

NEW FLSA OVERTIME RULES

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Special Feature

The long anticipated revisions to the Department of Labor's (DOL) overtime rules have been released after extended delay and public safety workers will likely see little change. The Bush administration announced in March 2004 that it intended to update the interpretive guidelines to the Fair Labor Standards Act (FLSA) at the urging of business groups, which sought relief from mounting lawsuits by workers challenging their eligibility for overtime. The proposal drew immediate outcry from organized labor, Democrats, and even some Republicans. Criticism reached such a high level that the Senate voted last year to stop the issuance of the new rules but dropped the matter after intense lobbying by the White House. Over the last year DOL received more than 75,000 comments on the changes. DOL subsequently reshaped the rules to make more lower income white-collar workers eligible for overtime.

Among the critics of the initial guidelines were the International Association of Fire Fighters (IAFF), AFL-CIO, and various police labor unions who feared that highly compensated fire fighters and police officers might lose their eligibility for time-and-one-half compensation. Such fears have proven to be unfounded.

The new rules require public employers to continue to pay overtime to fire fighters, police officers, emergency medical service personnel, and other first responders even though they may earn relatively high salaries. While the rules permit employers generally to deny overtime to workers earning \$100,000 a year or more, the regulations make it clear that public safety personnel are effectively exempt from this threshold. Thus, even highly compensated public safety line personnel likely will continue to receive overtime pay. The original proposal had set the cap at \$65,000 and would have caused many veteran public safety workers to lose overtime rights. With the exemption for first responders, any fire fighters who might reach the \$100,000 annual compensation threshold will remain eligible for overtime in most instances.

Under the new rules the exemption from overtime liability for bona fide executive, administrative, and professional personnel is continued but the "salary test" element is raised to \$455 a week. This means that any full-time fire service or police manager who earns less than \$23,660 annually must be paid for worked overtime. Likewise, command level personnel will continue to be viewed as exempt from overtime requirements. But, the average suppression fire fighter or patrol officer is unlikely to be considered an exempt employee. In summarizing the regulations, the DOL notes:

“First responders generally do not qualify as exempt executives because their primary duty is not management. They are not exempt administrative employees because their primary duty is not the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers. Similarly, they are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field or learning customarily acquired by a prolonged course of specialized intellectual instruction. Although some first responders have college degrees, a specialized academic degree is not a standard prerequisite for employment.”

The regulations reemphasize that job title alone is insufficient to move an individual into the exempt category. Thus, a fire captain who does not actually perform executive or administrative tasks as defined by the FLSA still enjoys overtime compensation rights. Duties, not rank, determine overtime qualifications.

One section of the regulations reaffirms the idea that first line supervisors are also subject to federal overtime guarantees. The rules note that a fire fighter or police officer does not become an exempt employee merely because he or she “directs the work of other employees in the conduct of an investigation or fighting a fire.” Prior case law has generally excluded fire lieutenants from being considered as exempt employees. The new rule is consistent with that view.

Left unaffected is the 7(k) exemption that defers federal overtime liability for fire fighters until the fire fighter has worked over 212 hours in a 28-day period, approximately 53 hours per week. Apparently DOL decided not to revisit the issue of the average workweek of public safety personnel.

However, the regulations do clarify that public safety personnel who are administrative or executive employees and take sick leave or leave without pay for periods of less than one day are still considered salaried and do not lose their exempt status.

The rules become effective in 120 days after publication in the *Federal Register*, which likely means around the middle of August. Under federal administrative rulemaking procedures Congressional approval of the new rules is not required. However, Senator Tom Harkin (D-Iowa), who led the Senate effort to block the original changes, has said he is “skeptical about these so-called revisions” noting, “As we say in Iowa, you can put lipstick on a pig, but guess what? It’s still a pig.” The Senator is sponsoring a bill that would rollback the changes before they go into effect. Whether or not Congress rescinds the rules is likely to have little effect on public safety personnel.

The IAFF, which has a 20-year history of vigorous enforcement of members’ overtime rights, had used its powers of political persuasion to press for protection of fire fighter overtime eligibility. Its efforts were rewarded by the inclusion of the public safety exemption in the new rules. The public safety exemption announcement was not a complete surprise to IAFF members. In March, General President Harold Schaitberger told delegates to the IAFF legislative conference that in private meetings with Labor Secretary Elaine Chao she had assured the IAFF leader that “. . . fire fighters and other public safety officers will not lose one hour of FLSA overtime or have their overtime eligibility reduced.”

The government’s “FairPay” website, which contains video and text explanations of the new rules along with a complete draft of the regulations, may be accessed through www.dol.gov.

