

Wage and Hour: Avoiding the Pitfalls of the Fair Labor Standards Act

Part 1: A Quick Look at the FLSA

By Wayne Evans,
FSA General
Counsel



Wayne Evans

This article marks the first of a series addressing the federal wage and hour law known as the Fair Labor Standards Act (FLSA) and the common missteps made by employers. FLSA compliance cannot be taken lightly as the consequences of an FLSA violation can be potentially punishing on a Sheriff's Office.

In recent years, Florida has been the proverbial "ground zero" for wage and hour lawsuits, particularly claims for unpaid overtime. As with most employment-related claims, such lawsuits are both expensive and disruptive to the workplace. FLSA noncompliance may also invite scrutiny and administrative action by the Department of Labor's Wage and Hour Division.

I asked Mike PIERRO and Marc SUGERMAN, attorneys with Allen, Norton, and Blue, P.A., who have a particular expertise in this field, to contribute to this article. Both lawyers have represented Sheriff's Offices recently in wage and hour matters, and they bring their experience with these cases in providing a review of this area of the law. Our series begins with an overview of the FLSA's basic minimum wage and overtime requirements and the concept of compensable time.

I. FLSA General Minimum Wage and Overtime Pay Requirements

It is commonly known that, generally, employees must receive at least minimum wage and may not be employed for more than 40 hours in a week without receiving overtime pay equal to at least one and one-half times their regular rate of pay for each hour worked over 40 hours. As discussed later in this series, there are certain employees who are exempt from the FLSA overtime requirements. Additionally, the FLSA provides alternative overtime calculations for certain categories of employees.

A. Minimum Wage

The FLSA requires the payment of the hourly minimum wage to all non-exempt employees for each hour of work suffered or permitted. The current federal minimum wage is \$7.25 an hour. Florida has enacted its own minimum wage law, section 448.110, Florida Statutes. The Florida Agency for Workforce Innovation is charged with increasing the minimum wage each year

based upon the rate of inflation.

The higher of the federal or Florida minimum wage must be paid. Florida's rate is currently the higher of the two at \$7.79 an hour. Given prevailing wage rates of Sheriffs' deputies and employees, minimum wage concerns are typically not encountered. The common pitfalls relate primarily to the overtime pay requirements.

B. Overtime

The FLSA does not limit the number of hours an employee may work. Rather, the FLSA only requires the payment of overtime compensation at a rate not less than one and one-half times the employee's regular rate of pay for each hour worked in excess of the maximum hours applicable to the type of employment in which the employee is engaged. Unless an exemption or different pay period applies, this usually means overtime for hours in excess of 40 hours per week. As discussed below, with regard to certain positions such as certified law enforcement and correctional officers, Sheriffs may establish a different work period that exceeds the standard 40-hour, one-week period.

The FLSA does not generally require that an employee be paid overtime for hours worked in excess of eight per day. Additionally, contrary to a common misconception of the FLSA, no overtime compensation is required for work on Saturdays, Sundays, holidays or regular days of rest, so long as the maximum number of hours worked in a work week is not exceeded. In short, the FLSA requires compensation for hours worked or "sweat time."

1. Compensatory Time "Comp Time"

Public employers are provided an element of flexibility in overtime compliance. The law authorizes such employers to give employees compensatory time, "comp time," in lieu of monetary overtime compensation. Similar to the standard calculation of paid overtime, the comp time must be given at a rate of not less than one and one-half hours for each hour of overtime worked. Certified personnel may accrue up to 480 hours of compensatory time while civilian employees may accrue up to 240 hours.

An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency. Also, an employee can be required to use comp time even if the employee prefers to bank it and use annual leave instead.

When an employee leaves the agency, the employee must be paid the higher of (1) his or her final regular rate of pay or (2) the average regular rate during his or her last three years of employment for any compensatory time remaining "on the books" when separation occurs. A Sheriff's Office cannot decline to pay accrued comp time simply because it exceeds an amount that has been established by policy that is less than the 240 hours for civilians or 480 hours for sworn personnel authorized by the FLSA. In other words, a Sheriff's Office cannot by policy override an employee's entitlement to comp time under the FLSA.

2. Alternative Maximum Workweeks for Certified Law Enforcement Personnel

Section 7(k) of the FLSA provides that law enforcement and "security personnel in correctional institutions" may be paid overtime on a "work period" basis. Such a work period may be from a seven consecutive day to a 28-consecutive day period. As to work periods of at least seven but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours in the work period. If the agency has established a 14-day work period for law enforcement and detention deputies, they must receive overtime after 86 hours worked during a 14-day work period.

