

LAW ENFORCEMENT MANAGEMENT INSTITUTE

**APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF
STATE AND LOCAL GOVERNMENT**

A RESEARCH PAPER
SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR
MODULE II

BY

MORGAN ROBNETT, PH.D.

DEPUTY SHERIFF
STAFF ASSISTANT TO THE SHERIFF
BRAZOS COUNTY SHERIFF'S DEPARTMENT
300 EAST 26TH STREET, SUITE #105
BRYAN, TEXAS 77803

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To Fred Toler, Executive Director of the Texas Commission on Law Enforcement Officer Standards and Education, to Jack Ryle, Director of the Law Enforcement Management Institute of Texas and to the many other dedicated law enforcement officers whom I have associated with for over 30 years.

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ABSTRACT

Application of the Fair Labor Standards Act to Employees of
State and Local Government (September, 1990)

In 1938, the United States Congress enacted the Fair Labor Standards Act (FLSA) to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.

The FLSA has been amended several times and the Act and its Amendments have been challenged and held constitutional.

The purposes of this study were to ascertain the contents of the FLSA as it effected primarily law enforcement employees, and, to make this information available to interested law enforcement administrators.

This study was focused primarily on legal definitions, accrual and use of compensatory time, maximum hours standards, on-duty/off-duty status, records keeping, and enforcement of the FLSA.

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SECTION I

INTRODUCTION: NATURE AND SIGNIFICANCE OF THE PROBLEM

The Nature of the Study

In 1938, the United States Congress enacted the Fair Labor Standards Act (FLSA) to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.¹

Since its inception, the FLSA has been amended several times and the Act and its Amendments have been challenged and held constitutional. As a results of these decisions, State and local government employees previously determined to be engaged in traditional governmental functions, and thus excluded from the minimum wage and overtime pay provisions of the FLSA, became subject to these provisions.²

Purpose and Research Questions

The purpose of this research is:

- A. To determine the content of the Fair Labor Standards Act;
- B. To determine the application, if any, of the FLSA as it deals with State and local governments, specifically law enforcement employees; and
- C. To make the research findings available to interested law enforcement administrators for their

information and possible consideration in policy and/or personnel actions.

This research will provide information to law enforcement agencies, the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE), The Law Enforcement Management Institute of Texas (LEMIT), and other agencies which are effected by the FLSA.

Procedure and Limitations

This study was limited to information collected from publications and documents, face-to-face interviews, and/or telephone interviews. Informants were assured of confidentiality, but, some informants may not be candid in their responses.

This study is not intended to be all encompassing in its research of the Fair Labor Standards Act, but rather a study that is generally restricted to law enforcement. It is also intended to be brief and concise in nature.

Definitions of Terms

COMPENSATORY TIME and **COMPENSATORY TIME OFF:** Means hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the

statutory hours for which overtime compensation is required by section 7 of the FLSA.³

FLSA: The Fair Labor Standards Act which regulates the working condition(s) of public employees.

LAW ENFORCEMENT OFFICER: A person certified as a Peace Officer by the Texas Code of Criminal Procedure, Annotated, Article 2.12 (example: municipal Police Officer, Sheriff, Constable, Texas Department of Public Safety Officer, etc. and/or their deputies), and, those persons with similar designations from other states, and, those persons designated as law enforcement officers by the United States government (example: Special Agents of the Federal Bureau of Investigation, the Secret Service, Border Patrol, etc.)

LEMIT: The Law Enforcement Management Institute of Texas which is an integral part of TCLEOSE.

PUBLIC SAFETY ACTIVITIES: As used in the FLSA, includes law enforcement, fire fighting or related activities.⁴

REASONABLE PERIOD: The period used to determine when compensatory time has been granted and will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case.⁵

REGULAR RATE: The regular rate may be more than the statutory minimum wage but it cannot be less. The regular rate includes all remuneration for employment paid to an employee such as commissions, attendance bonuses, production

bonuses, shift differentials, and other payments for work actually performed, including the cost of any facilities furnished to an employee.⁶

TCLEOSE: The Texas Commission on Law Enforcement Officer Standards and Education which is a State of Texas agency that regulates and certifies law enforcement agencies and police officers in the State of Texas.

