



Overtime for Fire and Police

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Overtime for Fire and Police

Reference Number: MTAS-953

207(k) Exemption

As previously discussed, the executive, administrative and professional exemptions from overtime pay do not apply to police officers, detectives, investigators, inspectors, park rangers, firefighters, 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 laws; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspects 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). Therefore, unless exempt as bona fide executive or administrative employees, public safety employees are eligible for overtime compensation just as regular non-exempt employees.

The primary duty test prevails in deciding whether the employee is exempt. This is especially the case for employees who have the discretion to perform regular police duties in addition to their executive or administrative duties. The FLSA, however, still provides “an exemption for employees engaged in law enforcement or fire protection activities.” 29 C.F.R. § 553.200(a). If the agency employs fewer than five employees during the workweek (29 U.S.C. § 213(b)(20)), then the full exemption applies. Public agencies not qualifying for the complete exemption may be eligible for a partial exemption as provided in 29 U.S.C. § 207(k). This exemption is commonly known as the “7(k)” or “207(k)” exemption.

Fewer Than Five Employees

Reference Number: MTAS-954

The FLSA provides a “complete overtime exemption for any employee of a public agency engaged in law enforcement or fire protection if that agency employs fewer than five (5) employees during the workweek.” 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200(a). It does not, however, exempt the public agency from the minimum wage requirements of the law.

“In determining the number of employees in law enforcement and fire protection, each group is considered separately. For example, if an agency has fewer than five fire protection employees but five or more employees in law enforcement activities, it may claim an exemption for the fire protection employees but not for the law enforcement employees. There is no distinction made between full-time and part-time employees and no distinction between employees on duty and those on leave. Volunteers are not, however, counted.” 29 C.F.R. § 553.200(b).

Definition of Employees Covered by 207(k)

Reference Number: MTAS-967

All personnel employed in police, fire or other public safety agencies do not qualify for the 207(k) exemption. Only certain law enforcement and fire protection employees are covered. Non-covered law enforcement and fire protection “civilian” personnel are covered by the normal 40-hour overtime standard of the act. 29 C.F.R. § 553.200(b).

Fire Protection Employee

Reference Number: MTAS-2097

Definition of Employees Covered by 207(k) - Fire Protection Employee

To be covered by the 207(k) exemption for fire protection employees, the regulations state that an employee in fire protection activities means “an employee, including firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel or hazardous material worker, who (29 U.S.C. § 203(y)); (29 C.F.R. § 553.210(a)):

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.”

These employees are covered “regardless of whether they are part-time or full-time employees or are temporary or casual workers employed for a particular fire or a particular time period.

This definition means that if your city employs firefighters who also run EMS or rescue calls or are on hazardous materials teams, who meet both the tests established by the amendment, then the 20 percent rule no longer applies to any of the functions specifically mentioned in the definition. It is very important that all fire department employees who are eligible to take advantage of the partial exemption from the overtime provisions of the FLSA meet both the tests. No longer will the number of EMS runs or hours spent on rescue missions threaten to jeopardize the 207(k) status of a firefighter. 29 C.F.R. § 553.212(a).

This new definition has cleared up the conflicting court opinions and the different tests that have been applied to different situations. According to the U.S. Department of Labor, EMS workers who do not meet the tests established by this new law are not subject to the 207(k) exemption and are therefore considered 40-hour employees. Just because an employee works for a local government and engages in fire protection, the employee still is not exempt from the overtime provisions. If EMS workers work for the police department, public works or other such units of the city they cannot qualify for the 207(k) partial overtime exemption. It is important to remember that this revision of the law applies to fire departments.

Another area of concern has been the status of volunteer firefighters. According to an August 7, 2006, DOL Wage and Hour opinion letter to the International Association of Fire Chiefs, any fee paid to a volunteer firefighter is considered nominal as long as the fee does not exceed 20 percent of what that public agency would otherwise pay to hire a full-time firefighter. The implementing regulations at 29 C.F.R § 553.106(e) provide that “a volunteer may be paid only expenses, reasonable benefits or a nominal fee, or any combination thereof, without losing volunteer status. This does not allow a firefighter already on the payroll as a full-time firefighter to respond on his off-duty time as a volunteer. Examples of permissible expenses or benefit payments are described as payment for expenses, such as dry cleaning; an allowance for a requirement, such as a uniform; reimbursement for an out-of-pocket expense, such as transportation; a payment to provide materials, such as supplies; or a payment for benefits, such as participation in group insurance plans.

While the statute and implementing regulations do not define what constitutes a “nominal fee,” the regulations provide guidance for determining whether a fee is nominal and permissible. If a fee is not nominal, the individual does not qualify as a volunteer and is considered an employee who is covered by the FLSA minimum wage and overtime provisions. FLSA Regulation 29 C.F.R § 553.106(e) provides that “the factors to consider in making the determination include but are not limited to:

1. The distance traveled and the time or effort required of a volunteer;
2. The availability — limited or unlimited — of a volunteer to provide services; and
3. The basis — as needed or throughout the year — on which a volunteer agrees to perform services.”

