League of California Cities
2022 City Attorneys' Spring Conference

Frequent FLSA Liability Risks in Public Agencies

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Presented by:

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Frequent FLSA Liability Risks in Public Agencies
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Agenda

• Work Period Designations
• Regular Rate of Pay
• Off the Clock Work
• Overtime Exemptions
Basic Requirements of FLSA

- Pay minimum and overtime wages when due
  - "Straight time" for every hour actually worked up to maximum hours threshold
  - 1.5 x the regular rate for hours actually worked in excess of OT threshold
  - Wages are due on the regularly scheduled pay day
  - Late payment = failure to pay
  - FLSA compensation owed is measured on a workweek / work period basis (no offsetting)
**FLSA Overtime is Measured by Work Period**

- **Work period**
  - Measures overtime under FLSA
  - Civilian - 7 days/40 hours per week
- **Work schedule**
  - 9/80, 4/10, 5/8, 48/96
  - MOU may provide for OT for hours outside of work schedule
- **Pay period**
  - Typically 14 day

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**Measuring FLSA Overtime by Work Period**

- FLSA overtime is measured on a “work period” basis
  - standard workweek is 7 consecutive 24-hour periods, i.e., 168 recurring hours
- Cannot offset excess hours in one week with lower hours worked in another week
- If you have 9/80 employees, must start and end FLSA workweek halfway through a workday
Measuring FLSA Overtime by Work Period

207(k) Work Period for Law Enforcement
- Must have power to arrest, or security personnel in correctional institutions
- Normally 28 day work period is optimal
- Must calculate FLSA overtime for work period, not pay period
- Cannot average or carry over FLSA overtime from one work period to another

207(k) Work Period for Fire Protection
- All fire employees on 7(k) work period must have actual responsibility to engage in fire suppression
- Work period needs to match the platoon/shift schedule
- If 3 shifts, want a work period divisible by 3
  - Usually 24 or 27 days
- Fire payroll needs to actually track the 24 or 27 day work period
Measuring FLSA Overtime by Work Period

207(k) Work Period for Fire Protection

- Level Pay Plans
  - Based on an “average” of 56 hours per workweek
  - Firefighters on an A/B/C shift schedule never actually work 56 hours per workweek
  - Cannot average FLSA overtime over work periods

Regular Rate of Pay
**FLSA Regular Rate of Pay**

- FLSA Overtime is paid at 1.5x Regular Rate of Pay
- Presumption – all remuneration for employment is included
  - Unless remuneration is *specifically* excluded by statute
    - 29 C.F.R. §778.108
- Only for FLSA Overtime hours
  - Can pay different rates for non-FLSA/MOU overtime hours

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**Critical Consideration #4 – Overtime Calculations**

Average hourly value – RRP – is arrived at via equation:

\[
\frac{\text{Total Compensation}}{\text{Total Hours Worked}}
\]
Regular Rate of Pay Quiz

Which of the below must be included in the regular rate?

a. Hazard pay
b. Cash-in-lieu of health benefits
c. Standby pay
d. All of the above

Regular Rate of Pay

• Cash in lieu of health benefits
  ▪ Cash back to employee must be included in regular rate of pay
  ▪ Does benefits plan (i.e. cafeteria plan) provide more than an “incidental” amount back to employees?
    o DOL rule – 20%
    o If not incidental, ALL contributions to plan must go into employees’ regular rate of pay
Regular Rate of Pay

**Sick Leave Cash Outs**
- Payments for forgoing sick leave, holiday leave, vacation leave may be excluded from the regular rate as pay for time not worked (29 CFR 778.219)
  - Same rules apply to all paid leave cash outs
  - Excluded as long as the sum paid depletes the leave bank in the amount bought back
  - Cannot be a “de facto” attendance bonus

**Holiday Compensation Excluded**
- Pay for not working on a holiday is excluded
- Holiday in Lieu pay
  - Holiday pay regardless of whether employee works on holiday or not
  - May need to be included in regular rate of pay
Off the Clock Work

- FLSA definition of work
  - Suffered or permitted by employer
  - Even if performed voluntarily by employee

- Key Issue
  - Does city have actual or *constructive* knowledge that work is being performed?
Off the Clock Work

- **Examples**
  - Working through unpaid meal break
  - Preparing reports after hours/weekends
  - Coming in early to prepare for work day/obtain or maintain equipment
  - Answering emails outside of work hours
  - Monitoring work equipment, machines or events remotely
  - Attending recommended trainings or classes
  - Opening up or closing down a facility

Off the Clock Work

- **Must have strong overtime policies**
  - Require employees to report all time worked
  - Require pre-approval for any overtime/excess work
    - If no pre-approval, still pay for work and evaluate for discipline
  - Require employee verification of timekeeping each week/work period
- **Must train supervisors on overtime policies**
- **Must enforce policies**
Off the Clock Work

- Remote work arrangements
  - Define what is hours worked
  - Require employee to report all time worked
  - Provide training on tracking and reporting remote time worked
  - Consider reasonable agreements 29 C.F.R. 785.23

Overtime Exemptions
Overtime Exemptions

• Administrative exemption
  ▪ Must involve work directly related to management or general business operations
  ▪ Must include exercise of discretion and independent judgment with respect to matters of significance

• First responders
  ▪ Is their primary duty responding to emergencies?
  ▪ Or is it supervision, management or administration?

Questions?