

**Letter Ruling: May 18, 1966 (cont.)**

overtime compensation is utilized in connection with employees who work a varying or irregular number of hours in a workweek. The fundamental characteristics of the method is that the employee receives the full amount of his fixed salary as straight time pay every week, regardless of the number of hours or days worked in the workweek, so long as the employee performs any work during the workweek. Deductions for absences of less than a week, whether for illness, personal business, or other reasons, may not be made under this method of compensation.

Also, a salary will not be considered payment for a workweek of varying hours, for the purposes of the act, unless all the facts demonstrate that this is so, and it is clearly understood and agreed upon by the employee and employer. There must be a clear agreement that the salary is straight time compensation for whatever hours are worked in the workweek, with no possibility that it is earned in the first 40 hours of work or other fixed period. When a salary is paid for a fluctuating workweek it must not only in fact assure that no workweek will be worked in which the salary fails to provide at least the current statutory minimum hourly rate of \$1.25, but the salary must also be so arranged that it is reasonably calculated to provide for such a statutory minimum.

Since the employees your client is concerned with are to be supervisory employees the possibility exists that the exemption provided in section 13(a)(1) of the act, as defined in Regulations, Part 541, may be applicable to their employment. If that is the case, neither the minimum wage nor the maximum hours and overtime compensation provisions of the act would be applicable.

If you have any further questions you may wish to contact our Regional Office at 911 U.S. Parcel Post Building, 341 Ninth Avenue, New York, New York 10001. That office will be pleased to assist you in any possible way.

/s/ Charles T. Lundquist  
Administrator

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**Letter Ruling: October 22, 1987**

This is in further response to your letter, with enclosures, concerning the application of the Fair Labor Standards Act (FLSA) to law enforcement personnel who are employed by the City of \_\_\_\_\_ (the City). We regret the delay in responding to your inquiry.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

On January 16, the Department of Labor published final regulations, 29 CFR Part 553, which implement the Fair Labor Standards Amendments of 1985. These regulations contain rules concerning certain statutory exclusions and exemptions, recordkeeping requirements, and compensatory time provisions which apply to State and local government workers in general, in addition to specific rules for volunteers and for fire protection and law enforcement employees. A copy of the regulations is enclosed for your information.

Your inquiry specifically concerns the proper methods of compensating law enforcement employees, who are paid hourly rates of pay, for their roll-calls, travel, and/or training. These three areas of your concern are responded to in order below.

**I. Roll-call**

Section 7(k) of FLSA provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of 7- to 28-consecutive days for the purpose of paying over time compensation to employees employed in fire protection or law enforcement activities.

The maximum hours standard for law enforcement personnel ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period.

The City has chosen a 28-day work period for the purpose of applying the provisions of section 7(k) of FLSA. During these 28 days, police officers are normally scheduled for twenty, 8-hour tours of duty, or a total of 160 hours for the work period. However, under the terms of a collective bargaining agreement, the police officers must report for a roll-call formation 15 minutes before the start of each 8-hour tour of duty. You are concerned that these additional 5 hours (20 x 1/4 hour) of work are not being properly compensated under FLSA.

As you were advised in telephone conversations with a member of my staff on March 4 and March 6, the law enforcement employees to whom you refer have been properly compensated under FLSA when, for any work period during which they have worked less than the applicable maximum hours standard, they have received at least the minimum wage (\$3.35 an hour) for all of their hours worked.

For example, a police officer who is paid at a rate of \$10.50 an hour for 160 hours ( $\$10.50 \times 160 \text{ hours} = \$1,680$ ) is paid in compliance with FLSA even though he or she actually works a total of 165 hours during a 28-day work period ( $\$3.35 \times 165 \text{ hours} = \$552.75$ ).

A different situation exists when a police officer works in excess of the applicable maximum hours standard for the work period, i.e. over 171 hours in a 28-day period. Under these circumstances, the employee's regular rate of pay must be used to compute the proper compensation due under FLSA. This is explained in section 778.315 of Interpretative Bulletin, 29 CFR Part 778 (copy enclosed). This can be illustrated in the case of a police officer who is paid \$10.50 an hour and who must work during an unscheduled tour of duty in addition to those which were scheduled ( $21 \times 8 \frac{1}{4} \text{ hours} = 173 \frac{1}{4} \text{ hours worked}$ ). Under FLSA, this employee must be paid at his or her regular rate of \$10.50 an hour for 171 hours ( $\$1,795.50$ ). This employee must also receive overtime compensation at a rate of not less than one and one-half times the \$10.50 hourly rate ( $1 \frac{1}{2} \times \$10.50 \times 2 \frac{1}{4} \text{ (OT hours)} = \$35.44$ ). Therefore, the employee in this example should be paid a total of \$1830.94 ( $\$1,795.50 + \$35.44$ ) for the work period.

**II. Travel**

The rules concerning the treatment, as hours worked under FLSA, of time spent in traveling are set forth in Interpretative Bulletin, 29 CFR Part 785 (copy enclosed). It is a general rule that the time spent in traveling which is a part of the employee's principal activity must be counted as hours worked and, such time must be properly compensated under FLSA. However, only those hours worked which exceed the applicable maximum hours standard must be paid for at a premium rate of pay.

Section 785.37 of Part 785 refers to time spent in traveling by an employee on a special one-day assignment for the employer in another city or at a different location. As explained in this section of Part 785, such travel is performed for the employer's benefit and, therefore, qualifies as an integral part of the employee's principal activity. However, the time spent in traveling by the employee in the normal, "home-to-work" portions of the trips to and from the location of the

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assignment may be excluded from the compensable hours worked under FLSA.

