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technical bulletin

Municipal Technical Advisory Service
Institute for Public Service, The University of Tennessee
In cooperation with the Tennessee Municipal League

December 2, 1974

DOL PRELIMINARY FLSA REGULATIONS ON POLICE AND FIREFIGHTERS (Reprinted from NLC's City Perspective, Nov. 22, 1974)

On Friday, November 1, 1974, the Department of Labor issued preliminary regulations governing the minimum wages and maximum hours for police and fire personnel.

Beginning January 1, 1975, a complete exemption from the overtime provisions for police and firefighters may be claimed only by cities employing fewer than five full-time and/or paid part-time law enforcement or fire fighting personnel. *All cities employing five or more full-time and paid part-time fire fighting or law enforcement personnel will be required to pay overtime to their fire protection and law enforcement personnel for hours worked over forty in a seven day period unless they follow the proper procedures (outlined below -- see "Tour of Duty" and "Work Period") entitling them to a limited exemption under the law.*

Definitions

Fire Fighter: An employee engaged in fire protection activities is any employee:

- (1) who is employed by an organized fire department or fire district;
- (2) who, pursuant to statute or local ordinance, has been trained in the prevention, control or extinguishment of a fire;
- (3) who has the legal responsibility for the prevention, control or extinguishment of a fire; and
- (4) who performs activities which are required for and directly concerned with the prevention, control or extinguishment of a fire of whatever type.

The definition includes trainees and probationary employees as well as permanent employees regardless of their specialty, their job title or their assignment to support activities. Rescue and ambulance personnel who form an integral part of the department or district's fire protection activities are also included.

The definition does not include "civilian" support personnel such as civilian dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, bull-dozer operators, tractor drivers, fire control laborers, clerks, stenographers, etc.

Law Enforcement Personnel: An employee engaged in law enforcement activities is any employee:

- (1) who is a sworn, uniformed or plainclothed

member of a body of trained officers and subordinates who are empowered by statute or local ordinance to enforce various laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes;

(2) who has the power to arrest;

(3) who has undergone a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

As with firefighters, the definition includes trainees, probationary employees or permanent employees regardless of their assignment to support activities. The definition also includes rescue and ambulance personnel if such personnel form an integral part of the city's law enforcement activities.

Employees who meet some but not all of the above criteria and who are not covered by the above definition include: fish and game wardens, civilian or unsworn traffic control employees, civilian or unsworn parking checkers, and building guards whose primary duty is to protect the lives and property of persons within the limited area of the building. Also not included in the definition of law enforcement personnel are "civilian" employees of law enforcement agencies who have not been sworn and who engage in support activities such as dispatchers, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers.

Security Personnel in Correctional Institutions:

The same definitions as apply to law enforcement personnel apply also to security personnel in correctional institutions. Correctional institutions are defined as "any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted or having breached the peace or committed some other crime," and includes city and village jails and precinct house lock-ups.

Employees of correctional institutions who qualify as security personnel are those who have been sworn and who perform potentially dangerous duties involving the direct supervision, custody and safeguarding of inmates whether inside the correctional institution or outside as in the case of road gangs, probationers or parolees. Civilian employees who engage in support activities or general administration or housekeeping functions are not covered.

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Public Safety Personnel: Assignment of employees to both fire fighting and law enforcement activities, if the jobs performed are consistent with the qualifications listed for fire fighter and/or law enforcement officer, entitles the city to the modified overtime exemption. How the time of the employee is divided between the two activities is irrelevant. *However, if such employee is engaged in an activity that is neither law enforcement nor fire fighting for more than 20 percent of the time, such employee must be paid time-and-a-half his regular rate of pay for all hours over forty in a seven day period.*

Training: Employees who are attending "bona fide" fire or police academies or similar training facilities operated by the city for either training (recruits) or further training such employees in their respective occupations are covered by the modified overtime exemption.

