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The 24/7 Workplace and Its Ramification
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Susan M. Matta
CARMELL CHARONE WIDMER MOSS & BARR, LTD.
One East Wacker Drive, Suite 3300
CHICAGO, ILLINOIS 60601
TEL: (312) 8033
FAX: (312) 236-6774
EMAIL: smatta@carmellcharone.com
An Overview Of The Fair Labor Standards Act As It Relates To Firefighters

The Fair Labor Standards Act, 29 U.S.C. §201 et seq. (“Act”) contains several provisions regarding employees engaged in fire protection activities due to the unique circumstances surrounding their tours of duty. Below is a general overview of the provisions that apply to Firefighters. Note that where the term “Firefighter” is used, it is intended to apply broadly to those who meet the definition of employees engaged in fire protection activities.

The Act defines employees in fire protection activities as those who are firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who:

1. Are trained in fire suppression, have legal authority and responsibility to engage in fire suppression and are employed by a fire department of a municipality, county, fire district or State; and

2. Are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.


I. Work Period And Compensable Hours Of Work

Different rules apply to Firefighters because, unlike most individuals employed in a 24/7 workplace, Firefighters actually work 24 hour shifts. A Firefighter’s schedule is generally such that they are on duty for 24 hours and off duty for 48 hours. Because of this, the Act provides an exception to the general rules regarding work periods and overtime liability. Pursuant to Section 207(k) of the Act, and as set forth in the Code of Federal Regulations, 29 C.F.R. §553.230, Firefighters employed by a public agency who have a work period of at least 7 but less than 28 consecutive days are not entitled
to overtime compensation until their number of hours exceeds the number of hours
which bears the same relationship to 212 as the number of days in the work period
bears 28. 29 C.F.R. §553.230 sets forth a chart detailing the maximum hours standard
for determining how many hours can be worked in a work period without incurring
overtime liability. It is common for Firefighter bargaining units to have work periods of
either 28 or 21 days. Thus, Firefighters whose work period is 28 days are not entitled to
overtime until their hours exceed 212 in that work period, and those whose work period
is 21 days are not entitled to overtime until their hours exceed 159 in that work period.

*Id.*

A. Sleep Time

If an employer elects to pay Firefighters overtime pursuant to Section 207(a) of
the Act, then an employer can exclude sleep time from hours worked so long as the
employer furnishes an adequate place to sleep and the employee can sleep for an
uninterrupted period of at least 5 hours. 29 C.F.R. §553.222(a) However, if the
employer pays Firefighters pursuant to Section 207(k) of the Act, then sleep time must
be included in hours worked if the tour of duty is either less than or exactly 24 hours. 29
C.F.R. §553.222(b). Sleep time is also excludable from compensable hours by express
or implied agreement if the Firefighter’s shift is more than 24 hours. If sleep time is
interrupted by a call to duty, then that time must be counted as compensable time, and
if sleep time is interrupted such that an employee cannot get at least 5 hours of sleep,
then none of the sleep period can be excluded from compensable time. 29 C.F.R.
§553.222(c).
B. Kelly Days

The Act allows employers to minimize overtime liability by reducing Firefighters’ work weeks without reducing their salaries so long as their hourly rate is set forth in the contract, and they are paid at least the minimum rate established in the Act, paid for no more than 60 hours at the regular rate per week, and paid overtime for any hours in excess of the defined maximum work week. 29 U.S.C. §207(f). However, this can only be done with respect to employees whose hours vary from week to week. Firefighters who work a typical tour of duty rotation of 24 hours on and 48 off qualify as those whose work hours regularly vary. In order to reduce the work week to avoid regular and consistent overtime, many Firefighter bargaining units have Kelly Days, also known as Work Reduction Days or Hour Reduction Days. 29 C.F.R. §778.404. Kelly Days are paid days off that do not count as hours worked under the Act. Generally, parties will negotiate the frequency of Kelly Days that are to be taken off in order to reduce the number of hours in a work period. For example, a collective bargaining agreement will establish a Kelly Day every 14th shift for bargaining unit employees. While this avoids overtime liability that would otherwise be incurred in the absence of Kelly Days, Firefighters are still entitled to overtime compensation when their hours exceed the number of maximum hours established for their work period and/or as otherwise specified by the collective bargaining agreement.

C. Meal Times

If Firefighters are confined to a duty station, then the Act provides that, where an employer pays employees pursuant to Section 207(k) of the Act, meal times cannot be
excluded as compensable time so long as they are on duty for either less than or exactly 24 hours. 29 C.F.R. §553.223(c).

