

## **FLSA for Public Safety**

### ***Are there special FLSA rules that apply to police officers and fire fighters?***

Yes. The Fair Labor Standards Act (FLSA) provides partial and total exemptions from overtime for peace officers and fire fighters in some cities. A partial exemption can be found in section 207(k) of the FLSA which provides that employees engaged in fire protection or law enforcement may be paid overtime on a “work period” basis.<sup>1</sup> 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 (53 hours in a seven-day work period), while law enforcement personnel must receive overtime after 171 hours worked during a 28-day period (43 hours in a seven-day work period).<sup>2</sup>

### ***Can a city ever have a total exemption from overtime for fire and police personnel?***

Yes. The FLSA provides an overtime exemption for law enforcement or fire protection employees of a police or fire department that employs less than five employees in law enforcement or fire protection activities.<sup>3</sup>

### ***Which fire and police employees are counted towards the five employees used to calculate the exemption?***

All personnel involved in law enforcement or fire suppression activities are counted towards the five employees regardless of part-time or full-time status.<sup>4</sup> The law enforcement agency and fire suppression employees are treated separately. A city could 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. Likewise, because volunteers are not considered employees, they do not count towards the minimum employee threshold.<sup>5</sup> However, 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.<sup>6</sup>

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<sup>1</sup> 29 U.S.C. § 207(k).

<sup>2</sup> *Id.*; 29 C.F.R. § 553.201.

<sup>3</sup> 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200.

<sup>4</sup> 29 C.F.R. § 553.200.

<sup>5</sup> *Cleveland v. City of Elmendorf*, 388 F.3d 522 (5th Cir. 2004).

<sup>6</sup> 29 C.F.R. § 553.216.

### ***How does the 207(k) exemption work?***

This exemption, commonly referred to as the “7(k)” exemption, allows a city to establish a work period of 7 to 28 consecutive days for determining when overtime pay is due to employees engaged in fire protection or law enforcement activities.<sup>7</sup> This exemption allows qualifying employees to work longer periods of time before they are entitled to overtime. For example, employees engaged in fire protection activities must be paid overtime for hours worked beyond 212 during a 28-day work period (53 in a 7-day work period), while law enforcement employees must be paid overtime for hours worked beyond 171 during a 28-day work period (43 in a 7-day work period).<sup>8</sup> To avail itself of the 7(k) exemption, a city must establish a work period.<sup>9</sup> A work period does not have to coincide with the pay period. For example, a city can establish a work period of 28 days with an employee receiving pay every 2 weeks.

### ***Which law enforcement and fire protection employees can be covered by the 7(k) exemption?***

Only certain law enforcement or fire protection employees are covered by the 7(k) exemption. If an employee does not qualify as an employee engaged in fire protection activities or law enforcement activities, the employee must be compensated under the general overtime rule. The U.S. Department of Labor (DOL) regulations define an employee engaged in law enforcement activities as an 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.<sup>10</sup>

### ***Are there any employees who engage in law enforcement activities that are not covered by the 7(k) exemption?***

The DOL regulations specifically provide that a building or health inspector, an animal control personnel, and sanitarians, among others, would normally not meet the definition of an employee engaged in law enforcement activities.<sup>11</sup> Additionally, employees who may be members of a fire or police department and who perform support activities, such

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<sup>7</sup> 29 U.S.C. § 207(k).

<sup>8</sup> 29 C.F.R. § 553.201.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 553.211(a).

<sup>11</sup> *Id.* § 553.211(e).

as dispatchers, radio operators, repair workers, clerks, or janitors do not qualify for the 7(k) exemption.<sup>12</sup>

***Does 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.<sup>13</sup>

Cities that utilize employees who perform dual-functions as firefighters and paramedics should be aware of a fairly recent Fifth Circuit opinion, which invalidated a DOL regulation (29 C.F.R. §553.212) and held that firefighters and certain dual-function paramedics can qualify for the 7(k) exemption even if they spend more than twenty percent of their time performing non-fire suppression activities, such as dispatching.<sup>14</sup>

