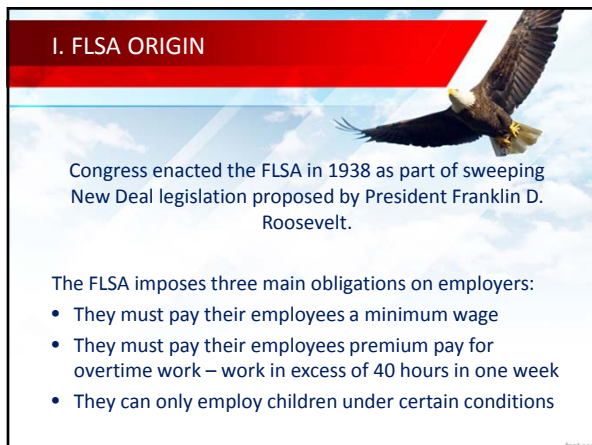




**FAIR LABOR STANDARDS ACT
FOR FIREFIGHTERS**

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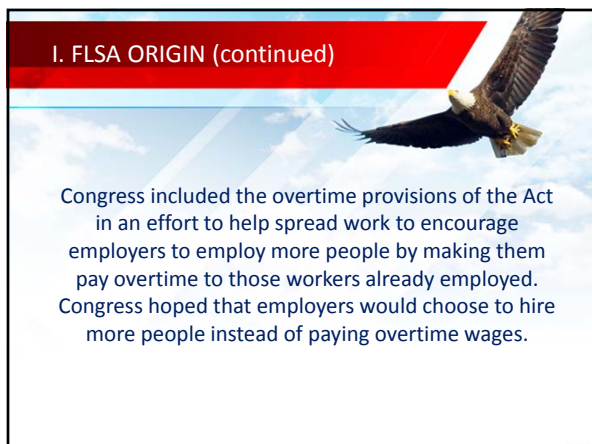


I. FLSA ORIGIN

Congress enacted the FLSA in 1938 as part of sweeping New Deal legislation proposed by President Franklin D. Roosevelt.

The FLSA imposes three main obligations on employers:


- They must pay their employees a minimum wage
- They must pay their employees premium pay for overtime work – work in excess of 40 hours in one week
- They can only employ children under certain conditions



I. FLSA ORIGIN (continued)


Congress included the overtime provisions of the Act in an effort to help spread work to encourage employers to employ more people by making them pay overtime to those workers already employed. Congress hoped that employers would choose to hire more people instead of paying overtime wages.

I. FLSA ORIGIN (continued)




Today, however, because of employee benefit packages, it has become cheaper, generally, for an employer to pay overtime to its existing workers than to hire additional workers, so the Act does not accomplish its work-spreading goals as well anymore. However, the overtime provisions of the FLSA are still intended to benefit society, not the individual worker. This is the reason exceptions to the Act are interpreted very narrowly.

II. FLSA VOLUNTEER EXEMPTION




Under the FLSA, public employers are obligated to pay employees at least the minimum wage and overtime compensation. The FLSA, however, exempts public employers from paying minimum wage and overtime to individuals who qualify as “volunteers” motivated to contribute services for civic, charitable or humanitarian reasons.

II. FLSA VOLUNTEER EXEMPTION



An individual who performs services for a public agency qualifies as a volunteer if:

- The individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- Such services are not the same type of services which the individual is employed to perform for the same public agency.



II. FLSA VOLUNTEER EXEMPTION

If an individual meets this criteria for volunteer status, he or she will not be considered an employee covered by FLSA minimum wage and overtime provisions, and the public employer is not obligated to compensate the individual for hours of volunteer services performed



II. FLSA VOLUNTEER EXEMPTION

A *bona fide* volunteer may perform, without compensation:


- Different work for the same agency
- Same or similar work for a separate and independent agency
- Different work for a separate and independent agency

III. PAYMENTS TO VOLUNTEERS

In accordance with Department of Labor (DOL) regulations, public employers may pay volunteers expenses, reasonable benefits, a nominal fee, or any combination thereof, without jeopardizing their volunteer status.


