

**RESOLUTION TO AMEND PERSONNEL POLICIES OF THE CITY OF SKY VALLEY
TO ESTABLISH CATEGORIES FOR WORK SCHEDULES AND OTHER PURPOSES**

Whereas, the City of Sky Valley has established personnel policies; and,

Whereas, the City of Sky Valley finds it desirable and necessary to confirm employee categories for the purposes of establishing effective and efficient work schedules.

Therefore, be it hereby resolved as follows:

- I. The personnel policies of the City of Sky Valley shall be amended as follows:
 - 1. The City of Sky Valley may from time to time establish employee classifications to promote efficiency in public service, to include efficiencies in public safety.
 - 2. Work time and pay rate schedules may be established consistent with regulations enacted by the U.S. Department of Labor and pursuant to the Fair Labor Standards Act (FLSA) as amended.
 - 3. Employees of the City of Sky Valley may be assigned work and pay schedules consistent with U.S. Department of Labor regulations and the FLSA as amended.
 - 4. The computation of any overtime or compensatory time off for employees of the City of Sky Valley Police Department shall be consistent and in compliance with Section 207(k) of the FLSA and regulations enacted thereunder.
- II. Any act, ordinance, policy, or regulation inconsistent with the above amendments is hereby deleted to be void and of no effect.
- III. This resolution will become effective upon enactment by the City of Sky Valley.

This _____ day of October, 2006.

Approved:

Steve Brett, Mayor

David Carr, Council President

Ray Becker, Councilor

Carolyn Burgess, Councilor

Delano Moore, Councilor

D. Starr Raye, Councilor

Attest:

Linda Wells, City Clerk

Read and adopted on the _____ day of _____, 2006.

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¶610 Overtime Pay for Section 207(k) Employees

Because employees who work schedules under §207(k) of the Fair Labor Standards Act (FLSA) are allowed to work more than 40 hours per week before overtime begins to accrue, it is important to carefully calculate the overtime and compensatory time due these employees according to the declared schedule.

¶611 Computing Overtime for Section 207(k) Employees Who Work More Than a Seven-, But Less Than a 28-Consecutive-Day Work Period

For an employee engaged in fire protection or law enforcement for a work period between seven and 28 consecutive days long, overtime for the excess hours is based on a proration of 212 hours or 171 hours, respectively, to a 28-day work period. Such employees cannot have a work period in excess of 28 days. The employer is responsible for setting the work period, with all time worked by an employee during this period totaled and overtime, if any, calculated accordingly.

The ratio for firefighters is 212 hours/28 days, or 7.57 (rounded) hours per day. The ratio for police is 171 hours/28 days, or 6.1 (rounded) hours per day. The following table sets forth the maximum hours for each work period after which the employee is entitled to one and one-half times the regular rate:

Maximum Hours Worked (Rounded) Before Overtime:

<i>Consecutive-Day Work Period</i>	<i>Hours Of Fire Protection</i>	<i>Hours Of Law Enforcement</i>
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

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It is important to note that to be exempt from the normal 40-hour-per-week overtime standards, the work period must be at least seven consecutive work days, up to a maximum of 28 consecutive work days.

The figures in the preceding table appear in a U.S. Department of Labor (DOL) publication entitled "State and Local Government Employees Under the Fair Labor Standards Act" (Page 20). (It also can be found in DOL regulations at 29 C.F.R. §553.230.) The DOL publication provides general information, and compliance with it cannot be relied upon as a good faith defense under the act. There are two statistical quirks or errors in DOL's compilation of schedules for law enforcement employees. If a 14-day work schedule is selected, DOL allows an 86-hour workweek. Thus, by selecting a 14-day period, an employer can work police officers 172 hours in a 28-day period, which is one more hour without overtime than if the employer selected the 171 hour 28-day option. A similar problem exists with regard to the 141 hours for a 23-day schedule allowed for in the DOL publication. Thus, it may be more advantageous to fix a 14-day work period if the fluctuating schedule of your police officers allows such a schedule.