***Does the 7(k) exemption apply to volunteer fire departments?***

While the 7(k) exemption is limited to public agencies and does not apply to private entities, the Fifth Circuit has held that a volunteer fire department that provided traditional fire fighting and fire protection services, was funded almost exclusively by taxes, was accountable to the county, and for which the county had ultimate authority over its actions, was a public agency for purposes of the 7(k) exemption.<sup>15</sup>

***Can a state law or ordinance give more overtime benefits than the FLSA requires?***

The FLSA does not preempt a state law or municipal ordinance that provides more benefits than the FLSA requires.<sup>16</sup> As such, a city that has a population of more than 10,000 may in some instances not utilize the 7(k) exemption for its nonexempt police officers and certain non-exempt employees of the fire department. Under Texas law, a city with a population of more than 10,000 may not require its police officers to work more hours during a calendar week than the number of hours in the normal work week of the majority of the employees of the city, other than police officers or fire fighters.<sup>17</sup> As such, if a majority of nonpublic safety employees in a city work 40 hours, a police officer would be entitled to overtime pay when the officer works more than 40 hours. However, a city may require a police officer to work more hours than permitted in the event of an

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<sup>12</sup> *Id.* § 553.211(g).

<sup>13</sup> 29 U.S.C. §203(y).

<sup>14</sup> *McGavock v. City of Water Valley, Mississippi*, 452 F.3d 423 (5th Cir. 2006).

<sup>15</sup> *Wilcox v. Terrytown Fifth Dist. Volunteer Fire Dep’t. Inc.*, 897 F.2d 765 (5th Cir. 1990).

<sup>16</sup> 29 U.S.C. § 218.

<sup>17</sup> TEX. LOCAL GOV’T CODE §142.0015(f).

emergency.<sup>18</sup> In addition, if a majority of police officers working for the city sign a written waiver of their rights, the city may adopt a work schedule requiring police officers to work more hours than permitted.<sup>19</sup> In this case, an officer is entitled to overtime pay if the officer works more hours during a calendar month than the number of hours in the normal work month of the majority of the employees of the city other than fire fighters or police officers.<sup>20</sup> A police officer or fire fighter can also work extra hours when exchanging hours with another fire fighter or police officer.<sup>21</sup>

In addition, certain nonexempt employees of the fire department who do not fight fires or provide emergency medical services (e.g., a mechanic, a clerk, an investigator, an inspector, a fire marshal, a fire alarm dispatcher, and a maintenance worker) are considered to have worked overtime if they work more hours in a week than the number of hours in a week that the majority of the city employees other than firefighters, emergency medical service personnel or police officers work.<sup>22</sup> A city can still use the 7(k) exemption for non-exempt firefighters or members of a fire department who provide emergency medical services.<sup>23</sup>

***Is a police chief considered exempt under the executive or administrative test?***

If the duties and salary of a police chief, ranking police officer, or detective would meet the “standard” or “highly compensated employee” tests for executive or administrative employees, then he or she could be considered exempt. The police chief is almost certain to qualify for one or the other exemption. Other ranking police officers and detectives may be exempt, depending on their job duties and responsibilities, and how closely they are supervised.<sup>24</sup>

***Do we have to pay our police and fire fighters a minimum amount?***

If your city has a population of 10,000 or more then there are minimum amounts that must be paid to fire fighters and police officers. These minimums can be found in Local Government Code Section 141.031. Also, in cities over 10,000, police officers and fire fighters must receive a certain amount of longevity pay based on their years of service.<sup>25</sup>

***Resources***

**Department of Labor:**

<http://www.dol.gov/whd/regs/compliance/whdfs8.pdf>

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<sup>18</sup> *Id.* § 142.0015(g).

<sup>19</sup> *Id.* § 142.0015(j).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 142.001(d).

<sup>22</sup> *Id.* § 142.0015(c).

<sup>23</sup> *Id.* § 142.0015(b).

<sup>24</sup> 29 U.S.C. § 213.

<sup>25</sup> TEX. LOC. GOV'T CODE § 141.032.