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Overtime and the Police: Application of the Overtime Provisions of the Fair Labor Standards Act on Law Enforcement

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OVERTIME AND THE POLICE

*...application of the overtime provisions
of the Fair Labor Standards Act
on law enforcement*

December 2007

Rex Barton, Police Management Consultant

THE UNIVERSITY of TENNESSEE 
MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League



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Richard Stokes, MTAS human resources consultant, is the author of the MTAS publication “The Fair Labor Standards Act: An Overview and Update.”

“The Fair Labor Standards Act: An Overview and Update” deals with the Fair Labor Standards Act as it applied to all employees, while this publication deals specifically with law enforcement personnel. The Fair Labor Standards Act creates some exemptions for law enforcement employees, but the general requirements of the act apply.

The author gratefully acknowledges Richard Stokes’ research and writing in the preparation of this publication. For a more detailed review of the Fair Labor Standards Act, readers are encouraged to read “The Fair Labor Standards Act: An Overview and Update” by Richard Stokes.



TABLE OF CONTENTS

INTRODUCTION	1
COMPENSABLE TIME	1
Fringe Benefit Time	2
Wait Time	2
On-call Time.....	2
Breaks and Meals	3
Training Programs	4
Travel Time	4
Examples of Compensable Working Time	5
Examples of Non-compensable Time.....	5
OVERTIME PAY	6
Work Periods	6
Overtime Threshold	6
Canine Handlers.....	7
Trading Shifts.....	7
Small Police Departments.....	7
HOW WORK PERIODS IMPACT OVERTIME	7
Fringe Benefit Time and Work Periods	8
Twelve-hour Shifts	9
COMPENSATORY TIME	10
EXEMPT EMPLOYEES	10
Executive Exemption	10
Administrative Exemption	11
Professional Exemption.....	11
VOLUNTEERS	11
Paid Employment in an Unrelated Job.....	12
CONCLUSION	12



OVERTIME AND THE POLICE

...application of the overtime provisions of the Fair Labor Standards Act on law enforcement

INTRODUCTION

This publication is an overview of the impact of the Fair Labor Standards Act (FLSA) overtime provisions on law enforcement agencies. For a more comprehensive examination of the act, readers should obtain “The Fair Labor Standards Act: An Overview and Update,” a Municipal Technical Advisory Service (MTAS) publication written by Richard Stokes, MTAS human resources consultant. In fact, substantial portions of this publication are derived from “The Fair Labor Standards Act: An Overview and Update.”

The FLSA was passed during the recovery from the Great Depression and deals primarily with the minimum wage and overtime. The act did not initially include government employees. A series of amendments to the act and subsequent court decisions extended coverage to government employees a little more than 20 years ago. The most significant of the court decisions was *Garcia v. San Antonio Metropolitan Transit Authority* (1985).

The act can be enforced by private lawsuits brought by employees or by actions of the Wage and Hour Division of the U.S. Department of Labor (DOL). There is a two-year statute of limitations, but the employer may be liable for back wages for three years if it is determined that the employer willfully withheld overtime pay.

There are some differences in the application of the act in relation to government employees as opposed to private employees. The act allows employers to dock exempt public employees for less than a full day as long as the employee was subject to

a pay system “established by statute, ordinance or regulation or by a policy or practice established pursuant to principles of public accountability.” 29 C.F.R. § 541.5(d). There is additional discussion about exempt employees later in this publication.

COMPENSABLE TIME

Understanding the concept of “hours worked” is crucial to complying with the FLSA. According to the U.S. Supreme Court [*Tn. Coal, Iron & R.R. Co. v. Muscodol Local No.123*, 321 U.S. 590 (1944)], 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.” The courts and the U.S. Department of Labor, however, have recognized that insubstantial or insignificant periods of time outside scheduled working hours may be disregarded in recording working time. 29 C.F.R. § 785.47. The rule applies only where a few minutes of work are involved and where the failure to count such time is due to considerations justified by “operational realities.” Such time is called “de minimis” (i.e., minor or trivial). The Portal-to-Portal Act of 1947 helps clarify the working-time issue. (See the discussion of the Portal-to-Portal Act in this section under Travel Time.)

