

JUN -1 2006



Mr. Neil Reichenberg
Executive Director
International Public Management
Association for Human Resources
1617 Duke Street
Alexandria, Virginia 22314

Dear Mr. Reichenberg:

This is in response to your letter requesting an opinion regarding whether dual-function firefighter/paramedics employed by a Fire Department qualify for the partial overtime exemption under section 7(k) of the Fair Labor Standards Act (FLSA) (copy enclosed). You submitted your request on behalf of the public sector agencies throughout the country that your entity represents, including cities and counties that operate integrated fire suppression and emergency response departments. Based on a review of the information provided, it is our opinion that the dual-function firefighter/paramedics described in your letter qualify for the partial overtime exemption.

In your example, you state that dual-function firefighter/paramedics are the only type of paramedic currently hired. There are no new single-function paramedic hires. Dual-function firefighter/paramedics are hired as firefighters and are required to complete the Fire Academy, a seventeen-week fire suppression training program. Firefighters chosen to become paramedics receive additional training in emergency medical services and paramedic certification. Dual-function firefighter/paramedics are fully trained in fire suppression skills, search and rescue operations, fire prevention, and public safety. They regularly receive fire suppression training and present fire prevention awareness programs. Dual-function firefighter/paramedics may be assigned to fire suppression or paramedic positions on rescue ambulances, and you indicate that in one-third of the stations they routinely rotate between these positions. Dual-function firefighter/paramedics assigned to rescue ambulances are issued breathing apparatus, "turnout" gear, and assigned personal protective equipment that they are required to carry in rescue ambulances at all times.

Dual-function firefighter/paramedics are dispatched to a variety of incidents at which they are expected to perform fire suppression services and medical services, as needed. Rescue ambulances are dispatched to all structure fires and reported smoke incidents, even if there is no express need for advanced life support medical services. To the extent that there are medical emergencies, dual-function firefighter/paramedics will provide emergency medical services. In other instances, the dual-function firefighter/paramedics must perform fire suppression activities when so directed by the Incident Commander. In

fact, you state that under certain circumstances, a dual-function firefighter/paramedic may serve as an Incident Commander in charge of the fire scene until relieved by a Captain or Battalion Chief. They perform the same fire attack, ventilation, evacuation, and exposure protection as single-function firefighters and are routinely called upon to perform fire suppression tasks alongside single-function firefighters.

Section 7(k) of the FLSA provides a partial overtime pay exemption for employees employed by a public agency in fire protection or law enforcement activities. Under this provision, a public agency employer may establish a work period of 7 to 28 consecutive days for determining overtime compensation owed to individuals employed in fire protection or law enforcement activities. The maximum hour standard for fire protection personnel ranges from 53 hours worked in a 7-day period to 212 hours worked in a 28-day period. *See* 29 C.F.R. § 553.230(c) (copy enclosed).

On December 9, 1999, the FLSA was amended to add section 3(y) (copy enclosed), which clarifies the definition of “fire protection activities” for section 7(k) partial overtime exemption purposes.¹ Section 3(y) states:

“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.

Based on your description of the facts, there is no question that the dual-function firefighter/paramedics described in your letter are trained in and have the legal authority to engage in fire suppression. Further, according to your letter, they are employed by a fire department of a municipality, county, fire district, or state. With respect to the issue whether the dual-function firefighters/paramedics have the responsibility to engage in fire suppression, it is apparent from the facts presented that the dual-function firefighter/paramedics clearly have a responsibility to engage in fire suppression.

Recent guidance provided by the U.S. Court of Appeals for the Ninth Circuit supports the conclusion that the dual-function firefighter/paramedics you describe have firefighting responsibilities. In *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied* 126 S. Ct. 1344 (2006), the Ninth Circuit stated that in order for dual-function firefighter/paramedics to have sufficient fire suppression responsibility under section 3(y), they must “have some real obligation or duty” to engage in fire suppression. *Id.* at

¹ It is the Wage and Hour Division’s view that section 3(y) supersedes the definition of employee engaged in fire protection activities contained in 29 C.F.R. § 553.210(a) and therefore renders analysis under that regulatory provision unnecessary in this case.

