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June 18, 2026

*VIA ELECTRONIC MAIL [to: hollye@crossplainsems.com]*

Holly Ellickson, Chief of EMS
Cross Plains Emergency Medical Services Corp.
d/b/a Cross Plains Area EMS
2027 Park Street
Cross Plains, WI 53528

**Re: Overtime Question and Using Weighted Average to Calculate Overtime for an Employee with Two Different Positions**

Dear Ms. Ellickson:

You requested a letter explaining how Cross Plains Area EMS should be paying overtime under federal law and whether there are any options for Cross Plains Area EMS to pay overtime other than the standard method. You also requested that we address how to calculate overtime for the same person perform different jobs at different rates of pay.

We are not licensed to practice law in Wisconsin and we do not address any Wisconsin state issues in this letter. This letter is based only on federal law. You should consult with an attorney licensed to practice law in Wisconsin for any Wisconsin state laws that may apply.

## Background on Cross Plains Area EMS

In searching the Wisconsin Department of Financial Institutions corporate records, we found "Cross Plains Emergency Medical Service Corp.," which is incorporated in Wisconsin as a non-stock corporation. However, in looking at what appears to be the organization's website, we also saw that there is a Cross Plains Area EMS District that was apparently created by the Village of Cross Plains, and the Towns of Berry, Cross Plains, and Springfield (according to an "Amended and Restated Agreement for Emergency Medical Services with Cross Plains Area Emergency Medical Services District" posted online). Therefore, it is also possible that Cross Plains Area EMS is a type of public agency.

## Overtime Analysis

The overtime rule for most employers subject to the federal Fair Labor Standards Act (FLSA) is that the employer may not have an employee work more than 40 hours in a workweek (a seven-day period) without compensating the employee for each hour worked over 40 hours, at least one and one-half times the employee's regular rate of pay. 29 U.S.C. § 207(a)(2)(C). *See also* U.S. Dept. of Labor, Wage and Hour Division Fact Sheets #22 and 23 (attached).

[illegible]
5010 E. Trevino Road, Suite 202 • Mercadosburg, MA 17030
(877) 790-2477 • Fax (717) 691-1220 • [illegible]

June 18, 2018

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## Overtime Analysis

The overtime rule for most employees subject to the Federal Fair Labor Standards Act (FLSA) is that the employer may not have an employee work more than 40 hours in a work week (a seven-day period) without compensating the employee for such hour worked over 40 hours at a rate one and a-half times the employee's regular rate of pay. 29 U.S.C. § 207(a)(1). See also U.S. Dep't of Labor, Wage and Hour Division Fact Sheets #22 and 23 (attached).

The Section 7(k) Partial Exemption from Overtime and Why It Does Not Apply to Cross Plains Area EMS

However, there is an optional partial exemption from overtime option for employees of "public agencies" engaged in "fire protection activities" or "law enforcement activities." 29 U.S.C. § 207(k). The gist of this optional partial exemption is that "public agencies" may pay their employees engaged in fire protection activities or law enforcement activities their regular rate of pay for a work period between 7 and 28 consecutive days in which the aggregate hours worked do not exceed 53 hours per 7-day workweek or 212 hours over a work period of 28 days or less. 29 U.S.C. § 207(k). For an employee engaged in "fire protection activities" whose work hours exceed these hours during such work period, the "public agency" must pay the employee at least one and one-half times the employee's regular rate of pay. *Id.* This exemption is commonly known as "the 7(k) exemption," and this is how I will refer to it throughout this letter.

The FLSA defines "public agency" to mean:

> [T]the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission [Postal Regulatory Commission]), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x).

The FLSA defines "employee in fire protection activities" to mean:

> [A]n employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who –
>
> N (1) **is trained in fire suppression**, has the legal authority and responsibility to engage in fire suppression, **and is employed by a fire department of a municipality, county, fire district, or State; and**
>
> Y (2) **is engaged in the prevention, control, and extinguishment of fires** or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y) (emphasis added).

