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## Overtime: Are Public Employees Compensated for Working Extra Hours?

Thomas P. DeMatteo

*Washington and Lee University School of Law*

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# Overtime: Are Public Employees Compensated for Working Extra Hours?

*Thomas P. DeMatteo\**

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\* Candidate for J.D. 2017, Washington and Lee University School of Law.

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### I. Introduction

Modern employees have more flexibility in their work environment. The way in which employees track their time and earn paychecks has changed.<sup>1</sup> The traditional notion of working from nine-to-five is significantly less pervasive in our modern world. In many instances, the forty-hour workweek is no longer universally sufficient to meet employers' needs.<sup>2</sup> When employees work longer hours than contracted, employees earn compensation for the time worked in addition to their regular hours, known as overtime pay.<sup>3</sup>

This note examines the Fair Labor Standards Act (FLSA) application to the calculation of overtime compensation for public employees, specifically firefighters. Generally, the FLSA requires employers to pay employees who work more than forty hours in a workweek overtime compensation at one and one-half times the regular rate.<sup>4</sup> The method used to calculate overtime varies.<sup>5</sup> The purpose of this note is to address the circuit split surrounding the interpretation of the FLSA provision regarding the calculation of overtime payments to public employees. More specifically, this

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1. See Alina Tugend, *It's Unclearly Defined, but Telecommuting Is Fast on the Rise*, N.Y. TIMES (Mar. 7, 2014), [http://www.nytimes.com/2014/03/08/your-money/when-working-in-your-pajamas-is-more-productive.html?\\_r=0](http://www.nytimes.com/2014/03/08/your-money/when-working-in-your-pajamas-is-more-productive.html?_r=0) (last visited Apr. 23, 2017) (discussing the growing trend of working from home while not self-employed) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See *id.* (referencing research “show[ing] that much of what managers and professionals call telecommuting occurs after a 40-hour week spent in the office.”).

3. See OFFICE OF PERS. MGMT., *Pay & Leave; Pay Administration Fact Sheet: How to Compute FLSA Overtime Pay*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/how-to-compute-flsa-overtime-pay/> (last visited Feb. 17, 2017) (explaining how to calculate overtime pay under the Fair Labor Standards Act) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. See 29 U.S.C. § 207(a)(1) (2012) (“[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate.”).

5. See *Haro v. City of Los Angeles*, 745 F.3d 1249, 1260 (9th Cir. 2014) (addressing different circuits' approach to overtime calculation).

note addresses the different methods of overtime calculation methodology: week-by-week, individual workweek, and the cumulative method.<sup>6</sup>

The calculation of overtime-offset calculation may seem mundane and uninteresting at first blush, but it is very important to the public employees whose compensation is directly affected by which calculation method applies. The overtime-offset calculation method also has significant financial implications to municipal departments, increasing or decreasing labor costs by millions of dollars per year.<sup>7</sup> These have significant financial implications for both parties. The following example illustrates these implications.

Under the FLSA, individuals classified as “fire protection” employees are due overtime only after 212 hours worked in a 28-day work period (or 204 hours worked in a 27-day period).<sup>8</sup> Employees who are not “engaged in fire protection” are due the normal overtime pay for work greater than 40 hours in a workweek (unless another exemption applied). For example, if “Firefighter Joe” works 80 hours in workweek one, 40 hours in workweek two, 65 hours in workweek three and 40 hours in workweek four, he has worked a total of 225 hours for 28 days. Applying the week-by-week calculation method, Firefighter Joe would be entitled to 40 hours of overtime one for week, none for week two, 15 hours for week three and none for week 4, totaling 55 hours of overtime. The total 55 hours of overtime, which multiplied by 1.5 times his hourly rate (\$50 per hour, \$75 per overtime hour) equals overtime payments of \$4,125.<sup>9</sup> Conversely, applying the two-week-pay period calculation method would result in 14 overtime hours for weeks one and two and none for weeks three and four, resulting in overtime payments of \$1,050.<sup>10</sup> The cumulative calculation method yields 13 overtime hours, and \$975 overtime compensation.<sup>11</sup>

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6. *See id.* (describing the differing methods of calculating overtime).

7. *See Singer v. City of Waco, Tex.*, 324 F.3d 813, 829 (5th Cir. 2003) (describing fire fighters seeking \$5 million in damages).

8. *See* Appendix A (indicating maximum hours standards for employees engaged in fire protection and law enforcement).

9. *Id.*

10. *Id.*

11. *Id.*

Applying this example to the year, the difference between week-by-week (\$53,625) and the cumulative approach (\$12,675) equals a difference of \$40,950 per year. Earning \$112,675 instead of \$153,625 per year has a significant impact on an individual's buying power and ability to save.<sup>12</sup> Additionally, the method used to calculate overtime has a significant impact on the bottom line of municipalities.

## *II. Background*

### *A. Overtime*

#### *1. Definition and Importance*

Overtime is the time worked in addition to an employee's usual scheduled working hours.<sup>13</sup> The United States Supreme Court has recognized that "overtime" is "not a word of art."<sup>14</sup> "Sometimes it is used to denote work after regular hours, sometimes work after hours fixed by contract at less than the statutory maximum hours and sometimes hours outside of a specified clock pattern without regard to whether previous work has been done, e.g., work on Sundays or holidays."<sup>15</sup> "The definition of overtime premium thus becomes crucial in determining the regular rate of pay."<sup>16</sup> Overtime payment is extra compensation for work performed in addition to work performed

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12. See Christopher Ingraham, *Americans Define 'Rich' as Anyone who Makes More Money Than They Do*, WASH. POST (Mar. 13, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/13/americans-define-rich-as-anyone-who-makes-more-money-than-they-do/> (last visited Apr. 23, 2017) (noting that families "feel the pinch of falling wages") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

13. See *Overtime*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The hours worked by an employee in excess of a standard day or week.").

14. See *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 466–77 (1948) (stating that the term "overtime" has a variety of definitions and when deciding overtime, "each respondent is entitled . . . to an additional sum equal to the number of hours worked for one employer in a workweek in excess of forty, multiplied by one-half the regular rate of pay.").

15. *Id.* at 466.

16. *Id.*

during normal hours.<sup>17</sup> “Under the definition, a mere higher rate paid as a job differential or as a shift differential, or for Sunday or holiday work, is not an overtime premium.”<sup>18</sup>

Generally, overtime provisions in the FLSA cover non-exempt employees requiring the payment of overtime pay for hours “worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay.”<sup>19</sup>

[FLSA] does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, unless overtime is worked on such days. [FLSA] applies on a workweek basis. An employee’s workweek is a fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.<sup>20</sup>

In order to understand the application of the FLSA, and which method of overtime calculation best serves its purpose, it is important to understand the background and history of the FLSA. The political and economic environment in the early 1930s raised concerns regarding the absence of protections for labor.<sup>21</sup> In order to remedy the challenging working conditions in the United States, both Congress and the Executive Branch considered legislation to

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17. *See id.* at 450 n.3 (defining “overtime premium” as “[e]xtra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute.”).

18. *Id.* at 465.

19. *See* DEPT OF LABOR, *Wage and Hour Division (WHD): Overtime Pay*, [http://www.dol.gov/whd/overtime\\_pay.htm](http://www.dol.gov/whd/overtime_pay.htm) (last visited Feb. 13, 2017) (discussing how to calculate overtime pursuant to the Fair Labor Standards Act) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

20. *See id.* (providing an overview of how overtime pay is calculated).