Ambulance and Rescue Service Employees: Ambulance and rescue service employees who are employed by other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities if:

- (1) their services are substantially related to fire fighting or law enforcement activities in that they have received special training in the rescue of fire victims or fire fighters injured in the performance of their job;
- (2) they are regularly dispatched to fires, riots, natural disasters and accidents;
- (3) such employees were not subject to the Fair Labor Standards Act prior to the 1974 Amendments; and
- (4) they are not employed by private organizations.

Volunteers: "Bona fide" volunteers are individuals who volunteer to perform fire fighting or law enforcement activities *without expectation of pay* and are considered employees of the fire department or district or law enforcement agencies to which they volunteer their services. Payment or reimbursement for out of pocket expenses incurred while answering a call does not jeopardize their status as volunteers. Holding an annual party, furnishing a uniform and related equipment, inclusion in a retirement or relief fund also does not jeopardize their volunteer status.

Employees of other city agencies may serve as "bona fide" volunteers.

If, however, a volunteer is compensated on a per-call basis, on a flat monthly basis or other paid basis, more than is required for reimbursement purposes, he will be considered an employee for purposes of the Act.

Cities Employing Fewer Than 5 Police Officers Or Firefighters

Law Enforcement and fire fighting personnel are considered separately. Thus, a city employing four firefighters but six police officers may claim the complete overtime exemption for firefighters but not for police officers. *Most importantly, no distinction is made between full-time and paid part-time employees.* A city employing three full-time police officers and two paid

part-time officers may not claim the complete overtime exemption. "Bona fide" volunteers (as described under "Volunteers" above) are not counted as employees.

Fire Fighters and Police Who Perform Unrelated Work

In the event a fire fighter or police officer works for two or more departments of a city, the hours spent on both jobs must be counted together for determining both hours of work and entitlement to the modified overtime exemption. *Any employee who is a fire fighter or police officer under the above definitions who spends more than 20 percent of his time in non-firefighting or non-law enforcement activity respectively, loses the overtime exemption and must be paid on the basis of a 40 hour, seven day week.* Even when such employees spend less than 20 percent of their time in non-fire or non-police activities, overtime must be paid for all of the combined hours which exceed the maximum permitted under the law. (e.g., firefighters who spend more than 20 percent of their on-duty hours reading water meters would lose the modified overtime exemption).

Joint Employment Relationships

In many cities, off-duty police officers perform law-enforcement activities for other private or public employers for which they are paid by the second employer. If an off-duty police officer is permitted to wear his official attire (uniform, badge, gun, etc.) while employed by the second employer (e.g. at a sports event directing traffic, at a shopping center or in the case of a firefighter whose presence is required at a theatrical performance) it is considered a joint employment relationship and all hours worked for the second employer must be included in calculating the number of hours worked.

Cities are urged to re-examine such joint employment practices and either discontinue them or re-evaluate rates charged to the second employer to include the cost of time-and-a-half. At the very minimum, cities should keep adequate records of such joint employment activities to avoid liability for overtime for hours worked for another employer.

Mutual Aid Agreements

All hours worked by employees assisting a jurisdiction outside of their own must be counted as hours worked and overtime must be paid if the combined hours exceed the maximum permitted by law.

Tour of Duty

The term "tour of duty" means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to the period of time between scheduled arrival and departure or to scheduled periods outside of the shift, as in the case of a special detail involving crowd control during a parade or such other event. Unscheduled periods refer to time spent in court by police officers,

time spent in handling emergency situations, or time spent after a shift in order to complete the required work.

Under the 1974 Amendments employers may not establish any work period of less than seven days or more than 28 consecutive days without losing the modified overtime exemption. In 1975, for those employees who have a work period of at least seven but less than 28 consecutive days, no overtime compensation is required until the ratio between the number of days in the work period and the hours worked during such work period exceeds the ratio between a work period of

28 days and 240 hours, at which point all additional hours are paid for at one-and-one-half times the employee's regular rate of pay. In 1976, the same applies for hours in a work period in excess of 232; in 1977, 216 hours.

