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While many of the "regular rules" of the FLSA apply to fire protection employees, there are some "special rules," as well. These include "special 7(k) work periods" which may increase the FLSA overtime thresholds, and some peculiar regulations governing "sleep time."

Special "7(k) Work Periods."

Public-sector (government) fire departments may establish special "7(k) work periods" for sworn firefighters, which can increase the FLSA overtime "thresholds" beyond the normal 40 hour week. Firefighters covered by these special work periods are entitled to FLSA overtime only for hours worked in excess of a threshold set by the Department of Labor on a chart. For example, in a 28 day work period, fire fighters would be entitled to FLSA overtime only for hours actually worked over 212 during that 28 day period (in essence, a 53 hour work week). "7(k)" refers to the section of the FLSA in which these special rules are contained, 29 USC §207(k). Most fire fighters who work "platoon schedules" will be classified by their employers as "7(k) eligible" and compensated accordingly.

The special work periods and overtime rules are available only for employees who meet the statutory definition of "employees in fire protection activities" which is contained at §203(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 medical situations where life, property, or the environment is at risk.

Thus, to qualify for §7(k) pay as a fire protection employee under this statutory definition, an employee must (a) work for a (government) fire department, (b) be trained in fire suppression, (c) have the legal authority to fight fires, (d) have the responsibility to fight fires, (e) and either actually engage in fire suppression work of the type defined or non-fire related emergency responses.

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There is at least one court decision which has held that arson investigators employed at fire departments are not eligible for §7(k) pay as "employees in fire protection." Arson investigators may be eligible for § 7(k) pay as "employees in law enforcement activities," using the different thresholds permitted for these employees. (See, FLSA and Police Officers.) Some EMS employees may be eligible for §7(k) pay as employees in fire protection activities, however some EMS workers may be "40 hour week" employees. (See, FLSA and Paramedics.)

Private fire protection employers are not permitted to use the special §7(k) work periods, and employees of private fire companies must be paid FLSA overtime for all hours worked over 40 per week. A private fire company means a fire protection unit of private industry. A public sector fire company means that the employer is the government. Employees of "volunteer" fire departments probably count as public sector employees.

Hours Worked.

For FLSA purposes, "hours worked" means time when the employee is actually performing services for the employer. These are the only hours which must be included when determining if FLSA overtime is due. Thus, for example, "Kelly days" or other paid leave days do not count as hours worked for FLSA purposes. "Sleep time" and meal breaks may or may not count as FLSA hours worked, see below. FLSA overtime is due only when and to the extent that FLSA hours worked exceed the applicable FLSA overtime threshold -- 40 hours per week or whatever the applicable "chart" hours are for a 7(k) work period. So long as employees receive at least minimum wage for FLSA hours worked under the FLSA overtime threshold, there is generally no federal violation. "FLSA overtime" may therefore be different from "contract overtime."

FLSA hours worked include not only "on the clock" hours worked, but also "off the clock" hours worked, so long as the employer "knows or has reason to believe" that the employee is performing this "extra" work and permits it to happen. The following may constitute compensable FLSA hours worked when performed during off the clock time: Care and maintenance of work equipment (e.g., arson dogs, trucks and engines, hoses, uniforms), work performed before or after regular shifts, job-related paperwork performed at home, job-related telephone calls from home, (most) training time.

Overtime Rate.

An employee's FLSA overtime rate should be calculated to include not only "base pay" but also various "wage augments" such as "longevity pay" and "shift differentials." These must be included only for calculating the employee's FLSA overtime rate, and need not be included for any other pay purposes.



Sleep Time.

The FLSA permits employers to exclude up to 8 hours from work time when shifts are exactly 24 consecutive hours (private sector) or more than 24 hours (public sector), as "sleep time." To permit a sleep time exclusion requires that there be an "agreement" with the employees. An employee who takes a job which has a sleep time exclusion in place will be deemed to have "agreed" to it. There must also be adequate sleeping facilities, and the employees must normally have the opportunity to obtain 5 hours of sleep. The 5 hours need not be consecutive, and if an employee does not have the opportunity to get at least 5 hours of sleep no sleep time exclusion is permitted. Any time during the sleep period when an employee is actually performing work must be counted as work time.

