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Technical Bulletins: DoL Final Regulations on Police and Fire Personnel

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On Friday, December 20, the Department of Labor issued final regulations governing the minimum wages and maximum hours for police and fire personnel. The regulations have been substantially altered since the initial regulations were proposed on November 1. While significant gains were obtained in the definitions of "joint employment relationships" and some quarter was given on the definition of "volunteers," the major issue of concern to the cities -- firefighters who serve shifts of 24 hours -- has not been amended. In conversations with the Wage and Hour Division staff, however, it was indicated that cities wishing to negotiate the exemption of sleep and meal time from calculations of hours worked with their employees may do so by providing for a shift that exceeds 24 hours by as little as 15 minutes or less. Thus, cities with firefighter shifts of 24 hours may wish to re-establish those shifts to be 24 hours and 15 minutes and then proceed to negotiate the sleep and meal time exclusion with their employees. We do caution, however, that cities which do so may well be challenged in court and there is no guarantee as to the outcome of such litigation. Cities which do determine to alter their shift time would be well advised to seek a declaratory statement — in writing — from the Secretary of Labor, that such action is in his opinion consistent with the intent of the 1974 Amendments to the Fair Labor Standards Act.

Other changes in the final regulations include expansion of the definitions of law enforcement and fire fighting personnel to include additional categories of employees and that the performance by "bona fide" law enforcement and fire fighting personnel of support activities under justifiable circumstances does not jeopardize their exempt status. The requirement that law enforcement officers be sworn has been deleted as has been the requirement for completed training. Entitlement to the executive, professional and administrative exemptions for appropriate law enforcement and fire fighting personnel has now also been included in the regulations. The new minimum wage for all municipal employees is increased to $2.00 per hour effective January 1, 1975.

In the following analysis, the italicized language is an addition to or modification of the proposed regulations. Where significant, deletions are struck through.

Effective Date

As of January 1, 1975, all cities employing five or more fire fighters and/or five or more police officers will be covered by the overtime provisions of the Act. Cities may avail themselves of the modified overtime exemption for fire fighting and law enforcement personnel or they may pay time-and-a-half to such personnel for hours worked over forty in a seven day period.

To be eligible for the modified overtime exemption, cities are urged to make a positive declaration determining what period of time between seven and up to 28 days constitutes a work period. Such a declaration is required by the 1974 Amendments; is for the city's records and for notification of the affected employees. There is no requirement that
such a declaration be filed with the Department of Labor, but it should be in written form in the event of subsequent review of city records by the Wage and Hour Division.

Exemptions from Coverage by the Modified Overtime Provisions

Cities employing fewer than five law enforcement officers or fire fighters are exempt from the overtime provisions of the Act. No distinction is made between full-time and part-time paid employees or between administrative, executive or professional and regular employees for purposes of counting the number of employees. Bona fide administrative, executive or professional law enforcement or fire fighting personnel (as defined in 29 CFR 541) are, however, exempt from coverage by both the minimum wage and overtime requirements of the Act. Law enforcement officers who are elected to their positions are also exempt from coverage.

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 the extent required by State 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 fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing attending community fire drills and inspecting homes and schools for fire hazards.

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, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. 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-deer-persons, tractor drivers, fire control laborers, camp cooks, 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 of arrest; and
(3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigatory 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 duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The definition also includes rescue and ambulance personnel if such personnel form an integral part of the city's law enforcement activities.
Law enforcement officers will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdiction. Such individuals need not be counted in determining whether the public agency has less than five employees engaged in law enforcement activities.

Employees who do not meet each of the three tests described above and who are not covered by the above definition include: building inspectors (other than those described under the definition of firefighter), health inspectors, animal control personnel, sanitarians, civilian traffic employees, civilian 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 dispatcher, 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 of 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 have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution as in the case of road gangs, probationers-or-parolees.

Public Safety Personnel: Assignment of employees to both firefighting 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 attending a "bona fide" fire or police academy or similar other training facility when required by the city does not constitute engagement in exempt activity unless the employee in question meets all of the definitional tests outlined above. In the case of an employee who does meet these tests, such training or further training would be considered incidental to, and part of, the employee's law protection or law enforcement activities. Only the time spent in actual training or retraining constitutes compensable hours of work. All other time, such as that spent in studying and other personal pursuits is not compensable hours of work even in situations where the employee is confined to campus or to barracks 24 hours a day.

