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FOURTH CIRCUIT INVALIDATES 7(K) PLANS FOR EMTS BUT UPHOLDS FLUCTUATING WORKWEEK

■ Stephen Allred

The Fourth Circuit Court of Appeals recently handed down two decisions dealing with the status of emergency medical technicians (EMTs) under the Fair Labor Standards Act (FLSA), and in each case the news was not good for counties. In both cases, the counties relied on Section 7(k) of the FLSA in scheduling their EMTs, and in both cases the schedules were held to violate the Act. The Fourth Circuit also rendered a decision upholding the applicability of the fluctuating workweek to EMTs, however, and may have provided an alternative means for North Carolina counties to comply with the FLSA without incurring significant additional costs.

The (7k) Decisions

Section 7(k) provides a partial exemption for public agencies employing persons "engaged in fire protection or law enforcement activities," by increasing the number of hours such employees must work above the regular 40-hour workweek before they are entitled to overtime compensation. Section 7(k) provides that a public employer need not compensate firefighters at the overtime rate until they have worked an aggregate of 212 hours for a period of 28 consecutive days (53 hours per week), or compensate law enforcement employees at the overtime rate until they have worked a total of 171 hours for a period of 28 consecutive days (43 hours per week). 29 C.F.R. § 553.230.

The Secretary of Labor has promulgated a regulation that permits employers to treat "ambulance and rescue service employees . . . as employees engaged in fire protection or law enforcement activities" for purposes of § 7(k) if their services are "substantially related to firefighting or law enforcement activities." 29 C.F.R. § 553.215(a) (1997). The Act, however, does not mention EMTs.

The first case, West v. Anne Arundel County,[1] invalidated the use of the 7(k) exemption as applied to EMTs on a 212 hour work schedule. The court held that because the EMTs were not performing work relating to firefighting, the Maryland county employer could not use the 212 hour standard under the FLSA to calculate overtime entitlement. The second case, Roy v. County of Lexington,[2] held that a South Carolina county could not classify its EMTs as

1. F.3d ___, 1998 WL 64079 (4th Cir. Feb. 18, 1998).

2. F.3d ___, No. 97-1731 (April 14, 1998).

firefighters or law enforcement officers for purposes of calculating their overtime pay. As in West, the court held that the employees did not perform work related to firefighting; but the court went one step further and held that the EMTs also did not perform work related to law enforcement and so were ineligible for participating in the lower 171-hour standard under the FLSA.

The court held the EMTs were employed neither "in fire protection activities" nor "in law enforcement activities;" rather, they were employed in emergency medical service activities. The court noted that sometimes employees of independent emergency service agencies assist public employees who do engage in fire and law enforcement activities. However, the court added, firefighters and police officers are assisted by a myriad of other public employees, including central communication workers, animal control and public health officers, and hospital and correctional employees. If Congress had intended to extend the scope of the 7(k) exemption to include employees of independent emergency service agencies, the court concluded, it certainly could have done so.

Although the court did not rule out the possibility that an EMT operation might be structured in a manner that would meet the 7(k) requirements, in that a county could demonstrate that EMTs were "regularly dispatched" to fires, crime scenes, riots, natural disasters and accidents, as provided in 29 C.F.R. 553.215, the court implied that this burden would be difficult to meet. The court held that the term "regularly dispatched" must be determined on a case by case basis, but required a showing that EMTs are dispatched with some frequency to the situations listed above.

It is unlikely that a county may successfully defend its use of the 7(k) exemption as applied to EMTs. A better alternative may be to place these employees under a fluctuating workweek using a 40 hour standard, as discussed in the next section of this bulletin.

The Fluctuating Workweek Decision

In Griffin v. Wake County[3] the Fourth Circuit Court of Appeals upheld the fluctuating workweek as applied to EMTs.

The fluctuating workweek is a compensation formula found in the Department of Labor's FLSA regulations at 29 C.F.R. 778.114. The plan allows employers to pay nonexempt employees a fixed salary for a fluctuating workweek and to compensate them for overtime on a half-time basis. An employer may use the half-time method of calculating overtime compensation only if three conditions are met: (1) the employee understands that his or her salary is meant to cover all hours worked; (2) the parties have a clear understanding that the salary (apart from half-time payments) will not fluctuate even though the job demands that the employee work more or less than 40 hours in a given week; and (3) the salary is large enough to assure that the average hourly wage never falls below the FLSA minimum wage.

Wake County implemented a fluctuating workweek for its EMTs in 1990. The employees were scheduled to work 24 hours on, 24 hours off, twenty four hours on, 24 hours off, 24 hours on, and then 96 hours (four days) off. Thus, EMTs worked either 48 or 72 hours in any given week throughout the year.

In 1996, a number of EMTs filed suit claiming that because they worked a set, alternating work schedule rather than irregular hours each week, and that the plan had been "unilaterally imposed," the plan was not in compliance with the FLSA. The county argued that the fluctuating workweek plan did not require an unpredictable schedule, merely one that varied. Further, the county argued, the FLSA only requires that employees understand the plan, not that they agree with it.

The court agreed with the county and dismissed the employees' claim, finding that the schedule, although predictable, was nonetheless fluctuating. The court also agreed with the county's assertion that mere employee understanding, not agreement, was all that was required to implement a fluctuating workweek plan. The court noted particularly that the county had mandatory meetings with all EMTs at which the plan was explained to them, and at which they signed statements indicating that they understood the plan.

Conclusion

In light of these three recent Fourth Circuit rulings, North Carolina counties may want to reassess their compensation plans for emergency medical personnel. Clearly, the continued utility of the 7(k) plan is doubtful. The fluctuating workweek plan, however, may be an appropriate alternative.

3. F.3d __, No. CA-96-281-5-BO (April 27, 1998).

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