Employees who, with the knowledge or consent of their employer, continue to work after their shifts are over, though voluntarily, 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, overtime



compensation may be due. 20 C.F.R. § 785.11. This is true whether the work takes place at the place of business or at the employee's home. For example, activities such as filling out reports, attending "roll call," and returning to the station after completing a call are all compensable work if done at the employer's behest and for the employer's benefit.

Fringe Benefit Time

Fringe benefits provided by the employer are not considered compensable under the act. Fringe benefits include vacation time, holidays, funeral leave, paid jury duty, and paid weather-related closings. The FLSA does not even address these types of fringe benefits. The extent to which an employer provides fringe benefits, or does not provide them, is entirely up to the employer. Time that an employee takes off with or without pay for any provided fringe benefit does not count as compensable time for the purposes of calculating overtime. This concept is demonstrated later in this publication.

Wait Time

Whether waiting time is compensable depends on the particular circumstances. The FLSA requires compensation for all time during which employees are required to wait while on duty or performing their principle activities. 29 C.F.R. § 785.15. This is particularly true where waiting periods are of such short duration that employees cannot use them for their own benefit.

Under the regulations (29 C.F.R. § 785.16), waiting time by an employee who has been relieved from duty need not be counted as hours worked, if:

1. The employee is completely relieved from duty and allowed to leave the job; or
2. The employee is relieved until a definite, specific time; and
3. The relief period is long enough for the employee to use the time as he or she sees fit.

A police officer waiting to testify in a court case, a detective waiting for a witness to arrive to be interviewed, and an officer waiting for a tow truck to arrive are all working during their periods of inactivity. The rule also applies to an employee who works away from the employer's premises. Employees who wait before starting their duties because they arrived at the work place earlier than the required time are not entitled to be paid for the waiting time as long as the employee does not engage in work activity during that time.

DOL has defined "off duty" as:

[P]eriods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his/her own purpose are not hours worked. The employee is not completely relieved from duty and cannot use the time effectively for his/her own purposes unless the employee is definitely told in advance that he or she may leave the job and that the employee will not have to commence work until a specified hour has arrived. DOL W.H. Publication 1459 (May 1985).

On-call Time

On-call time is time spent by employees in their own pursuits, usually away from the working premises, when the employee must remain available to be called back in to work on short notice, such as with a police detective. 29 C.F.R. § 785.17. The FLSA requires employers to compensate their workers for on-call time when such time is spent "predominantly for the employer's benefit." The regulations state that:

[A]n employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purpose is working while "on-call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home where he may be reached



or carries a pager or cell phone is not working while on-call.

On-call time has become a contentious issue with the proliferation of cellular telephones and pagers. Many law enforcement employers require employees to maintain a working telephone to facilitate “call back” to duty in an emergency. Many employees use cellular telephones as their only telephone. Even if the telephone or pager is provided by the employer, requiring the employee to have a telephone or pager does not mean that the employee is “working” while off duty, even if the employee is “on-call,” as long as the employee is free to pursue personal activities during the on-call time.

It is important to note that on-call payments may alter an employee’s regular rate of pay. If the employer chooses to pay the employee for on-call time (for example, a specified amount of money or number of hours to be paid during the period of time the employee is “on-call.”), that would not otherwise be considered hours worked under the regulation. The additional compensation must nevertheless be included in the employee’s rate of pay calculation, thus increasing the hourly rate used to compute overtime pay. Of course, all payment for time actually worked must also be included in the regular rate calculation. 29 C.F.R. § 778.223.

Once the employee arrives at work after being called into service, all working time must be compensated. If this pushes the hours worked above the overtime threshold for the work period, overtime must be paid.

