Need –to-Know Employment Law for Law Enforcement Administrators

Texas Police Chief's Association Legal Advisor Track

Jerris P. Mapes

4/16/2019

Contents

1. FLSA and State Law

FLSA

The Fair Labor Standards Act is a federal law that controls issues of pay affecting full-time and part-time workers in the private and government sectors.

Exempt and non-exempt

For non-exempt, all hours in excess of 40 during each work week, will receive overtime of 1.5 of regular rate. Be mindful of employee's activities. Do not allow employees to work extra hours "off the clock." This can result in a costly law suit.

Some jobs are classified as exempt by definition. For example, "outside sales" employees are exempt ("inside sales" employees are usually non-exempt). For most employees, however, whether they are exempt or nonexempt depends on (a) how much they are paid, (b) how they are paid, and (c) what kind of work they do.

The Pay Tests and Duties Test are used to determine exempt status.

Individuals who perform police work will usually be considered non-exempt under FLSA. However, the individuals in the top ranks, such as police chief, deputy chief, captains and some lieutenants and sergeants may meet the duties test for administrative or executive exemption.

Some Questions to Ask:

- Does the officer work to prevent crime, conduct investigations, apprehending suspects, interviewing witnesses, or other active law enforcement duties?
- Is the officer dispatched to calls, or does he have discretion to determine whether and where his assistance is needed?
- Does the officer meet the criteria for a manager? For example, some tasks include: evaluating performance of employees, coordinating training programs, handling complaints, managing the distribution of equipment, etc.

20% Rule

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.

Comp Time

The law allows comp time to be given in place of overtime as long as it is at least 1.5 times the regular rate. Also note, an employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency. Upon separation the employee must be paid the comp time.

K9 Officers

Case law has consistently found that the time spent by canine officers feeding, training, administrating medications and cleaning kennels was compensable under the FLSA and must be paid as regular overtime if in addition to their normal work week. Courts have awarded double back pay when the agencies were found to be willfully failing to compensate for this overtime.

Volunteer work for city prohibited.

Section 7(k) exception

This provides that employees engaged in law enforcement may be paid overtime on a "work period" basis. A "work period" may be from 7 consecutive days to twenty eight consecutive days in length. In this case, overtime must be paid for the additional hours in the "work period."

Who is Covered Under 7(k)?

Section 553.211(a) of the regulations (29 C.F.R. Sec 553.211(a), defines "any employee in law enforcement activities" as "any employee (1) who is a uniformed or plain-clothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or

willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics."

Section 553.211(f) of the regulations, in turn, specifically interprets the statutory term "security personnel in correctional institutions." Unlike the general "law enforcement" definition contained in section 553.211(a), the specific description of "security personnel in correctional institutions" in section 553.211(f) does not require that the employee have the power to make arrests in order to come within the section 7(k) partial exemption. Rather, "[e]mployees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions . . . ." 29 C.F.R. § 553.211(f).

Other civilian employees are not included in the exemption. Therefore, dispatchers, maintenance workers, janitors, clerks, etc, will not be eligible to have the schedules that provide additional hours during the week without overtime. 29 C.F.R. § 553.211(g)

Law Enforcement Volunteers

Public sector employees may volunteer to do different kinds of work in the jurisdiction in which they are employed, or volunteer to do similar work in different jurisdictions. For example, police officers can volunteer different work (non-law enforcement related) for Tip a Cop events, in city parks and schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed.

The Department of Labor's Regulations 29 C.F.R. Sec. 553.103, define "same type of services" to mean similar or identical services. The duties and responsibilities of a wait staff, for instance, would clearly not be the "same type of services." However, working security as a law enforcement officer is very similar to regular law enforcement duties.

Other Pay Concerns Under State Law

Texas Local Government Code 142.0015 - Hours of Labor and Vacation of Members of Fire and Police Departments in Municipality with Population of more than 10,000

(f) Except as provided by Subsection (g) or (j), a police officer may not be required to work:

(2)…more hours during a calendar week than the number of hours in the normal work week of the majority of the employees of the municipality other than fire fighters and police officers.

(j) If a majority of police officers working for a municipality sign a written waiver of the prohibition in Subsection (f), the municipality may adopt a work schedule for police officers requiring a police officer to work more hours than permitted by Subsection (f).

142.009 - Payment for Appearances of Fire Fighters and Police Officers in Court or Administrative Proceedings

(a) a Municipality shall pay a fire fighter or police officer for an appearance as a witness in a criminal suit, a civil suit, or an administrative proceeding in which the municipality or other political subdivision or government agency is a party in interest if the appearance:

(1) is required;

(2) is made on time off; and

(3) is made by the fire fighter or police officer in the capacity of a fire fighter or police officer.