990. Unlike the dual-function firefighter/paramedics described in your letter, the dual-function firefighter/paramedics at issue in *Cleveland* did not, according to the Court, carry fire suppression breathing equipment in their paramedic ambulances, were not expected to wear fire protection gear at fire scenes, did not assist with any fire suppression, and were dispatched only to perform medical services. The court looked at six factors in determining that the dual-function firefighter/paramedics in *Cleveland* did not have “some real obligation or duty” to engage in fire suppression. Using these same factors, it is apparent that the dual-function firefighter/paramedics described in your letter have sufficient fire suppression responsibility under section 3(y): 1) they carry firefighting turnout gear and breathing apparatus; 2) dispatchers assume that at least one dual-function firefighter/paramedic is in each ambulance dispatched to a call; 3) paramedic ambulances are always dispatched to fire scenes, and personnel must notify the Incident Commander at the scene whether they are dual-function firefighter/paramedics or single-function paramedics; 4) dual-function firefighter/paramedics are always expected to wear fire protective gear at a fire suppression scene (including wearing the same color helmet as other firefighters so the Incident Commander can quickly assess the fire suppression resources available); 5) to the extent medical emergencies exist, and to utilize their paramedic training, they are expected to provide emergency medical services as their primary responsibility, but also routinely perform fire suppression duties alongside their firefighting colleagues when not needed for medical care; and 6) they are routinely ordered to perform fire suppression duties, to attend fire suppression training, and to present fire prevention awareness programs. The dual-function firefighter/paramedics you describe therefore meet the Ninth Circuit’s test for “responsibility” to engage in fire prevention, control, and extinguishment. *Id.*

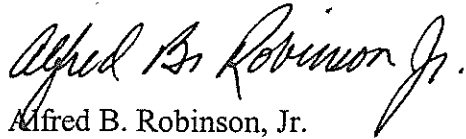
Finally, section 3(y) also requires that employees be engaged in either fire prevention and suppression or response to emergencies. The dual-function firefighter/paramedics you describe appear to engage in both fire prevention, control, and suppression and respond to emergencies where life, property, or the environment is at risk.

In this case, the dual-function firefighter/paramedics you describe are employed in fire protection activities under section 3(y) of the FLSA. They are trained in fire suppression, have the authority and responsibility to engage in fire suppression, and are engaged in fire suppression or response to emergencies. Therefore, the dual-function firefighter/paramedics described above qualify for the partial overtime exemption under section 7(k) of the FLSA because they are employed by a public agency in fire protection activities.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that your organization is not a party to pending private litigation concerning the issues addressed herein. You have also

represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Alfred B. Robinson, Jr.".

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures:

Sections 3(y) and 7(k) of the FLSA
29 C.F.R. § 553.230

(B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or

(C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons —

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool,¹⁴ elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s) (1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that —

(A) (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated),¹⁵

¹⁴ "A preschool" was added by the Education Amendments of 1972.

¹⁵ As amended by section 3(a) of the Fair Labor Standards Amendments of 1989. Prior to April 1, 1990, the dollar volume test for enterprise coverage (except in the case of an enterprise comprised exclusively of one or more retail or service establishments; or one engaged in construction or reconstruction; or one engaged in laundering, cleaning, or repairing clothing or fabrics; or one described in section 3(s)(1)(B) or (C)) was \$250,000. For retail enterprises, the dollar volume test was \$362,500. There was no dollar volume test for the other enterprises.

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.¹⁶

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour:

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency.

(y)¹⁷ "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

¹⁶ As amended by section 3(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. Prior to January 1, 1978, the dollar amount was \$20.

¹⁷ Added by Public Law 106-151, § 1 (113 Stat. 1731), effective 12/9/99.

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.

Administration¹⁸

SEC. 4. (a) There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.¹⁹

Excerpts From Reorganization Plan No. 6 of 1950, 64 Stat. 1263

"Except as otherwise provided [with respect to hearing examiners], there are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor and all functions of all agencies and employees of such Department* * *. The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

(b) The Secretary of Labor²⁰ may, subject to the civil service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with **Chapter 51 and Subchapter III of Chapter 53 of Title 5**.²¹ The Secretary²² may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Secretary²³ in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment,

¹⁸ Heading revised to reflect changes made by Reorganization Plan No. 6 of 1950.

¹⁹ Pursuant to 5 U.S.C. 5316, the Administrator of the Wage and Hour Division is classified under Level V of the Executive Schedule, for which the annual rate of basic pay is determined under 2 U.S.C. Chapter 11, as adjusted by 5 U.S.C. 5318.

²⁰ As amended by section 404 of Reorganization Plan No. 11 of 1939 (53 Stat. 1436) and by Reorganization Plan No. 6 of 1950 (64 Stat. 1263).

