phers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ 553.5 20-percent limitation on nonexempt work.

Employees engaged in fire protection or law enforcement activities, as described in §§ 553.3 and 553.4, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their firefighting activities. For example, those who work for forest conservation agencies may, during slack periods, plant trees and perform other conservation activities. The performance of such nonexempt work will not defeat either the section 7(k) or 13(b)(20) exemption unless it exceeds 20 percent of the total hours worked by the particular employee during the applicable work period.

§ 553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Some public agencies have employees (sometimes referred to as public safety officers) who engage in both law enforcement activities and fire protection activities, depending upon the agency needs at the time. This dual assignment would not defeat either the section 7(k) or 13(b)(20) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.3 (a), 553.4(a) and (e). This is so regardless of how the employees divide their time between the two types of activities. If, however, either the fire protection or law enforcement activities do not meet the tests of § 553.3(a) or §§ 553.4(a) and (e), and if such nonqualifying activities, standing alone or in conjunction with

some other nonexempt activity, exceed 20 percent of the employee's total hours of work in the work period, neither exemption would apply.

§ 553.7 Employees attending training facilities.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing public agency, does not constitute engagement in exempt activities, unless the employee in question meets all the tests described in § 553.3(a) or § 553.4(a), as the case may be, in which event such training or further training would be incidental to, and thus part of, the employee's fire protection or law enforcement activities. Only the time spent in actual training or retraining constitutes compensable hours of work. All other time, such as that spent in studying and other personal pursuits, is not compensable hours of work even in situations where the employee is confined to campus or to barracks 24 hours a day. See § 553.14. Attendance at training facilities and schools, which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for further advancement, need not be counted as working time even though the public agency may pay for all or part of such training.

§ 553.8 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received

special training in the rescue of fire and accident victims or firefighters injured in the performance of their firefighting duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, riots, natural disasters and accidents.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered employees. This would include employees of public agencies engaged in the operation of a hospital; an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions; a school for mentally or physically handicapped or gifted children; an elementary or secondary school; an institution of higher education; a street, suburban, or interurban electric railway; or local trolley or motor bus carrier.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency.

§ 553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.

(a) If an employee regularly engaged in exempt fire protection or law enforcement activities also works for another department or agency of the same State or political subdivision, such employee will lose the exemption if the other work is unrelated to fire protection or law enforcement activities. For example, if a city police officer also works

as a clerk in the city health department, which is clearly nonexempt work, the city could not claim the section 7(k) exemption for such employee and would have to pay overtime compensation for all hours worked for the two agencies in excess of 40 per week. See 29 CFR 778.117 for an explanation of how overtime compensation is computed in such a situation. If, however, such employee's other job for the city is also exempt work, as, for example lifeguarding at a seasonally operated city beach which work is exempt from both the Act's minimum wage and overtime provisions by virtue of section 13(a)(3), the city would be entitled to claim the lesser of the two exemptions which, in the example given would be the section 7(k) exemption, and it would have to pay overtime compensation only for the combined hours (if any) which are in excess of the employee's tour of duty.

(b) These same principles also apply where the fire protection or law enforcement employee works for another public or private employer who, although entirely separate from the employee's regular employer, is nonetheless a joint employer with the fire protection or law enforcement agency. Usually, of course, working for a separate employer does not affect the employee's status as an employee engaged in fire protection or law enforcement activities or the employing agency's right to claim the section 7(k) or 13(b)(20) exemption. In some limited circumstances, however, the relationship between the fire protection or law enforcement agency and the other employer is so closely related that they must be treated as joint employers. Such a joint employment relationship exists where the work done by the employee simultaneously benefits both employers and where it is done pursuant to an arrangement between the employers to

share or interchange employees, or where one employer acts directly or indirectly in the interest of the other employer in relation to the same employee, or where the employers are so closely associated that they share control of the employee, directly or indirectly. See 29 CFR Part 791.

(c) To illustrate, if a police officer independently finds after-hours employment as a repair mechanic in a gas station or as a security guard in a department store, there would be no joint employment relationship between the police department and the second employer. This would be so even if the police officer wore his or her uniform at the second job and even if the police department engaged in such "brokering" functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers. Nor would it matter whether the police department also established a wage scale for such extra outside work and approved it so as to avoid any conflict of interest problem. On the other hand, if the second employer is required by local ordinance or otherwise to hire a police officer to control crowds at a stadium or to direct traffic at a sports arena or during a parade, such employment benefits both the police department and the second employer, and, since both act in the interest of the other, a joint employment relationship is created.

§ 553.10 Mutual aid.

If employees engaged in fire protection activities voluntarily respond to a call for aid from a neighboring jurisdiction, they are volunteers in rendering such aid and their employer is not required to compensate them for the time spent in the neighboring jurisdiction. See § 553.10. If, however, the employees respond to such a call because their employer has a mu-

tual aid agreement with a neighboring jurisdiction or if the employees are directed by their agency to respond, all hours worked by these employees in rendering such aid must be added to their regular hours of work for purposes of the section 7(k) exemption.

§ 553.11 Fire protection and law enforcement volunteers.

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average $2.50 per call will be considered nominal. Payments in excess of this amount may also qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the volunteer. For purposes of this paragraph, it is not necessary for the

agency to maintain an exact record of expenses.

(b) Where, however, individuals engaged in fire protection or law enforcement activities receive more than a nominal amount or payment on a basis which does not reasonably approximate the expenses incurred by them, they are employees rather than volunteers and must be paid in accordance with the Act's requirements.

(c) Volunteers engaged in fire protection or law enforcement activities may include individuals who are employed in some other capacity by the same public agency. For example, a civilian PBX operator of a public agency engaged in law enforcement activities may also be a volunteer member of the local police reserve force. Similarly, an employee of a village Department of Parks and Recreation may serve as a volunteer firefighter in his or her local community.

(d) Police officers or firefighters of one jurisdiction may engage in fire protection or law enforcement activities on a voluntary basis for another jurisdiction where there is no mutual aid agreement or other relationship between the two jurisdictions. Such employees cannot, however, perform fire protection or law enforcement activities on a voluntary basis for their own agency, although they can engage in other activities not directly related to these primary functions. For example, a paramedic employed by a city fire department could volunteer to give a course in first aid at the city hospital and a police officer could volunteer to counsel young juveniles who are members of a boy's club or other similar organizations.

