



WHAT YOU NEED TO
KNOW ABOUT

FLSA

Fair Labor Standards Act



Municipal Technical Advisory Service
INSTITUTE *for* PUBLIC SERVICE



Municipal Technical Advisory Service
INSTITUTE *for* PUBLIC SERVICE



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MTAS is the resource for cities, towns and state agencies on municipal services and issues in Tennessee. With expertise on municipal government, and cost savings of a centralized source of service, MTAS assists cities and towns with the training and information necessary to support informed decisions, and develops valuable solutions to the issues and concerns facing these communities.

Agenda

- Introductions and course objectives
- FLSA Requirements
- Recordkeeping Requirements
- Compliance Issues
- Special Circumstances - 207(k) [**Fire and Police**]

Disclaimer



- We are not lawyers – this isn't legal advice
- We are not Dept of Labor Wage and Hour (DOL WHD) representatives
- We urge you to contact DOL WHD for case-by-case analysis of your specific circumstance(s)



COVID-19 INFORMATION

CLICK THIS BANNER TO LEARN HOW TO DOWNLOAD YOUR 1099-G TAX FORM OR IF YOU HAVE QUESTIONS ABOUT WHY YOU RECEIVED A TAX FORM

REGISTER FOR THE VETERANS ADVANTAGE: CYCLE ACROSS TENNESSEE EVENT IN APRIL

Welcome to TN Department of Labor & Workforce Development

1099-G Tax Information Available

Click Here to Learn How to Download Your 1099-G Tax Form or If You Have Questions About Why You Received a Tax Form

