



# MUNICIPAL HR BOOT CAMP

TMHRA PRE-CONFERENCE ★ MAY 16, 2023

Moody Gardens Hotel and Conference Center



# RAISING THE BAR *with* TEXAS MUNICIPAL HR

TMHRA ANNUAL CONFERENCE ★ MAY 17-19, 2023

Moody Gardens Hotel and Conference Center



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# FLSA 101:

## FOUNDATIONS, RULES, AND REGULATIONS

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# FLSA

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Show me the Money!

# FAIR LABOR STANDARDS ACT

- Minimum Wage
- Overtime Pay
- Child Labor Law
- Recordkeeping Requirements
- Applies to Public and Private Employers
- 40-Hour is Basic Work Week
- Applies to Full Time and Part-Time Employees



- While the **Fair Labor Standards Act** does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are several employment practices which the Act does not regulate. For example, the Act does not require:
  - Vacation, holiday, severance, or sick pay
  - Meal or rest periods, holidays off, or vacations
  - Premium pay for weekend or holiday work
  - Pay raises or fringe benefits
  - A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
  - Any limit on the number of hours of work for persons 16 years of age and over.

# FLSA's "WHITE COLLAR" EXEMPTIONS - APPLIES TO EXECUTIVE, ADMINISTRATIVE, & PROFESSIONAL (EAP) EMPLOYEES

To qualify for exemption, employee must satisfy three-part test:

- **Salary-basis test** – Must be paid salary free and clear, *i.e.*, not subject to deductions for variations in quality or quantity of work
- **Salary-level test** - Minimum of \$913/week (\$47,476/annually). Employees who make less are non-exempt even if paid on a salary basis & meet duties test
- **Duties Test** – Primary duty must be performance of exempt tasks as set out in DOL regulations (29 C.F.R. part 541)

# EMPLOYEES WHO MAKE LESS THAN \$913 A WEEK (\$47,476/YR) CANNOT BE EXEMPT

- This is true regardless of how they are paid or what their job duties are



# WHITE COLLAR EXEMPTIONS

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Duties Tests

# WHITE COLLAR EXEMPTIONS

## FLSA Section 13(a)(1)

- Establishes exemption from minimum wage and overtime for “any employee employed in a bona fide executive, administrative, or professional capacity...”
- Not defined in FLSA
- Terms should be “defined and delimited *from time to time* by regulations of the Secretary”





# KEY TERMS USED IN THE REGULATIONS

## Primary Duty

- Examine “primary duty:”
  - Principal
  - Main
  - Major or most important
  - Character of the employee’s job as a whole
  - “What does your daddy do?”

# “PRIMARY DUTY” IS KEY

- Replaces Percentage Limit on performance of exempt duties

Employees who spend less than 50% of their time performing exempt work can still be considered as having a primary duty that satisfies the standard duties test for exemption.

It is employer’s obligation to determine and communicate employee’s primary job duty

*Martin v. Indiana Mich. Power Co.*

# EXECUTIVE EXEMPTION

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# EXECUTIVE EXEMPTION

- Compensated on salary basis; \$913/week/\$47,476 per year
- Primary duty is management of test enterprise or a customarily recognized department or subdivision.
- Authority to hire or fire other employees; or recommendations as to hiring, firing promotion or any other change of status are given particular weight.
- Customarily and regularly directs work of two or more other employees.

# CUSTOMARILY RECOGNIZED DEPARTMENT OR SUBDIVISION

- Shifts can constitute a department or subdivision
- Teams or groups may constitute a department or subdivision
- Must have a permanent status and a continuing function



# DIRECTS TWO OR MORE OTHER EMPLOYEES

- Means two full-time employees or their equivalent
  - One full-time and two half-time employees, or four half-time employees, are equivalent
- Employees who assist manager of department and fill in as a supervisor only in manager's absence do not qualify for exemption
- Shared responsibility for same two employees: no exemption



# AUTHORITY TO HIRE OR FIRE OTHER EMPLOYEES

Suggestions Given Particular Weight Factors:

- Making such suggestions and recommendations are part of employee's duties
- Frequency with which employee's makes suggestions or recommendations
- Frequency with which suggestions are relied on

Executive must regularly supervise employees he/she makes recommendation about

- Manager does not have to make ultimate decision

# CONCURRENT DUTIES

- Concurrent performance of exempt and non-exempt work will not disqualify an employee from executive exemption if employee otherwise meets salary and duty requirements





# **ADMINISTRATIVE EXEMPTION**

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# ADMINISTRATIVE EXEMPTION

- Compensated on salary basis; \$913/week/\$47,476 per year
- Primary duty involves performance of office or non-manual work directly related to the management or general business operations of employer or of employer's customers and includes exercise of discretion and independent judgment with respect to matters of significance

# DIRECTLY RELATED TO MANAGEMENT OR GENERAL BUSINESS OPERATIONS

Directly related to running or servicing of business  
opposed to working on manufacturing  
production line or selling product



# FUNCTIONAL AREAS:

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Purchasing
- Procurement
- Marketing
- Personnel Management
- Employee benefits
- Human Resources
- Labor relations
- Public relations
- Government relations
- Internet and database administration
- Legal and regulatory compliance
- Similar activities
- Research

# DISCRETION AND JUDGMENT FACTORS

Matter of Significance

- Level of impact; or
- Consequences of work performed

Employee has authority to make an independent choice without immediate direction or supervision

Employee can still exercise discretion and independent judgment even if supervisor reviews decisions or recommendations



# HOW MANY FACTORS?

Employees who meet at least two or three of these factors are generally exercising discretion and independent judgment, although case-by-case analysis is required



# OTHER FACTORS FOUND RELEVANT

- Freedom from direct supervision
- Personnel responsibilities
- Troubleshooting or problem-solving activities on behalf of management
- Use of personalized communication techniques
- Authority to handle atypical or unusual situations
- Authority to set budgets responsibility for assessing customer needs
- Primary contact to public or customers on behalf of the employer
- Advertising or promotion work
- Coordination of departments
- Requirements or other activities for or on behalf of employer or employer's clients or customers

# EXAMPLES OF GENERALLY EXEMPT POSITIONS

- Insurance claims adjusters
- Risk managers
- Marketing representatives
- Team Leaders
  - Team of other employees assigned to complete major projects





