FLSA: Hot Topics and New Developments
Association of Government Accountants (AGA)
May 8, 2014

Presented By: Gage C. Dungy
Today’s Agenda

1. New Developments
2. Key FLSA and California Wage and Hour Requirements
3. FLSA Work Period
4. Hours Worked
5. Overtime Exemptions
6. Regular Rate of Pay
7. Compensatory Time Off
California Wage and Hour Law


• U.S. Supreme Court defined "Clothes" Under FLSA Section 203(o)

– “[T]he hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.”

Police Sergeant Could Maintain FLSA Collective Action For Time Spent Handling Emails, Voicemails, Text Messages, And Phone Messages Outside Of Regular Work Hours On His Department-Issued PDA/Smartphone.

Volunteers

- Payment of an Hourly Wage to Volunteer Firefighters is Not a “Nominal Fee”, so that the Firefighters Did Not Qualify as Volunteers for Purposes of the FLSA

*Mendel v. City of Gibraltar* (6th Cir. 2013) 727 F.3d 565.
Key FLSA and California Wage and Hour Requirements
Who Is NOT Covered by the FLSA?

- Elected Officials and Certain Staff Members
- Independent Contractors
- Trainees
- Volunteers
Who Is NOT Covered by the FLSA?

• Volunteers
  – Cannot be compensated for their time
    ▪ But may be reimbursed for allowable expenses, reasonable benefits, and a nominal fee
  – Cannot be employed by the agency to perform similar services for the agency
TRUE or FALSE

• An employee may volunteer to work additional time if it is solely the employee’s decision and not required by the employer.
• An employer may pay a volunteer an hourly wage as long as it is less than minimum wage.
• A civilian dispatcher may volunteer as a reserve police officer.
• A parks and recreation supervisor may volunteer as a referee for city sports programs.
Key FLSA Requirements

• Minimum Wages
• Minimum Overtime Compensation
• Record Keeping and Posting
• Child Labor
• No Retaliation
• Equal Pay
What the FLSA *Does Not* Require

- California Wage and Hour Laws
  - Daily overtime
  - Double time
  - Meal breaks and rest breaks
  - Alternative workweek elections
- Standby or On-call Pay
- Severance Pay
- Limits on Hours Worked
California Wage and Hour Law

• What Does Apply to the Public Sector?
  – Counties and Charter Cities
    ▪ Not Covered by State Wage Laws
  – Other Public Agencies
    ▪ State Minimum Wage Applies
    ▪ Overtime, Meal Break, Rest Break Generally Do Not Apply, Except:
      – Break Provisions for Commercial Drivers
        » Wage Order 9
      – Agricultural Employees
        » Wage Order 14
FLSA Enforcement and Remedies

• U.S. Department of Labor
  – Administrator Interpretations
    ▪ [http://www.dol.gov/esa/whd/opinion/flsa.htm](http://www.dol.gov/esa/whd/opinion/flsa.htm)
    ▪ Prior to 2010, DOL issued opinion letters to employers
      ▪ Absolute defense to liability if relied upon
  – Regulations and interpretive bulletins
  – Audit
  – Injunctive relief
  – Monetary damages
FLSA Enforcement and Remedies

• Private Litigation
  – Back pay – 2 or 3 years
  – Liquidated “double” damages
  – Attorney’s fees and costs
  – Collective actions
Other Enforcement and Remedies

- **Labor Agreements/MOUs**
  - Follow timeframes and remedies for a grievance under MOU, not FLSA
  - MOU can provide greater benefits
Record Keeping

• Non-Exempt Employees
• Exempt Employees
• Public Safety Employees [Section 7(k)]
• Posting Requirements
• Preservation of Records
FLSA Work Period
FLSA Work Period

• The work period is the basis for determining if an employee has worked FLSA overtime
  – Civilian – 7-day work week
  – Safety – 207(k) work period
  – Hospital – 207(j) work period

• Work Period ≠ Work Schedule
FLSA Work Period

• **Basic Work Period Principles**
  – A fixed and regularly recurring period
    - 7 days / 168 consecutive hours, unless safety
  – Must designate for each employee
  – Can be different for each employee
  – Changes must be intended to be permanent
FLSA Work Period

• The 7 Day / 168 Hour Workweek
  – The 5/40 Schedule
  – The 4/10 Schedule
  – The 9/80 Schedule

