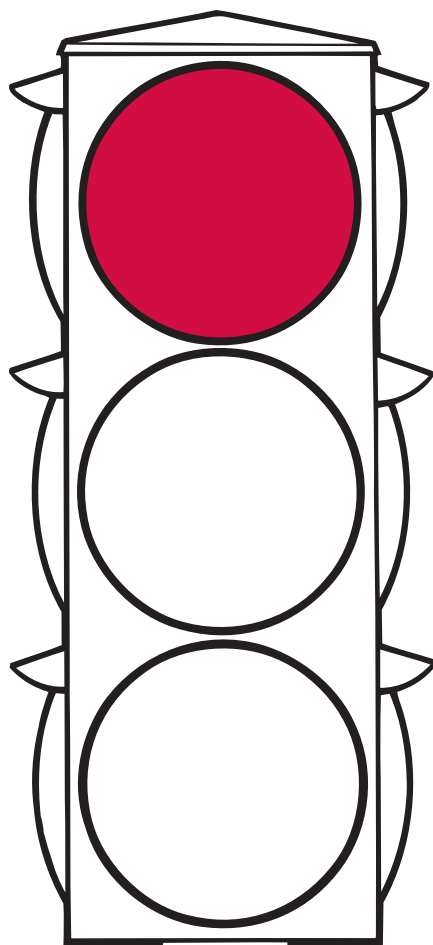


THE ALABAMA MUNICIPAL **JOURNAL**

March 2005

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Alabama 5th in Nation for Fatalities Caused by Running Red Lights

see story page 5

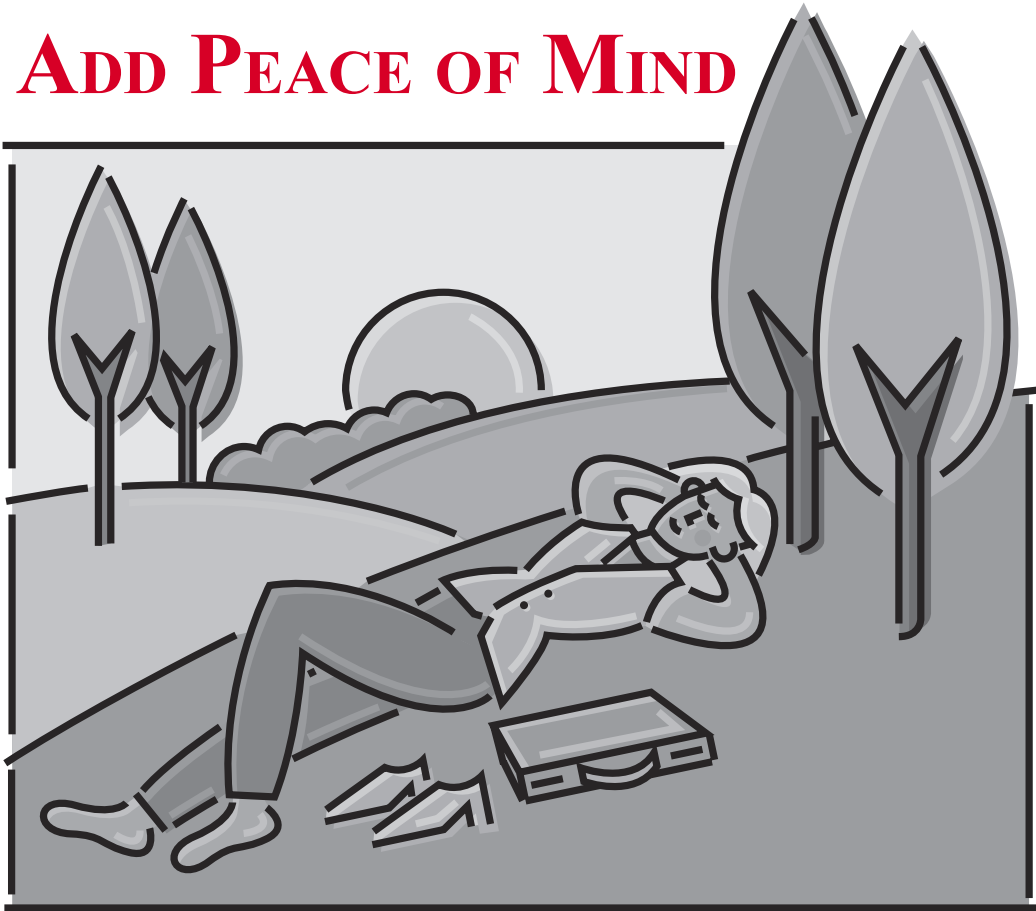
Inside:

- **FY 2006 Federal Budget Proposal**
- **Environmental Protection Agency Budget**
- **The Fair Labor Standards Act:
A Brief Overview**

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Municipal Clerks Receive Certification

The International Institute of Municipal Clerks (IIMC) announced certifications for the second half of 2004. Receiving the prestigious designation of Certified Municipal Clerk, CMC are:

- Steve Hicks, City Clerk/Treasurer, Enterprise
- Barbara Jones, Town Clerk, Trinity
- Barbara Waldon, City Clerk/Treasurer, Boaz

Upon receiving the designation of CMC, clerks may continue professional education and strive to obtain the designation of Master Municipal Clerk. The first step toward becoming a MMC is to become accepted as a member of the Master Municipal Clerk Academy. The following clerks have achieved this step:

- Linda Crump, City Clerk, Hoover
- Jane Hicks, City Clerk, Fultondale
- Donna Treslar, Deputy Clerk, Pelham
- Patricia Wambles, Town Clerk, Level Plains

Job Listing

Chief of Police, City of Foley

The City of Foley, Alabama is now accepting candidate applications for **Chief of Police**. Foley is located five miles north of the Gulf of Mexico in one of the fastest developing areas of both Alabama and the South. Due to this growth, the successful applicant should have that combination of education and experience that will enable him/her to assume the chief executive position of our rapidly growing police force. At a minimum, all applicants should have at least ten years of experience as a sworn law enforcement officer in positions characterized by increasing levels of responsibility. Resumes should clearly demonstrate that these increasing levels of job responsibility have been carried out with a high degree of excellence. Currently, the Foley Police Department has 65 personnel (38 sworn officers and 27 administrative and support staff) and is headquartered within our \$4 million Justice Center. Foley offers a full range of employee benefits with a starting salary commensurate with experience and education. The coastal region of Alabama's Gulf Coast combines an exciting work place with both a wonderful lifestyle and great environment in which to raise children. Mail applications to: Police Chief Search, Drawer 400; Foley, Alabama 36536. Applications should include starting salary expectations. This position will be open until filled. The City of Foley, Alabama is an equal opportunity employer.

The Master Municipal Clerk Academy was established to further professional education of municipal clerks and to enhance their skills as needed to meet the challenges of the office of the municipal clerk. Every two to four years, Academy members have to demonstrate that they have actively engaged in educational and professional participation that keeps them current with the changing events in the local government scene.

Advancing to the first level in the Master Municipal Clerk Academy are:

- Wanda Farmer, Town Clerk, Arley
- Barbara Wester, City Clerk/Treasurer, Rainbow City

IIMC proudly announced that Johnnie B. Wyers, Town Clerk, Eldridge, received the Master Municipal Clerk designation in September 2004. She joins 327 other municipal clerks of IIMC's 10,300 members who have achieved this status. There are 130 active CMC's in Alabama and 1,545 national members in the Master Academy. ■

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The President's Report

Jim Byard, Jr.
Mayor of Prattville

Alabama 5th in Nation for Fatalities Caused by Running Red Lights

Green means “Go” and red means “Stop!” Right? Wrong! In fact, in many of our cities, motorists waiting for their light to turn green, take a deep breath and count to five before pulling off, lest an otherwise law-abiding citizen decides to run the red light.

Running red lights has become so common in Alabama that the state now bears the dubious ranking of fifth in the nation for fatalities caused by red light running. Let me repeat that statistic – fifth out of the 50 states! In 2000, according to the Federal Highway Administration, there were approximately 106,000 crashes, 89,000 injuries and 1,036 deaths in the United States attributed to running red lights. From 1993 to 2001, statistics show that Alabama had 47,501 crashes caused by someone running a red light, an average of 5,278 a year. Included were 16,306 injuries and fatalities, an average of 1,812 per year. Officials point out that crashes from vehicles running red lights tend to be more severe than other crashes because the vehicles collide at right angles, offering little protection to occupants during a side impact situation.

In a mobile, rushing society, there are bound to be some accidents; however, the overwhelming number caused by the simple lack of courtesy of not obeying stop lights is appalling – and a source of concern for officials in Alabama towns and cities. Unfortunately, police personnel find it difficult to enforce red light violations because they must observe and often follow violators through the light in order to ticket them, which can, in itself, create a dangerous situation.

In response to a high occurrence of crashes caused by red light running, the City of Tuscaloosa volunteered to host a red light running camera pilot project in 2001. The Federal

Highway Administration, Alabama Department of Transportation and University Transportation Center for Alabama were also partners in this pilot project. Results coincided with national surveys which indicated that the more than 100 jurisdictions in 18 states and the District of Columbia that have implemented red light camera technology report reductions in violations ranging from 20 percent to 87 percent.

