

### § 553.31

met. For example, a school secretary could substitute as a coach for a basketball team or a maintenance engineer could provide instruction on auto repair on an occasional or sporadic basis.

#### § 553.31 Substitution—section 7(p)(3).

(a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

(b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.

(c) A public agency which employs individuals who substitute or "trade time" under this subsection is not required to keep a record of the hours of the substitute work.

(d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by

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whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

#### § 553.32 Other FLSA exemptions.

(a) There are other exemptions from the minimum wage and/or overtime requirements of the FLSA which may apply to certain employees of public agencies. The following sections provide a discussion of some of the major exemptions which may be applicable. This list is not comprehensive.

(b) Section 7(k) of the Act provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). In addition, section 13(b)(20) provides a complete overtime pay exemption for any employee of a public agency engaged in fire protection or law enforcement activities, if the public agency employs less than five employees in such activities. (See subpart C of this part.)

(c) Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as these terms are defined and delimited in part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary.

(d) Section 7(j) of the Act provides that a hospital or residential care establishment may, pursuant to a prior agreement or understanding with an employee or employees, adopt a fixed work period of 14 consecutive days for the purpose of computing overtime pay in lieu of the regular 7-day workweek. Workers employed under section 7(j) must receive not less than one and one-half times their regular rates of pay for all hours worked over 8 in any workday, and over 80 in the 14-day work period. (See § 778.601 of this title.)

(e) Section 13(a)(3) of the Act provides a minimum wage and overtime