Public employers must be careful:
Not to exceed these permissible payments to volunteers

III. PAYMENTS TO VOLUNTEERS




If payments to volunteers rise to the level of “compensation” for service rendered, the individual will no longer qualify as a *bona fide* volunteer but will be deemed an employee for purposes of FLSA minimum wage and overtime liability.

III. PAYMENTS TO VOLUNTEERS



Ultimately, the DOL will evaluate “the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation” to determine whether the individual loses volunteer status by virtue of payments made by the public agency.

A. EXPENSES



Public employers can reimburse volunteers for approximate, out-of-pocket expenses incurred by volunteers incidental to providing services for the public agency, which include the following:

- Meals
- Transportation
- Uniforms and Related Equipment
- Tuition and Other Costs Involved in Attending Classes Related to Volunteer Services
- Books, Supplies or Other Materials for Training

B. REASONABLE BENEFITS

A public employer does not risk the status of volunteers by providing reasonable benefits to volunteers, including:

- Insurance
- Workers' Compensation
- Pension Plans
- Length of Service Awards
- Personal Property Tax Relief

C. NOMINAL FEE

Although public employers can pay a nominal fee to volunteers, the fee must not be a substitute for wages and must not be tied to productivity.

Public employers who compensate volunteers with more than a nominal fee likely will create an employment relationship, thereby destroying the volunteer status of the individuals.

C. NOMINAL FEE (Continued)

The DOL has indicated that fire departments may consider the following factors when providing nominal fees to *bona fide* volunteers:

- Distance traveled
- Time and effort expended
- Whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods
- Whether the volunteer provides services as needed or throughout the year.

C. NOMINAL FEE (Continued)

In addition, the DOL provided the following additional guidance in various opinion letters.

- Per Call Basis (cannot be productivity-based compensation)
- Monthly or Annual Stipend (is allowed)
- Hourly Rate (destroys *bona fide* volunteer status and creates an employment relationship)

C. NOMINAL FEE (Continued)

The bad news for volunteer fire departments is if the stipend is tied to "hours of work or productivity" or if it does not meet certain FLSA requirements, the firefighter may be considered an under-compensated employee. If that is the case, the firefighter would be entitled to minimum wage for all hours worked/volunteered, plus overtime when his/her hours exceed the applicable threshold.

D. THE 20 PERCENT RULE

In a 2006 opinion letter, the DOL explained that "generally an amount not exceeding 20% of the total compensation that the employer would pay to a full-time firefighter for performing comparable services would be deemed nominal."

Further, the DOL indicated that so long as the fee is 20% or less of the total compensation for comparable services, the DOL will be less likely to focus on whether a fee is paid on an annual, monthly or daily basis.

D. THE 20 PERCENT RULE (Continued)

Fire departments can apply the 20% rule to evaluate whether a fee paid to volunteer firefighters is a nominal amount based on market information, including:

- Compensation paid to a full-time firefighter on the fire department's payroll
- Information from neighboring jurisdictions, the state or the nation (including data from DOL's Bureau of Labor Statistics)

D. THE 20 PERCENT RULE (Continued)

The DOL explained that the information necessary to make this calculation generally is within the knowledge and control of fire departments, and thus, the actual determination should be made by fire departments in good faith based on "any full-time firefighter a particular fire department has its payroll."

D. THE 20 PERCENT RULE (Continued)

A county fire department pays \$50,000 to hire a full-time firefighter for one year. The fire department pays an annual stipend of \$9,500 to a volunteer firefighter to perform the same services. (This payment would constitute a nominal fee under the 20 percent rule.)

D. THE 20 PERCENT RULE (Continued)

A county fire department pays \$50,000 to hire a full-time firefighter for one year. The fire department pays an annual stipend of \$9,500 to a volunteer firefighter to perform the same services. (This payment would constitute a nominal fee under the 20 percent rule.)

D. THE 20 PERCENT RULE (Continued)

A county fire department pays \$50,000 to hire a full-time firefighter for one year. The fire department pays an annual stipend of \$15,000 and life insurance to a volunteer firefighter to perform the same services. (This payment would not constitute a nominal fee under the 20 percent rule.)

