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**Overtime Pay Entitlement  
for Public Safety Employees  
Under the Fair Labor Standards Act (FLSA)**

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❖ **Introduction**

Non-exempt employees who work more than 40 hours in a workweek are generally entitled under the [Fair Labor Standards Act](#) (FLSA), [29 U.S.C. 201-219](#), to overtime pay at a rate of one and a half times their regular hourly rate for all excess hours worked. Public safety employees, including law enforcement, fire, and correctional employees, often are required to work longer hours based on the nature of their work and the emergency circumstances that they regularly encounter.

This three-part article examines how the law applies to public safety employees, focusing on exceptions to entitlement to overtime pay under the statute. It does not discuss issues arising under state overtime laws. This month's article discusses overtime in general and the administrative and executive exemption to the FLSA. Next month's article discusses the 7K exemption as well as how the law addresses special considerations for small departments and agencies, and Eleventh Amendment immunity for claims involving state

employees. The third article discusses overtime claims involving donning and doffing, and special issues arising from the duties of canine officers. At the conclusion, there is a listing of useful and relevant online resources and references.

Earlier articles in this journal have addressed some other FLSA issues. They are [On-Call Duty](#), 2008 (11) AELE Mo. L. J. 201 and [Overtime Pay for Preduty Preparations](#), 2009 (1) AELE Mo. L. J. 201.

## ❖ Overtime in General

Covered nonexempt employees must receive overtime pay for hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods) at a rate not less than one and one-half times the regular rate of pay. [29 U.S.C. § 207](#). If certain requirements are met, overtime for public safety employees may be calculated based on 171 hours in a 28 day period rather than 40 hours over a seven day week. That will be discussed in more detail in part two of this article.

There is no limit on the number of hours that employees 16 years or older may work in any workweek. The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days.

The law was first passed in 1938 at a time of economic depression with the motivation of increasing the number of jobs available in the country. The reasoning was that employers required to pay extra to employees working more than 40 hours a week would opt to instead hire more employees at the lower regular wage, thereby creating more jobs.

Up until 1974, it only applied to private sector employers. At that time, the statute was amended to also apply to public sector employees of states and their political subdivisions. Shortly thereafter, the U.S. Supreme Court ruled that the Fair Labor Standards Act amendments were unconstitutional under the Tenth Amendment with respect to employees performing traditional government functions, such as law enforcement, and that these provisions interfered with state sovereignty. [National League of Cities v. Usery](#), #74-878, 426 U.S. 833, 96 S. Ct. 2465 (1976). In 1985, however, the U.S. Supreme Court reversed itself and held that Congress did have the power to apply the FLSA to state and local governments. [Garcia v. San Antonio Metro. Transit Auth. \(SAMTA\)](#), #82-1913, 469 U.S. 528 (1985).

Elected officials and their appointed staffs are specifically exempted from coverage, such as an elected sheriff and his or her policymaking officials directly appointed by them.

## ❖ Administrative and Executive Exemptions

One narrowly construed exemption to the overtime requirement is for administrative and executive employees whose job duties are primarily management-related. In [\*Morrison v. County of Fairfax, VA\*](#), #14-2308, 2016 U.S. App. Lexis 11211, 166 Lab. Cas. (CCH) P36450, 26 Wage & Hour Cas. 2d (BNA) 1103 (4th Cir.), current and former county fire captains filed suit under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219, claiming that they were entitled to overtime pay.

The appeals court rejected an argument that the plaintiffs fell within the FLSA's exception for certain executive and administrative employees whose primary duties are management-related. The county failed to submit evidence that would permit reasonable jurors to find by clear and convincing evidence that the plaintiffs' primary job duties were anything other than first response to emergencies such as fires. The captains, therefore, were entitled to overtime compensation. Summary judgment for the plaintiffs was ordered.

