

## **The FLSA and Reserve Peace Officers**

By: James M. Kinsey

The **F**air **L**abor and **S**tandards **A**ct has been a difficult, complicated and troublesome issue for law enforcement since *Garcia v. San Antonio Metropolitan Transit Authority* in 1985. For more than 20 years law enforcement administrators and managers have tried to understand The Garcia Act and other provisions of the FLSA and apply them. This lack of understanding has resulted in many large judgements against law enforcement agencies.

Some of the most significant areas in which Garcia has impacted law enforcement are training, K-9s and Reserve Peace Officers. Trainees can no longer work long hours without compensation, K-9 officers must be compensated for off duty time spent caring for and training their dogs and reserve officers must be compensated for all time worked if an employee relationship has been established.

This article provides the basic framework, specifically with regard to Reserve Peace Officers, for law enforcement administrators, managers, supervisors and reserve coordinators to differentiate between an employee who is subject to compensation under the FLSA and a “bonafide volunteer” who is not. Reserve Peace Officers generally may not be both an employee and a volunteer for the same public agency.

### **History of the FLSA**

The Fair Labor and Standards Act was passed by congress in 1938 at the end of the Great Depression as a means of economic recovery. It proclaimed Congress’ intent to ensure the maintenance of a minimum standard of living necessary for health efficiency and the general well being of workers. The FLSA was intended to provide protection to workers from employers requiring them to work long hours and set a minimum “livable” wage, 25 cents per hour at the time. It was also intended that by requiring overtime pay, employers would hire more workers as opposed to existing employees working long hours.

In 1947, Congress enacted the Portal to Portal act. The Portal to Portal Act clarified that travel time to and from work, along with other general preliminary activities performed before work (dressing in uniform), are not compensable under the FLSA. It also established a two year statute of limitations for back pay recovery which increases to three years for willful violations. It required employees to file a complaint or their written consent in order to recover in FLSA lawsuits. It established a good-faith defense for employers. It conferred discretion on the courts to limit damages if the employer acted in good faith.

In 1963, Congress passed the Equal Pay Act as an amendment to the FLSA, requiring equal pay for equal work for both sexes.

FLSA defines employee as "any individual employed by an employer" and employ is defined as including "to suffer or permit to work." The FLSA expressly excludes volunteers from the definition of employees covered by the act. The FLSA prohibits employees from volunteering time to the employer. It is vital for the law enforcement officials to understand that the provisions of the FLSA cannot be waived by an agreement with an employee. Department of labor interpretative bulletins provide: *"Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial."*

A volunteer is defined by the U.S. Department of Labor, Code of Federal Regulations (CFR) title 29 CFR 553.101 as:

(a) An individual who performs hours of service for a public agency, for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation of services rendered is considered to be a volunteer during such hours.

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, directly or implied from an employer.

(d) An individual shall not be considered a volunteer if the employee is otherwise employed by the same public agency to perform the same type of services for those for which the individual proposes to volunteer.

A Reserve Officer is an employee if he is compensated by the public entity or agency for any of his/her work period and the compensation is based on time/hours. He is then therefore considered by the Department of Labor as subject to the requirements of the FLSA for any and all hours worked.

Unfortunately, in the case of Reserve Peace Officers, Department of Labor Opinion Letters do not resolve all of the issues or concerns. Often, agencies try to walk the fence between what is permitted and what is not in order to provide some compensation to reserves even though with the best of intentions. Whenever the reserve is paid for one assignment and volunteers for another, potentially there are some risks. The danger in this is that you may establish an expectation of receipt of compensation of services rendered making them an employee and creating liability. The following will attempt to provide some guidance on providing compensation.

### **Permissible Compensation**

While the FLSA precludes any compensation for services performed as a volunteer based on time, the act does allow agencies to compensate volunteers with their expenses, reasonable benefits, and a nominal fee as described in 29 CFR 553.106. Be cautious of awarding sums based on whether the volunteer is in "good standing" as that term is frequently based on participation (hours worked) and/or productivity.

A stipend is defined as: a fixed sum of money paid periodically for services or to defray

553.103(a). A Department of Labor, Administrative Letter Ruling, dated September 2<sup>nd</sup> 1994 specifically defines cadets and custodial aids as the same type of services but other civilian employees such as dispatchers, clerks, secretaries and mechanics are not and may volunteer. However, there are some circumstances where civilian any law enforcement employee may not be able to volunteer. Code Enforcement Officers also my not volunteer based on opinion letter FLSA2006-2 as they were classified as a “same type of service”. This is a risk management issue and consideration of allowing any non-sworn employee to volunteer as a Reserve Officer should be on a case by case basis. A call to the department of labor for an opinion may be in order in any circumstance in which an employee is also volunteering as a Reserve.

### **Penalties**

The Secretary of labor is empowered to initiate litigation against any employer in order to achieve compliance with FLSA, however, most commonly investigations are result of litigation initiated by an employee.

The statute of limitations is prescribed in the Portal to Portal act limits recovery to two years but may extend to three years if the violation is determined to be “willful”. A willful violation is when an employer showed reckless disregard as to whether the conduct was prohibited by the act.

Remedies for violations provided by the FLSA include back pay, penalties, damages, attorney’s fees and or criminal prosecution. This applies not only to the employee/volunteer who complained but to all employees/volunteers subject to the same conditions, whether they complain or not.

### **Conclusion:**

The FLSA can be a complex statutory puzzle with many traps for the unwary and with a potential of huge damage awards for those who fall into the trap. Many situations fall into a gray area and are subject to interpretations in a case by case basis. Agencies should consider that if they are trying to work around FLSA regulations, the Department of Labor will probably interpret that that was your intent and will probably rule against you should a claim be filed, no matter how noble your cause is. Clarification can be obtained in the form of an “Administrative Letter Ruling” by contacting the Department of Labor, or by consulting the agency’s personnel attorney. Lastly, remember an employee who volunteers today, may become disgruntled tomorrow. It only takes one.