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

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❖ **Donning and Doffing Uniforms & Equipment**

Another area in which the proper calculation of overtime to be paid arises is that of time spent before and after a work shift donning and doffing uniforms and/or equipment.

In [Perez v. The City of New York](#), #15-315, 2016 U.S. App. Lexis 14104 (2nd Cir.), active and former park rangers employed by a city Parks Department sued, claiming that they were entitled to pay under the Fair Labor Standards Act for time spent donning and doffing uniforms and equipment such as bulletproof vests and utility belts that they were required to wear which contained handcuffs, mace, and other materials. Overturning partial summary judgment for the employer, the federal appeals court found that, on the current record, it could not conclude that the plaintiffs' donning and doffing of uniforms were not

integral and indispensable to their principal job activities, a requirement for compensability.

The FLSA generally mandates compensation for “the principal activity or activities which [an] employee is employed to perform,” [29 U.S.C. § 254\(a\)\(1\)](#), including tasks — even those completed outside a regularly scheduled shift — that are “an integral and indispensable part of the principal activities.” Prior decisions have identified several considerations that may serve as useful guideposts for its application. The more the pre- or post-shift activity is undertaken for the employer’s benefit, the more indispensable it is to the primary goal of the employee’s work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable.

Additionally, an employer’s requirement that pre- or post-shift activities take place at the workplace may indicate that the activities are integral and indispensable to an employee’s duties. Courts have also concluded that an employee’s pre- and post-shift efforts to protect against heightened workplace dangers can qualify as integral and indispensable, such as the donning of a bulletproof vest.

Further proceedings were required to determine first whether the time was nevertheless non-compensable under either the *de minimis* doctrine or under the terms of a collective bargaining agreement. See [29 U.S.C. § 203\(o\)](#) providing that when tabulating “the [compensable] hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.”

The *de minimis* doctrine was first articulated by the Supreme Court in [Anderson v. Mt. Clemens Pottery Co.](#), #342, 328 U.S. 680 (1946). The Court explained:

“The workweek contemplated by § 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.”

Similarly, in [Bamonte v. City of Mesa](#), #08-16206, 598 F.3d 1217 (9th Cir. 2010), the court found that here is a three-part inquiry related to compensation for “donning and doffing.” The first is whether the activity constitutes “work”; the second is whether the activity is an

“integral and indispensable” duty; and third, whether the activity is *de minimis*. Because Mesa police officers have the option and ability to don and doff their uniforms and gear at home, the specific activity of donning and doffing uniforms and gear at the workplace was not compensable.

Determining the amount of time involved in donning and doffing can be complicated. In [*Tyson Foods, Inc. v. Bouaphakeo*](#), #14-1146, 136 S. Ct. 1036, 194 L. Ed. 2d 124, 2016 U.S. Lexis 2134, employees of a private food processing plant who worked in certain department were required to wear protective gear. The employer compensated some, but not all, employees for donning and doffing the gear, and did not record the time each employee spent on these activities. Employees who were not compensated sued under both federal and state wage laws.

A jury awarded approximately \$2.9 million in overtime, based on a study by an industrial relations expert who videotaped observations of how long various donning and doffing activities took, and estimated an average of 8 minutes a day for two departments and 21.5 minutes for a third. The U.S. Supreme Court upheld the result and the methodology, holding that because a representative sample could be the only feasible way to establish liability, it could not be regarded as improper solely because the claim was brought as a class action. Had each class member brought an individual action, they could have relied on the study to establish liability.

In [*Rosano v. Township of Teaneck*](#), #13-1263, 754 F.3d 177, (3rd Cir. 2014), a police union failed to show that a township violated the Fair Labor Standards Act by failing to pay proper overtime, pay compensation for muster time, and provide compensation for time spent putting on and taking off uniforms. 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. The court found that officers were compensated for muster time as a component of their negotiated salaries, and that there was a custom or practice under the collective bargaining agreement of not compensating officers for time spent donning and doffing clothes. The officers had the burden of showing that they performed work for which they were not properly compensated, and failed to do so.