By installing camera systems at heavily traveled intersections, the rear license plate is photographed twice to assure that a violation has occurred. The equipment records the date, time of day, time the light has been red and the length of time elapsed between the taking of the two photographs. The cameras are set so that only those vehicles that enter an intersection after the light has turned red are photographed. Trained personnel review the photographs and, after verifying that the vehicle was in violation, tickets are mailed to vehicle owners.

There are those that argue this procedure violates motorists’ privacy. However, the fact remains that driving is a regulated activity on public roads. When someone obtains a driver’s license, they agree to abide by the traffic laws as well as the rules and regulations of the jurisdiction in which they operate a motor vehicle. Stopping for a red light is very basic.

Several Alabama cities have indicated that they are interested in using automated camera equipment in an effort to decrease the number of red light running offenders. Cities would not use this system to generate revenue, as the camera systems are expensive. As my Police Chief said recently “if we put up the cameras and just one life is saved, I’d say it was worth it.”

At the present time, Alabama Code does not allow cities to use traffic control cameras to cite violators. In order to pass and enforce local ordinances, enabling legislation must first be passed by the Legislature. Senate Bill 200 sponsored by Senator Phil Poole of Tuscaloosa is currently before the Legislature. Prattville has joined Montgomery, Tuscaloosa and other cities in passing a resolution asking our legislative delegation to support this important legislation. A summary of this bill appeared in the League’s Legislative Bulletin, and the City of Tuscaloosa will be happy to provide you with a copy of its resolution expressing intent to allow automated traffic light enforcement.

I urge you to become informed about the benefits of such a system for your town and to support, through Resolution, the efforts of those cities that have a dire need for legislation to be passed so that they may monitor their particular traffic situations. We must continue to make our communities safe for all. ■

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Municipal Overview

By
PERRY C. ROQUEMORE, JR.
Executive Director

FY 2006 Federal Budget Proposal

On Monday, February 7th, President Bush unveiled his \$2.57 trillion fiscal year 2006 budget. The budget proposes significant cuts in discretionary domestic spending with the goal of reducing the deficit in half by 2009. Overall, the FY 2006 budget proposal requests a five percent increase in defense spending, a three percent increase in non-defense homeland security spending, and a one percent decrease in spending for other the remaining non-defense, non-security discretionary programs.

The proposed budget would place mandatory spending caps on domestic discretionary spending, freezing programs through 2010. Factoring in inflation, these federal spending caps would actually equal program cuts for discretionary programs through 2010. Homeland Security and defense programs are exempt from the mandatory spending caps.

The budget proposes more than 150 reductions and eliminations in non-defense discretionary programs. Among these are many important NLC priorities, including Community Development Block Grants, the long-time funding source for urban renewal, housing assistance, first responder funding, Amtrak, and the Clean Water State Revolving Fund (CWSRF).

The budget further attacks several programs assisting low-income individuals, many of whom live in cities. Spending for Medicaid, the joint federal-state program that provides health care for the poor and disabled, would be cut by \$60 billion over 10 years. States would be forced to pick up additional Medicaid expenditures, jeopardizing their annual budget allocations to local governments.

Critics of the President's budget are calling the budget plan deceptive. The document does not address the cost of the war in Iraq, and the cost of implementing the President's proposed permanent tax cuts and private personal accounts for Social Security.

On Capitol Hill, Democrats and Republicans alike have vowed to fight for the restoration of many of the discretionary programs cut or eliminated from the budget. Many of the funding cuts are already being called "dead on arrival." Others will have Congressional champions along with interest groups to lobby against their elimination. A long and arduous appropriations season is expected for the first session of the 109th Congress.

Specific NLC priority programs and other programs important to cities are highlighted below and in the attached chart.

Transportation

The Bush Administration used its fiscal year 2006 budget proposal to signal its willingness to accept a higher overall funding level for transportation reauthorization. The Administration's \$284 billion figure to fund surface transportation through fiscal year 2009 is a \$28 billion increase from its proposed \$256 billion reauthorization package last year.

The Administration's \$57.5 billion FY 2006 transportation budget proposal, one percent less than last year's proposed budget, represents funding continuity for municipalities. For Amtrak, however, the Administration's budget proposes to end its federal operating subsidies.

Amtrak. The FY 2006 budget proposal provides only \$360 million in capital funds for Amtrak's commuter services along the Northeast Corridor and elsewhere. This represents a 70 percent cut to Amtrak's current FY 2005 federal support of \$1.2 billion. The Administration, clearly frustrated that its Amtrak reform proposal is stalled, argues that "with no subsidies, Amtrak would quickly enter bankruptcy, which would likely lead to the elimination of inefficient operations and the reorganization of the railroad through bankruptcy procedures." The Administration maintains its offer to support more money for Amtrak if Congress enacts the Administration's Amtrak management and financial reform legislation. According to the Administration, reform would put Amtrak on track to financial stability and provide states and localities with flexibility to integrate intercity passenger rail locally. The Administration's FY 2006 budget would also eliminate funding for high speed rail.

Highways. The budget would obligate \$34.7 billion for highways, almost \$1 billion more than last year's request (and \$300 million more than appropriations), reflecting the Administration's continued commitment to improve highway safety and mobility.

Mass Transit. For transit, the Bush administration budget obligates approximately \$7.8 billion in funding, up from last year's request of \$7.6 billion. Within this total is a request for \$1.53 billion in major capital investment grants

continued next page

for the “New Starts” program to finance commuter rail, light rail, heavy rail, and bus rapid transit projects. This figure is slightly higher than the FY 2005 request of \$1.45 billion because program efficiencies pleased the Administration and it wants to help grow the “Small Starts” category of smaller-scale projects.

The Administration’s proposal also calls for \$6.1 billion in formula grants, including:

- \$3.7 billion for transit formula grants to urbanized areas, which increases the program above its FY 2005 level of \$3.3 billion; and
- \$1.3 billion for rail modernization projects in urbanized areas.

Airport Improvement. The Administration’s budget proposes \$3 billion for airport grants-in-aid under the Airport Improvement Program, a 17 percent decrease from fiscal year 2005 appropriation of \$3.5 billion. The proposed budget also requests \$50 million for the Essential Air Services program and a general provision to restructure it. This is a 50 percent reduction from fiscal year 2005.

Community and Economic Development

Community Development Block Grants (CDBG). As promised, the President unveiled his proposal to merge CDBG along with 17 other direct grant programs into a new \$3.71 billion Strengthening America’s Communities Initiative (SACI) to be administered by the Department of Commerce. For the previous budget year, funding for all 18 programs totaled roughly \$5.3 billion. CDBG, by itself totaled just over \$4.7 billion in 2004.

The President argues that the new proposal would “strengthen America’s transitioning and most needy communities, while making use of taxpayer dollars by reforming and restructuring many of the existing Federal economic and community development programs.” SACI would, according to the Commerce Department, “simplify access to the Federal system, set new eligibility criteria, and establish strong accountability standards all in exchange for the flexible use of the funds so the communities most in need will be assisted.” The program will “better target assistance and achieve greater results for low-income persons and economically-distressed areas.”

Section 8 Housing Vouchers. For FY 2005, Congress divides the Section 8 program into two separate accounts: Tenant-Based Vouchers and Project Based Vouchers. The two accounts together totaled \$20.079 billion in FY 2005. The budget request proposes that the combined accounts receive nearly \$21 billion in funding for FY 2006, a five percent increase.

In FY 2005, Congress made several changes to the Tenant-based Rental Assistance Program (also known as the Housing Choice Voucher Program) that allowed only

limited flexibility on the part of Public Housing Authorities (PHAs) to adjust to those changes. The proposal would increase the Tenant-based account by over \$1 billion to \$15.845 billion to restore “reductions imposed by the 2005 pro-rations” and add to the account to factor in inflation.

Congress also made several changes to the Tenant-based Rental Assistance Program that reduced the flexibility of Public Housing Authorities to adjust rental vouchers based on actual costs. The President will propose legislation it claims will give Public Housing Authorities “greater discretion in meeting local housing objectives and provides for steady and predictable funding levels adjusted annually for inflation.” But most housing advocates argue that it was this annualized inflation calculation that created last year’s funding shortfalls in many communities in the first place. The old method of factoring in inflation on a quarterly basis was much more accurate and efficient according to most housing experts. **In essence**, they contend, the annualized inflation factor now used amounts to nothing more than a budget cap for each Public Housing Authority. Based on last year’s experience, the legislative language proposed in the President’s budget documents for FY 06 is an expansion of what many housing official agree doesn’t work.

HOPE VI. Once again, the President’s FY 2006 budget proposal recommends eliminating funding for the HOPE VI program. It also proposes to rescind the entire \$143 million appropriated in the FY 2005 Omnibus Appropriations Act, which would essentially make those funds unusable for this year.

HOME. In FY 2005, the HOME program received roughly \$1.9 billion with nearly \$49 million going to the President’s American Dream Down Payment Initiative (ADDI). The President’s budget request adds an additional \$41 million to the program. However, the request also carves out \$200 million for ADDI.

