# FIREHOUSE LAWYER

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## FLSA Rules for Excluding Sleep Time

A federal district court case arising in Mississippi illustrates the FLSA rules for excluding sleep periods of firefighters for purposes of the FLSA.

In *Allen v. City of Greenville*, N.D. Miss., Civil Action No. 4:97 CV-57-D-B, decided December 20, 1999, 38 firefighters sued their employer, the City of Greenville, Mississippi, for back pay under the FLSA. The firefighters claim they should have been paid for designated sleep time that the City excluded from compensable work hours. The court ruling came in the context of a denial of a motion for summary judgment, which means that the plaintiffs raised sufficient issues to be submitted to the jury at trial.

The FLSA statute and regulations allow employers to exclude sleep periods of up to 8 hours from compensable hours worked of some employees who work long shifts, but only if certain regulations and requirements are met. Under §207(k) of the Act, firefighters can work flexible work periods of between 7 and 28 days, instead of the usual 7-day workweek. For example, a fire protection employee can work up to 106 hours in 14 days without receiving overtime pay.

These firefighters were scheduled pursuant to the 7(k) exemption to work 82.5 hours in 14 days. They worked five shifts every two weeks, with each shift lasting 24.5 hours. The employer considered 16.5 hours of each shift as compensable hours and the other 8 were treated as unpaid sleep hours. Their sleep periods were spent in sleeping quarters with separate beds for each firefighter. The facilities were air conditioned and heated, had showers, toilets, lockers and kitchen facilities. Each shift began at 5:30 p.m. on a given day and ended at 6:00 p.m. the next day. However, if the firefighter's replacement arrived by 5:30 p.m. rather than 6:00 p.m., the firefighter was permitted to leave work early but still paid for the 24.5 hours.

The essential regulation requirements are as follows. Before an employer can exclude this sleep time from compensable hours of work, certain conditions must be met. There are two sets of requirements – one for general employees and one for §207(k) employees like firefighters. The only real difference between the two sets of requirements involves the length of the work shift. Section 207(k) employees must be scheduled for a shift of more than 24 hours in order to qualify for the sleep time exclusion. Excluded sleep periods can be no more than eight hours long. The key requirements are that sleep time can be excluded only if (1) there is an express or implied

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agreement between the employer and the workers to exclude the time; (2) if the employer provides the workers with adequate sleeping facilities; and (3) if the workers are usually able to get an uninterrupted night's sleep. See 29 CFR §553.222.

If the firefighter is called to work during the sleep period, the interruption time must be counted as compensable hours worked according to the rules. Moreover, if the given sleep period is "interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes, means at least five hours), the entire time must be counted as hours worked". See 29 CFR §553.222. In other words, if the interruptions during the eight-hour sleep period prevent a reasonable night's sleep, the entire eight hours is included rather than excluded as compensable hours worked, which ordinarily then would have overtime compensation consequences.

The firefighters argued that their work shifts were actually only 24 hours long, but the court found that the City paid the firefighters based on a 24.5-hour shift and therefore the fact they were sometimes released early (when their relief came in early) made no difference. The evidence showed that the employees were informed of the City's pay policy, including the 24.5 hour shifts and the eight-hour sleep periods through notices posted on bulletin boards and through procedural manuals available at all fire stations. While the plaintiffs argued they had never agreed either implicitly or explicitly to this arrangement of excluding sleep time, they did not dispute that the sleep time deductions were reflected in their paychecks and that this documentation constituted ample notice of the pay plan. While some plaintiffs had questioned the sleep time exclusion in the past, they never filed any formal complaints about the policy with the City or the U.S. Department of Labor. They continued to work under this arrangement and accept paychecks for a period of years.

Quoting from a prior Fifth Circuit case, the Mississippi District Court stated that a worker's continuance of employment can be evidence of an implied agreement to the terms of that employment regardless of whether they like the policy. That, coupled with failure to file formal complaints, indicated that an implied sleep time agreement did exist, the court found.