D. THE 20 PERCENT RULE (Continued)

- Although the DOL found that a \$15,000 annual payment may qualify as nominal under the 20 percent rule, the DOL also observed that “it is unlikely that 3,000 hours of service (50+ hours per week) is ‘volunteering’ rather than employment.”
- If a volunteer is compensated annually for a comparable, high level of hours, the DOL likely will determine that a full-time employment relationship exists.
- A nominal fee must not vary depending on the productivity of the volunteer or the amount of time spent on volunteer activities.

D. THE 20 PERCENT RULE (Continued)

Although the DOL did not definitively answer whether a fire department can increase the yearly, monthly or per shift payment to volunteers for every time the volunteer staffs a requisite number of shifts, the DOL noted that this may constitute impermissible “compensation via a seniority or productivity system based on services rendered.”

D. THE 20 PERCENT RULE (Continued)

Even if a payment constitutes a nominal fee under the 20% rule, this payment must be considered in totality with other expenses or benefits received by volunteer firefighters to determine if the entire amount of payments precludes volunteer status under the “economic realities” test.

IV. DO VOLUNTEER SERVICES CONSTITUTE THE : “SAME TYPE OF SERVICES”

The FLSA “does not permit an individual to perform hours of volunteer services for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency.”




IV. DO VOLUNTEER SERVICES CONSTITUTE THE : "SAME TYPE OF SERVICES"

DOL regulations define "same type of services" as "similar or identical services." Whether volunteer services constitute the same type of services is determined on a case-by-case basis.

Examples:

- Cross-Trained Firefighter/EMT
- Firefighter/Police
- Fire Marshall/Firefighter
- Mechanic/Firefighter
- Detention Deputy/Law Enforcement Deputy
- Civilian Communications Specialist/Firefighter



V. DO TWO ENTITIES CONSTITUTE THE "SAME PUBLIC AGENCY"?

- An individual who is a paid employee of a public agency cannot also be an unpaid volunteer for the same agency while performing the same type of services that he is employed to perform.
- DOL determines whether two entities constitute the "same public agency" on a case-by-case basis.



VI. USE OF PAID LEAVE AND COMPENSATORY LEAVE

If an employee is a *bona fide* volunteer for a separate public agency, the employing agency may provide paid personal leave or dock the employee's compensatory time during volunteer calls without jeopardizing the individual's volunteer status with the separate agency.

- Further, the volunteer hours worked for the separate agency would not be compensable time worked for the employer and, thus, would not be counted by the employer when computing overtime.

VII. SECTION 7(K) EXCEPTION – CAREER EMPLOYEES

In 1974, Congress amended the Fair Labor Standards Act (FLSA) which governs overtime, so that the Act applied to state and local governmental organizations. However, Congress recognized that certain governmental employees, such as firefighters, do not work normal 40-hour work weeks.

Therefore, Congress included a partial exemption from the Act's overtime requirements for governmental employees, including those engaged in fire protection activities.

VIII. 14 OR 28 DAY WORK PERIOD

A fire department with a 28-day work period could pay employees daily, weekly, biweekly, or monthly (assuming it is allowed by state law), provided overtime is calculated based upon the 28 day work period.

VIII. 14 OR 28 DAY WORK PERIOD

If a fire department fails to formally establish a work period, it then becomes a question of fact to determine what work period the department has in fact been using. If a fire department pays its employees weekly and calculates their overtime on the basis of a seven-day workweek, then a court (possibly even a jury) will likely find the department has adopted a seven-day work period

VIII. 14 OR 28 DAY WORK PERIOD

Firefighters are the only profession that Congress allows to work 53 hours per week (212 hours in 28 days) without overtime. Police maximum hours are 43 per week (171 hours in 28 days).

VIII. 14 OR 28 DAY WORK PERIOD

When calculating hours worked for overtime purposes, the employer only has to count hours actually worked. Thus sick leave, vacation, Kelly days, etc. need not be included.

IX. EMS PERSONNEL

Under this "firefighter exemption," public agencies may pay their "fire protection" employees straight time, without overtime, for the first 53 hours worked in a week, or for the first 212 hours worked in a 28-day period. Section 7(k) also allows the agency to average out the fact that a firefighter may work more than eight hours in a shift and may work a different number of shifts each week. (See 29 CFR §553.201(a))

IX. EMS PERSONNEL

According to the DOL regulations that implement and interpret the FLSA, Section 7(k) does not apply to private companies that provide fire protection or EMS, even if those organizations have a contract with a town, city, county, or state.