Opportunity Zones. The President’s proposed budget creates 40 opportunity zones (28 urban and 12 rural) selected through a competitive process and decided by the Secretary of Commerce. The tax incentives for the zones would be in effect from January 1, 2006 to December 31, 2015 at a cost of \$9.594 billion over that time period. A local government desiring this incentive would first be designated as a *Community in Transition* if it has experienced the following during 1993-2003:

- Loss of at least 3% of manufacturing establishments;
- Loss of at least 3% of its retail establishments; and
- Loss of at least 20% of its manufacturing jobs.

Communities previously benefiting from *Empowerment Zones, Enterprise Communities, and Renewal Communities* programs would be eligible to apply for

continued page 18

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ENVIRONMENTAL OUTLOOK

By Gregory D. Cochran
Director, Intergovernmental Relations

Environmental Protection Agency Budget

President George W. Bush's 2006 budget provides \$7.6 billion for the Environmental Protection Agency and its partners across the nation. EPA Acting Administrator Steve Johnson and key Agency officials announced the budget at a Washington, D.C., news briefing today. The budget supports the Agency's core work of protecting public health and improving the environment, addresses needs identified in the EPA's Strategic Plan, and increases resources for EPA's critical role in security against terrorist acts.

EPA's Acting Administrator, Steve Johnson stated the President's budget, coupled with EPA's proven ability to leverage outcomes through strategic partnerships, insures they will continue to pick up the pace of protecting the public and the environment, while fulfilling EPA's role in homeland security. To help increase security against potential terrorist acts, the President's budget provides \$79 million increase in new resources for EPA homeland security efforts over the 2005 budget, to ensure that EPA's critical role is made a top priority. Included in the \$79 million increase in Homeland Security funding is:

- \$44 million to launch a pilot program of monitoring and surveillance in select cities to provide early warning of contamination;
- An increase of \$19.4 million for environmental decontamination research and preparedness, with an additional \$4 million requested for the Safe Buildings research program; and
- More than \$11.6 million in new resources to support preparedness in our environmental laboratories.

To address the high priority of reducing nitrogen oxide, sulfur dioxide and mercury emissions, the President's budget provides that EPA will continue to support the enactment of the Clear Skies legislation, and should legislation not be enacted soon, to finalize the proposed Clean Air Interstate Rule. To reduce emissions from trucks and other mobile sources, the President's budget provides \$15 million for the national Clean Diesel Initiative, which will be leveraged significantly by working with EPA partners. EPA and a

coalition of clean diesel interests will work together to expand the retrofitting of diesel engines in new sectors. To ensure cleaner lands and economic revitalization through waste site cleanups, the President's budget provides:

- \$210 million for the national Brownfields Program, an increase of \$46.9 million over enacted 2005 funding. Under this program, EPA is working with its state, tribal and local partners to meet its objective to sustain, clean up and restore contaminated properties and abandoned sites.
- Together with the extension of the Brownfields tax credit, EPA expects to achieve the following in FY 2006:
- Assess 1,000 Brownfields properties;
- Clean up 60 properties using Brownfields funding;
- Leverage an additional \$1 billion in cleanup and redevelopment funding;
- Create 5,000 jobs related to the Brownfields efforts.

To ensure cleaner, safer water, the President's budget provides:

- \$2.8 billion to improve the quality of surface and drinking waters by expanding the nationwide monitoring network and taking watershed-wide approaches to water quality protection;
- \$730 million for the Clean Water State Revolving Fund to support sustainable wastewater infrastructure; and
- \$73 million for the Great Lakes programs and regional collaboration. That amount includes \$50 million for the Great Lakes Legacy Act program to remediate the contaminated sediment in Areas of Concern such as the Black Lagoon in the Detroit River.

For the complete summary of EPA's FY2006 budget request with additional specific program-related information visit: www.epa.gov/budget .

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THE LEGAL VIEWPOINT

Mary Ellen Wyatt Harrison
Staff Attorney

The Fair Labor Standards Act: A Brief Overview

The Fair Labor Standards Act (FLSA) is a federal law which was enacted by Congress in 1938. It was established to guarantee employees of private employers certain minimum wages and time and one-half overtime standards. The FLSA was adopted as a means of economic recovery from the Great Depression. The FLSA sought to ensure a maximum number of jobs, which paid a minimum livable wage. By requiring overtime pay, the FLSA created a monetary penalty for employers who did not spread their existing work among a greater number of employees. Certain employees are exempt from the minimum wage and overtime pay standards set in the provisions of the Act.

Originally, only private employers were covered by the FLSA. However, amendments in 1966 and in 1974 extended the application of the FLSA to public employers. The National League of Cities challenged these amendments in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In this case, the United States Supreme Court held that the 10th Amendment to the United States Constitution prohibited Congress from making local governments subject to the FLSA.

However, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court reversed *Usery* by a close 5 to 4 vote. The ruling in *Garcia* extended complete coverage to public employees.

As a result of the *Garcia* case, Congress amended the FLSA in 1985. In 1986, the U.S. Department of Labor (DOL) released long-awaited final regulations regarding the application of the FLSA to state and local employees. These regulations implemented the 1985 amendments to the FLSA.

Nationally, over 90 million employees are covered by the Fair Labor and Standards Act.

This article examines major provisions of the FLSA and discusses their application to municipal governments.

Non-Employees Under the FLSA

Not all public employees are covered by the FLSA. Non-employee regulations are generally strictly construed by the courts in light of DOL regulations and should be applied narrowly. Employees who are not considered to be employees under the FLSA include elected officials; personal staff members, policy making appointees, immediate legal advisers not covered by personnel rules, independent contractors, prisoners and trainees.

Elected officials

Elected Officials, such as the mayor and councilmembers are not covered by the minimum wage, overtime and recordkeeping provisions of the FLSA. *See* 29 U.S.C.A. § 203(e); *see also* 29 C.F.R. § 533.11.

Personal Staff Members

The term personal staff members includes “only persons who are under the *direct supervision* of the selecting elected official and have *regular contact* with such official.” (emphasis added). The term does not include individuals supervised by someone other than the official. For example, the mayor’s personal secretary may fall within the exception; however, the secretary’s assistant will not. *See* 29 U.S.C.A. § 203(e); *see also* 29 C.F.R. § 533.11. The Department of Labor issued a Wage Hour Opinion Letter dated Dec. 19, 1974 that set forth a test to determine whether the employee is considered a personal staff member. Among the tests to be considered with respect to members of the personal staff of an elected office holder are the following:

- (1) is the person’s employment entirely at the discretion of the elected officeholder
- (2) is the position not subject to approval or clearance by the personnel department or division of any part of the government;

continued next page

(3) is the work performed outside of any position or occupation established by a table of organization as part of the legislative branch or committee or commission formed by an act of the legislature;

(4) is the person's compensation dependent upon a specific appropriation or is it paid out of office expense provided to the officeholder?

See 29 U.S.C.A. § 203(e); see also 29 C.F.R. § 533.11.

Policy-Making Appointees

Policy-making appointees are individuals who are appointed by an elected official and intimately involved in the creation of policy. The position must be outside civil service. To fall within the policy-making appointee exception, the staff member must be appointed by and serve solely at the pleasure and direction of the elected official. See 29 U.S.C.A. § 203(e); see also 29 C.F.R. § 533.11. The crucial distinction is between appointees who actually make and formulate policy and appointees who simply implement and apply policies made by others. See *Anderson v. City of Albuquerque*, 690 F.2d 726, 801 (10th Cir. 1982).

Immediate Legal Advisors not Covered by Personnel Rules

Immediate legal advisors not covered by personnel rules are not covered by FLSA. See 29 U.S.C.A. § 203 (e)(2)(C)(V). The exclusion is limited to staff who serve as advisors on constitutional or legal matters and who are not subject to the civil service rules of the employing agency. See 29 U.S.C.A. § 203(e); see also 29 C.F.R. § 533.11.

This provision excludes some city or council attorneys. The exclusion depends on the immediacy of the legal advisor's contact with the elected official. See *Ramirez v. San Mateo County Dist. Attorney's Office*, 639 F.2d 509 (9th Cir. 1982); see also *Wall v. Coleman*, 393 F.Supp. 826 (S.D.Ga.1975) and *Gearhart v. Oregon* 410 F.Supp. 597 (D.Ore. 1976).

Independent Contractors

Independent contractors employed by public entities are not covered by FLSA. The "economic reality test" established in *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984) can be used to determine whether the private employer is an independent contractor:

The focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself. In applying this test, the courts generally focus on five factors:

- (1) the degree of control exerted by the alleged employer of the worker;
- (2) the worker's opportunity for profit or loss;
- (3) the worker's investment in the business;
- (4) the performance of the working relationship;
- (5) the degree of skill required to perform the work.

If the private employer does not meet the economic reality test, the contractor must be treated as an employee for FLSA purposes. See *Doty* at 723-4; see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

The Department of Labor established an economic reality test as well in a Wage and Hour Opinion Letter Dated June 23, 1986:

- (1) the extent to which services rendered are an integral part of the employer's business
- (2) the permanency of the relationship
- (3) the amount of the worker's individual investment in facilities and equipment
- (4) the opportunities for the worker to experience profit and loss
- (5) the degree of initiative, judgment or foresight exercised by the individual who performs the services.