The U.S. Department of Labor (DOL) has promulgated regulations interpreting the FLSA's exemptions for executive and administrative employees, the two categories at issue in that case. Under the DOL regulations, an "employee employed in a bona fide executive capacity" is one who earns at least \$455 per week, has authority over hiring and firing, routinely supervises at least two other employees, and — most relevant to this case - whose "primary duty is management of the enterprise in which the employee is employed." [29 C.F.R. § 541.100](#).

The administrative exemption similarly is based on a management-related primary duty. An "employee employed in a bona fide administrative capacity" is one who, in addition to earning at least \$455 per week and exercising discretion on significant matters, has as a "primary duty" the "performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."

The DOL in 29 C.F.R. Sec. 541.3(b) clarified that firefighters and other first responders did not qualify for the exemption "regardless of rank or pay level." They do not qualify as exempt executives because their primary duty is not management and do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to management or general business operations.

In this case, the appeals court examined the record concerning the fire captains' duties. Whatever the precise importance of their non-firefighting duties, such as evaluations of personnel, disciplinary reports, making annual conforming changes to fire station policies, it was clear to the court that "fighting fires is the more important part of the job. "When an

emergency call comes in, it takes priority, and the captains do not have discretion to decline to respond.”

An employee’s “primary duty” is “the principal, main, major or most important duty that the employee performs,” “based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.” 29 C.F.R. § 541.700(a) lists four non-exhaustive factors to consider in determining the primary duty of an employee:

(1) “the relative importance of the exempt duties as compared with other types of duties;”

(2) “the amount of time spent performing exempt work;”

(3) “the employee’s relative freedom from direct supervision;”

and (4) “the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.”

Unlike their superiors, the captains were part of the “core group of firefighters who are required to respond to a typical call.” Indeed, an engine cannot leave the station without its captain on board.

“The County repeatedly emphasizes that the Captains spend very little of their work time actually responding to emergency calls; it follows, the County argues, that first response cannot be the Captains’ primary duty. And the district court seems to have agreed, stressing that ‘[a]lthough [the Captains] participate in emergency response, the bulk of their time’ is spent at the station. We think this analysis misapprehends both the nature of the ‘time’ factor and the nature of firefighting... that a fire captain’s direct firefighting duties do not consume the majority of his or her time is simply the nature of first response work.”

The nature of the job of every front-line firefighter, the appeals court noted, “is generally to wait,” with any given day consisting of “extended periods of boredom, punctuated by periods of urgency and moments of terror.” Accordingly, how much time a captain spends answering emergency calls varies depending upon how many emergencies arise, but that does not change “the character of the job.”

The regulations suggested that that “employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement,” - § 541.700(b) — on managerial or management-related tasks. And the burden was on the county to prove this—which it did not do. Much time spent at the station included sleeping, eating, and getting prepared to respond to calls.

“Nor can the gap be filled with the approximately four hours per day the Captains devote to a combination of emergency response and physical fitness training. The Captains undergo the same training as all of the other firefighters at the station so that they, along with their crews, are able to fulfill their first responder obligations. That so much time is devoted to this process only underscores the importance of those direct response duties.”

The court pointed to another decision applying the “primary duty test” to hold that first responders, including fire department captains, are not exempt executives or administrators. [\*Dept. of Labor v. City of Sapulpa\*](#), #93-5144, 30 F.3d 1285 (10th Cir. 1994),

Similarly, the court pointed to [\*Mullins v. City of New York\*](#), #09-3435, 653 F.3d 104 (2nd Cir. 2011), in which the court ruled that police sergeants were non-exempt under the executive or administrative exemptions. The professional duties of police sergeants did not make them management, and did not make them qualify for the bona fide executive exemption of the overtime pay provisions of the Fair Labor Standards Act. Summary judgment for the defendants on the sergeants’ overtime pay claims, therefore, was reversed.

The regulations provide this example of the primary duty doctrine in 29 C.F.R. Sec. 541.3(b)(2):

“Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not [an exempt executive] merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.”