RULES FOR DETERMINING THE TOUR OF DUTY, WORK PERIOD AND COMPENSABLE HOURS OF WORK

§ 553.12 General statement.

(a) In extending the Act's coverage to public agency employees engaged in fire

protection and law enforcement activities, Congress, recognizing the uniqueness of these activities, established section 7(k) which permits the computation of hours worked on the basis of a work period (which can be longer than a workweek) and which bases the overtime requirements on a work period concept. In adding this provision, Congress made it clear that some adjustment would have to be made in the usual rules for determining compensable hours of work (Conf. Rept. 93-953, p. 27) and where the employer elects section 7(k), these rules must be used for purpose of both the Act's minimum wage and overtime requirements.

(b) If, however, any public agency chooses not to claim the partial overtime exemption provided in section 7(k), but elects to pay overtime compensation as required by section 7(a), it need not concern itself with the "tour of duty" or "work period" discussion which follows or with the special rules relating to the determination of what constitutes compensable hours of work since, in that event, overtime would be payable on a workweek basis and the regular method of computing "hours worked" as set forth in 29 CFR Part 785 would apply. Such an agency would not, however, be able to take advantage of the special provisions of Part 553 relating to the balancing of hours over an entire work period, trading time and early relief.

§ 553.13 Tour of duty.

The term "tour of duty," as used in section 7(k), means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to shifts, i.e., the period of time which elapses between scheduled arrival and departure times, or to scheduled periods outside the shift,

as in the case of a special detail involving crowd control during a parade or other such event. Unscheduled periods refer to time spent in court by police officers, time spent handling emergency situations, or time spent after a shift in order to complete required work. When an employee actually works fewer hours than those scheduled, the employee's tour of duty is reduced accordingly. Nothing in section 7(k) precludes employers (acting pursuant to collective bargaining agreements or in accordance with their own authority) from establishing new tours of duty for their employees, provided, however, that the change is intended to be permanent at the time that it is made.

§ 553.14 General rules for determining compensable hours of work.

(a) Compensable hours of work generally include all of that time during which an employee is on duty or on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such hours thus include all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related and indispensable to its performance, such as attending roll call, writing up and completing reports or tickets, and washing and re-racking fire hose. It also includes time which an employee spends in attending required training classes. See § 553.7. Time spent away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits, also constitutes compensable hours of work. For example, a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness, is engaged in

compensable hours of work. On the other hand, employees who are confined to barracks while attending police academies are not on duty during those times when they are not in class or at a training session since they are free to use such time for personal pursuits. This would also be true in a forest fire situation where employees, who have been relieved from duty and transported away from the fire line, are, for all practical purposes, required to remain at the fire camp because their homes are too far distant for commuting purposes. Also, a police officer who has completed his or her tour of duty but who is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls would be compensable, except in those instances where it is miniscule and cannot, as an administrative matter, be recorded for payroll purposes.

(b) Additional examples of compensable and noncompensable hours of work are set forth in 29 CFR Part 785 which is fully applicable to employees for whom the section 7(k) exemption is claimed except to the extent that it has been modified below in § 553.15.

§ 553.15 Sleeping and meal time as compensable hours of work.

(a) Where the employer has elected to use the section 7(k) exemption, sleep and meal time cannot be excluded from compensable hours of work where (1) the employee is on duty for less than 24 hours, which is the general rule applicable to all employees (29 CFR 785.21) and (2) where the employee is on duty for exactly 24 hours, which represents a departure from 29 CFR 785.21.

(b) Sleep and meal time may, however, be excluded in the case of fire pro-

tection or law enforcement employees who are on duty for more than 24 hours, but only if there is an express or implied agreement between the employer and the employee to exclude such time. In the absence of any such agreement, sleep and meal time will constitute hours of work. If, on the other hand, the agreement provides for the exclusion of sleep time the amount of such time shall, in no event, exceed 8 hours, in a 24-hour period, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time. If such sleep time is interrupted by a call to duty, the interruption must be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes, means at least 5 hours), the entire time must be counted as hours of work.

§ 553.16 Work period.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the pay period or with a particular day of the week or hour of the day. Once the beginning time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within that period. The beginning of the work period, may, of course, be changed, provided that the change is intended to be permanent at the time that it is made.

(b) An employer may have one work period applicable to all of its employees, or different work periods for different employees or groups of employees. Prior

approval from the Wage and Hour Division is not required. The employer must, however, make some notation in its records which shows the work period for each employee and which indicates the length of that period and its starting time.

(c) For those employees who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required until the ratio between the number of days in the work period and the hours worked during such work period exceeds the ratio between a work period of 28 days and 240 hours, at which point all additional hours are paid for at one and one-half times the employee's regular rate of pay.

(d) The ratio of 240 hours to 28 days is 8.57143 hours per day (8.57 rounded). Accordingly, overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay must be paid during calendar year 1975 for all hours worked in excess of the following maximum hours standards:

Work period (days) :	*Maximum hours standard*
28	240
27	231
26	223
25	214
24	206
23	197
22	189
21	180
20	171
19	163
18	154
17	146
16	137
15	129
14	120
13	111
12	103
11	94
10	86
9	77
8	69
7	60

§ 553.17 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift or tour of duty prior to the scheduled starting time. Such early relief may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer the time involved must be added to the employee's tour of duty and treated as compensable time.

§ 553.18 Trading time.

Another common practice or agreement among employees engaged in fire protection or law enforcement activities is that of substituting for one another on regularly scheduled tours of duty (or for some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. This practice is commonly referred to as "trading time." Although the usual rules for determining hours of work would require that the additional hours worked by the substituting employee be counted in computing his or her total hours of work, the legislative history makes it clear that Congress intended the continued use of "trading time" "both within the tour of duty cycle * * * and from one cycle to another within the calendar or fiscal year without the employer being subject to [additional overtime compensation] by virtue of the voluntary trading of time by employees" (Congressional Record, March 28, 1974, Page S 4692). Accord-

ingly, the practice of "trading time" will be deemed to have no effect on hours of work if the following criteria are met: (a) The trading of time is done voluntarily by the employees participating in the program and not at the behest of the employer; (b) the reason for trading time is due, not to the employer's business operations, but to the employee's desire or need to attend to personal matter; (c) a record is maintained by the employer of all time traded by his employees; (d) the period during which time is traded and paid back does not exceed 12 months.