TOUR OF DUTY: The period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period.⁷

VOLUNTEERS: An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during those hours. Auxiliary police and firefighters are considered volunteers and the FLSA provides that volunteers are not considered as "employees."⁸

WORK PERIOD: Refers to any established and regularly recurring period of work which, under the terms of the FLSA and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day.⁹

Design and Statistics

This was a descriptive study utilizing frequencies, percentages, and means. This information was used to partially analyze and draw conclusions from the research information that was gained from the related literature and from interviews. The information in this study is presented in a descriptive manner.

Organization

This study has been divided into six sections. Section I present the nature of the study, the purpose of the study, the research questions, procedure and limitations of the study, the definition of terms, and the organization of the study.

Section II presents a review of the related literature and it details areas that have been investigated.

Section III presents the major findings that resulted from the research.

Section IV presents, summarizes, and analyzes the information from the research.

Section V presents the selected bibliography of the research literature.

Section VI presents the professional resume of the investigator.

SECTION II

REVIEW OF THE RELATED LITERATURE

Background

In 1966, Congress amended the Fair Labor Standards Act of 1938 to cover employees of certain publicly operated institutions, principally schools and hospitals. The Educational Amendments of 1972 further extended the FLSA coverage to employees of public preschools. Virtually all of the remaining State and local government employees who were not covered as a result of the 1966 and 1972 FLSA Amendments were brought under the coverage of the Act by the 1974 Amendments.¹⁰

On April 18, 1986, the Department of Labor published in the Federal Register (51 FR 13402) proposed regulations to implement the changes in the FLSA resulting from Amendments that were enacted on November 13, 1985. These Amendments changed certain provisions of the FLSA as they relate to employees of State and local government resulting from a U. S. Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia), 105 S.Ct. 1005.¹¹

A total of 165 comments were received by the Wage and Hour Division on these proposed regulation changes. Included were requests from a number of commenters requesting that the regulations be revised to explain the

application of the FLSA to specific hypothetical situations (or ask for specific opinions on fact situations), concerning, for example, hours worked issues. In the Department's view, the regulations, which are intended to have broad, general application, cannot attempt to address such specific issues which, in any event, would require a full examination of all the facts and circumstances in specific cases. Therefore, such comments have not been addressed.¹²

These 1985 Amendments included special provisions applicable to State and local government agencies and their employees. The amended Act permits such agencies to grant compensatory overtime wages to their employees under certain conditions, permits the exclusion of certain hours of work in calculating overtime compensation for employees who work for two separate employers or in two separate capacities for the same employer, and provides special standards by which volunteers for public agencies are excluded from the Act's coverage (and therefore, from the FLSA's minimum wage and overtime pay requirements) provided they receive no compensation other than reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof.¹³

Section 6 of the FLSA requires the payment of a minimum wage by an employer to his/her employees who are subject to the Act.¹⁴ Section 7 of the FLSA requires that covered,

nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. This compensation received in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.¹⁵

Exemptions to the Act

The Act also excludes, from its provisions, elected public officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities. A condition for exclusion is that the employee must not be subject to the civil service laws of the employing State or local agency.¹⁶

An exemption from both the minimum wage and overtime pay requirements is provided in section 13(a)(1) of the FLSA for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity. An employee will qualify for exemption if he/she meets all of the pertinent tests relating to duties, responsibilities, and salary as stipulated in the following:

Executive: In order to be exempt as a bona fide executive employee, all of the following tests must be met:¹⁷

A. The employee's primary duty must be management of the enterprise, or of a customarily recognized department or subdivision; and

B. The employee must customarily and regularly direct the work of at least two or more other employees therein; and

C. The employee must have the authority to hire or fire, or recommend hiring and firing; or whose recommendations on these and other actions affecting employees is given particular weight; and

D. The employee must customarily and regularly exercise discretionary powers; and

E. The employee must devote no more than 20 percent of his/her hours worked to activities not directly and closely related to the managerial duties; and

F. The employee must be paid a salary basis at a rate of at least \$155 a week exclusive of board, lodging or other facilities.

