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ATTORNEY GENERAL OPINION NO. 86-85

Larry E. Wolgast, Ed.D.
Secretary of Human Resources
401 S.W. Topeka Avenue
Topeka, Kansas 66603

Re: Labor and Industries--Minimum Wage and Maximum Hours--Overtime and Compensation; Exceptions

Synopsis: The Kansas minimum wage and maximum hours law (MWMHL) supplements the Fair Labor Standards Act (FLSA), covering those occupations the FLSA does not reach and those which the FLSA excludes from coverage. It is therefore our opinion that the provisions of the MWMHL apply to law enforcement agencies with less than five employees as these occupations have been exempted from coverage under the FLSA. Cited herein: K.S.A. 44-1201 et seq.; 29 U.S.C. §§207, 213; 29 C.F.R. §553.4.

* * *

Dear Secretary Wolgast:

As the Secretary of the Department of Human Resources, you have requested our opinion as to the applicability of the Fair Labor Standards Act (FLSA) to law enforcement agencies. Specifically, you inquire whether deputy sheriffs, who are employed by a county covered by the FLSA, but who are exempted because the sheriff's department employs five or fewer deputies, are then subject to the provisions of K.S.A.

44-1201 et seq., the Kansas minimum wage and maximum hours law (MWMHL).

Under the FLSA, minimum wage and maximum hours are prescribed. 29 U.S.C. 201 et seq. The Act applies to all employers and employees engaged in commerce or the production of goods for commerce, and if applicable, supersedes any state law in the area. The basic hours rule is that no employer shall require employees to work for more than 40 hours a week unless compensation equal to 1 1/2 times the normal rate is paid for those extra hours. 29 U.S.C. §207(a).

Recognizing that certain occupations were not amenable to a standard maximum hours law, Congress adopted alternative rules to cover those areas. For our purposes, Congress provided that:

> "No public agency shall be deemed to have violated subsection (a) with respect to the employment of . . . 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) [29 USCS §213 note] 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 which he is employed." 29 U.S. §207(k).

This provision allows law enforcement officers to work longer hours before requiring public agencies to pay overtime rates.

In 1974, Congress altered the effect of the above section with 29 U.S.C. §213. This relevant section reads as follows:

> "The provisions of section 7 [29 USCS §207] shall not apply with respect to --
>
> "20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be;"

"Any employee in law enforcement activities" refers to any employee:

> "(1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power of arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement technique, community relations, medical aid and ethics." 29 CFR §553.4.

Before 1985, the applicability of these statutes to local law enforcement agencies was in doubt. In National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (U.S.D.C. 1976) a sharply divided Supreme Court ruled that the overtime provisions of the FLSA are not enforceable against the states "in areas of traditional governmental functions." 426 U.S. at 852. However, the Court did not provide guidelines as to how traditional functions were to be distinguished from nontraditional ones. Presumedly, police protection would be considered a traditional governmental function exempted from FLSA coverage under the Usery rule.

After the lower federal courts struggled to apply the principles of Usery, the Supreme Court reversed itself in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. _____, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (U.S. Tex. 1985). The majority held the traditional functions test was unworkable in practice and unsound in principle and led to inconsistent results. The court rejected the traditional/nontraditional test and opened the doors to federal regulation of local government employees. Consequently, the overtime and wage provisions of the FLSA could be applied to mass transit authorities since they were not destructive of state sovereignty or violative of the Constitution.

This landmark decision has left state and local governments scrambling to bring their employment policies within the guidelines of the FLSA. In Kansas, Garcia has resulted in state and local governments being elevated from the Kansas minimum wage and maximum hours law (MWMHL) K.S.A. 44-1201 et seq., to the FLSA.

Once a county is subjected to the FLSA, can a FLSA exemption remove the county's law enforcement agency into the provisions of the previously applied state labor act? The answer is yes and can be supported on two grounds.

First, the MWMHL applies to employers and employees as defined by Kansas statute.

> "(d) 'Employer' means any individual, partnership, association, corporation, business trust or any person or group of persons acting directly or indirectly in the interest of an employer in relation to

> an employee, but shall not include any employer who is subject to the provisions of the fair labor standards act of 1938 (29 U.S.C.A. §201 et seq.) and any other acts amendatory thereof or supplemental thereto.
>
> "(e) 'Employee' means any individual employed by an employer, but shall not include: (1) Any individual employed in agriculture; (2) any individual employed in domestic service in or about a private home; (3) any individual employed in a bona fide executive, administrative or professional capacity or in the capacity of an outside commission paid salesman, as such terms are defined and delimited by regulations of the secretary; (4) any individual employed by the United States; (5) any individual who renders service gratuitously for a nonprofit organization as such terms are defined by regulations of the secretary; (6) persons eighteen years of age or less or sixty years of age or older employed for any purpose on an occasional or part-time basis; or (7) any individual employed by a unified school district in an executive, administrative or professional capacity, if the individual is engaged in such capacity fifty percent (50%) or more of the hours during which the individual is so employed." K.S.A. 44-1201(d) & (e). (Emphasis added.)

The MWMHL was passed in 1977 to supplement those gaps in coverage of the FLSA after the Supreme Court's decision in Usery. Kansas intended to put its employees on par with those covered by the FLSA. Thus, when Garcia elevated some state and local employees to FLSA protection, it removed them from MWMHL coverage. However, not all state employees were removed, and some were removed and then subsequently exempted. It seems likely that the original intent of the MWMHL would apply today to place those not subjected to the FLSA's provisions under the supplementary Kansas act. Thus, law enforcement employees in departments with less than five employees should be covered by the MWMHL. We believe, in this case, that the FLSA "exempt"

law enforcement officers are not subject to the FLSA but are covered by the Kansas act.

A second rationale for this interpretation is that the FLSA would otherwise set up a dilemma as now stated. It includes a county under its definition of "employer" but would exempt the same county's law enforcement officers from being covered by the FLSA's definition of "employee." 29 U.S.C. §207 and 29 U.S.C. §213(20) must be read in pari materia to afford a proper interpretation of the FLSA. In general, §213 must be read as removing §207 coverage from the stated occupations. More clearly, the occupations exempted under §213(b) are "not covered" by the FLSA.

It is clear under certain circumstances the state may enact supplements to federal legislation since only an actual conflict of legislation will operate to suspend inconsistent state laws.

> "Unless Congress has clearly manifested otherwise or a clear repugnance exists between federal and state legislation, a state will not be barred, as a consequence of federal legislation, from legislating within a particular area.
>
> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." 16 Am.Jur.2d Constitutional Law §292 (1985).

The MWMHL is not inconsistent with federal regulations. It was enacted to supplement existing federal law and involves no actual conflict with the FLSA. As support for this argument, Kansas recognized federal preeminence in the field by specifically excluding MWMHL application from areas covered by the FLSA. As a corollary, an occupation not covered by the FLSA is implicitly covered by the MWMHL. Thus, the law enforcement agencies with less than 5 officers exempted by 29 U.S.C. §213(b)(20) are covered by the supplementary Kansas MWMHL.

In conclusion, the Kansas minimum wage and maximum hours law supplements the Fair Labor Standards Act, covering those occupations the FLSA does not reach and those which the FLSA excludes from coverage. It is therefore our opinion that the provisions of the MWMHL apply to law enforcement agencies with less than five employees as these occupations have been exempted from coverage under the FLSA.

Very truly yours,

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