Unions and Employees Looking for FLSA Payday

Officer Friendly complains to the Police Chief that Quinn Bill and longevity payments are not included in the overtime rate. Firefighter Lively tells the Fire Chief he is owed overtime for eight hours because he worked two 24 hour shifts totaling 48 hours this week. Sergeant Terrier remarks to the Personnel Director that he has been caring at home for his canine crime-fighting sidekick on his own time for the last five years. Lieutenant Windfall grieves the departmental policy that does not allow him to use compensatory time when it will result in hiring a replacement on overtime.

Each of these situations implicates rights under the Fair Labor Standards Act (FLSA), and similar situations around the state, and around the nation have been spurring federal court lawsuits by public safety employees and their unions looking for a big pay day at public expense. In Massachusetts, the case of O'Brien, et al. v. Agawam, 350 F.3d 279 (2003), has focused the attention of local employee groups on the FLSA, and a wave of litigation and threatened litigation has been the result. FLSA claims are tricky and require expertise to handle them properly when they are made. As with most legal troubles, taking steps to prevent successful claims is far better than waiting until they are made.

In 1986, the Federal government applied the Fair Labor Standards Act to municipalities, but with special rules and exemptions crafted through legislation and through the Department of Labor's rule-making process. The M.M.A. sponsored three very well attended seminars to instruct municipal officials on how to comply with and implement the FLSA. In public safety, with the 28-day work period, made available by Section 7(k) of the FLSA, everyone understood – municipal officials and union heads alike – that this would be no bonanza for employees.

Because of the Agawam case, where Agawam was ruled unable to take advantage the 28-day work period, some police unions and union attorneys are forgetting the sensible conventional wisdom in the mid-1980s. They are also hoping that municipal officials will forget that wisdom when faced with their substantial demands for settlements to avoid what is being framed as huge liability, and costly and time-consuming federal court litigation. At the same time, municipalities seeking to insulate themselves from FLSA liability are attempting to "adopt" the 28-day period, and finding that unions are filing unfair labor practice charges for failure to bargain over a change in working conditions. Unions have found comfort at the Labor Relations Commission for the view that the 28-day work period is a bargainable change, in City of Boston, 33 MLC 1 (2006), which is currently under appeal. (We have filed an amicus brief on behalf of the MMA).

The issue in FLSA cases presented by the hypothetical Officer Friendly centers upon whether stipends and differentials have been appropriately included in the regular rate for overtime purposes under the FLSA. Often, overtime under the contract excludes some differentials from the calculation, and as a matter of contract law and state law, this is perfectly legal. Moreover, it is still legal under the FLSA, as long as the premium pay for contractual overtime exceeds any shortfall in the premium paid for hours over the FLSA threshold (171 hours for police and 212 hours for firefighters). The Unions are claiming that, in Towns that have not sufficiently "adopted" the work period exemption, the operative overtime threshold is 40 hours in a 7-day workweek, and the overtime shortfall can be several dollars per hour, depending upon how it is calculated. Not surprisingly, the Unions usually calculate it in the way most favorable to the employees.

The determination of the appropriate work period and the appropriate overtime threshold is the problem highlighted by Firefighter Lively's complaint. Unfortunately, the Agawam decision does little to clarify an already complicated area of the law. For example, the Agawam court found that the town had established a six-day work period, while the federal statute clearly indicates that no work period can be less than seven days. Other aspects of the decision make it clear that the Agawam court did not consider a number of important arguments in arriving at its conclusions. The problems with this case only complicate the task of compliance with the FLSA. In our experience, however, Firefighters rarely have a good case under the

FLSA, because almost all of them, whether on the 24-hour shift, or on "10s and 14s," work on an 8-day cycle which evidences a 7(k) exemption. In addition, the hours-worked threshold for fire is even higher than for police (212 hours in a 28-day cycle, or 61 hours in an 8-day cycle) so not many are entitled to FLSA overtime, and those that are, generally have plenty of contractual overtime premiums to offset the marginal FLSA liability. See "Gap Time" article to understand why.

We have found, when defending these claims, that most communities declared their intentions to use the 28-day period for police and fire in late 1985 or early 1986. Finding the pertinent paperwork, 20 years after the fact, can be a challenge, but it is not impossible. Such documentation is often found in the minutes of Board of Selectmen meetings, and in memoranda to and from department heads. It is a labor intensive task, but can be well worth the effort. Many Unions will back down in the face of evidence that the Town has evidence of a 28-day work period. If your city or town has available the 28-day work period (or any work period recognized under section 7(k) of the FLSA), it is unlikely that there will be any significant liability under the FLSA. This is true even if differentials (e.g. Quinn bill, night shift, weapons pay, longevity) are not included in base pay when calculating contractual overtime. The reason for this is that employers can offset premiums paid for non-FLSA (contractual) overtime against liability resulting from underpaying for FLSA overtime. In addition, the liberal leave policies, and the liberal use of those policies by employees, makes it unusual for employees to exceed the applicable FLSA thresholds, especially under work periods of 14 days or more.

If the contractual overtime rate already includes Quinn Bill or other education incentive pay, the likelihood of liability shrinks even more. Quinn Bill tends to be the biggest ticket item among the non-included differentials, given that it can represent 10% to 25% of base salary. The other differentials rarely add up to much, even under the most unfavorable work period, although there can be exceptions to this.

The Unions rarely do their homework when it comes to calculating the actual liability, and the claims they make are either grossly overstated, or purely speculative – and usually both. The devil is truly in the details when calculating this type of liability and the Union's figures should never be taken at face value. For example, some Union attorneys over-calculate overtime shortfall by multiplying the hourly equivalent of an annual stipend by 1.5, instead of by 0.5, ignoring the fact that the stipend paid already accounts for the straight time component of hours for which an additional overtime premium is due. Claims are also being made for police superior officers, many of whom are, especially above the rank of sergeant, exempt from the provisions of the FLSA as "executives."

The situation presented by Sergeant Terrier, the canine officer, is one of the most dangerous areas when it comes to the potential for large FLSA liability, because in many departments home dog care is truly uncompensated time, as opposed to under-compensated time which characterizes most of the other types of FLSA claims. In addition, the proof problems for municipalities in these cases are daunting, since no one but the officer really knows what he does for the dog, and how long it takes. Adding insult to injury is the fact that specialty stipends paid to these officers typically do nothing to decrease the liability, and can actually increase the required hourly rate used as base to calculate unpaid overtime pay. In these cases, the availability of the 28-day period is essential for reducing liability, but even that does not typically eliminate liability. The key to avoiding liability is to negotiate appropriate contract language that recognizes and limits dog care time for which the employer will be responsible. This can be done by establishing a different rate for dog care time, limiting the amount of daily dog care time, allowing time from the regular shift for dog care, or a combination of these approaches.

The case of Lieutenant Windfall implicates the little known regulation that requires that compensatory time granted in lieu of FLSA overtime pay be granted as time off "within a reasonable time" of the time off request. DoL opinion letters confirm the Labor Department's view that the need to replace the employee with overtime does not constitute a valid excuse to deny the requested time off. The result in departments that permit employees to accrue comp time in lieu of overtime pay is a loss of control over staffing decisions and overtime costs. Some departments have negotiated away the employee's right to accrue comp time for overtime, and permit comp time only for holidays, or in other situations that do not implicate the FLSA. Another more complicated way to address the problem is to track which comp time hours result

from FLSA overtime, and which result from contractual non-FLSA overtime, and apply the "no-hire" policy only to the latter. Finally, an employer may be able to avoid a hiring situation by offering time off at a more favorable time (for the employer) that precedes the time requested, without running afoul of the FLSA. Whether a bargaining obligation would be triggered by this is a matter that would depend on the situation in the particular department.

Cities and Towns that are faced with demands should contact counsel experienced in dealing with the FLSA before making any type of response. Municipalities interested in being proactive should consider the scenarios and solutions discussed in this article, and if there is no record regarding a 28-day cycle, work with counsel experienced in public safety FLSA matters to begin tracking hours on a 28-day basis to assess liability. Even after all of these years, the law in this area is still in flux; so, don't go it alone.