Birds of a Slightly Different Feather: Wage and Hour Issues Affecting Labor and the Public Sector

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INTRODUCTION

Litigation under the Fair Labor Standards Act ("FLSA") is on a slight decline since its peak in cases in 2007. The Administrative Office of the U.S. Courts reports that in 2007 alone, a total of 7,310 FLSA cases were filed in U.S. District Courts. This represents an increase of approximately 74% from the total number of FLSA cases that were filed just seven years earlier in 2000 (i.e., 1,935 cases). Since 2007, cases filed under FLSA have averaged 6,157 per year. The 6,335 cases filed in 2011, however, still represent an approximate increase of 31% of the cases filed in 2000.[1] Significantly, this increase does not take into account a clear increase in state wage and hour lawsuits.

There appears to be no consensus concerning the reasons for the boom in wage and hour litigation over the last decade. Some speculate that it may have been due to the heightened political attention surrounding the FLSA rules changes that went into effect in 2004. Some assert that the private bar has simply stepped in where public entities, such as the U.S. Department of Labor ("DOL"), have failed to enforce the law. Others note that litigation under the FLSA is particularly appealing to the plaintiffs' bar because the burden of proof is not as high in FLSA matters as it is in employment discrimination suits, and prevailing plaintiffs are entitled to recover reasonable attorneys' fees and costs from defendants. Whatever the reason, all agree that private and public sector employers must be vigilant concerning their responsibilities under both federal and state law.

The aim of this paper is to highlight certain issues of interest to public sector employees and employers under the FLSA. Many of the rules arising under the FLSA are transferable from

[1] Administrative Office of the United States Courts. *2011 Annual Report of the Director: Judicial Business of the United States Courts.* Washington, D.C.: 2012, p. 127.

the private to the public sector; however, there are certain statutory and regulatory requirements that are exclusive to the public sector. The intent of this paper is to outline a rough discussion of some of those requirements, including those dealing with compensatory time, occasional or sporadic employment, hours/shift substitution, first responders, and the partial overtime exemption concerning police and fire employees. To be clear, this paper is not intended to exhaust the full range of issues that are exclusive to the public sector. In fact, there are many items that are not covered that are worthy of discussion, such as the salary basis test for public employees, salary tests for school administrators, the compensability of time spent in court, state immunity issues, and issues concerning removal of claims against states, among others.

I. COMPENSATORY TIME

In terms of FLSA compliance, perhaps one of the largest differences between the public and private sector lies in the fact that private sector employers, unlike those in the public sector, cannot offer compensatory time off to their employees in lieu of monetary payment for overtime hours worked.

A. Policy

In 1985, Congress amended the FLSA to permit state and local governments to agree with their employees that overtime work would be rewarded with compensatory time off ("comp time") in lieu of monetary payment. This was done to address the concerns of state and local governments regarding the costs of compliance with the FLSA while still protecting employees who worked overtime. See THE FAIR LABOR STANDARDS ACT, 11-30 to 11-31 (Ellen C. Kearns et. al. eds., 2nd ed. vol. I, 2010).

B. Statutory and Regulatory Language

Section 207(o) of the FLSA provides that in lieu of overtime compensation, public sector employees may receive 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 the FLSA. See 29 U.S.C. §207(o). Compensatory time means hours during which an employee is not working and for which the employee is compensated at his/her regular rate. See 29 U.S.C. §207(o)(7). A public agency may provide compensatory time only 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...

See 29 U.S.C. §207(o)(2).

Under the statute, if the work of an employee for which compensatory time is provided includes work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue no more than 480 hours of compensatory time. Employees engaged in any other work may accrue no more than 240 hours of compensatory time. See 29 U.S.C. §207(o)(3)(A). In determining which cap applies, the focus is on whether the employee's work *regularly* involves seasonal, emergency response, or public safety activities. See THE FAIR LABOR STANDARDS ACT, 11-36 (Ellen C. Kearns et. al. eds., 2nd ed. vol. II, 2010) (citing 29 C.F.R. §553.24). A public agency may not provide compensatory time where an employee has accrued the maximum number of comp time hours allowed under the statute. See 29 U.S.C. §207(o)(2)(B).