Wisconsin is located within the Seventh Circuit. In 1994, the United States Court of Appeals for the Seventh Circuit had the occasion to consider whether paramedic employees of the fire department of the City of Chicago are covered under the 7(k) exemption in *Alex v. City of Chicago,* 29 F.3d 1235 (7th Cir. 1994). In this case, the paramedic employees for the City of Chicago claimed that the City of Chicago was not paying them correctly because the City of Chicago was paying them pursuant to the provisions of the 7(k) exemption. The paramedics did not engage in any fire protection, fire suppression or rescue services and were not trained in fire suppression. As a result, the court held that the paramedics did not qualify for the 7(k) exemption and the City of Chicago owed the paramedics overtime. While this case is in

## The Section 7(k) Partial Exemption from Overtime and Why It Does Not Apply to Cross-Plains Area EMS

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With basis in Congress's intent in the Second Circuit, in 1999, the United States Court of Appeals for the Seventh Circuit had the occasion to consider whether paramedics employees of the department of the City of Chicago were covered under the 7(k) exemption in Mitchell v. City of Chicago, 207 F.3d 1329, 7th Cir. (1999). In this case, the paramedics complained that they were Chicago's contend that the City of Chicago was not paying them correctly because the City of Chicago was paying them pursuant to the provisions of the Fair Compensation Act. Paramedics did not engage in any fire protection, fire suppression or rescue services and were not trained in fire suppression. As a result, the court held that the paramedics did not qualify for the 7(k) exemption and thus the City of Chicago owed the paramedics overtime. While this case is a

Wisconsin's circuit but not its state, all of the courts we are aware of around the nation that have considered this issue have all held that the section 7(k) exemption does not apply to employees not engaged in fire protection or law enforcement activities.

While it is possible that Cross Plains Area EMS might be a public agency. Whether it is or is not is not that important, as we do not believe that Cross Plains Area EMS has employees who are engaged in fire protection or law enforcement activities. Consequently, we do not believe that Cross Plains Area EMS would be lawfully able use the 29 U.S.C. § 207(k) partial overtime exemption for its employees who perform emergency medical services.

Recommendations for Cross Plains Area EMS for Paying Overtime

As we indicated above, Cross Plains Area EMS must use the standard method of paying overtime. The standard method of paying overtime is that whenever an employee works more than 40 hours in the employer's designated workweek, the employee must be compensated for those hours over 40 at one and one-half times the employee's regular rate of pay. 29 U.S.C. § 207(a)(2)(C).

This means that when an employee works 48 hours in the employer's designated workweek, the employee is entitled to 8 hours of overtime for that workweek. It does not matter that the employee only works 24 hours during the next workweek. The employee is still entitled to 8 hours of overtime during the workweek in which he or she worked 48 hours.

The only way around this is to tinker with the start and end of the workweek. The employer is in charge of designating the workweek and publishing this on its bulletin board and in its policies. While the typical workweek begins at 12:00 on Sunday and ends at 11:59 the following Saturday, this is not required to be the employer's designated workweek. For example, the workweek can begin at 3:00 p.m. on Wednesday and end at 2:59 p.m. the following Wednesday. If you can figure out a way to reduce overtime by changing the workweek, then this would be Cross Plains Area EMS's only real option to reduce overtime. Remember, if Cross Plains Area EMS does change the workweek, it must first revise and publicize its policy on this, as well as post it with the other employment posters.

We would also like to point out that EMS crew positions cannot be salaried positions (i.e., positions that would be exempt from overtime). This, too, would violate the Fair Labor Standard Act. Section 13(a)(1) of the FLSA provides an exemption from overtime for employees who are employed as bona fide executive, administrative, professional and outside sales employees, and Section 13(a)(7) of the FLSA also exempts certain computer employees from overtime. 29 U.S.C. §§ 213(a)(1) and (7).

In fact, 29 C.F.R. § 541.3 specifically provides that firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, and all other types of first responders cannot be considered exempt from overtime under Section 13(a)(1) of the FLSA. I have attached a Fact Sheet from the Department of Labor (Fact Sheet #17J) about that topic.

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**Using Weighted Average to Calculate Overtime for an Employee with Two Different Positions**

You also asked us to explain how to calculate overtime for an employee that works two different non-exempt positions for your agency. This can occur, for example, if you have a person who works for your organization both as an EMT and a mechanic.