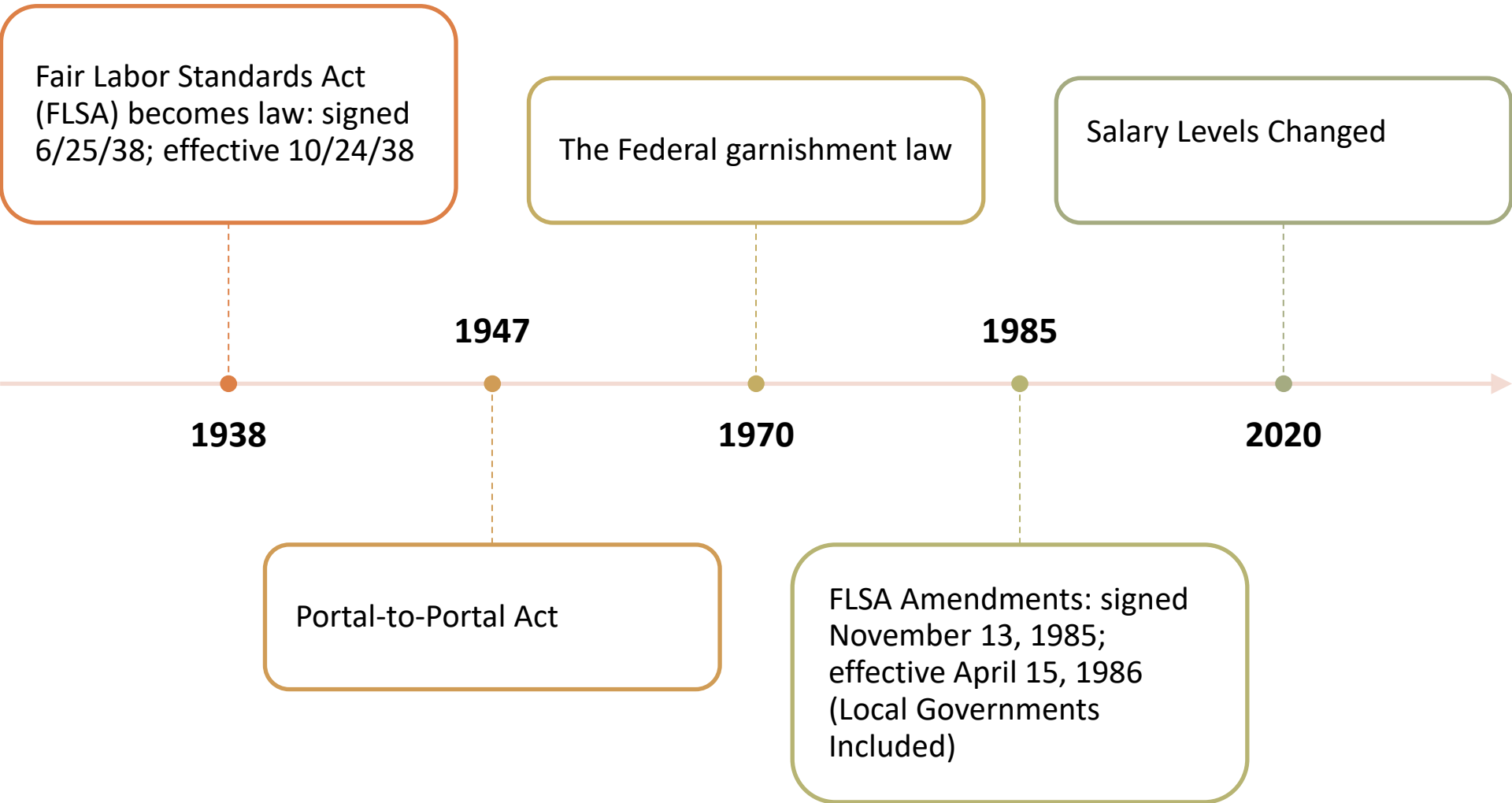


Nashville
Knoxville
Memphis



866-4-USWAGE
(866-487-9243)

Brief FLSA History



Fair Labor Standards Act (FLSA) becomes law: signed 6/25/38; effective 10/24/38

The Federal garnishment law

Salary Levels Changed

1947

1985

1938

1970

2020

Portal-to-Portal Act

FLSA Amendments: signed November 13, 1985; effective April 15, 1986 (Local Governments Included)

FLSA Requirements

Minimum
Wage
=
\$7.25/hour



EMPLOYEE RIGHTS

UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

\$7.25 PER HOUR

BEGINNING JULY 24, 2009

- OVERTIME PAY** At least 1½ times your regular rate of pay for all hours worked over 40 in a workweek.
- CHILD LABOR** An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor.
- Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:
- No more than
 - 3 hours on a school day or 18 hours in a school week;
 - 8 hours on a non-school day or 40 hours in a non-school week.
- Also, work may not begin before 7 a.m. or end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Different rules apply in agricultural employment.
- TIP CREDIT** Employers of "tipped employees" must pay a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.
- ENFORCEMENT** The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.
- Employers may be assessed civil money penalties of up to \$1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to \$11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to \$60,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to \$100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act.
- ADDITIONAL INFORMATION**
- Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions.
 - Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands.
 - Some state laws provide greater employee protections; employers must comply with both.
 - The law requires employers to display this poster where employees can readily see it.
 - Employees under 20 years of age may be paid \$4.25 per hour during their first 90 consecutive calendar days of employment with an employer.
 - Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.



For additional information:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

WWW.WAGEHOUR.DOL.GOV



U.S. Department of Labor | Wage and Hour Division

WHD Publication 1035 (Revised July 2008)

Posters & Records

a person
people to do work
employment / ɪm'plɔɪ
plural)
ing a job that yo
ndon and

Suffered or Permitted to Work

Times 'necessarily required to be on the employer's premises, on duty, or at a prescribed workplace.'

Exclusions

NOT Covered

- Elected officials
- Personal staff of elected officials
- Political appointees and legal advisors
- Bona fide volunteers
- Prisoners/consignees
- Trainees
- Independent contractors

Employment Factors - IRS

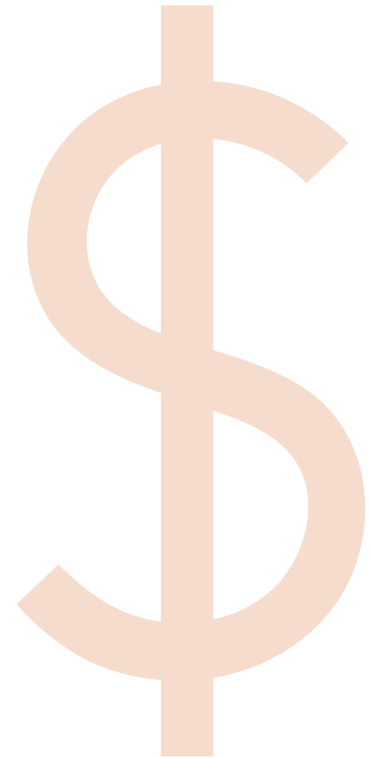
Behavioral Control

Financial Control

Relationship of Parties

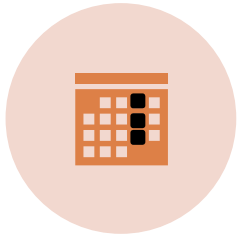
Pay Period

- May or May Not be the same as Work Period
- Longer periods allowed for public safety under 207(k)
- (7-28 days) – *discussed in detail later*