In [*Abbe v. City of San Diego*](#), #09-56437 444 Fed. Appx. 189, 2011 U.S. App. Lexis 14876 (9th Cir.), cert. denied, #11-673, 585 U.S. 2012), a federal jury in San Diego found that the time that eight police officers spent performing various tasks prior to their shifts was not compensable under the Fair Labor Standards Act. The officers alleged that departmental policy required them to load equipment into their squad cars and to check for e-mails and voicemail before their shifts began. In an earlier ruling the court found that the time spent donning and doffing safety gear is de minimis as a matter of law, and is not compensable.

In [*Smiley v. El DuPont de Nemours & Co.*](#), #14-4583, 2016 U.S. App. Lexis 18242 (3rd Cir.), employees at a private manufacturing plant were required to be onsite before and after their work shifts to “don and doff” uniforms as well as protective gear. They were also required to help with “shift relief,” in which employees from an outgoing shift shared information about the status of the work with incoming shift workers. The time that donning, doffing, and shift relief took varied from 30 to 60 minutes a day. The company paid employees for 30 minute meal breaks and two other 30 minute breaks during their 12-hour shifts, even though not legally required to do so. The paid break time was always in excess of the time spent on donning and doffing and shift relief.

A class action lawsuit sought overtime under both the Fair Labor Standards Act and a Pennsylvania state statute for the time spent donning and doffing and providing shift relief. While the trial court granted summary judgment to the employer, a federal appeals court reversed, finding that the court’s prior precedent limited offsetting to “extra compensation” not included in the regular rate, which was therefore inapplicable to the paid break time regularly paid.

❖ Canine Officers

Canine officers spend substantial amounts of time outside of regularly scheduled work shifts caring for police dogs, including time spent at home. Such compensable activities includes feeding, grooming, training, exercising, and providing veterinary care, all of which are “indispensable and integral” to the officer’s job duties. In many instances, departments and agencies have negotiated with employee unions to provide compensatory time off in lieu of overtime, flat rate (lump sum) extra pay, or reduced shift hours to offset time spent on caring for the canine at home.

In [*Diorio v. Village of Tinley Park*](#), #11-C-6724, 2012 U.S. Dist. Lexis 93765, 19 Wage & Hour Cas. 2d (BNA) 834, 2012 WL 2681298 (N.D. Ill.), the court ruled that an officer who is the human component of a police K-9 team can pursue a claim for overtime for the hours he spends, outside of the regular workday, caring for, training, grooming, and transporting

his canine partner. While he was currently given a lump sum of \$2,000 a year as supposed compensation for this work, he argued that this does not adequately compensate him for the time spent, and that he should be receiving time and a half for all the hours spent in excess of 40 per week.

If the hours the officer claimed were accurate, the court found, he was being compensated less than the minimum wage for the extra time he spent each day taking care of the dog. Additionally, if the employer city does not compensate the officer for extra expenses for the dog, such as food, water, transport, and veterinarian bills, then his actual hourly pay was even lower. The court ruled that a jury must decide, as a factual matter, whether the \$2,000 lump sum payment, agreed to by the officer's union, was reasonable, bringing it within an exception to the overtime requirement, or whether the officer was entitled to overtime for approximately 40 minutes a day.

In [*Lewallen v. Scott County*](#), #3:08-cv-520, 724 F.Supp.2d 893, 2010 U.S. Dist. Lexis 69807 (E.D. Tenn.), the court held that time spent by canine officers administering medications, feeding and training their dogs, and cleaning the kennel was compensable under the FLSA and must be paid as regular overtime. The fact that canine officers were paid an additional \$1,000 per year did not constitute an agreement between the parties.