As explained in section 785.39 of Part 785, travel that keeps an employee away from home overnight must be paid for as hours worked where this time crosses the employee's workday. In such instances, the employee is substituting travel for other duties which are performed for the employer's benefit.

**III. Training**

In your letter, you indicate that the law enforcement employees to whom you refer are regularly assigned to attend training sessions which are held outside of their scheduled tours of duty. The City pays, at a rate of one and one-half times the employee's regular rate of pay, for this time spent in training only when the employee's total hours worked exceeds the maximum hours standard (171) for the work period. However, the information in your letter appears to indicate that all time spent in training is counted by the City as hours worked for the purpose of applying the provisions of section 7(k). You are concerned that the City is not properly compensating employees for their time spent in training during those work periods in which the maximum hours standard is *not* exceeded (less than 171 hours worked).

As explained in our discussion under "roll-call" above, the method of paying for training time which you describe complies with the requirements of FLSA when the police officers are paid at least the minimum wage of \$3.35 an hour for *all* hours worked in those work periods which do not exceed the maximum hours standard. Again, as discussed above, all of the employees' overtime hours worked must be paid for at rates which are not less than one and one-half times their regular rates of pay.

We trust that the above is responsive to your inquiry.

/s/ Paula V. Smith  
Administrator

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**Letter Ruling:** October 28, 1987

This is in further response to your letter of August 28 with which you enclosed correspondence from \_\_\_\_\_ concerning the application of the Fair Labor Standards Act (FLSA) to firefighters employed by the City of \_\_\_\_\_ (the City).

\_\_\_\_\_ states that the City proposes to exclude sleep and meal periods in calculating the hours worked by firefighters during their tours of duty. Currently firefighters work a 24-hour tour of duty and no deductions are made for sleep and meal periods occurring during the 24-hour tour of duty. According to \_\_\_\_\_ the City proposes to change the tour of duty of its firefighters to 24 hours and 15 minutes. The City would then deduct 5 hours for sleep time and one hour for meal time per tour of duty in determining compensable hours per shift. \_\_\_\_\_ states that this action would reduce the hours worked in a 28-day period from 216 hours to 160 hours.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The provisions of this law apply to all employees of State and local governments except to those who are specifically excluded in section 3(e)(2)(C) of FLSA or who may qualify for exemption from the minimum wage and/or overtime pay requirements of the statute.

Section 7(k) of FLSA provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of 7 to 28 consecutive days for the purpose of paying overtime compensation to employees employed in fire protection or law enforcement activities. The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. The provisions of FLSA as they apply to fire protection and law enforcement employees of public agencies are set forth in Regulations, 29 CFR Part 553 (copy enclosed).

Sections 553.222 and 553.223 of the regulations set forth the criteria under which a public agency employer may exclude the time which firefighters spend sleeping and eating meals from their hours worked under FLSA. Sleep time and meal time may be excluded from compensable hours of work of such employees under FLSA if, among other things, the employees are on a tour of duty of more than 24 hours. We would consider a tour of duty of 24 hours and 15 minutes as being a tour of duty of more than 24 hours. Therefore, with respect to sleep time and meal time, such time may be excluded from the employee's compensable hours of work if the conditions described in sections 553.222 and 553.223 of the regulations are met. One of the conditions that must be met before such time may be excluded from compensable hours of work of an employee who is on a tour of duty of more than 24 hours is that there must be an expressed or implied agreement between the employer and employees to exclude such time. The information contained in your constituent's letter, we are able to determine if such an agreement exists. However, the following information may be of assistance to \_\_\_\_\_.

As a general principle, an implied agreement or contract must contain the same elements as an express agreement. (See *Dr. Franklin Perkins School v. Freeman*, 741 F.2d 1502 (7th Cir. 1984).) Furthermore, every contract requires some form of mutuality of obligation. (See *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1979).) A contract cannot be implied in fact when one party has expressly disavowed all intention to contract. (See *Vantage Point, Inc., v. Parker Bros., Inc.*, 529 F. Supp. 1204 (E.D. N.Y. 1981), *affirmed*, 697 F.2d 301 (2nd Cir. 1982).) If the City were to exclude sleep time and meal time in this case and pay the firefighters accordingly, mere acceptance by these employees of the reduced paychecks would not constitute an implied agreement to or reduced paychecks would not constitute an implied agreement to or acceptance of the acceptance of the exclusion. (See *Beebe v. United States*, 640 F.2d 1283 (Ct. Ct. 1981).) In *Beebe*, the court stated that for an implied agreement to exist there needed to be a "statement, act or deed on the part of . . ." the employees or their union representative which could be construed as consent to the exclusion of certain time from compensable hours worked.

The City needs to identify a statement, act, or deed by its firefighters, beyond acceptance of a reduced paycheck to establish the necessary implied agreement for the proposed exclusion from hours worked of sleep time and meal time. In the absence of such an agreement, an employer may not make deductions for sleep time and meal time from compensable hours of work under FLSA.

Should your constituent have further questions concerning FLSA, you may wish to suggest that he contact the \_\_\_\_\_ Wage and Hour Area Office at \_\_\_\_\_. That office would be pleased to be of all possible assistance to your constituent.

/s/ Paula V. Smith  
Administrator

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