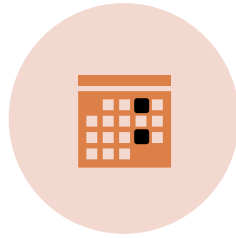


Work Period = Time Period Used for Overtime Calculations

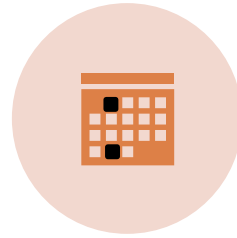
Common Pay Periods



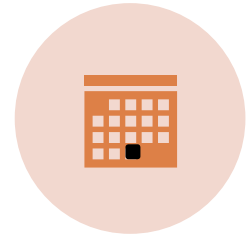
Weekly



Bi-weekly



Semi-
monthly



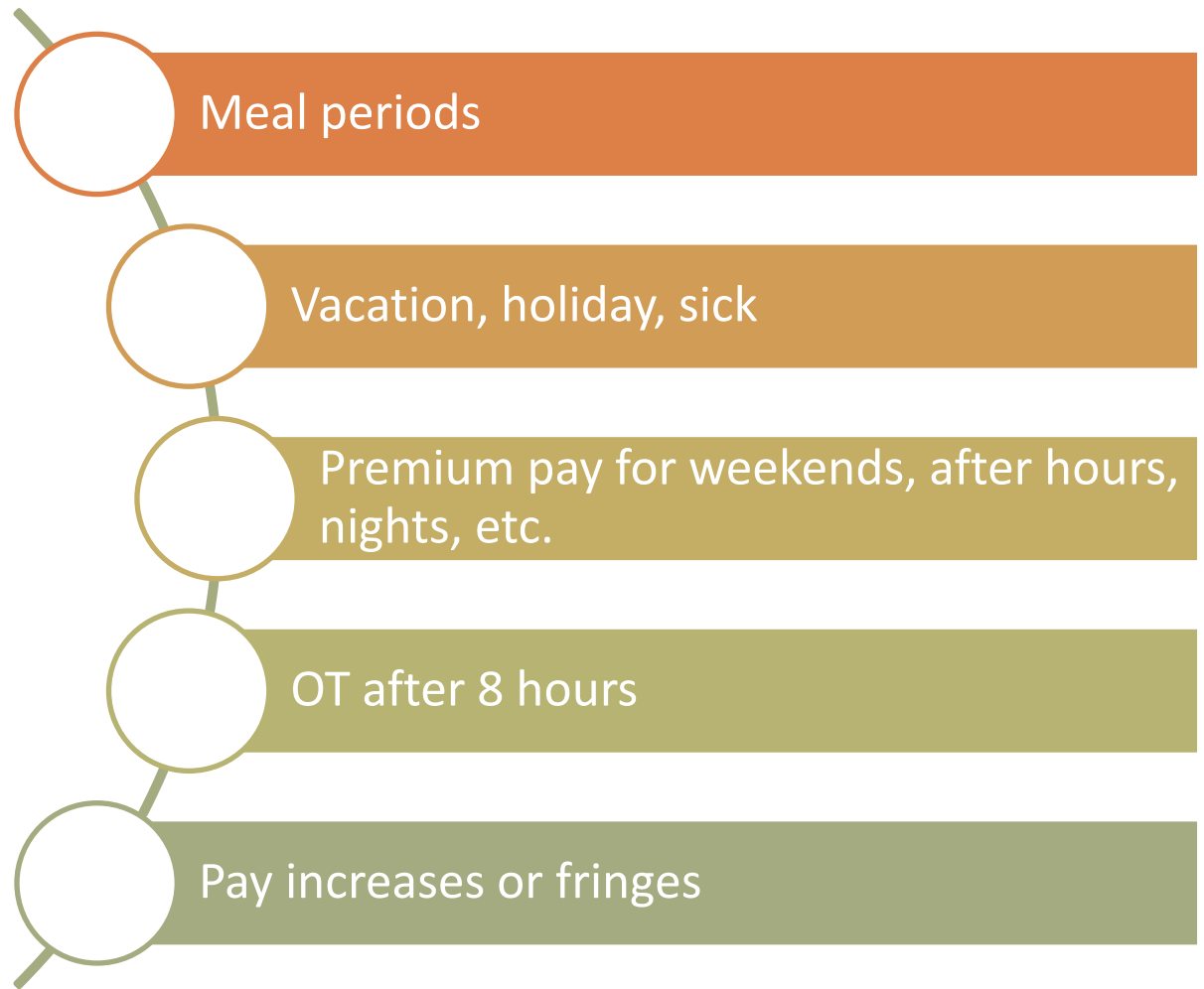
Monthly

Recordkeeping

- Start, stop, and overtime is recorded and kept
- Retain a minimum of five (5) years
- Child labor standards are followed



**Not
Required**



Exempt vs. Non-Exempt

Exempt Employees

- Exempt from Overtime Provisions

Non-Exempt Employees

- Entitled to at least federal minimum wage for all hours worked in a work period
- Entitled to 1.5 times regular rate for hours worked in excess of 40 hours (or 207(k) thresholds for public safety)

What's in a Title?



Paying a salary does not ensure exempt status



Titles do not matter, duties do!