  ▪ Overtime may be caused by:
    – Switching the regular day off
    – Coming in early or late on employee’s “split” day
    – Not designating employees’ workweeks
## A “Flexible” Workweek
(Begins 4 hours into 8-hour Friday shift)

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*LCW*  
*Liebert Cassidy Whitmore*
FLSA Work Period

• Public Safety Section 7(k) Work Periods
  – 7 to 28 consecutive days (53 to 212 hours) for “fire protection activities”
    ▪ Must have legal authority and responsibility to suppress fires
  – 7 to 28 consecutive days (43 to 171 hours) for “law enforcement activities”
    ▪ Must have power to arrest, except for security personnel in correctional institutions
FALSE

- The work period must coincide with the calendar week.
- An employer may not change an employee’s work schedule to avoid the payment of overtime.
- Workweek designations must include time of day that the workweek begins.
Hours Worked
Hours Worked - Topics

- Suffered or Permitted
- *De Minimis* Time
- One Employee Working Two or More Jobs
- Meal and Rest Periods
- Standby/On-Call Time
- Pre- and Post-Shift Duties
- Travel Time
- Training Time
Hours Worked

• **Basic Rule:**

All time suffered or permitted by an employer is hours worked under the FLSA.
Hours Worked

- Does the employer have actual or constructive knowledge of the work?
- A rule prohibiting unauthorized overtime is not enough!

Employers Must **Discipline** Employees Who Violate the Rule!
Hours Worked

• Examples of Off-the-Clock Hours
  – Staying late and/or arriving early
  – Finishing paperwork/reports at home
  – “Volunteer” work
  – Handling lengthy and/or frequent phone calls or emails at home
• Pre- and Post-Shift Activities
  – Re-fueling vehicles and checking out tools
  – Administrative work
  – Set-up and clean-up of premises or equipment
  – Required to don/doff specialized clothing or protective gear on employer’s premises
  – Care of police K9s
De Minimis Time

• Record time in the same increment as other payroll items
• Factors for de minimis time
  – Is it practical to track the time?
  – What is the size of the time in the aggregate?
  – Is the time regularly worked?
Rounding of Time

• Basic Rule: Rounding cannot operate to the detriment of the employee over time.
One Employee Working Two or More Jobs

• Generally: Hours worked in different jobs must be combined for overtime purposes

• Exceptions in 207(p):
  – “Occasional or sporadic work” that is “In a different capacity”
  – Mutual aid
  – Substitution (shift trades)
Hours Worked

- Meal Periods
  - “Bona Fide” meal period
  - Relieved of duty
- Rest Periods
  - Counted towards hours worked
- Sleep Periods
  - Exclude by agreement if shifts 24 hours (safety) or more than 24 hours (civilian)
TRUE or FALSE

• The FLSA requires an employer to provide an employee with the opportunity to take a meal break.

• If the employee voluntarily chooses to work through his meal break, the employer need not compensate the employee.
Hours Worked

• Standby/On-Call Time
• Is the time at issue sufficiently restricted to convert it to hours worked?
  – The degree to which the employee is free to engage in personal activities
  – Agreement between the parties
Hours Worked

• Factors Regarding On-Call Time
  – Use of pager or cell phone
  – Restrictive, fixed response time limit
  – Frequency of calls
  – Ability to trade on-call responsibilities
  – Excessive geographical restrictions on employee’s movements
  – On-premises living requirement
  – Does employee actually engage in personal activities
Hours Worked

• Travel Time
  – To and from work?
    ▪ Generally can exclude commute time
  – During the workday
    ▪ Must pay
Hours Worked

• Overnight Travel – Charter Cities and ALL Counties
  – Is the travel during the employee’s normal work hours, even on an off day?
  – Is the employee driving to the location?
  – Was the employee offered public transportation?
Hours Worked

• Charter cities and all counties follow FLSA rules:
  – No pay for overnight travel that does not cut across work hours

• All others may be subject to California law and must pay for:
  – Employer-required overnight travel
Hours Worked

• Training Time
  1. Is the training during normal working hours?
  2. Does the employee perform productive work?
  3. Is the training for a certification required by a higher government agency?
4. Is the training voluntary?