IX. EMS PERSONNEL

Also, the regulations state that “an employee engaged in fire protection activities,” includes only employees who

- (1) are employed by an organized fire department or fire protection district;
- (2) have been trained to the extent required by State statute or local ordinance;
- (3) have the legal authority and responsibility to engage in the “prevention, control or extinguishment of a fire of any type”; and
- (4) perform activities which are required for and directly concerned with the prevention, control or extinguishment of fires, which can include incidental non-firefighter functions such as housekeeping, equipment maintenance, lecturing, attending community drills, and inspecting homes and schools for fire hazards.

IX. EMS PERSONNEL

In addition to these requirements, employees must also spend at least 80 percent of their work time performing fire protection activities – this is what is commonly known as the “80/20 Rule.”

IX. EMS PERSONNEL

However, the DOL regulations state that fire department EMS personnel may qualify for treatment under the Section 7(k) exemption “if such personnel form an integral part of the public agency’s fire protection activities.” The regulations also state that employees of a public agency “third service” ambulance and rescue service providers may also be treated like employees engaged in fire protection activities.

IX. EMS PERSONNEL

However, their services must be “substantially related to firefighting” activities, in that:

- (1) the ambulance and rescue service employees must have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their duties; and
- (2) the ambulance and rescue service employees must be regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

IX. EMS PERSONNEL

Fire-based EMS personnel must meet the “integral part” test to be included within the exemption. Personnel who work for third-service EMS agencies must meet the “substantially related” test to be paid pursuant to the exemption. However, the courts have not adopted these distinctions, and, consequently, they have not evaluated fire-based EMS personnel in a uniform manner.

IX. EMS PERSONNEL


Indeed, the courts are split as to their analytical approach to fire-based EMS. Some courts have followed the language of the regulations and have asked whether EMS personnel were an integral part of the fire protection system.

IX. EMS PERSONNEL

In choosing to analyze fire-based EMS in the same manner as a third-service EMS provider, the Federal Court of Appeals for the Sixth Circuit (which includes Ohio) stated that “we are unable to understand why ambulance and rescue service personnel within the fire department should be treated differently for these purposes from those who are within another public agency.” 4 F.3d 1387 (6th Cir. 1993)


X. FLSA, OVERTIME AND STAFF PERSONNEL

Certain high level fire department employees (fire chief, assistant chief, administrative chief, etc.) may qualify as executives under the FLSA and would be completely exempt from the overtime requirements. While a fire department may choose to pay overtime to these employees, it is not required. If individuals qualify as executives, then paying them overtime after 43 hours per week (83 hours in two weeks) would be permissible.



X. FLSA, OVERTIME AND STAFF PERSONNEL


In order to qualify for the executive exemption, the firefighter must be paid a minimum of \$455 per week on a salary basis, (\$913 in December 2016), supervise other workers, make important policy level decisions, and have the authority to hire and fire or at least play a significant role in that process. Again, the employer can choose to pay even executives overtime above and beyond their salary, however, the FLSA does not require it.



X. FLSA, OVERTIME AND STAFF PERSONNEL

The U.S. Department of Labor and most courts have concluded that firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as:

- preventing, controlling or extinguishing fires of any type;
- rescuing fire, or accident victims;
- preventing or detecting crimes; conducting investigations or inspections for violations of law;



X. FLSA, OVERTIME AND STAFF PERSONNEL

Are hourly employees entitled to overtime. Attempting to classify any of the above as executives would most likely end up as an FLSA violation.

- There are two other exemptions that may apply:
- Small fire department exception (5 or fewer employees)
- Law enforcement 7(k) – if the staff personnel are (for example) arson investigators, they may qualify under the law enforcement 7(k) exemption.

XI. OVERTIME FOR MANDATED TRAINING

The general rule under the FLSA is that an employer must compensate employees for time spent in employer mandated training. However, as is often the case with the FLSA, there are exceptions to the general rule. Required training for licensure may lie squarely within one of these exceptions depending upon the specific facts and circumstances.