Administrative: In order to be exempt as a bona fide administrative employee, all of the following tests must be met:¹⁸

A. The employee's primary duty must be either:

1. Responsible office or nonmanual work directly related to the management policies or general business operations of the employer or the employer's customers; or

2. Responsible work that is directly related to academic instruction or training carried on in the administration of a school system or educational establishment; and

B. The employee must customarily and regularly exercise discretion and independent judgment, as distinguished from using skills and following procedures, and must have the authority to make important decisions; and

C. The employee must:

1. Regularly assist a proprietor or bona fide executive or administrative employee; or

2. Perform work under only general supervision along specialized or technical lines requiring special training, experience or knowledge; or

3. Execute under only general supervision special assignments; and

D. The employee must not spend more than 20 percent of the time worked in the work period on

work that is not directly and closely related to the administrative duties discussed above; and

E. The employee must be paid on a salary or fee basis at a rate of not less than \$155 a week.

Professional: In order to be exempt as a bona fide professional employee, all of the following must be met:¹⁹

A. The employee's primary duty must be either:

1. Work requiring knowledge of an advanced type in a field of science or learning, customarily obtained by a prolonged course of specialized instruction and study; or

2. Work that is original and creative in character in a recognized field or artistic endeavor the result of which depends primarily on the employee's invention, imagination, or talent; or

3. Work as a teacher certified or recognized as such in the school system or educational institution by which he/she is employed; and

B. The employee must consistently exercise discretion and judgment; and

C. The employee must do work that is predominantly intellectual and varied, as distinguished from routine mental, manual, mechanical, or physical duties; and

D. The employee must not spend more than 20 percent of the time worked in the work period on activities not essentially a part of and necessarily incident to the professional duties; and

E. The employee must be paid on a salary or fee basis at a rate of not less than \$170 a week.

Small Fire Protection and Law Enforcement Agencies:

Section 13(b)(20) of the FLSA provides an overtime pay exemption for any employee of a public agency engaged in fire protection or law enforcement activities (including security personnel in correctional institutions), if the public agency employs less than five (5) employees (including part-time employees) in fire protection or law enforcement activities as the case may be. Only employees of a public agency who are actively engaged in the named activities are counted for determining the availability of the exemption.²⁰

Hours Worked

An employee who is subject to the FLSA in any work period must be paid in accordance with its provisions for all hours worked. In general "hours worked" includes all

time that an employee is required to be on duty, or on the employer's premises, or at a prescribed workplace for the employer, and all time during which the employee is suffered or permitted to work for the employer.²¹

Hours worked have been established by the Supreme Court as including at least all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his/her business." Some examples are:²²

On Duty: A highway department employee who must wait for a vehicle to be removed from the road, a firefighter who watches television at the firehouse while waiting for alarms, and a worker who talks to fellow employees while waiting for equipment to be repaired are all working during their periods of inactivity. The time may be hours worked even though the employee is allowed to leave the premises or the job site during periods of inactivity when such periods are unpredictable and of short duration. In such case, because the employee is unable to use the time effectively for his/her own purpose, it belongs to and is controlled by the employer.²³

Off Duty: Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for

his/her own purposes are not hours worked. Whether the time is long enough to enable the employee to use the time effectively for his/her own purposes depends upon all of the facts and circumstances of the case.²⁴

On-Call Time: An employee who is not required to remain on the employer's premises and is free to engage in his/her own pursuits, subject only to the understanding that the employee leave word at his/her home or with the employer where he/she can be reached by the employer, is not working while "on call."²⁵

On-Call And Required To Remain At Home: An employee who is "on call" may be required to remain at home to receive telephone calls when the employer's office is closed. If the employee is uninterrupted for long periods of time, any reasonable agreement of the parties for determining the number of hours worked will be accepted.²⁶