An employee who has accrued compensatory time off and who has requested the use of such compensatory time, "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." See 29 U.S.C. §207(o)(5). "Whether a request to use compensatory time has been granted within a 'reasonable period' will be determined by considering the customary work practices within the agency based on the facts and circumstances of each case." 29 C.F.R. §553.25(c). "Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff." Id. "An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his/her making a request for use of such time." 29 C.F.R. §553.25(b).

An employer may, at its sole option, substitute monetary compensation at any time in lieu of providing compensatory time. Any such monetary compensation for overtime work must otherwise meet the requirements of overtime compensation, i.e., 1 ½ times the employees' regular rate. See THE FAIR LABOR STANDARDS ACT, 11-30 (Ellen C. Kearns et. al. eds. 2nd ed. vol. I, 2010). There are no limitations on an employer's ability to cash out accrued compensatory time at the employee's regular rate at the time of payment. Id. at 11-38.

C. Case Authority

In Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004), police officers claimed that the city violated the FLSA when the city denied officers' requests to use accrued compensatory

time. In response, the city contended that it would have been required to pay overtime to substitute police officers had it granted other officers' comp time requests and that such an arrangement would have been a financial burden on the city. The court held that unless specifically agreed to in the collective bargaining agreement, the city's payment of overtime to a substitute police officer did not alone justify the denial of another officer's request for compensatory time. The city must present "clear proof" that the financial impact of granting requested compensatory leave would have cause a disruption in the city's police services or the city's operational needs. See also Heitmann v. City of Chicago, 2007 WL 2739559 (N.D. Ill. 2007), *aff'd* 560 F.3d 642 (7th Cir. 2009); Debraska v. City of Milwaukee, 131 F.Supp.2d 1032 (E.D.Wis. 2000); Canney v. Town of Brookline, 2000 WL 1612703 (D.Mass. 2000). It is important to note, however, that the "clear proof" standard does not place a heightened evidentiary burden on the employer. Thomas v. Speedway SuperAmerica, LLC, 506 F.3d 496, 502 (6th Cir. 2007). Rather, the employer claiming an FLSA exemption is merely raising an affirmative defense, thus bears the burden of establishing the elements by a preponderance of the evidence. Renfro v. Indiana Michigan Power Co., 497 F.3d 573, 576 (6th Cir. 2007).

In Aiken v. City of Memphis, 190 F.3d 753 (6th Cir. 1999), police officers claimed that the city violated the FLSA by denying their requests to use accrued compensatory time off. The city claimed that its denial of such requests on particular days was justified where other officers had requested leave on the same days. The court held that the city's policy of not allowing officers to use compensatory time off on days when other officers' had signed up to be off was not in violation of the FLSA. The court, relying on 29 C.F.R. §553.25(c)(2), reasoned that under the collective bargaining agreement, the city and the union agreed that the reasonable period for

requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the number of officers requesting the use of compensatory time on the given date would bring the precinct's staffing levels to the minimum level necessary for efficient operation. See also Mortensen v. County of Sacramento, 368 F.3d 1082 (9th Cir.2004); Houston Police Officers' Union v. City of Houston, 330 F.3d 298, 300 (5th Cir.), *cert. denied*, 540 U.S. 879 (2003).

II. "OCCASIONAL OR SPORADIC" EMPLOYMENT and HOUR SUBSTITUTION

Two additional areas of the FLSA that are unique to the public sector concern "occasional or sporadic" employment and shift or hour substitution. To further address concerns of state and local governments regarding the costs of compliance with the FLSA, Congress added Sections 207(p)(2) and (3) to the FLSA as part of the 1985 amendments. Both Sections identify specific instances (i.e., occasional or sporadic employment and hour substitution) under which an employee's actual hours worked are not counted for purposes of calculating the total number of his/her overtime hours.

