.
[394] 29 U.S.C. §207(o)(3); 29 C.F.R. §553.22.
[395] 29 U.S.C. §207(o)(6)(B).
[396] 29 C.F.R. §553.26.

In addition, substituting monetary compensation for comp time for a given workweek or weeks will not affect the subsequent granting of comp time in future workweeks.[397]

16.2 Prior Agreement or Understanding

The first requirement that must be met for the accrual of comp time is that comp time must be paid pursuant to:

> (i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. . . .[398]

For employees not covered by subclause (i) who were hired before April 15, 1986, no new agreement or understanding is required if the employer had in effect on that date a regular practice of granting comp time in lieu of overtime pay.[399]

A federal court held that language in a collective bargaining agreement granting the city the right to handle overtime "as allowed by the FLSA" did not mean that the city must meet its overtime obligations by giving compensatory time off. [400]

On the other hand, courts have found that employer-issued memoranda to employees stating a comp time policy was sufficient to constitute an agreement to award comp time even where such policy is adopted unilaterally, without objection.[401] Further, one court held that an employee's acceptance of comp time without complaint, where the employer gives the employee the option of being paid in cash or comp time, negates any later attempt to demand cash payment.[402]

16.3 Representative of Employees

The statutory language of the FLSA does not clearly define when public employees have a representative with whom the employer must negotiate regarding an agreement to provide comp time and the conditions regarding its use. Although subclause (ii) of the statute applies to "employees not covered by subclause (i)," subclause (i) does not define which public employees have a representative within its meaning. In addition, the legislative history is contradictory, because the report of the Senate Committee on Labor and Human Resources refers to the "recognized" representative, whereas the report of the House Committee on Education and Labor

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[397] *Id.*
[398] 29 U.S.C. § 207(o)(2)(A); 29 C.F.R. §553.23(a).
[399] 29 C.F.R. § 553.21; *Moreau v. Levenhagen*, 508 U.S. 22 (1993).
[400] *Alexander v. City of Evansville*, 120 F.3d 723 (7th Cir. 1997).
[401] *Robertson v. Board of County Commissioners of County of Morgan*, 78 F. Supp. 2d 1142 (D. Colo. 1999); *Baker v. Stone County*, 41 F. Supp. 2d 965 (W.D. Mo. 1999).
[402] *Auten v. Brooks*, 2006 U.S. Dist. LEXIS 50747 (S.D. Ohio July 25, 2006).

states that the representative "need not be a formal or recognized collective bargaining agent."[403] In 1993, the Supreme Court determined in *Moreau v. Klevenhagen*[404] that in states in which the employees have no collective bargaining rights, agreements entered into individually with sheriff's deputies, who were members of a union without any bargaining rights under state law, were valid comp time agreements and were analyzed under the FLSA in the same manner as for employees without a designated representative.

16.3.1 Employees without a Designated Representative

In the absence of a designated employee representative, the employer may award compensatory time if the employer has arrived at an agreement or "understanding" with the employees before the performance of the work.[405]

Although the employer may have a compensatory time agreement with employees hired before April 15, 1986, the employer is still required to negotiate this point with employees hired after April 15, 1986.[406]

16.3.2 Employees with a Designated Representative

If the employees have a designated employee representative, the employer cannot award compensatory time without first reaching an agreement on the issue with the designated representative.[407] If the employer and the designated employee representative fail to reach an agreement, the employer must pay cash for overtime due under the FLSA.

To award compensatory time in lieu of cash, the requirement that an agreement with the representative must first be reached is necessary even though the designated employee representative may not be the formally recognized collective bargaining representative of the employees. Some cities have failed to recognize IAFF local unions as the elected representatives due to the absence of state collective bargaining statutes. As a result, both Congress and the U.S. Department of Labor have provided additional clarification on the issue.

In a letter to then Secretary of Labor Brock, Congress explained that the emphasis is on the employees' designation and not the employer's recognition of the selected representative. In addition, the Congressional letter explains that the FLSA requirement of an agreement on compensatory time applies in states without collective bargaining statutes.[408] The DOL regulations also emphasize that the employee representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.[409]

Nevertheless, in some cases, including *Moreau*, discussed above, employers were permitted to enter valid individual compensatory time agreements despite the designation of an employee

[403] *Compare* S. REP. NO. 99-159, at 10 (1985) *with* H.R. REP. NO. 99-331, at 20 (1985).
[404] 508 U.S. 22 (1993).
[405] 29 U.S.C. § 207(o)(2)(a)(ii); 29 C.F.R. § 553.211.
[406] *Id.*
[407] 29 U.S.C. § 207(o)(2)(a)(i); 29 C.F.R. §§ 553.21, 23.
[408] Congressional Letter to Secretary of Labor Brock dated 9/26/86.
[409] 29 C.F.R. §553.23(b).

representative.[410]

16.3.3 How to Become the Designated Employee Representative

IAFF local unions in areas without a "recognized" representative or an existing labor contract should immediately notify their employers in writing that the fire department employees have selected the local union as their "representative" for the purpose of negotiating a compensatory time agreement. This letter should be sent certified mail, return receipt requested, and should be accompanied by a petition signed by each employee. The signed petition should serve to refute any future argument by an employer as to whether the employees had actually selected the local union as their representative.

16.4 Calculation of Compensatory Time

The 1985 FLSA Amendments require the employer to grant compensatory time at time and one-half for each hour of overtime worked.[411] Compensatory time may also be awarded in combination with cash overtime payments.[412] The following examples illustrate this point.

Example 1

A Section 7(a) employee must receive overtime pay for all hours in excess of 40 per week. During the week in question, the employee works 43 hours or 3 hours beyond his regular schedule. Since the city must grant compensatory time at the rate of time and one-half for the 3 overtime hours the employee is entitled to 4.5 hours or compensatory time.

Example 2

A Section 7(k) employee must receive overtime pay under the 1985 FLSA Amendments for all hours in excess of the maximum in the established work period. The employer establishes a 28-day work period. The maximum number of hours which may be worked before overtime compensation is due is 212. During the work period in question, the employee works 224 hours or 12 hours beyond his regular schedule. Since the city must grant compensatory time off at the rate of time and one-half for the 12 overtime hours the employee is entitled to 18 hours of compensatory time.

Example 3

The employees' representative and the employer negotiate an agreement in which the employees receive cash equal to their hourly rate of pay and one-half hour of compensatory time for each overtime hour worked. The employer designates a 28-day work period. The employee works 224 hours. He is entitled to receive 12 hours in cash plus compensatory time equal to one-half times 12 hours.

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[410] 508 U.S. 22 (1993).
[411] 29 C.F.R. § 553.21.
[412] 29 C.F.R. §553.23(a)(2).

16.5 Accrual of Compensatory Time

16.5.1 Rate of Accrual

Comp time must accrue at the rate of not less than 1.5 hours for each hour of overtime work, just as the monetary rate for overtime is paid at the premium rate of not less than 1.5 times the regular rate of pay.[413]

The FLSA's provisions on the accrual and use of comp time do not apply to employees who are exempt from the Act's overtime provisions. If an employer has decided to provide its exempt employees with comp time, the rate of comp time accrual for those exempt employees can be greater or less than 1.5 times the amount of overtime work.[414] Thus, a public employer's policy of allowing exempt employees to accrue comp time, "administrative leave," or similar time off is unaffected by the comp time provisions of the Act.

16.5.2 Maximum Accrual

The 1985 Amendments place limitations on the number of compensatory hours which can be accrued. Section 7(o)(3)(a) of the 1985 FLSA Amendments establishes two accrual levels. An employee engaged in public safety, emergency response, or seasonal activities may accumulate up to 480 hours of unused compensatory time for overtime hours worked on or after April 15, 1986. To be eligible for the 480-hour accrual level, the employee must serve regularly in public safety, emergency response, or seasonal activities. An employee engaged in occupations not mentioned above may only accumulate up to 240 hours of unused compensatory time for overtime hours worked on or after April 15, 1986.[415] Once the maximum number of hours has been banked, the employee must be paid cash for overtime until the number of hours in the compensatory time bank is reduced beneath the maximum accrual level. This point is illustrated in the following example:

> A fire department employee has the maximum number of 480 hours in his compensatory bank. The employee receives compensation (either in cash or time off) for 30 of the hours. The employee's compensatory bank is reduced to 450 hours. As a result of this reduction, the employee could be credited with 20 hours of compensatory time at the rate of time and one-half and still be within the maximum accrual limit established for him under the 1985 FLSA Amendments.

