# Firehouse Lawyer

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# DOL Proposes Some Clarifying FLSA Amendments to Regulations

The U.S. Department of Labor is proposing some "clean-up" regulatory amendments, which seem to clarify and/or codify changes already made by statutory enactments or judicial decisions. While some of these changes have been fairly recent, others go back about 30 years or more, but the regulations were never changed. We discuss only two of the proposed changes here, as they are relevant to fire service public employers.

First, a change is proposed to clarify *when* the employer must grant the comp time request of an employee. As most of you know, the FLSA allows state and local government employers to offer their employees compensatory time in lieu of monetary overtime payment, under certain circumstances. Congress allowed this comp time alternative to ease the overtime burden on public employers. (Remember, however, that you still need to post the comp time at a rate of one and one half hours for each hour of overtime worked.)

The statute provides that an employee "who has requested 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…." At this time, DOL is proposing to revise the regulations to make it clear that public employers need not grant the comp time requests on the days specifically requested. Historically, some courts have held that under existing regulations an employer may not deny such requests for comp time unless they can show an "undue disruption" will result if the request is granted on the day requested. But three federal appeals courts have ruled the FLSA unambiguously states that once comp time is requested, the employer has a "reasonable time" to grant the request, and therefore, within reason, the employer can deny time off on the requested day and provide it on a different day. To rule otherwise would render the "reasonable time" language meaningless, some commentators have noted.

One of the three appellate cases, by the way, was a Ninth Circuit case:

*Mortensen v. County of Sacramento,* 368 F.3d 1082 (9th Cir. 2004), in which the Court said the current regulation was not entitled to judicial deference as it was not consistent with the statutory language about "reasonable period".

Hence, in order to respond to the court rulings, the DOL proposes adding a clause to the regulations stating that the FLSA does not require a public agency to allow the use of comp time on the day specifically requested, but only requires permitting use of the time within a reasonable time after the request is made, unless the use would unduly disrupt the agency's operations. Presumably, in that rare situation, the request could be denied altogether and a different resolution would have to be sought.

Second, a clarifying change regarding "employees engaged in fire protection" activities is proposed. Most of my readers are familiar with the FLSA partial exemption created by Section 207(k) of the FLSA. Many of you are familiar with the long-running judicial debate about eligibility for certain personnel such as EMS workers at fire departments who had no firefighting duties per se. Almost all of the issues were resolved by the 1999 FLSA amendment that clarified when a worker was engaged in fire protection activities. This latest change just solidifies that statutory change, by providing that this partial exemption covers ambulance and rescue workers if they have certain types of responsibilities, and that only employees of fire departments may be deemed to fit within the definition.

## UNEMPLOYMENT – VOLUNTARY QUIT EXCEPTION NARROWED

The Unemployment Compensation statute has long had an exception, by which unemployment compensation is disallowed, when an employee "voluntary quits" their employment. However, for many years, there also have been well-recognized exceptions to the "voluntary quit" disqualification. For example, if an employee quits to protect himself or a family member from domestic violence or stalking, UC benefits are not denied. Alternatively, quitting due to an unsafe working environment or due to illegal activities in the workplace has long been allowed without disqualifying the employee from benefits. The current statute lists 11 specific circumstances that constitute "good cause" for quitting work. And the courts have generally held, until now, that the "good cause" reasons for quitting were limited to those enumerated in that statute.

However, in *Spain v. Employment Security Department, et al.,*

#79878-8, decided June 19, 2008, the state Supreme Court recently held that an employee who quits their job for reasons other than those listed in the law is *not necessarily* disqualified from receiving benefits. The Court held the 11 listed reasons are not meant to be an exclusive or exhaustive list of all the fact situations that might constitute "good cause" for quitting. The effect is that "good cause" is a broad and undefined exception, subject to the interpretation of the Employment Security Department on a case-by-case basis.

While such a decision certainly adds an element of uncertainty or ambiguity to this "good cause" exception, it may not open the floodgates to much wider benefits. This writer would assume that the department would interpret the broad exception to mean that only situations essentially similar to those listed in the statute would rise to the good cause standard. Only time will tell whether this ruling means that the exception will swallow the rule. Suffice it to say, for now, that the good cause exception to the voluntary quit rule has clearly been broadened by the Supreme Court.



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## INDEPENDENT CONTRACTOR CLAUSES

I am often asked to review contracts for services, such as those negotiated with Physician Advisors, or consultants who perform various services for fire department clients. Contracts that I draft, and many of those drafted by other attorneys, often include a clause providing that the consultant is an independent contractor and not an employee. Obviously, the characterization as an independent contractor and not an employee has ramifications under numerous federal and state statutes. The following is a sample contract clause suggested by the FLSA Handbook, disseminated by the Thompson Publishing Group. I felt it was a rather good example, so include it herein for reader edification, with only very minor changes:

*General Independent Contractor Clause*

This agreement does not create an employee/employer relationship between the parties. It is the parties' intention that the contractor will be an independent contractor and not [the public employer's] employee for all purposes, including but not limited to, the application of the Fair Labor Standards Act (FLSA) minimum wage and overtime payments, Federal Insurance Contribution Act (social security), the Federal Unemployment Tax Act (FUTA), the provisions of the Internal Revenue Code, all state tax laws, Washington State workers compensation statutes, and Washington State unemployment compensation law. The contractor will retain sole and absolute discretion in the judgment of the manner and means of carrying out the contractor's activities and responsibilities hereunder. The contractor is a separate and independent enterprise from the public employer, has full opportunity to find other business, has made its own investment in its business, and will utilize a high level of skill necessary to perform the work. This agreement shall not be construed as creating any joint employment relationship between the contractor and [the public employer], and [the public

> employer] will not be liable for any obligation incurred by the contractor, including but not limited to unpaid minimum wages and/or overtime premiums.

I think this suggested clause can be very useful; perhaps the only thing worth adding is that the independent contractor is also "licensed by the State of Washington to carry on such a business…."

## POLICY ON PHOTOS OR VIDEO AT EMERGENCY SCENES

I am sure some of you have been following the furor over photographs of a patient, inadvertently released to other agencies or publicly disseminated, which embroiled a Fire Chief in a real privacy debacle and may have cost him his job. The controversy points up the need for a policy governing the taking of photos and videos at emergency scenes, and also the use and dissemination of such photos, particularly if they depict members of the public (such as EMS patients). I have recently developed such a policy, as I was unable to find or identify any pre-existing one, by checking with my usual sources and research services.

Let me start by saying that I understand the legitimate need or desire to take photos or videos at emergency scenes, for use in training, quality assurance, or even education about the department's mission or operations. The policy I have developed attempts to regulate and control the use and disposition of such media, rather than prohibit such activities altogether. However, we must also be mindful of the privacy rights and concerns of patients, other members of the public, and even our own fire service members or employees. I tried to draft a balanced policy, weighing the need for training or education against risk management considerations. My draft policy places the responsibility for allowing (or not) such photos or videos to be taken, at the emergency scene or fireground, upon the incident commander. Permission in advance is recommended, but not required in every case. Protecting the privacy and modesty of the patient, and other members of the public, is also a cornerstone of the policy. Finally, dissemination and use is to be strictly controlled, with release outside of the department allowed only under extraordinary circumstances, or with permission.

Feel free to contact me to obtain a copy of the model policy.

## DISCLAIMER