

LAW ENFORCEMENT MANAGEMENT INSTITUTE

FAIR LABOR STANDARDS ACT:  
ITS APPLICATION TO THE POLICE FUNCTION

A LEARNING CONTRACT  
SUBMITTED IN PARTIAL FULFILLMENT  
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## PREFACE

This document was written to assist the author in completing the requirements of the learning contract for attendance in the Management Institute. The "Fair Labor Standards Act" was selected as a topic to provide the Texas Peace Officers with a guide to assist them in their understanding of the salient areas of the Act. In its ruling in Garcia v. San Antonio Transit Authority, the United States Supreme Court has affected the largest resource in the criminal justice field, its labor force. Peace officers should be familiar with the Act and its application to law enforcement functions. The motivation for selection of this topic arose from the many times that the author has observed the "Fair Labor Standards Act" misquoted or misunderstood. I thank the administrative and faculty staff of the Management Institute for their assistance and guidance. I also thank my brothers and sisters in law enforcement for my desire to continue.

Grady C. Patterson Jr.  
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To all our brothers and sisters in law enforcement that,  
while in the performance of their duty, they made the  
ultimate sacrifice so that others may live. May we never  
forget.

## INTRODUCTION

The Fair Labor Standards Act (FLSA) has been in existence since 1938. It was enacted by the U.S. Congress to assist the nation in recovery from the Great Depression by providing for minimum wage and overtime pay. It originally applied to the employees of private employers engaged in commerce. In 1966, the coverage of the Act was extended to include employees of schools, hospitals, nursing homes and local transit authorities. This expansion of scope was upheld by the U.S. Supreme Court in their decision of Maryland v. Wirtz, 392 U.S. 183 (1968).

In 1974, Congress extended the coverage of the Act to include employees of state and local governments. This was overturned by the U.S. Supreme Court in their decision of National League of Cities v. Usery, 426 U.S. 833 (1976). In its decision, "The court reasoned that 'integral or traditional state and local government functions' could not be invaded by the federal government. Thus wages for traditional functions such as firefighters, policemen and school employees could not be regulated by Federal Law." (Ginsburg and Abrahams 1986, 100-5) This decision led to confusion and more litigation.

In 1985, the U.S. Supreme Court in its decision of Garcia v. San Antonio Transit Authority U.S. 105 Sct., 1005

(1985) extended the coverage of the Act to employees of state and local governments. This was delayed by the Legislature with the passage of the Fair Labor Standards Amendments of 1985. The Amendments of 1985 retroactively removed any liability for payment of overtime prior to April 14, 1986. The Department of Labor issued regulations that were effective on January 16, 1987.

The Act provides minimum standards for the payment of wages and overtime. It does not require or restrict the use of sick leave or personal leave. It does not restrict an employer from paying wages higher than the minimum or payment of overtime sooner than required. The Act extends coverage to law enforcement employees of state, county and local governments.

The Fair Labor Standards Act is regulated by the Department of Labor, Wage and Hour Division. The Act does not preempt state or local law or bargaining agreements that meet the minimum requirements of the Act. The relation between these must be understood.

A state or local government is permitted under the act to pass legislation which exceeds the minimum requirements of the Act . . . Additionally, a state or local law may require that overtime be calculated on a workweek basis rather than a longer period of time. (Phillips and Miller 1988, 7)

## COMPENSABLE HOURS

Compensable hours are those hours where an employee is on duty, on the employer's premises, at the prescribed workplace, or any other time where an employee has been "suffered or permitted" to work for the employer. This does include, "all pre-shift and post-shift activities that are an integral part of the employee's principal activity, or that are closely related to performance." (Ginsburg and Abrahams 1986, 600-27) An employee can be away from the employer's premises under conditions that restrict the employees' use of their time to conduct personal business.

For law enforcement employees, there are several conditions that are considered compensable hours. Roll call is compensable when attendance is required as a condition of employment. Post-shift activities such as writing reports are also compensable. Appearance in court to testify in a duty-related matter is compensable. Texas state law requires a municipality to compensate a fireman or police officer for an appearance in court if the municipality is a party or has an interest and the appearance is made on their time off.

### On-Call Time

On-call time will be considered as compensable hours



if the employee has to remain on the employer's premises or the employee's movement is so restricted that he is unable to conduct personal business. On-call time will not be considered compensable if the employee on call is only required to carry a pager or leave a forwarding phone number. If the on-call employee is called out to work, the time from the notification, including travel time, is compensable. If a law enforcement officer responds to an emergency while off duty, the time spent responding to the emergency is compensable.