2. FMLA

The Family and Medical Leave Act, or FMLA, was approved in 1993 to permit employees to take a maximum of 12 or 26 weeks, job-protected, unpaid leave for certain family and medical reasons during a 12 month period.

The law protects employees by prohibiting employers from interfering with, preventing, or denying any right provided by the FMLA. Any FMLA violations that cannot be resolved equitably can be brought to court by the U.S. Department of Labor to enforce compliance. Employees are also entitled to bring a private, civil action against an employer for FMLA violations.

Eligibility: Employees are considered to be eligible for FMLA leave if they have worked a minimum of 1,250 hours for a covered employer. Employees, to be deemed eligible for FMLA leave, must also work for at least one year at a site where at least 50 employees of the same employer are working within 75 miles.

A covered employer must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month span for any of the following reasons:

Pregnancy, prenatal medical care or childbirth-related incident

A severe health condition that makes the employee incapable of performing his or her job

To care for the employee's child after birth, or placement for adoption or foster care

To care for the employee's spouse, son or daughter, or parent who has a serious health condition

A serious health condition, under FMLA, is defined as an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or ongoing treatment by a healthcare provider for a condition. This serious condition either inhibits the employee from

performing his or her job tasks, or prevents the effected family members from attending school or partaking in other routine activities.

Active Duty: Employees with a child, spouse, or parent on covered active duty status, or called to covered active duty status, in the Armed Forces, including the National Guard and Reserves, may also be entitled to a 12-week leave and are permitted to use it in order to address any qualifying circumstances. This can include attending specific military events, arranging for alternative childcare, taking care of financial and legal arrangements, going to counseling sessions, and attending post-deployment reintegration briefings.

During FMLA leave, an employee's health coverage is mandated to be kept by the employer under any "group health plan" on the same terms as if the employee had been continuing to work. When an employee has returned from FMLA leave, typically they must be reinstated to their original positions with equivalent pay, benefits and other employment terms. The use of FMLA leave by an employee cannot result in the loss of any employment benefit that accumulated before an employee began his or her FMLA leave of absence.

'Leave Year'

Counting the 'Leave Year:' The FMLA gives employers four ways to count the 12-month period (also called the "leave year") for FMLA purposes. Employer may use:

1. The calendar year.

2. Any other fixed 12-month period that starts on the same date each year, such as the beginning of the company's fiscal year, the anniversary of the employee's hire date, and so on.

3. A method called "counting forward." In this system, the 12-month period officially begins on the first day an employee takes FMLA leave, or

4. A method called the "rolling year." When an employee takes FMLA leave, the leave year is measured backward from the employee's first day off. Each time the employee takes leave, any part of the 12-week entitlement that wasn't used in the past 12 months is available to the employee. If you haven't used any FMLA leave before, you would be entitled to 12 weeks off. But if, for example, you had already used six weeks of FMLA leave six months ago, you would only have six weeks to use. Six months later, you would be eligible for six more weeks of leave.

Employers are required to use the same method of counting the leave year for all employees, and they must notify employees of that method in their written FMLA materials. If the employer doesn't have a policy that states how it calculates the leave year, employees may use whichever of these four methods is the most favorable to them.

3. ADA

The Americans with Disabilities Act (ADA) is a Federal civil rights law. It gives Federal civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in State and local government services, public accommodations, employment, transportation, and telecommunications.

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- pay
- hiring
- firing
- promotion
- job assignments
- training
- leave
- lay-off
- benefits
- all other employment related activities.

Who is protected?

Under the ADA, a person has a disability if he has a physical or mental impairment that substantially limits a major life activity. The ADA also protects individuals who have a record of substantially limiting impairment, and people who are regarded as having a substantially limiting impairment.

The employee or applicant must be qualified.

An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation, in order to be protected by the ADA.

Reasonable Accommodations

Any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of the job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

Service and Comfort Animals

With regard to service animals, there are separate titles that cover service animals and reasonable accommodation. The reasonable accommodation is more lenient than the standard rules on how to handle service animals under the ADA.

For example, when a person with a service animal enters a public facility or place of public accommodation, the person cannot be asked about the nature or extent of his disability. Only two questions may be asked:

1. Is the animal required because of a disability?

2. What work or task has the animal been trained to perform?

A public accommodation or facility is not allowed to ask for documentation or proof that the animal has been certified, trained, or licensed as a service animal.