5. Does the training correspond to courses offered by independent bona fide institutions of higher learning?

6. Does the training directly relate to the employee’s current job?
Overtime Exemptions
Overtime Exemptions

• The “White Collar” Exemptions
  – The Salary Tests
    ▪ Paid on a “salary basis”
    ▪ $455 per week
  – The Duties Tests
    ▪ Performance of “exempt” duties
      – Executive
      – Administrative
      – Professional
    ▪ Highly compensated employees
**Exempt Employees - Hours Worked**

**TRUE or FALSE**

- City may require its exempt employees to complete accurate timesheets each workday.
- City cannot require an exempt employee to be present at the workplace from 8 a.m. to 5 p.m.
- City may not require an exempt employee to use 2 hours of vacation leave if he leaves at 3 p.m.
- City may suspend an exempt employee for one day for assaulting his department head.
- An exempt employee will lose his exempt status if he is paid overtime.
The Salary Basis Test

• Permissible Deductions from an Exempt Employee’s Salary:
  – Absences of a day or more for personal leave, sickness or disability
  – Good faith discipline for major safety violations in full day increments
  – Good faith disciplinary suspensions for infractions of generally applicable written workplace rules in full day increments
  – Unpaid FMLA leave
The Salary Basis Test

• Daily Suspensions
  – Only allowed for workplace conduct violations, not performance or attendance issues
  – Applies only to suspensions, not fines or other monetary penalties
  – Written policy does not have to list all possible grounds for discipline
  – Narrow exception to salary basis test
The Salary Basis Test

• Permissible Deductions from a *Public Agency* Employee’s Salary:
  – Budget-related furloughs
  – Partial day absences
    • Paid according to a pay system under which the employee accrues personal and sick leave, and
      – Permission for use of accrued leave has not been sought or has been sought and denied;
      – Accrued leave has been exhausted; or
      – The employee chooses to use leave without pay.
The Salary Basis Test

• Impermissible Deductions from an Exempt Employee’s Salary:
  – Jury duty
  – Attendance as a witness
  – Temporary military leave

*But an employer can offset any fees received (i.e., jury duty pay) against salary owed for that workweek*
The Salary Basis Test

• Additional Compensation Is Allowed
  – Overtime, CTO, shift differentials, flex time are permitted for exempt employees
    ▪ Must have guaranteed regular weekly salary of at least $455

• May Require Exempt Employees to Track Hours

• May Require Fixed Hours
Regular Rate of Pay
Regular Rate of Pay

• FLSA Regular Rate **IS NOT** the Same as Employee’s Base Hourly Rate
  – Hourly: Divide total pay (including special pays) for work period by total number of hours worked
  – Salary: Divide total pay (including special pays) for work period by number of hours that pay is intended to compensate
Dan, an hourly employee, is paid a $20 bonus per week. His hourly rate is $10. He worked 48 hours during the last workweek. What was his regular rate of pay?

- $480 + $20 Bonus = $500 Total Wages in the Workweek
- $500 / 48 Hours Worked = $10.42/Hour as the Regular Rate of Pay
Regular Rate of Pay

• Employees Working Two or More Positions
  – Weighted average, or
  – (If agree ahead of time) Paid at rate applicable to position for which overtime is worked
Regular Rate of Pay

- Compensation Excluded from Regular Rate:
  - Pay for vacation, holiday, or illness
  - Pay for time not worked (non-worked show-up time or minimum call-back time)
  - Overtime payments pursuant to an MOU, ordinance or rule
  - Gifts not dependent on hours worked
Regular Rate of Pay

• Payments Included in Regular Rate:
  – Shift differentials
  – Retroactive pay increase
  – Educational and other incentive pay
  – Standby pay and uncontrolled standby time
  – Performance awards
  – Bilingual pay
  – Longevity pay
  – Acting pay
Regular Rate of Pay

• Timely Payment of Wages
  – Payday can be at any frequency
  – Wages for the workweek due on regular payday for that workweek
TRUE or FALSE

• An MOU can define the employee’s regular rate.
• Bilingual pay must be included in the regular rate.
• Educational incentive pay is included in regular rate.
• Tuition reimbursement is included in regular rate.
• Standby pay must be included in regular rate.
• An employee who works 80 hours in a pay period, with 45 hours in the first work week and 35 hours in the second work week, is not entitled to overtime.
Compensatory Time Off
Compensatory Time Off

- Agreement Required
- Must Be Given at Time and One Half
- FLSA Limits on Accrual
  - Safety – 480 hours
  - Non-safety – 240 hours
Compensatory Time Off

• Employee’s Right to Use v. Employer’s Right to Deny Usage
  – Employer must grant request to use FLSA CTO within a reasonable period of time
  – MOU (non-FLSA) Overtime

• Employer’s Right to Force Use of CTO

• May Pay CTO to Exempt Employees
Thank You!

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