TYPES OF EXEMPTIONS



Executive

- ✓ Paid on Salary Basis
- ✓ At least \$684/week
- ✓ Manages enterprise, or department, or subdivision
- ✓ Supervises at least 2 or more FTE's
- ✓ Hire, fire, or recommendation given significant weight





Administrative

- ✓ Paid on Salary Basis
- ✓ At least \$684/week
- ✓ Performance of office or non-manual work directly related to the management or general business operations
- ✓ Exercise of discretion and independent judgment with respect to matters of significance





Professional

- ✓ Paid on Salary Basis
- ✓ At least \$684/week
- ✓ Performance of work requiring advanced knowledge that is intellectual in character
- ✓ Field of science or learning and must come from specialized intellectual instruction





Computer

- ✓ Paid on Salary Basis
- ✓ At least \$684/week
(or \$27.63/hour)
- ✓ Employed as systems analyst,
programmer, engineer or
similar





Highly Compensated

- ✓ Total remuneration at least \$107,432
- ✓ Primarily office or non-manual work
- ✓ Customarily and regularly performs at least one of the exempt duties or responsibilities of another exemption



What is included in “work”?

Break
periods

Meal
periods

Sleep time

On-call time

Training
time

Unauthorized work

Unauthorized Work

Suffered/Permitted

Have policy Against It

Still must pay

Can (should?) discipline

COMPENSATORY TIME



Compensatory Time

Current Rate / 3-year avg payout

Can't lose it

Employer can require use

Employer can cash out early

Special Rules for Governments



207(k) Exemptions



Public Accountability Rules 29
C.F.R. § 541.602(b)(2).

Fire Service



Fire Service

Fire protection personnel (and law enforcement) are specifically addressed in the Fair Labor Standards Act statute



Fire Protection Personnel

29 USC Chapter 8 Section 207(k) Partial Overtime Exemption for fire service personnel who meet the following criteria:

- Must be employed as firefighters, paramedics, EMTs, rescue workers, ambulance personnel, and hazardous materials workers

AND

Fire Protection Personnel

- ✓ Employed by a public entity such as a municipality, county, or state
- ✓ Are trained in fire suppression
- ✓ Have the legal authority and responsibility to engage in fire suppression
- ✓ Are engaged in the prevention, control and extinguishment of fires, or response to emergency situations where life, property, or the environment is at risk.

Fire Protection Personnel-Non 207(k)

Fire and EMS workers not meeting all the previous requirements...

Standard 40-hour FLSA rules apply



207(k) Partial Exemption

- Fire Protection Personnel (as defined in FLSA)
- Assigned to a “Work Period” between 7-28 days (*longer work periods can reduce overtime costs*)
- Firefighter overtime threshold is raised from 40 hours in 7 days to an average of **53 hours per 7 days** up to a 28-day work period
- Each “Work Period” stands alone

207(k) Partial Exemption

Work Period Overtime Threshold Activity

Common Work Periods

Overtime Threshold

7-Days

53-Hours

14-Days

106-Hours

21-Days

159-Hours

27-Days

204-Hours

28-Days

212-Hours



Example

- Firefighter A is working a regularly scheduled 24-hour shift

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Compensable

- Compensable or Not Compensable?

Example

- Firefighter A usually and customarily arrives to the fire station about

- Firefighter A usually and customarily arrives to the fire station about 7:45 a.m. on weekdays. Firefighter A usually and customarily arrives to the fire station about 7:45 a.m. on weekdays. Firefighter A usually and customarily arrives to the fire station about 7:45 a.m. on weekdays.

- At 8:00 a.m. on weekdays, Firefighter A is required to report to work and perform his duties. At 8:00 a.m. on weekdays, Firefighter A is required to report to work and perform his duties. At 8:00 a.m. on weekdays, Firefighter A is required to report to work and perform his duties.

- Arriving at the fire station at 8:00 a.m. on weekdays, Firefighter A is required to perform his duties. Arriving at the fire station at 8:00 a.m. on weekdays, Firefighter A is required to perform his duties. Arriving at the fire station at 8:00 a.m. on weekdays, Firefighter A is required to perform his duties.

