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LEAGUE OF CALIFORNIA CITIES MUNICIPAL FINANCE INSTITUTE

Making the FLSA Work For You - Tips and Tricks to Ensure Compliance

12/11/2019

PRESENTED BY:

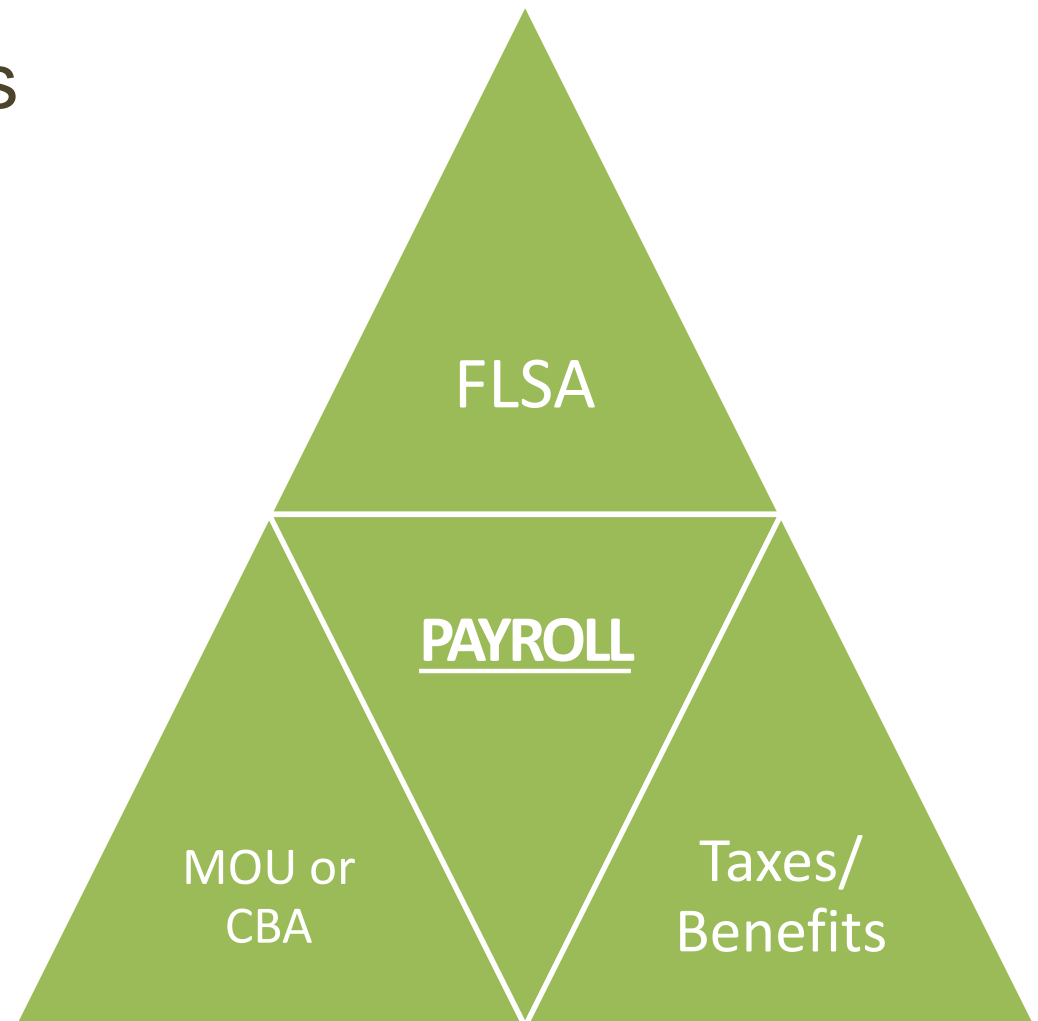
T. Oliver Yee

Agenda

- Timekeeping - Tracking and Recording FLSA Hours Worked
- Common Payroll System FLSA Errors:
 - Administering FLSA Work Periods
 - Calculating the Regular Rate of Pay
 - Tracking and Paying Out Compensatory Time Off
- Pay Codes
- Final Tips

Overview

- Most payroll systems are not designed for the unique needs of public sector payroll.
- FLSA compliance is different from PERS, IRS or MOU compliance



Basic FLSA Requirements

- Pay minimum straight-time & overtime compensation owed when due
 - Hourly rate for hours actually worked up to the maximum hours threshold.
 - 1.5 x the **regular rate of pay** for hours actually worked in excess of threshold.
 - Most common OT threshold is 40 hours / workweek
 - Wages due on the regularly-scheduled pay day
 - Untimely payment = failure to pay

Does Your Timekeeping System Track and Record All Hours Worked?

