Applying the Fair Labor Standards Act to the Dayton Fire Department

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Certification Statement

I hereby certify that this paper constitutes my own product, that where the language of others is set forth, quotation marks so indicate, and that appropriate credit is given where I have used the language, ideas, expressions, or writings of another.

Signed: ____________ Brad French    Bradley A. French
Abstract

The Fair Labor Standards Act has a great deal of applicability to the American fire service. In order to properly apply the rules of the FLSA, fire department officers and administrators must have a full understanding of the provisions affecting fire and EMS providers. A fire department’s most important assets are its people, and properly compensating employees in relation to the number of hours worked and the specific nature of that work is mutually beneficial to both parties (in addition to being legally required). In the Dayton Fire Department, a medium-sized, urban organization that traditionally employed “cross-trained” firefighter/EMTs and firefighter/paramedics was reorganized and restructured to employ a large amount of single-role EMS providers. This rapid change in employee type led to supervisors within the organization needing to become keenly familiar with the 40-hour work week provided to EMS-only members, while still scheduling and managing a larger amount of 48-hour work week firefighters. This research paper is designed to provide a road map for Dayton Fire Department company officers whose responsibilities encompass the management of the EMS-only members, as well as provide a history of the FLSA and offer examples of both best practices and mistakes from other departments around the United States. Continually monitoring the work hours of EMS-only providers, and assuring that they are either compensated with overtime pay or released from duty each week after the 40-hour mark, can lead to awkward shift-change times, disgruntled employees, and administrative headaches if not properly planned for and managed. This paper will also address briefly the implications of the Affordable Care Act on the national fire service, including the potential impacts on current health care plans offered by career fire departments through their municipality, as well as impacts on the volunteer fire service and any potential mandate to provide health care coverage to their members.
Applying the Fair Labor Standards Act to the Dayton Fire Department

The Fair Labor Standards Act, or FLSA, is widely known throughout the working world. The history of this federal law dates back to the 1930’s, when Congress first heard early versions of a new proposal to limit the number of hours worked each week by employees. The law was intended to spur additional hiring by employers during the national economic lethargy of the Great Depression, and would also serve to establish the now commonly accepted standards of minimum wage and overtime compensation (Bennett, 2008). The Fair Labor Standards Act was formally passed in 1938, and established a 40-hour work week as the national standard. Four additional hours of work were allowed under the law, bringing the total to 44, but any hours over 40 were required to be paid at time-and-one-half. The law also established a minimum wage for that time period of 25 cents an hour, and contained various other provisions such as restricting certain types and characteristics of acceptable child labor. In 1986, a U.S. Supreme Court case resulted in the FLSA applying not only to private employers, but to state and local government employees as well (IAFF, 2013). Years later, under President Clinton, a specific provision was put into the law that required overtime pay for EMTs and Paramedics for any hours worked over 40, while municipal employees performing fire protection would earn overtime for any work time over a 53 hour week, or 212 hours in a 28-day period (Bennett, 2008). The characteristics of a “fire protection employee”, however, have been debated and argued in court after some municipalities attempted to pay their EMTs and Paramedics under the 53-hour overtime threshold and not the appropriate 40-hour mark. According to the FLSA Law Enforcement and Fire Protection Provision, fire protection employees are defined as those who are “trained in fire suppression; have the legal authority and responsibility to engage in fire protection; are employed by a fire department of a municipality, county, fire district, or state; and are engaged in
the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk” (DOL, 2011). Single-role EMS providers therefore do not meet the necessary standards for fire protection employees, and are entitled to overtime after working 40 hours in a work week, even if “cross-trained” firefighter/paramedics within the same department or even the same individual fire station are not eligible until they have worked 53 hours in the same weekly schedule timeframe. A recently filed lawsuit in Kansas City illustrates the continued presence of ongoing litigation around the United States related to single-role EMS providers and the FLSA. In the class-action suit, employees of the fire department that operate the City’s ambulances and medic units (and never ride fire trucks or become involved in fire suppression) are claiming that they should be paid overtime for any hours worked over 40, but since 2010 have been held to the 53-hour threshold for overtime compensation that has historically been paid to all Kansas City Fire Department firefighters (USDC, 2011). The plaintiffs are claiming direct violation of the FLSA, and are seeking retroactive back pay and damages. Often in FLSA lawsuits, defendants found in violation of the statute can be required to pay “liquidated damages”, which doubles the amount of the back pay awarded to the plaintiff (Bennett, 2008). Collective Bargaining Agreements (CBAs) can lower the hour threshold for employees’ overtime compensation if negotiated and mutually agreed upon by the employer and the bargaining unit members. This is the case in many fire departments that have instituted the practice of assigning personnel a “Kelley Day” or “EDO” (Earned Day Off) to keep the overall average work hours down over a certain time period.

The Dayton Fire Department employs approximately 50 single-role, EMS-only emergency responders that are certified at either the EMT or paramedic level. The department had slowly transitioned away from single-role EMS providers in the late 1990’s, but reinstituted
the program in 2010 as a result of a firefighter hiring freeze imposed by a Consent Decree between the City of Dayton and the U.S. Department of Justice related to supposed discriminatory hiring practices. These employees are exclusively assigned to medical transport units, and have no specific fire protection responsibilities. Although they are issued a firefighter protective ensemble consisting of a coat, helmet, pants, boots, and gloves, the gear is solely for use on auto accidents and other potentially hazardous environments where they would be delivering EMS care. The Dayton Fire Department has fully addressed the FLSA/overtime relationship for the EMTs and paramedics through DFD General Order #86 (“Paramedic and EMT-B Work Hours”), and through the Collective Bargaining Agreement with Dayton Firefighters IAFF Local 136, of which these “civilian” EMS-only providers are a member. In accordance with the CBA and G.O. 86, paramedics and EMTs are scheduled to work 40 hours per week. This differs from the 48 hour week that their firefighter/paramedic co-workers are subject to, as per the specific provisions of the CBA applicable to firefighters. The system of maintaining 24-hour per day coverage for the medical transport units, while maintaining the requirements of the FLSA, has led to the EMS-only providers for DFD being regularly eligible for overtime during the course of nearly every standard work week. The work week administratively starts and ends at 07:00 hours on Monday morning. EMTs and paramedics then typically work a rotating 24 hours on and 48 hours off shift, similar to the fire suppression personnel. However, on the second 24-hour shift in each work week, the EMTs and paramedics are eligible for eight hours of overtime. Their 40th hour ends at 23:00 hours on the evening of the second shift of the week, and they are paid overtime for the period from 23:00 hours until 07:00 hours the following morning. This pattern applies to work weeks which follow the pattern either of Tuesday/Friday or Wednesday/Saturday. Additionally, the employee has the discretion
to request that their extra eight hours be paid as “Comp Time” that they can accumulate for additional time off at a later date, or they can opt to simply leave work at 23:00 hours and be on “Approved Absence” for the remainder of the 24-hour shift. On work weeks that begin on Monday, the employee would theoretically be required to work three 24-hours shifts (Monday, Thursday, and Sunday). However, due to the time restrictions of FLSA, as well as to exercise fiscal restraint and avoid having to pay out excessive overtime on such a regular basis, the EMTs and paramedics are given a Scheduled Day Off (SDO), similar in nature to the EDOs taken by firefighters. This results in the EMTs and paramedics working two shifts in their “three day” Monday/Thursday/Sunday weeks, with the third being a day off. The regular overtime guidelines for time in excess of 40 hours still apply, of course, giving the employee an eight hour overtime opportunity during the second shift of the week that they are working at the firehouse. For example, an EMT may work Monday for 24 hours, Thursday for 24 hours (including eight hours of overtime), and then be on a Scheduled Day Off on Sunday. The hours worked during the “three-day” week need not occur in sequence however. Another example would be an EMT working 24 hours on Monday, being off on SDO for Thursday, and then returning for a 24-hour shift (including eight hours of overtime) on Sunday. An interesting quirk in the application of the FLSA provisions to the DFD EMS providers is that fire department management restricts the employee’s right to opt for “Comp Time” in lieu of actual overtime pay to only those weeks where they are scheduled for two shifts (i.e. Tuesday/Friday or Wednesday/Saturday). The reasoning for this is unclear, but likely stems from a desire to limit the amount of compensatory time accrued by employees to prevent high volumes of personnel leave on any given day. Numerous employees “cashing in” their accrued compensatory time on a certain day would lead to widespread gaps in staffing, and would likely result in a spike in overtime costs. Finally, it is
critical for DFD Company Officers that are entering employees’ hours into the computer system to remember that the eight hours of “extra” time that the employee can work each week for FLSA overtime or comp time is not required, and therefore any other type of leave would only be counted against their balance for 16 hours during that particular shift. For example, if an employee were off on sick leave on the second work shift of the week (i.e. their “16 hour” day), they would be entered into the system as only 16 hours of sick leave, and then their eight hours of Approved Absence for the remainder of the work shift. However, if that same employee were to take sick leave on the first day of their work week (i.e. their “24 hour” day), the entire shift of 24 hours would be charged against their accumulated sick leave balance. The Dayton Fire Department has taken a proactive approach to the FLSA rules and their application to the single-role EMTs and paramedics on our department. The department readily recognizes that they are not “fire protection employees”, and therefore has made no attempt to hold overtime standards for these personnel to anything other than the appropriate 40 hour threshold. Despite the release of the City of Dayton from the U.S. DOJ-imposed Consent Decree that led to the hiring of these EMS employees, fire department management and city administrators have indicated that the single-role civilian EMS provider program is likely to be a permanent fixture going forward. Understanding the FLSA and being able to apply the rules properly will continue to be an important part of training for new Company Officers managing these personnel, as well as the EMTs and paramedics themselves that are directly affected with overtime and leave hours.

