Firehouse Lawyer

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FLSA: IS CLASS TIME WORK TIME FOR OVERTIME PURPOSES?

Occasionally, a client will ask me how to handle time spent in classes or educational endeavors, when the class is not required by the employer but rather requested by the employee for their own personal reasons. Not surprisingly, the FLSA regulations respecting overtime and "work time" do provide some answers for us in these situations, which can be quite tricky. I use, and highly recommend the FLSA Handbook, published by Thompson Publishing, for guidance on such questions.

Suppose your firefighter employee wants to take a class or an entire quarter of classes at the local community college in public administration or government. Your liberal educational incentive policy provides that the employer will pay tuition and the cost of books for such classes, but obviously these are not classes required by the employer or directly related to firefighting. What if the employee later argued that, since the employer paid for the class, the time spent in class must be work time, and therefore claimed overtime pay?

In order for such a class or training activity to **not** be counted as compensable work time (and perhaps raise overtime issues) all four of the following four criteria must be met:

1. attendance must occur outside the employee's regular work hours;
2. attendance must be voluntary;
3. the employee must do no productive work while attending the training; and
4. the program, lecture, or meeting should not be directly related to the employee's job.

See 29 C.F.R. Section 785.27.

Attendance is not considered "voluntary" if it is required by the employer or if the employee believes his or her working conditions or continuance of employment would be adversely affected by non-attendance. 29 C.F.R. Section 785.28. Training is not "directly related" to the job if the course is undertaken for the 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 present job, even if the training "incidentally improves his skill in doing his regular work." 29 C.F.R. 785.29.

Federal district court decisions and rulings of the Circuit Courts of Appeals support these regulations.

Suppose the state--not the employer--- requires training or continuing education as a condition of continuing in the profession as in continuing certification of nurses or paramedics, but the training is not tailored to meet the particular needs of the employer. In a Wage and Hour Opinion Letter dated October 23, 1980 (WH-504) the Department of Labor said such training would not be compensable training time. But in another administrative ruling, DOL did find health clerks employed by a school district were entitled to compensable time for hours spent in a Red Cross recertification class, *because* the school district **required** its health clerks (as a condition of continued employment) to renew their first aid certifications every three years. The lesson to be learned is to be careful what you require as a condition of employment or in those job descriptions!

Thus, I would say (as one client recently asked me) that if the county medical program director requires EMTs or paramedics to attend a certain type of training to remain certified with the State, but the employer does not require it, and the class is not tailored to the employer's needs, the training time is not work time.

In addition to the above-referenced regulations, there are some special regulations in the subpart pertaining to law enforcement and fire service workers. 29 C.F.R. Section 553.226 specifically addresses training time. This regulation notes first that the general rules for determining the compensability of training time are set forth in Sections 785.27 through 785.32, which we have been discussing above. Then, this regulation states the general rule that training time is considered compensable, when required by the employer, with a few exceptions.

This regulation provides that attendance outside of regular work hours at specialized or follow-up training required by law for certification of public and private sector employees within a particular governmental jurisdiction is not compensable.

Similarly, if the attendance and certification is due to the law of a higher jurisdiction, such as the state or county, the same result is reached. Subsection (b)(3) of this regulation clarifies that the time spent in training is *still* not compensable even if all or part of the training costs is borne by the employer.

Finally, subsection (c) of this regulation states that while in attendance at an academy, a firefighter is not considered to be on duty when not in class or at a training session, if they are *free to use such time for personal pursuits.* Thus, just because your trainees are attending an academy, that does not mean all time is work time.

What about study time, when attending training activities that are admittedly work related, or that do not meet all parts of the four-part test? This study time is generally compensable work time too. The leading case seems to be *Donovan v. U.S. Postal Service,* 25 Wage & Hour Cas. (BNA) 58 (Dist. D.C. 1981). In this D.C. Circuit federal trial court case, postal workers were required to memorize specific address components while practicing manual mail distribution. While the Postal Service tried to pay the workers what it felt was a reasonable time to complete this training or learning task, the court rejected that argument, saying the employer does not get to determine how much study or learning time is reasonable, once it orders the employee to study.

FLSA: TRAVEL TIME

Recently, a client asked me about the FLSA "work time" issues presented when the training, educational conference or class, such as we discuss above, necessitated some travel. While the employer had already acknowledged that the conference or classes were work time, they wondered if they had to pay overtime for the many hours spent traveling too.