A. "Occasional or Sporadic" Employment

(1) Statutory and Regulatory Language

Section 207(p)(2) states as follows:

> (2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

29 U.S.C. §207(p)(2).

Thus, when public sector employees, at their option, work occasionally or sporadically on a part-time basis for the same public agency in a capacity that is different from their regular employment, the hours worked in the different job do not have to be combined with the regular hours for the purpose of determining overtime liability under Section 207(p)(2). THE FAIR LABOR STANDARDS ACT, 11-47 (Ellen C. Kearns et. al. eds. 2nd ed. vol. I, 2010). To take advantage of this exclusion, a public employer must satisfy the "occasional or sporadic" and "different capacity" requirements of the statute. The DOL has defined "occasional or sporadic" to mean "infrequent, irregular, or occurring in scattered instances." 29 C.F.R. §553.30(b)(1). Activities occurring every week or every other week do not qualify as occasional or sporadic. 29 C.F.R. §553.30(b)(3). The DOL has also noted that "different capacity" means that the occasional or sporadic employment at issue must not fall within the same general occupational category as the employee's regular employment. See 29 C.F.R. §553.30(c). In addition, in order to qualify under Section 207(p)(2), the employee must undertake the employment in the different capacity "solely at the employee's option." The regulations explain further that while the employer may suggest the position, but the employee "must be free to refuse to perform such work without sanction and without being required to explain or justify the decision." 29 C.F.R. §553.30(b)(2).

(2) Case Authority

While there appears to be no reported court decisions concerning Section 207(p)(2), one 8th Circuit decision has been rendered where the court considered Section 207(p)(2) in its analysis. In Specht v. City of Sioux Falls, firefighters brought suit against the City seeking overtime compensation for work performed at the request of the State of South Dakota to help

fight wildfires. 639 F.3d 814 (8th Cir. 2011). On appeal from summary judgment, the City argued that the occasional and sporadic exemption applied because the firefighters "voluntarily participated in the deployment, the wildland firefighting deployments were occasional and sporadic, and the firefighters were working in a different capacity during deployment." Id. at 824, fn. 9. The court refused to rule on the merits, holding that whether the firefighters were engaged in "part-time employment" for the City or State was a genuine issue of material fact. Consequently, the City continued to bear the burden of proof on each element that triggers the "occasional and sporadic" exemption under Section 207(p)(2) and its implementing regulation, 29 C.F.R. § 553.30. Finally, the court gave leave for the district court to consider on remand whether a firefighter fighting wildfires is working in "any capacity in which the employee is regularly employed" as a matter of law. Such a distinction would preclude application of the "occasional and sporadic" exemption. To date, no further decision has been rendered on this issue.

However, the DOL has issued a number of opinion letters delineating the nuances of the "occasional or sporadic" and "different capacity" requirements. See, e.g., WH Admin. Op. (December 18, 2008), FLSA2008-16 (finding that employee's primary employment of providing victim assistance and other social work services is a different capacity as services performed as a reserve police officer, and further that performance of law enforcement occurring ten hours per quarter was sufficiently occasional or sporadic to satisfy Section 207(p)(2); WH Admin. Op. (March 7, 2008), 2008 WL 1847290 (DOL WAGE-HOUR) (finding that sheriff may claim Section 207(p)(2) exclusion for detention and patrol officers who occasionally or sporadically work in civilian communications department (i.e., dispatch) because work performed in that

department is in a different capacity from the work that they perform in the detention and patrol departments); WH Admin. Op. (October 20, 2006), 2006 WL 4512964 (DOL WAGE-HOUR) (finding that office secretary for board of education who also works as a site manager for sporting events approximately two hours per day, two days per week, satisfied "different capacity" requirement of Section 207(p)(2), but not the "occasional or sporadic" requirement); WH Admin. Op. (December 6, 2001), 2001 WL1870383 (DOL WAGE-HOUR) (finding satisfaction of "occasional or sporadic" and "different capacity" requirements where three full-time dispatchers and one full-time records clerk serve as special police officers who perform police and security functions for official details that occur on an irregular basis throughout the year, such as parades, meetings and other municipal functions); WH Admin. Op. (October 1, 1987), WHM: 99:5157 (finding that teacher aides who regularly drive school buses to earn extra money are not considered to be working occasionally or sporadically).

