



FAIR LABOR
STANDARDS ACT – OACB
February 6, 2012



WHAT IS THE PURPOSE OF THE LAW?

- ◆ Requires most employees in the US be paid at least the Federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. It also establishes the standards to be met in order for an EE to be classified as overtime exempt.



Employment

- ◆ Employ as utilized by the DOL means to “suffer or permit to work”. The ER must know when someone is working.
- ◆ EEs working from home can cause immense problems for an ER if it is an hourly EE because the ER doesn’t know when they are actually working.



Volunteers

- ◆ The ER can accept volunteer work from a civic minded person. The person must be a bona fide volunteer and NOT an EE who is being compensated or coerced to volunteer.

Examples of Volunteer Work



- ◆ Help in a sheltered workshop
- ◆ Help in a group home
- ◆ Help on a field trip
- ◆ Driving a vehicle
- ◆ Working with DD persons
- ◆ Other such services to carry out the mission of the ER



Bargaining Agreements Impact

- ◆ Under collective bargaining agreements (CBA), the parties **MAY NOT** waive EE's statutory FLSA rights.
- ◆ You can provide benefits that are more beneficial but not less than the law.
- ◆ Violations of FLSA under a CBA can end up in Federal Court regardless of arbitration provisions of the CBA.



Bargaining Agreements Impact (cont.)

- ◆ Arbitration plus Federal Court provides “2 bites at the apple”
- ◆ First the EE demands arbitration and if the answer is less than satisfactory they can go to Federal Court.



Fair Labor Standards Act

- ◆ As amended August 23, 2004
- ◆ Exemption from both minimum wage and overtime pay for EE's employed as bona fide "executive, administrative, professional, computer and outside sales" EE's



White Collar Exemption

- ◆ The white collar exemption is terminology that refers to Executive, Administrative, and professional EE's.
- ◆ These exemptions are based upon duties NOT job titles, job descriptions or classifications.
- ◆ If an EE meets the requirements, the EE is EXEMPT from overtime.



White Collar Exemption (cont.)

- ◆ The importance of duties, not the time spent on duties is more important for positions of assistant directors or managers.
- ◆ Investigators utilize words such as primary duty, principal or main duty, major or most important duty.
- ◆ Positions that have such duties even if only a minority of their time is spent are exempt.



White Collar Exemption (cont.)

- ◆ That does not mean that you cannot pay overtime to the EE...but if you treat an EE as an hourly you risk having other similarly situated EE's being declared overtime eligible.
- ◆ The same concept can apply to handing out “comp time” to exempt EE's



Enforcement and Remedies

- ◆ The ER bears the burden of proving that a specific job meets ALL of the requirements for exemption.
- ◆ DOL is the government body that conducts investigations.
- ◆ An ER could have to pay back wages, liquidated damages, attorney's fees and court costs.



Enforcement and Remedies (cont.)

- ◆ DOL has requested from U.S. District Court that EE's should be able to file a single law suit and get Federal and State remedies.
- ◆ Additionally an ER could face criminal and civil penalties.



Enforcement and Remedies (cont.)

- ◆ ER's used to request opinion letters for a particular situation but in 2004 DOL stopped issuing such letters and now issue “general administrator interpretations” which are untested in court.



Executive Exemption – ALL must be met

- ◆ Salary basis => \$ 455/week
- ◆ Primary Duty – Managing enterprise, department or subdivision
- ◆ Regularly direct 2 or more FTE
- ◆ Authority (weighty influence) to hire/fire/promote/change employment status



Administrative Exemption – All must be met

- ◆ Salary basis => \$ 455/week
- ◆ Primary Duty – Performing office or nonmanual work directly related to the management or general business operations of ER or ER's customers
- ◆ Work includes exercise of discretion and independent judgment re: matters of significance



Learned Professional Exemption

– ALL must be met

- ◆ Salary/fee basis => \$ 455/week
- ◆ Primary Duty – perform work requiring advanced knowledge (intellectual character) requiring consistent exercise of discretion and judgment
- ◆ Advanced Knowledge in science or learning
- ◆ Advanced Knowledge customarily acquired by prolonged course of specialized intellectual instruction



Learned Professional Exemption (cont)

- ◆ For this exemption, it is not only the depth of knowledge necessary, but how it is acquired.
- ◆ This is why our SSA positions do not qualify as exempt under this exemption.