Generally speaking, the Portal-to-Portal Act (29 U.S.C. Section 254(a)) excludes from work time any

time spent traveling to and from the work place. Also excluded are time spent on activities which are preliminary or "postliminary" to the principal activity. However, if it is required by contract or collective bargaining agreement, or by past practice or custom, then compensation is necessary. See 29 C.F.R. Section 785.34. Obviously, this contract exception applies to most, if not all, FLSA rules--if you agree to provide more overtime than the FLSA requires, then you owe the overtime pay!

Except for normal commuting time, the general rule is that employees must be paid for all travel time *unless* it is overnight travel that is *outside* of regular work hours *and* on a common carrier *and* where no work is done. Let us illustrate this with an example. If you tell the employee traveling to the conference to travel outside of his regular work hours of 9:00 a.m. to 5:00 p.m., and if he/she is not driving but flying, and doing no work while flying, then the time is non-compensable travel. But what if they fly on a Saturday or Sunday (when they normally work Monday to Friday) but fly between those "work hours". That is compensable. Tell them to fly during the other hours of the day!

Out-of-town travel can be the most tricky. The DOL specifically permits the employer to exclude the travel time between the employee's home and the airport or railroad station as home-to-work commuting time. To sum up, travel time is compensable work time when it occurs during the employees regular working hours, as the employee is basically traveling instead of working. See 29 C.F.R. Section 785.39. And this is true even on non-working days if it is during those work hours. If the employee is free to relax on the airplane or other common carrier, during non-work time, it follows that this is not compensable. See 29 C.F.R. Section 785.39. Of course, if they perform work while traveling, that is compensable. See 29 C.F.R. Section 785.41. And the DOL considers driving a vehicle to be work (I agree as long drives are literally a pain in the neck for me).

The regulations do not seem to address how to deal with the 24-hour shift employees such as firefighters, while they might be engaged in non-workday overnight travel to an approved conference. Arguably, all hours of the day are within their customary work hours!

Hopefully, this discussion of the regulations and DOL or judicial interpretations thereof will help you, gentle readers, the next time you have one of these questions involving the FLSA and non-required classes and/or travel time.

LEGISLATIVE SESSION - SOME BILLS OF INTEREST TO THE FIRE SERVICE

Substitute Senate Bill 6685 would add a new section to the Open Public Meetings Act, requiring every public agency, special purpose district or other municipality that owns and maintains a web site to post agendas, minutes and proposed rules or regulations to the agency web sites.

This new law applies to cities, fire districts, and regional fire authorities, among others. Regular meetings require a posting at least 72 hours in advance, while special or emergency meetings require only 24 hours notice. Any proposed ordinance, rule or regulation (resolutions too, I presume) must have the full text included on the web site too, when the agenda is posted. Draft agendas must be so noted, so I would recommend always calling the agenda a draft.

Minutes of all meetings must be posted within 15 business days after the meeting, and must indicate whether they are draft minutes. A roster of all governing members must be posted, identifying their positions and constituencies, if any, and specifying their terms of office. Smaller entities such as fire districts serving a population under one thousand people are exempted from the posting rules as to minutes and agendas, but not the rosters.

This legislation does not seem to require agencies to operate and maintain web sites if they do not do so already. While the bill is somewhat ambiguous, or not tightly written, and could be interpreted to require public agencies and special purpose districts to post notices whether they own or maintain a web site or not, I think the statutory intent is relatively clear that the "owns or maintains a web site" language refers back to the entire list of agencies covered by the law.

Of course, such legislation is just another unfunded mandate from Olympia and it might provide some incentive for smaller agencies to abandon their seldom-maintained web sites altogether! My understanding is that neither the Washington Fire Commissioners Association nor the Washington State Fire Chiefs supports this bill.

Senate Bill 6461 would provide immunity from liability to both paid and volunteer firefighters when engaging in firefighting efforts outside their jurisdiction of employment or membership, or when providing emergency care, rescue, assistance, or recovery services at an emergency scene. Like most immunity laws, this one excludes protection when acts or omissions constitute gross negligence or willful or wanton misconduct.

In 2009, the Dry Creek Complex fire, or the Silver Dollar Fire, consumed about 49,000 acres in territory in "no man's land", i.e. outside of the jurisdiction of any fire protection agency, federal, state or local. Testimony in support of the bill was to the effect that when the Silver Dollar Cafe burnt down, firefighters were present on the scene but none of them warned the property owners or offered to help. The staff summary of the testimony added that this bill is referred to as a Good Samaritan bill because "if you have the equipment and manpower to help, you should."

