

Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, N.W.
Washington DC 20210

VIA: <http://www.regulations.gov>

Re: RIN 1215-AB13

The comments below are submitted on behalf of the International Public Management Association for Human Resources (IPMA-HR), the International Municipal Lawyers Association (IMLA) and the National League of Cities (NLC), collectively the “associations.” IPMA-HR, IMLA, and NLC are membership organizations representing city elected officials and public sector professionals. The associations’ members are often the ones with immediate responsibility for interpreting and applying the Fair Labor Standards Act (FLSA).

The associations appreciate the Department of Labor’s effort to update the FLSA regulations. The comments below apply to two provisions that are particularly important to public sector employers: Part 553.210 relating to the partial overtime exemption as applied to employees engaged in fire protection activities and Part 553.25 relating to the use of compensatory time.

The associations request that the Department provide additional clarification to Part 553.210 in light of recent litigation. As you are aware Section 203(y) of the Fair Labor Standards Act has been the subject of several Circuit Court opinions including *Cleveland v. City of Los Angeles*, 420 F. 3d 981 (9th Cir. 2005), and *Lawrence v. City of Philadelphia*, Docket No. 4564 (3rd Cir. 2008). These two cases were decided in favor of the plaintiffs. *McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006) and *Huff v. DeKalb County, Ga.* 516 F. 3d 1272 (11th Cir. 2008) were decided in favor of the defendants.

The Third and Ninth Circuit cases were decided incorrectly and in contradiction of the plain language of section 203(y) which was adopted into law in 1999 to put an end to these types of lawsuits. The legislation’s sponsor, Representative Robert Ehrlich (R-MD), whose district includes Anne Arundel, noted that taxpayers there were responsible for a successful suit brought against the locality. On debate of the legislation, Ehrlich said “Mr. Speaker, H.R. 1693 seeks to clarify the definition of a fire protection employee. The bill reflects the range of lifesaving activities engaged in by today's fire service, built upon its long tradition of responding to all in need of help. Specifically, today's firefighter, in addition to fire suppression, may also be expected to respond to medical emergencies, hazardous materials events, or even to possible incidents created by weapons of mass

destruction.” Rep. Ehrlich clearly recognized that modern, public fire departments respond much more frequently to emergencies involving vehicle collisions, medical emergencies and the like than they do to actual fires. Cross training the employees of these departments in all areas of emergency response enables the government to respond better to emergencies and to maximize its resources.

And, it is interesting to note that section 203(y) was passed three months after the plaintiffs in *Cleveland* filed their lawsuit and that the Ninth Circuit applied analysis of the regulations in effect at the time to the definition of section 203(y).

Section 203(y) states that an employee engaged in fire protection activities will be partially exempt from the overtime requirements:

(y) "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.

We believe that Congress intended the words to have their ordinary meaning and that lawmakers purposely used the disjunctive “or” when drafting the subsection (2) of 203(y). Therefore, an employee engaged in fire protection activities must *either* be engaged in the prevention, control, and extinguishment of fires *or* respond to emergency situations where life, property or the environment is at risk.

Unfortunately, the Ninth and Third Circuits mistakenly combined subsections (1) and (2) of section 203(y) thereby confusing the status of the employee with the duties of the employee. Subsection (1) refers to the status of the employees who are trained in fire suppression – that they have the *legal* authority and responsibility to engage in fire suppression and be employed by a public fire department. Subsection (2) – the duties – provides that the employee either be engaged in firefighting or respond to emergencies where life, property or the environment is at risk. As the Fifth Circuit correctly stated in *McGavock*, emergency personnel trained as firefighters could be exempt even if they “spend one hundred percent of their time responding to medical emergencies.”

We request that the Department clarify the purpose of subsections (1) and (2) of Section 203(y) in Part 553.210 by adding between the end of the sentence, “...is at risk.” and the next, the following sentence: “Paramedics, emergency medical technicians, rescue workers, ambulance personnel or hazardous materials workers that are employed by a fire department and trained in fire suppression will be covered under this section as long as they *either* are engaged in the prevention, control, and extinguishment of fires *or* respond to emergency situations where life, property or the environment is at risk.”

The associations also commend the Department for clarifying that the use of compensatory time must be within a “reasonable period” and not on a specified date in Part 553.25. This is of great assistance to localities that must have adequate staff in order to provide services to citizens.

The associations would urge the Department to add one further clarification, that public employers are not required to grant the use of accrued compensatory time if it means that the employer would incur overtime expenses. The Ninth Circuit adopted this position in *Mortensen v. County of Sacramento*, 368 F. 3d 1082 (2004) and we believe that putting it into the regulations will offer employers needed certainty in applying their policies.

Thank you for considering our comments. Should you have additional questions please feel free to contact us at the phone numbers and addresses below.

Sincerely,

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