Creative Professional Exemption

– ALL must be met

- ◆ Salary/fee basis => \$ 455/week
- ◆ Primary Duty – performance of work requiring intervention, imagination, originality or talent in recognized field of artistic or creative endeavor





Computer Employee Exemption

– ALL must be met

- ◆ Salary or Fee Basis => \$ 455/week **or** => \$27.63/hour
- ◆ Employed as computer systems analyst, computer programmer, software engineer, or similarly skilled worker in computer field performing described duties
- ◆ Primary duties – application of systems analysis techniques; design/development/documentation / analysis/creation/ of systems and programs



Outside Sales Exemption – All must be met

- ◆ Primary Duty – making sales or obtaining orders or contracts for services/use of facilities for which a consideration will be paid by the client or customer
- ◆ EE must be customarily and regularly engaged away from the ER's place(s) of business



Combination Exemption

- ◆ The U.S. Court of Appeals has issued a decision which permits a combination of exemption categories. In the instant case it was outside sales and administrative.
- ◆ The EE did not qualify for either exemption on their own, but utilizing a combination, the court ruled the EE was exempt.
- ◆ This could have ramifications for CBDD.



APPLICABILITY TO CBDD

- ◆ Determination of Salaried vs. Hourly Employee
- ◆ Overtime (40+ hours @ 1.5 hourly)
- ◆ Discipline, including suspensions
- ◆ Nursing Roles (RN/LPN)
- ◆ Periodic Review is necessary



APPLICABILITY TO CBDD (cont)

- ◆ Just because a position qualifies as a management position under ORC 5126 does NOT mean it is exempt.



DEDUCTIONS

- ◆ For salaried EEs you are permitted to deduct:
 - FMLA partial days
 - Sick leave
 - Personal leave
 - Leave from banks



ERROR CORRECTIONS

- ◆ Improper salary deductions that are either isolated or inadvertent will not result in loss of the exemption if the ER reimburses the EE for the improper deductions.
- ◆ No specific timelines of when reimbursement takes place



SAFE HARBOR

- ◆ If the ER has clearly communicated its policy regarding the types of deductions that will be made, but a manager engages in a practice of making improper deductions, the ER must reimburse the EE and make a good faith effort for the future to stop the bad practice. This results in a “Safe Harbor”



OVERTIME (OT)

- ◆ FLSA simply states that any hours worked in excess of 40 hours is considered to be overtime.
- ◆ If an EE works 50 hours in the first week of a pay period and 30 hours in the second week...they have 10 hours of OT.



OT (cont.)

- ◆ You must pay overtime at a minimum of 1.5 times the hourly rate. The OT hourly rate includes:
 - Shift differential
 - On call status (if you pay for such)
 - Hazardous duty pay
 - Longevity pay
 - Advanced education pay



OT (cont.)

- ◆ Example: An hourly EE makes \$10.00 per hour straight time but receives \$300 for longevity and normally works 2080 hours per year. Their overtime rate of pay is \$10.00 per hour plus $300/2080$ (\$.144) for a total of \$10.144.



