Navigating the Fair Labor Standards Act with Police and Fire Employees

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Special issues arise when applying the Fair Labor Standards Act (FLSA) to police and fire employees, including the option to define an extended work period, the FLSA's application to small departments, different ceilings on accrual of compensatory time, and rules for volunteer versus paid on-call fighters.

I. Administrative and executive exemptions

As a general rule, employees who perform police and firefighter work will be considered non-exempt under the FLSA, and must receive overtime or compensatory time off unless they fall under the small police/fire department exemption discussed below. However, certain high-ranking police and fire department employees such as police or fire chiefs, deputy chiefs, captains, lieutenants, sergeants, and corporals may meet the requirements of the administrative or executive exemption. Each city should determine on a case-by-case basis whether these positions meet the requirements of those tests.

Some guidelines cities may look at to help determine whether a police or fire employee would meet those requirements include the following:

Police or firefighting work

Does the employee perform police or firefighting work (e.g. preventing, controlling, extinguishing fires, crime prevention, investigations, apprehending suspects, interviewing witnesses, etc.) on more than just an occasional basis? The more direct police and firefighting work performed, the less likely the employee will be considered exempt.

Discretion

Is the employee dispatched to calls, or does he or she have discretion to determine whether and where his or her assistance is needed? Employees who are not dispatched to calls but have discretion to determine their own involvement are more likely to be considered exempt.

Managerial tasks

Does the employee meet all of the requirements to be exempt under the executive or administrative exemption and primarily perform managerial tasks?

Managerial tasks include:

- Evaluating performance of employees under their supervision.
- Enforcing and imposing penalties for violations of rules/regulations.
- Making recommendations as to hiring, promotion, discipline or termination.
- Coordinating and implementing training programs.
- Maintaining payroll and personnel records.
- Handling community complaints, including decisions whether to refer them to internal affairs for further investigation.
- Preparing budgets and controlling expenditures.
- Ensuring operational readiness through supervision and inspection of personnel, equipment and quarters.
- Deciding how and where to allocate personnel.
- Managing the distribution of equipment.
- Maintaining inventory of property and supplies.
- Directing operations at a crime, fire or accident scene, including deciding whether additional personnel or equipment are needed.

Employees who spend the majority of their time performing duties such as those listed above are more likely to be considered exempt.

A police or fire supervisor who directs the work of assigned staff during his or her shift but is also expected to routinely respond to dispatch calls and primarily does work investigating crimes or fighting fires is probably not going to be considered exempt.

However, a police or fire supervisor who primarily manages the department and performs administrative and office work and seldom does any work "on the street" fighting fires or investigating crime is likely to meet the qualifications to be considered "exempt."

Continued on page 14

Police and Fire Employees Cont'd from page 13

II. Small police/fire departments

The FLSA provides a complete overtime (but not minimum wage) exemption for any city employee who performs law enforcement work if the city has fewer than five employees who perform law enforcement work during the work period.[1] Part-time employees and employees on leave are counted. This exemption holds true for fire protection work as well. This exemption applies on a work period basis, so it is possible for a city to use the exemption some weeks and not others.

III. Extended work period exemption

A city can establish a work period for police and firefighters of anything between seven and 28 days.[2] The police or fire protection employee would then earn time and one-half overtime only for those hours that exceed the limits under their work period schedule.[3] (A table specifying the maximum hours worked before overtime is earned is attached as Appendix A at the end of this article).

The work period does not have to be the same as the pay period, but there must be a notation on the payroll records that shows the work period for each employee and indicates the length of the period and the starting time.[4] Different work periods may be established for different positions or groups of employees as long as each employee group is told what their work period is and it is documented.

The extended work period can help a city avoid FLSA liability, if it pays employees for overtime pursuant to a policy or collective bargaining agreement based on a more generous overtime threshold, but does not calculate the regular rate as required by the FLSA.[5]

The FLSA requires that for qualifying overtime, all stipends and differentials must be included in the regular rate.[6] However, non-FLSA premium pay can be offset against a claimed underpayment, which in many cases can avoid or substantially limit liability.

The overpayment can unquestionably be applied to the same work period in which it is earned, and some courts have extended this reasoning to allow offsets to prepay overtime obligations in subsequent work periods.

IV. Compensatory time

Police and firefighters may accrue up to 480 hours of compensatory time (as opposed to the 240 hour limit for other employees).[7] In most cases, cities should set much lower limits on compensatory time accrual.

Since cities need to have constant coverage in police and fire services, it is difficult to give employees time off without calling in another employee to cover the shift, often at overtime rates. Also, compensatory time earned in lieu of overtime must be paid when an employee leaves the city, which is usually at a higher rate of pay.