B. Shift or Hour Substitution

(1) Statutory and Regulatory Language

Section 207(p)(3) states as follows:

> (3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

29 U.S.C. §207(p)(3).

Thus, as long as an hours substitution is voluntarily agreed upon by the employees and approved by the public employer, the hours worked by Employee A in substitution for Employee B are not

counted as "hours worked" for purposes of determining the total number of overtime hours worked by Employee A. "Where one employee substitutes for another, each employee will be credited as if he/she had worked his or her normal work schedule for that shift." 29 C.F.R. §553.31(a). This means that the nonworking employee is credited with the hours worked by the substitute. Significantly, there is no FLSA requirement that the nonworking employee return the favor by subsequently working in place of the substitute. See THE FAIR LABOR STANDARDS ACT, 11-51 (Ellen C. Kearns et. al. eds., 2010) (citing WH Admin. Op. (January 2, 1987); Wage & Hour Manual (BNA) 99:5153-54). Moreover, employers are not required to keep a record of the hours of the substitute work. See 29 C.F.R. §553.31(c).

The provisions of Section 207 (p)(3) apply only when (1) employees' decisions to substitute for one another are made freely and without coercion, direct or implied, and (2) an agreement between employees to substitute for one another at their own option has been approved by the public agency. 29 C.F.R. §553.31(b), (d). "An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience." 29 C.F.R. §553.31(b). In addition, approval of the substitution agreement requires that the public agency be aware of the arrangement prior to the work being done (i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done). See 29 C.F.R. §553.31(d).

(2) Case Authority

In Senger v. City of Aberdeen, 466 F.3d 670 (8th Cir. 2006), the plaintiffs, a group of firefighters, were regularly scheduled to work more hours than the FLSA permits an employee to

work without receiving overtime pay. When other firefighters agreed to trade shifts with the plaintiffs, the city paid the plaintiffs straight time for their substituted shifts, but would not count that time as hours worked for purposes of overtime by either the substituting firefighters or the firefighter originally scheduled to work. The court held that under Section 207(p)(3) and 29 C.F.R. §553.31, the city was required to pay the plaintiffs just as if they had worked the scheduled shift, including all the overtime compensation to which the plaintiffs would otherwise have been entitled had they, themselves, worked all scheduled hours.

III. FIRST RESPONDER RULE

A. Regulatory Language

In light of the DOL's 2004 rule changes, there has been much discussion over the last eight years concerning the applicability of the white collar exemptions under Section 213(a)(1) of the FLSA in both the public and private sectors. Surprisingly, however, very little attention has been devoted to the first responder rule, which was made effective by the DOL on August 23, 2004. In short, that rule generally provides that the white collar exemptions do not apply to first responders. The first responder rule – found in 29 C.F.R. §541.3(b)(1)-(4) – is fairly large in scope as it applies to a significant number of public sector jobs. It states as follows:

> (b)(1) The section 13(a)(1) [(i.e., white collar)] exemptions and the regulations in this part also *do not apply* to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, 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, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole;

> interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or *other similar work.*

29 C.F.R. §541.3(b)(1) (emphasis added).

Continuing further, the regulations provide an explanation for why these employees fail to qualify for the executive, administrative and professional exemptions under Section 213(a)(1) of the Act:

> (2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under §541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.
>
> (3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under §541.200.
>
> (4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under §541.300. Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

29 C.F.R. §541.3(b)(2)-(4).

B. Case Authority

Although the language of the first responder regulation clearly suggests that *all* first responders may not be classified as exempt employees, the courts have held otherwise. Courts considering the scope and impact of the first responder rule have all concluded that even when an

employee is a “first responder,” he/she may still be exempt if he/she otherwise satisfies the requirements of the white collar exemptions. According to those courts, the DOL intended that the first responder rule ensure that only “front-line” first responders be entitled to overtime, regardless of what rank those first-responders held. See Crawford v. Lexington-Fayette Urban County Gov’t., 2008 WL 2885230, at *5 (E.D. Ky., July 22, 2008). A front-line first responder is an employee whose primary duty is one of those listed in the first responder regulation, 29 C.F.R. § 541.3(b)(1). See Rooney v. Town of Groton, 577 F. Supp.2d 513, 514 (D. Mass. 2008). Cf. Foster v. Nationwide Mutual Ins. Co., 695 F. Supp.2d 748 (S.D. Ohio, 2010) (plaintiffs employed by insurance company as "investigators" do not qualify for "first responder" rule; "the regulation pertains to law enforcement and safety personnel – not those who perform investigative duties in the private sector").

