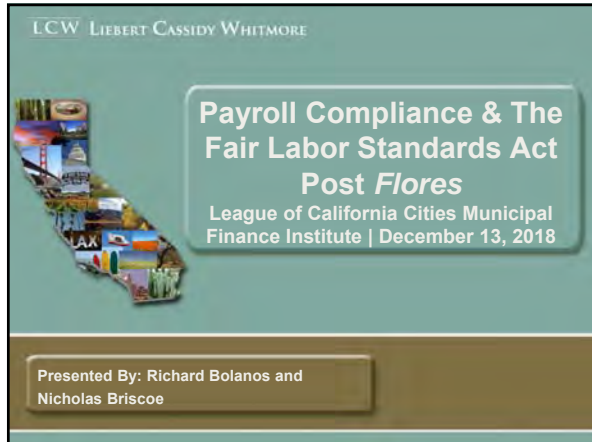# Payroll Compliance & The Fair Labor Standards Act Post *Flores*

League of California Cities Municipal Finance Institute | December 13, 2018

Presented by: Richard Bolanos and Nicholas Briscoe

LCW LIEBERT CASSIDY WHITMORE

Payroll Compliance & The Fair Labor Standards Act Post *Flores*
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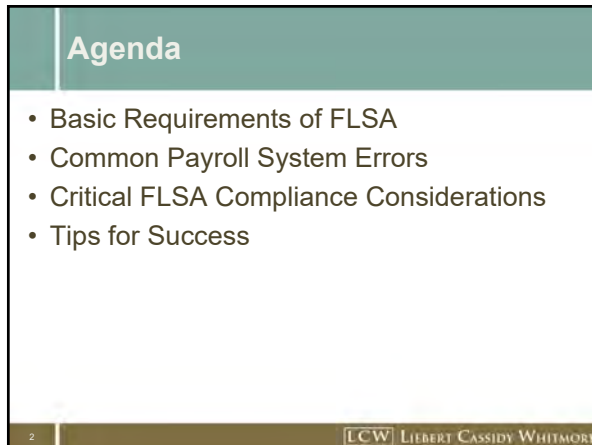
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Agenda

- Basic Requirements of FLSA
- Common Payroll System Errors
- Critical FLSA Compliance Considerations
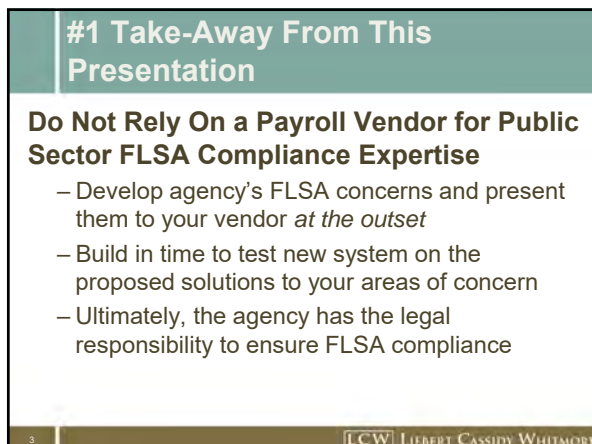- Tips for Success

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#1 Take-Away From This Presentation

Do Not Rely On a Payroll Vendor for Public Sector FLSA Compliance Expertise

- Develop agency's FLSA concerns and present them to your vendor *at the outset*
- Build in time to test new system on the proposed solutions to your areas of concern
- Ultimately, the agency has the legal responsibility to ensure FLSA compliance

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Basic Requirements of FLSA

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)

Basic Requirements of FLSA

- For a payroll system to pay minimum and overtime FLSA wages when due, it must
  - Accurately measure hours worked
  - Measure overtime hours on a workweek / work period basis
  - Correctly calculate and pay overtime compensation due

On Time!

Common Payroll System Errors

Common Payroll System FLSA Errors

- Measures overtime hours on a pay period basis instead of workweek/work period basis
- Cannot measure hours actually worked in a day or workweek/work period
- Incorrect calculation of the FLSA regular rate
- Improper smoothing or averaging, and/or treats non-exempt employees like salaried-exempt
- Cannot administer "split days" and/or different workweeks for 9/80 schedules
- Cannot perform a dual calculation – calculate MOU overtime and FLSA overtime separately

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Be Proactive! Address FLSA-Specific Concerns at the Outset of Process

Ensure With Vendor That System Can:

- Accurately record hours worked each day and on a workweek / work period basis
- Manage work periods with varying start/end dates (and of varying lengths for law enforcement/fire)
- Measure FLSA overtime on workweek or work period basis
- Correctly calculating overtime using MOU & FLSA methods (if different)

Critical Considerations for FLSA Compliance

Critical Consideration # 1 - Single or Dual Calculation?

- Difference between Statutory and Non-Statutory overtime.
- Does your agency combine or separate Statutory and Non-Statutory overtime?
- Purpose and function of Dual Calculation Method
- What overtime model is your agency using?

Critical Consideration #2 - Accuracy in Timekeeping

- FLSA requires employers to maintain accurate records of hours worked each workday and workweek/work period
- Accurate timekeeping records are also required to accurately pay employees their minimum & overtime wages

Critical Consideration #2 - Accuracy in Timekeeping

- How will hours data be entered into the payroll system?
  - Separate timekeeping system vs. all-in-one
  - Positive timekeeping
    - All time entered into system
  - Exception-based timekeeping
    - Only exceptions to regularly-scheduled time are entered into system

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Critical Consideration #2 - Accuracy in Timekeeping

- Positive timekeeping concerns
  - Must rely on employee to enter time properly
  - Time submitted too late for payroll cycle
  - Time not properly transferred to payroll
- Exception-based timekeeping concerns
  - May not track all hours actually worked
  - Preferable for exempt employees
  - Difficult for irregular schedules, 9/80s, etc.