The same bill sponsors who proposed SB 6461 also offered SB 6462, which would add a new section to RCW 52.12--the "powers" chapter of the title on fire protection districts. This is interesting because RCW 52.12 only applies to fire districts and regional fire authorities, and not to all fire protection agencies. Basically, this new section makes it **a duty** of a firefighter, present at the scene of a wildfire outside of his or her jurisdiction, to undertake firefighting efforts to suppress the fire if the fire poses a danger to human life or structures. There is no duty, however, if the firefighter "does not have the equipment or manpower at the scene to fight the fire in a safe and reasonable manner."

To me, this could place the firefighter in an untenable position in some cases, even with the immunity provided by SB 6461. On the one hand, WAC 296-305 creates safety standards, which include rules on wildland firefighting. On the other hand, this new law would create a duty--not a power that is permissive, but a duty--to fight that fire if danger to human life or structures is posed. Arguably, since fires have a habit of spreading if unchecked, all fires present such dangers to life and nearby structures! So should I proceed if I think it is basically safe, even though I am alone and may not be able to comply strictly with the vertical standards? Hmmm, I cannot be civilly liable as I have immunity but could the L&I Department find a safety violation anyway?

Frankly, I do not think such legislation is the best answer to the admitted problem of the no-man's land that does exist around the state. After all this new law does not apply to everyone--only volunteers or career firefighters employed by fire districts and RFA's. It would be better to provide some funds and then require the nearest fire protection agency to respond. No one wants to deny needed fire protection or rescue service and emergency medical care to those who need it. This is just not the right way to go about it, in my humble opinion. I am not even sure creating a duty for a fire district firefighter present outside his/her jurisdiction is constitutional. Should not the creation of duties be done by their employer? Could the legislature create such a duty for a private physician or nurse? I doubt it.

Compare the foregoing with the approach of Substitute House Bill 2549. This bill would deal with the no man's land issue in an entirely different way, by

adding a new section to Title 52, applicable to fire districts and regional fire authorities. This proposed new law would require counties to collect assessments from landowners who own property outside of any fire protection jurisdiction, to fund firefighting services to their properties. Then, to authorize and facilitate the provision of fire services, the new bill provides for a process for the county and its fire districts (including any RFA's presumably) to meet and agree on an allocation of responsibility for firefighting services to unprotected lands within the county, and a concomitant allocation of the aforesaid funds.

The new bill includes provisions to deal with the situation if the county and districts cannot reach such an agreement. The assessments are "forfeited" to the Department of Natural Resources, which must step in to protect the unprotected lands.

Although this approach may have some flaws or problems in the implementation, it seems to me a far better approach to the issue than SB 6461 and 6462. Although it involves a new tax, it would only be a tax applicable to property owners who purchase land that needs fire protection but is located in unprotected territory, i.e. land not within any organized fire protection jurisdiction. The assessment amount is limited to approximately the expected cost of providing services, but it cannot be less than what they would pay in taxes if the land were located in a fire protection district. I would assume the levy rate of the closest fire district, or the one determined to be best situated to respond in the county agreement, could establish the "floor" for such charges. Not a bad bill in my opinion, although I have not checked with either the WFCA or the WCF to see what the commissioners or chiefs think of it.

Obviously, this problem of no man's land has been with us for a long time and cries out for a solution. Even if this bill is not adopted, the legislative process provides an excellent forum for proposing and discussing creative ways to address our problems.

One more bill worthy of discussion is House Bill 2611, which would address the problem of disposition of voter-approved indebtedness at the time of annexation of a city to a fire district pursuant to RCW 52.04.061 et seq. At the present time, scores of cities and towns in Washington have "annexed" for service into the local fire district, as a means of providing fire protection and emergency medical services. But what if the city has previously existing bonded indebtedness for voter-approved bonds used to raise funds for fire stations?

The purpose of the bill is to apportion the tax/debt burden equitably across the entire taxing district. The concept is to attempt to ensure that residents of one area of the (post-annexation) district are not shouldering the debt burden incurred by another area of the district, but prior to the annexation. The law allows for differing levy rates as to such taxes, in what would ordinarily be considered a violation of the rule on uniformity of taxation. The bill provides also that the city ordinance proposing annexation in the first place must specify how the pre-existing indebtedness of both the district and the city's proposed annexation area (partial city annexations are now possible) would be allocated in the levy process. And if the fire commissioners initiate a proposal (the statutes now provide that the city initiates actually) they too must set forth their proposal to allocate the responsibility for the indebtedness. The point is that the voters would know how this issue would be dealt with prior to voting. This is another bill that clearly is needed.

We do not mention the impact fee legislation, which is a no brainer: the current status makes no sense--cities can charge impact fees but fire districts (and even cities annexed to districts) cannot! Why?

DISCLAIMER