In Crawford, plaintiffs, a group of current and former lieutenants, captains and majors working for defendant in its division of community corrections, alleged that defendant’s practice of refusing to pay overtime compensation, and awarding compensatory time instead, violated the FLSA. In response, defendant contended that it did not have to pay plaintiffs overtime and argued that plaintiffs were exempt under either the executive or administrative exemptions. Plaintiffs replied by arguing that they were non-exempt employees and entitled to overtime compensation because, irrespective of their rank, they performed duties explicitly identified under the first responder rule in 29 C.F.R. §541.3. The court considered the issue of whether the detention and supervision of inmates – a first-responder activity – automatically precludes an analysis of whether an employee may be exempt under the FLSA regulations. The court concluded that the DOL did not intend to bar all first-responders, such as law enforcement and

correctional officers, from qualifying as exempt when it enacted 29 C.F.R. §541.3. The court noted that even when an officer is a “first responder,” the court may nonetheless evaluate whether he/she is exempt under the FLSA regulations. According to the court, the officers' exempt status turns on whether their salary and duties meet the requirements of the exemptions under the FLSA. Ultimately, the court determined that disputed issues of fact concerning plaintiffs’ primary duties prevented it from issuing a finding as a matter of law concerning plaintiffs’ status under the FLSA.

The court’s decision in Crawford is illustrative of a number of other decisions. See also Maestas v. Day & Zimmerman, LLC, 664 F.3d 822, 827 (10th Cir. 2012) (reversing summary judgment as to three plaintiffs where defendant failed to put forth sufficient evidence that employees' administrative/executive duties were primary; "The first responder regulation does not alter the primary duty test"); Nigg v. U.S. Postal Service, 829 F. Supp.2d 889 (C.D. Cal., 2011) (despite possessing law enforcement duties, postal inspectors' primary duties directly relate to the general business operations of postal service; thus "first responder" rule inapplicable); Mullins v. City of New York, 653 F.3d 104 (2nd Cir. 2011) (reversing district court's decision denying plaintiffs' motion for judgment notwithstanding the verdict; as police sergeants performed "limited amount of exempt management duties" and "spent majority of their time performing non-exempt work in the field," defendant failed to establish they were exempt); Rooney, 577 F. Supp.2d 513 (finding town police lieutenant exempt under executive and administrative exemptions even though he participated in first responder activities); Murphy v. Town of Natick, 516 F.Supp.2d 153 (D. Mass. 2007) (applying duties test to police sergeants and lieutenants to find them exempt, while finding that detectives, under §541.3(b)(1), were not

exempt); Bennet v. City of Gould, 2007 WL 1288612 (E.D.Ark. Apr. 27, 2007) (finding police chief exempt despite § 541.3(b)(1) because his managerial duties were significant and the city gave him authority to hire and fire); Wage and Hour Opinion Letter, FLSA 2005-40 (Oct. 14, 2005), 2005 WL 3308611 (concluding that a police lieutenant, police captain, and fire battalion chief were exempt because they met the requirements set forth in the regulations and were not the types of first responders that the first responder regulation contemplated).

IV. MISCELLANEOUS ISSUES AFFECTING PUBLIC SECTOR EMPLOYEES

A. Partial Exemption for Law Enforcement and Fire Protection

(1) Policy

In general, public employers must pay their employees overtime compensation for hours worked in excess of 40 hours in seven days. See THE FAIR LABOR STANDARDS ACT, 11-74 (Ellen C. Kearns et. al. eds. 2nd ed. vol. I, 2010). However, most law enforcement and fire protection employees work longer tours of duty. Id. In an effort to avoid an undue burden on public agencies, as a part of the 1985 Amendments, Congress enacted Section 207(k) as a partial exemption to the FLSA's overtime requirements. Id.