## ➤ Executive or Administrative Assistants

- Assistants to senior executives
- Exempt where they work without specific instructions or prescribed procedures, and have been delegated authority regarding matters of significance

## ➤ Human Resource Managers

- Formulate, interpret or implement employment policies
- Management Consultants
- Propose changes in organization

## ➤ Purchasing Agents

- Authority to bind city on significant purchases
- True, even if they must consult with top management officials when making purchase commitment for raw material in excess of contemplated plant needs

# EXAMPLES OF GENERALLY NON-EXEMPT POSITIONS

- Inspectors who rely on standard techniques and procedures, either catalogued in manuals or acquired by special training or experience, who have little discretion
- **Public sector inspectors or investigators who apply prescribed procedures and whose work does not directly relate to management or general business operations**
- Personnel clerks who screen applicants for minimum qualifications, but do not set minimum standards or interview

# PROFESSIONAL EXEMPTION

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# PROFESSIONAL EMPLOYEES

Compensated on a salary basis; \$913/week/\$47,476 per year

Primary duty is performance of work

- Requiring advanced knowledge in field of science or learning customarily acquired by prolonged course of specialized intellectual instruction
- Requiring invention, imagination, originality or talent in “recognized field of artistic or creative endeavor”



# LEARNED PROFESSIONAL

Primary Duty – work involving:

- Knowledge of advanced type in field of science or learning customarily acquired by prolonged course of specialized study

“Advanced knowledge” cannot be attained at high school level



# FIELD OF SCIENCE OR LEARNING

- Includes but not limited to:

- Law
- Medicine
- Theology
- Accounting/Actuarial computation
- Engineering and Architecture
- Teaching
- Pharmacists
- “Other similar occupations,” as distinguished from “mechanical arts” or “skilled trades” where knowledge may be advanced but is not field of science or learning.



# COMPUTER EMPLOYEES

- Section 13(a)(1) computer systems analysts, computer programmers, software engineers or other similarly skilled workers in computers filed are eligible for professional exemption
- Section 13(a)(1) exemption applies to any computer employee paid appropriate salary amount
- Section 13(a)(17) exemption applies to any computer employee paid \$27.63 per hour
- Exemptions apply only to computer employees whose primary duty consist of:
- Application of systems analysis techniques and procedures
- Design, development, documentation, analysis, creation, testing, modification of computer systems or programs based on and related to user or system design specification
- Design, documentation, testing, creation or modification of computer programs related to machine operating systems, or
- Combination of above duties

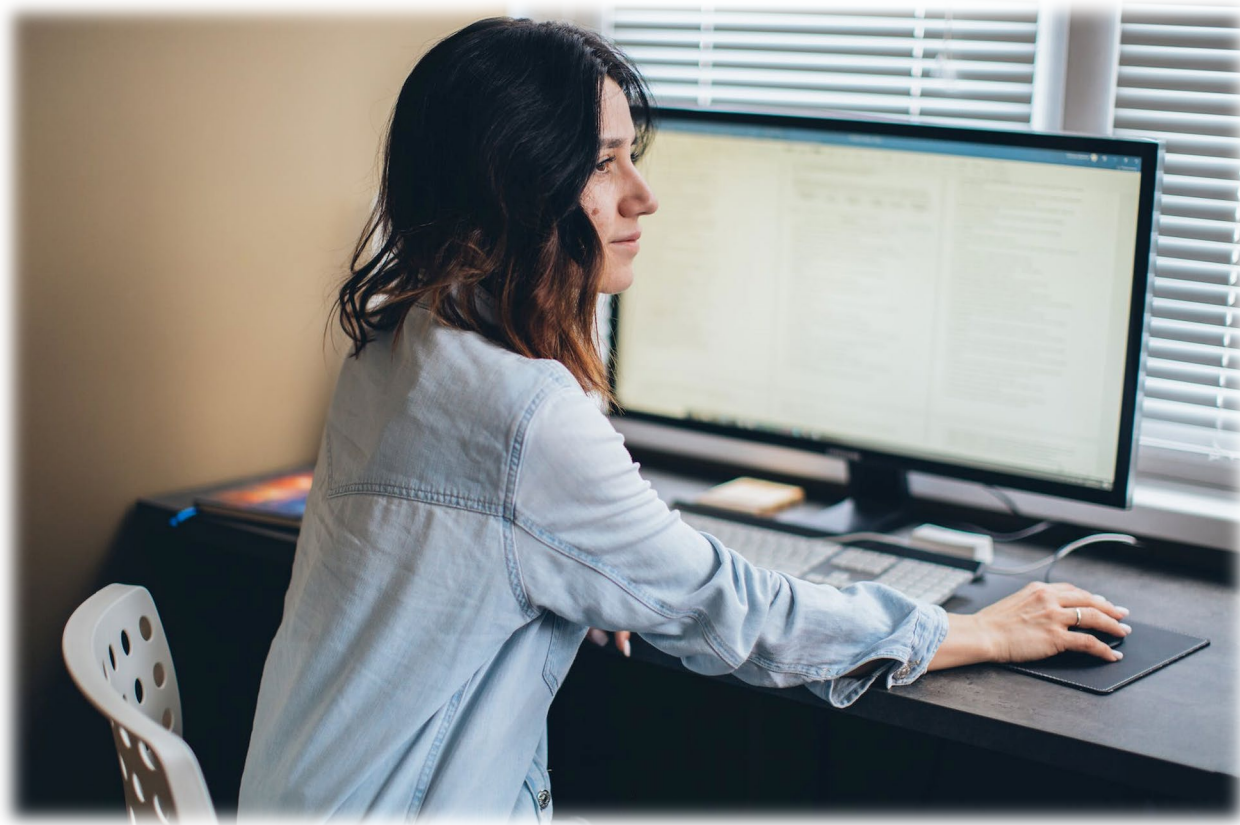
# COMPUTER EXEMPTION

- Exemption does not include those engaged in manufacture or repair of computer hardware and related equipment
- Exemption does not apply to employees whose work is highly dependent upon, or facilitated by, use of computers or software, but who are not primarily engaged in computer systems analysis and programming or other similar occupations