#### In-Service Training Hours

In-service training hours are compensable for law enforcement officers as long as the training sessions occur on duty or off duty. This was discussed in a Department of Labor wage and hour opinion letter dated January 2, 1987. Wage and Hour administrator Paula Smith stated:

The police officers attend state-certified training programs on a voluntary basis, sometimes during scheduled shifts and sometimes on their days off. The topics covered at these sessions include fingerprint analysis, accident investigation techniques and other law enforcement related training . . . . The training sessions are directly related to the employee's job, according to the DOL. Therefore, the hours attending the police training sessions are compensable working hours, whether attendance is on a workday or not. (Ginsburg and Abrahams 1986, 9)

With respect to section 211.100 of the Texas Commission on Law Enforcement Officer Standards and Education rules, there is a requirement for agencies that appoint peace officers to provide forty (40)-hours of in-service training

in a twenty-four (24)-month period. These hours are compensable as long as the training is job related.

Other Compensable Hours

There are infrequent occurrences of certain activities that will be considered compensable based on the circumstances of the situation. They will be mentioned and I will refer the reader to Section 785.10 of Subpart C-Application of Principles of the Fair Labor Standards Act for more specific information. (See, Section 785.10)

- 1) Waiting time (785.18)
- 2) Rest periods/coffee breaks (785.18)
- 3) Sleep time (785.20)
- 4) Maintenance of equipment (785.25)
- 5) Travel time (785.36-41)
- 6) Adjusting grievances (785.42 & 7)
- 7) Medical attention (785.43 & 8)
- 8) Civic and charitable work (785.44)

## NON-COMPENSABLE HOURS

The Fair Labor Standards Act only requires the use of actual time worked in the computation of overtime and time worked. Non-compensable hours are those hours that are not considered time worked. This is not relative to whether an employee is paid for their personal leave. The Act also does not forbid the use of non-compensable hours in the computation of time worked. Employers do allow this practice so that an employee may benefit directly from his personal leave.

### Personal Leave

Time used by an employee under sick or personal leave policies are non-compensable under the Act for the computation of time worked and overtime. For example, if a law enforcement agency uses the 207(k) exemption (see Exemptions) and the work cycle is based on a fourteen (14)-day period and an employee uses forty (40)-hours of personal leave during the first seven (7)-days and then works eighty (80)-hours during the next seven (7)-days, the employer is not required under the Act to pay overtime. The forty (40)-hours of personal leave are non-compensable. The employee has a total of eighty (80)-hours of time worked for this time period even though the actual total is one-hundred and twenty (120)-hours. However; employers under the Act are not forbid-

den from using non-compensable hours in the computation of overtime and time worked.

#### Meal Times

Meal times for law enforcement officers are non-compensable as long as the meal time meets the requirement of a bona fide meal period. (785.19) The Department of Labor considers a Bona fide meal period to be at least thirty (30)-minutes or more and the employee must be completely relieved of their duties. Special considerations are required for law enforcement in defining "completely relieved of their duties." The Department of Labor states that:

With respect to law enforcement employees, we would not consider the fact that they remain in uniform as meaning that they are on duty while eating a meal. Moreover, we would not consider infrequent interruptions of short duration . . . as nullifying the exclusion of an otherwise bona fide meal period from compensable hours of work. (Ginsburg and Abrahams 1986, 30)

If the requirements of a bona fide meal period are not met or the officer is restricted to a certain location on call or is required to perform law enforcement related duties during their meal time, then the time is compensable and should be added to their total hours worked. (See Association of Highway Patrolmen v. Department of Personnel, 229 Cal Rptr.729 CalApp 1986 and Madera Police Officers Association v. City of Madera, 682 P2d 1087 Cal 1984.) These cases are relative to the bona fide meal period and restrictions that these courts considered in deciding these cases.

Officers should be able to enjoy their meal time.

Scheduling requires certain flexibility to allow officers to eat where they choose with respect to their district or assignment. It should also be permissible for officers to conduct reasonable personal business during their meal time. The scheduling of meal times should not be so strict that an officer cannot plan their meal time so that they may use it in correlation to a reasonable time for a meal.

## EXEMPTIONS

The Fair Labor Standards Act contains the following exemptions to be used in the computation of overtime.

### Complete Exemption

The Fair Labor Standards Act contains a complete exemption from the requirements of the Act for any public law enforcement agency that employs less than five (5)-employees.