If an independent contractor does not meet these tests, the individual must be considered an employee for FLSA purposes.

Prisoners

Prisoners who are required to work for the government are generally not considered employees under FLSA. If a prisoner is contracted out to a private company or individual for work, FLSA would apply and the private company or individual should follow the provisions of FLSA. See Department of Labor *Field Operations Handbook* ¶ 10b27.

Trainees

Individuals who are not yet employees but are true "trainees" can be excluded from FLSA coverage. The Department of Labor issued guidelines on determining who falls under this exclusion in Wage and Hour Opinion Letter, Jan. 6, 1969:

Whether trainees are employees of an employer under the acts will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria apply, the trainees are not employees within the meaning of the Fair Labor Standards Act:

- (1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
- (2) The training is for the benefit of the trainees.
- (3) The trainees do not displace regular employees, but work under close observation.
- (4) The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion his operations may actually be impeded.
- (5) The trainees are not necessarily entitled to a job at the completion of the training period.

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Legal Notes

By Lorelei A. Lein
Staff Attorney

COURT DECISIONS

Tort Liability: The guarding of a municipal jail by a regular municipal police officer is a “law enforcement duty” within the meaning of the peace-officer immunity statute, Section 6-5-338(a). However, a peace officer who fails to follow mandatory rules and procedures for checking on inmates, is not entitled to peace-officer immunity. *Howard v. City of Atmore*, 887 So.2d 201 (Ala. 2004).

DECISIONS FROM OTHER JURISDICTIONS

Ordinances: A city ordinance that prohibits smoking in public places, including restaurants and bars, unless a separate smoking lounge with its own ventilation system is created and other specific conditions are met, does not effect a regulatory taking under the Fifth Amendment to the United States Constitution. *D.A.B.E., Inc. v. Toledo, Ohio*, 393 F.3d 692 (6th Cir. 2005).

ATTORNEY GENERAL OPINIONS:

Office of Profit: A person is prohibited from serving as both a supernumerary tax official and a member of the board of registrars because both positions are offices of profit. 2005-031.

Police Department: A town is not entitled to reimbursement from a county hospital board under Section 36-21-7 of the Code of Alabama 1975, for expenses paid by the town for training at a police academy by a former employee of the town. A county hospital is not one of the enumerated entities required to provide reimbursement under Section 36-21-7. 2005-034.

Annexation: A city can require private and commercial entities to become a part of the municipality in order to continue to receive water and sewer services from the city. 2005-038.

Streets and Roads: Under Section 11-3-11(19) of the Code of Alabama 1975, a county may provide materials and in-kind services to a municipality to assist in preparing a roadway on private property to promote industry by preventing the potential loss of the industry and jobs. The county commission must determine that a public purpose would be served by providing the benefits and services. 2005-041.

Fire Protection: A municipality may contract with a volunteer fire department for fire protection and related emergency services without the contract being let by competitive bidding. Further, a municipality may lease property to the volunteer fire department and donate or sell, for minimal consideration, its fire and emergency equipment and supplies to the volunteer fire department. 2005-046.

Conflicts of Interest: A municipality may do business with a bank where the mayor of the city serves on the bank’s board of directors and is a minority stockholder, provided, however, that the mayor does not vote on matters relating to the bank that are brought before the city council. 2005-047.

Licenses: Section 28-3A-21 of the Code of Alabama 1975, does not authorize a dry county to fix and levy privileges or license taxes on businesses that hold a state license to sell alcoholic beverages and that are within the municipal limits of a wet city located within the county. 2005-048.

continued next page

Nuisances: In accordance with Section 11-67-66 of the Code of Alabama 1975, the county tax collector is statutorily mandated to add and collect the cost of weed liens and the cost of collecting weed liens at the same time as the regular municipal ad valorem taxes are collected. The code makes no provision for any form of indemnification being a prerequisite for the county tax collector's collection of such liens and costs. 2005-053.

Appropriations: A municipality may produce a history of the municipality and distribute it to public school and university libraries. A municipality may not sell the history directly or indirectly through a nonprofit organization. However, a group of citizens may form an organization to produce and sell the history and donate the proceeds from the sale to the town. 2005-057.

ETHICS COMMISSION OPINIONS

AO NO. 2005-01: Members of a town council who are also members of an LLC, may develop a planned unit

development within the town's limits; provided, that they do not use their official positions to influence any dealings between the town and their LLC; that they do not vote, attempt to influence or otherwise participate in any town council matters relating to the development; that they do not appear on behalf of the LLC before the town council; and, further, that they do not use any confidential information obtained in the course of their service on the town council to assist the LLC in any manner.


AO NO. 2005-02: A municipality may do business with an automotive parts store which leases the land on which the business is situated from the Mayor of the municipality, if the mayor receives a flat rental amount on a monthly basis, and has no ownership interest, nor will profit from the business conducted by the automotive parts store with the municipality. However, the mayor may not vote, attempt to influence or otherwise participate in any purchases or other matters between the municipality and the parts store.

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Federal Legislative and Regulatory Issues

Mary Ellen Wyatt Harrison
Staff Attorney

Small Community Air Service Development Program Grants

The United States Department of Transportation (DOT) issued an order this past February for proposals from communities seeking grants from the Small Community Air Service Development Program. In the 2005 fiscal year awards will total \$20.2 million. The Small Community Air Service Development Program, which was originally established in 2002 as a pilot program, has been reauthorized through 2008. The program's objective is to help smaller communities enhance their air service and provides the flexibility necessary for a variety of cities and towns to reach this goal. Previous successful grant proposals have included a variety of projects, including promoting awareness among residents about new air service, attracting new carriers through revenue guarantees and providing local transportation service to the airport. The Department of Transportation Secretary can provide up to 40 grants for 2005. Eligible communities are those that were served by an airport no larger than a small hub in 1997 and had insufficient air service or unreasonably high fares. Communities that do not have commercial service are also eligible for grants if they meet certain requirements of the Federal Aviation Administration. Medium and large hubs are not eligible for funding. In issuing the grants, the DOT Secretary will give priority to communities where: average air fares are higher than air fares for all communities; a portion of the cost of the proposed project will come from local, non-airport revenue sources; a public-private partnership will facilitate air carrier service; improved service will benefit a broad section of the public; and 5 percent of the grant funding will be used in a timely manner. Grant proposals are due **April 22, 2005**, and DOT expects to complete the process before September 30, 2005. The department's request for proposals is available on the Internet at <http://dms.dot.gov>.

Monies Available to Fund Food Programs for Low-Income Residents

The U.S. Department of Agriculture is currently accepting applications for grants to fund programs that give low-income

people long-term access to high-quality, affordable and nutritional foods that are produced locally or regionally. Through its Community Food Projects Competitive Grants Program, USDA hopes to increase the food self-reliance of communities and address local food, farm and nutrition issues while at the same time involving the food production and processing sectors in community and economic development and environmental enhancement activities. Funds from this program may be used to develop self-sustaining community food projects, or to provide training and technical assistance to current grantees or other entities interested in developing a community food project. This fiscal year, approximately \$4.6 million is available through the program. Of this amount, up to \$500,000 will be awarded for training and technical assistance projects of private, nonprofit and other organizations that can offer their services regionally or nationally. All community food project grantees must provide a 100 percent match, but recipients of training and technical assistance grants are not required to provide matching funds.

Community food projects should be designed to meet the food needs of low-income people; increase the self-reliance of communities in providing for their own food needs; and promote comprehensive responses to local food, farm and nutrition issues. They also may be structured to meet specific state, local or neighborhood food and agriculture needs for infrastructure improvement and development; to plan for long-term solutions; or to create innovative marketing activities that mutually benefit agricultural producers and low-income consumers. Priority consideration will be given to projects that: involve linkages between two or more sectors of the food system; support the development or entrepreneurial projects; innovatively link the for-profit and nonprofit food sectors; and encourage long-term planning activities and multi-system, interagency approaches with multi-stakeholder collaborations that build the long-term capacity of communities to address the food and agricultural problems of the communities. Training and technical assistance grantees may use their funds to help potential applicants or current grantees with the grant application process, food security need

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opportunity zone status but must relinquish their current status and benefit if selected. Opportunity zone status offers the following tax incentives:

- Exclusion of 25% of taxable income for business with average gross receipts of \$5 million or less;
- Ability to expense qualified zone property, up to an additional \$100,000 above the amount generally available under section 179;
- Commercial revitalization deduction; and
- Wage credit for businesses that employ opportunity zone residents within the zone.

Homeland Security

The President's proposed budget for funding of first responders programs under the Department of Homeland Security is almost identical to the dollars appropriated by Congress for fiscal year 2005. The Administration has proposed \$1.02 billion each for the State Homeland Security Grant Program (SHSGP) and Urban Area Security Initiative Program (UASI). However, states and local governments will receive less state homeland security grant funding because the Administration has proposed reducing the distribution formula from .75 percent to .25 percent. If approved, each state would receive a minimum of \$2.6 million in state homeland security grants based on "risk, and an application-based review of need, and consistency with national priorities."