Not Compensable

Rates of Pay

Non-exempt employees should have three rates of pay

- Base Rate
- Regular Rate
- Overtime Rate

Rates of Pay

Base Rate

- The hourly rate earned without any additional wage augments

Regular Rate

- The sum of all payments for work converted to an hourly rate

Overtime Rate

- Premium compensation rate for work hours exceeding the overtime threshold

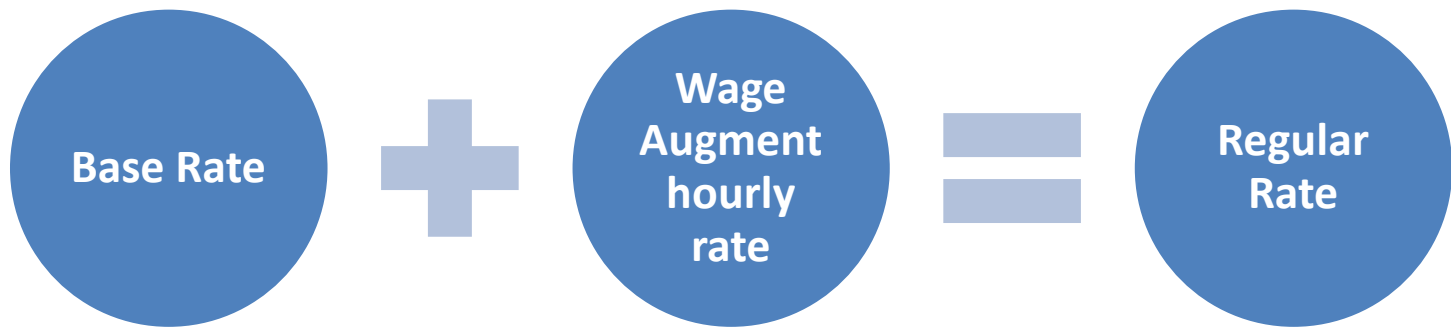
Base Rate

- Defined base pay rate per hour or salary rate to compensate for up to a certain number of hours of work.
- In either case, the base rate of pay is defined or can easily be calculated. (Salary/Hours)

Wage Augments

- Wage Augments must be identified and reduced to an hourly rate
 - *Bonuses, educational incentives, acting pay, longevity pay, etc.*
- Total number of hours worked when augment is earned / sum of augments.

Regular Rate



Overtime Rate



Managing Overtime

Fire departments have several techniques available to manage hours worked to potentially reduce their overtime liability.

- **Work Period Administration**
- Kelly Day
- Mealtime
- Sleep Time
- Modify employee's schedule

Work Period Impact on Overtime

*Four Week impact of 24/48 Shift Firefighter
assigned to a **7-Day work period***

- Week 1: 72-hours worked = 19.00 Overtime
- Week 2: 48-hours worked = 0.00 Overtime
- Week 3: 48-hours worked = 0.00 Overtime
- Week 4: 72-hours worked = 19.00 Overtime

240.00 Total Hours:
202.00 Hours Base Rate +
38.00 Hours of Overtime Rate

Work Period Impact on Overtime

*Four Week impact of 24/48 Shift Firefighter
assigned to a **28-Day work period***

- Week 1: 72-hours worked = 0.00 Overtime
- Week 2: 48-hours worked = 0.00 Overtime
- Week 3: 48-hours worked = 0.00 Overtime
- Week 4: 72-hours worked = 28.00 Overtime

240.00 Total Hours
212.00 Hours Base Rate +
28.00 Hours Overtime Rate

Work Period Impact on Overtime

*Compare Firefighter Overtime over **12-Weeks***

7-Day Work Period

1st 4-Weeks: 38 OT
2nd 4-Weeks: 19 OT
3rd 4-Weeks: 19 OT

76-Hours
Overtime

28-Day Work Period

1st 4-Weeks: 28 OT
2nd 4-Weeks: 4 OT
3rd 4-Weeks: 4 OT

36-Hours
Overtime

This 12-Week Cycle Repeats Continuously

Work Period Impact on Overtime

Compare Firefighter Overtime over 48-Weeks

7-Day Work Period

304-Hours
Overtime

28-Day Work Period

144-Hours
Overtime

28-Day Work Period Firefighter will earn an additional 160 hours of base rate pay rather than overtime rate.

Work Period and Overtime

Compare the Firefighter Overtime over 48-Weeks.

** Assume the Firefighter earns \$14.50 Base Rate and \$23.13 Overtime Rate.*

7-Day Work Period

304 Hours x 23.13
\$7,031.52

28-Day Work Period

144 Hours x 23.13
160 Hours x 14.50
\$5,650.72

\$1,380.80 Payroll Reduction

Kelly Day

A "Kelly Day" is the occasional hours/shift scheduled off-duty without pay to manage or control overtime

- Chicago Mayor Edward Kelly gave firefighters one day off after seven on duty, according to Chicago Firefighters Union Local 2
- Time off-duty without pay
- Time off-duty does not count toward work hours



Mayor Edward Kelly

Mealtime Deduction

Public agencies may exclude mealtime from compensable hours when:

- ✓ An employee is required to be on duty for more than 24 hours
- ✓ The employer and the employee agree to exclude bona fide meal periods
- ✓ The employee is completely relieved from duty responsibilities

Sleep Time Deduction

Up to 8 hours sleep time can be deducted if the following conditions are met:

- ✓ Must be assigned to a tour-of-duty of more than 24 hours
- ✓ Employer and employee must have an expressed or implied agreement
- ✓ Sleep period must be defined
- ✓ Employee earns pay for any hours worked during sleep period and if employee does not get at minimum 5 hours uninterrupted time, the employee gets compensated for the entire 8 hours

Training Time

Training time is *not required* to be counted as worktime when the following criteria is met:

- ✓ Outside normal working hours
 - ✓ Attendance is voluntary
 - ✓ Not directly related to employee's job
- and*
- ✓ No productive work is performed

Work Time or Not?