### Partial Exemption

The Act contains a partial exemption for a public law enforcement agency that allows the agency to establish work periods longer than one (1)-week for the purposes of computation of overtime. An agency may establish a work period from seven (7)-days to twenty-eight (28)-days. A maximum number of hours is provided for in 207(k) of the Act. (see table 1)

There is no correlation required of actual work schedule and the 207(k) work period established by an agency. The partial exemption under 207(k) allows an agency a partial exemption of three (3)-hours per seven (7)-days. There is also a partial exemption for consideration of actual time worked during this time period. An employer is not required to use non-compensable time in their computation of overtime and time worked.

Table 1

207(k)

WORK PERIODS (DAYS)	MAXIMUM HOURS
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

### Executive, Administrative and Professional Exemptions

The Fair Labor Standards Act provides complete overtime exemptions for certain classes of employees. There are specific requirements for these exemptions and all of these requirements must be met.

Mere title or job description is not conclusive as to one's entitlement to overtime compensation or compensatory time. The facts and circumstances relating to the job duties actually performed by the employee are determinative. (Phillips and Miller 1988, 21)

The requirements of these exemptions can be established by a long or short test based on the salaried income of the employee. The long test requirements are quite lengthy; the short test is appropriate for law enforcement.

#### Executive

The short test requirements for an Executive exemption are:

- 1) A salary of at least two-hundred and fifty (250.00) dollars per week.
- 2) The employee regularly directs the work of at least two (2) or more employees.
- 3) The employees primary duty is management of the enterprise, or a recognized department or subdivision thereof.

#### Administrative

The short test requirements for an Administrative exemptions are:

- 1) A salary of at least two-hundred and fifty (250.00) dollars per week.
- 2) The employees primary duty consists of either:
  - a) responsible officer or non-manual work directly related to the management policies or general business operations of the employer or the employer's customers.
  - b) responsible work that is directly related to academic instruction or training carried on in the administration of a school system or educational establishment.



- 3) Such primary duty includes work requiring the exercise of discretion and independent judgment.

#### Professional

The short test requirements for a Professional employee are:

- 1) A salary of at least two-hundred and fifty (250.00) dollars per week.
- 2) The employee's primary duty consists of work requiring knowledge of an advanced type in a field of service or learning, or work as a teacher in an activity of imparting knowledge which requires consistent exercise of discretion and judgement;  
or
- 3) The primary duty is artistic work that requires invention, imagination, or talent in a recognized field of artistic endeavor.

The burden of providing specific facts regarding the exemptions of employees lies with the employer. The Department of Labor ruled that investigators are "non-exempt employees" for the purposes of the Fair Labor Standards Act. Investigators function as a police officer that investigates major crimes and disposes of each case. The Department of Labor stated in a Wage and Hour opinion letter dated February 1, 1988, "that a police department's primary function is law enforcement and that the investigative activities performed by the police officer were more akin to 'day-to-day production' operations of the police department than to its management policies or general business operations." Also, in recent litigation in New York and Washington D.C., the courts have held that patrol sergeants are also non-exempt employees.

### Volunteers

Law enforcement volunteers (reserves) are not considered employees for the purposes of the Fair Labor Standards Act. Their status remains this way even if a department furnishes equipment and training. A full-time employed law enforcement officer cannot perform law enforcement related duties for his employer on a voluntary basis. This time would be considered compensable time. It would not be compensable time if the employee volunteers for another agency with which his employer does not have any type of mutual aid agreement.

### Exemption Under 1985 Amendments

Law enforcement officials that are elected public officials and their advisors, or persons that are selected to serve other capacities, are excluded as employees as long as these persons are not subject to the civil service laws of their respective agencies.

### Section 18

Section 18 of the Fair Labor Standards Act states that:

No provision of this Act or any other order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established by this Act.

For cities having over ten thousand (10,000) inhabitants (based on the last Federal census), 142.001 (VTCS Ann) prohibits a city from requiring a police officer to work more hours than the majority of non-law enforcement employees except

in an emergency. The city must compensate at one and one-half ( $1\frac{1}{2}$ ) for all overtime hours in a seven (7)-day period. Police officers can agree to compensatory time and they may also agree to a longer work period as long as the majority of employees enter in this agreement.