16.6 Conditions for Using or Cashing Out Compensatory Time

16.6.1 Requesting Compensatory Time Off

The FLSA requires that an employee who has accrued comp time under Section 7(o) be allowed to use that time off within a "reasonable period" after making a request, if the use does not "unduly disrupt" the operations of the agency.[416] The DOL's regulations provide that whether a request to

[413] 29 U.S.C. §207(o)(1); 29 C.F.R. §553.20.
[414] *See* 29 C.F.R. §553.28.
[415] 29 C.F.R. § 553.24.
[416] 29 U.S.C. § 207(o)(5); 29 C.F.R. §553.25(a).

use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practice within the agency based on the facts and circumstances of each case.[417] The regulations provide that determining whether granting the request would "unduly disrupt" the agency's operations is based on such factors as (1) the normal schedule of work, (2) anticipated peak workloads based on past experience, (3) emergency requirements for staff and services, and (4) the availability of qualified substitute staff. Employers are specifically prohibited from coercing employees into accepting more comp time than the employer can realistically and in good faith expect to be able to grant its employees within a reasonable period of time after employees request to use that time.[418]

16.6.2 Cashing Out Compensatory Time

Upon separation of employment, the employer must cash out the employee's accrued, unused comp time earned after April 14, 1986.[419] The rate at which the accrued comp time is cashed out must be the higher of the employee's final rate of pay or the average regular rate of pay earned by the employee during the last 3 years of employment.[420] If an employee's last 3 years of employment have not been continuous, the period of employment after the break in service will be considered new employment, provided that the break in service was intended to be permanent and all accrued comp time prior to the break had been cashed out. Likewise, if an employee has been employed for less than 3 years, the average rate must be calculated based on the rate(s) in effect during the period of employment, and this is compared to the final rate to determine which is higher.[421]

16.7 Usage of Compensatory Time and Its Effect on Regular Rate for Overtime Compensation

The use of compensatory time can be a double-edged sword. Section 7(o)(3)(b) provides that when compensatory time is used by an employee, he will be paid for the time off at his regular rate of pay.[422] However, when the employee uses his compensatory time, these hours are not included in determining the number of hours worked for the purpose of computing overtime due under the FLSA. The FLSA permits periods of non-work, such as annual leave, sick leave, and compensatory leave, to be excluded when computing overtime liability. The use of compensatory time permits the employer to minimize its future overtime liability. An example of this principle follows.

Example

> The employee in our example works under a 28-day work period. During the work-period he takes 24 hours of compensatory leave. The employee receives pay for 224 hours in a 28-day work period. When computing overtime liability, however, the 24 hours of compensatory leave must be subtracted from the 224-hour total because this time was not actual hours worked. The total number of actual hours of work is 200.

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[417] 29 C.F.R. § 553.25(c).
[418] 29 C.F.R. § 553.25(b).
[419] 29 U.S.C. § 207(o)(4).
[420] 29 C.F.R. § 553.27(b).
[421] *Id.*
[422] 29 U.S.C. § 207(o)(3)(b).

The hourly overtime standard during a 28-day work period is 212. As a result, the employee would not be entitled to any overtime compensation for the work period in question. Had the employee been paid cash for the previous overtime worked and not taken compensatory time off during the period in question, he would have received an additional 12 hours of pay at time and one-half.

16.8 Cash Overtime Payment

Section 7(o) of the 1985 FLSA Amendments does not prohibit an employer from substituting cash in whole or in part for compensatory time off at any time. Such cash overtime payments do not affect the subsequent granting of compensatory time off in future work periods.[423]

16.9 Records to Be Kept of Compensatory Overtime

A DOL regulation clearly specifies the types of records to be kept of compensatory time:

> "For each employee subject to the compensatory time and compensatory time off provisions of section 7(o) of the Act, a public agency which is a State, a political subdivision of a State or an interstate governmental agency shall maintain and preserve records containing the basic information and data required by §516.2 of 29 C.F.R. § 516 and, in addition:
>
> (a) The number of hours of compensatory time earned pursuant to section 7(o) each workweek, or other applicable work period, by each employee at the rate of one and one-half hour for each overtime hour worked;
>
> (b) The number of hours of such compensatory time used each workweek, or other applicable work period, by each employee;
>
> (c) The number of hours of compensatory time compensated in cash, the total amount paid and the date of such payment; and
>
> (d) Any collective bargaining agreement or written understanding or agreement with respect to earning and using compensatory time off. If such agreement or understanding is not in writing, a record of its existence must be kept."[424]

The chapter entitled "Record-Keeping" should be reviewed for a thorough explanation of all of the FLSA's record-keeping requirements.

16.10 Drafting a Compensatory Time Agreement

After the local union has been designated the employee representative, the union is given the responsibility of negotiating the specifics of the compensatory time agreement. Listed below are points of interest the union may want to consider during negotiations of the compensatory time issue.

[423] 29 C.F.R. §553.26.
[424] 29 C.F.R. §553.50.

- The compensatory time agreement should have a definite duration which is subject to extension or renewal upon the written consent and approval of the local union. An agreement with a short duration affords the local union the opportunity to gain additional concessions in return for continuing the compensatory time agreement.

- If the compensatory time agreement is terminated for any reason, the accrued compensation would be due and payable in cash at the option of the employee representative and upon the employees' notice to the employer that they are exercising that option.

- The compensatory time agreement should spell out whatever additional rights or protections the union may have been able to obtain outside the subject of compensatory time. The agreement will be considered null, void, and terminated if any of these additional provisions are violated or held to be invalid or unenforceable.

- The local union can negotiate a cap or ceiling on the accrual of compensatory time below the statutory maximum of hours specified in the 1985 FLSA Amendments.

- The local union may negotiate provisions concerning the employees' use of compensatory time. For example, the employee shall be able to use his compensatory time within 15 days of his request to do so.

16.11 Court Cases on Compensatory Time

- *Wilson v. City of Charlotte*[425]

The District Court held that a public employer could not avoid paying cash for overtime and take advantage of the alternative of awarding compensatory time unless it first reached an agreement with the employees' designated representative, however, the Fourth Circuit, on appeal, reversed the decision and held that a prior practice in place before the 1985 Amendments went into effect could constitute an agreement for the employees hired prior to that time.

- *Abbott v. City of Virginia Beach*[426]

The Fourth Circuit ruled that Section 7(o)(2)(A)(i), which states that a public employer must reach an agreement with the employees' representative to provide compensatory time in lieu of cash overtime payments, applies "only where state law permits employees of state and local governmental entities to have recognized representatives."

[425] 964 F.2d 1391 (4th Cir. 1992).
[426] 879 F.2d 132 (4th Cir. 1989).

This case is distinguishable from most situations because the employer reached agreement with the individual employees when it gave them an absolute choice between receiving compensatory leave, money, or any combination thereof, each time they worked overtime. In many other cases, the employers have unilaterally imposed a compensatory time policy without actually reaching individual agreements with the employees.

- *IAFF Local 2961 v. City of Jacksonville*[427]

The District Court ruled that if there is an employee representative, regardless of whether or not it is recognized as a bargaining agent under state law, an agreement is required between the employer and the representative before the employer can take advantage of the compensatory time alternative. Even if the public employer is prohibited by state law from recognizing the representative, if the employees have a designated representative, the employer must enter into an agreement or award cash overtime pay.

If an employer had a compensatory time policy in effect before the 1985 FLSA Amendments and the employees do not designate a representative, an agreement will be implied. However, if an employee representative is involved, an agreement must be reached.

- *IAFF Local 2203 v. West Adams County*[428]

The Tenth Circuit ruled that the employees' representative does not have to be a recognized bargaining agent. It merely has to be designated by the employees. Therefore, if employees designate a representative, the employer must make an agreement with that representative to use compensatory time. The court stated "the employees' designation, rather than the employer's recognition, of a representative is the event which triggers the application of Section 7(o)(2)(A)(i), thereby precluding the use of overtime pursuant to a regular practice." Thus, regardless of whether or not the employer is permitted to recognize the bargaining agent by law, the employer cannot award compensatory time unless an agreement exists with the employees' designated representative.

- *Bleakly v. City of Aurora*[429]

When employees are represented by a bargaining agent, the employer must reach an agreement with the employees' representative to award compensatory time in lieu of cash payments for overtime. The employer may not secure individual compensatory time agreements directly with employees. Compensatory time agreements with individual employees once the employees have designated a representative violate Section 7(o)(2)(A)(i).

- *Moreau v. Klevenhagen*[430]

The Supreme Court affirmed the lower courts' ruling that the County was not required to enter

[427] 685 F. Supp. 513 (E.D.N.C. 1987).
[428] 877 F.2d 814 (10th Cir. 1989).
[429] 679 F. Supp. 1008 (D.C. Colo. 1988).
[430] 508 U.S. 22 (1993).

into an agreement with the deputy sheriffs designated representative, and was therefore permitted to implement the compensatory time policy pursuant to individual agreements with each of the deputy sheriffs, as provided in subclause (ii). In reaching this conclusion, the Court rejected the County's broad argument that an employer may forego the collective negotiation requirements of subclause (i) whenever its employees have not successfully negotiated a collective bargaining agreement, noting that such an interpretation would allow employers to render subclause (i) inapplicable by simply declining to negotiate with the employee representative regarding the compensatory lime agreement. Instead, where state law permits collective bargaining, the employer must negotiate with the employee's designated representative.

On the other hand, the Court held that an employer is not required to negotiate with a designated representative if local law forbids collective bargaining. Accordingly, the Court held that the County was allowed to enter into individual compensatory time agreements with each of its deputy sheriffs, pursuant to subclause (ii).

- *Christensen v. Harris County*[431]

The Supreme Court ruled that employers could compel employees to use their comp time. The employer had instituted a policy which required employees to use their comp time once they neared the maximum number of hours accrued in order to avoid having to make cash overtime payments. The employees argued that the statute did not allow the employer to institute this mandatory use of the comp times, but the high court disagreed.

- *Baker v. Stone County*[432]

The district court held that there was a compensatory time agreement which did not violate the FLSA, even though it was entered into unilaterally by the County's Sheriff's office, because the employees were aware of the agreement and did not offer contemporaneous protest.