Breaks and Meals

Break periods, such as lunch or dinner meals or rest periods, may or may not be compensable depending on whether the employee is relieved from duty and the amount of time allocated for the activity. The FLSA does not require that employees be given rest periods, 29 C.F.R. § 785.18, but if rest periods are

provided, they must be counted as hours worked if they last 20 minutes or less [*Mitchell v. Turner*, 286 F.2nd. 105 (5th Cir. 1960); *Mitchell v. Grienetz*, 235 F.2nd. 621 (10th Cir. 1956); and *Aeromotive Metal Products, Inc. v. Wirtz*, 312 F.2nd 728 (9th Cir 1963)]. Coffee and snack breaks are compensable rest periods and cannot be excluded as meal periods from hours worked. Whether rest periods that last longer than 20 minutes are compensable depends upon an employee’s freedom during breaks.

A bona fide meal time, when the employee is completely relieved from duty, is not work time. 29 C.F.R. § 785.19. Short periods, such as coffee or snack breaks, are not considered meal time. Of course, if an employee works during the meal, the time is compensable. Whether or not an employee’s meal period can be excluded from compensable working time depends on the employee “freedom meal test.” 29 C.F.R. § 785.19.

Unless all of the following three conditions are met, meal periods must be counted as hours worked:

1. The meal period generally is at least 30 minutes;
2. The employee is completely relieved of all duties. If the employee must sit at a desk and incidentally answer the telephone, as a dispatcher might often do, this would be compensable time; and
3. The employee is free to leave his or her duty station. There are no requirements, however, that the employee be allowed to leave the premises or work site.

Meal time spent out of town on business trips, such as at out-of-town training programs, is not generally compensable time. 29 C.F.R. § 785.39. If, however, an employee works during the meal, such time is compensable.

Any volunteer work done during meal periods must be counted as compensable working time



if the employer knows or has reason to believe the work is being performed. If the employer does not know of the work, and the employee's work during meal time is essentially de minimis, no compensation is required. *Baker v. United States*, 218 Cl. Ct.602 (1978).

Training Programs

DOL regulations make clear that attendance at a bona fide police academy or other training facility, when required by the employing agency, constitutes engagement in law enforcement activities outlined in 29 U.S.C. § 207(k). Therefore, basic and advanced training is considered part of the employee's law enforcement activities. Time spent in actual training constitutes compensable hours of work.

Time spent studying or in other personal pursuits is not compensable even if the employee is confined to campus, such as at a police academy, 24 hours a day (Wage and Hour Opinion, February 5, 1990). Police officers who attend a police or other training facility are not considered to be on duty during the time they are not in class or training, as long as they are free to use such time for personal pursuits. 29 C.F.R. § 553.226(c).

When officers are assigned to in-service training classes, the time is considered compensable hours of work. In-service pay supplements provided by the state for completing state-mandated in-service training are just that: supplements. The state training supplement payment is not payment for the hours worked. The employer is responsible for compensating the employee for the hours worked during in-service training.

Travel Time

Whether travel time is compensable or not depends entirely on the kind of travel involved. Under the Portal-to-Portal Act, the employer generally is not responsible for time spent by the employee in walking, riding, or otherwise traveling to and from

the actual place of performance of the principle activities. 29 U.S.C. § 254(a). Excluding normal commuting time, the general rule is that employees should be compensated for all travel unless it is overnight, outside the regular working hours, on a common carrier, or where no work is done. Generally, an employee is not at work until he or she reaches the work site.

An employee who drives a police car home does not have to be compensated for commute time simply because he or she is operating the employer's vehicle, so long as it is for the employee's convenience. *Field Operations Handbook* § 31c01. According to the Wage and Hour Letter, April 13, 1995, an employee does not have to be compensated if all of the following conditions are met:

1. Driving the employer's vehicle between the employee's home and the work site is strictly voluntary and not a condition of employment;
2. The vehicle involved is the type of vehicle that would normally be used for commuting;
3. The employee incurs no cost for driving the employer's vehicle or parking it at home; and
4. The work sites are within the normal commuting area of the employer's establishment.