In addition to the FLSA and other current hot-button issues in fire service personnel management, the Patient Protection and Affordable Care Act of 2010 has raised a number of concerns amongst fire department administrators. A primary concern for career firefighters, as well as the International Association of Firefighters that represents the interests of the vast
majority of paid firefighters in the U.S., is that a significant number of negotiated and mutually
beneficially employee-sponsored health care plans will be considered “substandard” by the
Affordable Care Act and will be subject to major changes. The overarching concern amongst
labor leaders is that the new provisions required by the ACA will lead to substantial increases in
health care premiums. In some cases, changes in out-of-pocket costs are negotiable items
between the municipality and the labor bargaining unit, but in other cases could be unilaterally
imposed where health care is not a subject of bargaining. The volunteer fire service also has a
vested interest in the provisions of the ACA. A question posed to the Internal Revenue Service
(IRS) through the International Association of Fire Chiefs sought guidance on whether volunteer
members of a municipal fire department that receive limited compensation would be considered
“employees” in relation to the ACA. Under provisions of the ACA, any employer with 50 or
more employees will be required to provide health insurance policies to all of their employees
that meet the minimum standards set forth in the ACA (Morris, 2013). The fire department itself
need not be the sole employer of the personnel in order for the municipality to be required to
provide health insurance. For example, if a small city employs 20 full-time police officers, 5
full-time street maintenance workers, 15 full-time fire department personnel, and a full-time City
Manager and secretary, they would only have a total of 42 full-time employees and remain under
the cap for the “large employer” designation of the ACA that requires health care for all
employees. But if the city supplemented the career staff of the fire department with 30 active
volunteer, paid-on-call, or part-time members that worked regularly and were compensated in
some fashion, they would exceed the 50-employee threshold and be required to provide
insurance for all employees, including the non-full-time employees. The IAFC position
statement notes that although the enforcement of this provision (and the leveling of fines and
penalties for violation) has been delayed until 2015, fire service administrators would be wise to consider volunteer members as “employees” in their long-term planning and budgeting process to avoid penalties arising from potential violations of the Affordable Care Act (Morris, 2013).