- *Mortensen v. County of Sacramento*[433]

The Ninth Circuit ruled that an employer could impose an inflexible limit on the number of employees who could use their comp time at any one time. The employee had argued that the county should have to make an individualized assessment as to whether the employee's absence on a certain day would unduly disrupt the department's operations. The court rejected this argument and stated that the department could determine a baseline absentee rate which would jeopardize its services to the public.

- *Beck v. City of Cleveland*[434]

The Sixth Circuit ruled in favor of a police officer whose request to use comp time had been denied based on purely financial reasons. The court stated that the practice of rejecting requests

[431] 529 U.S. 576 (2000).
[432] 41 F. Supp. 2d 965 (W.D. Mo. 1999).
[433] 368 F.3d 1082 (9th Cir. 2004).
[434] 390 F.3d 912 (6th Cir. 2004).

to use comp time because it was trying to avoid paying overtime to substitute officers was not enough to unduly disrupt the department's operations. The court did state that financial hardship could be considered, but was not to be the sole consideration when determining whether to allow comp time to be used.

17. ENFORCEMENT

The Secretary of Labor administers the Fair Labor Standards Act (FLSA). Enforcement of the Act is accomplished through civil lawsuits brought either by the Secretary of Labor or by private parties. Though rare, criminal lawsuits for willful violation of the Act may also be brought by the U.S. Department of Justice.

The Secretary or employees may bring suits to recover back wages and overtime due, an equal amount as liquidated damages, and suits for retaliation against employees who have complained of FLSA violations such as not being paid overtime. Individual employees are also entitled to recover reasonable attorney fees and costs if they win. Private parties can only obtain injunctive relief in actions alleging retaliation. The Secretary, however, may bring injunctive actions not only for retaliation, but also to prohibit future minimum wage and overtime violations.

17.1 Actions by Employees

Employees may bring suit against employers in any federal or state court to recover unpaid minimum wage or unpaid overtime compensation as provided under the FLSA.[435] If the employee prevails in a suit of this nature, the court may also award liquidated damages in an amount equal to the unpaid wages or overtime due. In cases where the employee prevails, the court will allow reasonable attorney fees and costs to be paid by the defendant.[436] In the event liquidated damages are not awarded, in every circuit except the Fifth Circuit, interest is awarded.

Employees may not bring true "opt-out" class action suits under Section 16(b). Instead, the employees may bring "collective actions" in which each interested employee must "opt-in" to the lawsuit by giving his consent to sue his employer in writing. Participating employees in a collective action must be "similarly situated" to the other employees in the lawsuit.[437]

If an employee has not brought an action to recover overtime, his right to bring a private suit under Section 16(b) terminates once the Secretary of Labor files suit on his behalf. This release of employee rights cannot be restored unless the suit is dismissed without by the Secretary of Labor.[438]

Action may be brought against an employer under Section 16(b) of the FLSA for violations of Section 15(a)(3) of the Act. Section 15(a)(3) forbids employers to discharge or discriminate against an employee who filed a complaint or instituted any proceeding under the FLSA (see Anti-Discrimination Section, Chapter 19). In these cases, the court will award appropriate relief including reinstatement, promotion, payment of lost wages or overtime compensation, liquidated damages and even punitive damages.[439]

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[435] 29 U.S.C. § 216(b).
[436] *Id.*
[437] 29 U.S.C. § 216(b); *see also Thompson v. Seagle Pizza, Inc.*, 2022 BL 156587 (W.D. Ky. 2022)(*citing Jesiek v. Fire Pros, Inc.*, 275 F.R.D. 242 (W.D. Mich. 2011)).
[438] *Wirtz v. C&P Shoe Corp.*, 336 F.2d 21 (5th Cir. 1964).
[439] 29 U.S.C. § 216(b).

17.2 Actions by the U.S. Department of Labor

Section 16(c) of the FLSA allows the Secretary of Labor to bring action in any court to recover unpaid wages or overtime compensation, plus an additional amount for liquidated damages on behalf of the employees. The rights of the employee to bring suit under Section 16(b) are terminated upon the filing of a complaint by the Secretary of Labor. The FLSA authorizes the Secretary of Labor to supervise payment of unpaid wages or overtime compensation due under the Act. An agreement by the employee to accept supervised payments of this sort waives any rights of the employee to file suit under Section 16(b) for recovery of unpaid wages and overtime compensation or additional liquidated damages.[440]

An employer has a complete defense to further claims by an employee who has received and accepted the full amount offered in payment by an employer under the supervision of the Secretary of Labor. Three requirements must be met before voluntary payment can be considered a defense to employee's suits:

- The employee must agree to accept the payment;
- The payment agreed upon must be made in full; and
- The payment must be made under the supervision of the Secretary of Labor.[441]

Section 17 of the FLSA allows the Secretary of Labor to seek injunctions to stop future violations of the minimum wage and overtime provisions of the FLSA.[442] Typical examples of DOL injunctions are the prevention of future violations of employer recordkeeping requirements, promises to calculate overtime pay in a particular way that is in compliance with the Act, and prevention of future violations of the FLSA's anti-discrimination provisions.

Section 17 injunctions obtained by the Secretary of Labor impose a requirement on employers to continue complying with FLSA requirements in the future. Employers who fail to continue compliance with the FLSA under an injunction can be held in contempt of court. In contempt proceedings, the court may order the employer to pay the wages withheld in violation of the injunction, impose fines on the employer and order the employer to pay the costs incurred in bringing the court action. The Department of Labor has the burden of proof, but it does not have to show that violations of the injunction were willful.[443]

17.3 Settlements Supervised by the U.S. Department of Labor

Section 11(a) of the FLSA allows the Secretary of Labor, or his designated representatives, to make investigations and gather data regarding wages, hours, and other conditions of employment to determine whether any violations of the Act have occurred. Regional representatives of the

[440] *Id.*
[441] 29 U.S.C § 216(b)-(c); *see also Harrell v. S.D. Bell Dental Mfg. Co.*, 110 F. Supp. 538 (N.D. Ga. 1953).
[442] 29 U.S.C. § 217.
[443] *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949).

Wage and Hour Division of the DOL have the authority to enter and inspect an employer's premise and records, and to question employees.[444] In situations where the Wage and Hour Division determines that a violation of the FLSA has occurred, the employer will:

- be notified that he is not in compliance with the ELSA;
- be presented with a computation of the unpaid wages owed the employees; and
- be given an opportunity to make a settlement with the employees by paying the designated amounts in full.[445]

If there is an agreement on the part of the employer to pay the stipulated amounts and the employees agree to accept payment as full payment for all that is owed, all future claims by the employees for the time period covered by the settlement are terminated.

Employers are not required to pay the amounts computed by the Department of Labor. In situations where the employer refuses to settle for the designated amount the case will be referred to the Solicitor of the Department of Labor for a determination of whether or not a suit should be filed against the employer.

Similarly, employees are not required to accept the recommended payment computed by the Department of Labor. In situations where this is the case, the only other remedy available to employees is to file suit in federal or state court. The advantage for employees to bring court action is the possibility of being awarded a larger settlement than a DOL recommended amount since liquidated damages are not imposed in settlements supervised by the DOL. The DOL has a history of accepting reduced settlement amounts – both in terms of low backpay calculations and the failure to award liquidate damages – in exchange for the employer's promise of future compliance. The courts have the discretion to award liquidated damages in cases where the employer fails to prove its violation of the FLSA was in good faith and was based upon reasonable grounds.[446]

17.4 Criminal Penalties

The U.S. Department of Justice has the authority to seek criminal penalties against employers who violate the FLSA. Willful violations of the FLSA by employers are punishable by fine and/or imprisonment or both. Fines are limited to $10,000, and imprisonment cannot be longer than six months.[447] Prison sentences may not be imposed upon first-time offenders.[448] Criminal actions under the FLSA may be brought only by the U.S. Department of Justice and are extremely rare.

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[444] 29 U.S.C. § 211(a).
[445] *Enforcement Under the Fair Labor Standards Act*, U.S. Dep't of Labor, Wage & Hour Div., https://webapps.dol.gov/elaws/whd/flsa/screen74.asp.
[446] 29 U.S.C. § 216(b).
[447] 29 U.S.C. § 216(a).
[448] *Id.*

17.6 Arbitration of FLSA Claims

The Federal Arbitration Act requires federal courts to compel arbitration when claims are subject to a valid arbitration agreement.[449] An arbitration agreement can arise in a collective bargaining agreement or an individual employment contract. A party that agrees to arbitrate employment claims retains the substantive rights afforded by the statute but submits them for resolution in an arbitral rather than judicial forum.[450]

Employees covered under a collective bargaining agreement generally are not required to first seek relief under the dispute-resolution procedures of the agreement before bringing an action under the FLSA. The Supreme Court has held that employees cannot be barred from bringing statutory claims in federal court if the arbitration of these claims is not specifically authorized under the terms of the applicable labor contract.[451] To be enforceable as to such claims, the labor contract must contain a "clear and unmistakable" requirement for union members to arbitrate their individual statutory claims. For example, in *14 Penn Plaza* a collective bargaining agreement explicitly waived an employee's right to sue in court for violations of the Age Discrimination in Employment Act, instead mandating that such claims be subject to the grievance and arbitration procedure.[452]Federal courts have held that a general grievance provision that does not specifically reference FLSA claims is insufficient to meet this waiver standard.[453]

In situations where an employee chooses to use the grievance procedure established by the collective bargaining agreement and subsequently loses the case, he may still be able to bring an action in court under the FLSA and receive the full relief available under the Act. Arbitration agreements between an employer and employee or union do not preclude government actors from bringing an enforcement action to vindicate the rights of a party subject to an arbitration agreement.[454]