COMPUTATION OF OVERTIME

Employees not exempt from overtime under the Fair Labor Standards Act must be compensated not less than one and one-half (1½) times their regular rate of pay. The regular rate of pay is determined by dividing the base wage of one week by the number of regularly scheduled hours. (see table 2)

Computation of Overtime  
Seven (7)-day work period

1) <u>Hourly</u>	
Hourly rate . . . . .	\$10.00
Overtime rate . . . . .	\$10.00 x 1.5 = \$15.00
2) <u>Hourly Plus</u>	
Hourly rate . . . . .	\$10.00
Incentive bonus (per year) . . . . .	\$2500.00
Incentive bonus (hourly)=\$2500.00 divided by 2,080hrs @ year = \$1.20 per hour	
Regular rate . . . . .	\$10.00 + 1.20 = \$11.20
Overtime rate (per hour) . . . . .	\$11.20 x 1.5 = \$16.80
3) <u>Guaranteed Salary/Fluctuating Workweek</u>	
\$300.00 per week with overtime paid over 50 hours per workweek with no set hours.	
Regular rate of pay (@hr) \$300.00 divided by 50 = \$6.00	
Overtime rate (@hr) . . . . .	\$6.00 x .5 = \$3.00
Total . . . . .	\$300.00 + (10 x \$3.00) = \$330.00

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Note: Annual salary divided by 52 = weekly salary  
 Monthly salary x 12 divided by 52 = weekly salary  
 Semi-monthly salary x 24 divided by 52 = weekly salary  
 Bi-weekly salary x 26 divided by 52 = weekly salary  
 (Phillips and Miller 1988, 18)

Table 2

When computing the overtime rate with the regular rate

of pay, there is no requirement to use any type of premium pay included in the calculations. The Fair Labor Standards Act contains no requirement for specific pay periods, only work periods with respect to 207(k). "The employer may pay the employee at any intervals permitted by state or local law or agreement." (Phillips and Miller 1988, 17)

## COMPENSATORY TIME

When the coverage of the Fair Labor Standards Act was extended to state and local government employees in 1985, compensatory time in lieu of payment was not allowed. The Act was amended in 1985 and compensatory time is now allowed with certain restrictions. For law enforcement employees, there is a four-hundred and eighty (480)-hour limit that applies. This includes three-hundred and twenty (320)-hours multiplied by 1.5 to equal the maximum limit. There is a lower limit for employees not engaged in law enforcement-related duties.

For Texas cities with population of ten-thousand (10,000) or more inhabitants, the use of compensatory time in lieu of overtime is restricted by state law. (see VTCS 142.001) The use of compensatory time can also be restricted by municipal ordinance or bargaining agreements that are not in conflict with the Act. Be aware that an employee cannot be forced to accumulate more compensatory time than an employer can grant time off for.

If an employee has accumulated compensatory time and requests to use this time, an employer cannot refuse the use of this time unless it would be disruptive to the operation.

Mere inconvenience to the employer is not sufficient basis for the denial of a request for compensatory time off . . . it must impose an unreasonable burden on the agency's ability to provide services . . . Further, the rules require that the denial be reasonable and in good faith. (Phillips and Miller 1988, 37)

Upon termination of an employee, he must be paid for the balance of his compensatory time. The rate of pay must be based on the highest rate of pay within a three (3) year period just prior to termination.

## RECORD KEEPING

The Fair Labor Standards Act requires that certain records be maintained for wages, hours worked and other pertinent employee facts to include:

- 1) Name of employee
- 2) Address
- 3) Date of Birth
- 4) Sex
- 5) Occupation
- 6) Time of day, day of week which employee's work-week begins.
- 7) Regular hourly rate of pay for any workweek which overtime is due.
- 8) Daily and weekly hours of work
- 9) Total daily/weekly straight time earnings
- 10) Total additions/deductions from pay
- 11) Total overtime earnings
- 12) Total wages for each period
- 13) Date of payment and pay period covered

Note: These records must be maintained for a period of three years.



## LIABILITY

An employee can sue for recovery of back wages and damages equal to the amount of back pay. This type of damages awarded is referred to as double back pay. The Department of Labor can also file a lawsuit against an employer on behalf of an employee. The employer or persons responsible can also be prosecuted criminally if it is determined that the violation was willful. The penalty can range from a ten-thousand (10,000) dollar fine to up to six (6) months imprisonment. An employer may not retaliate against an employee that files a complaint with the Department of Labor.

A good faith defense does exist for an employer if it can show that the employer's actions were in good faith and they relied on a written opinion of a Wage and Hour Administrator. The statute of limitations for a violation of the Fair Labor Standards Act is two (2)-years unless it is determined that the violation is willful, then the statute of limitations is extended to three (3)-years.

Since the coverage of the Fair Labor Standards Act has been extended to state and local government employees, much seems to be taken for granted by law enforcement employees without dispute based on actual knowledge of the Act

I encourage officers to conduct research regarding the application of the Act and it's effects on the police function. There have been many instances that I have personally observed where the Act has been interpreted to fit certain needs without consideration for the actual meaning of the Act. This document is intended to be a discussion of the Fair Labor Standards Act as amended but additional information can be obtained.\*

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