For 1975, the ratio of 240 hours to 28 days is 8.57143 hours per day (8.6 hours rounded). Overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay must be paid during calendar year 1975 for all hours worked in excess of the following maximum hours standards:

Work Period (days)	Ratio	Maximum Hours Standard	Work Period (days)	Ratio	Maximum Hours Standard
28	8.6	240	17	8.6	146
27	8.6	232	16	8.6	138
26	8.6	224	15	8.6	129
25	8.6	215	14	8.6	120
24	8.6	206	13	8.6	112
23	8.6	198	12	8.6	103
22	8.6	189	11	8.6	95
21	8.6	181	10	8.6	86
20	8.6	172	9	8.6	77
19	8.6	163	8	8.6	69
18	8.6	155	7	8.6	60

In other words, time-and-a-half must be paid for all hours worked in excess of 60 in a seven day period, in excess of 69 in an eight day period, etc.

Work Period

The term "work period" as used by the Department of Labor is the recurring unit of time in days in which work hours are counted for overtime purposes. Previously, the work period for almost all employers has been the seven day work week. The 1974 Amendments permit the calculation of overtime for fire fighters and police officers on a basis other than the seven day week.

It is essential for cities to establish two work periods -- one for police and one for fire fighters. Such a work period must be at least seven and no more than 28 consecutive days. Cities are urged to make positive declaration determining what period of time between seven and up to 28 days constitutes a work period. Failure to do so will cost cities unnecessary overtime. If the work period is less than seven days or more than 28, cities will be liable for overtime compensation for all hours worked in excess of forty in a seven day period.

Most cities use a bi-weekly, semi-monthly or monthly pay period. Cities are not restricted in the choice of a work period for firefighters or police officers by the pay period which may be in use. For example, a city using a bi-weekly pay period of 14 days may choose to have a work period for firefighters of 27 days and for police officers of 28 days.

Sleeping and Meal Time

Continuing the policy established in the May 14, 1974 interim regulation, for police and fire-fighters only, sleep and meal time will not be excluded from hours worked when such employees are required to be on duty for 24 hours or less.

Sleep and meal time may be excluded from hours worked in the case of fire prevention or law enforcement employee who is on duty for more than 24 hours but only if the employer and employee have agreed to exclude such time. (Fewer than 1 percent of fire and police agencies currently have established tours of duty in excess of 24 hours. Attempts to establish shifts of more than 24 hours duration now will be viewed by the Department of Labor as an attempt to circumvent the law and will be disallowed.) In the absence of such agreement, sleep and meal time will be counted as hours worked. Sleep time may in no event exceed eight hours whether such figure is part of the agreement or not. Interruption during sleep time by a call to duty will be considered hours worked and if the employee is interrupted to such an extent that he cannot get a reasonable night's sleep (at least five hours), the entire time must be counted as hours worked.

Early Relief

The practice of early relief may be continued where it is voluntary and does not, over a period of time, work to the detriment of the employee. Early relief agreements may be either expressed

or implied.

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Trading Time

The practice of trading time may be continued as currently practiced if:

- (1) it is voluntary;
- (2) it is at the employee's request and not the employer's.
- (3) it is not because of the employer's business operations but because of the employee's desire or need to attend to personal matters;
- (4) records are maintained by the employer of all time traded by his employees; and
- (5) the period during which time is traded and paid back does not extend beyond the calendar or fiscal year.

Cities are urged to make positive declaration indicating that trading time, if permitted, must be paid back within either the calendar or fiscal year.

Compensatory Time

Compensatory time is no longer an allowable method of payment for city employees. For other than law enforcement and fire fighting personnel, all hours worked in excess of forty in a seven day period must be paid (in money) at time-and-a-half of the regular rate of pay. Cities may avail themselves of the additional non-overtime hours for police and fire if they declare a work period of within seven to 28 days. As stated earlier, failure to make such a declaration will result in payment of time-and-a-half the regular rate of pay for police and fire personnel over 40 hours in a seven day period.

Conclusion

These regulations are currently considered in draft form and thus subject to change. Final regulations will be issued following the end of the comment period, i.e. some time after December 2, 1974.

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