- Training directly related to employee's job
(off normal shift)
- Training req'd by law
(outside normal working hours)
- Training to prepare for another job / promotion
(outside normal working hours)

Work Time

Not Work Time

Not Work Time

Work Time or Not?

- Academies
*In class, training session,
or doing work*
- Study Time
*Required homework
time for compensable
classes*

Work Time

Work Time

Work Time or Not?

- Home to Work Not Work Time
- Home to Work/
Emergency Callout
 - *“substantial distance” to work location* Work Time
 - *normal work location* Not Work Time
- Home to Work Work Time
One day in another city: time spent in travel minus normal commute time and mealtime

Work Time or Not?

- Home to Work/Overnight
Travel time falls within normal working hours
- Work While Traveling
Required work performed

Work Time

Work Time

Medical Attention

Time spent waiting for/receiving medical attention at the direction of employer during normal working days/hours

Work Time

Civic / Charitable Time

Employer's request,
direction, control, or while
required to be on premises

Work Time

Substitutions / Time Trade

One person works/subs for another person at their request at no cost to the organization –

No FLSA Effect

FLSA was revised in 1986 to address substitutions/time trade practices

Off Clock Work

Work that is performed but not documented by the employee or employer that the employer reasonably knows the work was performed

Work Time

Other Information

If you have overpaid employees, there is no FLSA issue.

The DOL is only interested in ensuring FLSA minimum wage and overtime rules are met.

The DOL does not get involved with benefits accrual, use, or administration.

Incorrect Pay Calculation

What happens if we find we have not calculated overtime hours or overtime pay correctly?

- Very Serious Issue; Be transparent and communicate with your employees
- Determine whether the underpay was accidental or intentional
- If accidental, calculate the underpay for the past two years
- If intentional, calculate the underpay for the past three years plus any penalties the DOL may impose

Incorrect Pay Calculation

- Develop a plan to provide back pay for the amount underpaid
- Submit your plan to TN-DOL for approval
- Once approved by TN-DOL, make timely payment to employees



If firefighter(s) hire an attorney(s) and back pay is owed, the entity will also be responsible for reasonable and customary attorney fees for each person involved in the action (individual fees not eligible for a class action)

Take Aways

Develop a compensation policy (agreement) that addresses:

- ✓ Employee pay status: hourly, salary, exempt, non-exempt
- ✓ Declare 207(k) Partial Exemption
- ✓ Declare work period length (if employees qualify)
- ✓ Identify if sleep time and/or mealtime deductions are planned
- ✓ Define base rate, wage augments, regular rate, and overtime rate and how wage augments are handled.


Take Aways

- Define what hours of work and other hours will be counted toward calculating overtime compensation
- Publish **work period(s)** to include the start to finish dates/times
- Address shift change times (shift begin/end times)
- Define the process employees must use to report pay issues to the employer

POLICE



207(K) EXEMPTION

- 29 CFR, 553.201 section 207(k) 
- Applies to Fire, Police and Jailers
(not dispatch)
- Allows for longer work periods
- Provides for higher overtime thresholds
- Higher limits for compensatory time

Work Periods

Non-Public Safety

7 days

Public Safety

7-28 days

Reminder:

- Work period ≠ Pay period

Most Common Work Periods



Overtime Threshold

Non-Public Safety

- 7-day work period: 40 hours

Police Officers

- 7-day work period: 43 hours
- 14-day work period: 86 hours
- 28-day work period: 171 hours

Fire Service: Covered in Fire module

Overtime

Employer must compensate* at 1 ½ times the normal rate of pay for all hours worked in excess of the overtime threshold in any work period

** May be money or compensatory time*

! *Reminder:*
Work period ≠ Pay period

How Work Periods Impact Overtime (Police)

- Assume a police officer is on a **one-week work period** (43-hour OT threshold)
- The officer works 46 hours one week and 40 hours the next.
 - Week One: Three hours over the OT threshold
 - Week Two: No hours above the OT threshold

How Work Periods Impact Overtime (Police)

- Assume the same officer is on a **two-week work period** (86-hour OT threshold)
- The officer works 46 hours one week and 40 hours the next.
 - The total hours worked for the work period is 86 hours. The overtime threshold is 86 hours.
 - **NO OVERTIME!**

How Work Periods Impact Overtime (Police)

Fringe Benefit Time

- Assume a police officer is on a **one-week work period** (43-hour OT threshold)
- The officer works 10 extra hours one week and is on vacation the next week.
 - Week One: Seven hours over the OT threshold
 - Week Two: Forty hours of vacation pay

How Work Periods Impact Overtime (Police)

Fringe Benefit Time

- Assume the same officer is on a **two-week work period** (86-hour OT threshold)
- The officer works ten extra hours one week and is on vacation the next week.
 - The total number of hours ***actually worked*** in the work period is 50 hours. **There is no overtime.**
 - The officer is paid straight time for the 50 hours and is paid for 40 hours of vacation time.