In [*Krause v. Manalapan Township*](#), 486 Fed. Appx. 310, 2012 U.S. App. Lexis 13339, 2012 WL 2478360 (Unpub. 3rd Cir. 2012), the court upheld a negotiated amount of one hour of comp time per work day for canine officers which was based on one officer's research and record keeping as to the amount of time required. The court stated that the indeterminate nature of a K9 officer's task makes it exactly the sort of work as to which it makes sense for the parties to come to an agreement, to eliminate complicated repetitions, and hard-to-resolve disputes about exactly how much time it took to take care of the dogs each day.

One federal court found that Department of Homeland Security (DHS) canine enforcement officers were owed up to four additional hours of compensation a week for time spent laundering towels and preparing training aids for contraband-sniffing dogs, but off-duty time spent grooming the dogs or practicing with firearms was not compensable. The DHS was liable for double back pay for willfully failing to compensate 60 customs officers for overtime.

The court found that laundering training towels, constructing training aid containers, and caring for and maintaining weapons are activities that benefit the DHS. Those tasks are directly related to a K9 officer's primary duties.

The court held that 60 Customs K9 officers were owed 2 hours a week for laundering and processing training towels, 1.5 hours for constructing training aids, and 15-30 minutes for weapons care and maintenance.

Liquidated (double) damages were appropriate because the DHS understood the overtime rules but knowingly rejected them. The agency “had full knowledge of such circumstances, yet did nothing to redress them” until an internal memo addressed the pay requirements.

However, no compensation was owed K9 officers for firearms training, dog grooming, vehicle care, and paperwork performed while off duty. The court found that the K9 officers “are not principally employed to use a firearm, nor is off-duty firearms training necessary to improve the day-to-day performance of their work.” DHS requires K9 officers to maintain only a minimum weapons proficiency.

Because the agency’s supervisors were not aware that one of the plaintiffs, while off duty (1) completed various forms, (2) performed vehicle maintenance and (3) groomed her dog -- these claims were disallowed. [*Bull v. United States*](#), #2006-5038, 479 F.3d 1365 (Fed. Cir. 2007).

A police officer worked as a canine handler for around the last five years of his employment. He claimed that the department willfully failed to pay him overtime for many hours he spent off duty caring for a canine. The federal trial court noted that the statute of limitations for such overtime claims is two years, but held that it could be extended to three years in instances of willful violations, which the plaintiff was alleging. Claims older than three years, however, were ordered dismissed. [*Manning v City of Scottsboro*](#), #5:2012-cv-04108, 2013 U.S. Dist. Lexis 12188 (N.D. Ala. 2013). 2010).

In an interesting decision, the Ninth Circuit declined to follow the FLSA provision that allows management and the union to agree on flat compensation for a K9 officer, because the amount was grossly inadequate.

The case involved a Nevada K9 officer who spent about 28 off-duty hours per week caring for and training her dog. The city provided the officer a special vehicle, paid all of the costs associated with caring for and feeding the dog, and paid her \$60 every two weeks -- as negotiated with the union.

The appeals panel said that even if the union was authorized to represent her, it could not waive rights guaranteed to her under the FLSA, citing [*Barrentine v. Arkansas-Best Freight Sys.*](#), #79-2006, 450 U.S. 728, 740, 101 S. Ct. 1437 (1981).

Moreover, the city did not ask the K9 officer how much time she spent caring for her dog during her off-duty hours. Rather, the city relied on figures it obtained from an informal survey of other Nevada law enforcement agencies with K9 officers.

Here, the agreed compensation was per se unreasonable. The panel said that “at a minimum, an agreement must take into account some approximation of the number of hours actually worked by the employee or that the employee could reasonably be required to work.”

They noted that one circuit upheld one half-hour of overtime per on-duty day and one hour of overtime per off-duty day as agreed-on compensation for K9 overtime work. [*Rudolph v. Metrop. Airports Cmsn.*, #95-4183, 103 F.3d 677 \(8th Cir. 1996\)](#). Conversely, in [*Holzapfel v. Town of Newburgh*, #97-7114, 145 F.3d 516 \(2d Cir. 1998\)](#) a two-hour per week overtime limit was unreasonable.