In addition, twenty percent, approximately \$200 million must be extracted from both the SHSGP and UASI program to fund law enforcement terrorism prevention activities, effectively eliminating direct funding for the Law Enforcement Terrorism Prevention Grant. Further complicating matters, the Administration proposes that local government use their state homeland security funds for services such as the Urban Search and Rescue and the Metropolitan Medical Response System (MMRS) – programs for which funding was eliminated.

The requested budget, proposes changing the distribution formula for homeland security grants, and the expectation that local governments will use state homeland security grants to fund programs for which funding has been eliminated means that cities will have to compete with each other and within their own priorities to receive funding.

The good news is that the President's budget request preserves the Congressional directive that 80% of State Homeland Security Grants must go directly to local governments.

Human Development

Title I, No Child Left Behind (NCLB). The President's budget would increase funding for Title I of the No Child Left Behind Act (NCLB), which provides grants to low-income school districts, by \$603 million to \$13.3 billion. This is still \$9.4 billion below the amount authorized by law and advocated by NLC.

Individuals With Disabilities Act (IDEA). The President proposes a \$500 million increase for the IDEA. This would bring the federal commitment to \$11.1 billion for FY 2006. This proposed increase would fall short of the funding needed to meet the commitment in the recent IDEA reauthorization to fund 40% of local special education costs within eight years.

Afterschool. The Administration proposes level funding of \$999 million for afterschool programs — the 21st Century Community Learning Centers — for the fourth straight year.

High Schools. The highlight of President Bush's education budget is an emphasis on increased academic standards in high schools to ensure seniors graduate with the necessary skills needed to move on to higher education or directly to the workforce. In response to a study that found American high school students lag far behind their international peers in math and technology skills, the President has proposed \$1.5 billion for a high school achievement program.

Head Start. Head Start is level funded at \$6.9 billion. In addition the President's budget includes \$45 million to support the President's initiative to improve Head Start by funding nine state pilot projects to coordinate state preschool programs and federal child care grants.

NLC will oppose any attempt to block grant this successful local-federal partnership to the states.

TANF. The Temporary Assistance to Needy Families Block Grant (TANF) is level funded at \$16.5 billion for fiscal year 2006. TANF provides states funds to administer cash assistance and work supports to families working to leave the welfare rolls within five years as required by the law.

Child Care Development Block Grant (CCDBG). CCDBG, which provides child care assistance funds to low-income working families, is level funded at \$4.9 billion. NLC supports a significant increase in CCDBG in the TANF reauthorization bill to assist low-income working families striving to achieve self-sufficiency.

Ryan White CARE ACT. The Ryan White Comprehensive AIDS Emergency Resources (CARE) Act provides funding for care and services to uninsured and underinsured individuals with HIV/AIDS in the United States. The President's FY 2006 budget seeks \$2.1 billion for the CARE Act, a \$10 million increase from fiscal year

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(6) The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Volunteers

Volunteers are also not considered employees under the FLSA, but are considered separately due to their special status.

The 1974 regulations to the FLSA placed strict criteria upon which public workers could be exempt as volunteers. The 1987 regulations broadly construe the provisions governing volunteers.

Volunteers are defined as individuals who perform hours of service for a public agency for civic, charitable or humanitarian reasons with no expectation, promise or receipt of compensation for services rendered. If these conditions are met, the individual will not be subject to FLSA. *See* 29 C.F.R. § 533.101(a).

Workers may be considered “volunteers,” and thus excluded from coverage under the FLSA, even if they receive “reasonable benefits,” “nominal fees,” or expenses – or a combination of all three – for their work. *See* 29 U.S.C.A. § 203(e)(4)(A); *see also* 29 C.F.R. § 533.106.

Examples of expenses are a uniform allowance or reimbursement for reasonable cleaning expenses for a school crossing guard, out of pocket expenses incurred during volunteering.

Examples of reasonable benefits are inclusions of volunteers in group insurance plans and pension plans.

Whether a fee may be considered nominal must be determined on a case-by-case basis. The DOL will examine the total amount paid, including fees, benefits, and expenses, in the context of the economic realities of the total situation. A fee will not be considered nominal if it is merely a substitute for compensation or is tied to productivity, although payment may be made on a per call or similar basis. Examples include the distance traveled, the time and effort expended by the volunteer, whether the volunteer has agreed to be available around the clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. A volunteer who agrees to provide services periodically on a year-round basis may receive an annual stipend or fee and still be considered a volunteer.

The only significant restriction on volunteerism is a ban on employees performing on a volunteer basis during their off-duty hours the same type of services as they are employed to provide. Public employees who perform volunteer work for other agencies that are not treated as separate by the Census of Governments may be barred from doing volunteer work of the same type which they are employed to perform.

Exempt Employees

Certain public employees, although covered by the FLSA, are exempt from overtime and minimum wage provisions.

Unlike those workers who are not considered employees, exempt employees are still covered by FLSA recordkeeping requirements. Exempt employees include:

Executive Exemption

An executive employee, other than a “highly compensated employee” (discussed below), must meet all of the following requirements of the standard test to be exempt from the FLSA’s minimum wage and overtime provisions:

(1) The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week; (29 C.F.R. § 541.100)

(2) The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; (29 C.F.R. § 541.102)

(3) The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; (29 C.F.R. § 541.701) and

(4) The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. (29 C.F.R. § 541.100).

The executive exemption does not apply to a long list of “non management” law enforcement, fire protection and emergency services personnel. Police officers, detectives, investigators, inspectors, correctional officers, parole or probations officers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, do not qualify as exempt white-collar workers if they perform the following types of work:

- i. preventing, controlling or extinguishing fires of any type;
- ii. rescuing fire, crime or accident victims;
- iii. preventing or detecting crimes;
- iv. conducting investigations or inspections for violations of law;
- v. performing surveillance
- vi. pursuing, restraining, and apprehending suspects;
- vii. detaining or supervising suspected and convicted criminals, including those on probation or parole;
- viii. interviewing witnesses;
- ix. interrogating and fingerprinting suspects;
- x. preparing investigative reports; or
- xi. other similar work

This rule is aimed at employees who do not have management as their primary duty. Executives are those employees whose primary duty consists of managing the department in question, and who regularly supervise two or more employees.

continued next page

The Department of Labor has defined management as including:

- i. interviewing, selecting and training employees;
- ii. setting and adjusting their rates of pay and hours of work;
- iii. directing the work of employees
- iv. maintaining production or sales records for use in supervision or control;
- v. appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- vi. handling employee complaints and grievances;
- vii. disciplining employees;
- viii. planning the work;
- ix. determining the techniques to be used;
- x. apportioning the work among the employees;
- xi. determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- xii. controlling the flow and distribution of materials or merchandise and supplies;
- xiii. providing for the safety and security of the employees or the property;
- xiv. planning and controlling the budget; and
- xv. monitoring or implementing legal compliance measures.

See 29 C.F.R. § 541.102; see also 69 Fed. Reg. 22, 133.

Firefighters

High ranking firefighter positions, such as battalion chief, fire captain and fire lieutenant, are most likely to qualify for the executive exemption. Courts have looked at the following factors:

- Whether more than 50 percent of time is spent performing managerial duties. See *Harkins v. City of Chesapeake, VA*, 1988 WL 235927 (E.D.Va. 1988)
- Whether there is a lack of supervision over the manager. See *Harkins v. City of Chesapeake, VA*, 1988 WL 235927 (E.D.Va. 1988)
- Whether their duties included management of an entire station during their shift, which included the direction of two or more employees. See *International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F.Supp 1230 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990).
- Supervision of three or more employees, in charge at fire scenes and responsible for major decisions in life or death situations. See *Sarver v. City of Roanoke, VA* 1990 WL 83327, 29 Wage and Hour Case (BNA) 1442 (W.D.Va. 1989)
- Whether the individual is responsible for directing, planning and budgeting the division's work. See *Simmons v. City of Fort Worth, TX*, 805 F.Supp. 419 (N.D. Tex. 1992).

Police Officers

Police communications sergeants, criminal investigation sergeants, fiscal management sergeants, planning sergeants,

internal investigative sergeants and animal shelter sergeants are exempt executive employees. See *International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990).

Emergency Services Personnel

Quirk v. Baltimore County, Md., 895 F.Supp. 773 (D. Md. 1995), held that EMS captains employed by the fire department are executive employees where 90 percent of their time was spent performing managerial tasks. In addition, a director of EMS who manages both the fire and EMS, trains personnel in the proper use of equipment, coordinates unit activities, purchases medical supplies, prepared budgets, and interviewed, hired, disciplined and evaluated employees also was exempt. See *Aly v. Butts County, GA.*, 841 F.Supp. 1199 (M.D. Ga. 1994).

