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This is in further response to your inquiry concerning the application of §7(k), 29 USC §207(k), of the Fair Labor Standards Act (FLSA) to firefighters covered by the provisions of a collective bargaining agreement (CBA). You ask whether a certain part of the overtime compensation section of the CBA will satisfy the overtime compensation requirements of the FLSA.

Section 21.02(a) of the CBA provides for a work cycle or work period of 15 days during which firefighters are normally scheduled to work five 24-hour shifts - 120 hours. Under §7(k) and 29 CFR §553.230(c), the FLSA overtime threshold is 114 hours. Consequently, during each work period firefighters are normally scheduled to work six FLSA overtime hours.

Section 21.02(a) of the CBA provides in part that:

To compensate for those hours actually worked in excess of one hundred and fourteen (114) hours during each fifteen (15) day cycle, employees working their schedule of five (5) shift days per cycle shall receive one (1) twenty-four (24) hour ("Kelly") day off duty during each period of 90 days. (For purposes of this provision, hours actually worked shall include scheduled vacation days utilized by employees in addition to days actually worked.) Such compensatory day off shall be scheduled off duty by the employees by agreement with the Fire Chief.

You state that the "Kelly Day" referred to in this section is a scheduled 24-hour shift off duty without pay. An employee opting for overtime compensation in accordance with this provision would receive one 24-hour shift off duty (in our experience, a "Kelly Day" is intended to be a day off with pay) as the only compensation for having worked 30 FLSA overtime hours (six overtime hours in five consecutive 15 day work periods). The "Kelly Day" compensation provided by in this section (whether or not it is with pay) does not satisfy, per se, the overtime compensation requirements of the FLSA.

For each work period an employee would be entitled to six hours of FLSA overtime compensation in cash (based upon the employee's "regular rate" of pay), or nine hours of compensatory time off, pursuant to §7(o), for use at some future date. While it is permissible to count scheduled vacation time in determining whether the FLSA overtime threshold has been reached (or exceeded), only hours worked need be counted under the FLSA. Consequently, employees paid pursuant to this CBA provision may not be employed in violation of the FLSA overtime requirements in work periods in which they have used sufficient vacation time so that they have not actually worked in excess of the 114-hour threshold.

We note that, in lieu of the above provision, employees may opt to receive overtime compensation (section 21.03) in accordance with the provisions of §7(o) of the FLSA. Nevertheless we suggest that the provisions of section 21.02(a) discussed above be modified or deleted. See Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) in which the Supreme Court held that a union may not negotiate a provision that waives employees' statutory rights under the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator