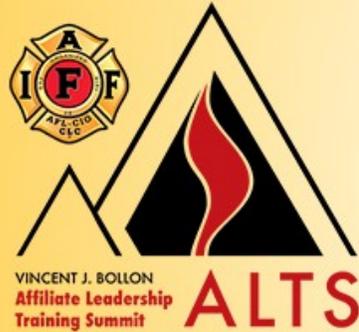


# INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS



Vincent J. Bollon  
Affiliate Leadership Training Summit

Ernest A. "Buddy" Mass  
Human Relations Conference

January 19-22, 2020 | Lake Buena Vista, Florida



ERNEST A. "BUDDY" MASS  
**HUMAN RELATIONS**  
CONFERENCE

## Understanding FLSA

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# Legal Disclaimer

This presentation is being offered solely for informational purposes. It is not intended, and should not be relied upon, as legal advice. Any affiliate requiring legal advice or assistance on any topic covered in this presentation should contact the IAFF Legal Department through its District Vice President, or its local counsel, to obtain advice appropriate to its particular situation.



# Agenda

- **Maximum Hour Standards:** Section 7(a) v. Section 7(k)
- **Exempt Employees:** Executive, Administrative, and Professional Employees
- **Calculating Overtime:** The “Regular Rate,” “Hours Worked,” and “Total Remuneration”
- **Compensatory Time**
- **Exercising Your Rights:** Enforcement, Retaliation, and Bargaining



# IAFF FLSA Policy

- Direct legal representation from the IAFF General Counsel's Office to pursue meritorious FLSA claims
- Financial assistance up to \$10,000
- Self-sustaining program
- Contact District Vice President if you believe you may have a claim, or for more information



# Maximum Hour Standards

Section 7(a) v. Section 7(k)



# Maximum Hour Standards

- FLSA requires premium pay for hours worked in excess of certain hourly thresholds
- FLSA contains two overtime standards that may be applicable to IAFF members
  - **Section 7(a)** = private- and certain public-sector employees
  - **Section 7(k)** = public-sector employees



# Maximum Hour Standards

- FLSA does **not** govern the number of hours employees may work in a given day or workweek
  - Employer generally may require employees to work as many hours per day or week as they see fit
- FLSA does **not** require premium pay for weekends, holidays, regular rest days, or based on the number of hours worked on a given day
  - But other laws, or parties' agreement, may require such payments



# Maximum Hour Standards

## Section 7(a)

Employer must pay employees time and one-half their regular rate of pay for all hours worked in excess of 40 hours in a given workweek



# Maximum Hour Standards

- **Section 7(a) “workweek”** = fixed, regularly recurring 168-hour period (7 consecutive, 24-hour days)
  - Need not coincide with calendar week or pay period, or be same for all employees



# Maximum Hour Standards

## Section 7(k)

Employer must pay fire protection and law enforcement employees time and one-half their regular rate of pay for all hours worked which exceed the ratio of either 212 hours to 28 days (fire protection) or 171 hours to 28 days (law enforcement) in a given work period



# Maximum Hour Standards

- **Section 7(k) “work period”** = fixed, regularly recurring period of 7-28 days
  - Need not coincide with duty cycle, pay period, or particular day of the week or hour of the day, or be same for all employees



# Maximum Hour Standards

Work Period (Days)	Fire Protection	Law Enforcement
7	53	43
8	61	49
9	68	55
10	76	61
11	83	67
12	91	73
13	98	79
14	106	86
15	114	92
16	121	98
17	129	104



# Maximum Hour Standards

Work Period (Days)	Fire Protection	Law Enforcement
18	136	110
19	144	116
20	151	122
21	159	128
22	167	134
23	174	141
24	182	147
25	189	153
26	197	159
27	204	165
28	212	171



# Maximum Hour Standards

- Section 7(k) exemption applies only to “fire protection” (or “law enforcement”) employees
- Who is a “fire protection” employee”?
  - Firefighter, paramedic, EMT, rescue worker, ambulance personnel, or HazMat worker



# Maximum Hour Standards

## “Fire Protection”

1. Trained in fire suppression;
2. Legal authority and responsibility to engage in fire suppression;
3. Employed by municipal, county, fire district, or state fire department; **and**
4. Engaged in fire prevention, control, and extinguishment of fire or response to emergency situations where life, property, environment at risk



# Maximum Hour Standards

Employer fully cross-trains all fire department employees as both fire fighters and medics. It adopts a 7(k) work period, and applies the fire-protection hourly thresholds to all Department employees.