# EXECUTIVE AND ADMINISTRATIVE COMPUTER EMPLOYEES



- Computer employees may also have executive and administrative duties that qualify them for exemption
  - Employees who work in many functional areas are exempt so long as their primary duty includes exercise of discretion and independent judgment with respect to matters of significance

# NO EXEMPTION FOR FIRST RESPONDERS

Does *not* mean that *all* police officers or firefighters are overtime eligible

Some high-level police and fire officials may be exempt executives or administrative employees, in limited situations

- Must satisfy pertinent requirements of applicable exemption; *and*
- Have as their primary duty performance of managerial tasks more in line with administering affairs of department or general business operations, as opposed to investigation

*But see: §142.0015 TLGC*

# EXEMPTION FOR HIGHLY COMPENSATED EMPLOYEES (HCE)

- Total annual compensation of at least \$134,004
- At least \$913 guaranteed per week - paid on salary or fee basis
- Remainder can be commissions, nondiscretionary bonuses, & other nondiscretionary compensation
- Performs office or non-manual work
- Customarily & regularly performs one or more exempt duties set out in duties test for white collar exemptions
- Employer can use any 52-week period as the year; can pro-rate \$134,004 for employees who work less than 1 year
- Catch-up: Employer may, within 1 month after year end, make one final payment to reach \$134,004

# FLSA – HIGHLY COMPENSATED STILL MUST MEET EXEMPTION

*Helix Energy Solutions Group v. Hewitt, 2/22/2023*

- Hewitt worked on oil rig; 84 hours one week, none the other week
- Paid a daily rate only for days he worked (\$963/day)
- Earned more than \$200,000/yr
- Hewitt sued for OT
- Company said he was bona fide executive and exempt from OT
  
- Supreme Court ruled for Hewitt; day rate is not a salary

# SALARY BASIS TEST

Predetermined and fixed salary not subject to reduction because of variations in quality or quantity of work performed

Partial-day or partial week deductions from an employee's pay *generally* do not satisfy salary basis test and will render employee non-exempt

# KEEP IN MIND . . . .



- FLSA does not prohibit employers of exempt employees from requiring them to work certain hours and/or to track their hours worked
- Business reasons for requiring it: ensuring availability to address operational issues; client billing; eligibility for certain benefits
- If exempt employee fails to comply with attendance and time-keeping requirements, *do not dock pay*; rather, treat it as a disciplinary matter
- Do not tie compensation of exempt employees to the number of hours worked
- No docking of partial day absences

# PREGNANT WORKERS FAIRNESS ACT PUMP ACT

## PWFA

- Expands protections for medical conditions relating to pregnancy, childbirth.
- *Reasonable accommodations*
- Must engage in interactive process.
- Must give employee desired accommodation unless u/h.
- EEOC enforces – eff. 6.27.2023

## PUMP

- Private location to pump.
- Break time.
- Employee gives employer 10-day notice of non-compliance; 10 days to remedy.
- FLSA remedies – eff 4.28.2023

# OVERTIME FOR NON-EXEMPT EMPLOYEES

- Pre-Shift and Post-Shift Work
- Roll Call
- Report Writing
- Training
- Breaks/Call-back/On call
- Furloughs
- Travel





# COMPENSABLE TIME AND MEAL BREAKS

- Compensability evaluated under “Completely relieved” v. “predominant benefit” standard”
- Creating a policy that prohibits unauthorized work during meal breaks is not enough to avoid liability; policy must be consistently enforced
  - Liability triggered when employee is permitted or suffered to work
- Automatic meal break deductions are lawful
  - Challenge is to identify time actually worked and adjust automatic deduction; policy should place burden on employee to report exceptions to otherwise uninterrupted meal period
  - Can require workers to remain on site during a meal, but do not require them to remain at their post
- Employers should have strict meal break policies that either prohibit employees from eating at their desk or require them to notify supervisors if they are working through their meal breaks
- Brown bag lunches/lunch time meetings should not be counted as unpaid meal break

# WHAT IS WORK TIME? NOT COMMUTING

- *Singh v. City of New York*, (2d Cir. 2008)
- Fire alarm inspectors claimed extension of work time of 10-15 minutes due to toting the files
- Commuting while carrying files is not work time
- Employee not engaged in work for city's benefit and at city's request
- Test: did carrying files restrict ability to use commuting time?