Section 7(k) allows public agencies to minimize the accrual of overtime by balancing the hours of work over an entire work period for law enforcement and correctional officers. For example, if a deputy whose work period is 14 days works 50 hours in the first week, and then works 36 hours in the second week, no overtime pay is owed.

It must be noted that the alternative maximum work periods available under 7(k) cannot be applied to civilian employees. Non-certified personnel must be paid overtime (whether monetary or comp time) for all hours worked in excess of 40 in one week.

Sheriff's Offices have learned the hard way that civilian employees cannot be put on an alternative work period under 7(k). While placing dispatchers, for example, on the same 14-day schedule as patrol deputies may seem like a good idea, it is a violation of the FLSA if the dispatchers aren't paid overtime for all hours worked in excess of 40 hours in a work week.

On occasion, agencies may place qualified certified personnel in dispatch on a temporary basis pending recovery from an injury. During such temporary periods, the deputy or corrections officer should be paid based on the appropriate civilian (40 hour) workweek rather than the 7(k) period adopted by the agency for certified law enforcement personnel.

To be considered among "security personnel in correctional institutions" for purposes of 7(k), an employee must "have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions." Civilian correctional employees, such as correctional technicians or non-sworn control room operators, do not qualify for the alternative work periods prescribed by 7(k).

Sworn personnel may perform some tasks that are not part and parcel of their law enforcement or corrections activities. However, a person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under 7(k).

Though the FLSA does not require a written agreement in order to implement an alternative pay scheme under 7(k), it is highly recommended that agencies that utilize an alternative period, such as 14 days, establish a policy and retain confirmation of receipt of the policy by each deputy. Again, such alternative work periods may not be applied to civilian employees.

II. Compensable Work Time

The FLSA's minimum wage and overtime requirements only apply to time actually worked by a nonexempt employee. Time is compensable work time if the employee has been "suffered or permitted to work." If an employee works, it is of no consequence that an employer did not authorize the work. If the work is performed, the work has been "suffered or permitted" and is therefore compensable.

Unauthorized work is compensable, but the employee may be counseled or disciplined to discourage future unauthorized work. In any event, the employee should be informed in writing that the off-duty work is not permitted and future instances will result in discipline. While it is generally obvious when an employee is engaged in compensable work, certain activities may not be compensable depending upon the attendant circumstances:

A. On-Call Time

An employee who is required to remain on-call at home, or who is allowed to leave a message where he can be reached, is typically not engaged in

compensable work time. Of course, if the employee is called into work or otherwise required to perform some duties, the time actually spent working is compensable.

Significant constraints on the employee's freedom could require this time to be compensated. However, a restriction on alcohol consumption during on-call hours does not in and of itself render the time compensable. If an employee is engaged to be waiting, his time is compensable. If he is waiting to be engaged, his time is not compensable.

Whether on-call time is compensable will generally depend upon consideration of the following factors:

1. The frequency of call-ins;
2. The extent of the geographic restrictions; and
3. The amount of time in which to respond to a call.

On-call time is compensable if the on-call conditions are so restrictive or the calls are so frequent that the employee cannot use the time for personal activities.

B. Rest and Meal Periods

Rest periods of short duration (typically 20 minutes or less) must be counted as time worked. Bona fide meal periods (usually 30 minutes or more) generally need not be compensated as time worked. Employees are not relieved if they are required to perform any duties, whether active or inactive, while eating.

For example, if a clerical employee is required to remain at his desk, he may be likely to continue to work by filing, doing data entry, or performing related duties. Such time would be considered compensable, and therefore employees should not be allowed to remain at their work stations during meal breaks. In contrast, the simple fact of remaining on-call, as in the case of an on-shift deputy eating at a local restaurant during a meal break, does not render the meal period compensable.

Problems may arise when Sheriffs utilize "built-in" lunch periods for employees whereby a standard designated meal period is automatically deducted from the total scheduled hours. As an example, a deputy works a 12-hour shift and the Sheriff's Office deducts 30 minutes as a non-compensable meal period. If the deputy either does not take the meal period or is required to perform duties during such period, the break time is now compensable. The problem with this work schedule is that the breaks must be scrutinized to ensure that any time deducted reflects time away from work.

The better approach to avoiding violations of the FLSA with regard to meal periods is to simply pay for the period regardless of whether a deputy actually takes a meal break. This approach is particularly recommended with regard to patrol deputies given the nature of

their work and the potential to be called during a meal break.

C. Lectures, Meetings and Training Programs

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if four criteria requirements are met:

1. The activity is outside normal work hours;
2. It is voluntary;
3. Not job related; and
4. No compensable work is concurrently performed.

