

OVERTIME ISSUES FOR FIRE AND RESCUE PERSONNEL

THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) is a federal law that requires employers to pay minimum wage and overtime compensation (under specific circumstances) to their employees. Since the FLSA became applicable to state and local government employers in 1986 following a ruling by the U.S. Supreme Court, many public employers have attempted various ways to avoid paying overtime compensation (i.e., time and one-half pay) to fire fighters, rescue service, emergency medical service (EMS) and law enforcement personnel as the law requires.

If an employer's overtime pay practices are in violation of the FLSA, employees may file a lawsuit against the employer and obtain back pay (which may be doubled to include what is known as "liquidated damages"), reimbursement for attorneys' fees and litigation expenses.

Various circumstances in which public employers are required to pay overtime (after a specific threshold is met)—and in which many public employers try to avoid paying overtime—are described below.

ON-CALL TIME—Payable in certain circumstances.

In some jurisdictions, public safety employees are required to be on-call during times that they are not on duty at their normal work site. These on-call hours may be considered compensable hours of work (and payable at the overtime rate) if the restrictions placed on the employee during the on-call time prevent the employee from utilizing the time effectively for his/her own personal pursuits, and thus the time is regarded as being predominantly for the employer's benefit. Factors that are considered in determining whether on-call time must be treated as compensable work hours include the following:

- the average number of emergency calls the employee responds to during the on-call period;
- the time in which the employee has to be at the work site after being called in;
- whether an employee is subject to discipline for missing or being late to a call-back; and
- the extent to which an employee is able to engage in other activities while on-call.

SLEEP TIME—Can your employer deduct on-duty sleep time?

Many fire and rescue employees work shifts that span an entire day, and because of the time period involved, sleep at their work sites during each shift. Unless certain conditions are met, a public employer must treat this sleep time as compensable hours (even if no emergency calls come in). Under applicable law, an employer can deduct up to eight hours of sleep time per shift from the number of compensable hours of work that trigger overtime pay only if the following two conditions are both met:

- the shift lasts more than 24 hours (e.g., 24 hours, 15 minutes); and

- there is an express or implied agreement from the employee that the employer may deduct such time.

Not surprisingly, many of the cases in this area focus on the issue of whether an express or implied agreement ever came into existence.

MEAL TIME—Should you be getting paid for on-duty meal breaks?

Fire and rescue employees who are required to work shifts lasting an entire day also usually eat meals at their work site. As with sleep time, employers may try to exclude meal periods from an employee’s compensable work time. However, an employer may exclude meal periods (and avoid paying overtime) *only if* the following conditions are met:

- the shift lasts more than 24 hours (e.g., 24 hours, 15 minutes); and
- the time that is designated for eating is a “bona fide” meal period, meaning that the employee is generally relieved of duties during this time such that he uses the time predominantly for his benefit rather than for the employer’s benefit); and
- there is an express or implied agreement from the employee that the employer may deduct such time

As with sleep time claims, if each of the required conditions is not met, meal time must be considered as compensable work time.

RECEIVING COMPENSATORY TIME IN LIEU OF CASH FOR OVERTIME HOURS—It is allowed only in the public sector and only if you agree.

The FLSA permits public employers to afford compensatory time (“comp time”) to fire and rescue personnel in lieu of cash overtime payments provided that the employees agree in advance to this compensation policy. In states that permit collective bargaining between employers and employee representatives, an agreement covering a group of employees may be reached through negotiations with the employees’ representative. In noncollective bargaining jurisdictions, an employer may institute a comp time in lieu of cash overtime policy through agreements with individual employees. Under current law, fire and rescue personnel can work 320 overtime hours and thereby accrue a maximum of 480 hours of comp time (320 hours times 1.5) before overtime hours worked above this maximum must be compensated in cash.

An employer must permit an employee to use his/her accrued comp time upon request unless using it on a particular day would (in legal terms) “unduly disrupt the employer’s operation.” An issue that will soon be decided by the U.S. Supreme Court is whether an employer can force an employee to use accrued comp time.

EXCLUDING OFFICERS FROM THE OVERTIME PAY REQUIREMENT—Are fire officers entitled to overtime? Answer: Some are and some are not.

The FLSA generally requires that public employers pay time and one-half overtime to fire and rescue personnel when they work more than an average of 53 hours a week. However, the FLSA

also exempts certain classes of employees from this overtime pay requirement. A public employer can determine that officers shall not be paid overtime if:

- officers are paid on a salaried (rather than per hour) basis; and
- the officers perform primarily supervisory duties during their work time.

The courts have established factual and legal standards that are applied to determine whether these two conditions are met (and therefore, whether officers are improperly being denied overtime pay).

SPECIAL JOB CLASSIFICATIONS

EMERGENCY MEDICAL SERVICE (EMS) EMPLOYEES (If they are not cross-trained as fire fighters paid on a 40 hour week)

Public employees who are not engaged in fire protection activities are, in general, entitled to overtime pay after working 40 hours in a workweek. However, to avoid overtime costs, some public employers attempt to treat EMS employees as fire fighters, thereby paying them overtime only when they work more than 53 hours a week. Under applicable federal regulations, a state or local government employer must demonstrate that EMS/ambulance employees meet all of the following criteria in order to treat them as being eligible for overtime pay only after they have reached 53 work hours in a week:

- the EMS employee must be an “integral part” of the public agency’s fire protection activities;
- the EMS employee must be trained in the “rescue” of victims of fires, crimes and accidents;
- the EMS employee must be regularly dispatched to fire, crime scenes and vehicle accidents; and
- the EMS employee must spend at least 80% of his/her work time and calls in conjunction with fire protection/rescue activities.

Single role EMS employees whose jobs do not meet all of the above tests (including being cross-trained in fire and rescue activities) are required to be paid overtime compensation after they work 40 hours each week.

ARSON INVESTIGATORS (Not subject to fire fighter overtime hourly standard)

Fire (arson) investigators in a public fire department whose job is to investigate possible arson following a fire may not be grouped with fire fighters for overtime pay purposes, and therefore, public employers cannot decide that they will pay overtime to these employees only after they have worked 53 hours in a week. Arson investigators are entitled to overtime compensation after they have worked either 40 or 43 hours in a week, depending on whether their job responsibilities include certain law enforcement functions (e.g., whether or not they have the authority to make arrests).

DISPATCHERS (Paid on a 40-hour workweek)

Employees who perform an emergency communications role dispatching public safety personnel and equipment to fire, crime and accident scenes and who are not assigned (or rotated) into law enforcement or fire protection (i.e., fire suppression or prevention) functions must be paid overtime according to the 40-hour workweek standard rather than the higher thresholds permitted for police and fire fighters.

PRE-SHIFT AND POST-SHIFT ACTIVITIES—Must be paid overtime for activities such as lineups, check out firearms, writing reports.

Many public employees, aside from canine handlers, are entitled to be compensated for job-related duties that they perform either before or after their regular work shifts. The general rule is that an employee must be compensated for activities performed either before or after the regular work shift if those activities are an integral and indispensable part of the principal work activities for which the person is employed. Whether pre-shift or post-shift activities are considered an integral and indispensable part of the principal work activities is highly dependent upon the specific facts of each case. In deciding a particular case, courts analyze whether the activities in question are necessary to the job and performed at least in part for the benefit of the employer (compensable time), or are performed for the employee's convenience (non-compensable time). Therefore, in many cases, public safety employees are entitled to be compensated for such activities undertaken outside their regular shift such as cleaning firearms, checking firearms in and out, inspecting and repairing equipment, attending a lineup or briefing or writing reports.