\*Reading



\*Eating

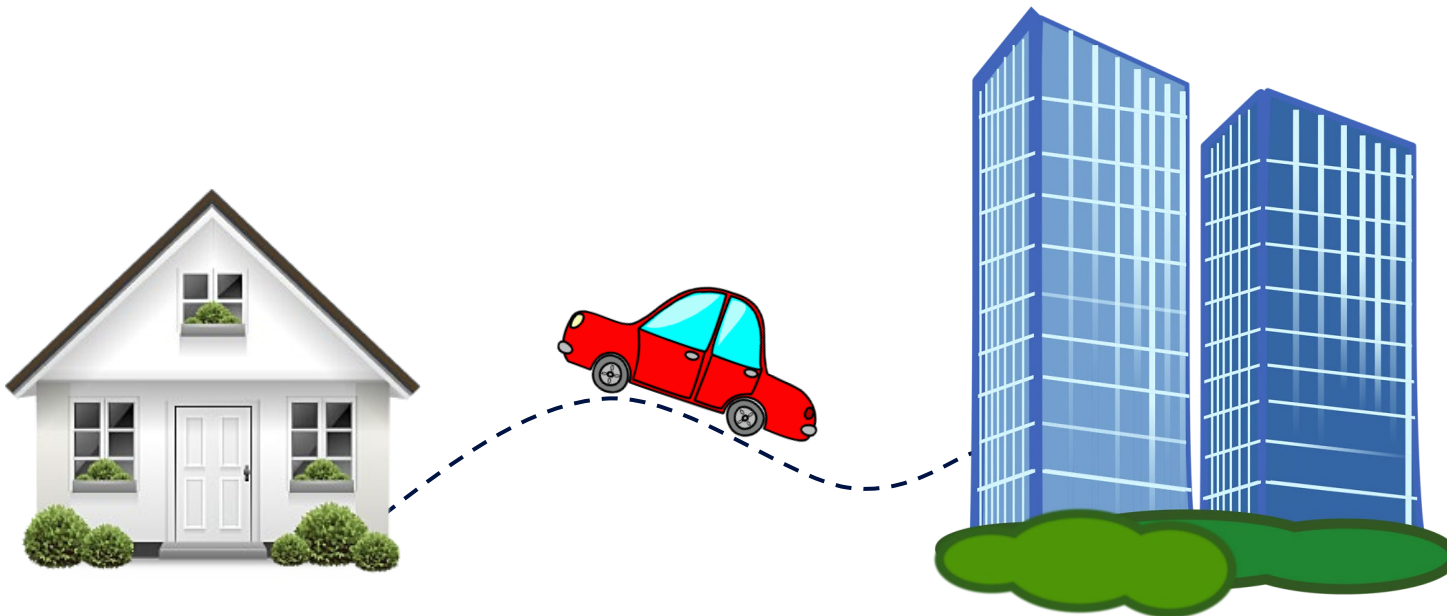


\*Listening to music



# TRAVEL DURING OR AFTER WORKDAY

- Job-site to job-site travel is compensable
- Travel to employer's premises after work is compensable
- Travel to home after work is not compensable





# OVERNIGHT OUT OF TOWN TRIPS

- Travel away from home during workday is compensable
- Travel during normal working hours on non-working days is compensable
- DOL letter opinion on topic

# ON-CALL TIME

- Cell phones and alcohol restrictions do not necessarily constitute inability to use free time



# COMPENSABILITY OF ON-CALL TIME

## FLSA 2008-8NA

- On-call 4 hours/day—five days/week
- *8 minute response time*
- Compensable in winter—called nearly every day
- Non-compensable in summer
- No trading of on-call responsibilities with volunteers
- VIP: short response time



# CALL BACKS

- Is there a minimum amount of time city must pay for?
- Is call back time overtime?
- What about a telephone call to home of police officer to ask status of report?



# FACTORS TO EVALUATE REGARDING COMPENSABILITY OF ON CALL TIME

- Terms of employment agreement
- Physical restrictions placed on employee while on call
- The maximum period of “response time”
- Percentage of calls expected to be returned by on-call employee
- Frequency of actual calls during on-call periods
- Actual uses of on-call time by employee
- Disciplinary action, if any, against employees who fail to answer calls



# TRAINING TIME

- Compensable if during regularly scheduled work time
- Non-compensable only if all four are met:
  - Truly voluntary
  - No productive or “real” work performed
  - Not directly related to current job duties, and
  - Outside of regular work hours
- If not, then it is compensable



# TRAINING & STUDY TIME-COMPENSABLE?

## DOL LETTER RULING FLSA2009-15

- City required certain employees to attend & pass training courses intended to make employees more proficient at existing jobs
- Attend training during regular work hours, but are assigned reading and assignments
- Study time? Compensable—but the City may establish a limitation on the amount of time expected to complete assignments/read chapters
- If exceeds that time, the employee must still be paid the overtime—but the employer may be able to discipline the employee for non-compliance with the policy

# WEB-BASED TRAINING OUTSIDE OF WORKING HOURS IS COMPENSABLE DOL LETTER RULING FLSA2009-13

- Private sector company—technicians who install, monitor, and service voice and data communication circuits
- Training is expected to improve their performance at their existing job; although could perform the job without additional training
- Training is NOT voluntary because was “directly related” to job; therefore—time is compensable



# OVERTIME CALCULATION

## *Dept. of Labor Opinion Letter – 2/14/05*

- Employees who perform more than one job for an employer must be paid overtime on a weighted average basis.
  - Non-exempt employee works at more than one job and jobs' pay rates different.
  - Employers may reach written agreement in advance with employee to be paid time and one-half for all overtime hours based on the type of work performed during those hours.
  - Exempt employee performing two jobs:
    - Non-exempt work performed by exempt employee should not exceed 20% of employee's time
- 29 C.F.R. §778.115 “Employees Working at Two or More Rates”
  - Add all amounts earned at different rates and divide by number of hours worked in pay period, include add-on pays, to calculate new RROP

# HOURS WORKED



- Care, feeding & exercising of Police K-9s at home.
- Rest periods of 20 minutes or less
- Clean-up work after the conclusion of a shift
- The entire meal period if the employee is not completely relieved from all duties, and responsibilities. Example: A clerical employee who must sit at his/her desk and answer telephones during his/her lunch period
- Transporting or delivering materials or equipment to a job site prior to the start of the workday

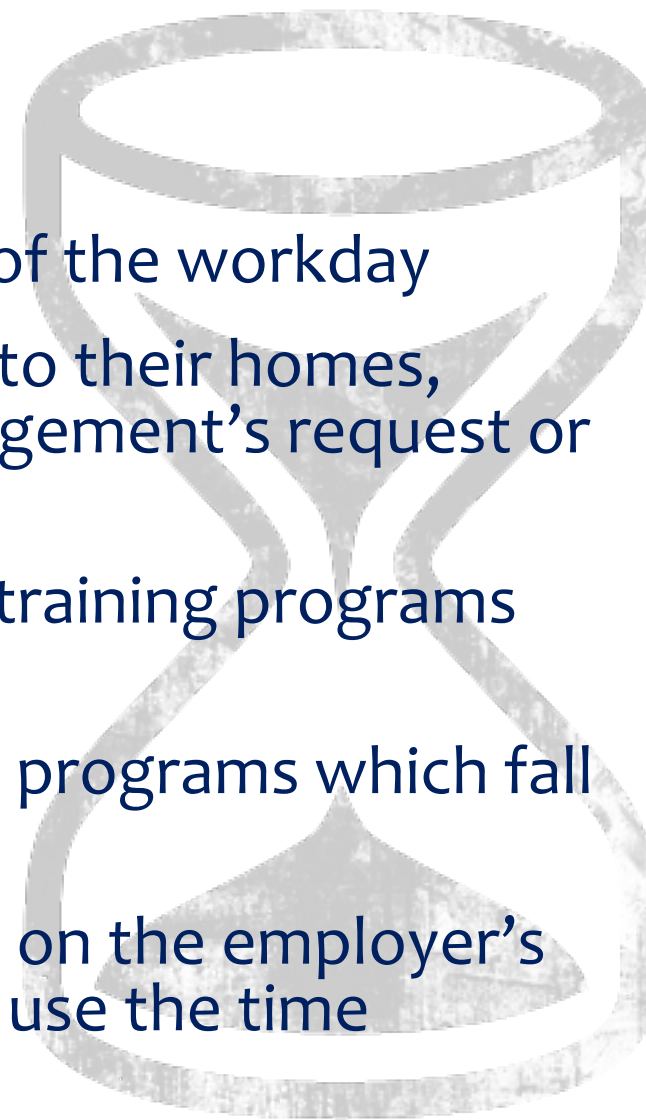
# HOURS WORKED

- Taking clerical work home to complete
- Answering phones during lunch periods
- Answering phones before official starting time in the morning
- Staying after “quitting time” to finish a task
- Delivering mail to the PO after punching out for the day
- Time spent in meeting a requirement to report prior to the official beginning of the shift
- Maintaining/washing government vehicles (cars, motorcycles) at home