In certain rare emergency situations, the regulations (29 C.F.R. § 785.36) provide that an employee must be compensated for home-to-work travel time. Generally, if an employee, after completing a day's work, is called at home and must travel a "substantial distance" to perform an emergency job, the travel time is compensable.

Out-of-town travel is a bit more complicated because DOL takes the position that out-of-town travel is not ordinary home-to-work travel. Because the travel is performed for the employer's benefit and at the employer's request, the employee must be compensated. Not all the travel, however, needs to be counted as hours worked. DOL specifically



permits the employer to exclude the travel time between the employee's home and an airport, bus, or railroad station. 29 C.F.R. § 785.39.

The regulations provide that travel time is compensable work time when it occurs during the employee's regular working hours. DOL does not count as working time overnight travel that occurs outside of regular working hours as a passenger on an airplane, train, boat, bus, or car and where the employee is free to relax. 29 C.F.R. § 785.39. If an employee is required to drive or required to ride while another employee drives, the employee must be compensated for the travel time (29 C.F.R. § 785.41) except when the employee is on a bona fide meal break.

Examples of Compensable Working Time

The following are examples of working time for which an employee is entitled to be compensated:

- Caring for tools that are a part of principal activities, such as guns by police officers. *Cooley v. United States*, 26 Wage & Hour Cas. (BNA) 50 (Fed.Cir. 1983);
- Charitable work requested or controlled by the employer. 29 C.F.R. § 785.44;
- Emergency work/travel time. 29 C.F.R. § 785.36;
- Disaster drills, whether voluntary or involuntary, either during or after regular working hours. *Field Operations Handbook* § 31b15;
- Meal periods if (a) employees are not free to leave their posts or (b) the time is too short to be useful to employees. 20 C.F.R. § 785.19;
- Medical attention during working hours at the employer's direction. 29 C.F.R. § 785.43;
- On-call time where liberty is restricted. 29 C.F.R. § 785.17;
- Preparatory work that is a part of the principal activity. *Lindow v. United States*, 738 F.2d 1057 (9th Cir 1984);
- Principal activities: patrol, investigations, etc. 29 C.F.R. § 790.8;
- Rest periods of 20 minutes or less. 29 C.F.R. § 785.18;

- Training in regular duties to increase efficiency. 29 C.F.R. § 785.29;
- Training programs required by the employer. 29 C.F.R. § 785.27;
- Travel (but not performing work) from one work site to another or traveling out of town during working hours. 29 C.F.R. §§ 785.38 and .39;
- Waiting for work *after* reporting time or while on duty. 29 C.F.R. § 785.15; and
- Cleaning and maintaining police vehicles if the officers are responsible for those tasks. Wage and Hour Opinion Letter, Dec. 30, 1985.

Examples of Non-Compensable Time

The following are examples of work-related matters for which an employee need not be compensated:

- Absences (including sick leave, annual leave, holidays, funerals, and weather-related absences). 29 C.F.R. § 778.218(d);
- Athletic contest involvement as a participant, official, or scorer, even if sponsored by the employer, so long as it is voluntary and not a condition of employment. *Field Operations Handbook* § 31b05;
- Charitable work done voluntarily outside working hours. 29 C.F.R. § 785.44;
- Holidays on which an employee does not work. 29 C.F.R. § 778.218(d);
- Jury duty. 29 C.F.R. § 778.218(d);
- Meal periods involving no duties and lasting one-half hour or longer. 29 C.F.R. § 785.19;
- Medical attention outside of working hours or not at the direction of the employer. 29 C.F.R. § 785.43;
- On-call time when the employee merely leaves a telephone number or carries a pager or cell phone and is not restricted. 29 C.F.R. § 785.17;
- Operating an employer's motor vehicle for the employee's own commuting convenience. *Field Operations Handbook* § 31c02;
- Training programs voluntarily attended that are unrelated to regular duties and involve no productive work. 29 C.F.R. § 785.27;



- Travel (a) from home to a work site and vice versa (29 C.F.R. § 785.35), or (b) on overnight trips during nonworking hours except while performing duties or other work. 29 C.F.R. § 785.39; and
- Waiting time (a) in a paycheck line, (b) to check in or out, or (c) to start work at a designated period. 29 C.F.R. § 790.7(g).