21. *See* *Stewart v. Region II Child & Family Servs.*, 788 P.2d 913, 917 (Mont. 1990) (“To ensure a minimum living standard, the F.L.S.A. establishes a minimum hourly wage, 29 U.S.C. § 206, and a maximum workweek without overtime compensation.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–57 (1985) (finding that Congress was within its authority and did not violate the commerce clause by extending FLSA protections to SAMTA employees).

fix this problem.<sup>22</sup> In 1932, Senator Hugo Black originally drafted the FLSA. In 1937, Senator Black was appointed to the Supreme Court. In 1937, President Roosevelt instructed Congress that America should be able to give “all our able-bodied working men and women a fair day’s pay for a fair day’s work, and a self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling worker’s wages or stretching workers’ hours.”<sup>23</sup> Congressional support urged that the bill would assist the “one-third of the population” who were “ill-nourished, ill-clad, and ill-housed.”<sup>24</sup> Supporters advocated that the bill would end oppressive child labor and “unnecessarily long hours which wear out part of the working population while they keep the rest from having work to do.”<sup>25</sup> Additionally, “Shortening hours would create new jobs . . . for millions of our unskilled unemployed,’ and minimum wages would ‘underpin the whole wage structure . . . at a point from which collective bargaining could take over.’”<sup>26</sup>

In 1938, after three attempts, Congress passed the Fair Labor Standards Act (FLSA un-amended). The purpose of the FLSA un-amended was to raise substandard wages, first by minimum wage and then by increased pay for overtime work.<sup>27</sup> By enacting FLSA un-amended, Congress sought “to raise substandard wages and lessen unemployment by shortening hours and spreading available work among a greater number of workers.”<sup>28</sup>

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22. See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, DEP’T OF LABOR, <http://www.dol.gov/general/aboutdol/history/flsa1938> (last visited Feb. 17, 2017) (discussing the controversy in passing a bill involving higher minimum wages and hour maximum workweek) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

23. See Franklin D. Roosevelt, *Message to Congress on Establishing Minimum Wages and Maximum Hours*, PUB. PAPERS (May 24, 1937) (advocating for fair payment practices).

24. Grossman, *supra* note 22.

25. *Id.*

26. *Id.*

27. See *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 581 (1942) (stating that the purpose of the Act was to “raise substandard wages first by a minimum wage and then by increased pay for overtime work” in addition to “requir[ing] extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum.”).

28. See *McComb v. Sterling Ice & Cold Storage Co.*, 165 F.2d 265, 271 (10th Cir. 1947) (explaining that “the hourly rate of the contract was not the real rate

The legislative history of FLSA shows Congress' intent "to protect certain groups of population from substandard wages and excessive hours, which endangered the . . . health and well-being" of its citizens, as well as the "free flow of goods in interstate commerce."<sup>29</sup> "The purposes of wage and hour provisions were (1) to raise sub-standard wages, (2) to spread employment by placing financial pressure on the employers through overtime pay requirement, and (3) to compensate employees for the burden of workweek in excess of" fixed hours.<sup>30</sup> In 1938, Congress passed a revised version of the initial proposal, establishing an eight-hour day and a forty-hour workweek and allowing workers to earn wages for an extra four hours of overtime as well.<sup>31</sup> The FLSA played an important role in President Franklin Roosevelt's New Deal.<sup>32</sup>

The FLSA requires employers to pay their employees who work more than forty hours in a workweek overtime compensation at one and one-half times the regular rate.<sup>33</sup> The original FLSA passed in 1938 specifically excluded the States and their political subdivisions from its coverage.<sup>34</sup> "In 1974 . . . Congress enacted the most recent of a series of broadening amendments to the [FLSA]."<sup>35</sup> "By these amendments, Congress has extended the

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of pay" and that the "Administrator was entitled to an injunction restraining the enforcement of the contract and the shipment of goods in commerce in violation of the provisions of the [FLSA].").

29. See *Sermond v. Lotz*, 47 A.2d 432, 434 (N.J. 2nd Dist. Ct. of Paterson 1946) (finding that the plaintiff was entitled to overtime and liquidated damages pursuant to FLSA, in addition to attorney's fees).

30. See *Ille v. Travis Oil Corp.*, 164 P.2d 998, 1000-01 (Okla. 1945) (deciding that employers and employees may "in good faith, contract for a regular rate of pay so long as the wages agreed upon are not less than the minimum required by the [FLSA].").

31. Grossman, *supra* note 22.

32. *Id.*

33. 29 U.S.C. § 207(a) (2012).

34. See 29 U.S.C. § 203(d) (2012) (amended 1974) ("Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State.").

35. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 836-37 (1976) (holding that the 1974 amendments extending the protections of the FLSA to state employees interfered with state authority), *overruled* by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 528 (1985).



minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions.”<sup>36</sup>

In 1974, Congress created the fire protection exemption to the overtime requirement under the FLSA when it recognized that fire suppression personnel typically work significantly more hours than other public employees work.<sup>37</sup> As such, Congress and the Department of Labor established a higher overtime threshold.<sup>38</sup> This exemption permits fire departments to schedule firefighters and firefighter-paramedics on platoon duty without incurring large amounts of overtime liability in a workweek.<sup>39</sup>

## *2. Overtime Takes on a Different Meaning When Applied to Public Employees: Fire Protection Activities and General Law Enforcement Personnel*

The FLSA generally requires employers to pay employees overtime compensation at time and a half for any hours worked in excess of forty in a week.<sup>40</sup> However, Congress provided a partial overtime exemption in the FLSA for employees “in fire protection activities,” which allows sworn personnel to be paid overtime after a higher threshold.<sup>41</sup> Problems arose in applying this partial

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. 29 U.S.C. § 207(a) (2012).

41. *See* 29 U.S.C. § 207(k) (2012). The provision specifically states:

Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in

exemption, however, because firefighters perform medical services in addition to firefighting.<sup>42</sup>

In order to address concerns that police and firefighters' overtime was becoming too costly for municipalities, Congress passed and created a partial FLSA exemption for law enforcement and fire protection personnel (public safety personnel) in 1974.<sup>43</sup> In 1985, the Supreme Court upheld Congress' power under the FLSA to regulate the payments due to state and local employees.<sup>44</sup> State and municipal authorities reacted with "grave concern" to the decision, due in part to "[t]he projected 'financial costs of coming into compliance with the FLSA—particularly the overtime provisions.'"<sup>45</sup> Both the House and Senate responded to the concerns of the state and municipal authorities, held hearings on the issue, and considered legislation designed to alleviate the burdens associated with necessary changes in public employment

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his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days.

*Id.*

42. See Ted Roelofs, *Medical Calls, Not Fire Emergencies, Dominate Firefighter Runs*, MLIVE (May 23, 2012), [http://www.mlive.com/politics/index.ssf/2012/05/medical\\_calls\\_dominate\\_fire\\_ru.html](http://www.mlive.com/politics/index.ssf/2012/05/medical_calls_dominate_fire_ru.html) (last visited Apr. 24, 2017) ("Thanks in large part to the advent of smoke detectors and commercial and industrial sprinkler systems, fire departments battle far fewer fires today than they did decades ago. In Michigan, the number of fires fell to 33,421 in 2010; in 1977, the total was 82,297") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

43. See 29 U.S.C. § 207(k) (2012); *Nixon Signs Minimum Wage Increase*, CQ ALMANAC 1974, 1975, at 239–44, <http://library.cqpress.com/cqalmanac/cqal74-1224480> (last visited Apr. 24, 2017) (detailing Senate arguments over firefighters' overtime pay, with one Senator fruitlessly arguing "that such coverage 'would . . . be asking our cities to pay the additional costs out of existing funds, to raise taxes or use their revenue-sharing funds to pay for these basic citizen services'") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

44. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985) (stating that "Congress' action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause.>").

