

AUG 19 2002

Dear :

This is in response to your request for an opinion on whether certain aspects of a proposed plan for utilizing "volunteer" firefighters on a regular basis in a municipal fire department in a rural town would comply with the Fair Labor Standards Act (FLSA).

Initially, we would note that the "volunteer" designation is somewhat a misnomer in this instance, as you have described the proposal. Section 3(e)(4)(A) of the FLSA (29 U.S.C. §203(e)(4)(A)) excludes from the definition of "employee" individuals who volunteer to perform services for a public agency of a State or local government only if they receive no compensation for their services. (This does not prevent payment of expenses, reasonable benefits, or a nominal fee as provided in 29 CFR §553.106.) As you described the proposal, all municipal employees who "volunteer" will be paid an hourly wage while performing "volunteer" firefighting duties, but at different hourly rates than the wages they receive for their regular positions of employment. Those individuals who do not hold other positions of employment with the municipality will also be paid an hourly wage while performing firefighter duties. Thus, regardless of whether the individuals hold other jobs as employees of the municipality, both categories of individuals are to be paid hourly wages while performing firefighter duties as proposed, making them paid employees of the municipality for the time so spent for purposes of the FLSA.

For those individuals who also hold another position with the municipality, all of their shifts on days they work as firefighters will be 24 hours, scheduled from 8:00 a.m. to 8:00 a.m. the next morning each shift, and they will work two or three 24-hour shifts per month. Some of the shifts will be on days when these individuals work their regular jobs during the day (from 8:00 a.m. to 5:00 p.m.), after which the individuals will report to the fire department from 5:00 p.m. until 8:00 a.m. the next morning. On weekend shifts when the individuals are not scheduled to work their regular jobs, they will work in the fire department from 8:00 a.m. to 8:00 a.m. the next day. Eight hours of the 24-hour shift will be unpaid sleep time, unless a fire call occurs during the sleep period, in which case the individual will be paid for the time spent on that call. The remainder of the eight hours will be considered unpaid sleep time so long as the individuals have a five-hour uninterrupted sleep period. If they do not receive at least five hours of uninterrupted sleep, they will be paid for the entire eight-hour sleep period. Time spent performing the duties

of their regular municipal jobs will be paid at their regular pay rate for those jobs; time spent performing firefighting duties will be paid at an hourly wage different from their regular jobs.

All hours worked over 40 in a workweek will be paid as overtime using the weighted average method, *i.e.*, one-and-one-half times the average regular rate (determined by dividing total pay for the week by total hours worked in the week).

Individuals who do not hold other positions with the municipality will be scheduled for 24-hour shifts and paid an hourly wage while performing firefighting duties. They will have eight hours of unpaid sleep time per shift unless they respond to a fire call during the sleep period, in which case they will be paid for the time spent on the fire call. The remainder of the eight-hour sleep period will be unpaid unless they do not have at least five hours of uninterrupted sleep, in which case they will be paid for the entire eight-hour sleep period. Overtime will be paid these employees at time-and-one-half their regular rate of pay if they work in excess of 40 hours in a workweek.

You indicate that no municipal employee is required to participate in this program. You also state that no regular, or career, firefighters will work as "volunteers" under the program. With these facts as background, you present the following questions:

1. Does scheduling 24-hour shifts under the plan comply with the FLSA?

Answer: Yes, subject to the conditions that are discussed in the answers to the questions below being satisfied.

2. Do the plan's provisions for unpaid sleep time of eight hours during a 24-hour shift comply with the FLSA?

Answer: Yes, if the employer has entered into an agreement with the employees to exclude *bona fide*, regularly scheduled sleeping periods (of not more than eight hours) from hours worked, and provided further that the employer furnishes adequate sleeping facilities and the employees can usually enjoy an uninterrupted night's sleep. See 29 CFR § 785.22(a); 553.222(a). Where no expressed or implied agreement to exclude sleep time is present, the eight hours of sleeping time constitute hours worked.

3. Do the plan's provisions for payment of actual time worked on calls during the eight-hour sleep period comply with the FLSA?

Answer: Yes. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. See 29 CFR § 785.22(b).

4. Do the plan's provisions for payment of all eight hours of the sleep period if employees are unable to have five uninterrupted hours of sleep comply with the FLSA?

Answer: Yes. For enforcement purposes, the Wage and Hour Division has adopted the rule that if an employee cannot get at least five hours of sleep during the scheduled sleeping period, then the entire time must be counted as working time. See 29 CFR § 785.22(b).

5. Do the plan's provisions for payment of individuals who have other positions with the municipality at two different rates for their work as firefighters and their work in their regular positions comply with the FLSA?

Answer: Yes. An employer may establish different non-overtime rates of pay (of not less than the applicable minimum wage) for different types of work performed by an employee within a single workweek. See 29 CFR § 778.115.

6. Do the plan's provisions to pay for overtime at the weighted average of the two hourly rates for individuals who have other positions with the municipality comply with the FLSA?

Answer: Yes. Where an employee in a single workweek works at two (or more) different types of work for which different non-overtime rates of pay have been established, the regular rate of pay for overtime purposes is the weighted average of such rates. See 29 CFR § 778.115.

7. Are there any other provisions of the FLSA that may impact the proposed firefighter plan?

Answer: Certain statutory exceptions permitting alternative methods of computing overtime pay in the case of an employee paid at two or more different rates of pay for different types of work performed are discussed in 29 CFR §§ 778.415 through 778.421.

This opinion is based exclusively upon the information you provided. The existence of other factual information not contained in your description might require a different conclusion than the one expressed herein.

Sincerely,

Tammy D. McCutchen
Administrator