Managing Overtime

- Officer Mary Katherine works 8-hour shifts and is on a one-week work period.
- She is in court for 6 hours on her normal off day.
- Her supervisor sends her home 3 hours early on two consecutive days before the end of the work period.

No OT For The Work Period

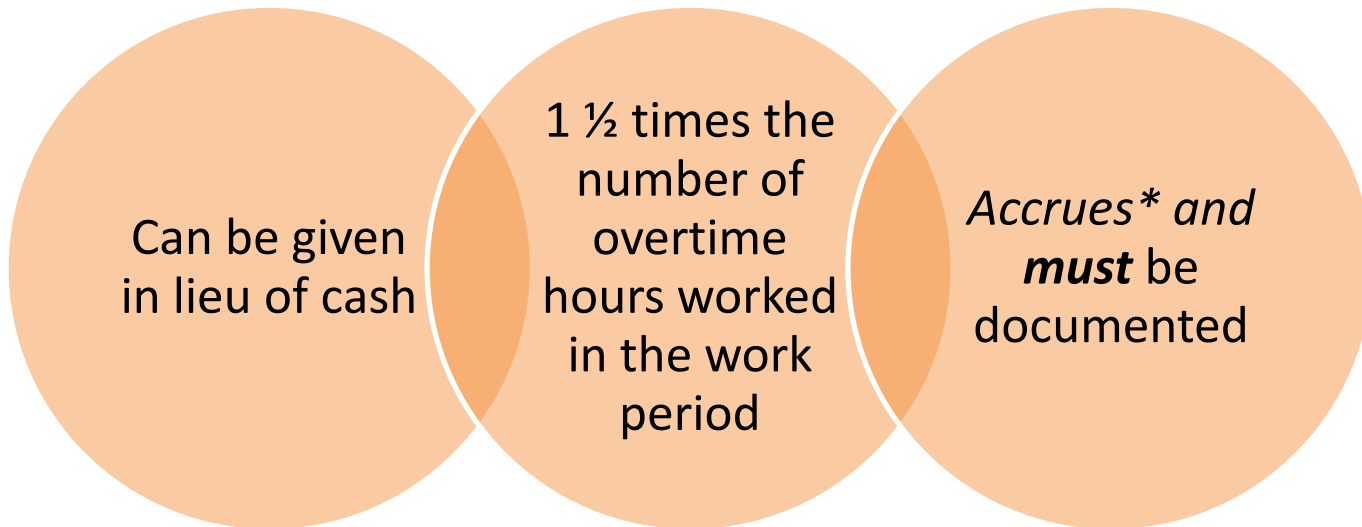


Managing Overtime



Longer work periods provide more time to manage overtime by modifying an employee's schedule.

Compensatory Time



** Federal limit for fire and police is 480 hours.*

Employer has to pay cash for overtime that exceeds 480 hours.

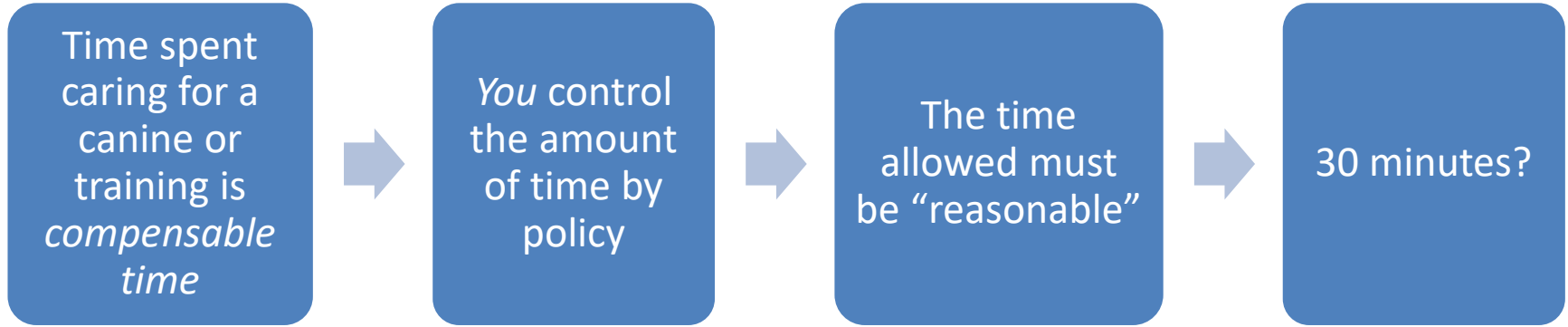
Compensatory Time

When an employee leaves, all accrued comp time must be paid at the employee's *current* rate of pay