Some arbitration agreements require individual arbitration and prohibit class or collective arbitration (for example, a group of fire fighters forced to pursue arbitration of an FLSA claim individually rather than in a collective). In *Epic Systems v. Lewis*, the Supreme Court held that

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[449] 9 U.S.C. § 2.
[450] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).
[451] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).
[452] *Id.*
[453] *See, e.g. Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34 (1st Cir. 2013)(CBA specifying general grievance procedures arising out of interpretation of CBA do not clearly and unmistakably subject employees' statutory FLSA claims to arbitration); *Alderman v. 21 Club, Inc.*, 733 F. Supp. 2d 461, (S.D.N.Y. 2010); *Jones v. Does 1-10*, 857 F.3d 508 (3d Cir. 2017) (general grievance clause with specific provision requiring grievance of discrimination claims did not "clearly and unmistakably" waive employee's rights to bring FLSA claims in federal court, where there was "no similar provision for FLSA disputes"); *Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130 (7th Cir. 2017) (definition of "grievance" to include claims or disputes "concerning pay, hours, or working conditions" was not unmistakable language requiring arbitration of FLSA claims); *Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679 (9th Cir. 2011) (references to statute that fall short of incorporation are insufficiently "clear and unmistakable" to bar access to federal court).
[454] *Walsh v. Ariz. Logistics, Inc.*, 998 F.3d 393 (9th Cir. 2021)(*citing EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002))

the Federal Arbitration Act requires courts to enforce arbitration agreements that provide for individualized arbitration proceedings.[455]

Most collective bargaining agreements do not explicitly divest courts of jurisdiction to hear FLSA claims, avoiding this issue altogether. However, employers have increasingly turned to forced arbitration as a method to avoid litigation related to federal labor and employment laws in recent years.

[455] 584 U.S. (2018)

18. RELEASE OF RIGHT TO OVERTIME COMPENSATION

Generally, neither an individual employee nor his union may waive an employee's rights under the Fair Labor Standards Act. There are three circumstances however, in which an employee can release his right to bring suit for unpaid wages, liquidated damages and attorney fees: 1) by accepting a voluntary payment in a process that is under the supervision of the Secretary of Labor; 2) by consenting to the initiation of a suit by the U.S. Secretary of Labor; 3) or by reaching a settlement or compromise of FLSA claims and the employee is represented by an attorney.

18.1 Voluntary Payment – Wage and Hour Administrator's Supervision

Under Section 16(c), the Wage and Hour Administrator is authorized to supervise payment to employees of unpaid minimum wages and overtime compensation due under the FLSA.[456] The right to bring suit under Section 16(b) is released if the employee agrees to accept the voluntary payment.[457] In addition, liquidated damages and attorney fees may not be recovered if the agreed payment is made in full.[458]

18.2 Suit by Secretary of Labor on Behalf of Employees

Under Section 16(c), the Secretary of Labor may file a lawsuit on behalf of the employees for minimum wages and overtime compensation due under the FLSA.[459] It is important to note that the 1974 Amendments have eliminated the need for a written request by the employee as a prerequisite for a wage collection suit by the Secretary of Labor. Thus, the Secretary, on her own, may initiate a lawsuit and by doing so, foreclose the opportunity of a lawsuit against the employer by a private employee.

Unless the suit is dismissed without prejudice, the employee is bound by any settlement or court decision.[460] The employee is subject to the terms of any settlement or outcome, and cannot avoid it on his or her own motion unless the Secretary of Labor finds it is appropriate to move for such a dismissal.

18.3 Settlement with Employees

Individual employees cannot voluntarily agree to waive their right to overtime compensation. Any settlement reached with the employer must be supervised by the Department of Labor or the employee must be represented by an attorney. This protects employees from unscrupulous employers who may force employees to waive their right to overtime under the threat of losing

[456] 29 U.S.C. § 216(c).
[457] *Id.*
[458] *Id.*
[459] *Id.*
[460] *Id.*

their jobs. If a settlement is unsupervised, a court will refuse a request to enforce it.[461] If a lawsuit has been initiated, the court must approve the settlement.

If DOL imposes a settlement, it only waives an employee's FLSA claims for a particular time period. In one case, where an employee had signed a DOL waiver of claims form as part of a settlement, the employee was allowed to sue for a different time period.[462]

[461] *Lynn's Food Stores v. United States*, 679 F.2d 1350 (11th Cir. 1982).
[462] *Dent v. Cox Commc'ns Las Vegas*, 502 F.3d 1141 (9th Cir. 2007).

19. ANTI-DISCRIMINATION/RETALIATION

Employees who assert a right to Fair Labor Standards Act (FLSA) minimum wage or overtime compensation are afforded protection against retaliatory discrimination by an employer under Section 15(a)(3) of the Act.[463] This Section makes it unlawful for an employer to discharge or discriminate in any manner against any employee because that employee filed any complaint or suit under the FLSA, initiated or caused to be initiated any proceeding under the FLSA, or testified or agreed to testify in any proceeding under the FLSA.

On March 22, 2011, the U.S. Supreme Court resolved a split among federal circuit courts in deciding that the anti-retaliation protections found in the FLSA protected even verbal complaints by employees to their employers. Prior to this decision, some courts had held that under section 15(a)(3), the employee must prove that he or she suffered directly as a result of having filed a suit or complaint with the Department of Labor. Other courts had held that to be protected from retaliation, an employee merely must have voiced a complaint or concern about the employer not properly complying with the FLSA. As noted above, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court adopted the latter view, finding that the anti-retaliation provisions protected both oral and written complaints.[464]

19.1 Retaliation – Section 15(a)(3)

Section 15(a)(3) of the FLSA states:

> (I)t shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding....[465]

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court analyzed the term "filed any complaint" to determine whether the protections of Section 15(a)(3) applied to both written and verbal complaints.[466] In this case, an employee brought an anti-retaliation lawsuit

[463] In the 1985 Amendments to the FLSA, Congress enacted Section 8 of the FLSA which expanded the protections of Section 15(a)(3). Section 8 made it illegal for a state or local government employer to discriminate against any employee with respect to wages or other terms and conditions of employment because the employee asserted coverage under the FLSA. After August 1, 1986, however, Section 8 provides that its protections are afforded only if an employee takes the actions described under section 15(a)(3) of the FLSA. The language of Section 8 may make it easier for an employee to prove employer discrimination under the Act than under section 15(a)(3). Section 8 of the Amendments only requires that the employee show that the employer's discrimination nullified the effect of the FLSA overtime provision.

[464] *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011).

[465] 29 U.S.C. § 215(a)(3).

[466] In the past, courts have looked to the term "institution of a proceeding" to determine the scope of protection under Section 15(a)(3). The majority of courts applied a broad interpretation to the meaning of this term, ruling that acts such as an employee insisting that the employer pay overtime compensation owed him or making a statement to a U.S. Department of Labor investigator satisfied the "institution of a proceeding" requirement; however, other courts held that to be protected, an employer's retaliation must have been in response to the employee having filed a

against his former employer for discharging him after he complained that the employer located its time clocks between the area where the employee and other workers put on (and took off) their work-related protective gear and the area where they carry out their assigned tasks. The location of the clock prevented workers from receiving credit for the time they spent putting on and taking off their work clothes – contrary to the Act's requirements. The sole question presented was whether an oral complaint of a violation of the FLSA is protected under Section 15(a)(3). The Court explained that the FLSA protects employees who have "filed any complaint," and that this "includes oral as well as written complaints within its scope."[467] To decide otherwise, the Court stated, "would discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act."[468]

Although the decision may leave the door open on the question of who must receive the "filing" (i.e., an employer or a government agency) for the protections to extend to oral complaints, the decision greatly expanded the anti-retaliation provisions of the Act.

To prevail under Section 15(a)(3), the employee must prove the employer discharged or otherwise discriminated against the employee as a result of his or her initiating a proceeding or filing a complaint under the FLSA. This burden of proof can be met by showing the discharge or discrimination occurred after the employer became aware of the employee's filing of a complaint or other initiation of proceedings under the FLSA. If the employee is successful in making this showing, the burden then shifts to the employer to show that the reasons for its actions were non-discriminatory.

19.2 Cases/Rulings

19.2.1 Court Cases on Discrimination/Retaliation Under the Act

- *Glover v. N. Charleston*[469]

Fire fighter applicants, who had never been employed by the city defendants, were not considered "employees" under the Act and therefore could not pursue an FLSA action against the city. The plaintiff fire fighters had been employed by a fire district that was disbanded with the fire services transferred to the city. The city opted not to re-employ the plaintiffs, who were involved in an FLSA action against the fire district. The court found that they lacked the standing to sue, because they did not have the necessary employer-employee relationship with the city.

complaint in court or filed a complaint with the U.S. Department of Labor regarding violations of the FLSA. *Goldberg v. Zenger.* 43 Lab. Cas. (CCH) P31, 155 (D. Utah 1961); *Mitchell v. Equitable Beneficial Life, Health and Accident Co.,* 34 Lab. Cas. (CCH) P71, 428 (D.N.J. 1958).

[467] *Katsen* at 1329.

[468] *Id.* at 1334.

[469] 942 F. Supp. 243 (D.S.C. 1996).