EXCLUSIONS FOR OVERTIME RATE

- ◆ Christmas gifts
- ◆ Rewards
- ◆ Travel expense
- ◆ Tuition reimbursement
- ◆ PERS pickup
- ◆ Hours worked beyond 8 in a day*



OT PAY RATE (2 different rates)

- ◆ If an EE has 2 different pay rates (e.g. they are paid \$12.00/ hour as a work shop spec and \$10.00/hour to work as a custodian and they work 56 hours in a work week which alternates between the 2 jobs as needed. They work 30 hours @ \$12.00 and 26 hours @ \$10.00...their OT rate is calculated as a “weighted average”



WEIGHTED AVERAGE

- ◆ 30 hours x \$12 = \$360
- ◆ 26 hours x \$10 = \$260
- ◆ \$620
- ◆ $\$620/56 = \11.07
- ◆ $\$11.07 \times 16 \text{ hours OT} \times 1.5 = \265.68
- ◆ Total pay is $\$620 + \$265.68 = \$885.68$



REST PERIODS

- ◆ Rest periods such as smoke and coffee breaks are work time as long as they are less than 20 minutes.
- ◆ Meal periods are not work time unless specified in policy or in a labor contract
- ◆ If you require an EE to be “on duty” during their meal period it is considered work time.



Unpaid Breastfeeding Breaks

- ◆ A new addition to the 2004 law is that ER's must provide an unpaid breastfeeding break to nursing moms for every time they need to express milk.
- ◆ The ER's must provide a private area, other than a bathroom, where such employees may express milk for their infants.
- ◆ ER's of less than 50 are exempt if it would impose an undue hardship.



SLEEP TIME

- ◆ If you are going to arrange for “sleep time”, it must be agreed upon BEFORE the activity. Normally no more than 8 hours is sleep time. Interruption of sleep time is work time and compensable.



TRAVEL TIME

Basically, if you order the travel...you as the ER pay....even if OT

Travel during the day to perform job functions is work time

You can set aside a meal time while the EE is traveling, but it is compensable, unless you provide enough time to travel plus have a meal.



COMPENSATORY TIME

- ◆ Under Ohio law a county board can grant comp time for overtime work at the rate of 1.5 hours of comp time for each hour of OT.
- ◆ An EE under Ohio law can accumulate up to 240 hours of comp time
- ◆ Under Ohio law the EE must utilize the comp time within 180 days of accrual.



COMP TIME (Cont.)

- ◆ Usage of comp time is to be mutually agreed to and an ER cannot reasonably withhold approval.
- ◆ The ER can mandate the usage of comp time
- ◆ Comp time is not mandatory, therefore the max accrual and timelines for usage are governed by policy or labor contract



COMP TIME (Cont.)

- ◆ We suggest no comp time !!
- ◆ Payout OT as it occurs to maintain better control of usage and cost.
- ◆ When an EE is on comp time, in most cases the ER must hire a sub which increases cost plus incurs an additional cost in that the sub will earn sick leave.



FLEX TIME

- ◆ Flex Time doesn't exist in FLSA !!
- ◆ If an EE works 10 hours on Tuesday, you can have them report to work on Wednesday 2 hours later...or leave 2 hours early in order to avoid O.T.
- ◆ You cannot carry over into the next week!!



PENALTIES

- ◆ Failure to pay OT for OT eligible EE's will result in back pay for OT hours accrued for:
 - 3 years if intentional
 - 2 years if not intentional
- Plus interest and potentially any fines that could be levied for intentionally not paying OT hours



RECOMMENDATIONS

- ◆ Conduct an FLSA audit of positions that might meet the standards for being classified as OT exempt.
- ◆ Review all policies regarding OT
- ◆ Review all policies regarding comp time
- ◆ Review all policies regarding travel time
- ◆ Refrain from flex time if it encompasses more than one week



RECOMMENDATIONS (CONT.)

- ◆ Hold managers responsible for control of overtime.
- ◆ Be cautious of utilizing the concept of four ten hour days rather than current practice.
- ◆ No comp time
- ◆ Flex only within the work week



January 1, 2012 OHIO Minimum Wage Increases

◆ Effective 1.1.11

- EE min wage increases to \$7.70/hour (EE's 16 or older)
- Tipped EE's – min wage increases by \$0.05 to \$3.70/hour



CONCLUSION:

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