Administrative Exemption

An administrative employee must meet the criteria of either the standard test or the highly compensated test below or the standard test for the administrative exemption. The standard test criteria are as follows:

(1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; (29 C.F.R. § 541.200)

(2) The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; (29 C.F.R. § 541.700 and 29 C.F.R. § 541.201) and

(3) The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. (29 C.F.R. § 541.202)

In several cases firefighters and police officers have been held to fall under the administrative position:

- If the employee's duties are related to production of a product or service rather than administration, the employees are nonexempt. For example, a criminal investigator's duties are related to the production of law enforcement services, not the administration of the department. See *Ahern v. State of New York*, 807 F.Supp. 919 (N.D.N.Y. 1992).
- Fire captains who report to the battalion chief and were higher in rank than lieutenants and firefighters, are exempt administrative employees, especially where their duties relate to management policies or general business operations. See *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, Ga.*, 920 F.2d 800 (11th Cir. 1991).
- A fire station training lieutenant may be deemed exempt as an administrative employee when their duties are related to the management practices or general business operations of firefighting. See *International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F.Supp. 1230 (E.D.Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990).

Professional Exemption

The professional exemption from the overtime and minimum wage requirements of the Fair Labor Standards Act involves two exemptions—learned professionals and creative professionals. To qualify for the professional exemption, the employee must meet either the learned professional standard test or the creative professional standard test or the highly compensated employee test below. To qualify for the learned professional employee exemption, all of the following tests must be met:

(1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; (29 C.F.R. § 541.300(a)(1))

(2) The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; (29 C.F.R. § 541.700 and 29 C.F.R. § 541.301)

(3) The advanced knowledge must be in a field of science or learning; (29 C.F.R. § 541.301) and

(4) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. (29 C.F.R. § 541.301(d))

To qualify for the creative professional exemption, all of the following tests must be met:

(1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; (29 C.F.R. § 541.300)

(2) The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. (29 C.F.R. § 541.302)

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption. *See* 29 C.F.R. § 541.601.

Computer Employees

To qualify as an exempt computer employee under 29 C.F.R. § 541.400(b), a worker must have a primary duty that consists of:

(1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications:

(2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications:

(3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) a combination of the aforementioned duties, the performance of which requires the same level of skill.

Primary duty means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties, the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. *See* 29 C.F.R. § 541.700(a).

Computer employees can also be exempt if they are compensated at an hourly rate not less than \$27.63 an hour. *See* 29 C.F.R. § 541.400(b). Also, computer employees are not eligible for exemption under the highly compensated employee test.

The Work Period

For non-exempt employees, the FLSA established a work week of 7 consecutive 24-hour periods, regardless of the pay period of the employee. The FLSA does not permit averaging of hours over two or more weeks.

However, the schedule need not coincide with the calendar week. It may begin on any day of the week, but it must end seven days later. The pay period may be weekly, biweekly, semimonthly, monthly, or any agreeable time, but the computation for overtime must be based on a seven-day work week. The total hours that may be worked at the regular rate in these 7 consecutive days is 40 hours.

Public Safety Employees

Section 207(k) of the Fair Labor Standards Act permits a municipality to select a longer work week and different regular hours before incurring overtime liability for law enforcement and fire protection personnel. This period must be at least 7 days and up to a maximum of 28 consecutive work days. The maximum number of allowable hours in work periods of particular lengths before overtime is allowed for qualified employees is as follows:

Work Period (Days)	Maximum Hours	
	Fire	Police
28	212	171
27	204	165
26	197	159

continued next page

25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	098
15	114	092
14	106	086
13	098	079
12	091	073
11	083	067
10	076	061
09	068	055
08	061	049
07	053	043

See 29 C.F.R. § 553.230.

To qualify for the special work period a firefighter must be a member of an organized department; meet minimum training requirements; have legal authority and responsibility to engage in prevention, control or extinguishment of a fire and perform activities that are required for fire prevention and control. Non-qualifying positions include dispatchers, alarm operators, clerks, mechanics and other support personnel. See 29 C.F.R. § 553.210.

Law enforcement personnel who qualify for the special work period must meet the following criteria: be a uniformed or plainclothes member of an organized department; be empowered by statute or local ordinance to enforce laws designed to maintain public peace and order, protect life and property from accident or willful injury, and prevent and detect crimes; have power to arrest; and meet minimum qualification and training requirements. Non-qualifying positions include dispatchers, building inspectors, animal control personnel, civilian traffic controllers and other support personnel. See 29 C.F.R. § 553.211.

The following are example of exempt law enforcement employees under § 207(k):

- police officers (29 C.F.R. § 553.211(c))
- security personnel in correctional institutions (29 C.F.R. § 553.211(f))
- Arson investigators (Wage and Hour Opinion Letter, Feb. 23, 1993)

The following are examples of nonexempt law enforcement employees under § 207(k):

- Building and health inspectors
- Animal control personnel
- Civilian traffic employees who direct vehicular and pedestrian traffic at specific intersections

- Building guards who protect life and property within a limited area of a building
 - Civilian parking inspectors
- See 29 C.F.R. §553.211(e).

Rescue and ambulance personnel may also qualify for the special work period if they have received training in rescues related to either law enforcement or firefighting and they are regularly dispatched to fires, crime scenes, and accidents. See 29 C.F.R. § 553.215.

If a qualified public safety employee works more than 20 percent outside the exempt classification (i.e., as a clerk, dispatcher, etc.), then that employee is not exempt for that work period and must be paid overtime for all hours worked above 40 per week. See 29 C.F.R. § 553.210(b); see also Wage and Hour Opinion Letter, Dec. 7, 1988; Wage and Hour Opinion Letter, April 27, 1989.

Note: Any municipality that employs fewer than five (5) law enforcement personnel or five (5) fire protection personnel is excused from the overtime provisions of the FLSA as to those employees. Volunteers and employees who work in non-qualifying positions do not count in determining the number of employees. See 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200.

Compensatory Time

The 1985 amendments to the FLSA dramatically changed the rules concerning compensatory time. Employees may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum set for their work period. See 29 U.S.C. § 207(o). For employees hired on or after April 15, 1986, comp time is permitted so long as it is provided for pursuant to an agreement or understanding between the employer and the employee. See 29 U.S.C. § 207(o)(2). However, no agreement is necessary for employees hired prior to April 15, 1986, if the employer had a regular practice of granting comp time in effect on that date.

An agreement or understanding with non-unionized employees may be established by notifying the employees of the comp time practice. See 29 C.F.R. § 553.23. The agreement must be arrived at **before** the performance of work. See 29 C.F.R. § 553.23(a). An agreement will be presumed to exist if the employee does not object after receiving notice.

Comp time is accrued at time-and-a-half. See 29 C.F.R. § 553.20. Employees generally may accrue up to 240 hours of comp time (equivalent to 160 hours of overtime work). Qualified public safety employees may accrue up to 480 hours (equivalent to 320 hours of overtime work). See 29 U.S.C. § 207(o)(3)(a).

If an employee has accumulated unused FLSA comp time at the time of termination of employment, the employer must cash out the accrued comp time at the rate of the employee's regular pay rate upon termination or the employee's average pay rate for the last three years of employment, whichever is higher. See 29 U.S.C. § 207(o)(4). If an employee has had a

break in employment, the employer need only use the rate of pay during the current period of employment.

Even where a comp time agreement has been formulated, the employer may freely substitute cash, in whole or in part, in lieu of comp time. This decision will not affect future granting of comp time pursuant to the agreement.

Overtime Pay Requirements

If a public agency pays their employees cash for overtime (as opposed to compensatory time), the wages must be paid at time and one-half the employees' regular rates of pay. See 29 U.S.C. § 207. Additionally, if an employee has accrued more than the maximum 480 hours of compensatory time allowed to public safety employees, they must be paid wages for overtime hours in excess of the maximum set for the work period. See 29 C.F.R. § 553.232. When calculating overtime for 207(k) employees, the employer should not use the 40-hour workweek standard; however, the employee should look to the employee's work period and the maximum number of hours that may be worked for that period (see chart above). Overtime is calculated for hours worked in excess of the 207(k) maximum.

Compensable Time

Compensable time refers to the hours of work for which an employee must be paid under the FLSA. Compensable

time includes all hours that an employee is required or permitted to work.

As a general rule, the amount of freedom enjoyed by the employee determines whether the time is compensable. Employment under the FLSA is broadly defined to include all hours that an employee is suffered or permitted to work for the employer. See 29 U.S.C. § 203(g). Additionally, hours worked include time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place. See 29 C.F.R. § 785.7. For instance, employees who are permitted to work after their shift ends are engaged in compensable working time. It is the employer's duty to ensure that employees perform no overtime work the employer does not wish performed. Questions frequently arise when travel time, waiting time, meal time, rest time and sleep periods are involved. These situations will be discussed below.

Additionally, the employer need only compensate employees for hours actually worked. If an employee is sick on a scheduled work day and works on an unscheduled day to make up for the sick day, the employer owes no overtime.

Compensable Time Situations

- Time spent by budget or fiscal employees required to remain until an official audit is completed (29 C.F.R. § 785.15)

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assessments, and project implementation and evaluation activities. USDA will support projects for one to three years. Applicants may request up to \$125,000 for any single year, but no more than \$300,000 over a three-year period. The deadline to apply for community food project funding is **March 30, 2005**. Application instructions can be obtained online at <http://www.csrees.usda.gov/fo/fundview.cfm?fonum=1080>, or from the USDA's Proposal Services Unit, (202) 401-5048.

