

The FLSA

Twenty Years Later

Labor Relations Institute

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ENERGY PASSION COMMITMENT SHIRTSLEEVES

Minimum Wage Update

- FLSA: pending legislation would increase to \$5.85 within 60 days, \$6.55 within a year and \$7.25 within 2 years
- Washington Minimum Wage Act: \$7.93 in 2007 with CPI escalator thereafter

White Collar Exemptions

- Exempt status requirements compliance with the salary basis test + duties test.
- Salary basis test.
 - Predetermined amount not based upon the quality or quantity of work performed.
 - Can part-timers be exempt?

White Collar Exemptions Cont.

- Duties Test.
 - First responders.
 - Computer employee exemption. Primary duties must consist of:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - A combination of the above, the performance of which requires the same level of skills.

Volunteer Problem Areas

- Dual employee/volunteer status
- Improper payments to volunteers
- Use of volunteers to fill in for absences of paid personnel

Regular Rate of Pay Problems

- Failure to include add-ons to base pay (*e.g.*, longevity, education incentives)
 - Only required if employees work more than FLSA threshold
 - Deceptive contract language
- Failure to consider lump sum payments (related issue of sick leave buy-back)

Items to Include in Regular Hourly Rate of Pay

- Shift differential
- Payments for achieving certain levels of certification
- Education incentives
- Hazardous duty pay
- Special assignment or acting pay
- Clothing allowance (only if amount does not approximate actual cost of purchase and cleaning)
- On-call pay
- Non-discretionary bonuses
- Contest prizes
- Employee lunch or meal expenses paid by employer, unless incurred for the employer's benefit
- Retroactive pay increases
- Travel expenses of employees going to and from work, if paid by employer, unless incurred for the employer's benefit
- Tool allowances (only if doesn't reasonably approximate actual cost of purchasing and maintaining tool)

Items Excluded From Regular Hourly Rate of Pay

- Vacation pay
- Sick leave
- Bereavement leave
- Jury duty pay
- Discretionary bonuses
- Holiday pay, if it is equivalent to regular earnings
- Premium pay for work on holiday, weekends, etc.
- Idle time beyond the control of the employer
- Severance pay
- Qualified pension and profit sharing contributions
- Call-back premium pay
- Travel expenses, if business trips are taken by the employee
- Show up or reporting pay which exceeds hours actually worked
- Weekly overtime pay
- Health and welfare fund benefits received by the employee
- Death benefits
- Employer-paid benefits
- Reasonable uniform and clothing allowances
- Comp time use payments

Sick Leave and Vacation Leave Cashouts

- 8th Circuit ruled sick leave buy back is a form of non-discretionary bonus added to regular rate
- No 9th Circuit case
- Department of Labor concluded vacation sell back is not part of regular rate of pay

Overview of “Hours Worked” Component

- Includes all time that employees are directed to work
- Also, includes “off-the-clock” work that employees are “permitted to work”

Time Spent Changing Clothes

- Generally considered non-work time
- If clothing is integral to work performed or required to take place at worksite, then time is compensable
- Cutting edge issues
 - Donning and doffing of police uniforms
 - What is “de minimis” time

The Continuous Workday

- What does the continuous workday mean.
- Impact on employees checking voicemail and email during non-duty hours?

Travel Time Maze

- Commute Travel Time.
 - Home to work travel—Not compensable
 - Home to different work location—Not compensable as long as:
 - Commute takes place outside the normal work hours
 - The assignment is not a special or unique assignment
 - The commute is within the general commute area for the agency.
 - Home to training assignment that is a normal incident of work and within general commute area—Not compensable
 - Home to special and unique assignment in another City-Compensable
 - Using an employer-provided vehicle to commute-Not compensable as long as at employee's option.

Travel Time Maze Cont.

- Non-commute Travel Time
 - Travel during normal work hours-Compensable
 - Travel during normal work hours on days off-Compensable
 - Travel outside regular work hours-Not compensable unless employee is driving. Travel as a passenger outside regular work hours is not compensable.
 - Overnight travel-Travel during normal work hours is compensable but time spent in travel away from home outside work hours is not compensable.

