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Technical Bulletins: FLSA: The Continuing Saga

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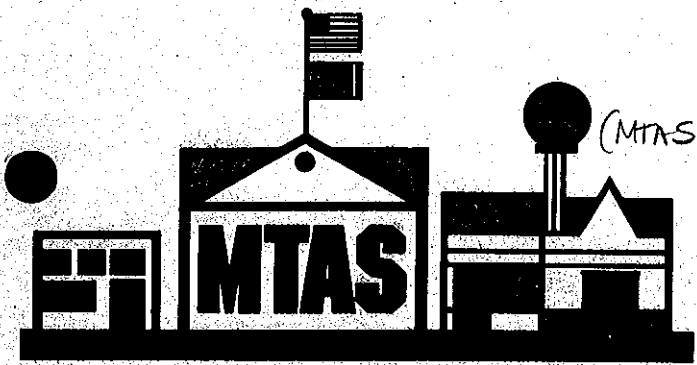
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TECHNICAL BULLETIN

MUNICIPAL TECHNICAL ADVISORY SERVICE,
THE UNIVERSITY OF TENNESSEE;
IN COOPERATION WITH THE TENNESSEE MUNICIPAL LEAGUE,

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Sept.
September 24, 1985

FLSA: THE CONTINUING SAGA

By Richard M. Ellis, Consultant, Management Programs

Although there appears to be some action in Congress concerning the future of the Fair Labor Standards Act (FLSA) as it applies to state and local governments, the current law concerning overtime and minimum wages for employees in state and local governments remains the same. You must come into compliance with FLSA by Oct. 15, 1985, retroactively to April 15, 1985. MTAS will continue to make every effort to keep you informed on the changes that will occur as the FLSA is applied to local governments in the state. We will develop and distribute these Technical Bulletins as we obtain information concerning enforcement actions and changes in FLSA regulations that are implemented by the Department of Labor (DOL). We expect that, as DOL begins enforcing FLSA, there will be changes in regulations and various administrative rulings and court cases which will have an impact on how you will comply with the law. We feel Technical Bulletins are the most effective method of getting the information to you. If you have questions about compliance with FLSA or the contents of this Technical Bulletin, or any future bulletins, please call the MTAS Municipal Consultant for your city, or the main office in Knoxville, (615) 974-5301.

DOL Enforcement Policy

The DOL will begin monitoring the activities of state and local governments for compliance with FLSA Oct. 15, 1985. However, DOL will be holding state and local governments responsible for overtime wages back to April 15, 1985. It is imperative that, if you have not already done so, you review your operations to determine whether or not your organization is in compliance. To assist in determining whether or not you are in compliance, DOL recently published a checklist which you may have already received. If you can respond satisfactorily to this checklist, it can be assumed that you are in substantial compliance with FLSA.

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Knoxville, TN :

1. Are accurate payroll and time records kept for your employees? If you have questions concerning compliance with this requirement, check page 31 of the Technical Report relating to FLSA.
2. Are your employees paid at least the federal minimum wage of \$3.35 per hour? If you have a question in this area, refer to page 16 in the Technical Report.
3. Are your employees paid premium pay of at least time-and-one-half their "regular rate of pay" for hours worked in excess of 40 per week? Refer to page 18 in the Technical Report.
4. Do your employees who receive "Extra Pay" (i.e., shift differentials, hazardous duty pay, production bonuses, etc.) have such pay added in when their "regular rate of pay" for overtime purposes is calculated? Refer to the definition of Regular Rate of Pay on page 6 of the report.
5. Are your law enforcement officers and firefighters paid overtime on a "work period" rather than a "work week" basis? Is the "work period" 7 to 28 days? If so, are they paid overtime after 171 hours for law enforcement and 212 hours for firefighters (or lesser proportion if the workweek is less than 28 days)? Refer to page 24 for information on public safety exemptions. Related to public safety exemptions is the provision permitting the exclusion of sleep and meal time for firefighters who are scheduled to work in excess of 24 hours. This matter is discussed on page 28 of the report, and further in this bulletin.
6. Are your employees ever paid for time spent in "on call" and "standby" status? Refer to page 28 in the Technical Report.
7. Do your employees receive compensatory time off in lieu of overtime pay? A discussion of "compensatory time" is presented under the heading OVERTIME PROVISIONS on page 18 of the Technical Report.
8. Do you have employees who "moonlight" as part-time employees in other departments or agencies within your organization? If so, are they properly paid for such work? Refer to page 38, question number 30. If a public safety employee exempted under the 7(k) provisions of FLSA spends more than 20 per cent of his or her time on a "moonlighting" job with the same organization, that person may lose the 7(k) exemption.

