

OVERVIEW of the FLSA RULES for FIREFIGHTERS

Overview

The Federal Labor Standards Act (FLSA) sets basic minimum wage and overtime standards that cities and counties must comply with when paying personnel. FLSA allows for longer work periods than the traditional “40 hour” work week for public safety employees, often referred to as the “7(k)” exemption or the “tour of duty rules.” In order to qualify, employees must be engaged in fire protection activities, or activities that are incidental or in conjunction with fire protection duties 80 percent or more of their time.

The section of federal law that addresses the 7k exemption for firefighters are found at 29 C.F.R. § 553.210. To be eligible for the exemption for fire protection employees, an employee must meet all of the following criteria:

- Be employed by an organized fire department or fire protection district;
- Have been trained to the extent legally required by statute or ordinance;
- Have the legal authority and responsibility to engage in the prevention, control, or extinguishment of a fire of any type; and,
- Perform activities that are required for, and are directly concerned with, the prevention, control or extinguishment of fires.

Firefighting activities also include such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills, and fire prevention inspections. Employees who satisfy the criteria listed above are considered fire protection employees regardless of their status as “trainee”, “probationary”, or “permanent,” or of their particular specialty or job title (e.g., firefighter, engineer, fire inspector, lieutenant, etc.) The term may also include rescue and ambulance personnel (EMS) **IF** such personnel form an “integral part” of the city or county’s fire protection activities. The ambulance personnel must be trained in firefighting procedures as outlined above and must respond on a regular basis to fires, natural disasters, and accidents. In many departments, the EMS employees do not qualify for the 7k exemption because the majority of their work involves transporting patients for medical reasons unrelated to fire or law enforcement activities.

The exemption does not include agency employees who do not fight fires on a regular basis, such as dispatchers, maintenance and office personnel. The exemption also does not apply to “civilian” personnel that perform support activities of the fire department.

Tour of Duty

The FLSA authorizes the establishment of work periods of not less than seven nor more than 28 days for public safety personnel. The regulations establish the maximum allowable non-overtime hours as 212 hours per 28-day period for firefighters. For tours less than 28 days, the same ratio applies for allowable non-overtime hours. Some of the most common tours of duty and non-allowable overtime hours include:

- 28 days- 212 hours
- 21 days- 159 hours
- 14 days- 106 hours
- 7 days- 53 hours

The pay period does not have to coincide with the tour of duty. For example, the pay period may be every week or every other week, while the tour of duty is a 21 or 28 day tour. The employee would receive the normal pay rate until the maximum allowed hours are exceeded in the tour of duty and would then receive the overtime pay rate of time and a half for the hours worked after 159 or 212 hours, respectively in the above example.

Compensable Time

Compensable time refers to the hours of work for which an employee must be paid under the FLSA. This topic is covered in the regulations found at 29 C.F.R. part 785. Compensable hours of work include all times during which the employee is on duty or on the employer's premises available for work or time spent away from the employer's premises under conditions that prevent the employee from using the time for personal activities. The concept of "hours worked" is a crucial determining factor in complying with the FLSA. An employee must be compensated for "all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944). Employees who, even though voluntarily, continue to work after their shift is over are engaged in compensable working time. The reason for the work is immaterial; as long as the employer "suffers or permits" employees to work on its behalf, proper compensation must be paid.

Compensatory Time

Public employers are allowed to give an employee compensatory ("comp") time off in lieu of cash payment for overtime worked. Comp time accrues at the rate of one and one-half hours for each hour of overtime worked. A county may provide comp time instead of cash for overtime as long as an agreement or understanding with the employee (or a regular practice or policy in place prior to April 15, 1986) has been reached prior to the performance of the work. The FLSA does not require a written agreement with each employee; a notice or written policy can be used. Different agreements can be reached with different employees. The agreement may take the form of a condition of employment so long as the employee knowingly and voluntarily agrees to it as a condition of employment. A statement may be placed on the employment application advising applicants that the county gives compensatory time off in lieu of cash payment for overtime worked and stating that acceptance of employment with the county constitutes the employee's agreement to accept comp time.

If a notice or written policy is used, an agreement or understanding will be presumed to exist for any employee who fails to express to the employer an unwillingness to accept comp time off in lieu of overtime pay. However, the employee's decision must be freely made without coercion or pressure. An agreement can restrict the taking of comp time to only certain hours of work and can provide for the use of a combination cash payment and comp time so long as the time and one-half principle is followed. Further provisions concerning preservation, use and cashing out comp time can be included. The regulations governing comp time are found at 29 C.F.R. § 553.21 *et seq.*

Accrual of Comp Time

Compensatory time accrues at the rate of one and one-half hours of compensatory time off for each hour of overtime worked. Employees in public safety, emergency response or seasonal activities may accrue up to 480 hours, which represents 320 hours of actual overtime worked. Other employees may accrue up to 240 hours, which represents 160 hours of actual overtime worked. Cash can always be used to compensate for overtime at the employer's option.

Use of Comp Time

Comp time cannot be used as a means of avoiding statutory overtime pay. An employee has the right to use accrued comp time, and must not be coerced to accept more comp time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of a request for use of such time. An employee must be permitted to use accrued comp time within a reasonable period after making the request, as long as it does not unduly disrupt the workplace.