Duty Of 24 Hours Or More: Fire Protection and Law

Enforcement Employees: A special 24-hour-duty rule for determining if sleep and meal time may be excluded is applicable to law enforcement and fire protection personnel in a public agency. The rule is that, where the employer has elected to use the partial overtime pay exemption, sleep and meal time cannot be excluded from compensable hours of work where (1). the employee is on duty for less than 24 hours, or (2). where the

employee is on duty for exactly 24 hours. If the employee is on duty for more than 24 hours, sleep and meal time can only be excluded where the parties have agreed in advance of the work period to exclude those time periods from hours worked.²⁷

Compensatory Time

Generally, as a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.²⁸

The Department of Labor has no legal authority under the statutory language or legislative history of the 1985 Amendments to issue rules concerning collective bargaining negotiations between a public agency and their employees

regarding compensatory time, except those needed to assure that any such agreements are consistent with the provisions of section 7(o) of the Act. The outcome in such cases is a matter between the parties and is dependent upon the terms of the expiring collective bargaining agreement, any other formal agreements or understandings between the parties, and applicable labor-management relations laws.²⁹

If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. Included are "any employees in law enforcement activities" which includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, and reformatories.³⁰ All other covered and nonexempt employees can accrue up to 240 hours of compensatory time.

Any such employee who, after April 15, 1986, has accrued 480 hours of compensatory time off shall, for additional overtime hours of work, be paid overtime

compensation.³¹ However, support staff, such as civilian dispatchers, who regularly perform "emergency response" activities will qualify for the higher compensatory time cap because of their regular involvement in such "emergency" activities.³²

The legislative history is clear that an employee must be regularly engaged in an emergency response activity to qualify for the higher compensatory time cap. Thus, the term "emergency response" does not apply to employees who only in rare instances perform emergency services. In addition, emergency response is not intended to be a subset of public safety activity, but is meant to include those persons who regularly perform work in emergency situations but would not qualify as "public safety." This may include dispatchers of public safety employees and ambulance and rescue personnel who do not qualify as law enforcement or fire protection employees.³³

The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480 hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked. The 480- and 240-hour limit on accrued compensatory time only applies to overtime hours worked

after April 15, 1986, and time accrued prior to that time is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.³⁴

For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least seven (7) but less than 28 consecutive days, no overtime compensation is required under section 7(k) of the Act until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to twenty-eight.

Section 7(k) of the Act permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a law enforcement officer's work period is 28 consecutive days, and he/she works 65 hours in each of the first two weeks, but only 41 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 171 for the work period. If the same officer had a work period of only 14 consecutive days, overtime compensation or compensatory time off would be due for 44 hours (130 minus 86 hours) in the first 14 day work period.³⁵

The ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay of compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):³⁶

<u>Work Period (Days)</u>	<u>Maximum Hours Standards for Law Enforcement</u>
28.....	171
27.....	165
26.....	159
25.....	153
24.....	147
23.....	141
22.....	134
21.....	128
20.....	122
19.....	116
18.....	110
17.....	104
16.....	98
15.....	92
14.....	86
13.....	79
12.....	73
11.....	67
10.....	61
9.....	55
8.....	49
7.....	43

Also, an employee of a public agency which is a State, political subdivision or a State, or an interstate governmental agency, who has accrued authorized compensatory time off, and after requesting the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the

request if the use of the compensatory time does not unduly disrupt the operations of the public agency.³⁷

An employee who has accrued compensatory time authorized as above, shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than:³⁸

A. The average rate received by such employee during the last three (3) years of the employee's employment, or

B. The final regular rate received by such employee, whichever is higher.

Travel Time

The principles which apply in determining whether or not time spent in travel is working time depends upon the kind of travel involved. An employee who travels from home before his/her regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he/she works at a fixed location or at different job sites.³⁹

There may be instances when travel from home to work is worktime. For example, if an employee who has gone home after completing his/her day's work is subsequently called out at night to travel a substantial distance to perform an emergency job, all time spent on such travel is working time.⁴⁰

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days.⁴¹

Lectures, Meetings and Training Programs

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:⁴²

- A. Attendance is outside of the employee's regular working hours;
- B. attendance is in fact voluntary;
- C. the course, lecture, or meeting is not directly related to the employee's job; and
- D. the employee does not perform any productive work during such attendance.