D. Training

Generally, when an employer requires employees to attend training, such time is compensable work. However, if a Firefighter attends specialized or follow-up training outside of regular hours, and this training is required by law for certification, then time spent in training is not compensable, even if all or part of the training expenses are paid for by the employer. 29 C.F.R. §553.226(b)(1) and (3). Time spent in attendance at the fire academy or other training facilities is compensable while Firefighters are in a class or training session. Time spent outside of a class or training session is not compensable if they are free to use their time as they please. 29 C.F.R. §553.226(c).

II. Overtime Compensation and Compensatory Time

Despite contractual provisions designed to reduce the amount of hours worked in a work period, it is very common for Firefighters to work overtime. The reasons for this vary, but usually center upon staffing needs. Some collective bargaining agreements contain minimum manning requirements, which establish the minimum number of bargaining unit personnel on shift each day. If there are no minimum manning requirements, employers still need a certain number of personnel in order to operate safely. Due to absences resulting from injury, illness, or paid time off, employers are often required to hire back employees on overtime. Of note, the Act does not limit the amount of overtime that can be worked. Thus, many parties will establish a limit to the number of consecutive hours that can be worked. Increasingly, we see fewer
employees taking on greater workloads, and in fire protection, this situation poses a real safety risk.

Firefighters may receive compensatory time off at a rate that is no less than 1 ½ hours for each hour for which overtime compensation is required. 29 U.S.C. §207(o)(1). The maximum amount of compensatory time that can be accrued by Firefighters is 480 hours. If an employee has accrued 480 compensatory hours, then any overtime hours worked must be paid as overtime compensation. 29 U.S.C. §207(o)(3)(A). Pursuant to 29 C.F.R. §553.25(d), requests for compensatory time off shall be honored unless such requests will be “unduly disruptive.” This Section provides that:

Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency’s ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.

Id. (internal citation omitted). As this standard does not clearly define what constitutes an unreasonable burden, it is not uncommon to see contractual language that allows an employer to deny a request to use compensatory time because it will result in overtime. However, both the 7th and 6th Circuit Appellate Courts have held that denials of compensatory time requests on the basis that the employer is required to backfill for the absent employee on an overtime basis violate the Act, as such circumstance does not amount to an undue disruption. See Heitmann v. City of Chicago, 560 F.3d. 642 (7th Cir. 2009); Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004).
III. **Paid Benefit Time and Holidays**

Commonly, collective bargaining agreements establish accrual rates and terms of usage for sick days, personal days and vacation days. It is common for Firefighters to use their accrued benefit time in either 12 or 24 hour increments. However, it is also common for employees who are injured on the job to be required to perform light duty based on a 40 hour schedule. This can cause problems and confusion with respect to how much accrued time is to be applied to the use of sick time while working a 40 hour work week. So long as it is addressed in the collective bargaining agreement, then very few problems arise. However, in the absence of language addressing the amount of time to be deducted, situations arise where employers will deduct 24 hours of time, even though the employee is working an 8 hour day. Thus, this is something that needs to be monitored.

Because fire stations do not close down on holidays, Firefighters must work holidays. Parties handle this in many different ways. Some receive extra compensation for working holidays, whereas other bargaining units simply receive additional compensation for holidays regardless of whether they work the holiday or not.

IV. **7(g) Work**

Section 207(g) of the Act governs situations wherein employees perform two or more kinds of work for which different hourly rates apply, and provides that overtime under these circumstances is computed at a rate of not less than 1½ times the rates applicable to the same work when performed during non-overtime hours. 7(g) work cannot be imposed upon an employee, but, rather, must be pursuant to an agreement between the employer and the employee. 29 U.S.C. §207(g). Thus, even if a collective
bargaining agreement establishes a 7(g) rate for certain kinds of work, an employee cannot be ordered to perform that work, but must do so by agreement only. Thus, it is customary for the employer and employee to enter into a 7(g) agreement.

The types of 7(g) work vary, and can include, among other things, fire inspection, mechanic, training and/or safety coordinator, and even paramedic work. The key is that it must be different from the type of work normally performed by Firefighters in the department. Insubstantial overlaps between duties regularly performed by Firefighters and 7(g) work will not render the jobs the same type of work. See Mathias v. Addison Fire Protection District No. 1, 43 F.Supp.2d 916, 922 (N.D. Ill. 1999).

Generally, 7(g) work is that which is only performed on an overtime basis, and not as part of employees’ regular duties. Thus, if the department regularly employers Firefighters who are also Paramedics and they perform paramedic work as part of their regular duties, then employees cannot perform paramedic work at the 7(g) rate. In such circumstances, overtime must be paid based on a rate of 1½ times the employee’s regular hourly rate. However, if the department only performs fire inspector work on an overtime basis, then employees can work as fire inspectors at the 7(g) overtime rate.

V. Conclusion

The nature of fire protection services presents different and unique employment circumstances compared with other types of employees. Accordingly, it is important to be aware of the various provisions set forth in the Act pertaining to Firefighters to ensure that safeguards are in place so that Firefighters are compensated properly.