- *Claudio-Gotay v. Becton Dickinson Caribe Ltd.*[470]

In order to receive the anti-retaliation protection of the FLSA, an employee must file or threaten to file an action adverse to the employer, actively help other employees in asserting their FLSA rights, or engage in other activities that assert their own FLSA rights. When an employee informed the employer of possible FLSA violations as part of his job of reviewing and approving invoices, he had not engaged in any FLSA protected action.

- *McKenzie v. Renberg's Inc.*[471]

In order to be protected for retaliation under the FLSA, an employee must allege FLSA violations outside of her job duties. In this case, the employee informed the company president and its attorney that the company was not paying its employees overtime properly as part of her job as personnel director. She was fired 16 days later. The court ruled that because the FLSA allegations raised were part of her job duties, the employee did not receive the anti-retaliation protections of the act.

- *Velazquez v. Yoh Servs., LLC*[472]

The Second Circuit held that an employee's retaliation claim was properly dismissed where there was insufficient evidence to find she engaged in activity protected by the FLSA. The court found that she made various informal complaints such as texting her supervisor inquiring about her lack of pay and stating "I better get paid in the next week" and asking if her supervisor had been messing with her time entries because she was short on money. The court noted that these complaints were insufficient to put the employer on notice that she was asserting her rights under the FLSA. The Second Circuit held that "a reasonable jury could not conclude that [her] employers understood [her] to be seeking to reconcile discrepancies between her pay and her own recollection of hours worked, but not that she was asserting her federally protected right to overtime under the FLSA."

- Townbridge v. Wernicki[473]

The District Court found that the plaintiff could base his FLSA retaliation claim on the informal complaints he made to his employer. Namely, plaintiff had written letters to his supervisor asking about his employer's compensation obligations under the FLSA and expressing his feeling that his supervisor was retaliating against him. The court found these complaints were sufficiently definite to put defendants on notice that the plaintiff was asserting his rights under the FLSA.

[470] 375 F.3d 99 (1st Cir. 2004).
[471] 94 F.3d 1478 (10th Cir. 1996).
[472] 803 F. App'x 515 (2d Cir. 2020).
[473] No. 3:13-cv-01797 (JAM), 2015 BL 188060 (D. Conn. June 15, 2015).

20. RECORDKEEPING

Employers are required to keep records for all employees covered under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).[474] These records will help either refute or substantiate an employee's claim that the employer has violated the provisions contained within the FLSA. If the employer fails to keep adequate records, courts will rely on the testimony of employees to draw a reasonable inference as to employees' work time and rely on this evidence to award damages in an FLSA lawsuit.[475]

In addition to general recordkeeping information, the employer is required to keep specific records for 7(k) employees and employees who are covered by the compensatory time provision contained within Section 7(o) of the FLSA. Significantly, the Department of Labor (DOL) Regulations also outline recordkeeping requirements for those employees who serve in a bona fide executive, administrative or professional capacity, although such employees are considered exempt from the FLSA.

The employer is required to post and keep posted notices pertaining to the applicability of the FLSA as prescribed by the Wage and Hour Division.

The employer is generally required to keep the aforementioned records in an accessible location for either a two or three year period. Willful failure by the employer to keep records or to falsify records constitutes a criminal offense punishable by up to $10,000 and/or six months imprisonment.

20.1 General Records to Be Preserved for 3 Years

The following is a list of records that employers are generally required to keep for 3 years under the FLSA:

- Name of employee in full;
- Home address (including zip code);
- Date of birth (if under 19);
- Sex and occupation;
- Time of day and day of week on which the employee's workweek begins;
- Regular hourly rate of pay in any workweek in which overtime premium is due and basis of wage payment (such as "$5/hour," "$40/day," "$200/week plus 5% commission");
- Daily and weekly hours of work;
- Total daily or weekly straight-time earnings;
- Total overtime compensation for the workweek;

[474] 29 U.S.C. § 211(c); 29 C.F.R. Part 516.
[475] *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946)

- Total additions to or deductions from wages paid;
- Total wages paid each pay period; and
- Date of payment and the pay period covered by payment.[476]

20.2 Additional Records to Be Preserved For 3 Years

The following is a list of additional records that employers are required to keep for 3 years:

- Collective bargaining agreements relied upon for the exclusion of certain costs under Section 3(m) of the FLSA - Section 3(m) addresses lodging, board, tips and the wage rate;
- Collective bargaining agreements which establish a 1040 or 2080 plan as permitted in Section 7(b)(a) and (2) of the FLSA - A 1040 Plan would require that no employee work more than 1040 hours within a 26-week period. A 2080 Plan would require that no employee work more than 2240 hours in a 52-week period. If an employee works more than 2080, however, he must be paid time and one-half;
- Plans, trusts, employment contracts and collective bargaining agreements under Section 7(e) of the FLSA - Section 7(e) addresses inclusions and exclusions in computation of the regular rate;
- Individual contracts or collective bargaining agreements which establish a Belo Contract as permitted in Section 7W of the FLSA - if the Belo Contract is not in writing, a written memorandum summarizing the terms of the oral agreement must be provided. It is important to understand that Belo Contracts are extremely rare and are allowable only when employees work irregular hours. If an employee can be so classified, he and the employer may agree to a regular rate, not less than minimum wage, upon which both straight-time and overtime compensation are based. It is also important to note that the employee must receive a weekly guarantee regardless of the number of hours actually worked. One stipulation on the weekly guarantee is that it shall cover no more than 60 hours. An example of a Belo Contract is as follows: Company X employed John Smith as an insurance adjuster at a regular rate of pay of $4 per hour for the first 40 hours in any workweek, and at the rate of $7.50 for all hours over 40 in any workweek, with a guarantee that John Smith will receive in any week in which he performs any work for the company, the sum of $275 as total compensation for all work performed up to and including 50 hours in such a workweek;
- All written agreements or written memoranda which summarize the terms of oral agreements to establish a 14-day pay plan for hospital employees;
- All written agreements or written memoranda summarizing the terms of oral agreements which establish a piece rate employment as permitted in Section 7(g) of the FLSA;
- A record of total dollar volume of sales or business and total volume of goods purchased or received during such periods and in such forms as the employer

[476] 29 C.F.R. § 516.2.

maintains in the ordinary course of business.[477]

20.3 Records to Be Preserved For 2 Years

The following is a list of additional records that employers are required to keep for 2 years under the FLSA:

- Time and earning cards which show the daily starting and stopping times for either individual employees or separate work forces;
- Tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages or salary, or overtime excess compensation;
- Tables or schedules of the employer which establish the hours and days of employment for either individual employees or separate work forces;
- Ordering, shipping and billing records, including the originals or copies of all customer orders or invoices, incoming or outgoing shipping or delivery records, bills of lading and billings to customers who the employer retains or makes in the regular course of business;
- Records of additions or deductions from wages, including the following:
    - Employers must keep records of any additions or deductions from wages during the pay period (such records shall include the date, amount, and nature of the deduction);
    - All employee purchase orders or assignments made by employees, all copies of addition and deduction statements furnished by employees; and
    - All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges if such costs and charges are involved in the additions to or deductions from wages paid.
- Any records which describe the basis for payment of any wage differential to employees of the opposite sex in the same establishment. For example, records which provide information on job evaluations, job descriptions, or seniority or merit systems, which may establish that the wage differential is based on a factor other than sex.[478]

In addition to general recordkeeping information, the employer is required to keep specific records for 7(k) employees and employees who are covered by the compensatory time provision contained within Section 7(o) of the FLSA. The DOL regulations also outline recordkeeping requirements for those employees who serve in a bona fide executive, administrative, or professional capacity.

20.4 Records to Be Kept for 7(k) Employees

The employer must identify the work period for each employee subject to the provisions of 7(k). This notation should include both the starting time and length of the work period. If a group of

[477] 29 C.F.R. § 516.5.
[478] 29 C.F.R. § 516.6.

workers have the same work period (same starting time and length), a single notation of the work period would be acceptable for these workers. Such records must be preserved for 3 years.[479]

20.5 Records to Be Kept for Compensatory Time

If an employee is subject to the compensatory provisions contained within Section 7(o), the employer is required to preserve the following records for 3 years:

- The number of hours of compensatory time earned by the employee pursuant to Section 7(o) for each work period. Such time shall be earned at the rate of time and one-half for each overtime hour worked;
- The number of hours of compensatory time used by the employee for each work period;
- The number of hours of compensatory time compensated in cash. Such records shall include the amount and date of payment; and
- Any collective bargaining agreement or written understanding with respect to earning and using compensatory time off. If such agreement is not in writing, some record of its existence must still be kept.[480]

20.6 Recordkeeping Requirements for Bona Fide Executive, Administrative, and Professional Employees

Although the employer is not required to pay overtime monies under the FLSA to employees who serve in a bona tide executive, administrative, or professional capacity, it is still obligated to preserve the following records for 3 years:

- The number of hours of compensatory time earned by the employee pursuant to Section 7(o) for each work period. Such time shall be earned at the rate of time and one-half for each overtime hour worked;
- Name of employee in full;
- Home address (including zip code);
- Date of birth (if under 19);
- Sex and occupation;
- Time of day and day of week in which the employee's workweek begins;
- Total wages paid each pay period;
- Date of payment and the pay period covered by the payment;
- The basis on which wages are paid, with sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits. This requirement may be fulfilled by notations such as: "$725/month," "$165/week," or "$1,200/month plus hospitalization and insurance."[481]

[479] 29 C.F.R. § 553.51.
[480] 29 C.F.R. § 553.50.
[481] 29 C.F.R. § 516.3.