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his/her present working conditions or the continuance of

his/her employment would be adversely affected by nonattendance.⁴³

The training is directly related to the employee's job if it is designed to make the employee handle his/her job more effectively as distinguished from training him/her for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make him/her a better stenographer. Time spent in such a course given by the employer or under his/her auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to his/her job. Thus, the time he/she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his/her present job, the training is not considered directly related to the employee's job even though the course incidentally improves his/her skill in doing his/her regular work.⁴⁴

Of course, if an employee on his/her own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his/her employer even if the courses are related to his/her job.⁴⁵

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his/her employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his/her job, or paid for by the employer.⁴⁶

Recording Working Time

Section 11(c) of the FLSA authorizes the Secretary of Labor to promulgate regulations requiring the keeping of records of hours worked, wages paid and other conditions of employment.⁴⁷

For each public agency employee as defined in the Act, the agency shall maintain and preserve records containing:⁴⁸

A. The number of hours worked during a work period by each employee at the rate of one and one-half hour for each overtime hour worked;

B. The number of hours of such compensatory time used each work period;

C. The number of hours of compensatory time compensated in cash, the total amount paid and the date of such payment; and

D. Any collective bargaining agreement or written understanding or agreement with respect to earning and using compensatory time off.

In addition, certain records must be preserved for specified periods of time. The following records must be preserved for a period of three (3) years:⁴⁹

A. Payroll records,

B. Certificates, agreements, plans, notices, collective bargaining agreements, etc. from their last effective date,

C. Sales and purchase records.

The following records must be preserved for a period of two (2) years:⁵⁰

A. Supplementary basic records such as basic employment and earning records, and wage rate tables,

B. Order, shipping, and billing records,

C. Records of additions to or deductions from wages paid.

Enforcement

Section 11(a) of the FLSA authorizes representatives of the Department of Labor to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records; and question employees to determine whether any person has violated any provision of the FLSA. Every effort is made to

resolve the issue of compliance and payment of back wages at an administrative level.⁵¹

However, the FLSA also provides for the following enforcement procedures:⁵²

A. An employee may file suit to recover back wages and an equal amount in damages, plus attorney's fees and court costs.

B. The Secretary of Labor may file suit on behalf of the employees for back wages and an equal amount in damages.

C. The Secretary may obtain a court injunction to restrain any person from violating the law, including unlawfully withholding proper minimum wage and overtime pay.

D. Employers who have willfully violated the law may, upon conviction, face criminal penalties of a fine of not more than \$10,000, or to imprisonment for not more than six months, or both.

Also, employees who have filed complaints or provided information during any investigation may not be discriminated against or discharged for having done so. If they are, they may file a suit or the Secretary of Labor may file a suit on their behalf for relief, including reinstatement to their jobs and payment of wages lost plus monetary damages.⁵³

A two year statute of limitations applies to the recovery of back wages except in the case of willful violations, in which case a three year statute of limitations would be applicable.⁵⁴

SECTION III

MAJOR FINDINGS

In 1938, the United States Congress enacted the Fair Labor Standards Act (FLSA) to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.

Since its inception, the FLSA has been amended several times and the Act and its Amendments have been challenged and held constitutional. As a results of these decisions, State and local government employees previously determined to be engaged in traditional governmental functions, and thus excluded from the minimum wage and overtime pay provisions of the FLSA, became subject to these provisions.

The purpose of this research was to:

A. To determine the content of the Fair Labor Standards Act;

B. To determine the application, if any, of the FLSA as it deals with State and local governments, specifically law enforcement employees; and

C. To make the research findings available to interested law enforcement administrators for their information and possible consideration in policy and/or personnel actions.

