

## FLSA 1216

November 19, 1986

This is in further response to your letter of October 21 concerning the application of the Fair Labor Standards Act (FLSA) to fire fighters who are employed by State and local governments. You request an opinion, on behalf of members of the \*\*\* Association of Fire Fighters \*\*\* concerning the proper method of determining a salaried employee's regular rate of pay for the purpose of computing premium compensation for overtime hours worked.

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.

Nonexempt, salaried firefighters who are employed by a State or local government must be paid not less than one and one-half times their regular rates of pay for all hours worked which exceed the applicable maximum hours standard for a workweek or work period. Normally, the workweek is the basic unit to which the provisions and requirements of FLSA are applied. However, as provided in section 7(k) of FLSA, an employer may use a work period instead of the workweek for the purpose of determining overtime hours worked. It follows, therefore, that the basic principles concerning FLSA, such as the computation of the regular rate of pay, which apply to a "workweek" also apply in the same manner to a "work period."

The Supreme Court has stated that the regular rate "is not an arbitrary level chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts" (Walling) v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419, 424-425). It is further stated in section 778.109 of 29 CFR Part 778 (copy enclosed) that the regular hourly rate of pay is determined by dividing an employee's total remuneration (except statutory exclusions) for any workweek by the total number of hours actually worked in that workweek.

You specifically wish to know how to compute the regular rate for nonexempt salaried firefighters who work "240/216 hours" pursuant to a 28-day work period as provided by section 7(k) of FLSA. Your reference to "240/216 hours" is based on the fact that a firefighter who is on duty for a 24-hour period and off duty for the following 48 hours will work consecutive, 28-day work periods of 240, 216, and 216 hours before the cycle

repeats itself. Based on information provided by \*\*\* in telephone conversations on November 14 with a member of my staff, it is our understanding that the annual salaries which are paid to the firefighters in question are considered to be straight-time pay for a fixed, or scheduled, number of hours in each work period, and not fixed salaries for fluctuating hours as discussed in section 778.114 of Part 778. Therefore appropriate adjustments in the firefighters' pay must be made when they work any number of hours in a work period other than those which are regularly scheduled.

In accordance with section 778.113(b) of Part 778, the regular rate of pay for a firefighter who is paid on this basis is computed by reducing the annual salary to its work-period equivalent and then dividing this amount by the number of hours which it is intended to compensate. Under these circumstances the firefighter must be paid an additional one-half times the regular rate for hours worked which exceed the maximum hours standard provided by section 7(k) of FLSA.

To illustrate, we will compute the regular rate for a firefighter who is paid an annual salary of \$20,800 for a fixed number of hours. The firefighter in our example works "24 on/48 off" during a 28-day work period as described above. The maximum hours standard for this work period is 212 hours. The work period (28 days) equivalent of the annual salary of \$20,800 in this example is \$1595.62:

$$\frac{28}{365} = .0767; .0767 \times \$20,800 = \$1595.62$$

365

The regular rates of pay for the firefighter during the three consecutive, 28-day work periods of the cycle are:

Work period #1 \$1595.62 (equiv.) = \$6.65 (regular rate)

240 (hours)

Work period #2 \$1595.62 (equiv.) = \$7.39 (regular rate)

216 (hours)

Work period #3 \$1595.62 (equiv.) = \$7.39 (regular rate)

216 (hours)

Since the firefighter in our example has received straight-time pay (\$1595.62) for the scheduled hours in the work periods, additional compensation is due at a rate of one-half times (1/2T) the regular rate of pay for the hours worked between 212 and 216 or 240, whichever applies. This is computed in the following manner:

Work period #1  $\$6.65 \times 28$  (overtime hours worked) = \$93.10

2

Work period #2  $\$7.39 \times 4$  (overtime hours worked) = \$14.78

2

Work period #3  $\$7.39 \times 4$  (overtime hours worked) = \$14.78

2

If the firefighter is called out for extra duty during a work period and, as a consequence works more than the scheduled hours, he or she must be compensated for this additional time at a rate of not less than one and one-half times (T 1/2) the regular rate of pay for the particular work period. For example, a firefighter who is called to duty for 12 hours, in addition to his or her regular hours, during work period #1 above, should be paid a total of \$1808.48 pursuant to the requirements of FLSA. This is computed in the following manner:

Work period #1 salary equivalent = \$1595.62

1/2T for 28 overtime hours worked = \$ 93.10

T1/2 for 12 hours of additional duty

$\$6.65 \times 1 \frac{1}{2} \times 12$ (hours = \$ 119.76

\$1808.48

We trust that the above is responsive to your inquiry. If You have any further questions please do not hesitate to contact me.

Sincerely,

Susan R. Meisinger  
Deputy Under Secretary

Enclosure