# HOURS WORKED

- Returning materials or equipment after the end of the workday
- Transporting employees to work sites, office, or to their homes, either before or after the paid workday, at management's request or directive
- Mandatory attendance at meetings, lectures or training programs outside the employee's working hours
- Attendance at all meetings, lectures and training programs which fall within the employee's regular working hours
- "On call" time by an employee who must remain on the employer's premises or so close thereto that he/she cannot use the time effectively for his or her own purpose



# CALCULATING OVERTIME

- Time and a half
- 40+ hours in 7 day workweek
- Define workweek in writing
- Not pay period
- Can make up time in same 7 day work period, but not pay period





# COMPUTATION OF OVERTIME COMPENSATION

- Hourly paid employees
- Pay at 1 and  $\frac{1}{2}$  x compensation paid for regular hours
- There is another option when pay non-exempt employees on a salary basis: salaried non-exe



# OVERTIME ISSUES IN TECHNOLOGICAL AGE

- Employees work away from office through laptops, cell phones and tablets
- Liable for overtime if employer “knew or had reason to know” that the employee was working from home.
- If you learn the employee is working overtime from home, you must pay him or her overtime for all hours worked over 40 in a workweek, regardless of whether a claim for overtime pay has been made.
- If you do not want the employee to work overtime, you must implement a policy that overtime is allowed *only* with prior approval from the supervisor.
- Telecommuting



# **CHRISTENSEN V. HARRIS COUNTY**

## **U.S. SUPREME COURT (MAY 1, 2000)**

- A public employer may compel use of compensatory time

*\* But see § 142.0016 TLGC*

Remember, public safety can accrue up to 480 hours of comp time; regular government employees can accrue up to 240 hours of comp time

# WEEKLY TIMESHEETS



- Policy requiring all employees (exempt and non-exempt) to keep weekly timesheets
- For exempt, timesheets not kept for purposes of determining employee's wages, but for determining how much leave employee has taken
- Practice is permissible

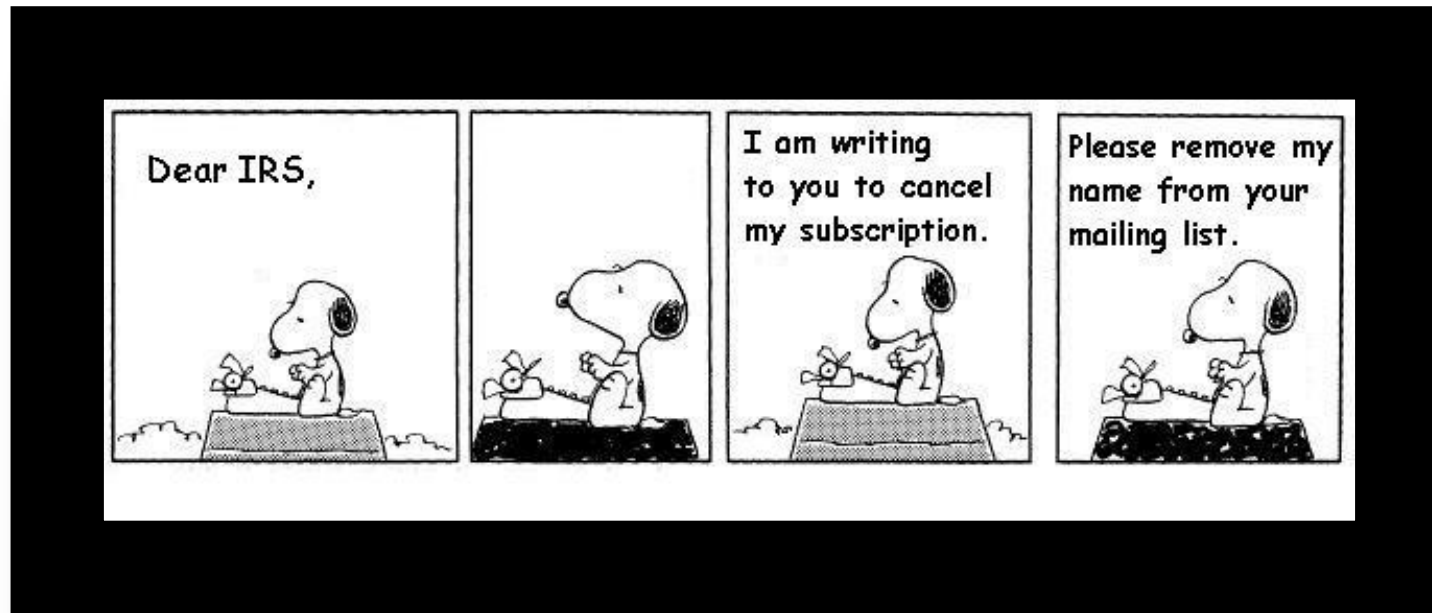
# REGARDLESS OF TEST USED, DOL, IRS, TWC, & MOST COURTS LEAN TOWARD CLASSIFYING WORKERS AS EMPLOYEES



- Does “employer” pay its regular employees to perform essentially same duties as contractor?
- Did worker previously perform same tasks as employee?
- Is it “production” work?
- Are there restrictions on worker’s ability to work for other companies?
- When in doubt, safest choice is to treat worker as employee

# IRS AUDITS - BEWARE!!

- Municipal court judges
- Recreation instructors



# MISCLASSIFICATION OF INTERNS

January 2018 – DOL issued Fact Sheet #71, setting forth new guidelines for classifying interns at for-profit companies.