As previously stated in Section I, this study was not intended to be all encompassing in its research of the Fair Labor Standards Act, but rather a study that was generally restricted to law enforcement. It was also intended to be brief and concise in nature. Also, this study was limited to information collected from publications and documents, face-to-face interviews, and/or telephone interviews.

The major findings of this research are areas of the FLSA deemed significant by the investigator from his conversations and interviews with law enforcement administrators, interviews with a representative of the United States Department of Labor's Hour and Wage Division, the publications and documents research, and the investigator's law enforcement administrative experience.

Two broad, general research purposes were formulated to ascertain the information for this study. The major findings of each of these purposes will be discussed as follows:

The first research purpose was to determine the content of the Fair Labor Standards Act. This was accomplished by visiting Mr. Charles Frazier of the United States Department of Labor (DOL), Employment Standards Administration, Wage and Hour Division in Bryan, Texas. Mr. Frazier furnished numerous publications and documents that were authored by the DOL that specifically dealt with the Fair Labor Standards Act of 1938 and its Amendments. Even though there

were a small number of publications, these publications were subject specific and they dealt with the Act and the application of the Act to State and local government employees. These documents were researched by the investigator to ascertain their exact contents and applications.

The second research purpose was to determine the application, if any, of the FLSA as it dealt with State and Local governments, specifically law enforcement employees. This was accomplished by researching the publications from the DOL, and, the following major findings concerning the FLSA's application to law enforcement employees were discovered:

A. Significant terms such as "compensatory time," "public safety activities," "reasonable period," "regular rate," and "work period" were defined.

B. On November 13, 1985, Amendments to the FLSA were enacted that changed certain provisions of the FLSA as they related to employees of State and local government resulting from a U. S. Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority.

C. Many comments concerning these 1985 Amendments were received by the Hour and Wage Division. Many requested that the regulations be revised to explain the application of the FLSA to specific hypothetical

and/or fact situations. The Department views these regulations with the intent that they have broad, general applications and that specific issues would require a full examination of all facts and circumstances in specific cases. Consequently, the Department refused to address these requests.

D. Section 6 of the FLSA requires the payment of a minimum wage by an employer to his/her employees who are subject to the Act.

E. Section 7 of the FLSA requires that covered, non-exempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards.

F. The Act also excludes certain individuals from both the minimum wage and overtime pay requirements. A major condition for this exclusion is that the employee must not be subject to the civil service laws of the employing State or local agency. Exempt employees are:

1. Elected public officials, their immediate advisors, and certain individuals who they appoint or select to serve in various capacities.

2. A bona fide executive, administrative, professional, or outside sales capacity.

3. The FLSA provides an overtime pay exemption for any employee of a public agency engaged in fire protection or law enforcement

activities (including security personnel in correctional institutions), if the public agency employs less than five (5) employees.

G. In general, "hours worked" includes all time that an employee is required to be on duty, or on the employer's premises, or at a prescribed workplace for the employer, and all time during which the employee is suffered or permitted to work for the employer.

H. Generally, as a condition for use of compensatory time in lieu of overtime payment in cash, the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees.

I. The DOL has no legal authority under the statutory language or legislative history of the 1985 Amendments to issue rules concerning collective bargaining negotiations between a public agency and their employees regarding compensatory time, except those needed to assure that any such agreements are consistent with the provisions of section 7(o) of the Act.

J. Compensatory time earned while performing public safety activities (to include security personnel

in correctional institutions), an emergency response activity, or a seasonal activity cannot be accrued in excess of 480 hours. All other covered and nonexempt employees can accrue up to 240 hours of compensatory time.

K. Compensatory time is earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by the Act. Thus, the 480 hour limit represents not more than 320 hours of actual overtime worked, and, the 240 hour limit represents not more than 160 hours of actual overtime worked.

L. Section 7(k) of the Act permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. The chart on page 19 of this study indicates the work period limitations for law enforcement and fire protection employees.

M. Upon request, the employee must be permitted the use of his/her accrued compensatory time within a "reasonable time" after making the request and if the use of the compensatory time does not unduly disrupt the operations of the public agency.