(2) Statutory and Regulatory Language

Section 207(k) provides a partial overtime exemption in two respects. First, it allows for a higher number of hours to be worked before requiring overtime compensation to be paid. Second, the employer may compute overtime hours over a work period, selected by the employer, which is longer than one week. THE FAIR LABOR STANDARDS ACT, 11-74 (Ellen C. Kearns et. al. eds. 2nd ed. vol. I, 2010). Specifically, Section 207(k) provides:

> (k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) of

> this section 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 … or (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.

29 U.S.C. § 207(k).

Section 207(k) allows for fire protection employees to work up to 212 hours in 28 days before becoming eligible for overtime pay. 29 C.F.R. § 553.201(a). Similarly, law enforcement employees may work up to 171 hours in a 28 day period. Id. Thus, in a seven-day work period, fire protection employees may work up to 53 hours and law enforcement employees may work up to 43 hours before they are eligible for overtime compensation. See 29 C.F.R. § 553.230 (providing a chart of maximum hour standards for fire protection and law enforcement employees measured by days in the work period).

(3) Case Authority

In order to claim the 207(k) partial exemption, a municipal employer need only demonstrate two simple elements. Lemieux v. City of Holyoke, 740 F.Supp.2d 246, 252 (D. Mass. 2010). The employer must show, first, that its employees are engaged in fire protection or law enforcement activities within the meaning of the statute. Id. Second, the employer must demonstrate that it has adopted a qualifying work period. Id. If these two conditions are satisfied, the employer may simply pay employees according to Section 207(k), without the employees' approval. O'Brien v. Town of Agawam, 350 F.3d 279, 291 (1st Cir. 2003).

Moreover, the employer may opt to pay its employees more than required by Section 207(k), without forfeiting the protection of the partial exemption. Calvao v. Town of Framingham, 599 F.3d 10, 15 (1st Cir. 2010).

The qualifying work period is defined by 29 C.F.R. § 553.224(a) as "any established and regularly recurring period of work which is at least seven but no more than twenty-eight consecutive days in length." Lemieux, 740 F.Supp.2d at 252. The work period requirement is not an onerous burden and is typically met by any bona fide, fixed period between 7 and 28 days. Id. The employer may establish a 207(k) work period either by public declaration and notice to its employees or by practice, so long as its employees actually work a regularly recurring cycle. Spradling v. City of Tulsa, Okl., 95 F.3d 1492, 1505 (10th Cir. 1996); see Calvao, 599 F.3d at 16-19.

B. Compensation for Time Spent Caring for Working Animals

No provision of the FLSA specifically details compensation requirements for the care of animals in employment; however, police officers and firefighters often spend a significant amount of time caring for their service animals. Consequently, most courts have held that time spent caring for and training service animals is compensable. See Letner v. City of Oliver Springs, 545 F.Supp.2d 717 (E.D. Tenn. 2008) (finding police officer was entitled to compensation for off-duty time spent feeding, bathing, exercising, cleaning up after, and training his police dog, and that he did not waive his FLSA claim by failing to complain); Bull v. United States, 68 Fed.Cl. 212 (Fed.Cl. 2005) (holding that off-duty time spent by Custom and Border Patrol canine enforcement agents laundering training towels and constructing training aid containers for detector towels was compensable); Leever v. Carson City, 360 F.3d 1014 (9th Cir.

2004) (recognizing that the City did not dispute that caring for a police dog was compensable time); Brock v. City of Cincinnati, 236 F.3d 793 (6th Cir. 2001) (holding that officers' time caring for canines was compensable where County required officers to house, feed, and care for the canines). Compare with Aiken v. City of Memphis, Tenn., 190 F.3d 753 (6th Cir. 1999) (police officers were not entitled to compensation for canine commute time, absent evidence that more than a *de minimus* amount of time was spent on dog-care activities during the commute).