Primary beneficiary test: which party is the “primary beneficiary” of the relationship?

Under old six-factor test, intern was employee unless all six factors were met. New test is more flexible.



# DOL'S NEW TEST: PRIMARY BENEFICIARY

- Clear understanding no expectation of compensation
- Similarity to educational environment (clinical/hands-on training provided by educational institutions)
- Tied to intern's formal education by integrated coursework/academic credit
- Accommodates/tied to academic calendar
- Limited in duration to provision of beneficial learning
- Complements/does not displace paid employee's work
- Understanding of no entitlement to job following completion of internship



# INDEPENDENT CONTRACTOR V. EMPLOYEE – STEPS TO AVOID MISCLASSIFICATION OF WORKERS AS INDEPENDENT CONTRACTORS UNDER FLSA

- Look at all individuals currently classified as independent contractors
- Evaluate based on DOL's new guidance
- Ensure contractor's functions are not integral to core business function & not performing job similar to regular employees
- Create checklist and require "high level" review and approval of independent contractor/vendor arrangements
- Require independent contractor to sign written agreement
- Don't conduct performance evaluations, provide training, require to work specific hours, or attend employee meetings
- Maintain separate files and ensure accounting records reflect contractor status – 1099 forms
- Do not give contractors employee handbooks

# INDEPENDENT CONTRACTOR V. EMPLOYEE – STEPS TO AVOID MISCLASSIFICATION OF WORKERS AS INDEPENDENT CONTRACTORS UNDER FLSA (CONT'D)

- Consider having workers complete “independent contractor” questionnaire and provide supporting documentation to establish independent contractor status
- Select contractors with specialized skill set to perform tasks-for a fixed term—specialized services distinct from employees’ tasks
- Retain/engage independent contractors who are incorporated or otherwise have an established trade or business
- Ensure mutual understanding of independent contractor’s status, including assumption of insurance/licensing
- Do not train or provide benefits, tools, work space or reimbursement to contractor
- Do not restrict ability of contractor to work for others
- Avoid using terminology reflecting wages/employment
- Do not issue business cards, identification, voicemail boxes or email addresses to contractors

# PUBLIC EMPLOYER: SPECIAL RULE FOR “DOCKING” EXEMPT EMPLOYEES’ PAY

## PUBLIC ACCOUNTABILITY

- Pay system established by statute, ordinance, regulation or policy/practice established per principles of public accountability
- 29 C.F.R. §541.701
  - Does not destroy exemption if employee has exhausted leave, or use has been requested and denied
  - AND – if furloughed – may dock pay and not destroy exemption

# FLSA AND POLICE AND FIRE EMPLOYEES

- 7(k) exemption
- Texas–firefighters only
- Components of 7(k) exemption select work period up to 28 day
- Pay overtime only if hours exceed chart
- Hourly versus salaried employees
- Fluctuating work week and half-time method of computing overtime
- Police: §142.0015 TLGC

## Fact Sheet #8: Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the [FLSA](#) to law enforcement and fire protection personnel of State and local governments.

### Characteristics

Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who:

1. are trained in fire suppression;
2. have the legal authority and responsibility to engage in fire suppression;
3. are employed by a fire department of a municipality, county, fire district, or State; and
4. are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform. So long as the employee meets the criteria above, he or she is an employee “employed in fire protection activities” as defined in section 3(y) of the FLSA.

Law enforcement personnel are employees who are empowered by State or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement.

Employees engaged in law enforcement activities may perform some nonexempt work which is not performed as an incident to or in conjunction with their law enforcement activities. However, a person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under the FLSA.

### Coverage

Section 3(s)(1)(C) of the FLSA covers all public agency employees of a State, a political subdivision of a State, or an interstate government agency.

### Requirements

[Hours of work](#) generally include all of the time an employee is on duty at the employer’s establishment or at a prescribed work place, as well as all other time during which the employee is suffered or permitted to work for the employer. Under certain specified conditions time spent in sleeping and eating may be excluded from compensable time.

The FLSA requires that all covered nonexempt employees be paid the statutory [minimum wage](#) of not less than \$7.25 per hour effective July 24, 2009.

The FLSA requires that all covered nonexempt employees be paid [overtime pay](#) at no less than time and one-half their regular rates of pay for all hours worked in excess of 40 in a workweek.

Section 13(b)(20) of the FLSA provides an overtime exemption to law enforcement or fire protection employees of a public agency that employs less than five employees during the workweek in law enforcement or fire protection activities.

Section 7(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a “work period” basis. A “work period” may be from 7 consecutive days to 28 consecutive days in length. For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28. For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.

Under certain prescribed conditions, a State or local government agency may give compensatory time, at a rate of not less than one and one-half hours for each overtime hour worked, in lieu of cash overtime compensation. Employees engaged in police and fire protection work may accrue up to 480 hours of compensatory time.

An employee must be permitted to use compensatory time on the date requested unless doing so would “unduly disrupt” the operations of the agency.

At the time of termination an employee must be paid the higher of (1) his or her final regular rate of pay or (2) the average regular rate during his or her last three years of employment for any compensatory time remaining “on the books” when termination occurs. For more information on state and local governments under the FLSA, see [Fact Sheet #7](#).

No covered employer may employ any minor in violation of the [youth employment provisions](#) of the FLSA. The Act establishes specific provisions concerning prohibited occupations and/or hours of employment of minors under age 18.

Covered employers must make, keep and preserve payroll-related records as described by regulations [29 CFR Part 516](#).

### Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

# 29 CFR §553.31 SUBSTITUTIONS

## Section 7(p)(3).

- (a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.
- (b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or “trade time” with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.
- (c) A public agency which employs individuals who substitute or “trade time” under this subsection is not required to keep a record of the hours of the substitute work.
- (d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

# REGULAR RATE OF PAY

- “Regular Rate of Pay” generally exceeds hourly rate
- Must include add-ons:
  - Longevity
  - Educational
  - Shift differential
  - Assignment
- Does Not Include:
  - Uniform allowance
  - Cell phone reimbursement
  - Comp time/Overtime payments
  - Car reimbursement



# IF EMPLOYEE IS NOT EXEMPT, CALCULATE REGULAR RATE

- Must be more than minimum wage
- Overtime – 1 ½ times regular rate
- “Regular rate” must be an hourly rate
- Calculation: All remuneration earned in week ÷ total number of hours worked
- Remember, if the employer does not have any time records- the DOL/judge/jury will take the employee’s word for it!