9. Do you have employees who "volunteer" to perform work for their own governmental departments? Refer to pages 13 and 14.

If you are in doubt about whether you are in compliance with any of the nine points presented in the above check list, please contact the MTAS management consultant for your city, or the Knoxville office, (615) 974-5301. If you would prefer going directly to the DOL for information concerning compliance with FLSA, DOL has established a toll-free FLSA hotline, (800) 233-3572, which is in operation between 8:15 AM and 4:45 P.M. EDT.

Although it appears that the initial DOL enforcement activities will be reasonable and designed to assist jurisdictions to come into compliance with the FLSA, it must be pointed out that continued non-compliance could be dealt with harshly. A jurisdiction which chooses to WILLFULLY violate the provisions of the act may be fined up to \$10,000, and the hiring authority, on subsequent conviction, may be subject to the fine and to imprisonment for up to six months. In addition, a jurisdiction which is forced to pay back wages due to court action will be subject to the back wages, an amount equal to the back wages as "liquidated damages," and attorneys' fees and other costs associated with the court action. As you can see, the WILLFUL choice of not complying with the FLSA can be expensive and is avoidable.

Provision for Sleep and Meal Time

Many cities have either established or are considering establishment of a condition of employment for firefighters whereby designated sleep and meal periods are not counted as time worked when they are scheduled to work MORE THAN 24 HOURS, and sleeping and eating facilities are provided. A maximum of eight hours of sleeping time and three hours of meal time may be excluded from hours worked when the shift exceeds 24 hours. Sleep time may not be excluded if a firefighter can not obtain at least five hours of uninterrupted sleep. In such an event, all the scheduled sleep time must be considered hours worked. The same goes for meal time: If a firefighter is called to duty during any portion of the designated meal period, that time must be counted as hours worked.

The regulations which permit the exclusion of sleep and meal time require that the city and the firefighter agree to the sleep and meal time exclusions, and the establishment of a duty shift of more than 24 hours. However, this is an implied agreement, which means that if the city decides to establish the

sleep and meal time exclusion as a work policy, the firefighter agrees to the policy when he or she works the duty shift. If this work policy is established, it should be in writing and prominently posted in the fire department, and a copy placed in each firefighter's personnel file.

Exemptions

The FLSA provides that certain employees are not covered by the act, and are classified as exempt. These employees are not covered by any provisions of the FLSA. One of the toughest problems facing cities in their efforts to come into compliance with the act is determining who is exempt and who isn't. Pages 8 through 15 in the Technical Report provide an excellent summary of the regulations relating to determination of exempt/non-exempt status.

A major problem with determining exemptions is that many cities are attempting to stretch the definition of exemptions to include employees that may not be considered exempt by DOL. If you feel you have employees who are exempt, here are a few pointers to assist you in proving they are exempt:

- (1) The secret to exemptions is a good job description. The job title means nothing. Making someone a data processing manager when in reality they are a senior word processing clerk will not establish an exempt position. DOL will be looking for the job description, and they may audit the job to ensure the person is actually doing the job which is described.
- (2) All exempt employees must be paid by salary. Any employee paid on an hourly basis is non-exempt.
- (3) When utilizing the administrative criteria for establishing an exemption, ask these questions: 1) What happens if the employee doesn't perform his or her job properly? 2) How much independent judgment is really permitted? Be prepared to back up your judgment in writing and actual job performance.

It is anticipated there will be additional information concerning the determination of exempt status in upcoming DOL regulations, possibly by the end of the year. As soon as we obtain this information, we will pass it on to you.