¶612 Compensatory Time Off

Section 207(k) employees may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum set for their work period (29 C.F.R. §553.231; see also ¶560 concerning the guidelines for compensatory time).

The purpose of 207(k) plans is to permit public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. As the regulations note, if a firefighter's work period is 28 consecutive days and he or she works 80 hours in each of the first two weeks, only 52 hours in the third week, and not at all in the fourth week, no overtime compensation (in cash or compensatory time) is due. This is because the total hours worked did not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation would be due for 54 hours (160 minus 106 hours) in the first 14-day work period (29 C.F.R. §553.231(b)). Of course, the compensatory time off must be subject to a valid agreement between the employer and the employee (see, for example, Wage and Hour Opinion Letter, Aug. 19, 1994).

¶613 Overtime Pay Requirements

If a public agency chooses to pay its employees in cash for overtime, such wages must be paid at time and one-half the employees' regular rates of pay (see ¶614 and Tab 500). In addition, employees who have accrued more than the maximum 480 hours of compensatory time allowed to public safety employees must be paid cash wages for overtime hours in excess of the maximum set for the work period (29 C.F.R. §553.232).

Note that it is improper to pay section 207(k) employees for an "average" number of hours worked. DOL found impermissible one city's plan that would pay a firefighter on a 27-day work schedule

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(with a maximum of 204 hours under the regulations) for 112 hours every two weeks or 224 hours for the work period at a straight time rate when the firefighter actually worked 216 hours. DOL struck down the plan, noting that the 12 overtime hours (204 to 216) must be based on time and one-half the firefighter's regular rate of pay (Wage and Hour Opinion Letter, Jan. 23, 1986).

¶614 Calculating the Regular Rate and Overtime for Section 207(k) Employees

The rules for computing a section 207(k) employee's regular rate, for purposes of determining cash overtime compensation, are the same as those applied to all employees (see ¶510). For example, reimbursements for use of an automobile are not includable in the regular rate of pay for an investigator (Wage and Hour Opinion Letter, Dec. 12, 1988). But bonuses for shift differentials, hazardous duty pay, educational degrees and longevity pay are includable (*Featsent v. City of Youngstown, Ohio*, No. 94-3439 (6th Cir. 1995)). Nonetheless, wherever the regulations use the word "workweek," the words "work period" should be substituted (29 C.F.R. §553.233; see also Wage and Hour Opinion Letter, Nov. 19, 1987.)

When calculating overtime for 207(k) employees, the employer should not use the 40-hour workweek standard. Instead, the employer should look to the employee's work period (which can be up to 28 days) and the maximum number of hours that may be worked for the period (such as 212 for a firefighter's 28-day period or 171 for a police officer's 28-day period). Overtime pay is then calculated for hours worked in excess of the 207(k) maximum (see *Schmitt v. State of Kansas*, 2 Wage & Hour Cas. 2d (BNA) 481 (D. Kan. 1994)). Note that since 207(k) employees are "salaried," employers may use the half-time method of calculating overtime (see ¶530).

Example #1 (Using Half-time Method For Overtime)

A firefighter has a 28-day work period and earns an annual salary of \$24,000 for all hours worked. The firefighter therefore works about 13 work periods per year (28 days x 13 work periods = 364 days). For each work period, the firefighter receives \$1,846.15 ($\$24,000 \div 13$).

Suppose the firefighter worked 224 hours in the work period (12 more than the 212 maximum permitted). His regular rate of pay would be: $\$1,816.15$ (salary for work period) \div 224 (hours worked) = $\$8.24$. For the 12 hours of overtime, the employee would receive an additional $\$4.12$ half-time per hour for every hour worked over 212, or a total of $\$49.44$. (See, for example, *Aaron v. City of Wichita*, 54 F.3d 562 (10th Cir. 1995)).