In Lewallen v. Scott County, Tenn., the court held that a police officer's off-duty time spent caring for and training his service dog to join the narcotics program was compensable. 724 F.Supp.2d 893 (E.D. Tenn. 2010). The court relied upon a three-prong analysis: first, did the employer require or suffer the officer to care and train the dog? Id. at 896. Second, was the dog's care and training primarily for the benefit of the employer? Id. Third, was the off-duty work an integral and indispensable part of the officer's principal activities? Id. After finding in the affirmative concerning all three issues, the court awarded the officer overtime compensation for the 1.5 hours per day that he spent feeding, watering, brushing, medicating, and cleaning the dog's kennel, as well as the time he reported on the dog's training logs, over the course of 874 days. Id. at 898.

C. Status as Volunteer or Employee

(1) Policy

The status of an individual as an employee or volunteer is an incredibly important consideration when applying the FLSA in the public sector. Congress did not intend the FLSA to impede volunteer work for civic, charitable, or humanitarian purposes. It did seek, however,

to prevent any manipulations or abuse of the FLSA's minimum wage or overtime requirements. 29 C.F.R. §553.101(b).

(2) Regulatory Language

If individuals are "volunteers," rather than "employees," the FLSA does not apply to them. 29 U.S.C.A. § 203(e)(4)(A) (West 2010). In order to be classified as a volunteer under the regulations, an individual must be exercising their free will and be motivated by civic, charitable, or humanitarian reasons when performing a service for a public agency. 29 C.F.R. §553.101(a). If the individual's services are offered under the employer's pressure or coercion, direct or implied, they cannot be classified as a volunteer. 29 C.F.R. §553.101(c). Similarly, an individual cannot be a volunteer if she is otherwise employed by the same public agency to perform the same type of services. 29 C.F.R. §553.101(d). Furthermore, volunteer work done at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is normally considered non-volunteer working time. 29 C.F.R. §785.44.

(3) Case Authority

Usually courts determine the status of an employee under the FLSA using the economic realities test. Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985). Court's applying the economic realities test generally apply the following criteria: (1) the extent to which the services in question are an integral part of the "employer's" business; (2) the amount of the "employee's" investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee's" opportunities for profit or loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship.

However, several courts have noted that many of the prongs of the economic realities test are inapposite because the test was crafted to determine whether an individual was an employee or an independent contractor, not an employee or a volunteer. In Krause v. Cherry Hill Fire District 13, non-career firefighters brought suit under the FLSA for violation of the minimum wage standards. The employer argued that the firefighters were volunteers. 969 F.Supp 270 (D. N.J. 1997) The court stated that the six factor "economic realities" test is best suited to determine whether, as a matter of economic reality, an individual is in business for himself or herself as an independent contractor, or is an employee of another, and is of limited utility in determining whether an individual is an "employee," as opposed to a "volunteer." Id. at 274-75 The court found that the degree of control, who suffers profit or loss, and degree of specialized skill required to perform the job, do not lend themselves to helpful distinctions in the case of employee or volunteer. Id. at 275. The remaining two factors, continuity of employment and primacy of services performed, were useful and lent themselves to the conclusion that the firefighters were employees. Id.

Instead of the economic realities test, the court relied heavily on 29 C.F.R. §553.101(a), defining "volunteer" in the FLSA context. The court determined that the firefighters in this case were motivated by more than a mere civic duty and that they expected more than nominal compensation for their services. Id. at 277. The firefighters had, in fact, been paid an hourly rate of pay. Id. The court therefore concluded that the firefighters were clearly not volunteers. Id. See also, Purdham v. Fairfax County School Board, 637 F.3d 421, 433-34 (4th Cir. 2011).

Instead, in the Fifth Circuit at least, a combination of a statutory and regulatory test is used to define volunteer. A volunteer is: 1) an individual who has a civic, charitable, or humanitarian reason for performing hours of service, and 2) the absence of a promise, expectation or receipt of compensation for the performance of those services. Cleveland v. City of Elmendorf, Tex., 388 F.3d 522 (2004)(anyone who performs public services without the expectation of compensation, and with no tangible benefits for himself, is volunteering for civic, charitable and/or humanitarian reasons).