45. See *Moreau v. Klevenhagen*, 508 U.S. 22, 26 (1993) (quoting S. REP. NO. 99–159, at 8 (1985)).

practice.<sup>46</sup> Congress ultimately enacted several provisions designed to allay public employers' fears and contain costs.<sup>47</sup>

In 1999, Congress enacted 29 U.S.C. § 203(y) to define an employee in fire protection activities.<sup>48</sup> Congress' intent in enacting Section 203(y) was to "avoid lawsuits" and "essentially require only that an individual be employed by a traditional fire department and have some nominal but real participation in a fire department's traditional mission of fighting fires."<sup>49</sup> In drafting § 203(y), Congress adopted some of the preexisting language from 29 C.F.R. § 553.210, a Department of Labor regulation defining "fire protection activities." Congress declined to adopt the Department of Labor definition, which includes "incidental non-firefighting functions" and "rescue and ambulance service personnel" who "form an integral part of the public agency's fire protection activities." It is not part of the present FLSA definition of "fire protection activities."<sup>50</sup> "Congress chose to exclude parts of

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46. *Id.*

47. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c), 99 Stat. 787, 788-89.

48. *See* 29 U.S.C. § 203(y) (2012) (defining "employee in fire protection activities."). The definition states:

"Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

*Id.*

49. *Lawrence v. City of Philadelphia*, 527 F.3d 299, 325-26 (3d Cir. 2008). The Court stated:

In short, the legislative record suggests that § 203(y)'s supporters sought to reverse the trend of court cases in which the exemption—which historically had included any emergency responder employed by a fire department—had been narrowed, resulting in large damage awards against municipalities. And in clarifying the exemption, Congress intended to overturn much of the recent caselaw in favor of the more inclusive approach that had prevailed historically under the FLSA. This may explain why § 203(y) was drafted to bring more fire department employees within the ambit of the exemption.

*Id.* (citations omitted).

50. *Id.*

the Department of Labor definition,” which resulted in a narrower definition covering fewer employees.<sup>51</sup>

The legislative history of Section 203(y) does not imply that Congress meant to depart from the ordinary, common meaning of the provision’s words.<sup>52</sup> The brief statements of the few legislators who spoke about the bill that became Section 203(y) provide no basis to conclude that the words in that Section 203(y) mean anything other than their common meaning.<sup>53</sup> The legislative history demonstrates that Congress intended that the exemption only apply to those fire fighters who go to the scenes of emergencies and directly deal with them.<sup>54</sup> The amendment was intended to assure that fire fighters who go to both medical and fire calls would fall under the exemption.<sup>55</sup> Generally, falling under the exemption is bad for employee firefighters because the threshold to receive overtime pay is higher.<sup>56</sup> Thus, for a seven-day workweek, a firefighter needs to work at least 53 hours instead of the usual 40 hours to receive overtime compensation.

Firefighters’ duties have expanded. On the House floor, Congressman Clay noted that “where fire fighters are cross-trained and are expected to perform both firefighting and emergency medical services, they will be treated as fire fighters for

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51. *Haro v. City of Los Angeles*, 745 F.3d 1249, 1254 (9th Cir. 2014). The Court indicated that:

[O]ne of these exclusions reads as follows: [A]ny employee . . . who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non–firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency’s fire protection activities.

*Id.*

52. *See Lawrence*, 527 F.3d at 318 (indicating that the Court concluded that “the statutory language is plain,” the Court turned to legislative history, which “suggests that Congress intended that true dual function paramedics . . . would fall within the exemption.”).

53. *Id.* at 325.

54. *Id.*

55. *See* 29 U.S.C. § 203(y) (2012) (listing “fire protection activities” as involving employees engaged in fire suppression or “response to emergency situations where life, property, or the environment is at risk.”).

56. Appendix A.

the purpose of overtime.”<sup>57</sup> Similarly, Congressman Ehrlich stated, “today’s fire fighter in addition to fire suppression, may also be expected to respond to medical emergencies, hazardous materials events, or even to possible incidents created by weapons of mass destruction.”<sup>58</sup> As firefighter duties have expanded to include responses to more dangerous incidents, it seems counterintuitive to require more work to receive more pay, unless Congress’s goal has been to reduce the overtime burden on local municipalities.

### 3. *Workweek Definition*

Under Section 207 of the statute and the Department of Labor’s regulations, the “workweek” is the basic unit of measurement for determining an employer’s FLSA overtime obligation to employees.<sup>59</sup>

The FLSA ensures overtime payments to employees and prescribes the rules for calculating overtime wages.<sup>60</sup> Section 207(a) sets forth the basic overtime standard of 40 hours in a 7-day workweek, and specifies the overtime rate of one and one-half times the regular rate.<sup>61</sup> The question is whether Section 207(h), which addresses credits for overtime payments previously made to employees, should be read in light of the statute’s core workweek concept prescribed in Section 207(a).<sup>62</sup> The Department of Labor has long interpreted the FLSA to mean that premium compensation earned and paid for work done within one workweek may not be offset against overtime due in another workweek.<sup>63</sup>

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57. 145 CONG. REC. 28, 520 (1999) (statement of Rep. Clay).

58. *Id.* (statement of Rep. Ehrlich).

59. *See, e.g., Scott v. City of New York*, 592 F. Supp. 2d 475, 484 (S.D.N.Y. 2008) (explaining that “[w]hen calculating statutory overtime, the FLSA uses a single workweek as the basic unit of measurement.”); *see also Chessin v. Keystone Resort Mgmt., Inc.*, 184 F.3d 1188, 1196 (10th Cir. 1999) (noting that a plain language interpretation supports “[a] workweek-by-workweek approach.”); 29 C.F.R. § 778.104 (2011) (“[FLSA] takes a single workweek as its standard and does not permit averaging of hours over [two] or more weeks.”).

60. 29 U.S.C. § 207 (2012).

61. 29 U.S.C. § 207(a) (2012).

62. *Id.*

63. 29 C.F.R. § 778.202(c) (2011); *see* DEP’T OF LABOR, Wage & Hour Div., Opinion Letter (Dec. 23, 1985) (“[S]urplus overtime premium payments, which

The FLSA overtime pay is due on the employee's payday covering overtime work from the prior workweek.<sup>64</sup> Congress has long recognized this necessity of prompt payment of wages to workers.<sup>65</sup> Sections 207(e) and (h) instruct employers how to calculate overtime-owed employees on payday.<sup>66</sup> If the employer fails to pay overtime as prescribed on payday, employees may file a claim and an enforcement suit for the unpaid overtime.<sup>67</sup> When an employer has failed to pay its employees overtime in due course, the overtime owed is calculated in the same way that it should have been calculated if the employer had actually complied with the law.<sup>68</sup>

Applying any other calculation method, other than workweek-by-workweek calculation for FLSA violations, would have the perverse effect of encouraging employers not to pay overtime as is, because the employer not paying overtime on time would have a more favorable offset rule than an employer who faithfully paid on time.<sup>69</sup> This “would eviscerate the protection intended by the overtime payment requirement.”<sup>70</sup>

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may be credited against overtime pay pursuant to section 7(h) of the FLSA, may not be carried forward or applied retroactively to satisfy an employer's overtime pay obligation in future or past pay periods”) (on file with the Washington and Lee Journal Civil Rights and Social Justice).