Firefighter Grant Training Available Online

The PowerPoint presentation used by the Department of Homeland Security to help fire departments apply for the Assistance to Firefighters Grant program is now available online. The *2005 Applicant Workshop Presentation* covers such topics as changes to the AFG program for fiscal year 05; activities supported by the AFG program; regional applications; successful grant writing; grantee requirements; and the new Staffing for Adequate Fire and Emergency Response (SAFER) program, which supports hiring firefighters, and recruiting and retaining volunteer firefighters. The presentation can be downloaded from www.firegrantsupport.com/present.aspx. Approximately \$650 million will be available in the 2005 fiscal year through the AFG program. The month-long application period is expected to begin around March 7.

Preventing Teen Pregnancy: Online Grant-writing Training Available

Applying for abstinence grants and other funds that support teen pregnancy prevention and care services is now easier than ever. The Office of Population Affairs has created an online training course for organizations interested in competing for funds from the Office of Adolescent Pregnancy Programs. OAPP awards approximately \$30 million annually through its Adolescent Family Life Demonstration and Research program for projects that involve developing, testing and using sexuality education curricula to promote abstinence among adolescents until marriage; developing interventions with pregnant and parenting teens, their infants, male partners and family members to address the challenges facing teen parents, their babies and their families; and research the causes and consequences of adolescent premarital sexual relations, adolescent pregnancy and teen parenting. The online tool is intended to improve the grant-writing skills of potential Adolescent Family Life program applicants. It contains an introduction to the program and the application kit, as well as lessons on key elements to include when describing an organization; how to identify the proposed project and geographic area; creating effective program objectives; describing the proposed program; identifying support for the proposed program; developing an evaluation plan; creating a summary and appendices; and presenting the budget

description. The program also contains a course review. The OAPP Grant Application Training Course can be accessed at <http://opa.osophs.dhhs.gov/titlexx/training/oapp-training.html>.

Upcoming Grants and Deadlines

Training and Technical Assistance Targeting Ryan White CARE Act Title IV Grantees. This grant is designed to provide training and technical assistance to Ryan White CARE Act Title IV grantees and other programs with an interest in improving access to primary medical care, research and support services for HIV-infected infants, children, youth, women and their families. The grant funds are available to nonprofit entities, schools and academic health science centers. The application deadline for the grant is April 2, 2005. The contact for the grant is Helen Rovito at 301.443.3286. For further information, please visit www.hrsa.gov/grants/preview/hivaid.htm#hrsa05042.

Immigration Related Employment Discrimination Public Education Programs. This grant is designed to help eligible grantees conduct public education programs about the rights afforded potential victims of employment discrimination and the responsibilities of employers under the antidiscrimination provision of the Immigration and Nationality Act. State and local government agencies, community- and faith-based organizations, small and large business associations, labor and immigrant organizations, and employer groups and associations are eligible for the grant funds. The deadline for grant application is March 21, 2005. For further information, please contact Lilia Irizarry at 202.616.5594.

Migrant and Seasonal Farmworkers Program. This grant is funded in order to support vocational rehabilitation services for individuals with disabilities who are migrant and seasonal farm workers and their family members. To be eligible the applicant must be a state-designated agency, or nonprofit or local agencies working in collaboration with a state agency. The application deadline is March 7, 2005, and the contact person is Theresa DeVaughn at 202.245.7321.

Recreational Programs. The fund uses for this grant are to provide individuals with disabilities with recreational activities and related experiences to aid in their employment, mobility, socialization, independence and community integration. State, public agency and private nonprofit organizations are eligible, and the application deadline is March 29, 2005. For more information contact Pedro Romero at 202.245.7645.

Airport Improvement Program. The Airport Improvement Program funds are available to make capital improvements to airport facilities. Airports that have received Airport Improvement Program entitlement funds, except those nonprimary airports located in designated block grant states, are eligible to receive these grant funds. The deadline for application is May 1, 2005. The contact for more information is Barry Molar at 202.267.3831.

- Cleaning and laundering uniforms or other distinctive clothing required by the employer, at least to the extent that it cuts into the minimum wage (*Marshall v. S.F. of Ohio Inc.*, 25 Wage and Hour Cas. (BNA) 227 (S.D. Ohio 1981))
- Charitable work requested or controlled by the employer (29 C.F.R. § 785.44)
- Cleaning and oiling machinery (29 C.F.R. § 785.24(b)(1))
- Fire drills or other disaster drills, whether voluntary or involuntary, either during or after regular working hours (FOH § 31b15)
- Meal periods, if: (a) employees are not free to leave their posts; or (b) the time is too short to be useful to employees (29 C.F.R. § 785.19)
- Medical attention during working hours at the employer's direction (29 C.F.R. § 785.43)
- On-call time where liberty is restricted (29 C.F.R. § 785.17)
- Preparatory work that is part of the principal activity (*Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984))
- Rest periods of 20 minutes or less (29 C.F.R. § 785.18)
- Training programs required by employer (29 C.F.R. § 785.27)
- Training in regular duties to increase efficiency (29 C.F.R. § 785.15)
- Traveling (but not performing work) from one work site to another or traveling out of town during work hours (29 C.F.R. § 785.38, § 785.39)
- Attendance at hearings which are a regular part of the employee's duties. (29 C.F.R. § 541.602(b)(3))
- Time spent by a canine officer caring for animals under his or her control which exceeds that necessary for caring for household pets. (*Cooley v. United States*, 26 Wage & Hour Cas. (BNA) 50 (Fed.Cir. 1983))
- Time spent cleaning and maintaining vehicles pursuant to city rules. (Wage and Hour Opinion Letter, Dec. 30, 1985)
- Travel during working hours. (29 C.F.R. § 785.36)
- Sleep time if the employee is on duty for 24 or more hours. (29 C.F.R. § 785.21; FOH § 31b00)
- Sleep time for public safety employees on shifts of 24 or fewer hours; for shifts greater than 24 hours, sleep time may be treated as non-compensable pursuant to an employer-employee agreement. (29 C.F.R. § 553.201; *see also* Wage and Hour Opinion Letter, June 25, 1990; Wage and Hour Opinion Letter, Sept. 11, 1987)
- Caring for tools that are a principal part of job activities. (*Cooley v. United States*, 26 Wage & Hour Cas. (BNA) 50 (Fed.Cir. 1983))
- Participation in an athletic event, even if sponsored by employer (FOH § 31b05)
- Changing clothes, if the change is for the employee's convenience (29 U.S.C. § 203(o))
- Clothes changing at home (FOH § 31b13)
- Holidays on which an employee does not work (29 C.F.R. § 778.218(d))
- Jury Duty (29 C.F.R. § 778.218(d))
- Meal periods involving no duties and lasting one half hour or longer (29 C.F.R. § 785.19). Special rules exist for firefighters— no exclusion for meal time during shifts of 24 hours or less; meal time may be excluded by agreement on shifts of more than 24 hours. (29 C.F.R. § 553.223(d))
- Medical attention outside of working hours, not at the direction of the employer (29 C.F.R. § 785.43)
- On-call time where the employee merely leaves the telephone number and is not restricted (29 C.F.R. § 785.17)
- Operation of an employer's motor vehicle for an employee's own commuting convenience (FH § 31c02)
- Personal time for a worker who lives on his or her employer's premises (29 C.F.R. § 785.23)
- Time spent before, after or between regular working hours (29 C.F.R. § 790.7)
- Training programs voluntarily attended that are unrelated to regular duties and involve no productive work (29 C.F.R. § 785.27)
- Traveling from home to work site, and vice versa (29 C.F.R. § 785.35), and overnight trips, during nonworking hours, except while performing duties or other work (29 C.F.R. § 785.39)
- Waiting time in paycheck line, to check in or out, and to start work at a designated period (29 C.F.R. § 790.7(g))
- Washing up or showering under normal conditions (29 C.F.R. § 790.7(g))
- Time spent by an officer on standby for a court appearance, where ample freedom of movement is provided, even if the officer is not permitted to drink alcohol.

Sporadic or Occasional Part-Time Work

The FLSA permits municipal employees to perform part-time work for the municipality during off-duty hours without the extra hours of work counting toward computation of overtime hours. *See* 29 U.S.C. § 207(p)(2). However, two major restrictions apply to this exception:

- the additional part-time work may be done only on an occasional or sporadic basis; and
- the work must be in a different capacity from the employee's regular work. *See* 29 C.F.R. § 553.30(c)(3).

Non-Compensable Time Situations

- Absences (including sick leave, annual leave, holidays, funerals and weather-related absences) (29 C.F.R. § 778.218(d))

continued next page

“Occasional and sporadic” means infrequent, irregular, or occurring in scattered instances. *See* 29 C.F.R. § 553.30(b)(1). The decision to work in the different capacity must be made freely by the employee. *See* 29 C.F.R. § 552.30(b)(2).