# Article 2.12 CCP

## WHO ARE PEACE OFFICERS?



- Police officers of a city, town or village, and reserve municipal police officers who hold a permanent peace officer license.
- Members of an arson investigation unit.
- Municipal park and recreational patrolmen and security officers.
- And thirty-two others . . .

**TEXAS GOVERNMENT CODE**  
**CHAPTER 419**  
**TEXAS COMMISSION ON FIRE PROTECTION**  
**WHO ARE FIREFIGHTERS?**



# § 419.021 – DEFINITION OF FIRE FIGHTER

- Permanent, full-time law enforcement officers designated as fire and arson investigators.
- Aircraft rescue and fire protection
- Permanent, full-time fire department employees who are not secretaries, stenographers, clerks, budget analysts, or similar support staff persons or other administrative employees and who are assigned duties in one or more of the following categories:
  - Fire suppression and inspection;
  - Fire and arson investigation;
  - Marine and aircraft rescue & fire fighting
  - Fire training and education;
  - Fire administration; and
  - Any other position necessarily or customarily related to fire prevention.



**TEXAS**  
**LOCAL GOVERNMENT CODE**

**COMPENSATION & EXPENSES OF**  
**MUNICIPAL OFFICERS AND EMPLOYEES**

## § 141.007 - POLICE RESERVE FORCE

A city may compensate a reserve officer, but only for time served in training for, or in the performance of, official duties.

A reserve officer may serve without compensation.

# § 141.008 - PAYROLL DEDUCTIONS FOR ASSOCIATION DUES

(IN CITIES WITH POPULATION GREATER THAN 10,000)

## ALL EMPLOYEES

- City *may* deduct if employee requests in writing.

## FIRE FIGHTERS

- City *must* make deduction if it receives revenue from the state and it permits deductions for purposes other than charity, health insurance, taxes, or other purposes. Request must be in writing.

# § 141.008 - PAYROLL DEDUCTIONS FOR ASSOCIATION DUES

(IN CITIES WITH POPULATION GREATER THAN 10,000)

## POLICE OFFICERS

- City *must* make deduction if department not covered by collective bargaining or meet-and-confer agreement, and city permits deductions for purposes other than charity, health insurance, taxes or other purposes. Request must be in writing.

Employee participation is voluntary.

**Written Request** on form provided by city, to include amount of deduction and directive to transfer to designated association. Remains in effect until written notice of revocation.

**Reasonable administrative fee** - City may charge administrative fee from each employee for collecting, accounting for, and disbursing the funds.

# LOCAL GOVERNMENT CODE SUBCHAPTER B

## COMPENSATION OF POLICE OFFICERS & FIRE FIGHTERS IN CERTAIN MUNICIPALITIES





# §141.032 - LONGEVITY PAY FOR POLICE & FIRE

(IN CITIES WITH POPULATION GREATER THAN 10,000)



- A police officer or fire fighter is entitled to an additional payment of \$4 a month for each year of service in the department, not to exceed 25 years.

# §141.033 - CLASSIFICATION OF POSITIONS SALARY SCHEDULE

## Rank Structure

The city is required to classify all positions in its fire and police departments and specify the duties and salary of each classification.

## Step-Up Pay

If an employee is required to perform the duties of a particular classification, that employee must be paid the corresponding salary for the time the employee performs the duties.



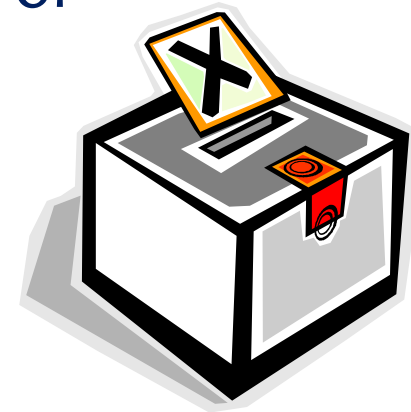
# § 141.034 - PETITION TO INCREASE SALARIES

(In cities with population greater than 10,000)

Voters may petition the city council to increase the minimum salary of fire fighters and police officers.

City council required to take one of the following actions:

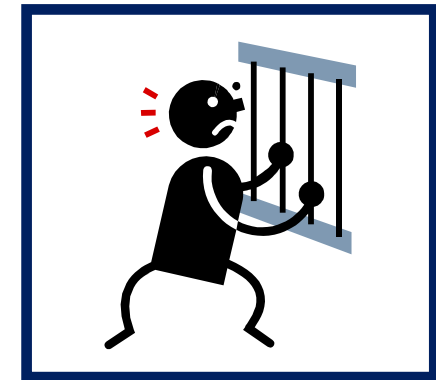
1. Adopt the proposed minimum salary stated in petition;
2. Offer an alternative minimum salary proposal; or
3. Call an election.



# §141.035 - PENALTY

(IN CITIES WITH POPULATION GREATER THAN 10,000)

- A municipal official in charge of the fire or police department and who is responsible for setting compensation of members of these departments, commits an offense if he/she violates any of the compensation provisions of Subchapter B.



**CHAPTER 142**  
**LOCAL GOVERNMENT CODE**

**ASSISTANCE, BENEFITS & WORKING**  
**CONDITIONS**  
**FOR**  
**POLICE OFFICERS**  
**&**  
**FIRE FIGHTERS**

# SUBCHAPTER A

## GENERAL PROVISIONS



# §142.001 - HOURS OF WORK & VACATION FOR POLICE & FIRE



- Defines “**work cycle**” as the period in a posted work schedule ending when the cycle begins to repeat itself. The cycle may span any number of days, weeks, or a part of a day or week.



- **Trade Time** - with the Chief’s consent, police officers and firefighters may work extra hours when exchanging hours with another police officer or fire fighter.



## §142.0013 - HOURS OF LABOR & VACATION (IN CERTAIN CITIES)



- **Population of 25,000+:** A police officer or firefighter may not be required to be on duty for more than 6 days in a week, except in an emergency.
- **Population of 30,000+:** A police officer or firefighter is entitled to 15 paid vacation days each year if employed for at least one year in the department.
- **All Cities:** Police officers and firefighters must be given the same number of vacation days and holidays, or days in lieu of, as other city employees.