Meal Periods.

Unpaid meal periods may be excluded from FLSA hours worked, so long as the employee actually gets to take an "uninterrupted" meal break. Minor interruptions will be tolerated, but if an employee "works through lunch" the time must be included as FLSA hours worked. Merely being "on call" during a meal period is not sufficient to require meal breaks to be included as FLSA hours worked.

"On Call" or "Stand By" Time.

On call or stand by time need not generally be included as FLSA hours worked. An employer may require employees to "remain available" to be called into work without having to pay FLSA wages for that time. The only exception is if the employer places restrictions on the use of stand by or on call time which make it virtually impossible for the employee to use the time for any personal purposes. Such situations are very rare. "If you can watch TV when you are on call, you probably are not entitled to FLSA compensation for the time." Any work an employee does during on call or stand by status must be compensated appropriately.

Schedule Adjustments.

The FLSA permits employers to adjust schedules to avoid FLSA overtime, so long as the adjustments occur within a work period. Thus, a fire company may, consistent with the FLSA, require an employee "not to work" within a work period, for the purpose of avoiding the employee reaching the FLSA overtime threshold during that work period. However, an employer is not permitted to "average" FLSA hours worked from work period to work period. Stated another way, the FLSA is generally not concerned with an employee's actual schedule within a work period. The employer may, consistent with the

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FLSA, require an employee to work pretty much when it wishes. The FLSA generally governs only how an employee must be paid for FLSA overtime worked during a work period. The employee's FLSA hours worked "vest" at the end of the last day of the work period. At that point, the total FLSA hours worked (during that work period) are added, and any FLSA hours worked over the FLSA threshold must be compensated as overtime. Overtime owed for FLSA hours worked during one work period may not be offset by "hours not worked" during some other work period. Note that local law, employment contracts, or collective bargaining agreements may independently restrict an employer from requiring schedule adjustments, irrespective of the FLSA.

Compensatory Time.

Government employers are permitted to pay some FLSA overtime with "comp. time" in lieu of cash wages. To be permitted to pay FLSA overtime with comp. time instead of cash, there must be an "agreement" with the employees before the FLSA overtime work is performed. If the employees are represented by a union, this agreement must be collectively bargained. If not, it may be a "condition of employment" (at least for new hires) or contained in individual agreements. Comp. time in lieu of cash wages for FLSA overtime must be paid at the appropriate FLSA overtime rate -- time and one-half. Employees must be permitted to use their accrued FLSA comp. time pretty much when they want to (on reasonable notice), but an employer may require an employee to "burn" accrued FLSA comp. time. An employer may not prohibit an employee from using accrued FLSA comp. time unless the time off would create a real disruption in operations. A desire by the employer to avoid having to call in another employee for shift coverage are not sufficient reasons to deny comp. time requests, as that is a financial reason and not an operational hardship.

The FLSA comp. time rules apply only to "FLSA comp. time." This is "time" awarded in lieu of cash wages for hours worked which would be required to be treated and paid as overtime under the FLSA. Some employers grant comp. time to employees for other purposes or on other schedules. The FLSA comp. time rules do not apply to this kind of comp. time.

"Moonlighting" and "Dual Employment."

Employees may not "volunteer" to do similar work for the same employer without the time being counted as FLSA work time. Firefighters may not perform "additional" fire related activities for their employers without that time being included as hours worked for FLSA pay computation purposes. Also, employees who work "two jobs" for the same employer must aggregate their total hours worked for FLSA pay purposes. For example, a fire fighter who works 40 hours as a firefighter and an additional 20 hours as an animal

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control officer has a total of 60 FLSA hours worked. Employees are permitted to work "moonlighting" jobs -- for separate employers -- without the hours being aggregated. Employees may sometimes work for "joint employers," such as when they are assigned to a "task force." In such cases, each employer is equally liable to be sure FLSA wages are paid properly.

See, also, Paramedics.