64. 29 C.F.R. § 778.106 (2005); 29 C.F.R. § 790.21(b) (2012).

65. See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (noting the importance of paying wages in a timely fashion because to do otherwise “may be so detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers and to the free flow of commerce.”).

66. See 29 U.S.C. § 207(e) (2012) (defining “regular rate.”); 29 U.S.C. § 207(h) (2012) (discussing “[e]xtra compensation creditable toward overtime compensation.”).

67. See 29 C.F.R. § 790.21(b) (2014) (stating that “a cause of . . . for unpaid minimum wages or unpaid overtime compensation and for liquidated damages ‘accrues’ when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends.”).

68. See *Nolan v. City of Chicago*, 125 F.Supp.2d 324, 331 (N.D. Ill. 2000) (finding that offset should be applied so that “the employee and employer are placed in the same position as they would have been if the City had correctly calculated the overtime.”); see also *Givens v. Will Do, Inc.*, No. 4:10-CV-02846, 2012 WL 1597309, at \*6 (S.D. Tex. May 4, 2012) (“[T]he amount legally owed is the amount legally due. There is no special or different method of calculating overtime ‘damages’ for remedial purposes.”).

69. See Appendix A (demonstrating maximum hours standards).

70. See *Howard v. City of Springfield*, 274 F.3d 1141, 1148–49 (7th Cir. 2001)

In enacting the FLSA, and specifically Section 207, Congress defined the term overtime, what payments go into the regular rate, and what payments count against the employer's overtime obligation.<sup>71</sup> Of the eight categories of payments listed in Section 207(e), only three are creditable under Section 207(h)(2).<sup>72</sup> The courts have interpreted which overtime calculation method is correct under statute, reaching different conclusions.<sup>73</sup>

#### 4. *The Employer's Role In Calculating Overtime and Prior Overtime Payments*

"Under the FLSA, 29 U.S.C. § 207(h)(2), an employer may credit overtime payments already made to employees against overtime payments owed to them under the FLSA."<sup>74</sup> The statute, however, does not specify the method that must be used to calculate these overtime payments.<sup>75</sup> The statute simply states that "[e]xtra compensation . . . shall be creditable toward overtime compensation payable pursuant to this section."<sup>76</sup> Section 207(a) sets forth an overtime standard of forty hours in a seven-day workweek and time and one-half for overtime.<sup>77</sup> Further, "to determine the overtime owed for each workweek, the total hours worked over forty is multiplied by one and one-half the regular rate."<sup>78</sup> Then, under § 207(h), the overtime already paid by the employer is determined and credited against the overtime owed.<sup>79</sup>

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(referring to the City's argument that "advocate[d for] a method of payment that would allow it to pay its overtime obligations at a time far removed from when the overtime about was due.").

71. 29 U.S.C. § 207 (2012).

72. *Id.*

73. *See infra* Section III (discussing the circuit split between the method of calculating overtime).

74. *Haro v. City of Los Angeles*, 745 F.3d 1249, 1259 (9th Cir. 2014).

75. *See* 29 U.S.C. § 207(e) (2012) (evaluating the statute shows it does not proscribe a particular method of calculation).

76. 29 U.S.C. § 207(h)(2) (2012).

77. *See Haro*, 745 F.3d at 1259 (indicating that section 207(a) sets forth the basic overtime standard, set at forty hours in a seven-day workweek and time and one-half for overtime).

78. *Id.*

79. *See id.* (noting that overtime given by an employer is credited against overtime owed once it is calculated).

While § 207(h) does not state whether credits must be determined on a workweek basis, it must still be read within the context of the overtime due under § 207(a), which is calculated on a workweek basis.<sup>80</sup> Under this reading, compensation already paid for work done within one workweek should not be transferrable and offset against overtime due in another workweek.<sup>81</sup>

### *III. Analysis: What is the Correct Method to Calculate Overtime and Why?*

#### *A. Circuit Split Overview*

This Note addresses the circuit split regarding which overtime calculation method for firefighters is proper. This question is important because thousands of dollars are at stake for individual firefighters in overtime compensation and millions of dollars are at stake for municipalities in the form of overtime labor costs.<sup>82</sup> The method of overtime calculation applied by the court determines who retains the millions in the balance, the firefighters or the municipality.

The Sixth, Seventh and Ninth Circuits have ruled that the FLSA requires that employers approach each workweek separately.<sup>83</sup> The method for applying a credit for previously paid premium compensation when calculating back pay must be on a workweek-by-workweek basis.<sup>84</sup> Under the workweek-by-

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80. 29 U.S.C. § 207 (2012).

81. See *Haro v. City of Los Angeles*, 745 F.3d 1249, 1259 (9th Cir. 2014) (describing that money paid in one workweek should not be carried over or used to offset overtime in another workweek).

82. See *Singer v. City of Waco, Tex.*, 324 F.3d 813, 829 (5th Cir. 2003) (alleging that overtime costs can be in the millions).

83. *Haro*, 745 F.3d at 1260; see *Herman v. Fabri-Centers of America, Inc.*, 308 F.3d 580, 589 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003) (according to principles of statutory construction, the intent of Congress, and persuasive case law, it is clear that 207(h)(2) “should be interpreted to include a work week or work period restriction.”); *Howard v. City of Springfield*, 274 F.3d 1141, 1147 (7th Cir. 2001) (indicating that the appropriate test is “the test set forth in the statute, and is whether the payments are made because the hours are outside the regular workday.”).

84. See *Herman*, 308 F.3d at 592 (“[T]he workweek or work period concept is the standard point of reference for interpreting the provisions of the FLSA.”)



workweek approach, employees receive overtime payment for work completed in 7-day workweek with a forty-hour threshold instead of waiting for the 204-hour threshold in a 27-day period.<sup>85</sup> The reasoning behind this rule is that the employee improperly had to wait an extra pay period or two at most before receiving a payment he or she would have received under a 7-day workweek.<sup>86</sup>

The Fifth and Eleventh circuits have held that a cumulative offset approach is proper under the FLSA.<sup>87</sup> Under the cumulative approach, the Court calculates all the overtime owed to plaintiffs under a lower 40-hour per 7-day workweek threshold and subtracts from the amount the payments already made to plaintiffs (under the higher 204-hour per 27-day workweek thresholds).<sup>88</sup>

These different approaches have a very real and quantified effect on the bottom line of municipalities and firefighter income. Thus, it is very important that courts have applied the overtime calculation method correctly because the court is choosing winners and losers to the tune of millions of dollars.

## *B. Methods of Calculation*

### *1. Multi-Year Offset Method Calculation Demonstration*

Assume an individual worked overtime beyond 40 hours in a workweek in September 2015; however, in the 28-day work period in which those extra hours were worked, that individual did not receive any FLSA overtime pay because the individual did not work a total number of 212 hours under the applied Section 207(k)

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(quoting DEP'T OF LABOR, Wage & Hour Div., Opinion Letter (Dec. 23, 1985)); *Howard*, 274 F.3d at 1148 (noting the court's adoption of a workweek-by-workweek approach).

85. Appendix A.

86. *Id.*

87. See *Singer v. City of Waco*, 324 F.3d 813, 828 (5th Cir. 2003) (finding that “the district court did not err in offsetting the overpayments paid to the fire fighters in some work periods against the shortfalls in other work periods.”); *Kohlheim v. Glynn Cty.*, 915 F.2d 1473, 1481 (11th Cir. 1990) (stating that “[t]he FLSA mandates that ‘extra’ compensation paid by an employer be credited toward overtime compensation due.”).