Maintaining Accurate Time Records

- All agencies subject to any provision of the FLSA must make, keep and preserve certain time records
- Time clocks are not required and time records need not be kept in any particular form
- However, agencies must maintain accurate records of hours worked each workday and each workweek

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Alternative Work Schedule: 9/80

Agency has a 14 day pay period and the employee works a 9/80.
What would be the 7 day work period based on looking at this chart?

Sun	Mon	Tue	Wed	Thu	Fri	Sat
off	9	9	9	9	4	off
					4	
off	9	9	9	9	off	off
					off	
off	9	9	9	9	4	off
					4	
off	9	9	9	9	off	off
					off	

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Case Study: Role of Work Periods

- Jules is a Code Enforcement Officer
- Work Schedule: 9/80; 9 hours M-Th (7:30 – 5:30) with alternating 8-hour Friday (7:30 – 4:30) off. Biweekly pay periods.
- Week One: Jules worked her regular schedule (this week Mon – Fri) and on Friday worked 3 additional hours attending an evening community meeting to provide support to a case she worked on.
- Week Two: Jules worked her regular schedule (Mon – Thurs) but took four hours off on Tuesday to take her child to a medical appointment.

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Case Study: Role of Work Periods

Is Jules owed overtime under the FLSA?

NO.

What if Jules switched her regularly-scheduled day off in week two?

YES.

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Public Safety 207(k) Work Period

- Partial overtime exemption for *public safety employees*
- Allows longer work periods with higher overtime thresholds.
 - Between 7 and 28 consecutive days
 - No OT owed until hours worked exceeds number of hours which bear the same relationship to 212 (fire) or 171 (law enforcement) as the number of days in the work period bears to 28.
- Where the 207(k) work period is not equal to the length of the pay period, computation of FLSA overtime may require that the payroll system calculates the hours worked over multiple pay periods to determine whether any FLSA overtime is owed.

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Common 207(k) Mistakes

- Belief that adoption of 7(k) unnecessary because MOU is more generous than the FLSA
- Failure to update 207(k) work periods and related documents as work schedules and MOUs change
- Applying 7(k) to civilian police employees
- Applying 7(k) to fire employees who do not have fire suppression responsibility

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FLSA Overtime

- FLSA OT
 - Minimum statutory overtime obligations
 - When total hours actually worked in work period exceed FLSA OT threshold
 - 40 hours in 7 day workweek for most civilian employees
 - 43-171 hours for law enforcement 7(k)
 - 53-212 hours for fire protection 7(k)
- To ensure FLSA compliance, **you must know:**
 - (1) *hours actually worked, and*
 - (2) *the correct work period*

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Contract / MOU Overtime

- Contract / MOU OT
 - OT requirements of MOU/Contract
 - Frequently more generous than floor FLSA requirements
 - E.g., OT for hours worked outside of "regular" or normal schedule
 - E.g., leave may be credited as hours worked per contract
 - E.g., Holidays, weekends, nights, special events, call backs are OT regardless of hours actually worked
- Employees entitled to contract OT may not be entitled to FLSA OT.
 - Only FLSA OT must be paid at FLSA regular rate of pay.
 - Premium paid for contract OT may be used to offset FLSA liability.
 - Failure to pay contract OT is NOT an FLSA violation.

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Dual Calculation

- Ideally, an agency would perform two side-by-side overtime calculations:
 - MOU OT calculation
 - FLSA OT calculation
- Payroll system compares results to make sure no MOU or FLSA OT underpaid
- In addressing FLSA claims, knowing when the agency exceeded the FLSA requirements is helpful

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FLSA Hours Worked

- Basic Rule: All time suffered or permitted by an employer is hours worked under the FLSA.



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Identifying Hours Worked

- Does your agency track and your payroll system account for **all** FLSA compensable hours worked? For example, do timesheets/payroll system differentiate between compensable and non-compensable:
 - Travel Time
 - Training Time
 - Standby/On-Call Time
 - K-9 Time and Other Work off Premises

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Problems with Level Pay Plans

- Under a level pay plan, employees are paid based on average hours worked each pay period, even though employees actually work more or less every pay period
 - Common in fire (56 hour workweek myth)
 - Common for monthly or semi-monthly pay periods
- FLSA prohibits averaging of FLSA overtime over work periods
- Can result in underpayment – especially for fire employees – therefore, payroll system must pay firefighters based upon the actual hours worked in the FLSA work period, not an average of the hours worked

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Can Your Payroll System Calculate the Regular Rate of Pay (RRP) Per the FLSA?