§ 553.19 Time off for excess hours or so-called "comp time."

(a) As a general rule, all overtime hours must be paid for in cash and not in time off. Section 7(k) creates a partial exception to this general rule by allowing employers to balance the employee's hours over a work period, which, as indicated in § 553.16, may be longer than a workweek, and to pay the overtime compensation required by the Act only if the employee's hours exceed the total number of hours established by section 7(k) for that particular work period. Thus, for example, if the duration of the employee's work period is 28 consecutive days, and he or she works 80 hours in the first week, but only 60 in the second week and 50 in each of the next 2 weeks, no additional overtime compensation would be required, since the total number of hours worked does not exceed 240. Of course, there might be a State law requiring overtime compensation at some earlier point (e.g., for any hours worked in excess of 40 in a week), but that obligation could be met with "comp time," if comp time is permissible under State law and if the wages paid to the employee for all hours worked during the entire 28-day tour of duty equal at least the minimum wage set forth in section

6(b) of the Act (29 U.S.C. 206(b)). Similarly, an employee whose work period is 1 week could be paid in "comp time" for all excess hours up to 60, provided that comp time is a permissible form of payment under State law and provided, also, that the wages paid to the employee equal at least the statutory minimum wage. Such "comp time" could be taken at any time authorized by state law or local ordinance.

(b) If the employee in either of the examples given above works more than the stated number of hours for a 7-day or 28-day work period, overtime compensation must be paid at one and one-half times the employee's regular rate. In computing the employee's regular rate, the cash equivalent of any comp time must be included. See also § 553.20.

§ 553.20 The "regular rate".

The rules for computing an employee's "regular rate," for purposes of the Act's overtime requirements, are set forth in 29 CFR Part 778. These rules are fully applicable to employees for whom the section 7(k) exemption is claimed, except that wherever the word "workweek" is used the word "work period" should be substituted.

§ 553.21 Records to be kept.

The recordkeeping requirements of the Act are set forth in 29 CFR Part 516. These requirements are applicable to public agencies engaged in fire protection and law enforcement activities, except that where section 7(k) is claimed, the records for those employees can be kept on a work period, instead of a workweek, basis. In addition, the records must show, as indicated in § 553.16(b), the work period for each employee.

Signed at Washington, D.C. this 18th day of December 1974.

BETTY SOUTHARD MURPHY,
Administrator.

[FR Doc.74-29843 Filed 12-19-74;8:45 am]

Affidavit of Jack I. Karlin, Dec. 27, 1974
(in Support of Defendant's Motion to Dismiss)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs	)	
v.	)	Civil Action
	)	No. 74-1812
THE HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant	)	

AFFIDAVIT

District of Columbia) SS:

Jack I. Karlin, being duly sworn, deposes and says:

1. I am Director, Division of Evaluation and Research, Office of Program Development and Accountability, Employment Standards Administration, U.S. Department of Labor.

2. As such I am responsible for all the long term research conducted by and for the Employment Standards Administration (ESA) including the development of all official coverage and impact estimates for the laws administered by ESA.

3. I have been employed by the Department of Labor since April 1940, preparing coverage estimates, estimates of impact and economic effects studies. For the past four

years I have been the Director of Evaluation and Research.

4. In connection with the issuance of 29 C.F.R. Part 553, I was asked to estimate the cost of the impact of the overtime provisions on State and local government public safety employees (policemen, firemen and security personnel in correctional institutions). The $27 million dollar estimate included in Part 553 as published in the Federal Register on December 20, 1974, 39 F.R. 44142, is based upon the following:

5. The March 1970 survey[1] of hours for State Government employees shows that 3.1 percent of public safety employees worked more than 48 hours in the survey week.[2] The survey of hours for local government employees shows that 11.0 percent of public safety employees worked more than 48 hours in the survey week.[3] Using recognized statistical methods, my staff extrapolated from the survey estimates of the percentage of such employees working over sixty hours and the average number of hours over 60 worked by them.

6. These estimates are:

(a) 0.4 percent of the State public safety employees worked over 60 hours per week, and averaged 6.9 hours per week over 60.

(b) 3.8 percent of the local government public safety employees worked over 60 hours per week, and averaged 11.6 hours per week over 60.

---

[1] U.S. Department of Labor, Workplace Standards Administration, *Nonsupervisory Employees in State and Local Governments: Data Pertinent to an Evaluation of the Feasibility of Extending Minimum Wage and Overtime Protection under the Fair Labor Standards Act*, Washington, 1971. Defendant's deposition, Exhibit 37.

[2] Table 24, page A-28.

[3] Table 25, page A-29.

7. (a) These estimates are applied to the most recent (*i.e.*, as of October 1973) estimates of public safety employees who are covered by the 1974 Amendments and qualify for the 7(k) exemption. Thus, the 0.4 estimate is applied to 110,000, the total of State government employees. This yields a total of approximately 400 employees who worked more than 60 hours.

(b) The 3.8 estimate is applied to 477,000, the total of local government employees. This yields a total of approximately 18,000 employees who worked more than 60 hours.

8. (a) Multiplying 6.9 hours times 400 employees times 52 weeks equals approximately 144,000 hours over 60 per week worked by State public safety employees.

(b) Multiplying 11.6 hours times 18,000 employees times 52 weeks in the year equals approximately 10,860,000 hours over 60 per week worked by local government public safety employees.

9. The average hourly earnings was estimated to be approximately $5.00. This estimate was based on the March 1970 survey ($3.71) and updated to October 1974 according to the percentage change indicated in the monthly earnings reported in *Public Employment*, an annual Bureau of the Census publication, for police protection and local fire protection.

10. (a) Thus, the increased cost for overtime work (*i.e.*, the additional half-time premium) totals approximately $360,000 for State governments (144,000 hours times $2.50 per hour).

(b) The increased cost for local governments is $27,150,000 (10,860,000 hours times $2.50 per hour).

(c) The total of the above costs for State and local

governments as shown in this affidavit is $27,510,000.[4]

11. The cost was also estimated using the same technique on the combined State and local figures. This yielded a lower cost estimate. For the purpose of Part 553, the higher estimate was used.

/s/ Jack I. Karlin
Jack I. Karlin

Sworn and subscribed this 27th day of December, 1974.

/s/ Betty-Jo Boudine
Notary Public
My Commission Expires
November 30, 1978

[4] For the sake of simplification, more rounded figures were used in this affidavit. Using less rounded figures, the total was slightly lower.

Letter, William F. Danielson to Charles S. Rhyne, Dec. 24, 1974

CITY OF SACRAMENTO
DEPARTMENT OF PERSONNEL
201 NINTH STREET, ROOM 201
SACRAMENTO, CALIF. 70414

December 24, 1974

Mr. Charles S. Rhyne
Rhyne and Rhyne
400 Hill Building
839 – 17th Street, N.W.
Washington, D.C. 20006

Dear Mr. Rhyne:

Your office has requested that I provide a written explanation of my estimate of $200,000,000 additional costs to state and local governments during the calendar year 1975 for fire protection services and further additional costs in 1976, 1977 and 1978 as a result of the imposition of the Fair Labor Standards Act.

Estimated 220,000 Firefighters in United States

Mr. Gerald M. Feder, representing the International Association of Fire Fighters, in his testimony before the Department of Labor on November 21, 1974, stated that there are 220,000 full-time firefighters in the United States at this time. I have no reason to doubt that Mr. Feder's estimate of the number of firefighters in the United States is not correct. Recent survey data from the International City Management Association and from several official governmental sources confirm this estimate, either directly or indirectly.

Estimate of 205,700 Fire Suppression Employees

Not all uniformed firefighters are assigned to fire suppression. In the report which I prepared for the League of California Cities entitled, "Fire Department Working Conditions and Salaries", in January 1965, most California municipal fire departments were surveyed in detail. In 1964 in California cities surveyed there were 14,256 firefighters, of whom 923 were assigned to a 40-hour work week, performing administration, fire prevention, or other such duties, and 13,333 were assigned to fire suppression. Therefore, 6.47% of California firefighters were assigned to a 40-hour work week; 93.53% of California firefighters were assigned to fire suppression duties. The ratio of about 6.5% of firefighters being assigned to other than fire suppression activities is still a good one to use. If anything, with the reductions in duty hours which have taken place in the last ten years, requiring greater staffing in fire suppression than in fire prevention, it is possible that the percentage of firefighters assigned to fire suppression may be as high as 94 or 95%. However, I have chosen to be conservative in this calculation in every respect. Therefore, my estimate is that 93.5% of the 220,000 firefighters in the United States are assigned to fire suppression duties, or 205,700 firefighters.

Average Fire Salary is $11,123 Per Year

The federal Equal Employment Opportunity Commission recently released a compilation of the survey information contained within the EEO-4 forms submitted by 5,007 state and local governments throughout the United States. This information was gathered as of October 1973. The EEOC survey divides state and local

governments into fifteen occupational categories, one of which is fire protection. The median salary of fire protection employees is shown to be $11,123 per year, which, as I recall, is the highest median salary for any occupational group in state and local governments. The 1973 median salary of $11,123 times the estimated 205,700 fire employees assigned to fire suppression equals an annual salary expenditure for fire suppression activities of about $2,288,001,100. Adjusting this figure by a conservative 6% to add salary adjustments received since October 1973 increases the estimate of 1974 fire suppression salaries to $2,425,280,000.

International City Management Association
Fire Scheduling Survey

In May and June 1974, I wrote the questions which were used in the special survey of fire duty hour scheduling practices in United States cities over 10,000 population conducted by the International City Management Association. I reviewed the tabulation of the results of that survey and included this information as a part of the statement on behalf of the National League of Cities and other public interest groups which was submitted to the Department of Labor on July 5, 1974. Subsequently, this data has been refined and published by the Urban Data Service of the International City Management Association in October 1974 in the publication I co-authored entitled, "Fire Duty Schedules and the Fair Labor Standards Act". Table 5a of the Urban Data Service report shows a total of 1,263 cities reporting information as to the average number of firefighters' hours on duty per week, averaged over a year. Table 5b shows that, of the 1,263 cities, 1,068

report having an average fire duty week of 60 hours or less. Therefore, 195 cities, or 15.43% of the total number of cities reporting, indicate having an average duty week above 60 hours. The size of the fire departments which reported average hours on duty per week above 60 is somewhat smaller than the cities reporting an average of 60 hours a week or less. It is estimated that the 15.43% of cities represent at least 10% of the total fire suppression payroll. Therefore, 10% of the fire suppression payroll is $228,800,000. Using unpublished data of the array of duty weeks reported by cities above an average of 60 per week, the mean average duty week for the group of 195 cities is 68.0. For the particular group of cities whose average fire duty week is above 60, it will be necessary to reduce the hours on duty to 60 or less commencing January 1, 1975, to avoid the penalties imposed by the Fair Labor Standards Act. The reduction from an average of 68 to 60 is a reduction of 8 hours, equivalent to an average increase of 13.33% in fire suppression payroll costs. *Therefore, the 13.33% increase in the fire suppression payroll costs in cities with average fire duty schedules of over 60 per week is estimated to be a minimum of $30,499,000 ($228,800,000 x 13.33%).*

Additional Costs Caused by Fire
Duty Cycle vs. Work Period

The ICMA survey shows that less than half of the fire departments in the United States presently have fire duty cycles which fit immediately between 7 and 28 days. Forty-one percent (41%) of the cities have fire duty cycles ranging from 2 to 6 days. Nine and one-half percent (9.5%) have reported fire duty cycles in excess of 28 days.

The 41% of the cities which have fire duty cycles of less than 7 days will be able to declare a work period of between 7 and 28 days. However, it is difficult to estimate the additional costs to this particular group of cities. Some of the problems involved in estimating these costs are that there are three time cycles which interact for employees engaged in fire protection activities pursuant to the Fair Labor Standards Act:

1. The length of the *work period* to be declared;
2. The length of the *pay period* used by the governmental agency;
3. The length of the *fire duty cycle*.