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Critical Consideration #2 - Accuracy in Timekeeping

Example
- Danielle works a 9/80 schedule. Her "split day" is Thursday. Danielle comes to work two hours late on her "split day" and leaves two hours later to make up for it. The agency has an exception-based timekeeping system. Danielle doesn't enter anything into the payroll system because she worked eight hours that day.
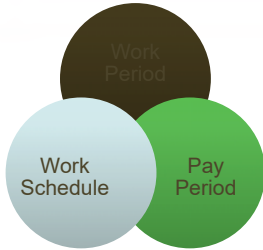
Any problems?

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Critical Consideration #3 – Measuring Overtime by Work Period

- **Work Period**
  - Measures overtime under FLSA
  - Usually seven days in length with an overtime threshold of 40 hours / week
- **Work Schedule**
  - 48/96, 4/10, 5/8, 9/80, etc.
  - MOU may provide for OT for hours outside of work schedule
- **Pay Period**
  - 14 days, bi-monthly, monthly
  - System may calculate overtime based on pay period

Work Period

Work Schedule

Pay Period

Critical Consideration #3 – Measuring 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
- If you have 9/80 employees, your system must be able to administer a "split day"

Measuring overtime on pay period basis alone may result in underpayment.

Critical Consideration #3 – Measuring Overtime by Work Period

Example

- Analyst Suzanne is scheduled to work 36 hours in week one and 44 hours in week two, totaling 80 hours in the two-week pay period *= 4 FLSA OT hours in week 2*
- Dispatcher George is scheduled to work 37.5 hours in week one, 37.5 hours in week two, 37.5 hours in week three, and 47.5 hours in week four, totaling 160 hours per four-week work cycle *= 7.5 FLSA OT hours in week 4*

Can your payroll system calculate FLSA overtime hours owed in these scenarios?

Critical Consideration #3 – Measuring Overtime by Work Period

207(k) Work Period for Safety

- Law enforcement and fire protection personnel are eligible for work periods of 7 - 28 days with overtime thresholds between 43-171 (LE) & 53-212 (fire).
- If your agency has 7(k) work periods, payroll system should be capable of measuring overtime hours on a work period *and* workweek basis
  - e.g. 28-day work period for LE and 7-day for everyone else

Critical Consideration #3 – Measuring Overtime by Work Period

System MUST:

- Measure hours actually worked on a workweek/work period basis (not pay period)
- Calculate overtime hours on workweek/work period basis (not pay period)
- Administer "split days" – sometimes many different split days

Critical Consideration #4 – Overtime Calculations

Regular Rate of Pay (RRP)

- 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 excluded by statute
    - **29 C.F.R. §778.108**

Critical Consideration #4 – Overtime Calculations

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

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

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Critical Consideration #4 – Overtime Calculations

Steps the System Should 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
- **Step 3**
  - Identify total work period payments to include in the FLSA RRP calculation
- **Step 4**
  - Calculate the FLSA RRP by dividing total work period compensation by total hours worked.

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Critical Consideration #5 – Avoid Smoothing & Averaging

- 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" week)
  - Common for monthly or semi-monthly pay periods
- FLSA prohibits averaging of hours/FLSA overtime over work periods
- Can result in underpayment – especially for fire employees
  - Payroll system should ensure employees are paid for all hours actually worked in the FLSA work period and/or pay period, not an average of the hours worked

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Critical Consideration #5 – Avoid Smoothing & Averaging

Example

- Agency pays firefighters on a 48/96 schedule 121.33 regular hours every semi-monthly pay period.
  - 121.33 = 2912 / 24.
- **Any Problems?**
  - Firefighters are actually scheduled to work 2920 hours per year (192 x 15.21)
  - Sometimes firefighters work more than 121.33 "regular" hours per pay period

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Critical Consideration #6 - Pay Period & Pay Date

- Best practice for non-exempt employees is a bi-weekly pay period
  - Only way to encompass complete workweeks
- Best practice is a pay date that occurs well after the close of the pay period
  - When the pay date is the last day of the pay period, you cannot ensure you are paying employees all hours worked in the pay period.
- Remember: late payment = failure to pay

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Critical Considerations #7 – Lump-Sum Payments

- Special pays such as holiday-in-lieu or cash-in-lieu are sometimes paid as lump-sum amounts rather than a continuous every pay period payment.
- What methods of incorporating these payments into the overtime rate or regular rate of pay are available to handle complying with FLSA and your MOU?
  - Retroactive overtime payments
  - Continuous every pay period special payments
  - Payroll system circular errors.

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Critical Consideration #8 - Dual Calculation

- Ideally, an agency would perform two overtime calculations:
  - MOU/Contract 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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Tips For Success

Tips for Success

- Specify unique public sector FLSA requirements in RFP
- Assess FLSA needs during design phase
  - Include legal counsel in process
- Keep records of design decisions
- Ascertain how to modify system when/if law changes in future
- May be appropriate time to update overtime calculation method, move to bi-weekly pay periods

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Tips for Success

- Contact vendor's public sector references
  - If you have a fire department, make sure you get a reference specific to fire payroll
- Use caution with customization packages
  - What you need may not be possible even with customization
- Thoroughly audit/test installed product to ensure correct outcomes – in overtime calculations, dual calculations, etc.
  - Be open to different mathematical ways to arrive at correct result.

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Tips for Success: Bargaining Table

- Discussing and/or negotiating out problematic special pays
- Knowing the financial costs of your MOU overtime language
- Changing pay period/work periods dates to make FLSA compliance more efficient
- Dual calculation

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Thank you!

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