N. An employee who has accrued authorized compensatory time, shall, upon termination be paid for the unused compensatory time.

O. "Ordinary" travel time, such as travelling to and from his/her home to/from their place of employment at the beginning and end of a workday is incidental to the employment and is not considered to be "working time." If an employee has gone home after a normal workday and is called to return to a workplace for an emergency job, the travel is working time.

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

1. Attendance is outside of the employee's regular working hours;
2. attendance is in fact voluntary;
3. the course, lecture, or meeting is not directly related to the employee's job; and
4. the employee does not perform any productive work during such attendance.

Q. Attendance is not voluntary if it is required by the employer or the employee is given to understand or led to believe that his/her present working conditions or the continuance of his/her employment would be adversely affected by nonattendance.

R. The training is directly related to the employee's job if it is designed to make the employee handle his/her job more effectively as distinguished

from training him/her for another job, or to a new or additional skill.

S. If an employee on his/her own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his/her employer even if the courses are related to his/her job.

T. For each public agency employee as defined in the Act, the agency shall maintain and preserve records containing:

1. The number of hours worked during a work period by each employee at the rate of one and one-half hour for each overtime hour worked;
2. the number of hours of such compensatory time used each work period;
3. the number of hours of compensatory time compensated in cash, the total amount paid and the date of such payment; and
4. any collective bargaining agreement or written understanding or agreement with respect to earning and using compensatory time off.

U. The FLSA authorizes representatives of the Department of Labor to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and

records; and question employees to determine whether any person has violated any provision of the FLSA.

V. Every effort is made to resolve the issue of compliance and payment of back wages at an administrative level.

W. An employee, or the Secretary of Labor on the employee's behalf, may file suit to recover back wages and an equal amount in damages, plus attorney's fees and court costs.

X. Employees who have filed complaints or provided information during any investigation may not be discriminated against or discharged for having done so.

Y. A two year statute of limitations applies to the recovery of back wages except in the case of willful violations, in which case a three year statute of limitations would be applicable.

Z. Employers who have willfully violated the law may, upon conviction, face criminal penalties of a fine of not more than \$10,000, or to imprisonment for not more than six months, or both.

SECTION IV

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

The Fair Labor Standards Act of 1938 was amended specifically in 1985 to change certain provisions as they relate to employees of State and local government resulting from a U. S. Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority et. al. (Garcia), 105 S. Ct. 1005.

These 1985 Amendments included special provisions applicable to State and local government agencies and their employees. The amended Act permits such agencies to grant compensatory overtime wages to their employees under certain conditions, permits the exclusion of certain hours of work in calculating overtime compensation for employees who work for two separate employers or in two separate capacities for the same employer, and provides special standards by which volunteers for public agencies are excluded from the Act's coverage provided they receive no compensation other than reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof.

Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. This compensation received in lieu of cash must be at the rate of not less

than one and one-half hours of compensatory time for each hour of overtime work.

The Act also excludes, from its provisions, elected public officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities. A condition for exclusion is that the employee must not be subject to the civil service laws of the employing State or local agency.

An employee who is subject to the FLSA in any work period must be paid in accordance with its provisions for all hours worked. In general "hours worked" includes all time that an employee is required to be on duty, or on the employer's premises, or at a prescribed workplace for the employer, and all time during which the employee is suffered or permitted to work for the employer.

If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time. Included are "any employees in law enforcement activities" which includes, by express reference, "security personnel in correctional institutions."

For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least seven (7)

but less than 28 consecutive days, no overtime compensation is required under section 7(k) of the Act until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to twenty-eight. Section 7(k) of the Act permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees.

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

- A. Attendance is outside of the employee's regular working hours;
- B. attendance is in fact voluntary;
- C. the course, lecture, or meeting is not directly related to the employee's job; and
- D. the employee does not perform any productive work during such attendance.

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his/her present working conditions or the continuance of his/her employment would be adversely affected by nonattendance.

