

FLSA 1213

January 2, 1987

This is in further response to your letter of October 27 concerning overtime compensation under the Fair Labor Standards Act (FLSA). You are employed by the *** County Sheriff's Department as a police officer and are concerned about situations where police officers substitute or trade time with one another.

You were contacted by *** of my staff by telephone on November 7 to discuss the questions in your letter. However, you also requested a written response to your letter. You also advised *** that the police officers employed by the *** County Sheriff's Department are covered by the terms of a collective bargaining agreement (CBA). The CBA provides that overtime worked in excess of 8 hours per day and/or 40 hours will be compensated at time and one-half. An employee may either take compensatory time off or receive payment in cash.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The application of FLSA to State and local government employees is explained in the enclosed WH Publication 1459.

The Fair Labor Standards Amendments of 1985 (the Amendments), Public Law 99-150, provided certain changes in FLSA as it applies to public employees. In order to implement the Amendments, the Department of Labor published proposed regulations on April 18 (copy enclosed).

As indicated in section 553.31 of the proposed regulations, section 7(p)(3) of FLSA provides that two individuals employed in any occupation by the same public employer 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 worked for which the substituting employee would otherwise be entitled to overtime compensation under FLSA. Where employees trade hours, each employee will be credited as if he or she had worked his or her normal schedule for that shift.

We have analyzed your questions under the above provisions. You give an example in which officer A works 8 hours for officer B and you ask:

Q.1. Can officer B transfer 8 hours of overtime which he has accrued to officer A's overtime account instead of actually working 8 hours for officer A?

A.1. Under the rule stated in section 553.31, officer B is credited with the hours worked by officer A in his place. However, the hours worked by officer A in substituting for officer B are excluded by the employer in the calculation of the hours for which officer A

would otherwise be entitled to overtime compensation. Thus, there is no FLSA requirement that officer B substitute in turn for officer A in order to repay officer A. This is a matter left to the parties to resolve.

The transfer of compensatory hours to officer A which have been accrued by officer B, which you propose, would require the employer to maintain a separate recordkeeping system, which is not required by FLSA. See section 553.31(c).

However, to accomplish the payback objective, officer B may use his own accrued compensatory time at the same time while working the appropriate number of hours to payback officer A. For example, officer B could use 40 hours of his accrued compensatory time while simultaneously working 40 hours for officer A. Thus, under the rule discussed above, officer A would be credited with and receive 40 hours of pay by the employer, while officer B would also receive 40 hours of compensatory time off with pay from the employer.

Q.2. Is there any problem with the "transfer" of hours from one officer's accrued hours of compensatory time to another officer's compensatory time record?

A.2. Yes. For the reasons indicated above, hours may not be transferred from one officer's record to another officer's record.

For police officers, the maximum amount of compensatory hours which may be accrued under FLSA is 480 (320 hours of actual overtime worked). See sections 553.23 and 553.24.

Q.3. Are there any limitations on the numbers of trades that may be made between employees?

A.3. No.

Please note that other compensatory time is not affected by the limits discussed in A.2. For example, non FLSA compensatory time which is earned as the result of the provisions of a CBA may be handled in any fashion the parties so choose. See section 553.28.

We trust that the above discussion has satisfactorily responded to your inquiry. Please let us know if we may be of further assistance.

Sincerely,

Paula V. Smith
Administrator

Enclosures