Special Detail Work

The FLSA allows public safety employees to perform special detail work for second employers without the additional hours counting toward the primary employer’s overtime liability. Two criteria must be met:

- The special detail work must be performed at the option of the employee, and
- The employers must, in fact, be separate and independent.

If these criteria are satisfied, the municipality has several options for establishing a special detail work program. It may require, by ordinance, that city police officers be hired to work at certain events (concerts, parades, etc.) without incurring any liability for overtime pay. Or the municipality may maintain a list of employees willing to perform such work; select officers from the list; negotiate their pay; and retain a fee for administrative costs. It may require payment of the fee directly to the municipality and may compensate the officers through the regular payroll.

Substitution

Employees may substitute for each other during regular hours without the additional work counting toward computation of overtime hours if:

- The substitution is voluntarily undertaken by the employees, and
- The employer approves.

Each employee in such a situation will be presumed to have worked his or her regular schedule. *See* Wage and Hour Opinion Letter, Aug. 23, 1974; *see also* Wage and Hour Opinion Letter, June 17, 1994.

Recordkeeping

Employers are responsible for adequate records on all covered and exempt employees. *See* 29 U.S.C. § 211(c); 29 C.F.R. Part 516). Such records must include, at a minimum:

- Name and Social Security number or employee identification number. (29 C.F.R. § 516.2)
- Home address. (29 C.F.R. § 516.2(a)(2))
- Date of birth, if under 19. (29 C.F.R. § 516.2(a)(3))
- Sex and occupation. (29 C.F.R. § 516.2(a)(4))
- Time of day and day of week on which the work week begins; for public safety employees, the starting time and length of the employees’ work period. (29 C.F.R. § 516.2(a)(5))

- Regular hourly rate of pay for any work week in which overtime compensation is due. (29 C.F.R. § 516.2(a)(6))
- Hours worked each day and total hours worked for each week. (29 C.F.R. § 516.2(a)(7))
- Total daily or weekly straight-time earnings or wages due for hours worked during the work day or workweek (29 C.F.R. § 516.2(a)(8))
- Total premium for overtime wages (29 C.F.R. § 516.2(a)(9))
- Total additions or deductions from wages each pay period. (29 C.F.R. § 516.2(a)(10))
- Total wages each pay period. (29 C.F.R. § 516.2(a)(11))
- Date of payment and the pay period covered by payment. (29 C.F.R. § 516.2(a)(12))

The FLSA does not specify a particular form for keeping records, provided all information is kept. Records need not be kept on workers in positions which are not defined as employees under the FLSA.

For further information on the Fair Labor Standards Act, please visit the United States Department of Labor website at www.dol.gov. ■

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Alabama Citizens Pay for Highway Litter

More than \$5 million of Alabamians' taxpayer money was earmarked for highway litter and debris cleanup last year. One environmental activist says the amount is greater than the Legislature's entire allocation to the state's anti-pollution watchdog agency.

Pat Byington is a Birmingham ecologist who is on the state Environmental Management Commission. The commission oversees the Alabama Department of Environmental Management (ADEM), which regulates the air, landfills and water.

Byington stated, ADEM usually receives just under \$4 million annually from state lawmakers. He said while the more than \$5 million spent by the Alabama Department of Transportation (ALDOT) cleaning up alongside highways shows how ADEM needs more state support, it also confirms Alabama is becoming "the ultimate throw-away society. Of the \$5.01 million ALDOT budgeted for highway cleanliness, nearly \$1.95 million of it was for tidying up the rights-of-way along interstates and U.S. thoroughfares in and near Birmingham. The money spent cleaning up after litterbugs could be better used for filling potholes, widening highways and building new ones.

An assistant state maintenance engineer for management and training at ALDOT, emphasizes that the more than \$5 million was not entirely for picking up litter. ALDOT also has to clean ditches and gutters to ensure proper drainage and remove potentially hazardous obstructions from the lanes and shoulders. Some examples are pieces of blown-out truck tires and items that fly off poorly-strapped 18-wheelers.

We all acknowledge the environmental benefits of keeping debris and trash out of creeks, rivers and lakes because they could harm wildlife. Our goal should be to display the best image that we can for our state, for people that live here and tourists and visitors that travel through Alabama. Not only do we want to have a smooth, comfortable drive through Alabama, but it should also be aesthetically pleasing. Our sister states budgeted the following amounts for their transportation departments for similar programs: Georgia, \$14 million; Florida, \$10.2 million; Tennessee, \$4.76 million; and Mississippi, \$2.27 million.

James C. Howland Award for Municipal Enrichment

The National League of Cities is celebrating 16 years of recognizing successful local government initiatives. Has your city or town made a significant difference in the quality of life for your community? If so, share the news about those accomplishments by submitting a nomination to the National League of Cities' 2005 James C. Howland Award for Municipal Enrichment, sponsored by CH2M HILL.

This prestigious community award honors all population sizes and is divided into four winning categories, under 50,000; 50,001 – 150,000; 150,001 – 500,000; and more than 500,000. Each category will have two winners, Gold and Silver.

Criteria for this award are based on program innovation, local government implementation and the measurable benefit to the community and local government. A complete listing of the criteria, eligibility requirements, additional information, and a nomination form is available at www.nlc.org/resources_for_cities/awards_recognition/118.cfm.

2005 Howland Awards Deadline: June 16, 2005.
For more information, please contact the National League of Cities at 202-626-3000 or write to Kelly@nlc.org. ■

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2005. This is of significant interest to cities; presently, 40% of CARE Act funds go directly to cities.

Energy Environment and Natural Resources

With the exception of funding for municipal wastewater, programs of interest to cities and towns would receive modest increases under the President's proposed fiscal year 2006 budget request for the Environmental Protection Agency (EPA).

Wastewater. Of the 150 programs the administration is proposing to eliminate or significantly reduce, four are within the purview of the U.S. Environmental Protection Agency. Reductions are proposed in the Clean Water State Revolving Fund (CWSRF) (proposed reduction of \$274 million to \$730 million) and funding for Alaska Native Village wastewater needs (reduced from \$40 to \$15 million because of poor performance and poor results). The proposed budget would also eliminate earmarks for special projects (\$500 million) and funding for Water Quality Cooperative Agreements and wastewater operator training programs (\$22 million).

Reductions in funding for the CWSRF have consistently been proposed for over 8 years by both the Clinton and Bush Administrations. As budget documents again indicate, "[m]ore than \$22 billion has already been provided to capitalize the CWSRF, well over twice the original Clean Water Act authorized level of \$8.4 billion." Over \$52 billion, which includes state match and repayments to the fund, has been made available since the 1987 Clean Water Act Amendments, of which "more than \$48 billion has been provided to communities as financial assistance."

Drinking Water. The President proposes to restore funding for the Drinking Water State Revolving Fund (DWSRF) to its fiscal year level of \$850 million. While Congress appropriated \$850 million for the program in FY 2005, the omnibus appropriations measure subjected all programs to an across the board .08 percent reduction, which reduced funding for the drinking water loan program to \$782 million for the current fiscal year. Since the program was enacted in 1996 (and funding begun in 1997), the DWSRF has made \$7.9 billion available primarily to small drinking water systems not in compliance with Safe Drinking Water Act standards.

The administration is again requesting that Congress continue state authority, first approved in the 1996 Safe Drinking Water Act Amendments, to transfer up to 35 percent of DWSRF funds to the CWSRF and vice versa.

In addition, the administration is requesting enactment of a Water Sentinel Initiative, a \$44 million pilot project in

five major cities to "develop an operational water monitoring and surveillance system for dangerous contaminants" in drinking water. "The program will demonstrate a standardized, cost-effective approach . . . to enhance water security."

Superfund. The Administration's budget proposes to increase funding for the nation's hazardous waste site clean up program to \$1.3 billion, \$32 million above the current funding level. The budget proposal indicates that the increase is necessary to address the size and complexity of cleaning up the remaining sites on the National Priorities List (NPL). According to the budget, EPA estimates that remedial action at the approximately 80 plus large sites remaining on the NPL can cost \$132 million per site.

Brownfields. The President is seeking an increase of \$46 million over current funding levels for Brownfields remediation for a total of \$210 million for fiscal year 2006. Brownfields are old abandoned industrial sites with modest contamination requiring cleanup before being available for productive reuse. Funding is available for site assessment, cleanup and job training activities. The proposed amount would fund remediation at about 6,000 sites.

Public Safety

The President's budget proposal reduces or eliminates several programs that the Administration claims "do not have a record of demonstration results." For example, the Administration argues that programs such as the Community Oriented Policing Services (COPS) Hiring Grants, COPS Law Enforcement Technology Grants, Byrne Justice Assistance Grants (JAG), and Byrne Discretionary Grants have not had a demonstrably effective impact on reducing crime. The Administration proposes eliminating these programs, which it claims will save \$940 million a year.

The President's budget allocated \$118 million for the COPS account, but proposes to cancel \$95.5 million of unobligated balances available under the COPS account – leaving only \$22 million in new budget authority. It is unclear whether multi-year grants that are currently in their second or third year would be cancelled under the budget proposal.



*The best thing
about the future is that
it only comes one day at a time.*

— Abraham Lincoln

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