



MAY 09 2003

This is in response to your request for an opinion regarding the application of the Fair Labor Standards Act (FLSA) to the State Police when they provide police escorts during their off-duty hours to certain vehicles and loads on the highways as required by state law.

Your letter states that Revised Statute 32:837(B)(4) and rules and regulations promulgated pursuant thereto require the to escort certain vehicles and loads on the highways. Off-duty personnel are offered the opportunity to escort permit loads which require State Police escorts. An officer's participation is solely voluntary. The permittees/movers are required to pay the for the wages of the trooper and fees for the use of the vehicle required for the off-duty escort. Each officer is paid through the payroll system at his time and one-half rate without regard to the number of regular hours worked during the pay period.

The permittees/movers are private employers which are separate and independent of the which is under the Department of Public Safety and Corrections, Public Safety Services in the Executive Branch of State Government.

As indicated in Section 553.227, Section 7(p)(1) of the FLSA makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation. Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

This special provision applies even if the public agency facilitates the employment or affects the conditions of employment of such employees. Section 7(p)(1) applies to special details even where a State or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. These principles are exceptions to the usual rules on joint employment set forth in 29 CFR 791 (copy enclosed).

In other words, when a fire protection or law enforcement employee is jointly employed by both a public and private employer during the same workweek, the public employer would not be liable for the payment of any overtime compensation which may otherwise be due as a result of the joint employment. Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees. Private sector firms would still be obligated to pay "moonlighting" public employees, as any other employees whom they employ, in accordance with the monetary provisions of the FLSA.

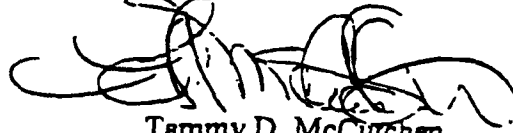
It is our opinion that a permittee/mover, who is a private employer, and the State Police are separate employers for the application of the FLSA. Therefore, provided the other provisions of 7(p)(1) are met, the permittee/mover would not be obligated to include the hours worked voluntarily by State Troopers in their off-duty hours escorting permit loads as required by State law when calculating and paying overtime due to the State Troopers.

You ask if [redacted] method of administering the off-duty escorts for troopers meets the requirements of Section 553.227(d), which permits employers to facilitate conditions of employment or affect the conditions of such employees. [redacted] offers off-duty, volunteer troopers the opportunity to escort permit loads, requires private employers to pay the wages and fees for the services directly to the department, and pays the troopers through the agency's payroll system. These methods are within the requirements of Section 553.227(d).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division,

or which is in litigation with respect to or subject to the terms of any agreement or order applying or requiring compliance with the provisions of the FLSA.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tammy D. McCutchen', written in a cursive style.

Tammy D. McCutchen
Administrator

Enclosure