Requirements to Exclude Training Time From Hours Worked

- Either:
 - All of the following four requirements must be met:
 - Attendance outside regular working hours
 - Attendance voluntary
 - Not directly related to employee's job; and
 - Employees do not perform productive work during attendance
- Or:
 - Training required by government agencies as condition of profession (*e.g.*, Paramedic re-certification training)

Training cont.

- Voluntary study time
- Off-duty physical fitness training
- CLEs
- Off-duty time acquiring necessary skills

Compensable hours cont.

- Time spent in counseling.
- Off the clock hours of work.
 - Definition: work voluntarily performed where agency knew, or should have known
 - How to control
 - Pre-approval requirement for overtime
 - Enforcement of requirement

Washington Meal & Break Law

- Effective 5-20-03, basic meal and break period rules apply to public employers
- Basic rule, 10 minutes paid per 4 hours (either fixed or intermittent) and 30 minutes unpaid for lunch
- Can opt out or change by union contract or employee agreement
- Law recognizes certain pre-existing exemptions before 4-1-03

Shift Trade Issues

- Voluntary trades between employees – ignore actual hours worked
- Overtime pay for substituted hours (*Senger v. City of Aberdeen*, 2006 WL 278752 (8th Cir. 9-29-06))
- Problems
 - Safety concerns
 - Discontinuity of crews
 - Overtime costs
 - Trades repaid with leave

What's the Applicable Work Period?

- For most employee, work week composed of 7 consecutive 24 hour periods
- Work weeks are not necessarily pay periods
- Work weeks can be modified for certain employees
- Alternatives to work week available for health care employees and commissioned police and fire personnel

7(k) Overview

- Allows work period as long as 28 days
- Higher hour's threshold for FLSA overtime
- Greater flexibility to accommodate non-traditional shifts
- Not available for civilians
- Status of EMS personnel

**7(k) WORK PERIOD EXCEPTION
FOR FIRE AND POLICE PERSONNEL**

NUMBER OF DAYS IN WORK PERIOD	MAXIMUM ALLOWABLE HOURS	
	FIRE	POLICE
7	53	43
8	62	49
9	68	55
10	76	61
11	83	67
12	91	73
13	98	79
14	106	86
15	114	92
16	121	98
17	129	104
18	136	110
19	144	116
20	151	122
21	159	128
22	167	134
23	174	141
24	182	147
25	189	153
26	197	159
27	204	165
28	212	171

7(k) Problems

- Improper attempt to match 7(k) period to pay periods
- Using 7(k) for employees ineligible
- Wrong 7(k) period for work schedule (*e.g.*, 3-12's on 28 day cycle)
- Improper Kelly Day scheduling
- Washington's generous equivalent of 7(k)

Managing Comp Time

- Denying request requiring overtime coverage
- Cap on accrual and/or use
- Don't agree to comp time in lieu of paid overtime
- Yearly cashout
- FLSA vs. non-FLSA comp time
- Compel use of comp time

New Wage Hour Theory: Late Payment of Wages

- Source of potential problem: WAC's re establishing regular payday at least once a month + lag of up to 7 days for payroll
- Question: Does this apply if you pay more frequently than once a month?
- Answer: Kent and Thurston County decisions say no. Petition for review to Washington Supreme Court pending.

Regulatory Response to Late Payment Issue: New L&I Regs.

- Regulations require employers to establish payday at least once monthly.
- Employers who pay once monthly must pay all wages earned up to seven days prior to the end of the payroll period. Employees who pay more often than once monthly are not subject to the seven-day payroll period.
- Regulations effective 3/1/07 provide that employers who pay more than once a month should strive to include overtime pay in the pay period from which it was earned, unless they can demonstrate that it was not possible to do so, at which point they should pay it on the next regular-scheduled pay period.