However, in the workplace an employee may ask for a reasonable accommodation to have their service or emotional support animal. As we know, laws prohibit employment discrimination because of a disability. Employers are required to provide reasonable accommodation. Allowing an individual with a disability to have a service animal or an emotional support animal accompany them to work may be considered an accommodation.

The Equal Employment Opportunity Commission (EEOC), which enforces the employment provisions of the ADA (Title I), does not have a specific regulation on service animals. In the case of a service animal or an emotional support animal, if the disability is not obvious and/or the reason the animal is needed is not clear, an employer may request documentation to establish the existence of a disability and how the animal helps the individual perform his or her job.

Documentation might include a detailed description of how the animal would help the employee in performing job tasks and how the animal is trained to behave in the workplace. A person seeking such an accommodation may suggest that the employer permit the animal to accompany them to work on a trial basis.

Both service and emotional support animals may be excluded from the workplace if they pose either an undue hardship or a direct threat in the workplace.

In general, the employer are expected to grant the accommodation request if: a) the employee's disability and the service animal's function are related; b) the service animal will improve the worker's ability to perform their job; c) the animal has had sufficient training to not be a disruptive presence in the workplace; and d) the accommodation does not present an undue hardship.

It's important to note that any claims of allergies or fears of the service animal are not valid reasons for denying access or refusing service to people using service animals. If employees or customers are afraid of service animals, a solution may be to allow enough space for that person to avoid getting close to the service animal.

Most allergies to animals are caused by direct contact with the animal. A separated space might be adequate to avoid allergic reactions.

If a person is at risk of a significant allergic reaction to an animal, it is the responsibility of the business or government entity to find a way to accommodate both the individual using the service animal and the individual with the allergy.

Pregnancy

The Pregnancy Discrimination Act (PDA) is a United States federal statute. It amended Title VII of the Civil Rights Act of 1964 to "prohibit sex discrimination on the basis of pregnancy.". The Act covers discrimination "on the basis of pregnancy, childbirth, or related medical conditions."

Unless it's clear that the pregnancy is affecting the officer's ability to perform her regular duties, endangering herself, other employees or members of the public, most police departments can't force the pregnant officer to take a temporary reassignment.

Lactation Law

Texas Government Code 619 Right to Express Breast Milk

Sec. 619.03 Policy on Expressing Breast Milk. (a) A Public employer shall develop a written policy on the expression of breast milk by employees under this chapter.
(b) A policy developed under Subsection (a) must state that the public employer shall:

(1) support the practice of expressing breast milk; and

(2) make reasonable accommodations for the needs of employees who express breast milk.

Sec. 619.004 Public Employer Responsibilities. A public employer shall:

(1) provide a reasonable amount of break time for fan employee to express breast milk each time the employee has need to express the milk; and

(2) provide a place, other than a multiple user bathroom, that is shielded from view and free from intrusion from other employees and the public where the employee can express breast milk.

Military Leave Accounts

Texas Local Government Code Sec. 143.075 Military Leave Time Accounts
(a) A municipality shall maintain military leave time accounts for the fire and police departments and must maintain a separate military leave time account for each department.
(b) A military leave time account shall benefit a fire fighter or police officer who:
(1) is a member of the Texas National Guard or the armed forces reserves of the United States;
(2) was called to active federal military duty while serving as a fire fighter or police officer for the municipality; and
(3) has served on active duty for a period of 3 continuous months or longer.
(c) A fire fighter or police officer may donate any amount of accumulated vacation, holiday, sick, or compensatory leave time to the military leave time account in that fire fighters or police officers department to help provide salary continuation for fire fighters or police officers who qualify as eligible beneficiaries of the account under Subsection (b). A fire fighter or police officer who wishes to donate

time to an account under this section must authorize the donation in writing on a form provided by the fire or police department and approved by the municipality.

(d) A municipality shall equally distribute the leave time donated to a military leave time account among all fire fighters or police officers who are eligible beneficiaries of that account. The municipality shall credit and debit the applicable military leave time account on an hourly basis regardless of the cash value of the time donated or used.

6. Free Speech

The Supreme Court has said municipal workers and others have a right to speak out as citizens on "matters of public concern." However, the First Amendment does not protect them if they disagree with their employers about a workplace dispute.

In Garcetti vs. Ceballos, a well-known Supreme Court Case, the court, by a 5-4 vote, said an employee within the county prosecutor's office could not claim free-speech protection for speaking out against the handling of a disputed police search warrant. In that case, the court said the complaint by the Los Angeles County deputy district attorney arose from a workplace dispute and therefore, did not have First Amendment protection.