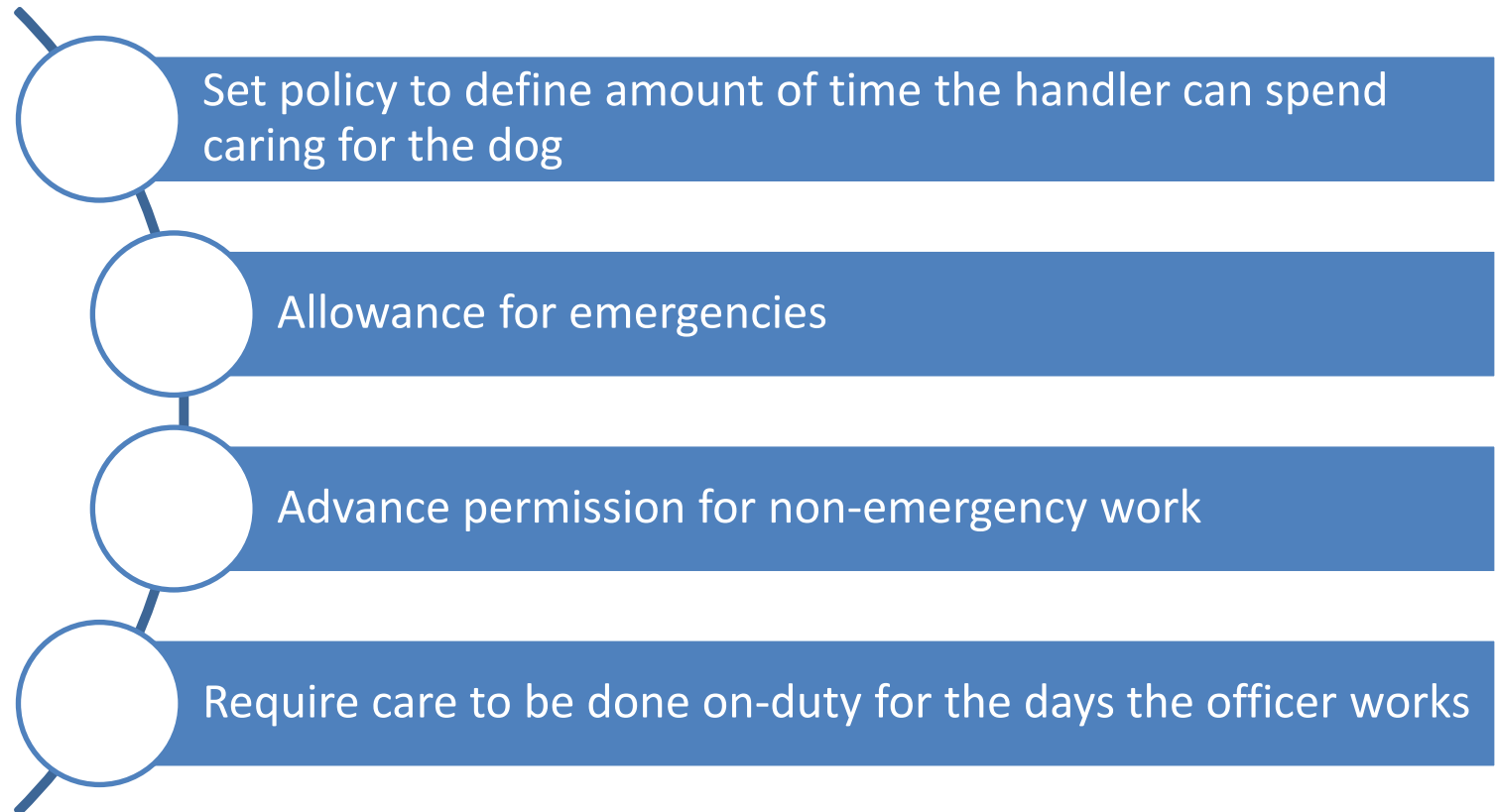
Comp time cannot be taken away. It must be taken off or paid for.

The employer may require the employee to take comp time.

Canine Handlers



Controlling Canine Time



Exempt vs. Non-Exempt Police

Employees performing law enforcement duties *cannot be exempt* from overtime!

- Remember the “duties” requirement for exempt
 - Mostly **law enforcement** duties ? Cannot be exempt!
 - Mostly **executive or admin** duties? May be exempt!
 - *Not all chiefs should be exempt*

Very Small Police Departments

- Total employees: 5 or less
 - Exempt from overtime rules
 - Includes chief and part-time officers
- Does not include volunteers
- Does not include support personnel

Questions?

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