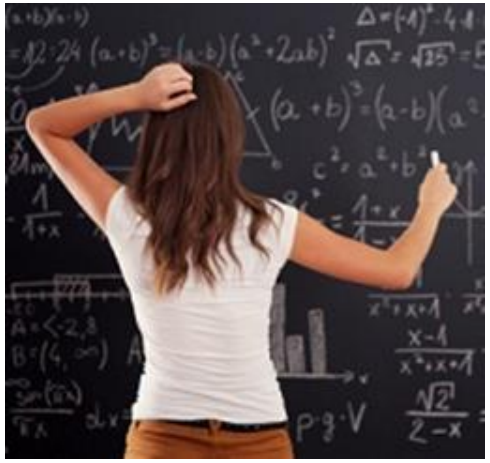
Navigating the Fair Labor Standards Act with Police and Fire Employees

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General Rule On Overtime

Over 40 Hours actually worked in a 7 day work week: pay 1.5 times the regular rate.





Regular Rate

All Hours ÷ All Pay = Regular Rate

By All Pay we mean regular pay, and money paid for skill, ability and experience, but not reimbursements, overtime premiums, and pay for not working (leave).

By All Hours we mean hours actually worked.

Consequences of FLSA Liability

- Statute of Limitations 2 years, but 3 years for “willful” violation.
- Damages are doubled, unless Employer proves defense of good faith.
- Prevailing plaintiff gets Attorney Fees.

FLSA Overtime Exemptions

What about supervisors?



NON-EXEMPT



EXEMPT

FLSA Overtime Exemptions

Common Areas of Concern:

- Shift Trading & Early Relief
- Sleep Time & Meal Periods
- Outside Employment
- Small Cities Exemption



FLSA Section 7(k) Overtime Exemption

Applies to Police and Fire:

- Police Officers, Fire Fighters, EMTs, Paramedics
- But NOT: Dispatchers, Mechanics, Other Support Personnel.

Allows work periods of 7 to 28 days with increased OT thresholds:

- Police: 171 Hours for 28 Days
- Fire 212 Hours for 28 Days

FLSA Section 7(k) Overtime Exemption

Applies to Police and Fire employees regardless of rank or pay level who perform work such as:

- Preventing, controlling or extinguishing fires of any type;
- Rescuing fire, crime or accident victims;
- Preventing or detecting crimes;
- Pursuing, restraining and apprehending suspects;
- Preparing investigative reports; or other similar work.

FLSA Section 7(k) Overtime Exemption

But NOT:

- Dispatchers
- Mechanics
- Support Personnel



FLSA Section 7(k) Overtime Exemption

What about cross-trained employees?



Consequences of Regular Rate

Includable in Regular Rate for FLSA Purposes:

Longevity	**E.g.**	**$2000/yr ($38.31/wk)**
Night Differential	**E.g.**	**$40/wk**
Education Incentive	**E.g.**	**$7,500/yr ($143.68/wk)**
Specialty Pay (Canine, EMT, etc.)	**E.g.**	**$1500/yr ($28.74/wk)**
Hazardous Duty Pay	**E.g.**	**$750/yr ($14.37/wk)**

Total extras=$265.10/wk ÷ 40 hours = $6.62/hr

This is the number employees will want added to base to get regular rate.

Qualifying Work Period "QWP"

28 Days is 4 consecutive 7-day weeks.

Work periods may correspond to schedule cycles but don't have to. Some common work periods:

Work Period	Police	Fire
7 Days (pay week)	43	53
8 Days (MA Fire schedules; 5&3 police)	49	61
14 Days (bi-weekly pay)	86	106
24 Days (4 x 4&2 or 3 x 8-day schedule)	147	182
28 Days	171	212

Impact of Using the QWP

Police Regular Hours on 4&2 schedule, 8 hour shift:

1	2	3	4	5	6	7	Tot
8	8	8	8	x	x	8	40
8	8	8	x	x	8	8	40
8	8	x	x	8	8	8	40
8	x	x	8	8	8	8	40
x	x	8	8	8	8	x	32
x	8	8	8	8	x	x	32

Even on a 7 day QWP, the threshold is 43 hours.

4 weeks provides 160 regular hours here, but the threshold is 171. (+11 GAP)

4 weeks provides 144 regular hours here, but the threshold is 171. (+27 GAP)

Impact of Using the QWP

Fire Regular Hours on the "1-2-1-4" 24-Hour shift:

1	2	3	4	5	6	7	Tot
24	x	x	24	x	x	x	48
x	24	x	x	24	x	x	48
x	x	24	x	x	24	x	48
x	x	x	24	x	x	24	48
x	x	x	x	24	x	x	24
24	x	x	x	x	24	x	48
x	24	x	x	x	x	24	48
x	x	24	x	x	x	x	24

Even on a 7 day QWP, the threshold is 53 hours.