The training is directly related to the employee's job if it is designed to make the employee handle his/her job

more effectively as distinguished from training him/her for another job, or to a new or additional skill. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and it is not intended to make the employee more efficient in his/her present job, the training is not considered directly related to the employee's job even though the course incidentally improves his/her skill in doing his/her regular work.

For each public agency employee as defined in the Act, the agency shall maintain and preserve records containing:

- A. The number of hours worked during a work period by each employee at the rate of one and one-half hour for each overtime hour worked;
- B. The number of hours of such compensatory time used each work period;
- C. The number of hours of compensatory time compensated in cash, the total amount paid and the date of such payment; and
- D. Any collective bargaining agreement or written understanding or agreement with respect to earning and using compensatory time off.

Section 11(a) of the FLSA authorizes representatives of the Department of Labor to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records; and

question employees to determine whether any person has violated any provision of the FLSA. Every effort is made to resolve the issue of compliance and payment of back wages at an administrative level.

Also, employees who have filed complaints or provided information during any investigation may not be discriminated against or discharged for having done so. If they are, they may file a suit or the Secretary of Labor may file a suit on their behalf for relief, including reinstatement to their jobs and payments of wages lost plus monetary damages.

A two year statute of limitations applies to the recovery of back wages except in the case of willful violations, in which case a three year statute of limitations would be applicable.

In conclusion, it is obvious that the seriousness of the content of the Fair Labor Standards Act of 1938 can not be overlooked by any law enforcement administrator. The Act specifically sets out the working conditions which are mandated for law enforcement and other public employees. The parameters of the accumulation of compensatory time, the method of payment for overtime, and exempt personnel are clearly stated in the Act. In addition, the penalties for violation of the Act are strenuous enough to deplete a small law enforcement agency's annual budget.

It is recommended that this research be made available to any State and/or local law enforcement or other public agency who might find it of interest. It is also recommended that each public administrator seriously study the FLSA and that each administrator seek competent legal advise from their attorney before making any firm commentment to alter their present employee compensation and/or record keeping systems.

SECTION V

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SECTION VI

PROFESSIONAL VITA

WALTER MORGAN ROBNETT

Birthplace: Dallas, TX Birthdate: July 21, 1938
 Children: Sandra Lee Robnett and Sheri Lynn Robnett

ACADEMIC HISTORY

Texas A&M University	Ph.D.	Curriculum and Instruction	1989
Southern Methodist University	M.P.A.	Public Administration	1980
Sam Houston State University	B.S.	Criminal Justice	1977
Waxahachie High School Waxahachie, TX			1956

PROFESSIONAL EXPERIENCE

Staff Assistant to the Sheriff Brazos County Sheriff's Department Bryan, TX	1990-Present
Division Head Law Enforcement & Security Training Division Texas A&M University, College Station, TX	1985-1990
Assistant Chief Deputy Dallas County Sheriff's Department Dallas, TX	1982-1984
Motorcycle Sergeant of Police (Retired) Dallas Police Department Dallas, TX	1962-1982

MILITARY EXPERIENCE

United States Coast Guard Reserve Lieutenant Commander (O-4) Commanding Officer 8th District Law Enforcement Unit New Orleans, LA	1966-Present
Texas Air National Guard Dallas, TX	1960-1966

SPECIALIZED TRAINING

Criminal Investigator's Course	1988
Federal Law Enforcement Training Center	
Brunswick, GA	
International Conference on Assessment Centers	1987
International Association of Chiefs of Police	
Orlando, FL	
Management Seminar	1987
Center for Executive Development	
College of Business	
Texas A&M University	
College Station, TX	
Northwestern University Traffic Institute	1972
Evanston, IL	

OTHER

Who's Who in Law Enforcement for 1990	1990
American Biographical Institute's	1990
Distinguished Leadership Award	
Dignitary Protection Detail	1986
U. S. Coast Guard	
Statute of Liberty Celebration	
Governor's Island	
New York, NY	
Planner and Operational Commander	1984
Dallas County Sheriff's Department	
Republican National Convention	
Dallas, TX	

WRITTEN MATERIALS

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Unpublished doctoral dissertation	
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Administration Thesis	