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

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❖ **7K Exemption**

The Fair Labor Standards Act (FLSA) provides a partial overtime exemption for fire protection and law enforcement personnel employed by public agencies on a “work period” basis. [29 U.S.C. § 207\(k\)](#). Section 7(k) states that “[n]o public agency shall be deemed to have violated subsection (a) of this section [requiring the payment of overtime compensation] with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions)” if an employee receives overtime compensation in accordance with the tours of duty described in section 7(k). Overtime guidelines for law enforcement personnel include maximum hours standards (before overtime compensation is required) for work periods between 7 and 28 consecutive days.

This does not mean no overtime. It merely alters the time period over which overtime is calculated. The employer is responsible for setting the “work period.” A “work period” may be from seven consecutive days to 28 consecutive days in length. For example, fire protection personnel are due overtime under such a plan after 212 hours worked during a 28-day period (or 53 hours in a seven-day work period), while law enforcement personnel must receive overtime after 171 hours worked during a 28-day period (or 43 hours in a seven-day work period).

The formula for calculating this is as follows. For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28. For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.

Who is Covered?

Section [553.211\(a\)](#) of the regulations (29 C.F.R. Sec 553.211(a), defines “any employee in law enforcement activities” as

“any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce 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, 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, investigative and law enforcement techniques, community relations, medical aid and ethics.”

Section 553.211(f) of the regulations, in turn, specifically interprets the statutory term “security personnel in correctional institutions.” Unlike the general “law enforcement” definition contained in section 553.211(a), the specific description of “security personnel in correctional institutions” in section 553.211(f) does not require that the employee have the power to make arrests in order to come within the section 7(k) partial exemption. Rather, “[e]mployees of correctional institutions who qualify as security personnel for

purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions” 29 C.F.R. § 553.211(f).

“Not included in the term ‘employee in law enforcement activities’ are the so-called ‘civilian’ employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.” 29 C.F.R. § 553.211(g)

What about fire personnel? Do fire activities include employees who are paramedics and fire fighters? Under [section 203\(y\)](#) of the FLSA, an “employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who

- (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or state; and
- (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Court Rulings

A number of court decisions have applied and interpreted the 7(k) exemption. In [Rosano v. Township of Teaneck](#), #13-1263, 754 F.3d 177 (3rd Cir. 2014), the court ruled that a police union failed to show that a township violated the Fair Labor Standards Act by failing to pay proper overtime. The township qualified for the Sec. 207(k) exemption from overtime by adopting a valid work period requiring that officers work either a seven day or a nine day period on a regularly recurring basis.

A police department must explicitly adopt a particular work period in order to qualify for the exemption. In [Harris v. Boston](#), #2002-10123-RBC, 312 F. Supp. 2d 108, 9 WH Cases2d 941 (D. Mass. 2004), a city’s failure to adopt a work period under the FLSA results in large overtime liability. Double damages were due for all nonexempt Boston police officers. Also see [Taylor v. Co. of Fluvanna](#), 70 F.Supp.2d 655, 5 WH Cases2d (BNA) 1255 (W.D. Va. 1999), ruling that a sheriff’s department that never adopted a

28-day work period to calculate overtime due was not entitled to the benefits of the 7(k) exemption.

A host of decisions have grappled with issues concerning the application of the exemption to various fire department personnel with varying duties. In [*Haro v. City of Los Angeles*](#), #12-55062, 745 F.3d 1249 (9th Cir. 2014), city employees assigned to duties as fire department dispatchers or aeromedical technicians claimed that the employer violated the Fair Labor Standards Act by providing them compensation as “fire protection” employees under Sec. 207(k). A federal appeals court ruled that neither the dispatchers nor the aeromedical technicians were engaged in fire suppression, and accordingly, they should not have been denied standard overtime pay. Sec. 207(k) did not apply to them. Liquidated damages and a third year of withheld overtime pay, rather than the standard two, were proper when the city acted in willful violation of the law.

What about employees engaged in both fire and law enforcement duties? Cross-commissioned fire investigators properly raised a claim for denied overtime. “For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.” §553.213(b). [*Creemeens v. City of Montgomery*](#), #09-15633, 602 F.3d 1224 (11th Cir. 2010).

Because firefighters who are assigned as paramedics are “engaged in the ... response to emergency situations where life, property, or the environment is at risk,” they are partially exempt from overtime requirements under 29 U.S. Code §203(y), according to [*Gonzalez v. City of Deerfield Beach*](#), #07-11280, 549 F.3d 1331 (11th Cir. 2008), *cert. denied*, #08-1379, 558 U.S. 819 (2009).

In accord is [*Huff v. DeKalb County*](#), #07-10862, 516 F.3d 1273 (11th Cir. 2008), stating that paramedics employed by a fire department and trained in fire suppression have the “responsibility to engage in fire suppression” under 29 U.S. Code §203(y), and are partially exempt from the normal 40-hour overtime schedule established by the Fair Labor Standards Act, even if they do not regularly engage in fire suppression. They carry fire protective gear in their rescue vehicles and are regularly dispatched to fire scenes.