V. Volunteer and paid on-call firefighters

Cities are not required to pay minimum wage or overtime to true "volunteers."[8] However, in order to qualify as volunteers, individuals cannot receive anything but "expenses, reasonable benefits or a nominal fee" for the work they perform.[9] For example, a fire department might provide uniforms at no expense or reimburse volunteers for their uniform cleaning, meals, and transportation expenses. Generally, pension benefits provided to volunteer firefighters are also viewed by the Department of Labor (DOL) as "reasonable."

"Nominal fee" is not specifically defined in the law; however, the closer compensation is to minimum wage, the less likely it will be viewed as "nominal." Many fire protection employees in Minnesota cities would probably not meet this definition due to the level of compensation paid and are often referred to as "paid on-call" employees.

The regulations do provide some guidance on factors to examine to determine whether fees and stipends are nominal.[10] These include:

- The distance traveled and the time and effort expended by the volunteer;
- whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and
- whether the volunteer provides services as needed or throughout the year.

The DOL has stated that fees and stipends paid to volunteer firefighters that are less than 20 percent of what would be paid to a full time firefighter are likely to be found to be nominal. *"So long as the City's calculations are based on an approximation of the prevailing wages of a driver or firefighter within its area and the fee amount does not exceed 20 percent of that driver or firefighter's wages for the same services, the Department would find that such a fee would be nominal within the meaning of 29 C.F.R. § 553.106. Moreover, in evaluating whether a fee is nominal, the City should consider that, in addition to paying a nominal fee, as noted above the City may reimburse an individual for the approximate out-of- pocket expenses incurred."*[11]

Cities should also avoid paying employees on an hourly basis or on any basis tied to productivity. Per-call rates are, however, specifically allowed within the regulations.[12]

City employees cannot "volunteer" to perform the same or similar duties on their off –hours as they perform during their regular employment with city (e.g. a fire inspector probably cannot "volunteer" to perform fire protection duties after-hours).[13] Even if the work is different, employees who hold two jobs with the city are likely to qualify for overtime if they exceed 40 hours in one work period in either or both jobs.[14] With the agreement of the employee, the overtime wages can be paid at one and one-half times the regular rate for the actual work that is being performed during the overtime hours.

Otherwise, the city must determine a weighted average hourly rate earned for that work period and pay the overtime hours at one and one-half times that rate.

For example, a city has a street department maintenance worker who also serves as a paid on-call firefighter. The maintenance worker puts in 40 hours of work (Monday-Friday) in his regular job at $20/hour, then, in the same work period, puts in an additional six hours (on Saturday) as a firefighter at an hourly wage of $10/hour. The six hours

Continued on page 15

over 40 can be paid at $15/hour ($10 x 1.5 times) if the employee agrees in advance. Or, they can be paid at the blended rate of $28.05/hour (40 hours x $20 plus six hours x $10 = $860/46 hours= $18.70/hour x 1.5 times = $28.05/hour).

VI. Hours worked

Time that is spent on pre-shift or post-shift activities is generally included when computing "hours worked." For example, the time a police officer spends at "roll call" before or after each shift generally counts as hours worked. Time spent writing reports at the end of the shift and time spent racking up fire hoses after a fire call are also counted.

Regular home-to-work travel, even if it is in a take-home patrol car, does not count toward "hours worked." Once an officer responds to a call, however, the time counts as "hours worked."[15]

Time spent caring for a police canine is generally considered "hours worked." However, some court and arbitration decisions have upheld agreements that are in place specifying a set amount of paid time or extra compensation that an officer will receive for caring for the dog.[16]

Shift swapping/time trading

The substitution of one employee to work hours (partial or full shifts) scheduled for another of the same rank or position is often referred to as "shift swapping" or "time trading," and is a common practice in many public safety departments. The FLSA provides guidance on how shift swapping/time trading should be administered.[17]

The FLSA permits, under certain circumstances, permits two employees of a public agency, with that agency's approval, to substitute for one another during scheduled work hours in the same capacity without those hours being subject to overtime. Even though a substitution has occurred, each employee will be considered to have worked his or her normal schedule, and the traded time will not be considered in calculating hours for overtime for the substituting employee. The arrangement for trading time and payback is left to the two employees involved.

Key points of a shift swap/time trade for hours that would not be overtime for the substituting employee include:

- The employee's decision to substitute must be freely made, and without coercion, direct or implied, so the request is exclusively for the scheduled employee's convenience. The regulations note that an employer may *suggest* an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be *free to refuse* to perform such work without sanction and without being required to explain or justify the decision.[18]

- The employer must be aware and approve of the substitution beforehand, thus the city must know what work is being done, by whom it is being done, and where and when it is being done.