While that element was satisfied with respect to the exclusion, the plaintiffs fared better on other issues. They argued that the City had not provided them with adequate sleeping facilities, complaining about insects, wet floors, poor ventilation, heating and cooling. They argued the beds were too small, the mattresses were uncomfortable and they were given inadequate shower space. The Court found this demonstrated a genuine issue of fact as to the adequacy of the plaintiff's quarters which prevented the court from granting summary judgment and required the issue to be submitted to the jury.

The plaintiffs also argued they were usually not able to get uninterrupted sleep during their rest periods, as per the regulations. On this issue the court found evidence showing that nighttime calls to duty were frequent and that they occurred during 15% to 25% of the shifts between 1994 and 1996. While that percentage might eventually prove insufficient to invalidate the sleep time exclusion, the court found this issue too should be submitted to a jury and declined to grant any motion for summary judgment to the City.

The plaintiffs also argued that even if the sleep time exclusion was valid, they had still not been properly paid for sleep time

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interrupted by calls to work
under the partial exclusion rules referenced above. The court agreed there was a question as to whether they had been fully compensated and submitted that issue to the jury as well.

According to FLSA rules, work that is not requested but allowed by the employer is work time. The plaintiffs presented testimony indicating they sometimes performed work duties while off the clock upon returning from a call. The City argued that some of these duties could have waited until morning, but the court rejected this argument citing 29 C.F.R. §785.13. The court stated that it is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them, the court said. Even though the plaintiffs could provide no documentary evidence of extra hours worked, this did not necessarily invalidate the claim since it is the employer's duty to maintain records of hours worked by employees.

This case certainly points up the difficulties of satisfying all of the requirements necessary to exclude sleep periods from compensable hours worked. We believe that, at least in the Pacific Northwest, firefighters working shifts in excess of 24 hours is unusual, as is employers attempting to exclude such sleep periods. Nonetheless, it has obviously been attempted in many other parts of the United States. The regulations need to be followed in order to avoid back pay liability exposure.

# Exempt Status Upheld

Ever since *Auer v. Robbins*, 519 U.S. 452 (1997), the Federal Circuit Courts of Appeal have been struggling with the question whether exempt status is destroyed by an employer making improper pay deductions. Basically, under the FLSA, administrators, executives and professionals are often excluded from overtime pay status and considered exempt employees. The employees must meet the salary basis test and the duties test. To meet the salary basis test, the employee must receive a predetermined amount each pay period which is not subject to reduction based on the quality or quantity of work performed. Under FLSA regulations, deductions can be made from the salary of an exempt employee who violates safety rules of major significance without destroying exempt status. Otherwise employers generally cannot reduce the pay of exempt employees in increments of less than a week for violation of rules other than major safety rules. In *Auer v. Robbins*, the Supreme Court established criteria for determining whether an employee is subject to improper salary deductions, in violation of the FLSA. The court said that exempt status is destroyed where an employer has either an actual practice of making improper deductions or has in place a policy that creates a significant likelihood of such deductions.

A recent Sixth Circuit case, *Johnson v. Lexington-Fayette Urban County Government*, 6th Cir. No. 98-590, decided October 21, 1999, presented this question once again. In *Johnson* exempt employees argued that the disciplinary policies subjected them to improper deductions for infractions unrelated to major safety issues. The district court found no significant likelihood of improper deductions, and the appellate court affirmed. On appeal, the plaintiffs argued that they were more than nominally covered by the disciplinary policy, but expressly covered. The policy had been created to provide consistent rules of conduct for all employees at all levels. The appeals court rejected the plaintiffs' arguments, finding that the plaintiffs' attempt to minimize the importance of the personnel

## Exempt Status Upheld (Continued)

manager's testimony was unsuccessful. His testimony showed that each employee disciplinary incident was evaluated based on its particular facts. Therefore, an employee's exempt status would be considered in determining whether pay deductions are appropriate. All disciplinary recommendations were reviewed to ensure compliance with the FLSA. The personnel manager testified that since at least 1984 no exempt employees had ever experienced a deduction in pay for violating the disciplinary policy. The county had in 1993 adopted an ordinance stating that its disciplinary policy would be construed in conformity with the FLSA. Thus, because no actual deductions existed and no significant likelihood of such deductions could be shown, the plaintiffs failed to demonstrate that they were paid on an hourly rather than a salary basis.