In [*Lang v. City of Omaha*](#), #98-3445, 186 F.3d 1035 (8th Cir. 1999), Omaha paramedics were found to fall within the FLSA exemption for firefighters and law enforcement personnel for overtime purposes. Though most of their time is spent on medical calls unrelated to fires, they were hired and trained as firefighters, and also respond to fire calls to provide medical backup.

However, Philadelphia's fire dept. paramedics who are assigned to ambulances do not have a responsibility for fire suppression activities and are therefore not exempted from the overtime provisions of the FLSA, the court ruled in [*Lawrence v. City of Philadelphia*](#), #06-4564, 527 F.3d 299, 13 WH Cases2d 1089 (3rd Cir. 2008), *cert. denied*, #08-388, 555 U.S. 1085 (2008).

There is nothing mandatory about the 7(k) exemption, and an employer can forego it and be governed by normal overtime rules. In [*Sharpe v. Cureton*](#), #00-5805, 319 F.3d 259, 8 WH Cases 2d (BNA) 801, 2003 Fed. App. 0050P (6th Cir. 2003), *cert. denied*, #03-72, 540 U.S. 876 (2003), a federal appeals court held that a city can elect not to use the FLSA's Section 207(k) exemption and to pay a firefighter assigned to administrative duties overtime after 40 hours a week.

Comp Time

It is worth noting that under certain conditions, pursuant to an agreement with employees or their collective bargaining representatives, state or local government agencies may give compensatory time, at a rate of not less than one and one-half hours for each overtime hour worked, in lieu of cash overtime compensation. Employees engaged in police and fire protection work may accrue up to 480 hours of compensatory time. An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency.

Any comp time arrangement must be established under the applicable provisions of a collective bargaining agreement, memorandum of understanding, any other agreement between the public agency and representatives of overtime-protected employees, or an agreement or understanding arrived at between the employer and employee before the performance of the work.

This agreement may be evidenced, for example, by a notice to the employee that compensatory time off will be given in lieu of overtime pay (for example, providing the employee a copy of the personnel regulations). This comp time arrangement can apply to all state and local agencies, not just law enforcement, fire, and correctional employees.

❖ Small Departments and Agencies

For small departments and agencies, the FLSA provides an overtime exemption for law enforcement or fire protection employees of a police or fire department that employs less than five people in those activities. All personnel involved in law enforcement or fire

suppression activities are counted towards the five employees regardless of whether they are part-time or full-time.

The law enforcement agency and fire suppression employees are treated separately. A city could, therefore, have less than five employees in law enforcement and claim the exemption even if the city had five or more employees in fire suppression and could not claim the exemption for the fire suppression employees. Also, an employee who is assigned to the fire department or police department and who performs support services, such as a dispatcher, alarm operator, clerk, or mechanic, does not count towards the five-employee threshold.

Similarly, because volunteers are not considered employees, they do not count towards the minimum employee threshold. See [Cleveland v. City of Elmendorf](#), #04-50103, 388 F.3d 522 (5th Cir. 2004), holding that individuals who worked as unpaid police officers for a small Texas town to retain their commissions as peace officers under state law were “volunteers” under the FLSA, and should not be counted as “employees” for purposes of finding that the town, which had only three paid police officers at any time, met the five-employee threshold for public agencies to be covered by act’s maximum hour requirements. The peace officer commissions provided by the town were only a formality.

However, it should be noted that a higher paid exempt officer who engages in fire protection or law enforcement activities, such as a fire or police chief, is counted for purposes of determining whether the complete overtime exemption applies even if they themselves would not qualify for overtime.

❖ Eleventh Amendment Immunity

States, state agencies, and state employees sued in their official capacities are entitled to immunity under the [Eleventh Amendment](#) from federal lawsuits except in some cases in which Congress has explicitly abrogated that immunity on particular causes of action or the state has explicitly waived that immunity. State public safety agencies should be aware of this and learn what the current state of the law is on the application of Eleventh Amendment immunity to FLSA claims in their state.

See, for example, [Quillin v. Oregon](#), #96-35790, 127 F.3d 1136 (9th Cir. 1997), in which the Ninth Circuit ruled that federal courts lack jurisdiction over FLSA cases brought against states in the absence of a waiver of immunity.

The requirement that such a waiver be explicit rather than implied is illustrated by [Allen v. Fauver](#), #A-146 S.T. 1999, 167 N.J. 69, 768 A.2d 1055, 6 WH Cases2d 1741, in which the New Jersey Supreme Court dismissed overtime claims by corrections officers on grounds

of state and federal sovereign immunity. The fact that the collective bargaining agreement contained a reference to the FLSA did not waive the state's right to assert immunity.

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