What is a reasonable period will be determined by considering the customary work practices based on case by case facts and circumstances, including:

1. Normal work schedule,
2. Anticipated peak workloads based on past experience,
3. Emergency requirements for staff and services, and
4. Availability of a qualified substitute staff. To the extent the conditions are contained in an agreement or understanding, such can interpret what constitutes a "reasonable period."

Being unduly disruptive means more than mere inconvenience to the employer. The employer, in order to turn down a comp time request made within a reasonable period of time, must reasonably and in good faith anticipate that it would impose an unreasonable burden on the employer's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

Also, the employer may require employees to use their compensatory time. The U. S. Supreme Court has determined that the FLSA does not prohibit the practice of forcing employees to use accrued comp time. In a workweek or work period during which an employee works overtime hours for which cash overtime payment will be made, and the employee also takes

compensatory time off, the payment for such comp time may be excluded from the employee's regular rate of pay for overtime purposes.

Payment for Accrued Comp Time

The FLSA permits an employer to "cash out" an employee's accrued comp time at any time by paying the employee cash for the unused comp time. These payments are to be made at the regular rate of pay the employee was receiving at the time the payment is made.

Upon termination of employment, an employee with banked comp time must be paid for the banked comp time at the higher of:

1. The average rate received by the employee during the last three (3) years of employment, or
2. The final regular rate of pay.

The "last three (3) years of employment" means immediately prior to termination. If there is a break in service, the period of employment after the break is treated as a new period of service (so long as it was intended as permanent during the break, and accrued comp time was cashed out). Where the final period of service was less than three (3) years, the rate is calculated based on the rate in effect during the final period of service.

Sick Leave/ Vacation Leave/ Holiday Pay

While many cities and counties provide sick and vacation leave for employees, the provision of sick and/or vacation leave is not a requirement of FLSA. For jurisdictions that do provide this benefit, the sick or vacation leave hours are not counted as hours worked. For a firefighter that is scheduled for three 24 hour shifts in a seven day tour of duty that takes vacation for one shift, overtime would not be accumulated for this tour since only 48 hours were actually worked.

Holiday pay is a benefit that many jurisdictions provide to employees that are essential to the services of the community, such as public safety staff. The services of the fire department personnel are needed 365 days a year. Many jurisdictions provide an additional benefit for employees who cannot stay home on a recognized holiday as a compensation for working on those days. This compensation may come as a special holiday pay rate or the employee may accumulate additional comp time. Regardless of the method of compensation chosen, it is vital that a policy be clearly drafted in order that all parties understand the holiday pay benefit for the agency.

Work Shifts

Fire departments utilize a variety of shifts to maximize staffing coverage. One of the most common is 24 hours on and 48 hours off. Other agencies may use a series of 24 hours on and 24 hours off, with 72 or 96 hours off between cycles. Additional personnel may be scheduled in 8, 10, or 12 hour "power" shifts to supplement during peak times of coverage. Regardless of the shift schedule, the tour of duty will establish the maximum number of allowable non-overtime hours.

Work Scenarios

Example 1

Firefighter with an hourly rate of \$10.00, working a 24 hours on and 48 hours off schedule on a **14 day tour of duty (106 allowable non-overtime hours)**. The “short tour” will rotate among the three shifts:

1st 14 day tour = 120 hours (106 hrs x \$10 = \$1060) + (14 hrs overtime x \$15.00 = \$210) Gross pay = \$1,270

2nd 14 day tour = 120 hours (106 hrs x \$10 = \$1060) + (14 hrs overtime x \$15.00 = \$210) Gross pay = \$1,270

3rd 14 day tour = 96 hours (96 hrs x \$10 = \$960)

Example 2

Same work schedule above with firefighter using 24 hours of vacation leave in the 2nd tour of duty:

1st 14 day tour = 120 hours (106 hrs x \$10 = \$1060) + (14 hrs overtime x \$15.00 = \$210) Gross pay = \$1,270

2nd 14 day tour = 120 hours (96 hrs x \$10 = \$960) + (24 hrs Vacation Leave x \$10 = \$240) Gross pay = \$1200

3rd 14 day tour = 96 hours (96 hrs x \$10 = \$960)

Executive Exemptions

Certain employees of the fire department meet the FLSA requirements to be considered an Executive Employee that can be paid a salary instead of an hourly rate. The following requirements that must be met to qualify for the executive exemption:

1. The employee must be compensated on a salary basis at a rate not less than \$455 per week;
2. The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. The employee must customarily and regularly direct the work of two (2) or more other full-time employees, or their equivalent; and
4. The employee must 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 of other employees must be given particular weight.

While the fire chief or assistant fire chief would most likely meet this requirement, a district or battalion chief might not depending upon the duties assigned and “management” functions they are responsible for completing.

Policies

One of the most important actions regarding FLSA compliance that a city or county can do is to create clear policies regarding work schedules, sick leave, vacation leave, and/or holiday pay and to ensure that all personnel receive training to understand how pay and leave are calculated.

This document covers some of the most common issues regarding FLSA compliance for fire personnel. It is not intended to be a comprehensive guidance to compliance with the entire FLSA regulations. It is important to consult the Code of Federal Regulations and the Department of Labor for any changes in the law or court cases that affect the application with specific facts.