**§142.0015**  
**HOURS OF LABOR & VACATION**  
**(IN CITIES WITH POPULATION GREATER THAN 10,000)**

**Overtime Ratio for Fire fighters & EMS**

A fire fighter or EMS employee (excluding chief, assistant chief, or an equivalent) who works more than the same ratio to 212 hours in a 28 day work period, is entitled to overtime.

**Overtime Ratio for Other Fire Employees**

A member of fire department who does not provide EMS services or fight fires (excluding chief, assistant chief, or an equivalent) who works more hours in a week than a majority of other city employees (excluding fire fighters, EMS and police officers) is entitled to overtime.

# FIRE FIGHTERS & OTHER MEMBERS OF FIRE DEPT.

## ON-CALL TIME

If employee on call at or near city premise & can't use time effectively for personal use, time is counted toward hours worked. If employee only required to leave telephone number or can be reached by radio or pager, hours not counted.

## HOURS IN WORK WEEK OR WORK CYCLE

Vacation, sick time, holidays, time in lieu of holidays & compensatory time may be excluded as hours worked.

## MANDATORY OVERTIME

A city may require fire fighters & other members of fire department to work overtime. Overtime is paid at the rate of 1 ½ times the regular rate.



# §142.0015- (F-J) POLICE OFFICERS - OVERTIME

(f) With 2 exceptions, police officers can't be required to work more hours during a calendar week than the number of hours in the normal work week of the majority of city employees other than fire fighters and police officers.

## 2 Exceptions:

1. **Emergency**- if there is an unexpected happening or event or an unforeseen situation or crisis that calls for immediate action & Chief orders the officer to work overtime.
2. **Written waiver** - if a majority of police officers sign a written waiver, city may require police officers to work more hours than permitted by sub. (f).

**Overtime** – Even with written waiver, officer who works more hours in normal calendar month than majority of city employees (other than police and fire), is entitled to overtime pay.

Dispatchers – cannot waive FLSA work periods

# POLICE OFFICERS – OVERTIME RATE & MEALS

- A police officer is entitled to overtime pay or comp time of 1 ½ times regular rate if required to work overtime in an emergency. Time worked includes pre-shift and post-shift activities.
- Bona fide meal periods are not counted as hours worked if officer is completely relieved from duty. Meal periods are generally 30 minutes or longer, but can be shorter under special conditions. Meal period does not include coffee breaks or time for snacks.



# § 142.0016 - USE OF COMP TIME

## (POPULATION OF MORE THAN 10,000)

- A fire fighter or police officer may, with city's approval, accept comp time in lieu of overtime pay, at rate of 1-1/2 times the regular rate.
- **Use of Comp Time** – A fire fighter or police officer may use comp time only when both employee and city agree.
- **Pay-out** – City may, at any time, pay all or part of employee's accumulated comp time if employee and city so agree
- If full payment of accumulated comp time would exceed 10% of annual salary, city may at its option, defer payment of excess amount until first pay period of next fiscal year.
- Accumulated comp time must be paid at employee's rate of pay at time payment is made, or at time payment requested, whichever is greater.
- If employee dies or is terminated for any reason, city pays accumulated comp time to employee or his/her estate.

## § 142.003 - HOSPITAL AND MEDICAL ASSISTANCE FOR POLICE RESERVE FORCE

- A City may provide hospital and medical assistance to a member of the police reserve force who sustains injury in the course of performing official duties in the same manner as provided to full-time police officers.



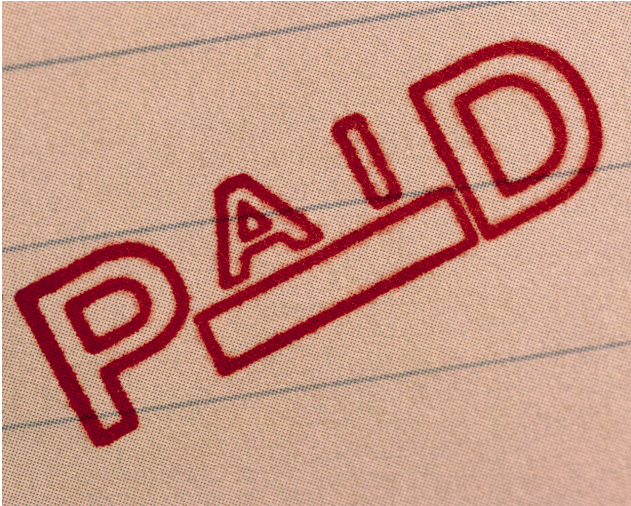
- A police reserve officer is eligible for death benefits as provided by Chapter 615, Gov't Code.

## § 142.006 MOTOR VEHICLE LIABILITY INSURANCE FOR PEACE OFFICERS AND FIRE FIGHTERS

- A City shall provide insurance against liability to third persons arising out of the operation, maintenance, or use of a motor vehicle owned or leased by the City.
- The City may elect to self-insure or to reimburse the employee on an individually-owned automobile liability insurance policy.



## §142.008 - SALARY CONTINUATION & SUBROGATION



- If a city pays an employee who has been injured, due to the tortious act of a third party, under a salary continuation program, the city may claim subrogation to the extent of such payments.
- A city is prohibited from denying salary continuation benefits because the employee has a cause of action against a third party for personal injuries.



## §142.009 - PAYMENT FOR COURT APPEARANCES

A city is required to pay a firefighter or police officer for appearing as a witness in a criminal or civil suit if the city or another city or governmental agency is a party, if the employee's appearance is:

- required
- made on time off, and
- done in capacity as fire fighter or police officer

Payment is at the employee's regular rate of pay.



## §142.011 - EDUCATIONAL LEAVE



- A city may grant a peace officer a leave of absence to enroll full-time in college to pursue a course of study related to law enforcement or public safety. The peace officer must submit a written application for the leave of absence.
- Officer on leave is entitled to continue receiving employee benefits (e.g., health & life insurance & accumulation of retirement credit) *if* officer pays for both his and city's cost of the benefits.
- Upon reinstatement, officer is entitled to full seniority credit for the leave time.



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