Previously the Department of Labor has had to contend with only two time cycles: (1) the *work week* (*work period*) of 7 days (and for certain instititional and hospital employees which may be 14 days) and (2) the *pay period* of the employer. The problems of dealing with the third time cycle grow at least exponentially with the introduction of the *fire duty cycle* and will create hidden liability which many cities will not recognize until too late.

Almost all of the 205,700 fire suppression personnel have been paid on a salaried basis until now. For almost all firefighters, salaries have been expressed in terms of monthly or annual amounts. Relatively few firefighters have been paid by the hour. The basic concept of the Fair Labor Standards Act requires that persons covered under the Act be paid by the hour. It is the general practice of almost all private employers to pay employees covered by the Fair Labor Standards Act by the hour. The Fair Labor Standards Act will force state and local governments to convert, similarly, all covered employees to be paid by the hour in order to fully comply with all

of the provisions of the Code of Federal Regulations. (This is not mandated by the law, but is a practical necessity.) Until firefighter pay is converted to a unit of pay per hour, governmental agencies will be especially vulnerable to liabilities incurred while firefighters continue to be paid on the pre-FLSA salaried basis.

In the first year, the impact of the new law and its many regulations unquestionably will expose to liability a great many cities and other state and local public jurisdictions which have not had the time to understand fully the implications of the new law and its accompanying regulations. I have only received the final regulation 29 CFR 553 today, December 24. I have not yet had the opportunity to read and fully understand it. Relatively few of the public agencies in the United States will have had an opportunity prior to the effective date of January 1, 1975, to receive the final regulation and to comprehend its meaning and to take appropriate steps. Unquestionably a great many cities and other public agencies will not have taken the steps necessary to declare a work period and otherwise utilize the partial exemption under the 7(k) provision of the Act. Failure to utilize the 7(k) exemption will render cities liable to pay time and a half over 40 hours within 7 days to firefighters and to law enforcement officers. This liability will be very substantial and is difficult to estimate. However, I will try to do so.

Over half of United States cities (50.5%) report using fire duty cycles which are less than 7 days or greater than 28 days in length. In addition, as is indicated on page 4 of the Urban Data Service report, "it appears from the returns that about 15% to 20% of the fire schedules may use some form of pay back or Kelly Day. If this estimate

is correct, then the number of cities with fire duty cycles greater than 28 days is probably at least double that reported." This means that at least 60% of American municipal fire departments presently have fire suppression duty cycles which are either shorter or longer than the Section 7(k) work period options of 7 up to 28 days.

In fire departments with fire duty cycles longer than 28 days, it almost always will be necessary to revise the duty schedule to avoid paying substantial unnecessary overtime (even though no additional fire hours will be worked). In all fire departments which use "paybacks", it will be necessary to immediately cease this practice and revise the fire duty schedule. In many fire departments which use "Kelly Days", it will be necessary to revise the fire duty schedule in order to avoid unnecessary fire overtime. In departments which have practiced different types of scheduling during the summer than the rest of the year, and have averaged hours over a year, it will be necessary to change scheduling practices.

Many fire departments which have average duty hour schedules of 60 or less have assumed that no further action is necessary on their part because of the new law. It is not realized that although a fire department may have a 48-hour average duty week, that where the fire duty cycle is longer than 28 days, the city may be vulnerable to paying substantial unnecessary fire overtime.

I estimate that many of the 60% of the cities which have fire duty cycles which are less than 7 days in length or greater than 28 days will either fail to declare a work period for employees engaged in fire protection activities, or will fail to revise the fire duty cycle to protect the city

(or be precluded from doing so by state law), or will fail to declare a work period for fire employees which will adequately protect the city from payment of unnecessary fire overtime.

We are considering the extra additional costs to the cities for "employees engaged in fire protection" pursuant to the Fair Labor Standards Act regulations. The payroll of these cities (exclusive of the 10% for fire departments averaging over 60 hours per week) is estimated to be (60% of 90% of total payroll) 60% x $2,182,752,000 = $1,309,651,200.

Section 7(k) of the Act requires that two conditions be met in order for a public agency to qualify for the partial exemption: (1) a work period must be declared of between 7 and not to exceed 28 days; (2) during 1975, overtime at one and one-half must be paid for hours worked within the work period over a ratio of 60 hours to seven days. If a public agency does not meet both of these conditions, the 7(k) exemption does not apply, and Section 7(a) of the Act does apply. That is, the city is required to pay one and one-half in the work period for hours worked over 40 in seven days.

The most commonly used fire duty cycle in the nation is the average 56 hours duty week, in which a firefighter is on duty 24 hours and off duty 48 hours in every three-day cycle. In this instance, if a city would fail to declare a work period, the penalty would be that the salary of the fire employees would be considered to be applied to the first forty hours, and the city would be required to pay overtime at time and one-half for 16 hours. At time and one-half for 16 hours, the city would be liable to pay 24 hours extra on top of salary figured on a regular rate based on 40 hours. This is equivalent to

a 60% liability, at the least. If double damages are assessed, the liability could be 120% of payroll for all work periods in which this would occur.

If a city with a 24-hours-on-duty, 48-hours-off-duty (56 hours average) fire duty cycle should mistakenly declare a work period of 7 days, the penalty would be almost as costly as if the city declared *no* work period. On this arrangement, a city would have the following experience:

1st week: X O O X O O X 72 hours (12 hrs. overtime over 60 at 1½ = 18 hrs)

2nd week: O O X O O X O 48 hours (no overtime penalty)

3rd week: O X O O X O O 48 hours (no overtime penalty)

The city would have to pay overtime for 18 hours every third week, even though no overtime was worked. If the city failed to pay overtime in any week when 72 hours were worked, then the city would be liable to pay 32 hours of overtime at time and one-half equal to 48 hours of additional pay every three weeks. The exposure of 48 hours for every 168 hours worked is equivalent to 28.57% liability of total fire suppression payroll.

Liability exposure will vary from one community to another, but in all cases it will be substantial. In many cities, there will be a risk of exposure to overtime claims from firefighters which will be in excess of 100% of firefighter salary, even though no overtime is worked by firefighters.

It is a virtual certainty that where the liability may exist that claims will be filed sooner or later with the Department of Labor to collect.

Many cities will manage to avoid the booby traps which are set within the Fair Labor Standards Act, but some cities will fall victim to them. I have been receiving telephone calls and correspondence from throughout the United States for several months now from fire chiefs, city managers, personnel directors, mayors, and other officials concerned with the law. The state of knowledge of the Act is minimal at this time among officials who will be responsible for administering the Act and its provisions.