Attendance at training facilities and schools, which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for further advancement, need not be counted as working time even though the public agency may pay for all or part of such training.

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 firefighters 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 FISA prior to the 1974 Amendments; and 
(4) they are not employed by private organizations.

Volunteers: Volunteers are individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, and without contemplation of pay and are not considered to be employees of the fire department or district or law enforcement agency to which they volunteer their services. They do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been destroyed or damaged in responding to a call. Nor is the volunteer status or such an individual jeopardized by holding an annual party, furnishing a uniform and related equipment or their inclusion in a retirement or relief fund, a workmen’s compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis. NOMINAL SUM IS DEFINED AS “PAYMENTS WHICH AVERAGE $2.50 PER CALL.” Payments in excess of this amount may also qualify as nominal, depending on the distances which must be traveled and other expenses incurred by the volunteer. It is not necessary for the city agency to maintain an exact record of expenses.

Where, however, individuals receive more than a nominal sum on a basis which does not reasonably approximate the expenses incurred by them, they will be considered employees rather than volunteers and must be paid in accordance with the provisions of the Act.

Employees of other city agencies may serve as volunteers under the above definitions.

Police officers or firefighters of one jurisdiction may volunteer their services in another jurisdiction where there is no mutual aid agreement and other relationship between the two jurisdictions. They may not, however, volunteer their services in their own jurisdiction except in activities not directly related to law enforcement or firefighting.

The example given in the regulations is a paramedic employed by a city fire department who volunteers to give a course in first aid at the city hospital, or a police officer who volunteers to counsel members of a boys’ club.

Firefighters and Police Who Perform Non-Exempt or Unrelated Work

Law enforcement officers or firefighters may perform some non-exempt activities, such as code enforcement, reading water meters, etc. without losing the modified overtime exemption. However, if such employees are engaged in non-law enforcement or non-firefighting activities for more than 20 percent of the total hours worked by the particular employee during the applicable work period, the exemption will be forfeit.

If a firefighter or police officer also works for another department or agency of a city, he will lose the exemption if the other work is unrelated to fire protection or law enforcement. If, however, the employee’s other job for the city is also exempt work, as for example, a police officer who serves as a lifeguard at a seasonally operated city swimming pool (which work is entirely exempt from both minimum wage and overtime coverage) the city is entitled to claim the lesser of the two exemptions, which, in this case would be the modified overtime exemption for the law enforcement activities of such employee. Overtime compensation would be required when the combined hours from both jobs exceeds the statutory maximum for the employee’s tour of duty as a police officer.
Joint Employment Relationships

The entire section governing joint employment relationships has been revised, clarified and modified in the final regulations.

A joint employment relationship will exist in some limited circumstances between city and private employers when:

1. the work done by the employee simultaneously benefits both employers and where it is done pursuant to an arrangement between the employers to share employees;
2. where one employer acts directly or indirectly in the interests of the other employer;
3. where the employers are so closely associated that they share control of the employee directly or indirectly. For example, if a municipality requires by ordinance that a private employer provide police activity to control crowds at a stadium or to direct traffic at a sports arena or during a parade, a joint employment relationship exists.

On the other hand, if a police officer independently finds after-hours employment as a repair mechanic in a gas station or as a security guard in a department store there is no joint employment relationship. According to the regulations, "this would be so even if the police officer wore his or her uniform at the second job and even if the police department engaged in such 'brokering' functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers. Nor would it matter whether the police department also established a wage scale for such extra outside work and approved it so as to avoid any conflict of interest problems."

Mutual Aid Agreements

Employees who voluntarily respond to calls from a neighboring jurisdiction will be considered volunteers in rendering such aid and their employer is not required to compensate them for the time spent in the neighboring jurisdiction.

If, however, employees respond to such a call because their employer has a mutual aid agreement with such neighboring jurisdiction or if the employees are directed by their employer to respond, all hours worked by these employees in rendering such aid must be added to their regular hours of work.

Tour of Duty

Cities which choose not to claim the partial overtime exemption, but choose rather to pay time-and-a-half over hours worked in excess of 40 in a seven day period may not take advantage of the special provisions relating to balancing of hours over a work period, trading time or early relief.