Federal statutes frequently impact the operations of local fire departments large and small. Each department is faced with its own set of challenges and compliance requirements based on various federal, state, and local regulations. In the Dayton Fire Department, compliance with the Fair Labor Standards Act is a regulatory requirement imposed on supervisors and administrators with responsibility for the single-role EMS providers within the organization. These employees deserve fair treatment based on the provisions of the law, and errors in overtime computation have cost a number of municipalities across the country large sums of money in back pay and liquidated damages. The financial implications of the Patient Protection and Affordable Care Act are still being studied in the fire service, but career and volunteer fire service members alike have concerns about the impact of the law on their operations. Fire service administrators and local legislators should embrace positive changes that accompany the law, but continue to be vigilant and work to minimize any potential adverse impact on fire department operations and budgeting in the coming years.
Appendix A

Dayton Fire Department - GENERAL ORDER NO. 86

SUBJECT: PARAMEDIC and EMT-B WORK HOURS

As required by the Contract between the City of Dayton and Local 136 of the IAFF, Dayton Fire Department Paramedics and EMT-Bs are to work 40 hours per week according to the following:

When Paramedics and EMT-Bs are scheduled to work Monday, Thursday and Sunday, they shall work two twenty-four hour shifts and have one Scheduled Day Off (SDO). SDOs will be administered similar to the EDOs in accordance with General Order 9.

Furthermore, during their forty-eight (48) hour weeks, Paramedics and EMT-Bs will be paid FLSA overtime for actual hours worked in excess of forty hours. Comp time (OC) shall not be entered in lieu of FLSA overtime (OT). Pay periods begin and end at 0700 hours on Monday. (See the Contract for further details concerning FLSA overtime.)

When entering FLSA overtime in the day sheet, “FL” shall be entered in the nature of overtime and notified by fields.

Should a Paramedic or EMT-B take leave during their FLSA week, their “24 hour day” will be recorded as 24 hours of the appropriate leave type. However, if it is their “16 hour day,” they should be entered as 16 hours of the appropriate leave and 8 hours of Approved Absence (AA).

During weeks where Paramedics and EMT-Bs are scheduled to work Tuesdays and Fridays, or Wednesdays and Saturdays, they shall be scheduled to work one twenty-four hour shift and one continuous sixteen-hour shift. On the day of their sixteen hour shift shall be entered as “AA” during their eight hours off.

In instances where the employee works past roll-call, this time shall be entered as overtime for actual time worked past roll-call, regardless of hours worked during the current week.

Herbert C. Redden – Director of Fire Services
Appendix B

Collective Bargaining Agreement – City of Dayton / Dayton Firefighters Local 136

Article 8

Hours of Work and Overtime

Section 1. Hours of Work

A. Management will grant employees covered herein who are assigned to the Division of Fire Suppression and assigned to the platoon shift schedule, and Senior Paramedics assigned to the platoon shift schedule, one (1) 24-hour tour of duty off with pay (EDO) in each 21 day continuous work cycle. The 21 day continuous work cycle begins on Monday at 0700 hours and ends on Monday at 0700 hours. The normal work week shall be approximately 48 hours for platoon shift employees.

B. The normal scheduled work week for Civilian Paramedics within the existing classification of Paramedic, shall be forty (40) hours per week as follows:

1. During weeks where Paramedics are scheduled to work Monday, Thursday and Sunday, they shall work two (2) twenty-four (24) hour shifts and have one scheduled day off. They shall be compensated for at time and one-half (1 ½) at the FLSA rate for the actual hours worked in excess of forty (40) during this week. For the purposes of this subsection only, actual hours worked shall not include an employee on vacation, holiday, sick leave, leave of absence, suspension and all other non-duty status absences. Employees in the classification of Paramedic may not accrue compensatory time off for regularly scheduled overtime.

2. During weeks where Paramedics are scheduled to work Tuesday and Friday, or Wednesday and Saturday, they shall be scheduled to work a twenty-four (24) hour shift and a continuous sixteen (16) hour shift.
References