20.7 Posting of Notices

An employer shall post and keep posted notices which pertain to the applicability of the FLSA as prescribed by the Wage and Hour Division. Notices must be posted in conspicuous places in every establishment to permit the employees the opportunity to easily view a copy of the notice on the way to or from their place of employment.[482]

20.8 Employee Access to Records

An employer must keep all of the above records at the place of employment or at an established recordkeeping office. These records must be made available to the Wage and Hour Administrator or one of his delegates within 72 hours of notification.[483]

An employee who has filed suit under the FLSA may request to see his employment records for pre-trial examination.

20.9 Electronic Recordkeeping

The DOL has indicated that employers may maintain electronic or internet-based recordkeeping systems as long as sufficient safeguards are enabled to protect the integrity of the data.[484] Furthermore, in a DOL opinion letter, the DOL explained that employers may use paperless time recording systems provided that the systems are accurate and the data can be converted into a form suitable for inspection.[485]

20.10 Failure to Comply with Recordkeeping Requirements

Section 16(a) of the FLSA imposes criminal penalties for willful failure to keep records or falsification of records. This criminal offense may be punished by a fine of up to $10,000 and/or six months imprisonment.[486]

Individual employees are without standing to enforce the recordkeeping requirements. Only the Department of Labor may do so. Nonetheless, in an action to enforce the overtime requirements of the FLSA, individual employees can access all recordkeeping by the employer with respect to that employee's claim.

20.11 Court Cases on Recordkeeping

- *Daves v. Hawaiian Dredging Co.*[487]

A Federal District Court ruled that although the Fair Labor Standards Act requires an employer

[482] 29 C.F.R. § 516.4.
[483] 29 C.F.R. § 516.7.
[484] WH Admin. Op. (February 6, 1998).
[485] WH Admin. Op. (March 10, 1995).
[486] 29 U.S.C. § 216(a).
[487] 114 F. Supp 643 (D. Haw. 1953).

to keep and preserve records, it is not obligated to keep such records in a form intelligible to the employee or at a place convenient to the employee. In addition, the employer is not obligated to make records available to potential plaintiffs so they can determine whether a cause of action exists or to enable them to set out a claim for relief. An employer is only required to provide its records for employee inspection after a complaint has been filed.

- *Ferrer v.Waterman*[488]

The Federal District Court held that in order to obtain access to the employer's records, the suing employees must allege that they worked hours not paid for under FLSA. The employees may not inspect employer records merely to determine whether a cause of action exists.

- *Silman v. Sprey*[489]

The Court found that an employee bringing a wage suit to recover back wages and liquidated damages under the FLSA is entitled to examine before trial the employer's records which relate to and are necessary for proof of: 1) basis on which employee's weekly compensation was computed, 2) how much the employee was paid for each week of period in question, and 3) number of hours worked by the employee during the period in question.

- *Fishman, etc. et al v. Marcourse*[490]

The Federal District Court held that an employee bringing a wage suit is entitled to examine the employer's wage and hour records pertaining solely to the employee. Production of such records by the employer does not violate constitutional rights against self-incrimination.

- *Young, et. al v. United States Trucking Corporation*[491]

A Federal District Court found that employees in a wage suit are entitled to pre-trial examination of the employer's copy of the employment contract and records which cover the period up to the institution of the action.

- *Hertz Drivurself Stations, Inc. v. United States*[492]

The 8th Circuit Court of Appeals ruled that changing the number of hours reported by the employees and basing payment on the altered hours constituted willful falsification of records. In this instance, both the employer and the manager who altered the time cards were found guilty. Loafing by the employees and a dispute as to whether the lunch period was to be considered hours worked were considered no grounds for the alterations in that the alterations were made capriciously and not after the investigation, thereby, failing to reflect the actual hours worked.

[488] 84 F. Supp. 680 (D. P.R. 1949).
[489] Unreported.
[490] 32 F. Supp. 460 (E.D. Pa. 1940).
[491] 54 F. Supp. 676 (S.D.N.Y. 1943).
[492] 150 F.2d 923 (8th Cir. 1945).

- *Mitchell v. Southwest Engineering Co.*[493]

The 8th Circuit Court of Appeals ruled that an employer violated the FLSA when it falsified records to hide employee overtime hours and destroyed records to cover up the falsification.

- *Dunlop v. Gray-Goto, Inc.*[494]

The 10th Circuit Court ruled that the employer's alleged good faith does not excuse violation of the recordkeeping provision where the payroll records did not accurately reflect the hours worked and wages paid. In addition, the records were misleading to outsiders examining the records. The Court noted that its attention had not been directed to any authority holding that so-called "good-faith" of the type found in its case (figures shown on basic time cards which accurately reflected the number of hours worked were altered in transferring the information to payroll cards) excuses what is otherwise a clear violation of the FLSA.

- *Walling v. Panther Creek Mines, Inc.*[495]

The 7th Circuit Court of Appeals held that a coal mine operator failed to keep the requisite records since his report did not show the number of hours worked daily and weekly. The system used was to keep so-called attendance records. The miners left numbered checks on a tally board at the mine from which absences might be deducted. Unless an absence was indicated, it was presumed that the miner worked seven hours a day. In addition, absences were sometimes determined by the amount of coal produced.

- *Herman v. Palo Group Foster Home Inc.*[496]

The Federal District Court held that an employer failed to maintain records of the number of hours actually worked by its employees each workday and the total number of hours worked each workweek.

- *Win v. Williams*[497]

The 5th Circuit Court of Appeals held that an employer had failed to keep records of the actual time consumed by truck drivers on various trips where the employer paid the drivers by the load rather than by the hour. Each trip was assigned a number of hours, for pay purposes, based on the employer's estimate of the normal driving time plus an allowance for loading time and any unusual experience the drivers might encounter. The Court found estimates to be unreliable since the driver's actual time varied substantially from delivery to delivery.

[493] 271 F.2d 427 (8th Cir. 1959).
[494] 528 F.2d 792 (10th Cir. 1976).
[495] 148 F.2d 604 (7th Cir. 1945).
[496] 976 F. Supp 696 (W.D. Mich. 1997).
[497] 369 F. 2d 783 (5th Cir. 1966).

- *McComb v. Puerto Rico Tobacco Marketing Co-op Association*[498]

The Federal District Court held that an employer violated the recordkeeping provisions of the FLSA where records were based on the employee's output of completed work instead of the hours actually worked by the employees.

- *Usery v. Godwin Hardware Inc.*[499]

The Federal District Court held that an employer violated the FLSA when it failed to display required information in its payment records, failed to label information in a way to avoid confusion about the significance of certain recordkeeping entries, and combined unrelated information into single entries in a false and misleading manner.

- *Acosta v. Min & Kim, Inc*.[500]

The Sixth Circuit found that the employer violated the recordkeeping requirements of the FLSA where they failed to keep time and payroll records from 2014 – 2016, failed to record more than an employee's name and biweekly pay on other records, and generally failed to consistently record the information required by 29 C.F.R. § 516.2. The employer tried to invoke the fixed-schedule exception – which allows employers to maintain records that show the schedule of daily and weekly hours worked by the employee – but the court found the employer failed to record the employees "exact number of hours worked each day and each week for every week in which they work more or less than the fixed schedule." The court also rejected the employer's argument that they did not know of the FLSA's recordkeeping requirements because the FLSA, like most civil laws, does not have a knowledge requirement.

- *DOL v. Fire & Safety Investigation Consulting Servs., LLC*[501]

The Fourth Circuit found the employer had failed to maintain appropriate records under the FLSA. The employer maintained that its records complied with the fixed schedule exemption in that they showed the schedule of daily and weekly hours worked by each employee. The court, however, found that the employer did not record the exact number of hours worked each day and each week when employees worked less hours than the fixed schedule. Indeed, the court found that the employer failed to record any hours when employees worked less than their fixed schedule. The court, therefore, held that the employer failed to make and maintain proper records under the FLSA.

- *Kuebel v. Black & Decker Inc.*[502]

The Second Circuit rejected a District Court's ruling that an employee who was responsible for filling out his own timesheets was required to prove the amount of overtime he worked with

[498] 80 F. Supp. 953 (D.P.R. 1948).
[499] 426 F. Supp. 1243 (W.D. Mich. 1976).
[500] 919 F.3d 361 (6th Cir. 2019).
[501] 915 F.3d 277 (4th Cir. 2019).
[502] 643 F.3d 352 (2d Cir. 2011).

specificity. The court noted that an employer has a non-delegable duty under the FLSA to maintain accurate records of its employees' hours. The court further observed that "once an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly record or claim his overtime hours."

- *Perez v. Oak Grove Cinemas, Inc.*[503]

The court found that the employer failed to meet the recordkeeping requirements of the FLSA even where the employer testified that the records were lost after water flooded a basement area where the records were kept. The court found that the "employers own testimony established that at a minimum they failed to preserve the relevant employment records [and] [t]hus, they violated the statute."

[503] 68 F. Supp. 3d 1234 (D. Or. 2014).

21. TABLE OF STATE OVERTIME LAWS

Alabama—There are no state overtime laws, so publicly-employed fire protection employees (fire fighters and EMS) are covered only under the FLSA.

