

Frequent FLSA Liability Risks in Public Agencies

League of California Cities 2022 City Attorneys' Spring Conference | May 5, 2022

Presented By: Jennifer Palagi

LCW LIEBERT CASSIDY WHITMORE

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Agenda

- Work Period Designations
- Regular Rate of Pay
- Off the Clock Work
- Overtime Exemptions

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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)

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Work Period Designations



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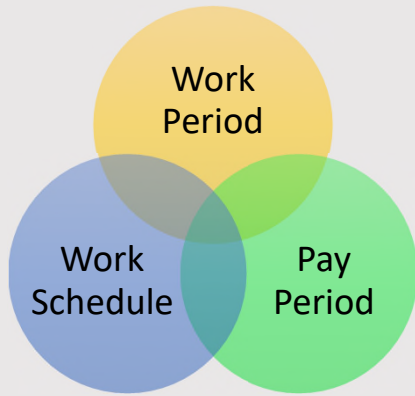
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FLSA Overtime is Measured by Work Period



- 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

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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

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Measuring FLSA Overtime by Work Period

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

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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

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Regular Rate of Pay



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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:

Total
Compensation

Total Hours
Worked

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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

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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?
 - DOL rule – 20%
 - If not incidental, ALL contributions to plan must go into employees’ regular rate of pay

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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



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Regular Rate of Pay

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



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Off the Clock Work



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?



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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

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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

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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

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Overtime Exemptions



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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?

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Questions?



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Thank You!

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