This case points up the importance of employer policies with respect to discipline, and how they are interpreted and applied to exempt employees. It is recommended that employers hoping to utilize these exemptions consistently interpret and apply their discipline policies so as not to allow deductions for exempt workers, except with respect to major safety rule violations. Of course, a reduction in an increment of a week or more is allowed for violations of rules other than major safety rules, without jeopardizing the exemption.

# Sexual Harassment

Previously in these pages we have reported on the U.S. Supreme Court decisions in *Burlington Industries v. Ellerth* and *Faraghar v. City of Boca Raton*. In those cases, the Supreme Court held that in alleged cases of sexual harassment by a supervisor, the employer could raise an affirmative defense to liability only when (1) it had exercised reasonable care to prevent and correct any harassing behavior, and (2) the employee (victim) unreasonably failed to take advantage of available preventive or corrective measures.

Now, in *Sangster v. Albertson's, Inc.*, on January 18, 2000, Division III of the Court of Appeals has applied the U.S. Supreme Court's reasoning in the State of Washington. Brenda Sangster contended that Albertson's, Inc., her employer, created a hostile work environment. The appeals court said that casual, isolated, or trivial incidents are insufficient to create hostile work environment and that the totality of the circumstances must be examined. Albertson's contended that the harassing activity of the store manager could not be imputed to Albertson's because he was not an owner, partner or corporate officer. Albertson's was relying on a 1985 Washington Supreme Court case in making that argument. In the 1985 case, the Court held that so long as prompt and adequate remedial action was taken in response to harassment complaints, it did not matter whether the harassers were supervisory or management personnel.

Obviously, the U.S. Supreme Court decisions have caused a change in the Washington court's thinking as well. While Sangster did not take advantage of Albertson's well-publicized policy against sexual harassment, the court nevertheless reversed the trial court's ruling because Albertson's may be strictly liable for the store manager's harassment unless it can successfully invoke the affirmative defense outlined in the two cited U.S. Supreme Court cases. This decision seems to bring Washington in line with the U.S. Supreme Court decisions holding that the employer is strictly liable for sexual harassment committed by supervisory management personnel unless the affirmative defense can be proved.

# Sector Boss

## Disclaimer

We need to clarify the purpose of this question and answer column. Like the Q&A column in any newspaper, the purpose of the Sector Boss column, and indeed the purpose of the Firehouse Lawyer newsletter, is to educate with respect to the law, but not to give legal advice to any particular client. There is no attorney-client relationship, simply because an agency or person has sent in a question to the newsletter editor. The Sector Boss column is not a free legal clinic for those submitting questions, even if they happen to be clients of Joseph F. Quinn. In other words, the purpose of this column is to answer short legal questions if there is room in the newsletter. A question may or may not be selected for publication. There may simply not be room. Joseph F. Quinn is not practicing law in any state except Washington, and therefore materials in the Firehouse Lawyer are not a substitute for obtaining legal advice for a particular situation. Therefore, readers are advised to consult with a qualified and competent attorney in their state or with respect to the federal questions sometimes discussed here.

**Q:** I found your website and newsletter very informative. However, I am looking for information on two issues: (1) Please discuss the legal aspects of residency requirements and forthcoming challenges with regard to full time employees and (2) please discuss the liability of volunteer firefighters responding in personal vehicles who get into motor vehicle accidents.