“Also not qualifying for the 207(k) exemption are civilian support employees of fire departments, fire districts or forest services, such as dispatchers, alarm operators, mechanics, camp cooks maintenance workers, clerks or stenographers.” 29 C.F.R. § 553.210(b).

Law Enforcement Officer

Reference Number: MTAS-2098

Definition of Employees Covered by 207(k) - Law Enforcement Officer

To be covered by the 207(k) exemption for law enforcement officer, “an employee, regardless of rank or status as trainee, probationary or permanent, must meet all the criteria established by statute.” 29 C.F.R. § 553.211(a):

1. Be a uniformed or plainclothes member of a body of officers and subordinates;
2. Be empowered by status or local ordinance to enforce laws designed to maintain public peace and order, protect life and property from accident or willful injury, and prevent and detect crimes;
3. Have the power to arrest; and
4. Have participated in a special course of instruction or study (or will undergo on-the-job training), which typically includes self-defense, physical training, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

“Employees who meet the test are considered ‘engaged in law enforcement activities’ regardless of their rank or their status as trainee, probationary, or permanent employees. Law enforcement employees also meet the test regardless of their being assigned to incidental duties, such as equipment maintenance and lecturing.” 29 C.F.R. § 553.211(b).

“Not eligible for the 207(k) exemption are civilian police department employees who engage in support activities such as dispatchers, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers” (Wage and Hour Opinion, August 21, 1987). “The exemption also does not cover employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or psychological, medical and paramedical services.” 29 C.F.R. § 553.211(g). Others not meeting the exemption test also include animal control personnel, civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other controlling points, civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, and building guards whose primary duty is to protect the lives and property of persons within the limited area of the building. 29 C.F.R. § 553.211(e).

Some public agencies employ public safety officers who serve as both law enforcement and fire protection personnel. The dual assignment will not defeat the 207(k) or 213(b)(20) exemption provided that the activities performed meet the definition of fire protection or law enforcement. The combined duties should make up at least 80 percent of the employee’s duties. FLSA regulation 29 C.F.R. § 553.213(b) provides that “for employees performing both fire protection and law enforcement activities, the applicable standard is the one that applies to the activity in which the employee spends the majority of work time during the work period.”

Calculating Overtime for Public Safety Employees

Reference Number: MTAS-959

The FLSA requires state and local governments using the 207(k) exemption to declare the work period for employees engaged in law enforcement and fire protection. The act does not require the same work period for all law enforcement and fire protection personnel. “Separate work periods can be declared for different employees or groups of employees.” 29 C.F.R. § 553.224(b). The work period chosen, however, need not coincide with the pay period for 207(k) employees.

DOL regulation 29 C.F.R. § 553.230(c) established the table below to set forth the maximum hours for each work period after which law enforcement and fire protection employees are entitled to time-and-a-half overtime pay.

Maximum Hours Worked (Rounded) Before Overtime

CONSECUTIVE DAYS WORK PERIOD	HOURS OF FIRE PROTECTION	HOURS OF 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

Section 207(k) allows “city and state employers to calculate the pay for non-exempt law enforcement and fire protection personnel based on a maximum 28-day period. **It is improper to pay section 207(k) employees for an ‘average’ number of hours worked.** For employees engaged in fire protection or law enforcement with a work period between 7 and 28 consecutive days, overtime for the excess hours is based on all hours over the number declared as the work period. A notation in the payroll records, however, must be made that shows the work period for each employee.” 29 C.F.R. § 516.2(a)(5).

The rules for computing a Section 207(k) employee’s regular rate are the same as those applied to all other nonexempt employees. When calculating overtime for 207(k) employees, the employer should not use the 40-hour workweek standard. Instead, the employer should look to the employee’s work period. Overtime pay is then calculated for hours worked in excess of the 207(k) maximum. The rules regulating the definitions of hours worked also apply. If employees are required to arrive at work early, the time is compensable. All time spent by law enforcement personnel in training sessions is counted as hours of work, but they are not compensated for overtime unless the total hours worked exceeds the maximum number of hours in the declared work period.

When off-duty police and firefighters are called back to work, they must be paid at least their regular hourly rate or at time and a half if they fall into an overtime situation. 29 C.F.R. § 553.221(c). Any on-call premium that is paid must be taken into consideration in determining the employee's overtime rate. 29 C.F.R. § 553.233. A recent Kentucky case emphasized this point. The court of appeals held that any on-call premium provided as an incentive payment is akin to additional compensation (rather than in the nature of a bonus), and as such, the employee would be entitled to overtime calculated at time and a half on the incentive pay based on an hourly rate for the pay period. *Kentucky Court of Appeals in City of Frankfort v. James Davenport, et al*, No. 2005-CA-0000036-MR.

Volunteer firefighters who are paid by the call or by the hour when called to duty often are referred to by fire departments as "on-call firefighters." On-call volunteer firefighters do not fall under this FLSA 207(k) exemption unless they are required to stay at the fire station or within a certain distance of the fire station.

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