The Department of Labor does permit employees who are working at different jobs to be paid at different rates. The Regulations discussing this are found at 29 C.F.R. § 778.115. This Regulation states:

> Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternate methods of computing overtime pay in such cases are discussed in §§ 778.400 and 778.415 through 778.421.

A copy of this Regulation is attached.

The permissibility of this does depend on what the two positions would be. But, generally speaking, the Department of Labor does permit an employment who works at two separate and distinct jobs for the same employer (such as a mechanic and an EMT) to be paid at two different rates for each position.

The most important thing for Cross Plains Area EMS to do is to ensure that it is correctly paying overtime to the employee who is working at two different jobs with two different rates for Cross Plains Area EMS. According to 29 C.F.R. § 778.115, the preferred method for calculating overtime utilizes a weighted average. This is the same method that the Department of Labor's Field Operations Handbook, Chapter 32, Section 32b05, utilizes. The Department of Labor's Field Operations Handbook is the handbook that the Department of Labor's Wage and Hour Division inspectors utilize in determining if there is a problem during with compliance with the Wage and Hours laws. I have attached a copy of the relevant page from this handbook.

Here are three examples of the weighted average method of calculating overtime for an employee who works at two different positions at the same job: one which pays $7.25/hour and one which pays $18.00 per hour:

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Here are three examples of the weighted average method of calculating overtime for an employee who works at two different positions at the same job: one which pays $12.00/hour and one which pays $18.00 per hour:

1. During the first workweek, the employee works 12 hours at $7.25 per hour and 25 hours at $18.00 per hour.

   12 hrs @ $7.25/hr = $87
   25 hrs @ $18/hr = $450
   $87 + $450 = $537 straight time pay
   12 hrs + 25 hrs = 37 total hours for workweek

   $\frac{537}{37} = \frac{\$14.51}{2} = \$7.26$ overtime premium

   But, there were no overtime hours worked by the employee for this workweek. So, the total due to the employee for this first workweek would be $537.

2. During the second workweek, the employee works 12 hours at $7.25/hour and 35 hours at $18.00 per hour.

   12 hrs @ $7.25/hr = $87
   35 hrs @ $18.00/hr = $630
   $87 + $630 = $717
   12 hrs + 35 hours = 47 total hours for workweek

   $\frac{717}{47} = \frac{\$15.26}{2} = \$7.63$ overtime premium

   $7.63 x 7 hrs overtime = $53.39 overtime payment

   $717 + $53.39 = $770.39.

   So, the total amount the employee should be paid for the second workweek is $770.39.

3. During the third workweek, the employee works 12 hours at $7.25/hour and 45 hours at $18.00 per hour.

   12 hrs @ $7.25/hr = $87
   45 hrs @ $18.00/hr = $810
   $87 + $810 = $897
   12 hrs + 45 hours = 57 total hours for workweek

   $\frac{897}{57} = \frac{\$15.74}{2} = \$7.87$ overtime premium

   $7.87 x 17 hrs overtime = $133.76 overtime payment

   $897 + $133.76 = $1030.76.

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2

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2

$7.87 x 17 hrs overtime = $133.79 overtime payment

$897 + $133.79 = $1030.79

So, the total amount the employee should be paid for the third workweek is $1,030.76.

Cross Plains Area EMS should work with its payroll company for this. Payroll companies can help their clients calculate this stuff are usually very knowledge on the rules of properly calculating the pay that an employee is owed. Assuming that Cross Plains Area EMS utilizes a payroll company that is knowledgeable on calculating weighted average overtime for this employee, then all Cross Plains Area EMS would have to do is double-check the payroll company's figures.

Conclusion

We hope that this analysis helps with explaining why Cross Plains Area EMS must pay all of its EMS crew employees for overtime for all hours worked over 40 in a workweek as well as how to calculate overtime when an employee works two different non-exempt jobs at two different rates of pay. If you have any other questions, please do not hesitate to ask.

Sincerely,

Christina M. Mellott, Esq.
for PWW ADVISORY GROUP

CMM:ms
Enclosures