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Regular Rate of Pay

- The average hourly value of all compensation paid to an employee in a work period.
- Presumption – All remuneration for employment is included
 - Unless remuneration is expressly excluded by Act
 - 29 U.S.C. §207(e)

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Regular Rate of Pay

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

$$\frac{\text{Total Compensation}}{\text{Total Hours Worked}}$$

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Regular Rate of Pay

- FLSA Regular Rate arrived at by mathematic formula
 - Cannot negotiate a lower / different measure of FLSA Regular Rate
 - CAN negotiate a different rate for non-FLSA OT
- Be careful of using critical terminology in MOUs and policies
 - Regular rate, hourly rate, base rate, regular hourly rate, overtime rate

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**Regular Rate:
Steps the System Must Perform**

- **Step 1**
 - Identify applicable work period and FLSA threshold
- **Step 2**
 - Identify total hours actually worked in the work period; evaluate whether hours actually worked in excess of FLSA OT threshold; if yes, continue
- **Step 3**
 - Identify total work period payments to include in the FLSA Regular Rate of Pay (RRP) calculation
- **Step 4**
 - Calculate the FLSA Regular Rate of Pay by dividing total work period compensation by total hours worked in the same work period.

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**Common Errors in Calculating
FLSA Regular Rate of Pay**

- Not calculating the FLSA Regular Rate of Pay at all.
- Calculating based on pay period instead of FLSA workweek or work period.
- Not including all required forms of compensation
- Incorrect method of calculation:
 - Not "breaking down" special pays to their workweek or work period equivalent.
 - Not calculating rate based on all hours worked in the workweek or work period, i.e., dividing total compensation by hours scheduled to work or all hours in paid status (including paid leave) instead of hours actually worked.
 - Employees with two or more rates
- Including overtime premiums in RRP

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Inclusions in Regular Rate

- Shift differentials
- Retroactive pay increases
- Education, other incentive pay
- Standby pay
- Bilingual pay
- Longevity pay
- Special assignment pay
- Acting / out of class pay
- Cash-in-Lieu of health benefits
- Job performance awards
- Merit bonuses
- Hazard pay
- Shooting pay
- Attendance bonuses

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Exclusions from Regular Rate

- Gifts that are not dependent on hours worked
- Payments for vacation, holiday, illness, or other payments for time not worked
- Reasonable expenses
- Uniform allowances
- Suggestion system awards
- Discretionary bonuses
- Overtime payments
- Vacation / PTO buy-backs

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FLSA Overtime Calculation Methods

- Two methods to compute FLSA overtime
 - Pay 1.5x for all FLSA overtime hours
 - Pay 1.0x for all hours worked, and 0.5x for FLSA overtime hours
- Should get SAME pay using either method

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Case Study: Basic Regular Rate of Pay Calculation

Anne is a non-exempt analyst on a 4/10 schedule (Mon-Thurs) and earns \$30.44 per hour. The City has bi-weekly pay periods and the seven day workweek begins Sunday at 12:00 a.m. and ends Saturday at 11:59 p.m. In week 1 of the pay period, Anne worked all of her regular schedule and three additional hours on Saturday, and in week 2 took a sick day on Monday, worked her regular schedule Tuesday through Thursday and worked four additional hours on Friday. The City counts vacation, holiday and sick time as hours worked under the applicable MOU and pays overtime for any hours worked outside the regularly scheduled hours. The MOU also states that MOU overtime does not include cash in lieu but includes all other special pays in the overtime rate.

During the pay period, Anne receives \$50 in bilingual pay, \$100 in cash in lieu and in workweek 2 receives \$75 in standby pay.

What is the FLSA regular rate of pay and total overtime compensation in each workweek?