Training is considered "not job related" if it is not required for the purposes of the employee's maintenance of the current job position. For example, if a deputy is engaged in a voluntary course of study on her own time in pursuit of a promotion to sergeant, the training time would not be considered job related.

With regard to meetings, if an employee is called in to attend a mandatory meeting, the time in attendance must be paid. The time is compensable even if the meeting is not held during the employee's scheduled shift.

D. Travel Time

1. Home to Work Travel

Commuting time to work is ordinarily not compensable. An employee who travels from home before the regular workday and returns to his home at the end of the workday is engaged in ordinary home-to-work travel, which is not work time.

2. Home to Work Travel on a Special One Day Assignment in Another City

An exception occurs if an employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the time the employee would normally spend commuting to the regular work site may be deducted.

3. Travel that is All in a Day's Work

Time spent by an employee in travel as part of the principal work activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked. Therefore, if an employee reports to work and leaves for a job assignment, the travel is compensable.

4. Travel Away from Home Community

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not

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Director's Update

Distracted Driving is Real Danger for Florida Deputies



A.J. Smith

Our world is fast moving and never seems to slow down. We have become a nation of multi-taskers, constantly trying to perform more tasks in less time.

And this includes when we are driving.

Whether it is visual, manual or cognitive distraction, it is never safe when we are not concentrating on the road. Never before has the level of distraction in our society carried such heavy consequences. Unfortunately, there is a bad guy lurking in our midst who can be as fatal as any gunshot. And for many of us, it is in our hand most of the time: our smart phone. Not only do we have to be very concerned with our driving, we have to be equally engaged in the distracted driving habits of the thousands of other drivers we encounter.

As deputy sheriffs, we are faced with many distractions throughout our day. Not only are we constantly on guard to protect our personal safety, but we are required to drive at high speeds, communicate on the radio, read on-board computer messages, and run radar and video cameras. That is in addition to being engrossed in our personal communication devices -- iPhones, Droids etc. -- which have email, text messages, Facebook and Twitter, fighting for our attention. Performing any one of these law enforcement tasks while driving is risky, but when you add in our personal phones, you have a recipe for disaster while driving.

I, and many other deputy sheriffs, have probably not given much thought to the different types of distracted driving. They are visual (taking your eyes off the road), manual (taking your hands off the wheel) and cognitive (taking your



mind off the road). Believe it or not, the minimum amount of time your attention is taken away from the road when you're texting and driving is five seconds. At 55 miles per hour, that equals driving the length of a football field before looking back up. And I have to admit, I have been guilty of all of these. Sadly, each day nine people are killed and 1,060 are injured as a result of a distracted driver.

Engaging in visual-manual subtasks (such as reaching for a phone, dialing or texting) associated with the use of hand-held phones and other portable devices increases the risk of getting into a crash by three times. As of October 1, it is law -- no texting or emailing while driving in Florida.

I never thought I would say this, but I'm old school. Even though I believe I am very tech savvy, back in the day before cell phones and on-board computers, all we had to do was drive and sometimes talk briefly on the radio. And every once in a while, we would have to turn on the blue lights and siren. Back then, we thought this was more than one could do and continue to operate a vehicle safely.

Studies have found that as a law enforcement officer's experience increases, many come to believe that they are invincible. Another sobering fact is the average age of law enforcement officers accidentally killed between 2000 and 2009 was 38 years old, with 10 years of experience.

Yet many deputy sheriffs still think they are faster than a speeding bullet, more powerful than a locomotive and able to leap tall buildings in a single bound. But in reality, deputy sheriffs are just like everyone else; we are perceived by the public as supermen and superwomen, but we are not invincible.

The reality is that we all know there are only so many tasks we can perform and operate a vehicle safely. So please think about what's most important, either pulling safely into your driveway after your shift or taking a chance and sending that not-so-important text message or email while headed south on two lanes of blacktop!

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only hours worked on regular working days during normal working hours, but also during corresponding hours on nonworking days. As an enforcement policy, the Department of Labor will not consider time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile as work time.

Later in this series we will discuss in greater detail travel time issues commonly encountered by Sheriff's Offices, and how to avoid liability for FLSA overtime claims premised upon alleged unpaid travel time. However, to more fully explain the general parameters of the FLSA, the next article will address positions that are exempt from overtime, the requirements for these positions, and practical issues concerning compensation, leave and discipline.

Questions regarding this opinion may be directed to Wayne Evans, at the Tallahassee office of Allen, Norton & Blue, P.A., (850) 561-3503, Richard M. Pierro at the Tampa office, (813) 251-1210, or Marc Sugerman at the Orlando office, (407) 571-2152. Specific questions concerning employee issues should initially be referred to the Sheriff's legal advisor.

Wayne Evans is FSA's General Counsel.