Chicago Firefighter

**A:** First, there are two different types of residency requirements: durational and continual. A durational type of residency requirement for employment requires a person, as a condition precedent to applying for public employment, to reside in a particular area such as the city limits for a specified length of time (duration). Durational residency requirements, sometime referred to as waiting periods, have been struck down as unconstitutional because they classify residents into two groups – those who have fulfilled the residency requirement and those who have not. Both federal and state courts have struck down these requirements as violating the constitutional right to travel both interstate and intrastate and/or as violative of the rights of Equal Protection under the 14th Amendment to the U.S. Constitution.

By contrast, continual residency requirements require a person to reside in a particular area for continued employment. This type of residency requirement has usually been upheld and not unduly burdening the fundamental right to travel.

Most courts have held that continual residency policy requirements are analyzed under a "rational basis" test, which means that the requirement need only further some reasonable or rational basis of the public employer. In *Ector v. Torrance*, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973) cert. denied 415 U.S. 935, 39 L.Ed. 493, 94 S. Ct. 1451 (1974), the Supreme Court of California upheld a municipal employer's residency requirement. The court noted that legitimate governmental purposes for this requirement could be promotion of ethnic balance in a community, reduction in high unemployment rates of intercity minority groups, improvement of relations between such groups and city employees, enhancement of the quality of employee performance by greater personal knowledge of the city's local conditions and by a feeling of greater personal stake in the city's progress, diminution of absenteeism and tardiness among the municipal personnel, ready availability of trained manpower and emergency situations, and the general economic benefits

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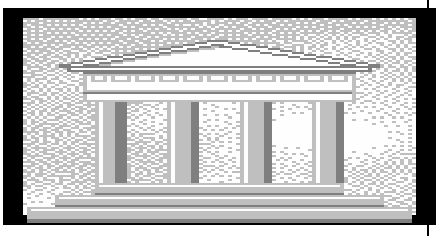
flowing from local expenditure of employees' salaries. The *Ector* court stated that it could not say that one or more of those goals was not a legitimate state purpose that was rationally promoted by the residency requirement.

Of course, such continual residency requirements must be constitutional as applied as well as constitutional on their face.

Thus, while many of us have doubts about the efficacy or wisdom of residency requirements as a condition of continuing employment, it seems that they are not unconstitutional.

Your second question related to the liability of a volunteer firefighter while driving their own personal vehicle in the course of their official duties. First, I recommend that district or department policy require insurance to be available for any claims or damages arising out of a personal vehicle in the course of performance of volunteer duties. On the other hand, a volunteer must have personal automobile insurance to cover events that take place during "commuting" to and from their service. In other words, there is a difference between driving to and from "work" and driving a personal vehicle either to the scene of an emergency or to the fire station, as a result of responding to an alarm. Generally speaking, I recommend that municipal corporations indemnify their employees and volunteers from any negligent, acts or omissions when engaged in the ordinary course of their duties. There are limits to this concept, however. If an employee or volunteer goes off on a "frolic and detour" of their own, engaging in activities which have no benefit to the employer, and are strictly personal, such as sexual harassment against the policies of the employer, I recommend that there be no such indemnification. Such acts often result in denial of insurance coverage as well for such individuals.

Apparently some jurisdictions allow volunteers to have emergency lights that they may use temporarily in their personal vehicles when responding to an emergency. Typical state statutes allow some exception to compliance to rules of the road, such as the ability to pass through red signal lights, when operating emergency lights. Even then, volunteer firefighters should use due care and can be liable for negligence.



**Joseph F. Quinn**

6217 Mt. Tacoma Dr. S.W.

Lakewood, WA 98499

(253) 589-3226

(253) 589-3772 FAX

e-mail: firehouselaw@earthlink.net

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**Joseph F. Quinn** is legal counsel to more than 20 fire districts in Pierce, King and other counties throughout the State of Washington.