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Case Study: Basic Regular Rate of Pay Calculation

Workweek 1

- **Convert add-on pays to work week equivalent:**
 - Bilingual Pay: $\$50/2 = \25
 - Cash In Lieu: $\$100/2 = \50
- **Total hours worked in work week 1:**
 - 40 (reg. hours) + 3 = 43 hours worked – **3 FLSA OT HOURS**
- **Total remuneration in work week 1:**
 - 43 hours x $\$30.44 = \1308.92 + $\$25$ (Billing.) + $\$50$ (CIL) = $\$1383.92$
- **Regular Rate of Pay:**
 - $\$1383.92/43 = \32.18
- **Total Compensation Under FLSA:**
 - 43 x $\$32.18 = \1383.74
 - $\$32.18 \times 0.5 \times 3 = \48.27 + $\$1383.74 =$ **$\$1432.01$**

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Case Study: Basic Regular Rate of Pay Calculation

Workweek 2

- **Convert add-on pays to work week equivalent:**
 - Bilingual Pay: $\$50/2 = \25
 - Cash In Lieu: $\$100/2 = \50
- **Total hours worked in work week 2:**
 - 30 reg. hours + 4 = 34 actual hours worked - no FLSA OT
 - 30 reg. hours + 10 hours sick + 4 hours = 44 MOU hours
- **Total MOU remuneration in work week 2:**
 - 44 hours x $\$30.44 = \1339.96 + $\$25$ + $\$75$ (Standby) = $\$1439.36$
- **MOU Overtime Rate:**
 - $\$1439.36/44 = \32.71
- **Total Compensation:**
 - 40 x $\$30.44 = \1217.60 + $\$25$ + $\$75$ + $\$50 = \1367.60
 - $\$32.71 \times 1.5 \times 4 = \196.26 + $\$1367.60 =$ **$\$1563.86$**

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Can Your Payroll System Track and Correctly Pay Out Compensatory Time Off (CTO)?

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CTO: Defined

- Generally, the FLSA requires overtime hours to be compensated in cash
 - Exception: Public agencies may compensate employees for overtime hours in compensatory time off (CTO)
 - Employer and bargaining representative must agree in labor agreement to compensate FLSA overtime in CTO

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FLSA CTO v. Non-FLSA CTO

- FLSA rules regarding CTO only apply to FLSA CTO
 - “FLSA CTO” means CTO accrued for FLSA overtime hours worked
- CTO granted for other reasons is not regulated by the FLSA
 - E.g. CTO granted for work on a holiday, CTO granted for time spent on standby, CTO granted for hours worked in excess of 8 in a day

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FLSA CTO v. Non-FLSA CTO

Practice Tip!

- Since FLSA rules regarding CTO only apply to FLSA CTO, agencies may want to distinguish between FLSA CTO and non-FLSA CTO in their recordkeeping and payroll system

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Rules Governing FLSA CTO

- **FLSA CTO must be credited at time and one half**
 - For every hour of FLSA OT worked, an employee must accrue 1.5 hours of CTO
 - Example: Marcus elects compensation in the form of CTO for eight (8) FLSA overtime hours worked that week. This means his CTO bank will increase by **12 hours**.

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Rules Governing FLSA CTO

- **Accumulated FLSA CTO must be cashed-out at the regular rate**
 - At termination, employee entitled to cash-out at the higher of
 - RRP at time of termination or
 - Employee's average RRP during last three years.
 - During employment, entitled to cash-out at RRP at time of cash-out

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Case Study: FLSA CTO Cash-Out

John was promoted to Sergeant in 2017. As a sergeant, he is not eligible for FLSA CTO. John maxed out his FLSA CTO bank while working as an officer (at a much lower rate). John is retiring at the end of the year and is entitled to cash-out all his FLSA CTO.

What is the rate at which John's FLSA CTO must be cashed-out?

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Distinguishing Between FLSA CTO & Non-FLSA CTO

- FLSA only regulates FLSA CTO
 - Employee may use within reasonable period unless use would unduly disrupt operations
 - CTO must be banked at a rate of 1.5x
 - CTO must be cashed-out at FLSA RRP
- Separately track FLSA CTO v. non-FLSA CTO
 - Can restrict use of non-FLSA CTO
 - Can bank non-FLSA CTO at any rate
 - Can cash-out non-FLSA CTO at any rate

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Pay Codes

Pay Attention to Pay Codes

- Ensure payroll codes are coded for FLSA regular rate and actual hours worked
 - Whether a form of compensation is taxable or pensionable (“special pay”) is not determinative
- System must allow agency to code inclusion in the FLSA regular rate separately from whether pay is pensionable
- System must distinguish between actual hours worked vs. other uses of hour codes
- Conduct legal review of pay code classifications

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