***Is the employer acting lawfully?***



# Maximum Hour Standards

## Adopting 7(k) Work Period

- To claim the exemption, employer must adopt a compliant, regularly recurring work period
- If adoption is disputed, employer bears burden of proof



# Maximum Hour Standards

## Changing the 7(a) Workweek or 7(k) Work Period

- Once beginning and end established, employer may change only if intended to be permanent
- Employer cannot change to evade OT requirements



# Exempt Employees

Executive, Administrative,  
and Professional Employees



# Exempt Employees

- FLSA provides a **complete exemption** from overtime requirements for bona fide **executive, administrative, and professional** employees
- So-called “**white collar**” exemptions, but also applicable to non-office jobs



# Exempt Employees

## Exemption Test

1. Primary duty is executive, administrative, or professional?
2. Paid on salaried basis?



# Exempt Employees

**Primary Duty** = “the principal, main, major or most important duty that the employee performs”



# Exempt Employees

## First Responder Regulation

- “[E]xemptions ... **do not apply** to ... fire fighters ... and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims ... or other similar work”
- The **primary duty** of these employees is **not** executive, administrative, or professional



# Exempt Employees

- DOL and courts have concluded this is **not** a blanket exception
- For any employee, still must analyze the type of work performed to determine whether the employee's **actual** primary duty is fighting fires, rescuing victims, or similar work



# Exempt Employees

## Primary Duty Factors

1. Relative importance of exempt duties compared with other types of duties
2. Amount of time spent performing exempt work
3. Employee's relative freedom from direct supervision
4. Relationship between employee's salary and wages paid to other employees for the kind of nonexempt work performed by the employee



# Exempt Employees

## Primary Duty: Executive

- Manages the enterprise, or a department or subdivision;
- Customarily and regularly directs work of two or more employees; and
- Has authority to hire or fire, or whose suggestions and recommendations about hiring, firing, advancement, promotion, or other change of status are given particular weight



# Exempt Employees

## “Management of the Enterprise”

- Interviewing, selecting, training employees
- Setting and adjusting rates of pay and hours
- Directing work
- Appraising employees’ productivity and efficiency for purpose of making recommendations about status changes
- Handling employee complaints and grievances



# Exempt Employees

## “Management of the Enterprise” (cont’d)

- Disciplining employees
- Planning work or determining work techniques
- Apportioning work among employees
- Determining materials, supplies, equipment to be used
- Providing for safety and security of employees
- Planning and controlling budget



# Exempt Employees

## Suggestions and Recommendations Given “Particular Weight”

- Part of job duties to make them
- How frequently employee makes them
- How frequently employer relies on them
- Does not matter whether employee has authority to make ultimate decision



# Exempt Employees

## Primary Duty: Administrative

- Performs office or non-manual work directly related to the management or general business operations of employer, **and**
- Exercises discretion and independent judgment on significant matters



# Exempt Employees

## Primary Duty: Professional

- Performs work requiring advanced knowledge in a field of science or learning customarily acquired by prolonged course of specialized intellectual instruction, or
- Performs work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor



# Exempt Employees

## Paid on Salaried Basis

- Predetermined amount each pay period
  - Regardless of quality or quantity of work
  - Regardless of number of days or hours worked
- Effective January 1, 2020:
  - \$455 → \$684 per workweek
  - \$23,660 → \$35,568 per year



# Exempt Employees

Courts have differentiated between salaried and hourly employee based on whether, and how, employer may make **deductions** from employee's pay for certain reasons



# Exempt Employees

## Permissible Deductions

- Absence of one day or more for personal reasons other than sickness/disability
- Absence of one day or more for sickness/disability if pursuant to bona fide sickness/disability plan
- Suspension of one day or more as good-faith penalty for rule infraction



# Exempt Employees

## Permissible Deductions (cont'd)

- Good-faith penalty for infractions of safety rules of “major significance”
- Unpaid FMLA leave
- Entire workweek
- Public Sector: increments of less than a day pursuant to principles of “public accountability” (e.g., AWOL)



# Exempt Employees

Fire captains earn a salary of more than \$23,660, and are responsible for annual employee evaluations, reporting disciplinary infractions, administering discipline decided upon by superiors, updating policies, and formulating purchase lists. They also are part of the minimum staffing complement, and work side by side with rank-and-file employees, preparing to respond, waiting to respond, or responding, to calls.

***Are the captains exempt?***



# Calculating Overtime

The “Regular Rate,” “Hours Worked,” and  
“Total Remuneration”



# Calculating Overtime

- Employees must be paid a premium rate for “**hours worked**” in excess of the applicable maximum hours standards
- The premium rate must be not less than one and one-half times the employee’s “**regular rate**” of pay
- Fire fighters, who earn a salary for working fixed, regularly scheduled hours, are only entitled to **half-time** payments for regularly scheduled overtime



# “Regular Rate”

- Regular rate is an **hourly rate**
- If salaried, **derive** an equivalent rate
- Must be **at least minimum wage**
- Must be calculated **every workweek or work period**, regardless of whether employee paid daily, weekly, biweekly, monthly, or other basis



# “Regular Rate”

**Regular Rate =**

Total remuneration paid to employee in workweek or work period, except statutory exclusions

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Total number of hours actually worked in workweek or work period for which such compensation was paid



# “Regular Rate”

## Total Number of Hours

Regularly Scheduled Hours

v.