OVERTIME PAY

The FLSA does not limit the number of hours that an employee may work, either daily or weekly. The act creates an overtime “threshold,” and all hours worked in excess of the threshold must be compensated at a premium rate of pay one and one-half times the normal rate of pay. 29 U.S.C. § 207 (a)(1). For most employees, the overtime threshold is 40 hours in a workweek, but the act contains an exemption for fire and police personnel, which allows longer work periods. The threshold for law enforcement personnel is based on the length of the work period.

The act does not require overtime pay for hours worked in excess of a scheduled shift on any given day or for hours worked on a regularly scheduled off day. Under the act, overtime applies only to hours worked in excess of the overtime threshold for the *entire work period*.

Work Periods

The standard work period for most employees, such as dispatchers and secretaries, is one week (seven days). The law enforcement exemption allows work periods from one week to four weeks (seven days to 28 days). Most employers will use one-week increments for work periods, and the most prevalent work periods are one week, two weeks, and four weeks. 29 C.F.R. § 553.230.

It should be noted that work periods are not necessarily the same as pay periods. For example, an employer may have a one-week work period

but a two-week pay period. Two-week pay periods are actually quite common. If the work period is one week, as it always is for non-public safety employees, overtime is calculated for each of the one-week work periods in the pay period.

The employer can have pay periods that are shorter than the work period. This is very common for fire departments and, to a lesser degree, police departments, especially police departments working 12-hour shifts. Overtime is calculated at the end of the work period, encompassing both pay periods. There is a longer discussion later in this publication of the benefits of longer work periods when an employer uses shifts longer than the traditional eight-hour shift.

Work periods longer than one week only apply to bona fide police officers. Persons performing clerical duties or dispatcher duties are not bona fide police officers, even if the employer designates them as such. The definition applies to the duties performed by the employee, not the title of the employee. For employees with varied job duties, the tasks performed the majority of the time determine the employee’s status. For example, if a police officer *occasionally* works as a dispatcher, the officer would still be subject to the law enforcement exemption.

Overtime Threshold

The overtime threshold is determined by the length of the work period. For non-public safety employees the work period is always one week, and the overtime threshold is 40 hours. For law enforcement officers the work period may be longer.

Non-law Enforcement Officers

Includes dispatchers, clerks, secretaries, and civilian parking control officers.

- One-week work period threshold.40 hours overtime



Law Enforcement Officers

- One-week work period threshold.43 hours overtime
 - Two-week work period threshold.86 hours overtime
 - Four-week work period threshold.171 hours overtime
- 29 C.F.R. § 553.230.

Once the number of hours actually worked in the work period exceeds the overtime threshold, the employee must be compensated at one and one-half times the normal rate of pay. It does not matter how many hours an employee works in any given day during the work period, whether the day fell on a holiday, or whether the work was on a regularly scheduled day off; overtime is calculated on the total number of compensable hours worked *in excess of the overtime threshold for the work period*.

Canine Handlers

Many police departments have drug dogs, bomb dogs, or general patrol dogs. The officers assigned to handle these dogs usually care for the animals at their homes and sometimes train the dogs outside their normal work schedules. This constitutes time worked, and the time must be compensated. The employer cannot allow the employee to volunteer to care for the animal. Wage and Hour Opinion Letters, Dec. 30, 1985, June 13, 1989, and Aug. 11, 1993.

Since the employee is caring for the animal at home, there is no way to monitor the time an employee actually spends caring for the animal. Monitoring can be accomplished by establishing a policy dictating how much time the employee will spend each day caring for the animal. Courts have held that 30 minutes a day can be an adequate amount of time to care for the animal, but the employer should establish what it deems as a reasonable amount of time. If the handler also trains the animal outside the regular work schedule, this time should be built into the policy.