Example #2 (Using Regular Overtime Calculation)

A firefighter has a 28-day work period and earns \$8.10 an hour. Suppose the firefighter worked 224 hours in the work period (i.e., 12 more than the 212 hour maximum permitted). Her regular rate of pay would be the hourly wage of \$8.10. For the 12 hours of overtime work, she would be entitled to payment of one and one-half times her regular rate, or $\$12.15$ an hour ($\$8.10 \times 1.5$), for a total of $\$145.80$.

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¶615 Special Section 207(k) Compensation Issues

Roll Call

In an Oct. 22, 1987, opinion letter, Wage and Hour Administrator Paula V. Smith addressed the compensability of roll-call and travel time for law enforcement personnel under a section 207(k) plan. In this case, the public employer had established a 28-day work period for which the maximum hours standard is 171 hours. According to the employer, the police officers were scheduled for 20 eight-hour duty shifts, or 160 hours for the 28-day work period.

The police officers also had to report 15 minutes before each tour of duty for roll-call information, totaling an additional five hours of work time for each work period, for which they were not compensated. The city, therefore, was concerned that the officers were not being properly compensated under the FLSA for the additional work.

DOL concluded that the city was properly compensating the police officers, so long as the maximum hours standard (here, 171) had not been reached, and the employees received at least the minimum wage for all hours worked. For example, a police officer receiving \$10.50 for 160 hours has been paid in compliance with the 207(k) provisions of the FLSA, even though he worked 165 hours in the 28-day work period. The total compensation divided by the total number of hours worked ($\$1,650 \div 165$) results in a higher-than-minimum-wage rate (\$10.18/hour). So long as the maximum hours standard has not been exceeded, this compensation scheme fully complies with the minimum requirements of the act, according to DOL.

DOL pointed out, however, that a different case exists if the officer in question works *more* than the 171-hour maximum established by the 207(k) plan. In that case, \$10.50/hour is determined to be the regular rate of pay, and all hours worked in excess of 171 must be compensated at one and one-half times this regular rate. For example, police officers who work an extra hour of duty (21 days x 8 1/4 hours per day = 173 1/4 hours) must be paid as follows:

171 hours @ \$10.50	\$1,795.50
2 1/4 hours @ \$10.50 x 1 1/2	<u>35.44</u>
	\$1,830.94

Training Time

In the same Oct. 22, 1987, letter, DOL addressed compensating 207(k) employees for training sessions. According to the employer, all time spent by law enforcement personnel in training sessions is counted as hours of work, but they are not compensated (above the 160 scheduled) unless the total hours worked exceeds 171. DOL concluded that, like roll-call formation, the city must pay for training time at an overtime rate *only* if the employee's hours of work exceed 171 hours in a 28-day work period.

According to DOL, so long as 207(k) employees do not exceed the maximum hours standard for their respective work period (such as 171 hours for 28 days worked) and so long as all hours actually worked

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are compensated at a rate above the minimum wage, then the requirements of the FLSA are fulfilled. Once the maximum hours standard is exceeded, however, the 207(k) employee must be compensated at a rate of time and one-half the regular rate of pay. In the opinion letter, DOL appears to calculate the regular rate of pay without including the roll-call or training time as hours worked. This produces an anomalous situation where the work time counts for computing overtime hours but not for computing the overtime rate of pay. DOL may want to re-examine this opinion letter to clarify the confusion.

In addition, while such an arrangement (no compensation for roll-call or training time up to 171 hours) may meet the FLSA's requirements, an employer in such a case should carefully review any applicable collective bargaining agreement or employment agreement to ensure that the employees also are being paid in accordance with the terms of the contract. For example, if the employer has agreed to pay the employees on an hourly basis for all work time, and roll-call and training time is considered work time, then the employer may be violating the terms of the contract, if not the FLSA, by failing to pay employees for such time. As with any question concerning the rights and obligations of employers and employees, any contractual agreement between the parties, in addition to the FLSA and other applicable laws, must be strictly adhered to. DOL's opinion letter offers no advice on this subject because it is outside the province of the FLSA.