Police, Fire, and EMS Overtime Exemptions

The special overtime exemptions for police, fire, and EMS employees are another area of difficulty cities are encountering in their efforts to comply with the FLSA. Cities are permitted to extend their work period for these class employees up to 28 days in recognition of their special service functions. Fire-service employees (and EMS employees who are trained and perform duties as firefighters) may work up to 212 hours in a 28-day work period before overtime is due. Police officers may work up to 171 hours in a 28-day work period. As mentioned in the previous section concerning sleep and meal time, when the duty shift is in excess of 24 hours, up to 11 hours per shift may be excluded. There are pointers which cities should be aware of in establishing these overtime exemptions for public safety:

- (1) You must note in the employee's personnel file that he or she is under the 7(k) overtime exemption and designate the work period they are under. Also, the decision to utilize the 7(k) exemption should be in writing and posted where all employees can become aware of the exemptions and the work rule establishing the exemption and the work period. You are permitted to establish a blanket work period which covers all employees, or you may establish a work period for individual employees, or small groups of employees, within a department. Whatever you do, it MUST BE IN WRITING.
- (2) EMS personnel are under the 7(k) overtime exemption only if they receive special training as fire or police personnel, are physically located in a fire and/or police facility, and actually perform duties as a fire or police officer when not functioning in an EMS status.
- (3) There still is no clear cut answer as to the status of the public safety officer. There is no question that these employees are under the 7(k) overtime exemption, but the question remains as to whether the work period would be 212 hours or 171 hours. DOL is saying at this time that the primary duty test will more than likely determine which work period will be utilized. Which function does the public safety officer perform most, police or fire? Whichever is greater, as established by job analysis and possible job audit, will determine the work period. Be prepared to substantiate whichever work period you choose.

- (4) The FLSA regulations make cities liable for overtime pay when police officers work special duty assignments for second employers. For example, when the city, by an ordinance or any other method, requires that a police officer be hired "to control crowds at a stadium or to direct traffic at a sports arena or during a parade," it is treated as a joint employer with the second employer.

In other words, if, because the police officer works a second job of this type during off duty hours, the total number of hours worked by the police officer for the two jobs are in excess of the maximum allowable hours under the FLSA (i.e., 43 hours a week), then the employee will be eligible for overtime pay on the basis of the total hours of work for the two jobs.

According to the regulations, a "joint employment" arrangement exists when the arrangement "benefits both the police department and the second employer." Arrangements of this nature are commonplace in many communities where second employers are required to hire police officers to provide security service at events of various types, such as sport events, concerts, and parades.

- (5) When an employee holds two separate jobs in different departments of the same city, the hours worked in the two jobs must be totaled and the two jobs treated as a single job for purposes of the FLSA. Moreover, if a police officer or a firefighter has a second job with the city in some other capacity, the city would be required to pay overtime for the total number of hours worked in the two jobs in excess of 40 in a week.

In other words, not only would the city be required to treat the two jobs as a single job, but it would also be prohibited from using the special overtime provisions established in the FLSA for firefighters and police officers.

- (6) A city is required to treat all hours worked by its firefighters in neighboring jurisdictions, in conjunction with a mutual aid agreement, as hours worked for the city for purposes of calculating overtime. Thus, if a city has established work schedules which are at or below the maximum number of hours established by the section 7(k) exemption

(i.e., an average of 53 hours or less a week), it will be subject to overtime liability if those maximums are exceeded as a result of a response to a fire, during unscheduled hours, in a neighboring jurisdiction under a mutual aid agreement.

Although the FLSA is basically a single law requiring the payment a minimum wage and overtime, the enforcement of the act is often complex and perplexing. Due to the complexity of complying with the act, we know you will have questions. Please call our offices or DOL to clarify any question you may have. The consequences of not complying with the act, especially if you willfully do not comply, are not pleasant and are avoidable. Do not rely on Congress to change the act, or on another court decision to change the requirements to comply. Although we hope, as you do, that certain aspects of the act change as they relate to state and local governments, there is no assurance that changes will occur. It is the law, and the DOL will begin enforcing it Oct. 15, 1985.

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