The panel said it did not mean to suggest that the rate of pay for home canine care must be equal to the rate of pay for law enforcement work. They cited a [*DoL/W&H Letter Opinion of Aug. 11, 1993*](#), 1993 DOLWH Lexis 28,1993 WL 901171, which states:

”We take the position that dog care activities of the type illustrated do not have to be compensated at the same rate of pay as paid for law enforcement activities. If different pay rates are used, the employer may, pursuant to an agreement or understanding arrived at with the employee before performance of the work, pay for overtime hours engaged in such work at time and one-half the special rate pursuant to §7(g)(2) of the FLSA.”

The salary differential in the plaintiffs’ contract bore “no resemblance to the compensation to which she would be entitled in overtime pay based on the number of hours she claims she actually worked.”

Here, the officer claimed that she spent four hours a day working with the dog, and her regular wages ranged from \$17.34 per hour (Jan. 1996) to \$20.51 at the time she resigned (Nov. 1999). The \$60 biweekly salary differential equaled only one hour of overtime pay per week. The matter was remanded for trial on the damages issue. [*Leever v. Carson City*, #02-16525, 2004 U.S. App. Lexis 4201, 9 WH Cases2d \(BNA\) 714 \(9th Cir.\)](#).

An excellent and more detailed discussion of FLSA issues for canine officers covering a number of topics that could not be included here appears in Chapter 9 (Labor Law Issues for Police Service Dog Handlers) of the [*K9 Officer’s Legal Handbook \(2nd Ed.\) with CD ROM and 2014 Supplement*](#) by Ken Wallentine.

❖ Resources

The following are some useful resources related to the subject of this article.

- [29 C.F.R. Part 541](#) - Overtime Exemption Regulations for Executive, Administrative, Professional, Computer & Outside Sales Employees.
- [K9 Officer's Legal Handbook \(2nd Ed.\) with CD ROM and 2014 Supplement](#) by Ken Wallentine. Chapter 9 (Labor Law Issues for Police Service Dog Handlers).
- [Fair Labor Standards Act](#). Wikipedia article.
- [Fair Labor Standards Act \(FLSA\) – Constitutionality](#). AELE Case Summaries.
- [FLSA - Overtime - Canine Officers](#) . AELE Case Summaries.
- [FLSA - Overtime - Roll Call & Meal periods](#). AELE Case Summaries.
- [FLSA - Overtime - in General](#). AELE Case Summaries
- [FLSA - Administrative & Executive Exemptions](#). AELE Case Summaries.
- [FLSA - 7K Exemption](#). AELE Case Summaries.
- [FLSA - Standby Time](#). AELE Case Summaries.
- [Guidance on Applying FLSA Overtime Provisions to Law Enforcement Employees Receiving Administratively Uncontrollable Overtime Pay](#), U.S. Office of Personnel Management.
- [Overtime: New Fair Labor Standards Act rule concerning overtime](#), 29 CFR Part 541, effective Dec. 1, 2016.
- [Overtime: Overtime Final Rule and State and Local Governments](#), U.S. Department of Labor (2016).
- [Overtime Pay](#). U.S. Department of Labor Wage and Hour Division.
- [Overtime Pay: Interpretive Guidance](#). U.S. Department of Labor Wage and Hour Division.
- [Overtime Pay: Applicable Laws and Regulations](#). U.S. Department of Labor Wage and Hour Division.

❖ Prior Relevant Monthly Law Journal Articles

- [On-Call Duty](#), 2008 (11) AELE Mo. L. J. 201.
- [Overtime Pay for Preduty Preparations](#), 2009 (1) AELE Mo. L. J. 201.

❖ References

- [“Donning and Doffing’ Police Uniforms and Protective Gear Under the Fair Labor Standards Act,”](#) by Richard G. Schott, FBI Law Enforcement Bulletin (June 2011).
 - [The Fair Labor Standards Act and Police Compensation,](#) by Michael E. Brooks, 73 (6) FBI Law Enforcement Bulletin 1 (June 2004).
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