While the county argued that the fire captains had a role in supervising training that qualifies as managerial, the appeals court disagreed. “Supervision and management are two different things under the executive exemption regulation, which requires both before an employee may be categorized as exempt.” And the regulations precluded the classification as management the supervision of employees in the course of activities directly related to first response duties.

In short, the court concluded that the captains were entitled to overtime based on the record.

The focus is always on the employee’s primary duties, rather than merely on whether they make particular personnel decisions. The DOL ruled that police lieutenants, police captains, and fire battalion chiefs were exempt from overtime under the Fair Labor Standards Act because their primary duty is management, even though they do not make

the ultimate decisions on hiring and firing. [Wage & Hour Opin. Ltr. # FLSA2005-40](#), 2005 DOLWH Lexis 52 (10/14/05).

The Supreme Court declined to review an appellate court holding that supervisory Border Patrol agents are "executives," and are exempt from the FLSA's overtime provisions. [Billings v. United States](#), #02-5069, 322 F.3d 1328, 8 WH Cases2d 929 (Fed. Cir. 2003); cert. den. [Lotz v. United States](#), #03-146, 540 U.S. 982 (2003).

What about public safety employees who do not receive pay based on an hourly rate? In [Auer v. Robbins](#), #95-897, 519 U.S. 452 (1997), the U.S. Supreme Court confronted the issue of whether sergeants and lieutenants in the St. Louis Police Department should be paid for working overtime. The city argued that the plaintiffs were bona fide executive, administrative, or professional employees and were compensated in a way that met the Department of Labor's rules for determining they were exempt from the FLSA's overtime pay requirement. The Department of Labor had established a "salary basis" test for determining an employee's exempt status. An employee is exempt if he "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."

In practice, the police department did not reduce the plaintiffs' salaries in the disciplinary way, but they claimed that the fact that the department could do so in theory meant that they should not be classified as exempt. They also claimed their work should not be considered "executive, administrative or professional." The trial court found that all petitioners were salaried, and most performed duties associated with exempt status. The U.S. Court of Appeals for the Eighth Circuit agreed, as did the U.S. Supreme Court. The Court rejected the argument that the regulations concerning "disciplinary actions" should not apply to public sector employees and deferred to the Department of Labor's regulations.

The DOL had reasonably interpreted the salary-basis test to be met when an employee's compensation may not "as a practical matter" be adjusted in ways inconsistent with the test. The standard is violated, it said, if there is either an actual practice of making deductions or an employment policy that creates a "significant likelihood" of them.

Some other relevant decisions in this area include:

- [\*O'Brien v. Town of Agawam\*](#), #03-1685, 350 F.3d 279, 2003 U.S. App. Lexis 24220 (1st Cir. 2003), in which the court held that police sergeants are exempt from FLSA overtime requirements.
- [\*Demos v. City of Indianapolis\*](#), #01-2952, 302 F. 3d 698 (7th Cir. 2002), in which the court found that various city employees were exempt from the FLSA. The fact that the city docked plaintiffs' pay if they failed to work a full eight-hour day did not alter their exempt status.
- [\*Kavanagh v. City of Phoenix\*](#), 87 F.Supp.2d 958, 2000 U.S. Dist. Lexis 2776, 6 WH Cases2d (BNA) 661 (D. Ariz), in which two lawyer-police officers who accepted executive assignments lost their right to claim overtime as nonexempt employees. The fact their pay stubs listed hourly pay and leave time was not determinative of their exempt status.
- [\*Anderson v. City of Cleveland, Tenn.\*](#), #1-99-cv-56, 90 F.Supp.2d 906, 2000 U.S. Dist. Lexis 4705 (E.D. Tenn.), ruling that the fact that police lieutenants often work alongside their subordinate officers did not qualify them for FLSA overtime based on the nature of their duties.

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### **AELE Monthly Law Journal**

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