²¹ Substituted for "the Classification Act of 1949, as amended" (amended by section 1104 of the Act of October 23, 1949 (63 Stat. 972)) on authority of Pub. L. 89-554, Sec. 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

²² See footnote 20.

²³ Ibid.

selection, classification, and promotion of officers and employees of the Secretary,²⁴ no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Secretary shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d)²⁵ *The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.*

(e) Whenever the Secretary has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: *Provided*, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.

(f) *The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any*

²⁴ Ibid.

²⁵ The Federal Reports Elimination and Sunset Act of 1995, Pub. L. 104-66, Dec. 21, 1995, Title I, Sec. 1102(a), 109 Stat. 722, modified the first sentence of Subsec. (d)(1) by substituting "biennially" and "preceding two years" for "annually" and "preceding year," respectively. Then, subsecs. (d)(1) (requiring a report to the Congress covering the Secretary's activities for the preceding two years and including such information, data, and recommendations for further legislation as the Secretary may find advisable) and (d)(3) (requiring a continuing study on means to prevent curtailment of employment opportunities for groups which have had historically high incidences of unemployment with reports transmitted to the Congress at two-year intervals) were terminated effective May 15, 2000. For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103-7 (in which reports required under paragraphs (1) and (3) of subsec. (d) of this section are listed on page 124), see Section 3003 of Pub. L. 104-66, effective Dec. 21, 1995, 109 Stat. 722, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

******(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection —

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

*** (h) (1)⁴⁰ Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.**

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.⁴¹

⁴⁰ Added by Pub. L. 106-202, Sec. 2(b), May 18, 2000, 114 Stat. 308 (Worker Economic Opportunity Act), effective August 17, 2000.

⁴¹ Amendment provided by section 7 of the Fair Labor Standards Amendments of 1949. See also footnote 37.

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. *In determining the proportion of compensation representing commission, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.*

(j) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k)⁴² No public agency shall be deemed to have violated subsection (a) 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 —

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to Section 6(c)(3) of the Fair Labor Standards Amendments of 1974)⁴³ in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

⁴² Effective January 1, 1975, the complete overtime exemption provided by section 6(c)(2)(A) of the Fair Labor Standards Amendments of 1974 was replaced by the more limited exemption in section 7(k). The present overtime standard — the lesser of 216 hours or the average number of hours (as determined by the Secretary of Labor) in tours of duty of employees in work periods of 28 consecutive days — became effective January 1, 1978. During calendar year 1977 the overtime standard was 216 hours, during 1976 the overtime standard was 232 hours, and during 1975 the overtime standard was 240 hours. The complete overtime exemption remains applicable only to public agencies employing less than 5 employees in fire protection or law enforcement activities. See section 13(b)(20), *infra*.

⁴³ The results of the Secretary's study were published in the Federal Register on September 8, 1983. The Secretary determined hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 FR 40,518).

(2) *in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,*

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) *No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).*

(m) *For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee —*

(1) *is employed by such employer —*

(A) *to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco.*

(B) *in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or*

(C) *in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and*

(2) *receives for —*

(A) *such employment by such employer which is in excess of ten hours in any workday, and*

(B) *such employment by such employer which is in excess of forty-eight hours in any workweek,*

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) *In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.*

(o)⁴⁴ (1) *Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.*

(2) *A public agency may provide compensatory time under paragraph (1) only —*

(A) *pursuant to —*

(i) *applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or*

(ii) *in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and*

(B) *if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).*

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

⁴⁴ As added by section 2(a) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

§553.226(b)(1)

sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.

(3) Time spent in the training described in paragraphs (b) (1) or (2) of this section is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

§ 553.227 Outside employment.

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) The special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special

details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in part 791 of this title.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

OVERTIME COMPENSATION RULES

§ 553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

§ 553.231 Compensatory time off.

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in § 553.230. The rules for compensatory time off are set forth in §§ 553.20 through 553.28 of this part.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a firefighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

§ 553.232 Overtime pay requirements.

If a public agency pays employees subject to section 7(k) for overtime hours worked in cash wages rather than compensatory time off, such wages must be paid at one and one-half times the employees' regular rates of pay. In addition, employees who have accrued the maximum 480 hours of compensatory time must be paid cash wages of time and one-half their regular rates of pay for overtime hours in excess of the maximum for the work period set forth in § 553.230.

§ 553.233 "Regular rate" defined.

The rules for computing an employee's "regular rate", for purposes of the Act's overtime pay requirements, are set forth in part 778 of this title. These rules are applicable to employees for whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages. However, wherever the word "workweek" is used in part 778, the words "work period" should be substituted.