- However, the employer is not required to keep a record of the hours of substituted work.

VII. Outside employment

There are special provisions for police and fire employees who perform special duty work in fire protection, law enforcement, or related activities for a separate and independent employer during their off-duty hours.[19] The hours of work for the separate and independent employer are not combined with the hours worked for the city for purposes of overtime compensation if both of the following guidelines are met:

- The special duty work is performed solely at the employee's option; and
- The two employers are, in fact, separate and independent.

The City may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may:

- Maintain a roster of officers who wish to perform special duty work during their off-duty hours;

- Select the officers from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses; or

- Require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special duty work through the police department's payroll system. For the purposes of calculating overtime, the officers would not be eligible for overtime pay since the employee opted to perform this special duty work and the work was performed for a separate and independent organization.

There may be times that a state law or local ordinance requires police or fire protection at an event and that only law enforcement or fire protection employees of a public agency in the same city perform the work. For example, a city ordinance may require the presence of city police officers at a convention center or during concerts or sporting events. If the officers perform such work at their own option, the hours of work do not need to be combined with the hours of work for the city in computing overtime compensation.

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Notes

1. 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200(c).
2. 29 U.S.C. § 207(k).
3. 29 C.F.R. § 553.230(c).
4. 29 C.F.R. § 553.51; 29 C.F.R. § 553.224.
5. 29 C.F.R. § 778.200; Howard v. City of Springfield, 274 F.3d 1141

Continued on page 16

Police and FIre Employees Cont'd from page 15

(7th Cir. 2001).
6. Singer v. City of Waco, 324 F.3d 813 (5th Cir. 2003).
7. 29 U.S.C. § 207(o)(3)(A).
8. 29 U.S.C. § 203(e)(4)(A).
9. DOL Opinion Letter 2007-3NA, September 17, 2007.
10. 29 C.F.R. § 553.106(e).
11. DOL Opinion Letter 2007-3NA, September 17, 2007.
12. 29 C.F.R. § 553.106(e).
13. 29 C.F.R. § 553.103(a).
14. 29 C.F.R. § 778.419; 29 C.F.R. § 778.115.
15. 29 C.F.R. § 553.221(e).
16. 29 C.F.R. 785.12; Rudolph v. Metropolitan Airports Comm'n., 103 F.3d 677 (8th Cir. 1996); Brock v. City of Cincinnati, 236 F.3d 793 (6th Cir. 2001).
17. DOL Opinion Letter 2004-23, November 23, 2004.
18. 29 C.F.R. 553.31.
19. 29 C.F.R. 553.227.

APPENDIX A

No. of Days in Work Period	Hours of Fire Protection	Hours of Law Enforcement
7	53	43
8	61	49
9	68	55
10	76	61
11	83	67
12	91	73
13	98	79
14	106	86
15	114	92
16	121	98
17	129	104
18	136	110
19	144	116
20	151	122
21	159	128
22	167	134
23	174	141
24	182	147
25	189	153
26	197	159
27	204	165
28	212	171

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IMLA INTERNATIONAL COMMITTEE UPDATE

By: Ben Griffith, Griffith Law Firm, Oxford, Mississippi

The IMLA International Committee business meeting is scheduled for Monday, October 16, 2017 from 2:40 pm – 3:40 pm during the IMLA Annual Conference in Niagara Falls, Ontario.

Sven Kohlmeier, member of the Parliament of the City of Berlin, Germany, and Ben Griffith, Chair of the International Committee, will present a program on Cybersecurity Best Practices for Local Government during the business meeting. These IMLA members will identify best practices in cybersecurity risk management in combination with deterrence and international norm building efforts. They will highlight cybersecurity attacks on infrastructure and systems, including a cyberattack on the Wolf Creek Nuclear Operating Corporation.

In light of President Trump's tweet several months ago that "Putin & I discussed forming an impenetrable Cyber Security unit so that election hacking, & many other negative things, will be guarded," the speakers will address the susceptibility of state and local election systems to cyber-hacking. Their discussion will include an overview of Australia's successful efforts that have enabled it to prevent 85% of cyberattacks on its governmental networks using three common sense techniques – application whitelisting, regular patching applications and operating systems, and minimizing the number of users with administrative privileges.

A report will also be presented on a webinar that the International Committee agreed to cosponsor on September 28, 2017 with the International Committee of the ABA Section of State & Local Government Law on the new Cambodia Environmental Code. This webinar is a spectacular effort that entailed pulling together all types of environmental and natural resource protections in one document that has the support of the Cambodian Ministry. It includes discussion of substantive environmental issues plus issues of distribution of power among different levels of government.