Of course, any unexpected time, such as emergency visits to a veterinarian, should be counted as additional time worked.

Trading Shifts

Police officers may trade shifts or substitute tours of duty with another employee without the employer being subject to additional overtime by virtue of one employee working the additional hours during the work period. The following criteria must be met in order for there to be no effect on hours worked:

- Substitution or trading is done voluntarily; and
- The substitution or trading is approved by the employer.

29 U.S.C. § 207 p(3).

The employees’ decision to substitute for each other must be made without any coercion by the employer, and they should be free to refuse the substitution without sanction or explanation. There is no requirement that the employer maintain a record of the time traded or substituted, nor is there any period of time for which the time traded must be paid back by the other employee. 29 C.F.R. § 553.31.

Small Police Departments

Police departments with fewer than five total officers, including the chief of police, are exempt from the overtime requirements of the FLSA. This number also includes any part-time officers, regardless of the number of hours they work. 29 C.F.R. § 553.200.

HOW WORK PERIODS IMPACT OVERTIME

Law enforcement officers generally will have to work some hours outside the normal work schedule, most often for court appearances or to complete a call for service at the end of a shift. These events occur sporadically, and the impact can be “leveled” by using longer work periods. For example:



If an employee is on a **one-week** work period:

- The employee is scheduled to work a normal 40-hour week and works each of the scheduled days.
- The employee works two additional hours at the conclusion of a regular shift.
- The employee has to attend court for three hours while not scheduled to work.
- Total number of hours worked for the week and the work period: 45 hours.
- Number of hours above the overtime threshold of 43 hours is two.
- *Two hours must be compensated at one and one-half times the normal rate of pay.*

The following week:

- The employee works the normal 40-hour shift with no additional hours worked.
- *The employee is paid for 40 hours with no overtime.*

But, if an employee is on a **two-week** work period and works exactly the same number of hours in each of the two weeks as described above:

- The employee is scheduled to work a normal 40-hour week and works each of the scheduled days.
- The employee works two additional hours at the conclusion of a regular shift.
- The employee has to attend court for three hours while not scheduled to work.

Then, the following week:

- The employee works the normal 40-hour shift with no additional hours worked.
- The total number of hours worked for the two-week work period is 85.
- *The overtime threshold for the two-week work period is 86 hours. The employee will be paid for 85 hours at the regular hourly rate of pay with no overtime.*

The use of a longer work period can lessen the impact of extra hours worked in any given week over the course of the work period. While the savings for the scenario described above may seem small, the savings of valuable resources over the course of the year can be substantial.

Longer work periods also give the employer an opportunity to relieve the employee of duty a couple or more hours before the end of the work period, avoiding extra pay altogether. For example, if an employee works two extra hours attending court early in the work period, the employer can relieve the employee of duty two hours early on a regularly scheduled shift later in the work period.

Fringe Benefit Time and Work Periods

If an employee is on a one-week work period:

- The employee actually works 46 hours in a week (whether by the scheduled shifts or due to extra hours worked outside the schedule).
- Number of hours in excess of the overtime threshold is three.
- *Three hours must be compensated at one and one-half times the normal rate of pay.*

The following week:

- The employee takes the week off on vacation.
- *The employee is paid for 40 hours of vacation.*

Now, let's consider the impact if the employee is on a two-week work period:

- The employee actually works 46 hours in a week (whether by the scheduled shifts or due to extra hours worked outside the schedule).

The following week:

- The employee takes the week off on vacation.
- The employee actually worked 46 hours in the work period and is paid for an additional 40 hours of vacation time.