I estimate that at least 25% of United States cities will fall victim to the Fair Labor Standards Act and become liable to pay for fire overtime, although no overtime is worked, during 1975. Probably these claims will not surface until the latter part of 1975 and, therefore, these cities will be confronted with substantial claims for fire overtime either during or by the end of 1975. I do not know, and cannot know, the extent to which cities will be assessed double damages for such overtime claims.

Using conservative assumptions, it is likely that 25% of the cities with fire duty cycles less than 7 days or greater than 28 days will, during 1975, incur fire overtime liability for fire suppression ranging from a few days to the entire year. I estimate that potential additional penalties will be about 40% of fire payroll for these cities. Estimated cost, therefore, is $130,900,000 (25% of $1,309,651,200 = $327,250,000 x .40 = $130,900,000).

A similar liability exposure exists for the cities which do have fire duty cycles of between 7 and 28 days. These cities do not have quite the problems in adjusting fire schedules nor the hazards in the same degree as the cities which have fire duty cycles of less than 7 or greater than 28 days. Therefore, the risk factor is less. The annual fire

payroll for these cities is (40% of 90% of total payroll) 40% of $2,182,752,000 = $873,100,800. If only 10% of these cities fail to declare a work period, or declare an erroneous work period, the payroll exposed to liability will be: 10% x $873,100,800 – $87,310,080. Again, if exposed, the penalty will be probably about 40%. Therefore, estimated overtime penalty in 1975 for cities with these fire duty cycles is: 40% x $87,310,080 = $34,924,030.

Summary Estimated 1975 Costs

In summary, estimated 1975 costs to state and local public agencies for fire protection caused by the Fair Labor Standards Act will be:

1. Reduction to 60 hour maximum fire duty schedule	$ 30,499,000
2. Costs to jurisdictions with fire duty cycles less than 7 or greater than 28 days	130,900,000
3. Costs to jurisdictions with fire duty cycles of between 7 days and 28 days	34,924,000
4. Extra costs related to joint employment provisions of the Act	10,000,000
	$206,323,000

There are so many ways for a public agency to trip and incur unanticipated costs that I am sure that the above estimate will be too low for 1975. The estimate means that the overall fire suppression payroll in the United States would be raised by about 9%. However, this increase would not be added equally to each public agency. Some fire departments will incur no additional costs because of Fair Labor Standards Act; some will incur such severe additional costs as to require doubling of payrolls or halving of fire services.

All of the above discussion is related to the calendar year 1975. For calendar years 1976, 1977 and 1978 different cost estimates must be made.

Cost Estimates: 1976, 1977, 1978

By the end of the year 1975, most public jurisdictions will have discovered and corrected most or all of the "work period" problems through hard experience with the new and unfamiliar law. Therefore, no work period costs are estimated for this reason after 1975.

1976

In 1976, overtime will be required to be paid for hours worked in excess of 58 in 7 days within the work period. Using the fixed post manning concept, it is not possible to construct a 58-hour average fire duty schedule within a 7-day to 28-day work period. The nation's fire departments will be required to lower hours to 56 therefore, rather than an impossible 58-hour figure.

This will require reduction from 60 hours to 56 hours for all fire departments at 60 hours in 1975, plus reduction of hours for any other departments now between 56 and 60 (such as the City of Sacramento) during 1975.

To reduce from 60 to 56 hours is equivalent to an additional cost of 7.14%. Applied to the larger base of 20% of payroll, this is equivalent to new costs of $2,288,000,000 x 20% - $457,600,000 (payroll understated because of no factor for salary increase or increase caused by 1975 FLSA compliance). $457,600,000 x 7.14% = $32,672,400 plus carryover cost of $30,499,000 from 1975 = $63,171,400 additional fire costs in 1976.

1977

The law requires overtime to be paid at time and one-half over 54 in 1977. This will require about 80% of fire payroll to be reduced by two hours from 56, equal to 3.7% increase:

$2,288,000,000 x 80% = $1,830,400,000	
x 3.7% =	$ 67,724,900
Plus additional carryover from 1975 and 1976	63,171,400
	$130,896,300

1978

The crushing costs of the Act are likely to fall in 1978, three years hence. If the Secretary of Labor would decree that overtime hours at time and one-half will be required at less than 54, as seems probable, the following costs are possible:

Over 48 hours:	
$2,288,000,000 x 90% = $2,059,200,000	
x 12.5% =	$257,400,000
Plus carryover 1975,1976,1977	130,896,000
	$388,296,000
Over 46 hours:	
$2,059,200,000 x 17.39% =	$358,094,900
Plus carryover 1975, 1976, 1977	130,896,000
	$488,990,000
Over 44 hours:	
$2,059,200,000 x 22.72% =	$467,850,240
Plus carryover 1975, 1976, 1977	130,896,000
	$598,746,000

Summary of Estimated Costs:

1975	$206,323,000
1976	63,171,400
1977	130,896,300
1978 (over 44 est.)	598,746,000
	$999,136,000

As none of the above estimates include any factors for salary increases, or increased size of fire suppression forces, the estimates, in fact, should exceed one billion dollars over the four-year cumulative period to fully experience the 1974 Amendments of the Fair Labor Standards Act for employees engaged in fire protection activities.

I wish to reiterate that I have not had a full opportunity to read carefully the final regulation 29 CFR 553 which was issued in the Federal Register 20 December 1974, which I have just received today. There may be additional cost factors contained in the regulation (such as the reduction in hours in the work period for 27 days being changed to required overtime over 231 hours instead of 232, as appeared in the preliminary regulation) which may have some impact. I believe that the $27 million cost impact estimate contained in the preamble of the final 29 CFR 553 regulation is extremely underestimated, as I have made no estimates in this letter of the additional costs which will be required for the hundreds of thousands of part-paid volunteer firefighters, nor of the costs to law enforcement agencies throughout the United States, as a result of the Fair Labor Standards Act. These costs also are substantial, and would be in addition to the fire suppression estimates presented here.