XI. OVERTIME FOR MANDATED TRAINING

The US Department of Labor regulation entitled "Training Time," 28 CFR 553.226, exempts state and local government employers from having to compensate certain employees for required training.

For state and local employers to qualify for this exemption, the required training must be outside of normal working hours and required by law for certification or recertification. Whether the employer pays the cost of the training is irrelevant to determining if the training is compensable.


XI. OVERTIME FOR MANDATED TRAINING

The Sixth Circuit Court of Appeals has applied this regulation to Memphis firefighters who were training to become paramedics. The Court of Appeals upheld a lower court ruling that the City of Memphis did not have to pay newly hired firefighters to attend paramedic classes while off-duty.




XII. CLOTHING ALLOWANCE

Under certain circumstances some or all of a clothing allowance may be considered compensation and thus includable in calculating the employee’s “regular rate.” Regular rate is the hourly wage that employees receive when all remuneration (compensation paid for work) is factored in. Overtime is based upon regular rate times 1.5.



XII. CLOTHING ALLOWANCE

A problem arises when the reimbursement is not dollar-for-dollar payment for the exact cost of expenses incurred – but rather is given as a stipend or allowance intended to cover estimated expenses. In such a case it is possible that some or all of the allowance may be considered remuneration.



XII. CLOTHING ALLOWANCE

To the extent a firefighter’s clothing allowance exceeds what is “reasonably approximate” for the costs to purchase, maintain, and launder required uniforms, the overage must be included in the regular rate. 29 CFR §778.217.

Determining if a clothing allowance is “reasonably approximate” for the expenses incurred requires a detailed factual analysis.

XIII. EARLY RELIEFS AND OVERTIME

The FLSA mandates that employees be paid for all hours worked. That includes work performed outside of the regular work hours such as when an employee comes in early or stays late. It does not matter whether the employer requested the extra work or the employee did it voluntarily. So long as the employer knows or has reason to know that extra work was performed, the employer is required to compensate the employee for the extra time.

XIII. EARLY RELIEFS AND OVERTIME

29 CFR §553.225 states that under certain conditions firefighters do not have to be paid for time spent as an “early relief.”

553.225 Early Relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be added to the employer’s tour of duty and treated as compensable hours of work

XIII. EARLY RELIEFS AND OVERTIME

The DOL understood the potential ramifications the FLSA could have on firefighters and carved out the early relief exception. The requirements that must be met in order for the exception to apply are as follows:

- The exception only applies to “employees engaged in fire protection activities,” and
- There must be either an express or implied agreement between the firefighters, and
- The early relief must be completely voluntary, and
- The early relief “does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked.”

XIII. EARLY RELIEFS AND OVERTIME

The regulations assume that the firefighter who comes in early will also be relieved early, and thus there is not a disproportionate number of extra hours worked by any one firefighter "over a period of time." The early relief must be voluntary between the involved members. Should the early relief be mandated by the department, the time is compensable.


XIV. COMP TIME FOR CIVILIAN FIRE DEPARTMENT EMPLOYEES

Comp time is an option for all public employees, not just firefighters.

The FLSA permits public employers (state and local government) to allow employees to accrue and use comp time in lieu of paying them overtime. It does not mandate comp time. As such, comp time is not an entitlement that firefighters can force the department to grant.


XIV. COMP TIME FOR CIVILIAN FIRE DEPARTMENT EMPLOYEES

Comp is permitted only by agreement of the parties. If an employee declines comp time, he/she must receive overtime compensation for all hours over their maximum hours cap. The hourly cap for firefighters is significantly different than for civilian employees such as secretaries. Where a secretary is entitled to overtime or comp time after 40 hours per week, firefighters are not entitled to overtime or comp time until 53 hours per week (or up to 212 hours in 28 days if the department has adopted a longer workweek).



XIV. COMP TIME FOR CIVILIAN FIRE DEPARTMENT EMPLOYEES

The maximum comp time accruals for police and fire are different than other public employees. Police officers and firefighters can accrue up to 480 hours of comp time before maxing out while other public employees can only accrue up to 240 hours.



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