88. See *Singer*, 324 F.3d at 823–24 (outlining the method used to calculate overtime owed).

exemption.<sup>89</sup> If some FLSA compensation was paid to the same worker years later, for example in December 2015, when the individual worked beyond the 204-hour, 27-day work cycle, then the multi-year offset method would enable it to use the overtime paid much later to cancel out the overtime compensation that was due and owing years earlier.<sup>90</sup> In this example, an individual who worked the extra overtime shift in September 2015 and should have received overtime in his/her paycheck immediately after that workweek would not receive it under the across-the-board offset theory. This approach likely gives too much uncertainty to employees and too much discretion to municipalities. The discretion results in uncertainty because the timeframe used to account for the overtime lasts over the span of multiple years, an intricate ledger would be required to account for the offset periods.

*2. The Sixth, Seventh, and Ninth Circuits Interpretation of the  
FLSA Overtime Calculation Method—Workweek-by-Workweek  
Method*

The Seventh Circuit has addressed the potential offset of overtime payments and ruled that “[t]he general rule is that overtime compensation earned in a particular workweek must be paid on the regular payday for the period in which such workweek ends.”<sup>91</sup> “When the correct amount of the overtime compensation cannot be determined until sometime after the regular pay period, however, the requirements of the FLSA will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.”<sup>92</sup> Additionally,

an employer may not average the number of hours worked over two weeks in order to avoid paying overtime; therefore, if an employee works 20 hours one week and 60 the next, the employer owes overtime in the second week even though the two weeks average to 40 hours each. Just as that averaging would constitute an end-run around the overtime requirement, the

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89. 29 U.S.C. § 207(k) (2012).

90. Appendix A.

91. *See* Howard v. City of Springfield, 274 F.3d 1141, 1148 (7th Cir. 2001) (stating the general rule regarding payment of overtime compensation).

92. *Id.*

City's attempt to apply credits whenever paid to all overtime liability attempts to accomplish the same result.<sup>93</sup>

The *Howard* Court addressed this issue when police officers who supervised and trained the canine unit brought action against city.<sup>94</sup> Similar to firefighters, police have different standards for overtime. The police officers sought payment pursuant to the FLSA for time spent taking care of dogs while on vacation, personal or sick days, or on days in which they used compensatory time or had in-service training or training with their dogs, and time in court.<sup>95</sup> “[T]he officers assert that payments for court time and for regular days off should not constitute premiums that could offset overtime liability.”<sup>96</sup>

Pursuant to the FLSA, an employer may credit some payments against any overtime it owes. Specifically, 29 U.S.C. § 207(h)(2) provides that, “[e]xtra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable towards overtime compensation payable pursuant to this section.”<sup>97</sup> “Extra compensation provided by a premium rate paid for certain hours worked by the employee (1) in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek”<sup>98</sup> or (2) “for work by the employee on Saturdays, Sundays, holidays,”<sup>99</sup> or (3) “pursuance of an applicable employee contract or collective-bargaining agreement.”<sup>100</sup> In addition, for work performed “outside of the hours established in good faith by the contract or agreement . . . where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.”<sup>101</sup>

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93. *Id.* at 1149.

94. *Id.*

95. *Id.*

96. *Id.* at 1146.

97. 29 U.S.C. § 207(h)(2) (2012).

98. 29 U.S.C. § 207(e)(5) (2012).

99. 29 U.S.C. § 207(e)(6) (2012).

100. 29 U.S.C. § 207(e)(7) (2012).

101. 29 U.S.C. § 207(e)(5)–(7) (2012).

Regarding the time police officers spent in court, “the premium pay for court time occurs regardless of whether that court time falls within the hours established as part of the regular day.”<sup>102</sup> The *Howard* Circuit Court even stated that “a common sense view would suggest that court time generally falls within a regular workday” and the importance of focusing on the statute.<sup>103</sup>

The *Howard* District Court concluded that “[c]ourt time payments are not tied to ‘certain special hours outside the established workday,’” and “[t]hus, the City may use court time premiums to offset the Plaintiffs’ FLSA claims pursuant to § 207(e)(7).”<sup>104</sup> The city sought to classify the court hours as overtime hours in order to offset other hours that law enforcement officers worked.<sup>105</sup> The *Howard* Circuit Court stated that “[t]he appropriate test here is not whether the payments for court time were paid because the hours were undesirable or because the hours worked, were certain special hours.”<sup>106</sup> Rather, “the test is set forth in the statute, and is whether the payments were paid because the hours are outside the regular workday.”<sup>107</sup>

“The statute is clear that the reason for the payment must be that the hours fall outside the regular established workday.”<sup>108</sup> “Payments made for another reason will not fall within § 207(e)(7).”<sup>109</sup> The test is whether the payments were previously paid because the work fell outside the regular hours. The *Howard* Circuit Court stated that the evidence must demonstrate that the payments were previously paid because the time worked was “outside the regular workday established by contract.”<sup>110</sup>

The *Howard* Circuit Court then considered the question of whether “payments made for work performed on their regular days off constitute creditable premiums.”<sup>111</sup> The statute “provides that premium payments made on regular days off may be used as

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102. *Howard v. City of Springfield*, 274 F.3d 1141, 1146 (7th Cir. 2001).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1147.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

offsets ‘where such premium rate is *not less than* one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days.’”<sup>112</sup>

The *Howard* Circuit Court found that “if the City were able to use premium payments in the manner” made during the years in issue to offset all overtime liability, regardless of when the payments were made and when the overtime was owed, “the City would be the recipient of the windfall, and in fact would be placed in a substantially better position than if it had complied with the overtime requirements of the FLSA all along.”<sup>113</sup> The *Howard* Circuit Court posited an example:

If the City complied with the FLSA all along, it would have paid the overtime each pay period as it accrued. Subsequent premiums payments could not be used to reduce those overtime payments, because they would have already have been calculated and paid. For instance, a premium payment made for the Thanksgiving holiday would not be used by a conforming employer to offset overtime paid back in March. But that is precisely what the City seeks to do here. It is contrary to the language and the purpose of the statute.<sup>114</sup>

Based on the Seventh Circuit’s approach in *Howard*, overtime offsets should clearly not span the course of the year, but what timeframe is proper under the FLSA for municipalities to offset overtime? <sup>115</sup> In *Howard*, the Seventh Circuit stated that “the credit provision must be read in the context of the statute as a whole, which is designed to protect workers from the twin evils of excessive work hours and substandard wages.”<sup>116</sup> “Courts have long interpreted the FLSA as requiring” payments occur in a timely manner.<sup>117</sup> Employers violate the FLSA even if the

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112. *See id.* (quoting 29 U.S.C. § 207(e)(6) (2012)).

113. *Id.* at 1148.

114. *Id.*

115. *Id.*

116. *Howard v. City of Springfield*, 274 F.3d 1141, 1148 (7th Cir. 2001); *see Monahan v. Cty. of Chesterfield*, 95 F.3d 1263, 1284 (4th Cir. 1996) (finding that “if the terms of the employment agreement do not violate the FLSA, freedom of contract prevails,” and here, the court found “no remedy under the FLSA for pure gap time claims [, so o]ur ruling precludes an employee from invoking the jurisdiction of federal court on” this claim).

117. *Howard*, 274 F.3d at 1148.

