



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

September 23, 1988

Honorable Chad Williams  
Baylor County Attorney  
Baylor County Courthouse  
Seymour, Texas 76380

LO-88-109

Dear Mr. Williams:

You ask whether the commissioners court of Baylor County may give compensatory time to employees of the Sheriff's Department rather than paying them for overtime hours worked. We note at the outset that Baylor County is a small county (1985 population 4,900) and that many provisions of state law applicable to Sheriff's Department personnel in larger counties do not apply to Baylor County. See, e.g., Local Gov't Code §§ 152.071, 157.021-.023.

Section 152.011 of the Local Government Code provides that the commissioners court shall set the compensation of county and precinct employees who are paid wholly from county funds. Provision of compensatory time to county employees is clearly a type of compensation which the commissioners court is authorized to set under section 152.011.

However, since the holding in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), it is also clear that public entities such as counties are subject to the provisions of the federal Fair Labor Standards Act (hereafter the FLSA) in their arrangements for the compensation of their employees. See, e.g., Attorney General Opinions JM-733 (1987); JM-475 (1986).

The principal provisions of the Fair Labor Standards Act pertinent to your question appear at 29 U.S.C. § 207, subsection (o):

Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and the employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employees' employment, or

(B) the final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection--

(A) the term 'overtime compensation' means the compensation required by subsection (a), and

(B) the terms 'compensatory time' and 'compensatory time off' mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate. (Emphasis added.)

Subsection (o)(1) refers to the "overtime compensation required by this section" for which compensatory time may be substituted. Subsection (a)(1) of section 207 provides with regard to such overtime compensation:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, 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 at which he is employed.

Thus, subsection (a) generally requires payment of overtime compensation for hours worked in excess of forty hours in a workweek, but subsection (o) provides that employees may in lieu of overtime pay receive compensatory time at a rate of not less than one and a half hours for each hour for which overtime compensation would be required by subsection (a).

As we noted in Attorney General Opinion JM-733 (1987), the requirement of overtime compensation or compensatory

time in lieu thereof only applies where more than forty hours are actually worked in a workweek. Where an employee is, for example, paid for a holiday or sick day on which he does not actually work, those hours do not count toward the forty hour FLSA threshold.

Also, subsection (k) of section 207 makes special provision for employees engaged in fire protection or law enforcement activities, as follows:

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 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,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Clearly, in enacting the above provisions, Congress recognized that the work schedules of law enforcement employees, such as the Sheriff's Department employees about whom you inquire, often do not conform to the standard forty hour week. Accordingly, the FLSA overtime/compensatory time

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requirements apply to such employees only where their aggregate hours worked over the longer periods specified in subsection (k) exceed the limits specified in that subsection. (See also subsection (p) of section 207, which makes special provisions for certain law enforcement personnel.)

We would also direct your attention to the provisions of subsection (o)(2), which require that a compensatory time arrangement must have been agreed to (e.g., set out in the county personnel policy, which constitutes part of the employee's employment contract) by the employer and employee before the work for which compensatory time is to be given is performed, and to the provisions of subsection (o)(3), which set limits on the amount of compensatory time which may be accrued.

Finally, we note that various exceptions set out in the FLSA to the requirements of section 207 may be relevant to particular individuals employed in the Sheriff's Department. Section 213(a)(1) exempts persons "employed in a bona fide executive, administrative, or professional capacity" from the requirements of section 207. Section 213 (b)(20) exempts public employees engaged in law enforcement activities if the employer "employs during the workweek less than five employees" in such activities. Section 203, subsection (e), provides that an individual is not an "employee" under the FLSA, and is thus not subject to its overtime pay/compensatory time provisions, if he is not subject to civil service provisions and either holds public elective office, is selected or appointed by the officeholder as a personal staff member or to serve at a policy making level, or is an immediate adviser to the officeholder with respect to the constitutional or legal powers of his office.

Very truly yours,



William Walker  
Assistant Attorney General  
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