All Hours Worked



# “Hours Worked”

- Averaging
- Early Relief
- Substitutions
- Training Time
- On-Call Time
- Meal Time
- Sleep Time



# “Hours Worked”: Averaging

**No averaging of hours over two or more weeks, even weeks in same pay period**



# “Hours Worked”: Early Relief

- Early relief is a common practice in fire service, and may occur under an express or implied agreement
- If voluntary, time does not count
- If required, time counts



# “Hours Worked”: Substitutions

A is scheduled to work a regularly scheduled shift. A and B agree, with employer’s approval, that B will work A’s shift. B works A’s shift.

***Should the employer count the shift hours as hours worked for A or B?***



# “Hours Worked”: Substitutions

- Hours worked on a substitution (i.e., swap, trade, exchange, etc.) count for the employee who was ***scheduled to work***, ***not*** the employee who ***actually worked***
- Each employee “credited” as if he or she worked his or her normal shift



# “Hours Worked”: Training Time

- Time spent in training **generally** counts as hours worked
- Two exceptions:
  1. General
  2. Public Safety



# “Hours Worked”: Training Time

**General Exception:** Training time does not count if

- Occurs outside regular hours
- Attendance is voluntary
- Not directly related to job
- No productive work performed



# “Hours Worked”: Training Time

**Public Safety Exception:** Training time does not count if

- Specialized or follow-up training
- Outside regular hours
- Required by law for certification



# “Hours Worked”: On-Call Time

- Is employee **so restricted** that he or she cannot effectively use on-call time for personal pursuits?
  - “Engaged to wait” v. “Waiting to be engaged”



# “Hours Worked”: On-Call Time

## Factors

- Call frequency\*
- Minimum response time
- Geographical restrictions
- Conduct restrictions
- Disciplinary consequences



# “Hours Worked”: Meal and Sleep Time

- Different standards for 7(a) and 7(k) employees
- Whether employer may seek to exclude meal or sleep time depends on shift length:
  - 7(a):  $\geq 24$  hours
  - 7(k):  $> 24$  hours



# “Hours Worked”: Meal Time

## Meal Time Conditions

- Agreement
- Bona fide meal period
  - Tests: Complete relief from work v. Predominant beneficiary
  - Unlikely to exist for FFs confined to station, and obligated to answer every call



# “Hours Worked”: Sleep Time

## Sleep Time Conditions

- Agreement
- Bona fide regularly scheduled sleeping period
  - Up to 8 hours excludable
- Adequate sleeping facilities
- Reasonable night’s sleep



# “Hours Worked”: Sleep Time

Employer has an agreement with employees that allows it to deduct sleep time from hours worked. During the night, on-duty employees are awoken from sleep multiple times to respond to calls.

***May the employer deduct the periods of interruption?***



# “Hours Worked”: Sleep Time

- Interruptions **count** as hours worked
- If employees are so interrupted that they cannot get **at least 5 hours** sleep, employer must count entire sleep period as hours worked



# “Total Remuneration”

## Payments Included:

- Wages/Salary
- Non-discretionary bonuses
  - Longevity
  - EMS
  - Education



# “Total Remuneration”

## Payments Excluded:

- Sums paid as gifts not related to hours worked, production, efficiency, etc.
- Vacation, holiday, sick, layoff, or similar pay for periods where no work performed
- Discretionary employer payments
- Employer contributions to bona fide plan for old age, retirement, life, accident, or health insurance or similar benefits



# “Total Remuneration”

## Payments Excluded:

- Premium payments made for working more than 8 hours in a day, or in excess of maximum workweek or regular working hours
- Premium payments for working on weekends, holidays, or regular rest days
- Premium payments for working hours outside those established by applicable employment contract or CBA as the regular workday or workweek



# “Regular Rate”

Employees accumulate 12 sick days per year. For employees who accumulate at least six months of sick leave, the employer will buy back accrued, unused sick days, and pay the employee a lump sum equal to a percentage of regular hourly pay.

***Is the payment includable in the calculation of the regular rate?***



# Compensatory Time



# Compensatory Time

Time off **in lieu of** monetary overtime compensation

**Note:** Hours do not count as hours worked



# Compensatory Time

- Rate of accrual
- Agreement
- Maximum accrual
- Use of time
- Cashing out



# Compensatory Time: Rate of Accrual

- 1 hour of work = at least **1.5 hours** of comp time
- Same rate as for monetary overtime compensation



# Compensatory Time: Agreement

- **Bargaining affiliates:** CBA, MOU, or other agreement between employer and union
- **Non-bargaining affiliates:** agreement or understanding between employer and employee
  - Before work is performed
  - Employer's unilaterally issued policy, or employee's acceptance of comp time without complaint, likely sufficient



# Compensatory Time: Maximum Accrual

- **480 hours** = Public Safety/Emergency Response
- **240 hours** = Others
- Once employee maxes out, employer must pay cash until number of banked hours is reduced



# Comp Time: Use of Time

- Employer **may compel** use of time
- Employer **must allow** use of time within “reasonable period” after request, if use will not “unduly disrupt” operations



# Compensatory Time: Use of Time

- **“Reasonable period”**
  - Customary work practice
- **“Unduly disrupt”**
  - Normal work schedule
  - Anticipated peak workloads
  - Emergency requirements
  - Availability of substitutes



# Compensatory Time: Use of Time

Employee makes a request to use comp time. Employer denies the request, saying it would “unduly disrupt” operations if it had to pay overtime to a substitute who would be hired to backfill the position.

***Is the employer justified?***



# Compensatory Time: Cashing Out

- Employer must cash out accrued, unused comp time upon separation
- Rate = Higher of
  - Final rate of pay, or
  - Average regular rate of pay for last 3 years



# Exercising Your Rights

Enforcement, Retaliation, and Bargaining



# Enforcement

- Action in federal or state court
- Order stopping unlawful practice
- Back pay and interest
  - 2 years = statute of limitations
  - 3 years = if willful violation
- Liquidated damages
- Attorney's fees and costs



# Retaliation

FLSA **prohibits** retaliation against employees who engage in protected activities to enforce their rights



# Retaliation

## Protected Activities

- Filing complaint
  - Good-faith belief of violation
  - Oral or written
  - Governmental agency or employer
- Instituting proceeding, or causing third party to do so
- Testifying (actual or scheduled testimony)



# Bargaining

- Labor organization **cannot** bargain away FLSA rights
- The FLSA serves as a floor, not a ceiling – you can **always** bargain for more rights
- Structured settlements in FLSA cases can serve as **proxy** for bargaining under a collective bargaining statute



# Questions?



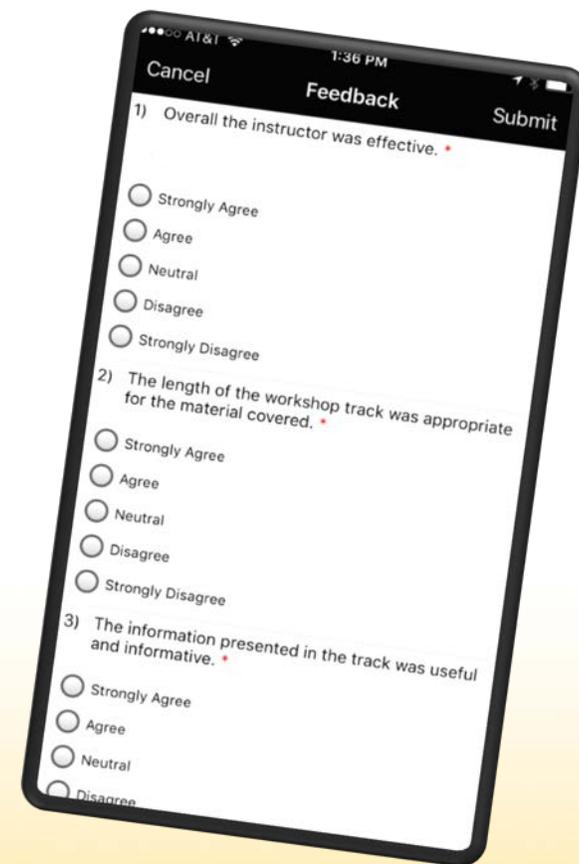
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Submit your workshop and overall evaluations to be automatically entered in two drawings for a new Apple Watch!

Complete your evaluations using the IAFF Frontline App:

1. Open the Frontline App and click on the “☰” symbol in the top left corner by the logo
2. Select “sign in” and login with your iaaff.org username
3. Click the “Events” icon and select ALTS
4. Select “Sessions” and click on the workshop you attended
5. Click “Session Evaluation”
6. Complete the evaluation
7. Click “Submit”

For the overall evaluation, follow steps 1, 2 and 3 then click “Dashboard” > “Event Evaluation”.



Winners will be announced  
February 7, 2020