“employer eventually pays the overtime amount that was due.”<sup>118</sup> Even if the workers were to choose a deferred payment form of employer held savings account, that would be improper under the FLSA.<sup>119</sup> “Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event, may payment be delayed beyond the next payday after such computation can be made.”<sup>120</sup> Therefore, under 29 C.F.R. § 778.106, “overtime generally must be calculated and paid on a pay period by pay period basis.”<sup>121</sup> This interpretation prevents both the employer and the employee from manipulating the overtime payments “to suit its economic concerns.”<sup>122</sup>

The language of the statute provides that premium payments are creditable “towards overtime compensation payable pursuant to this section.”<sup>123</sup> “Because the statute contemplates that overtime . . . [is calculated and paid] on a pay period basis, it is consistent with that language to calculate and apply credits in the same manner.”<sup>124</sup> The *Howard* Court also supported their rationale under 29 C.F.R. § 778.104, which “provides that an employer may not average the number of hours worked over two weeks in order to avoid paying overtime.”<sup>125</sup> The *Howard* case has a cogent dissent, describing that a workweek restriction should not apply because it improperly penalizes employers.<sup>126</sup> The Sixth Circuit has adopted a similar approach to the Seventh Circuit.

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118. *Id.*

119. *Id.*

120. *See id.* at 1149 (citing 29 C.F.R. § 778.106 (2017)).

121. *Id.* at 1148.

122. *Id.* at 1149.

123. *See Nolan v. City of Chicago*, 125 F.Supp.2d 324, 331 (N.D. Ill. 2000) (quoting 29 U.S.C. § 207(h)(2) (2012)).

124. *Howard v. City of Springfield*, 274 F.3d 1141, 1149 (7th Cir. 2001); *see also* 29 C.F.R. § 778.202(c) (2017) (“[C]redits may be given for daily compensation against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek.”).

125. *See Howard*, 274 F.3d at 1149 (“[I]f an employee works 20 hours one week and 60 the next, the employer owes overtime in the second week even though the two weeks average to 40 hours each . . . the . . . attempt to apply credits whenever paid to all overtime liability attempts to accomplish the same result.”).

126. *See id.* at 1149–50 (Manion, J., dissenting) (stating that he disagrees “with the court’s determination that the City may use premium pay credits to offset liabilities only when they occur during the same pay period.”).

In *Herman v. Fabri-Centers of America, Inc.*, the Sixth Circuit considered contractual premiums that “accrued regardless of whether employees worked overtime.”<sup>127</sup> In a Section 207(k) misclassification case, the local government employer will have paid overtime payments to the fire department or law enforcement personnel for work exceeding the higher hour thresholds.<sup>128</sup> If the local government employer misclassified the employees, and instead should have classified the employees at the traditional 40 hours per 7-day workweek threshold, then the employees are owed additional payments.<sup>129</sup> The Sixth and Seventh Circuits have decided that the fire departments or law enforcement agencies denied any credit for many of the prior payments of overtime. This policy favors employee firefighters.

According to the Sixth, Seventh and Ninth Circuits, a municipality may only gain a credit for a previously paid overtime payment to a firefighter or law enforcement personnel if the payment compensated an hour that would have qualified as overtime based on a 7-day workweek with a forty-hour threshold.<sup>130</sup> Based on a 207(k) schedule, a municipality will compensate overtime payments after the 204-hour threshold in a 27-day period is exceeded, so that overtime payments will “bunch up” in the third and fourth calendar weeks in the 27-day period.<sup>131</sup> Under the Sixth, Seventh and Ninth Circuits’ rule, employees retain the overtime payments, unless the payments correspond to hours that would also qualify as overtime in those third and fourth 7-day weeks.<sup>132</sup> These overtime payments may not offset overtime worked over 40 hours in the first and second weeks.<sup>133</sup>

The FLSA’s plain language also supports a cumulative approach to accounting for the overtime payments an employer already made to its firefighters.<sup>134</sup> Section 207(h)(2) of the FLSA

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127. *Herman v. Fabri-Centers of America, Inc.*, 308 F.3d 580, 583 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003).

128. 29 U.S.C. § 207(k) (2012).

129. *Id.*

130. *Supra* Section III(B)(2).

131. Appendix A.

132. *Supra* Section III(B)(2).

133. *Id.*

134. *See* 29 U.S.C. § 207(h)(2) (2012) (“Extra compensation paid as described... shall be creditable toward overtime compensation payable pursuant

provides that certain extra payments made by an employer “shall be creditable against overtime compensation payable pursuant to this section.”<sup>135</sup> This amount constitutes the “overtime compensation payable under this section” for the entire statutory limitations period, any “creditable payments” are subtracted from the amount of “overtime compensation payable.”<sup>136</sup>

In *Garcia v. San Antonio Metropolitan Transit Authority*, the United States Supreme Court held that the San Antonio transit authority was bound by the minimum wage and overtime requirements of the FLSA § 207(k), marking the importance this issue has to municipalities.<sup>137</sup> Under the FLSA, employees other than public safety personnel are generally entitled to payment “at a rate not less than one and one-half times” their regular wages for any time worked in excess of forty hours in a seven day period.<sup>138</sup> However, the partial exemption in § 207(k) set a higher threshold number of hours that public safety personnel can work in a twenty-eight day work period—or a proportional number of hours in a shorter work period of at least seven days—before these employees become entitled to overtime compensation.<sup>139</sup>

In *Haro v. City of Los Angeles*,<sup>140</sup> the Ninth Circuit explained that in order to be compliant, a fire department may not treat dual-function firefighters as partially exempt unless it arranges for them to be responsible for directly engaging the fire on-scene.<sup>141</sup> Municipalities argue that the plain statutory language does not require a narrow construction of “fire suppression,” but instead, requires only some type of nominal but real contribution to the fire department’s traditional mission of fighting fires.<sup>142</sup> This will afford fire departments very substantial savings intended by the

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to this section.”).

135. *Id.*

136. *Id.*

137. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 528 (1985).

138. 29 U.S.C. § 207(a)(1) (2012).

139. *See* 29 U.S.C. § 207(k) (2012) (setting up a sliding scale for overtime compensation based proportionally on hours worked).

140. *See Haro v. City of Los Angeles*, 745 F.3d 1249, 1261 (9th Cir. 2014) (concluding that the 207(k) exemption did not apply to fire department employees not engaged in fire protection).

141. 29 U.S.C. § 207(k) (2012).

142. *Haro*, 745 F.3d at 1258.



partial exemption, and aligns directly with plain terms of Section 203(y).<sup>143</sup>

Congress created the fire protection exemption to the overtime requirement under the FLSA when it recognized that fire suppression personnel typically work significantly more hours than other public employees work.<sup>144</sup> Congress and the Department of Labor established a higher overtime threshold because of this occurrence.<sup>145</sup> This exemption permits fire departments to schedule firefighters and firefighter-paramedics on platoon duty without incurring large amounts of overtime liability in a workweek.<sup>146</sup>

If the holding of the *Haro* decision deters the fire department from using the partial exemption, local governments would be required to pay overtime for all hours worked in excess of 40 hours per week, as opposed to all hours worked in excess of 53 hours per week, to provide the same level of service to the public.<sup>147</sup> Considering the potentially large number of firefighters and firefighter-paramedics nationwide by the *Haro* decision, the decision could cost local governments and taxpayers hundreds of millions of dollars per year.<sup>148</sup>

### 3. *The Fifth and Eleventh Circuits Support a Cumulative Approach to Credits for Overtime Already Paid*

In *Singer v. City of Waco*,<sup>149</sup> the Fifth Circuit allowed a municipality defendant to use cumulative offsets, and considered damages owed to already paid employees according to a twenty-eight-day overtime threshold under Section 207(k), when they should have paid under a fourteen-day threshold under the

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143. 29 U.S.C. § 203(y) (2012).