4 weeks provides 192 regular hours here, but the threshold is 212. (+20 GAP)

4 weeks provides 168 regular hours here, but the threshold is 212. (+44 GAP)

4 weeks provides 144 regular hours here, but the threshold is 212. (+68 GAP)

Calculating Liability From Stipends

- Employer only needs to worry about hours in excess of the FLSA threshold.
- For those hours the FLSA regular rate must be paid.
- If there are Stipends or compensation not included in the Contractual OT rate, the extra FLSA liability from that Stipend compensation must be calculated.
- Extra OT from a given stipend is calculated:

Stipend Attributable to QWP ÷ All Hours Worked in QWP

÷ 2 = Extra FLSA Potentially Due as a Result of Regular Rate

Calculating Liability From Stipends

Example:

Police Officer has a base hourly rate of $28/hr; CONTRACTUAL OT rate = $42/hr

She works 36 hours of overtime in addition to 171 Regular Hours in 28 Day QWP.

The 196 Hours exceeds 171 by **25** Hours of FLSA OT.

She receives annual Stipends for EMT, Education, etc., totaling $26,000/yr.

There are 13 28-day QWPs in a year, so $2000 of Stipends relate to this period.

$2000 ÷ 196 = $10.20 ÷ 2 = $5.10 x **25** =

$127.50 Shortage From Regular Rate OT For That Work Period

Using Offsets to Offset Liability

The real POWER of the 28 Day QWP:

1	2	3	4	5	6	7	Reg	OT	Tot
8	8	8+8	8	x	8	8	40	16	
8	8+8	8	x	x	8	8	40	8	
8	8	x	4	8	8	8	40	4	
8	x	x	8+8	8	8	8	40	8	
							160	36	196

25 Hours FLSA

11 Hours Contractual

11 Hours x Half Time Premium ($14) = **$154** is Non-FLSA OT premium which can be used to offset the shortage in FLSA OT pay due to the regular rate.

This $154 more than offsets the $127.50 shortage calculated previously.

Are Offsets Controversial?

Not when the offset is based on premiums paid within the same pay period. 29 U.S.C. §207(h)(2)

But Cumulating Offsets can be a powerful way to avoid FLSA OT liability.

You can never apply the excess back in time, but some courts say you can apply them as a prepayment of future OT.

Yes: Singer v. Waco (5th Cir); Kohlheim v. Glynn County (11th Cir)

No: Howard v. Springfield (7th Cir); Herman v. FabriCenters (6th Cir)

Example from a Real Case

In this fire department, we looked at an 8-day QWP, because it was easy to prove…

This was one of their bigger overtime folks, and this is one of his 8-day periods:

	regular hours								reg hrs	OT hrs	total hrs	FLSA OT	OT rate	prem pd	nFLSApre	EMT/yr	Educ/yr	Fitness/yr	xtra OT rate		flsa b4 offset	OffsetBal
	1	2	3	4	5	6	7	8	period	period	period	hours										
regular	24	0	0	24	0	0	0	0	48		88	27	$40.68	$542.40	$176.28	$6,200.00	$3,500.00	$1,000.00		$4.31	$116.30	$59.98
overtime	0	2	11	0	2	4	11	10		40						$4.99	$2.82	$0.81				

Regular and OT Hours

Totals of actual hours

FLSA OT Hours
Based on 61 Hour Threshold

Contractual OT Rate

Non FLSA Premium (Offset)

Calculation of the Extra FLSA OT

Offset Calculation

Special Problems in 7(k) Jurisprudence

- Bargaining Obligations
- How do you get a Qualifying Work Period?
- Canine Officers

Do You Have To Bargain About "Adopting" A QWP?

Federal Law: NO.

Federal Courts say that establishing a QWP does not require notification of employees, and there is no particular requirement to "adopt" or declare it. *Calvao v. Framingham*, 559 F.3d 10 (1stCir. 2010).

State Law: Your mileage may vary.

How Do You Get Yourself a QWP?

- Find the 1985-1986 declaration of the 28-day Work Period that many municipalities voted because of the *Garcia* decision.
- Start Using a QWP to Track Hours and Pay FLSA OT Liability.
- Bargain it in to a CBA if you have Unions.
- Vote it at a meeting of your local legislative body.
- ~~Click your heels together.~~



Canine Problems



- Canine is a special 7(k) problem because of the many hours of “dog care” time that is often uncompensated.
- Canine stipends complicate the problem because they actually add to the hourly rate since they are not tied to hours of work or overtime premium compensation.
- Solution: bargain language in the contract and/or have the Canine Officers sign off individually to limit dog care time, and explicitly compensate it under the agreement. *Krause v. Manalapan* (3d Cir).

Questions?

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