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 the 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. Nothing in the law precludes employers (subject to local collective bargaining agreements or in accordance with their own authority) from establishing new tours of duty for their employees, provided the change is intended to be permanent at the time it is made.
Rules for Determining Compensable Hours of Work

This section is entirely new and did not appear in the draft regulations.

Hours of work which must be paid include all time during which an employee is on duty or on the employer's premises or at a designated work place, as well as all other time during which the employee is permitted to work for the employer. Such hours include all pre-shift and post-shift activities which are an integral part or which are closely related and indispensable to the performance of the employee's principal activity, such as attendance at roll call, writing up and completing reports or tickets, and washing and re-macking fire hoses. It also includes time spent attending required training activities (see training above). Time spent away from the employer's premises under conditions which restrict the employee from effectively using his time for personal pursuits also constitutes hours of work which must be compensated. Employees required to remain at home in a "constant state of instant readiness" are engaged in work. On the other hand, a police officer who has completed a tour of duty but is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on to enable the officer to respond to emergency calls. Time spent responding to such calls is hours worked.

Sleep and Meal Time as Hours Worked

This section has only been clarified, NOT modified: Sleep and meal time may not be excluded from hours of work where:

(1) the employee is on duty for less than 24 hours; and
(2) the employee is on duty for exactly 24 hours.

Sleep and meal time may be excluded from hours worked in the case of a 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. 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.

Work Period

The term "work period" refers to any established and regularly recurring period of work which -- to qualify for the modified overtime exemption -- cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, a work period may be any length and need not coincide with the pay period or with a particular day of the week or hour of the day. Once a beginning time is established it remains fixed regardless of how many hours are worked within that period. The work period may be changed if such change is intended to be permanent.

It is essential for cities to establish two work periods -- one for police and one for firefighters. Prior approval from the Department of Labor is not required; however, according to both the law and the regulations cities must make some notation in their records which shows the work period for each employee and which indicates the length of that period and its starting time.

For employees who have a work period of at least 7 but less than 28 consecutive days no overtime is required (in 1975 only) until the ratio of 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. (This descends to 232 hours in 1976 and 216 hours in 1977). At this point all additional hours must be paid at the rate of time-and-a-half the employee's regular rate of pay.
For 1975, the ratio of 240 hours to 28 days is 8.57143 hours per day (8.57 hours rounded). In the draft regulations, the Department of Labor rounded the figure to 8.6. The new rounding affects by one hour almost half of the work periods between 7 and 28 days. The work periods not affected are those of 7, 8, 9, 10, 12, 14, 15, 17, 19, 22, 24 and 28 days. Those affected are 11, 13, 16, 18, 20, 21, 23, 25, 26, and 27 days.

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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.

Where the practice is required by the employer, the time involved must be added to the employee's tour of duty and treated as hours worked.

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 exceed 12 months.

Compensatory Time

Compensatory time is no longer an allowable method of payment for city employees. The expanded definition in the final regulations is a clarification only.

For police and fire personnel, the city is permitted to balance the employee's hours over a work period which may be at least 7 days but no more than 28 days and to pay overtime compensation only if the employee's hours exceed the total number of hours established for that particular work period. If an employee's work period, for example, is 28 days and such employee works 80 hours the first week, but only 60 in the second week and 50 in each of the next 2 weeks, no additional overtime compensation will be required since the total number of hours does not exceed 240. In the event of a conflicting State law (requiring payment of overtime at some earlier point) that obligation may be met with "comp time" if comp time is permissible under State law and if the employee is receiving at least minimum wages for all hours worked. An employee whose work period is seven days could be paid in "comp time" for all excess hours up to 60. Such "comp time" may be taken at any time authorized by State law or local ordinance. Employees who work in
excess of the maximum hours, as indicated in the examples above, such employee must be paid at time-and-a-half his regular rate of pay for all hours in excess of the maximum.

The following are additional clarifications specified in the final regulations:

Regular Rate of Pay

The rules for computing the "regular rate of pay" for purposes of overtime may be found in 29 CFR 778. These rules apply to police and firefighters who come under the modified overtime exemption except that wherever the word "workweek" is used the word "work period" should be substituted.

Records

Records for police and fire are the same as for all other employees and are set forth in 29 CFR 516. Again, for record-keeping purposes the words "work period" should be substituted for "workweek."