Alaska—State and local government employees are excluded from the state overtime laws, so they are only covered under the FLSA. ALASKA STAT. § 23.10.055(5). Private sector employees are to be paid one and one-half times the regular rate of pay for any hours worked in excess of 8 per day or 40 per week. ALASKA STAT. § 23.10.060. Private sector employees may negotiate through their union for different hours with respect to overtime pay. They may agree to a voluntary flexible work hour plan which would require overtime compensation to be paid after the employee has worked 10 hours per day or 40 hours per week. ALASKA ADMIN. CODE tit. 8, § 15.102.

Arizona—There is no general overtime law in Arizona. Where overtime compensation is mandated by federal law, *the state* will pay state employees at a rate of one and one-half times the regular rate for hours worked in excess of the normal work week. Arizona Revised Stat. Ann. § 23-391

Arkansas—Public fire fighter and EMS employers must follow the FLSA compensation guidelines. Ark. Code Ann. § 11-4-211(e). Private employers with 4 or more employees and who have gross annual revenues of less than $500,000 must pay employees who are not exempt under the FLSA at one and one-half times the regular rate for hours worked over 40 in one work week.

California—Private sector employees are to be compensated at a rate of one and one-half times the regular rate for work done in excess of 8 hours per day. Private sector employees are to be paid double the regular rate if they work for more than 12 hours in one day, unless an alternative work week is agreed upon. CAL. LAB. CODE §§ 510-511. Public employees are exempt from state overtime laws. *Johnson v. Arvin-Edison Water Storage Dist.*, 95 Cal. Rptr. 3d 53, 56 (Ct. App. 5th Dist. 2009) ("unless Labor Code provisions are specifically made applicable to public employers, they only apply to employers in the private sector. Since sections 510 and 512 do not expressly apply to public entities, they are not applicable here.") They are covered only under the FLSA.

Colorado—Municipal fire fighters may not work more than an aggregate of 12 hours per day per month except in cases of emergency. COLO. REV. STAT. §§ 8-13-107 to 8-13-108. All other employees are to receive overtime compensation for work in excess of 40 hours per week, 12 hours per day, or 12 consecutive hours. COLO. CODE REGS. § 1103-1.

Connecticut—Private employees are to be compensated at one and one-half times the regular rate for any hours worked in excess of 40 per week. CONN. GEN. STAT. § 31-76b. Permanent paid members of the uniformed firefighters of municipalities are specifically exempt from the Connecticut overtime laws. CONN. GEN. STAT. § 31-76i. They are covered by the FLSA.

Delaware—This state has no overtime laws, so all employees are covered only by the FLSA.

District of Columbia—Private employees are to be paid at a rate of one and one-half times the regular rate for hours worked in excess of 40 per week. D.C. CODE § 32-1003(c). Overtime laws explicitly include employees of the District of Columbia government. D.C. CODE § 32-1002(3).

Florida—There are no state overtime laws, so all employees are governed by the FLSA only. The Florida state constitution guarantees employees the minimum wage.

Georgia—State law excludes all employees who are subject to the FLSA from the State's minimum wage requirements. GA. CODE ANN. § 34-4-3.

Hawaii—Overtime laws exclude employees of the state. HAW. REV. STAT. § 387-1. Private employees are to be paid at a rate of one and one-half times the regular rate for all hours worked in excess of 40 per week. HAW. REV. STAT. § 387-3.

Idaho—There are no state overtime laws, so employees will be subject to the FLSA.

Illinois—Any hours worked in excess of 40 per week must be paid at a rate of one and one-half times the regular rate except that a governmental body is permitted to compensate firefighters in any manner that complies with the FLSA. 820 ILL. COMP. STAT. 105/4a(1), (4).

Indiana—Overtime must be paid a rate of one and one-half times the regular rate for hours worked in excess of 40 per week. IND. CODE § 22-2-2-4(k). The law exempts employers subject to the FLSA. IND. CODE § 22-2-2-3.

Iowa—There are no state overtime laws, so employees are subject to the FLSA.

Kansas—Overtime is required to be paid at a rate of one and one-half times the regular rate for hours worked in excess of 46 per week. KAN. STAT. ANN. § 44-1204(a). Overtime is required after fire fighters or EMS employees, both public and private, work more than 64.5 hours per week or 258 hours in a 28 day period or some ratio between 7-28 days reflecting these hours. KAN. STAT. ANN. § 44-1204. Hours that are worked based on a voluntary substitution with another employee will not have an effect on the hours of work. *Id.* § 44-1204(d). This section does not apply to any employees who are covered by the FLSA.

Louisiana—There is no general overtime law in Louisiana.

Maine—Overtime must be paid for private employees who work more than 40 hours per week at a rate of one and one-half times the regular rate. ME. REV. STAT. ANN. tit 26, § 664(3). All public employees are exempt from this requirement. ME. REV. STAT. ANN. tit. 26, § 664(3)(D).

Maryland—"A unit may adopt alternate work periods as allowed by the federal FLSA for the purpose of determining overtime work for its law enforcement employees or fire fighters." MD. CODE ANN., STATE PERS. & PENS. § 8-305. Otherwise, hours worked in excess of 40 hours in a

work week are to be paid at one and one-half times the regular pay rate. MD. CODE ANN., LAB. & EMPL. §§ 3-415, 3-420.

Massachusetts—Overtime at a rate of one and one-half times the regular rate of pay is required for all hours worked over 40 per week. MASS. GEN. LAWS ch. 149, § 30B; MASS. GEN. LAWS ch. 151 § 1A. This does not apply to publicly employed fire prevention engineers. MASS. GEN. LAWS ch. 149, § 30B.

Michigan—Overtime required after 40 hours of work in one workweek for both public and private employees. MICH. COMP. LAWS ANN. § 408.412 The state, or its subdivisions, may choose to pay overtime for fire protection employees who work more than 216 hours in a 28 day period or some ratio between 7-28 days reflecting these hours. All overtime is compensated at a rate of at least one and one-half times the regular pay rate. MICH. COMP. LAWS ANN. § 408.414a.

Minnesota—Employees who provide fire protection services are exempt from state overtime laws. MINN. STAT. ANN. § 177.23. Other employees must be paid at a rate of one and one-half times the regular rate for all hours worked over 48 per week. MINN. STAT. ANN. § 177.25.

Mississippi—There is no state overtime law. Employees may be covered under the FLSA.

Missouri—Overtime must be paid to private employees for any hours worked over 40 per week at a rate of one and one-half times the regular rate. VERNON'S ANN. MO. STAT. § 290.505. Government employees are exempt from this provision; only the FLSA applies to them. *Id.* § 290.500.

Montana—The state applies the FLSA provisions to overtime compensation for fire fighters. Mont. Code Ann. § 39-3-405(4). The state department of public safety is permitted to set up a different workweek for overtime purposes, so long as the aggregate of all work periods in a year does not exceed 2,080 hours. *Id.* § 7-32-115.

Nebraska—There is no state overtime law. Employees may be covered by the FLSA.

Nevada—Private employees are to be paid at a rate of one and one-half times the regular rate for hours worked in excess of 40 per week or 8 per day, unless there is an agreement that the employee will work 10 hours per day. NEV. REV. STAT. § 608.018. Public employees are to be paid one and one-half times the regular rate of pay for hours worked in excess of 8 hours in one day or sixteen hour period or in excess of 40 hours per week. Firefighters who work 24 hour shifts will be deemed to work 56 hours per week. Overtime will be considered any hours worked in excess of 24 hours in a scheduled shift or 53 hours average per week during one week period for those hours worked or on paid leave. NEV. REV. STAT. § 284.180.

New Hampshire—Employees, except those who are subject to the FLSA, are to be paid at a rate of one and one-half times the regular rate for hours worked in excess of 40 per week. N.H. REV. STAT. ANN. § 279:21.

New Jersey—Private and public employees are to be paid one and one-half times the regular rate of pay for work done in excess of the regular work week. N.J. STAT. ANN. §§ 34:11-56a1(g), 34:11-56a4..

New Mexico—Private employees are to be paid at a rate of one and one-half times the regular rate for all hours worked in excess of 40 per week. N.M. STAT. § 50-4-22. State and local government employees are exempt from the state overtime laws; only the FLSA covers those employees. N.M. STAT. § 50-4-21. Only certain employees, including fire fighters, are permitted to work more than 16 hours per day, except in emergencies. N.M. STAT. § 50-4-30.

New York—State officers and employees are to be paid at a rate of one and one-half times the regular rate for hours worked in excess of 40 per week. An employee who is called back to work after he has left shall be considered to have worked a half of a day. N.Y. CIV. SERV. LAW § 134. State law requires that fire fighters average 40 hours per week, though there are certain exceptions for certain jurisdictions (e.g., New York City) to establish overtime pay when fire fighters work more than 40 hours a week.

North Carolina—Employees are to be paid one and one-half times the regular rate of pay for hours worked in excess of 40 during one workweek. N.C. GEN. STAT. § 95-25-4. Fire fighters are governed by the FLSA. N.C. GEN. STAT. § 95-25.14. The legislature has enacted identical legislation which becomes effective if the FLSA is repealed or no longer effective. N.C. GEN. STAT. § 160A-295.1.

North Dakota— Overtime for private employees must be paid at one and one-half times the regular pay rate for hours worked over 40 in one week. N.D. ADMIN. CODE § 46-02-07-02(4). The state or a political subdivision of the state may provide for compensatory time and for a work period for compensatory time and overtime calculation for its employees if the state or political subdivision complies with the requirements of the FLSA." N.D. CENT. CODE § 34-06-04.1.

