



To: Diana Gomez, Finance Director

From: Miriam Soler Ramos, City Attorney *MSR*
Kara S. Nickel, Lisa Berg, Special Counsel

RE: Legal Opinion Regarding Special Taxing Districts and Security Services

Date: August 22, 2018

Effective October 1, 2018, Miami-Dade County will transfer control and responsibility for nine (9) special taxing districts to the City of Coral Gables. The districts were created in accordance with Chapter 18 of the Miami-Dade County Code of Ordinances. The terms of the transfer are identical for each district and are memorialized in written agreements executed by the County and the City in 2017.

A primary purpose of the districts is the provision of security for the residents, which can include a manned guard gate, roving patrol, or combination thereof. While under County control, some of the districts have used off-duty City of Coral Gables police officers to provide the security for the district. The County, on behalf of the districts, arranged for the officers through the City's established off-duty detail process and paid the City's established off-duty rate¹ for these security services. Based on our discussion, it is our understanding that eight (8) districts have moved to private security companies and only one (1) district currently uses off-duty officers.

Under the Fair Labor Standards Act (FLSA), a non-exempt employee (which would include police officers) is entitled to overtime compensation as 1 ½ times his/her regular rate of pay for all hours worked after 40 hours/workweek. The law contains a "special detail" exception for law enforcement personnel: off-duty detail hours voluntarily worked by law enforcement officer for a separate and independent employer are not combined with the officer's regular worktime for the officer's law enforcement agency employer (i.e., a municipal police department) for purposes of determining overtime compensation. 29 U.S.C. §207(p)(1); 29 CFR §553.227.²

For example, an officer works 38 regular duty hours with the police department and then works 10 hours on off-duty detail providing security for a business or school. While the officer

¹ The off-duty rate is currently \$38/hour. It will increase to \$41/hour later this year.

² The FLSA allows the officer's law enforcement agency employer (primary employer) to facilitate the off-duty work, including selecting employees for the detail, negotiating the fee, and requiring that the fee be paid to the agency (which then distributes it to the officers).

worked a total of 48 hours for the week, the 10 off-duty hours are separate from the officer's regular duty hours. As the officer only worked 38 regular duty hours, the officer is not entitled to overtime compensation from the police department.

A key issue in the analysis is whether the employer for the off-duty detail is separate and independent from the officer's primary employer, i.e., the police department. This is a fact-intensive inquiry, which includes consideration of the following factors: whether the entities have separate payrolls and retirement systems, and separate budgets; whether the entities deal with each other at arm's length concerning the employment of any individual; whether they are independent entities under state law; and whether they can sue and be sued in their own names. *See* DOL Wage and Hour Opinion Letters FLSA 2002-3 (June 7, 2002) and FLSA 2007-12 (December 31, 2007).

Applying these factors to the current situation, the County is a "separate and independent employer" of the officers providing security services to the special taxing districts. Consistent with the FLSA, the hours worked by City police officers on off-duty for the County (as security details for special taxing districts) was kept separate from their regular time worked for the City for purposes of determining overtime compensation.

You have asked whether the officers' off-duty time providing security to the special taxing districts may continue to be treated separately from the officers' time worked for the City (for purposes of determining overtime) following the City's assumption of control for these districts on October 1, 2018. The answer is no because there is no separate and independent employer of the officers for these off-duty hours. Rather, the City will be the employer of the officers for both regular and off-duty work hours.

While they are legal entities, the special taxing districts will not exist or operate independent of the City. The City will be the legal governing body for the special taxing districts and will have sole authority and responsibility for all matters relating to the districts, including operations, maintenance and finances. The districts will be required to obtain approval from the City Commission for all of these matters and to operate through City personnel as the districts do not have any employees or their own payroll, retirement or finance systems.³ The City will receive the collected assessment and disburse the funds, as needed, to pay for any district expenses for services, such as, landscaping, pest control and security. Significantly, the City will be the contracting party with the service providers. Thus, the City and the districts will not deal with each other in "arm's length" transactions for the employment of security personnel. Consequently, if a special taxing district elects to continue using off-duty City police officers for security services, the employer of the officers is the same: the City of Coral Gables.

The City's intention to use a third-party consultant, rather than a City employee, to assist with the day-to-day administration and operations for the special taxing districts does not change the above analysis because the consultant would not be a "separate and independent employer" for purposes of the FLSA. In managing the districts, the consultant will not be acting in its own name, but rather it will be acting on behalf of the City. The City Commission remains the governing body of the special taxing districts and the City is the sole legal entity responsible for the districts. In carrying out these duties, the consultant will work with City personnel, particularly the Finance Department, on a regular basis.

³ The districts will pay an administration fee to the City toward the costs for use of City personnel.

In both situations, an officer's time worked providing security for the City's special taxing district must be combined with the officer's regular work time. If the total hours worked are more than 40 hours/workweek, the officer is entitled to overtime compensation for those additional hours. Overtime compensation will vary per officer as it is 1 ½ times the individual officer's "regular rate" of pay, as that term is defined under the FLSA. 29 U.S.C. § 207(e) (includes all remuneration paid to an employee, unless specifically excluded by the FLSA).

The City has also contemplated whether the analysis might change if it used the Fraternal Order of Police (FOP) to coordinate the off-duty assignments and hire the officers. The analysis does not change. Similar to the third-party consultant hired by the City to assist with operating the special taxing districts, the FOP would not likely be deemed a "separate and independent employer" under the FLSA. The FOP is not a legal entity that routinely engages in the coordination and fulfillment of off-duty assignments or in processing payment to officers for off-duty work performed. The City continues to be the entity employing the officers as CGPD officers and would then also be the entity responsible for paying the officers for the off-duty work (as the City Commission is the governing body of the special taxing districts).

Additionally, the officers' compensation for providing these security services would be considered wages under the Internal Revenue Code. As such, the compensation is subject to applicable income taxes and FICA withholding for the employee's portion (reported on the employee's IRS Form W-2 for the year)⁴ and the City would be responsible for payment of the employer's FICA contribution on this compensation. The City should also evaluate whether this time worked would have any effect on employee benefits.

This opinion is issued pursuant to Sec. 2-252(e)(1) and (8) of the City Code, authorizing the City Attorney's Office to issue opinion and interpretations on behalf of the City.

⁴ For all other off-regular duty details, the officers are paid directly by the requesting entity (no taxes or withholding at the time of payment) and the officers are responsible for paying any self-employment taxes due from the payment in accordance with applicable IRS deadlines. The City is currently transitioning to a system that will allow for the requesting entity to pay the City and the City, in turn, pay the officer and withhold income taxes and FICA accordingly.

From: [Ramos, Miriam](#)
To: [Paulk, Enga](#)
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Enga, please publish.

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CITY OF CORAL GABLES
CITY ATTORNEY'S OFFICE

OPINION REGARDING SPECIAL TAXING DISTRICTS AND SECURITY SERVICES

To: Diana Gomez, Finance Director

From: Miriam Soler Ramos, City Attorney
Kara S. Nickel, Lisa Berg, Special Counsel

C: Frank Fernandez, Assistant City Manager
Chief Edward J. Hudak

Date: August 22, 2018

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Under the Fair Labor Standards Act (FLSA), a non-exempt employee (which would include police officers) is entitled to overtime compensation as 1 ½ times his/her regular rate of pay for all hours worked after 40 hours/workweek. The law contains a "special detail" exception for law enforcement personnel: off-duty detail hours voluntarily worked by law enforcement officer for a separate and independent employer are not combined with the officer's regular worktime for the officer's law enforcement agency employer (i.e., a municipal police

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