- *The overtime threshold for a two-week work period is 86 hours. Since the employee worked only 46 hours in the work period, the employer pays the employee for 46 hours at the regular rate of pay and for 40 hours of vacation time at the regular rate of pay. There is no overtime for the work period.*

For the purposes of illustration, these examples have used one- and two-week work periods. The “leveling” impact is increased with a four-week work period. The four-week work period is particularly advantageous when the police department uses longer shifts, such as 12-hour shifts. Twelve-hour shifts often result in significant fluctuations in the number of hours worked from one week to the next. The use of 12-hour shifts most often results in employees being scheduled to work 48 hours in some weeks and 36 hours in other weeks. It is difficult to “level” the number of hours worked in a two-week work period, let alone a one-week work period. The following example illustrates how a four-week work period is scheduled.

Twelve-hour Shifts

In the most prevalent 12-hour shift schedule officers work four days, followed by four days off. Obviously, the eight-day cycle of work days and off days does not correspond to a seven-day week. In any given one-week work period, the number of hours scheduled, let alone the number of hours actually worked, will fluctuate between 48 hours and 36 hours. For a one-week work period, the 48 hour weeks create five hours of overtime pay (five hours in excess of the 43 hour overtime threshold). Even with a two-week work period the schedule will create fluctuations in the number of hours scheduled to be worked from one work period to another. As you can see from the following table, a four-week work period provides a consistent number of hours scheduled for each work period. The 168 hours scheduled for each four-week work period is less than the 171 hours overtime threshold for a four-week work period.

SUN	MON	TUE	WED	THU	FRI	SAT	Hours	
Work	Work	Work	Work				48	
	Work	Work	Work	Work			48	
		Work	Work	Work	Work		48	168 Hours
			Work	Work	Work	Work	48	
				Work	Work	Work	36	
Work					Work	Work	36	
Work	Work					Work	36	
Work	Work	Work					36	

Schedule then repeats.



COMPENSATORY TIME

The employer may choose to compensate employees for overtime with cash or with time off in the future, called compensatory time. Compensatory time is treated the same as cash payments for overtime. All hours worked in excess of the overtime threshold must be compensated at one and one-half times the employee's normal rate of pay. That pay can be cash, compensatory time, or a combination of the two.

Just as an employer can compensate an employee with one and one-half times the rate of pay for overtime, the employer may also compensate the employee with time at one and one-half times the number of overtime hours worked. Assume that an employee works four hours in excess of the overtime threshold for a given work period. The employer could compensate the employee with six hours of compensatory time ($4 \times 1.5 = 6$), or the employer can compensate with a combination of cash and compensatory time. For instance, the employer could pay straight time for the four hours worked in the example above and add two hours of compensatory time for accrual.

Compensatory time is accrued over time (essentially banked for future use). The employer may not refuse a request by the employee to take the time off unless taking the time off would interfere with the ability of the employer to provide police services. Conversely, the employer may require the employee to take accrued time off, even scheduling the employee to be off using accrued compensatory time.

The maximum amount of time that an employee may accrue is 480 hours for law enforcement officers. Non-law enforcement officers may accrue only 240 hours. Once an employee accrues the maximum number of hours, the employer must compensate for overtime with cash. The employer may set its own maximum at a level less than the federal maximum but cannot exceed the federal maximum.

When an employee separates from employment, he or she *must* be paid for all accrued overtime at the employee's current rate of pay. The employer cannot take compensatory time away from an employee. The time must be taken off or the employee must be paid for accumulated time. 29 C.F.R. § 553.20.

EXEMPT EMPLOYEES

Certain employees meeting specific criteria may be exempt from the overtime requirements. While many people use the terms "salaried" or "hourly," those terms are not always correct. An employee who is not subject to overtime is considered to be "exempt." An employee who is entitled to overtime pay for hours worked in excess of the overtime threshold is considered to be "nonexempt."

To be exempt from overtime an employee must meet three tests. First, the employee must be paid on a salaried basis, although some salaried employees may not be exempt from overtime. Second, the employee must be paid at least \$455 per week or \$23,659.92 per year. Third, the employee must meet the job duties test. There are three classifications of exempt employees for the job duties test. They are the executive exemption, the administrative exemption, and the professional exemption.