Very truly yours,

/s/ William F. Danielson
William F. Danielson
Director of Personnel

Supplementary Affidavit of Jack I. Karlin, Dec. 30, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 74-1812
THE HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

SUPPLEMENTARY AFFIDAVIT

District of Columbia) SS:

JACK I. KARLIN, being duly sworn, deposes and says:

1. This supplements my affidavit of December 27, 1974, which has been filed in this action.

2. On December 27, 1974, I received a copy of a letter from William F. Danielson to Charles S. Rhyne, dated December 24, 1974, which purports to explain Mr. Danielson's "estimate of $200,000,000 additional costs to state and local governments during the calendar year 1975 for fire protection services and further additional costs in 1976, 1977 and 1978 as a result of the imposition of the Fair Labor Standards Act" (page 1). Mr. Danielson's letter estimates "1975 costs to state and

local public agencies for fire protection caused by the Fair Labor Standards Act will be" $206,323,000 (page 6).

3. The total of $206,323,000 includes $165,824,000 (items 2 and 3 at page 6) which I consider too speculative to be statistically valid. This amount is based upon the assumption that a substantial percentage of the cities whose tours of duty for firefighters do not exceed the maximum hours permitted without premium pay (an average of 60 hours per week) will mistakenly fail to elect the provisions of the Fair Labor Standards Act which will permit them to avoid all overtime premium pay.

In my opinion it is too conjectural to assume that State and local public agencies will mistakenly overspend in the amount of $165,824,000 by failing to utilize the available provisions under the Act that would eliminate such overspending. This is particularly true in view of the fact that as long ago as June 1974 the International City Management Association issued a report (prepared by Mr. Danielson) which explained how public agencies can avoid unnecessary fire overtime, and this report was known to the National League of Cities in June of 1974 (Defendant's Deposition Exhibit 3).

4. The total of $206,323,000 also includes $10,000,000 (item 4 page 6) said to reflect "extra costs related to joint employment provisions of the Act." This $10,000,000 amount is not explained in the letter.

5. This leaves $30,499,000 (item 1 at page 6) which is said to relate to "Reduction to 60-hour maximum fire duty schedule." I am not aware of any articulated, specifically supported estimate filed in this case by plaintiffs that estimates any cost to State and local public agencies under the 60-hour maximum provisions for policemen and correctional employees. When this is considered, the $30,499,000, while larger than the $27,000,000 estimate made by the Department of Labor

as the cost of the overtime provisions pertaining to public safety employees, is of the same general order of magnitude as the Department of Labor's estimate.

6. Moreover, with further reference to the $30,499,000 estimate, I find a number of shortcomings in that amount. Succintly stating some of them in the interest of brevity, they are:

First. The total of 205,700 firefighters on page 1 and the median salary of $11,123 per year on page 2 do not appear adequately to take into account exempt executive, professional and administrative employees.

Second. The use of a median amount rather than a mean amount is not appropriate for the purpose of the letter.

Third. No basis is stated for the letter's estimate that the 15.43% of the cities reporting represent at least 10% of the total fire suppression payroll.

Fourth. The 13.33% figure on page 2, stated as representing the average increase in fire suppression payroll costs, does not seem to me to be supportable. For example: Let us suppose that a city, prior to the Amendments, paid its firefighters a salary of $272 per week regardless of hours worked. The Amendment's provision for premium pay would be satisfied by paying $288 for a 68-hour week. This represents $272 divided by 68, to obtain the hourly rate for that week ($4.00)

and $16.00 premium pay for overtime (8 hours times $2.00).[1] In this example, the percentage increase in cost is approximately 6% rather than 13.33%.

/s/ Jack I. Karlin
JACK I. KARLIN

Sworn to and subscribed before me this 30th day of December, 1974.

/s/ Joyce P. Burch
Notary Public

[Certificate of service omitted]

[1] This method cannot be used if the hourly rate for the week comes out less than the minimum wage.

Opinion and Order of District Court below, dismissing Complaint and denying Preliminary Injunction, Dec. 31, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1812

THE NATIONAL LEAGUE OF CITIES,
an Illinois Corporation, on
behalf of its member cities,
1620 Eye Street, N.W.,
Washington, D.C. 20006,

THE NATIONAL GOVERNORS' CONFERENCE,
a District of Columbia Corporation,
on behalf of its members,
1150 Seventeenth Street, N.W.,
Washington, D.C. 20036,

The State of ARIZONA
N. Warner Lee, Attorney General
State Capitol
Phoenix, Arizona 85007

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, Tennessee
Milton H. Sitton, Director of Law
204 Courthouse
Nashville, Tennessee 37201,

The City of SALT LAKE CITY, Utah
Roger F. Cutler, City Attorney
101 City and County Building
Salt Lake City, Utah 84114,

The City of LOMPOC, California
Alan Davidson, City Attorney
119 West Walnut Avenue
Lompoc, California 93436,

The City of CAPE GIRARDEAU, Missouri
Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

Plaintiffs,

and

The State of CALIFORNIA,
State Capitol,
Sacramento, California 95814

by and through

EVELLE J. YOUNGER,
Attorney General, on
behalf of the People of
the State of California,

RONALD REAGAN
Governor,

VERNE ORR
Director, Department of Finance,

JAMES G. STEARNS
Secretary, Agriculture and Services Agency,

FRANK J. WALTON
Secretary, Business and Transportation Agency,

NORMAN B. LIVERMORE, JR.
Secretary, Resources Agency,

JAMES E. JENKINS
Secretary, Health and Welfare Agency,

Plaintiffs-Intervenors,

and

The State of INDIANA
Theodore L. Sendak, Attorney General
State Capitol
Indianapolis, Indiana,

The State of IOWA
Richard C. Turner, Attorney General
State Capitol
Des Moines, Iowa 50319,

The State of MARYLAND
Francis B. Burch, Attorney General
One South Calvert Street
Baltimore, Maryland 21202,

The State of MASSACHUSETTS
Robert H. Quinn, Attorney General
State House
Boston, Massachusetts 02133,

The State of MISSISSIPPI
A. F. Summer, Attorney General
State Capitol
Jackson, Mississippi 39105,

The State of MISSOURI
John C. Danforth, Attorney General
Supreme Court Building
Jefferson Building, Missouri 65101,

The State of MONTANA
Robert L. Woodahl, Attorney General
State Capitol
Helena, Montana 59601,