Ohio—Overtime shall be paid to employees who work more than 40 hours per week at a rate of one and one-half times the regular rate. Fire protection agency employees are specifically exempt from these provisions. OHIO REV. CODE ANN. § 4111.03. The FLSA governs overtime for fire fighters.

Oklahoma—Oklahoma does not have an overtime law for private employees. A full day is considered 8 hours for public employees except for public safety professionals. Overtime compensation for public employees is governed by the FLSA. OKLA. STAT. tit. 61, § 3.

Oregon—Overtime is to be paid after 40 hours of work at a rate of one and one-half times the regular pay rate. OR. REV. STAT. § 653.261, 653.268. Fire protection employees are exempt from the state overtime laws. OR. REV. STAT. § 653.269. Thus, they are covered only by the FLSA.

Pennsylvania—Private employees are to be paid overtime, at a rate of one and one-half times the regular rate, for hours worked over 40 in a work week. PA. CONS. STAT. § 333.104(c); 31 PA.

CODE § 231.41. There is no law that exempts public employees from the 40 hour per week overtime standard. However, in 1976, the state attorney general issued an opinion that in removing the exemption for public employees, the state legislature intended public employees to be covered by federal FLSA requirements. 29 Op. Att'y Gen. 92 (1976).

Puerto Rico—The FLSA is used to determine overtime for all employees. P.R. LAWS ANN. tit. 29 §§ 250, 275.

Rhode Island—Employees are to be paid overtime, at a rate of one and one-half times the regular rate, for all hours worked in excess of 40 in one work week. R.I. GEN. LAWS § 28-12-4.1(a). Firefighters must be compensated at a rate of one and one-half times the regular rate for all hours worked in excess of 42 hours based upon an average work week. R.I. GEN. LAWS § 28-12-4.1(c).

South Carolina—There is no state overtime law. Employees may be covered by the FLSA.

South Dakota—There are no state overtime laws that govern private employers. Cities must have hours of employment mutual agreements with fire fighters. Fire fighters must receive additional compensation or time off if they work 212 hours in a 28 day work period or 204 hours in a 27 day work period. S.D. CODIFIED LAWS § 9-14-43. This is consistent with the FLSA.

Tennessee—There are no state overtime laws that govern private employers. Overtime compensation can be paid to state employees for hours worked in excess of the normal workweek "when such extra work is performed at the direction of the supervising department or agency head, authorized in advance by the commissioner of personnel and approved in advance by the commissioner of finance and administration." TENN. CODE ANN. § 8-23-201.

Texas—There is no overtime law that governs private employers. Overtime laws vary depending on the size of the municipality for public safety employees. The law tracks the FLSA as it applies to fire protection employees. However, the law appears to prevent exclusion of sleep and meal time for fire fighters paid under section 7(k) of the FLSA. TEX. LOC. GOV'T CODE ANN. §§ 142.001-142.002.

Utah—There is no law governing private employee overtime compensation. Public employees who are covered by the FLSA are exempt from state overtime provisions. UTAH CODE ANN. § 63A-17-502.

Vermont—Employees are to be paid at a rate of one and one-half times the regular rate for all hours worked over 40 in one work week. VT. STAT. ANN. tit. 21, § 384(b) Overtime laws do not apply to state employees that are covered by the FLSA. *Id.* § 384(b)(7).

Virginia—There is no state law governing overtime for private employees. Fire fighters and EMS employees should be compensated at a rate of one and one-half times the regular rate for hours exceeding the maximum set in the FLSA. Under state law, leave hours count toward regularly scheduled overtime hours in computing fire fighters' FLSA overtime compensation. Va. Code Ann. §§ 9.1-700 to 9.1-703.

Washington—Employees should be paid at a rate of one and one-half times the regular rate for all work in excess of 40 hours per week. Fire protection workers are to receive time and one-half for hours worked in excess of 240 hours in a 28 day period or in a work period of at least 7 but not more than 28 days, the ratio that the number of days worked bears to 28 days, 240 hours. WASH. REV. CODE § 49.46.130. These requirements are less beneficial for employees than the FLSA, so the requirements of the FLSA apply.

West Virginia—Employees, both public and private, should be paid time and one-half for hours worked more than 40 in one week. Public employees may, however, receive compensatory time off in lieu of overtime compensation. W. VA. CODE § 21-5C-3. Firefighters should not be required to remain on duty for more than 112 hours in any 14 day period. No member should remain on duty for more than 24 hours, except in the case of an emergency. *Id.* § 8-15-10. Fire fighters who are scheduled to work holidays should be allowed equal time off or be paid at one and one-half times the regular rate. *Id.* § 8-45-10a.

Wisconsin—Employees are to be paid at a rate of one and one-half time the regular rate for hours worked in excess of 40 per week. WIS. STAT. § 103.025; WIS. ADMIN. CODE § 274.03. Wisconsin does provide that fire fighters should be granted one full rest day (24 hours) for each 72 hours in first class cities, one full rest day for each 96 hours in second and third class cities, and one full rest day for each 168 hours in fourth class cities. Wis. Stat. § 213.13.

Wyoming—There are no laws governing overtime for private employees. State and county employees can be compensated at a rate of one and one-half times the regular pay rate for work exceeding 8 hours per day or 40 hours per week if the state or county passes regulations to allow for such overtime payments. WYO. STAT. ANN. § 27-5-101.

22. IAFF FLSA POLICY

FLSA Legal Fees—The following policy is established to assist IAFF Local Affiliates under the Fair Labor Standards Acts.

1. Criteria for IAFF assistance to locals involved in FLSA cases is as follows:

    - The request for IAFF involvement must originate with the IAFF District Vice President with approval for IAFF participation determined by the International President.

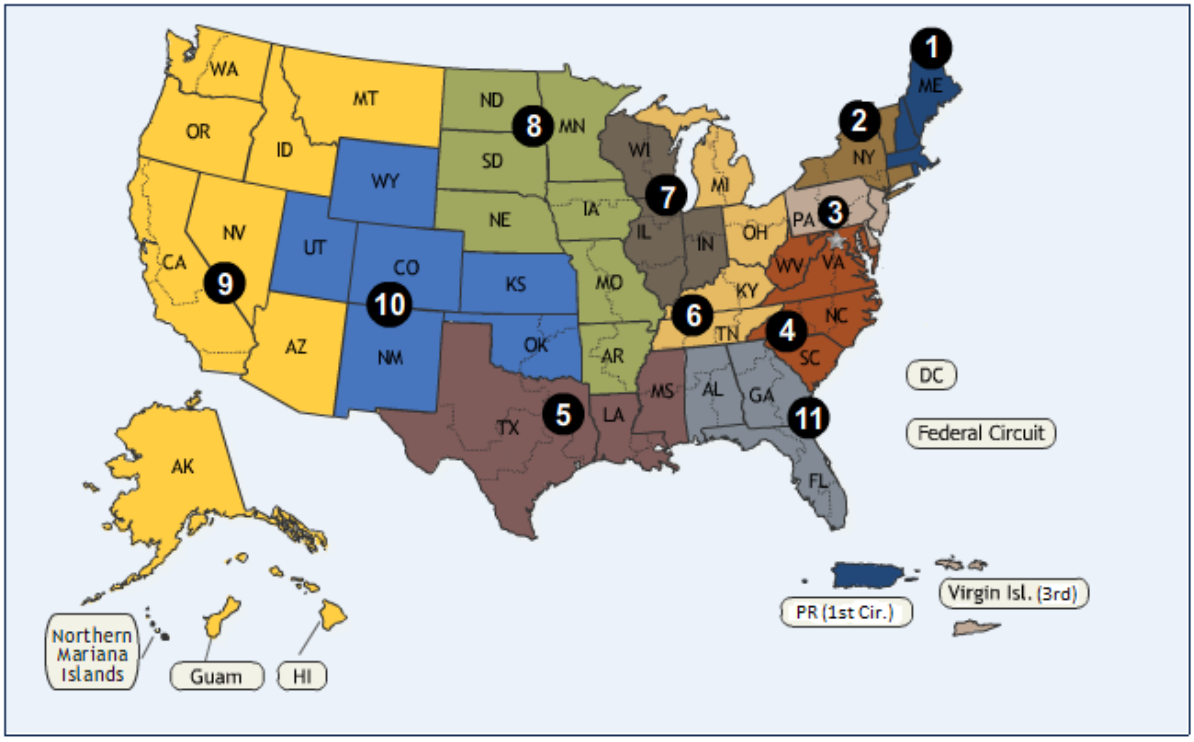
    - After consultation with IAFF General Counsel, the IAFF Local affiliate must retain a local attorney at its own expense and agree to cooperate with IAFF General Counsel in pursuit of the case. FLSA cases will be handled cooperatively by the local, the local attorney, and the IAFF.

2. IAFF will provide financial assistance for General Counsel legal fees in an amount not to exceed $10,000.00. Fees for expenses of IAFF General Counsel beyond the $10,000.00 limit are the responsibility of the Local. Any stipulated or negotiated conclusion to the case must provide for reimbursement to the IAFF for the cost of its legal fees.

3. Legal fees advanced by the IAFF and recovered subsequently are to be credited to IAFF Budget Line 128 so that the program is self-sustaining.

4. This policy is effective October 1, 1989.

MAP OF THE U.S. CIRCUIT COURTS OF APPEALS



Map of the Circuits of the U.S. Courts of Appeals