144. *Id.*

145. *Id.*

146. *Id.*

147. Appendix A.

148. *Haro v. City of Los Angeles*, 745 F.3d 1249, 1254 (9th Cir. 2014); see *Singer v. City of Waco, Tex.*, 324 F.3d 813, 829 (5th Cir. 2003) (explaining that firefighters sought millions in damages for overtime wages).

149. See *Singer*, 324 F.3d at 817 (5th Cir. 2003) (explaining that damages for unpaid overtime may be offset with excessive previously paid overtime payments).

section.<sup>150</sup> The cases from the Sixth and Seventh Circuits did not specifically involve misclassification under Section 207(k).<sup>151</sup>

Similarly, in *Kohlheim v. Glynn County*,<sup>152</sup> the Eleventh Circuit authorized a cumulative approach, holding that the public agency employer “should be allowed to set-off all previously paid overtime premiums ... against overtime compensation found to be due and owing during the damages phase of the trial.”<sup>153</sup> Additionally, the First Circuit has explained “[t]he regulations specifically explain how to treat such mid-workweek contractual overtime payments under the Act: only the premium portion of the contractual overtime rate (that is, the amount in excess of the employee’s regular rate) is deemed ‘overtime’ pay and may be offset against any statutory overtime liability in the same week.”<sup>154</sup>

Some experts posit that the FLSA’s application supports a cumulative approach to accounting for the overtime payments.<sup>155</sup> FLSA Section 207(h)(2) provides that certain extra payments made by an employer “shall be creditable against overtime compensation payable pursuant to this section.”<sup>156</sup> Under this approach, the total amount of overtime compensation that would have been due to plaintiffs under a 40-hour threshold is calculated. This amount constitutes the “overtime compensation payable pursuant this section” for the entire statutory limitations period.<sup>157</sup>

The Eleventh Circuit held that previously paid overtime could be cumulatively offset against the damages calculated.<sup>158</sup> The

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150. *Id.*

151. *See* *Herman v. Fabri-Centers of America, Inc.*, 308 F.3d 580, 583 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003) (explaining that the section to be examined is § 207(h)(2) in this case); *Howard v. City of Springfield*, 274 F.3d 1141, 1148 (7th Cir. 2001) (same).

152. *See* *Kohlheim v. Glynn County*, 915 F.2d 1473, 1481 (11th Cir. 1990) (finding that previously paid excessive overtime payments may be used to offset unpaid overtime payments).

153. *Id.*

154. *See* *O’Brien v. Town of Agawam*, 350 F.3d 279, 289 (1st Cir. 2003) (finding generally that the FLSA protects law enforcement officers, placing the burden on the public to pay for additional hours worked).

155. *See* 29 U.S.C. § 207(h)(2) (2012) (explaining that the overtime payments are cumulative).

156. *Id.*

157. *Haro v. City of Los Angeles*, 745 F.3d 1249, 1259 (9th Cir. 2014).

158. *See* *Kohlheim v. Glynn County*, 915 F.2d 1473, 1481 (11th Cir. 1990) (explaining that excessive overtime payments accrued and paying those may be

court failed to cite supporting authority.<sup>159</sup> The Fifth Circuit affirmed the district court's cumulative offset calculation.<sup>160</sup>

The Fifth and Eleventh Circuits allow local government employers to use cumulative offsets.<sup>161</sup> The Fifth Circuit considered damages owed to employees who had been paid according to a twenty-eight-day overtime threshold under FLSA Section 207(k), when they should have paid under a fourteen-day threshold under the section.<sup>162</sup> The Eleventh Circuit also ruled in favor of a cumulative approach, holding that the public agency employer "should be allowed to set-off *all* previously paid overtime premiums . . . against overtime compensation found to be due and owing. . . ."<sup>163</sup> Additionally, a District Court in Massachusetts held that defendants were "entitled to credit the premium portions of all contractual overtime payments regardless of when the premiums were paid and when the overtime work occurred."<sup>164</sup>

In the Fifth Circuit, plaintiff firefighters "contended that the district court lacked the authority under the FLSA to apply the offset."<sup>165</sup> Section 207(h) "states that employers may offset certain overtime premiums against overtime compensation due under the statute."<sup>166</sup> Plaintiff "fire fighters, relying on several cases interpreting § 207(h), argue that the provision does not permit a district court to offset overpayments made in some work periods against shortfalls in other work periods."<sup>167</sup> The Fifth Circuit determined that 207(h) does not apply in this case because "[t]hat provision refers to payments that are not included in determining

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used to offset related damages).

159. *Id.*; see *Haro*, 745 F.3d at 1260 (explaining that the Eleventh Circuit's interpretation holding that excessive overtime payments may be used to offset damages resulting from unpaid overtime was made without any precedential support) (citing *Kohlheim*, 915 F.2d at 1481).

160. *Singer v. City of Waco, Tex.*, 324 F.3d 813, 826 (5th Cir. 2003).

161. *Haro*, 745 F.3d at 1260 (citing *Singer*, 324 F.3d at 826).

162. *Singer*, 324 F.3d at 823.

163. See *Kohlheim*, 915 F.2d at 1481 (describing the cumulative approach adopted by the Eleventh Circuit).

164. See *O'Brien v. Town of Agawam*, 491 F. Supp. 2d at 170, 176 (D. Mass. 2007) (explaining the reach of the employer in setting off overtime premiums).

165. *Singer*, 324 F.3d at 826.

166. *Id.* at 827.

167. *Id.*

the regular rate of pay.”<sup>168</sup> “These overtime premiums are extra payments made by employers.”<sup>169</sup> “These sums are excluded from the total salary (from which the regular hourly rate is calculated) so that they do not improperly inflate the hourly rate.”<sup>170</sup> “In this case, the district court included the overpayments made to the firefighters’ in determining the fire fighters’ regular rate of pay.”<sup>171</sup> “The court did not treat the overpayments as ‘overtime premiums’; therefore, § 207(h), and the cases interpreting it, are inapplicable.”<sup>172</sup>

In *Singer*, plaintiff “fire fighters rely on a provision of the regulations stating that ‘[t]he general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.’”<sup>173</sup> “The provision makes clear that the payment of overtime compensation may be delayed only for a period that is ‘reasonably necessary for the employer to compute and arrange for payment[.]’”<sup>174</sup> The *Singer* Circuit Court found that “the fire fighters mischaracterize[d] the nature of the offset”<sup>175</sup> whereas, the *Singer* “district court did not permit the City to pay its overtime obligations years after they were due.”<sup>176</sup> “Instead, the court simply acknowledged that the City *already paid* the bulk of its overtime obligations,” finding that “[w]hen the City overpaid its employees in the 96–hour periods, it essentially compensated the employees for the shortfalls in the 120–hour periods.”<sup>177</sup>

The *Singer* Court approached overtime payments during the ninety-six hour work periods as pre-payments, as opposed to “late” payments of overtime compensation.<sup>178</sup> The *Singer* Court deemed

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168. *Id.*

169. *Id.*; see 29 U.S.C. § 207(e)(5)–(7) (speaking to “extra compensation provided at a premium rate” which are not included in the statutory definition of “regular rate.”).

170. *Singer v. City of Waco, Tex.*, 324 F.3d 813, 827 (5th Cir. 2003).