Executive Exemption

The employee must:

- Be paid on a salaried basis and meet the minimum salary test;
- Have the primary duty to manage the department or subdivision;
- Customarily direct the work of two or more employees; and
- Have authority to hire or fire employees or *whose recommendations for hiring, firing, promotion, etc., are given particular weight.*

Most police chiefs meet the above tests. Division commanders and other command officers may meet



the test, depending on their level of responsibility and authority. In many cities, the chief and certainly division commanders do not have the authority to hire, fire, or demote employees, but their recommendations are given considerable weight by those who do have that authority.

Concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from the exemption. For instance, a police chief or other exempt employee may have the discretion to perform line level, nonexempt duties and still remain responsible for the success or failure of the department's operations.

Administrative Exemption

The employee must:

- Be paid on a salaried basis and meet the minimum salary test;
- Perform office or non-manual work in management or operations of the employer or employer's customers; and
- Have a primary duty that includes exercising discretion and independent judgment on matters of significance.

This class of exempt employee may include administrative officers who do not directly supervise other employees. Some factors to consider in determining whether an employee meets these tests include:

- Work must be directly related to assisting with the running of the business;
- Discretion and independent judgment must be exercised with respect to "matters of significance";
- The employee must have authority to formulate, affect, interpret, or implement management policies or operating procedures.

Professional Exemption

The employee must:

- Be paid on a salaried basis and meet the minimum salary test;
- Have a primary duty to perform work requiring advanced knowledge or invention, imagination, or originality;
- Work in a field of science or learning or talent in a recognized field of artistic or creative endeavor; and
- Use knowledge customarily acquired by a prolonged course of specialized intellectual instruction.

The professional exemption rarely applies in police departments. Some examples include police attorneys or police psychologists. 29 C.F.R. § 541.

VOLUNTEERS

A bona fide volunteer is defined as an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons. Moreover, a volunteer performs these services without promise, expectation, or receipt of compensation for services rendered. The overtime provisions of the FLSA prohibit an employee from volunteering to perform duties that are part of the employee's job. The prohibition also covers charitable work when the employer controls the activity. For instance, a police department cannot *compel* a police officer to perform unrelated work, such as running a booth at a fair.

An employee can volunteer to perform unrelated work when the work is not a condition of employment in employee's primary job. Examples of volunteer work might include:

- Coaching a city-sponsored youth athletic team;
- Serving as a volunteer firefighter when the two departments are distinctly separate and not part of a joint public safety department; or



- Serving as a member of a local board or committee.
29 C.F.R. § 553.103.

Paid Employment in an Unrelated Job

Employees can work another *unrelated job* on an *occasional* or *sporadic* basis with the employer at the same or a different rate of pay without the hours of the second job counting toward overtime in the primary job. A police officer could work as a summer lifeguard at a city swimming pool, and the hours worked in that job could be separated from the hours worked with the police department for the purposes of computing overtime.

29 C.F.R. § 553.212(a).

Assuming the officer is scheduled to work 40 hours per week as a police officer and eight hours per week as a lifeguard, the eight hours worked as a lifeguard do not have to be added to the police work time to compute overtime.

The employer should be very careful to ensure that the secondary work is completely different from the work performed in the primary job and that the employee chooses to work the secondary job, rather than being assigned the duties. To retain the 207(k) exemption (work periods that are more than one week in length and a higher overtime threshold), the unrelated secondary work must be sporadic, occasional, or seasonal.

CONCLUSION

The overtime provisions for non-law enforcement personnel are relatively straightforward. The law enforcement exemptions can be very confusing because of the options for work periods, the higher overtime thresholds, and simply because they are different from the provisions that apply to everyone else. It is hoped that this publication aids in understanding the unique provisions for law enforcement.

It is important that all law enforcement executives and municipal administrators understand these provisions to ensure that the city is complying with the law and to use the police department's resources effectively and efficiently. Compliance is important to ensure that all overtime owed to employees is paid, but a thorough understanding of these provisions may help avoid paying overtime unnecessarily.



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