The State of NEBRASKA
Clarence A. H. Meyer, Attorney General
State Capitol
Lincoln, Nebraska 65809,

The State of NEVADA
Robert List, Attorney General
Supreme Court Building
Carson City, Nevada 89701,

The State of NEW HAMPSHIRE
Warren B. Rudman, Attorney General
State House Annex
Concord, New Hampshire 03301,

The State of OKLAHOMA
Larry D. Derryberry, Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105,

The State of OREGON
R. Lee Johnson, Attorney General
100 State Office Building
Salem, Oregon 97310,

The State of SOUTH CAROLINA
Daniel R. McLeod, Attorney General
Hampton Office Building
Columbia, South Carolina 29201

The State of SOUTH DAKOTA
Kermit A. Sande, Attorney General
State Capitol
Pierre, South Dakota 57501,

The State of TEXAS
John L. Hill, Attorney General
Supreme Court Building
Austin, Texas 78711,

The State of UTAH
Vernon B. Romney, Attorney General
State Capitol
Salt Lake City, Utah 84114,

The State of WASHINGTON
Slade Gorton, Attorney General,
Temple of Justice
Olympia, Washington 98504,

Plaintiffs-Intervenors,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

Per Curiam:

Petitioners, individual cities and states, the National League of Cities, and the National Governors' Conference, challenge the 1974 amendments to the Fair Labor Standards Act (FLSA), Public Law 93-259, 88 Stat. 55, amending 29 U.S.C. §§ 201 *et seq.* (1970), as beyond the power of Congress under the Commerce Clause in that they purport to extend the coverage of the FLSA to nonsupervisory state and municipal employees, including police and firemen. The Amendments generally went into effect on May 1, 1974; provisions relating to overtime pay of police and firemen become effective on January 1, 1975. Plaintiffs seek a declaratory judgment and temporary and permanent injunctive relief. Defendant opposed a temporary injunction, and moved to dismiss the action for failure to state a claim upon

which relief can be granted. A three-judge district court was duly convened. We grant defendant's motion to dismiss the complaint.

Although plaintiffs have raised a difficult and substantial question of law, we feel that our decision is controlled by the decision of the Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968).[1] Upholding the constitutionality of an earlier extension of the FLSA to cover employees of state-operated schools and hospitals against an attack similar to that lodged here, Justice Harlan, writing for the court, found a sufficient and independent rational relationship of the provisions of the Act to interstate commerce in that state hospitals and schools were significant purchasers of out-of-state goods and that strikes and work stoppages involving their employees would consequently interrupt and burden the flow of goods across state lines. 392 U.S. at 194-95. Since it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods, the decision in *Wirtz* disposes of this case.

Although the theory discribed above was an explicitly independent ground for the decision, there is language in

---

[1] In this opinion we have not addressed ourselves to any issue concerning the regulations and rulings issued by defendant under the 1974 amendments, either as to procedure followed, or as to substantive compliance with the Act. These issues were not the core of the complaint filed, and the contentions may be presented by plaintiffs either by way of defense, or in actions for declaratory relief. *See* National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S. App. D.C. 274, 443 F .2d 689 (1971).

the opinion that stresses that the state competes with private institutions which also operate schools and hospitals.[2] The institutions whose employees are in question here perform governmental functions, not seriously in competition with private industry. Moreover, there is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through compensatory time off arrangements, rather than time and half overtime pay, and through other local governmental agreements.[3]

---

[2] *See, e.g.*, "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U.S. at 197.

[3] California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that counties will be unwilling to continue to cooperate in this venture.

Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees.

Plaintiffs contend that the amendments will mean either increase in local government fiscal requirements, or reduction in services and personnel, with layoffs, or both, due to provisions in state and municipal constitutions, charters, statutes and ordinances, like those against deficit financing. Plaintiffs further contend that a large part of the budgets of state and local governments reflect costs of non-supervisory personnel, and that the budgeting processes currently under way indicate that the amendments may have the practical impact of a large scale reconstitution of tours of duty, without any factual predicate showing that there has been in the past any substantial degree of either widespread labor unrest curtailing flow of interstate commerce or substandard wage scales. They contend that the amendments here will intrude upon the state's performance of essential governmental functions far more than did those reviewed in *Wirtz*, although here, as there, the federal requirements are nominally limited to wage and hour regulations. We are troubled by these contentions, and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

If, as we must assume, the amendments are constitutional, a preliminary injunction would be inappropriate. We have prondered the possibility of relief pending appeal, to assure opportunity to litigate, but, apart from jurisdictional doubts, we apprehend that the only assistance available from such refief would be this, that states failing to comply with the new provisions

would not be exposed to the liquidated damages and double damage penalties provided for bad faith violations of the Act. However, we feel that since our opinion recognizes that plaintiffs have raised a substantial question regarding the amendments' constitutionality, this will be sufficient to indicate that the claim of the part of the cities and states that the Act cannot be constitutionally enforced has been raised in good faith.

Plaintiffs' request for declaratory and preliminary injunctive relief is denied. Defendant's motion for dismissal is hereby granted. Because the papers before us include depositions and affidavits, and they should be part of the record in the event of an appeal to the Supreme Court, our order dismissing the complaint will be entered under both Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.

The foregoing will constitute our findings of fact and conclusions of law.

Accordingly, it is hereby ORDERED, pursuant to and in accordance with Rules 12 and 56 of the Federal Rules of Civil Procedure, that the complaint of the National League of Cities, et al., as amended December 31, 1974, and the complaint in intervention of the State of

California, be, and they hereby are, dismissed with prejudice.

/s/ Harold Leventhal
Harold Leventhal
United States Circuit Judge

/s/ Oliver Gasch
Oliver Gasch
United States District Judge

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

December 31, 1974

Counsel for Plaintiffs:
Charles S. Rhyne
Rhyne & Rhyne
400 Hill Building
839 17th Street, N.W.
Washington, D.C. 20006

Counsel for Plaintiffs-Intervenors
The State of California et al.:
Talmadge R. Jones
Deputy Attorney General
of the State of California
555 Capitol Mall, Suite 550
Sacramento, California 95814

Counsel for Defendant:
Nathan Dodell
Assistant United States Attorney
Room 3427
United States District Courthouse
Washington, D.C. 20001