Moreover, employers should not be misled by the above discussion of training time to conclude that all "trainees" are, in fact, employees. Sometimes, trainees are not deemed to be employees (see ¶219 of the *Handbook*). For example, in *Martin v. Parker Fire Department District*, 1 Wage & Hour Cas. 2d (BNA) 505 (10th Cir. 1993), applicants for employment took a 10-week training course and were not deemed to be employees. The court adopted a six-part test urged by DOL, but did not require that all six "prongs" be satisfied. Rather, the court looked at the totality of the circumstances.

¶616 Scheduling Section 207(k) Employees

There are many factors to consider in designing a police or fire schedule under a Fair Labor Standards Act (FLSA) Section 207(k) plan (also called a 7(k) plan). One major advantage of the 7(k) plan is that it permits departments to minimize their overtime burden. Therefore, when scheduling 7(k) employees, an employer should attempt to minimize the number of overtime hours worked. Secondly, employers should try to develop schedules that are not administratively burdensome.

Work schedules specify the pattern of on-duty and off-duty days for individual employees or groups. Scheduling is important because effective scheduling reduces sick leave, increases incentive to work, reduces overtime and results in higher morale. Ineffective scheduling may produce boredom, fatigue and absenteeism, in addition to increased risk of injury or illness. See Sklar, "Work Scheduling: The Basics," ICMA Report (December 1985, Vol. 17, Number 12).

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There are general principles that an employer should follow in formulating a schedule. First, the employer should choose the longest work period possible. When long work periods are used (e.g., 28 days) the employer can control overtime liability. If, for example, a fire protection 7(k) employee has worked 212 hours in the first 21 days of a 28-day work period, an employer may excuse the employee from working the last days of the work period. These situations where there are large amounts of unscheduled work frequently occur for police and fire employees, and an employer will find that by having employees on a longer cycle, flexibility is increased and overtime may be avoided. The 28-day period provides maximum flexibility for the employer. Moreover, if the employer uses bi-weekly payroll periods it is easy to administer.

Another common concept is that a work period should coincide with some multiple of the number of days in the employee's regular tour of duty. For instance, if a department has a six-day-on and three-day-off tour of duty, there is a recurring nine-day work period. It is best, therefore, for the jurisdiction to select a period of nine, 18 or 27 days, so that the employees' nine-day tours will not overlap with other work periods. If a work period is straddled there may be a disproportionate number of hours worked or not worked during a particular work period. See *FLSA What It Means, What To Do*, ICMA (1986).

The FLSA is not concerned with how a fire or police department schedules its shifts or implements a work period. According to a U.S. Department of Labor opinion letter, the fact that a fire department schedules three different shifts of firefighters starting on the same day — which has the effect of denying two shifts opportunities for overtime pay — is of no consequence to the DOL (Wage and Hour Opinion Letter, May 13, 1987).

¶617 Tour of Duty

The term "tour of duty" is a unique concept applicable only to section 207(k) employees. The term refers to the period of time during which an employee is considered to be *on duty* for purposes of determining compensable hours. The time may be scheduled or unscheduled. The tour of duty includes "shifts" — time during which the employee is regularly assigned — and time spent performing work outside the "shift." An example of this would be a police officer assigned to crowd control during a parade or other event outside her normal shift (29 C.F.R. §553.220(a)).

Examples of unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and time spent working after a shift to complete an assignment. Even though the specific work performed may not have been assigned in advance, the time *must* be included in the compensable tour of duty (29 C.F.R. §553.220(b)).

The tour of duty does *not* include:

- time spent working for a separate and independent employer in special outside employment details (see 29 C.F.R. §553.227; ¶643);

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- time spent working on an occasional or sporadic and part-time basis in a different capacity from the employee's regular work (see 29 C.F.R. §553.30; ¶645);
- time spent substituting for other employees by mutual agreement (see 29 C.F.R. §553.31; ¶644); or
- time spent in volunteer firefighting or law enforcement activities performed for a different jurisdiction, even under a mutual aid agreement (see 29 C.F.R. §553.105; ¶642).

[The next page is Tab 600, Page 63.]