171. *Id.*

172. *Id.* at 827–28.

173. See *id.* at 828 (quoting 29 C.F.R. § 778.106 (2017)).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

the payments “more appropriate to view those overpayments as pre-payments: the City pre-paid the firefighters to compensate them for the shortfalls they would receive in subsequent 120-hour work periods.”<sup>179</sup> “[I]f those overpayments were seen as ‘late’ payments of overtime compensation, they would nonetheless violate the FLSA.”<sup>180</sup> “[A]n employer violates the FLSA not only by failing to pay overtime compensation but also by delaying the payment of overtime compensation.”<sup>181</sup>

“Although § 778.106 states that overtime compensation ‘generally’ should be paid in the same work period in which the work is performed, the provision does not prohibit an employer from paying overtime compensation in advance.”<sup>182</sup> When “employees regularly work overtime, it seems logical that an employer would choose to pre-pay its employees for that regularly scheduled work.”<sup>183</sup> Based on this interpretation, the *Singer* Court held that “offsetting the overpayments paid to the fire fighters in some work periods against the shortfalls in other work periods” is the proper application of overtime payments.<sup>184</sup>

### *C. Criticisms and Drawbacks of the Workweek-by-Workweek Calculation Method*

The most significant criticism to the workweek-by-workweek calculation method is that it results in a windfall to public employees.<sup>185</sup> In the current political and economic climate with significant challenges and significant concerns about government debt and taxation, paying public employees hundreds of millions of taxpayer dollars places a significant burden on the municipalities and the taxpayers.<sup>186</sup> Additionally, it could result in the *average*

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. See *Herman v. Fabri-Centers of America, Inc.*, 308 F.3d 580, 592 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003) (indicating that the cumulative offset model can be seen as a windfall for employers).

186. See *Singer v. City of Waco, Tex.*, 324 F.3d 813, 829 (5th Cir. 2003) (implying that the damage is in the millions, as the firefighters sought that

firefighters earning two to four times the median income in some metro areas.<sup>187</sup> This disparity in income could create resentment against firefighters from members of the community they are serving. Another concern in applying the week-by-week calculation method is the potential for abuse. If a firefighter wants to use the system to his or her advantage, a firefighter could alternate weeks of heavy overtime and then one of sick leave and vacation and regular time. Over the course of a month, a firefighter could work 212 hours and still collect a significant overtime payments if overtime was calculated on a week-by-week calculation method. The cumulative offset approach allows the department to offset the time off with overtime, reducing the costs to the department. Another concern is the disparity between firefighters across the country. Some municipalities employ an all-volunteer fire department; others use a mix of volunteer and salaried firefighters; other departments employ only salaried firefighters.<sup>188</sup> From volunteering, to employees earning over a half a million of dollars per year, a vast disparity in income levels nationwide exists in firefighter compensation.<sup>189</sup> Another concern is the abuse of overtime compensation as it pertains to pension fund contributions. Typically, firefighter pension payments are determined by the firefighter's last year of service salary. Knowing this, there is an unwritten rule that a firefighter in his or her last year of service has first rights to overtime opportunities, giving them an opportunity for the highest possible salary prior to retirement and thereby increasing their future pension payments. This abuse of the system in conjunction with a week-by-week calculation method could result in a windfall for retired firefighters receiving thousands of dollars from the public coffers.

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amount).

187. See Jeff German & Mike Trash, *The Advantage of Public Service*, LAS VEGAS SUN (Feb. 18, 2007, 7:32 AM), <http://lasvegassun.com/news/2007/feb/18/the-advantage-of-public-service/> (last visited Apr. 24, 2017) (addressing the pay of public employees including police officers and firefighters in Las Vegas) (on file with the Washington and Lee Journal Civil Rights and Social Justice).

188. See *Cleveland v. City of Elmendorf, Tex.*, 388 F.3d 522, 526 (5th Cir. 2004) (stating that an individual who performs service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation and services rendered, is considered to be a volunteer during such hours).

189. *Id.*

#### IV. Conclusion

Under the FLSA, 29 U.S.C. § 207(h)(2), an employer may credit overtime payments already made to employees against overtime payments owed to them under the FLSA.<sup>190</sup> However, the statute does not specify the method to be used to calculate these overtime payments.<sup>191</sup> The statute simply states that “[e]xtra compensation . . . shall be creditable toward overtime compensation payable pursuant to this section.”<sup>192</sup>

Section 207(a) sets forth the basic overtime standard, set at forty hours in a seven-day workweek and time and one-half for overtime.<sup>193</sup> To determine the overtime owed for each workweek, the total hours worked over forty is multiplied by one and one-half the regular rate.<sup>194</sup> Then, under § 207(h), the overtime already paid by the employer is determined and credited against the overtime owed.<sup>195</sup> While § 207(h) does not state whether credits must be determined on a workweek basis, it must still be read within the context of the overtime due under § 207(a), which is calculated on a workweek basis.

Applying this approach, compensation already paid for work done within one workweek should not be transferrable and offset against overtime due in another workweek. Public employees, especially firefighters, typically do not have other career options in the private sector; therefore, they rely on municipalities for compensation. Firefighters face unique work hazards which are continuing to expand and become more dangerous. Under the FLSA firefighters must work an additional thirteen hours in a workweek before they are eligible to receive overtime. Now more than ever, municipalities are refraining from hiring new firefighters in order to save on healthcare costs and pension plan payments. Those firefighters employed and working significant hours of overtime serving the public should receive compensation

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190. See 29 U.S.C. § 207(h)(2) (2012) (“Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.”).

191. *Id.*

192. *Id.*

193. 29 U.S.C. § 207(a) (2012).

194. 29 U.S.C. § 207(a)(1) (2012).

195. 29 U.S.C. § 207(h) (2012).

requisite with the hours worked beyond a fifty-two hour workweek. Even accounting for the increased cost to municipalities and indirectly to taxpayers, the workweek-by-workweek method of overtime calculation best balances the statutory interpretation and fairness to employees who risk their lives serving the public. This calculation method is most generous to employees, the party who is most economically vulnerable in this transaction. Municipalities and taxpayers should be able to absorb these costs through other avenues, one of which is reducing firefighter pension plans by averaging out a firefighter's salary across his or her career and not solely based on the last year of earned income. This is a better solution than reducing a firefighter's compensation for increased work.



*Appendix A*

	<b>Maximum Hours Standards</b>	
<b>Work Period</b>	<b>Fire protection</b>	<b>Law Enforcement</b>
28 days	212 hours	171 hours
27 days	204 hours	165 hours
26 days	197 hours	159 hours
25 days	189 hours	153 hours
24 days	182 hours	147 hours
23 days	174 hours	141 hours
22 days	167 hours	134 hours
21 days	159 hours	128 hours
20 days	151 hours	122 hours
19 days	144 hours	116 hours
18 days	136 hours	110 hours
17 days	129 hours	104 hours
16 days	121 hours	98 hours
15 days	114 hours	92 hours
14 days	106 hours	86 hours
13 days	98 hours	79 hours

<b>12 days</b>	<b>91 hours</b>	<b>73 hours</b>
<b>11 days</b>	<b>83 hours</b>	<b>67 hours</b>
<b>10 days</b>	<b>76 hours</b>	<b>61 hours</b>
<b>9 days</b>	<b>68 hours</b>	<b>55 hours</b>
<b>8 days</b>	<b>61 hours</b>	<b>49 hours</b>
<b>7 days</b>	<b>53 hours</b>	<b>43 hours</b>