Employment Law for Department Heads and Supervisors
November 14, 2019
School of Government, UNC-Chapel Hill

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Agenda

8:15	**Registration Opens**
9:00 – 9:15	**The Nature of Government Employment** Bob Joyce
9:15 – 10:30	**Employment at Will or Due Process Protections? Understanding Discipline and Discharge** Bob Joyce and Diane Juffras
10:30 – 10:45	**Break**
10:45 – 11:30	**Dealing with the Americans with Disabilities Act** Bob Joyce
11:30 – 12:15	**The FLSA and Overtime Law** Diane Juffras
12:15 – 1:15	**Lunch in the School of Government Dining Room**
1:15 – 1:45	**Stupid Things Employees Say on Social Media** Bob Joyce
1:45 – 2:15	**Preventing Unlawful Harassment** Diane Juffras
2:15 – 2:30	**Every Note You Take: Personnel Files for Public Employer Supervisors** Bob Joyce

2:30 – 2:45	**Break**
2:45 – 3:15	**Managing Employee Leave** Diane Juffras
3:15 – 3:45	**Public Employment and Drug Testing** Diane Juffras
3:45 – 4:15	**10 Other Things That Dep't Heads and Supervisors Need to Know** Bob Joyce
4:15	**Formal Adjourn**
4:15 – 5:00	**Optional Open Question and Answer with Diane and Bob**

Employment at Will or Due Process Protections?

Understanding Discipline and Discharge

Coates' Canons Blog: Firing At-Will Employees: Legal Limitations

By Robert Joyce

Article: https://canons.sog.unc.edu/firing-at-will-employees-legal-limitations/

This entry was posted on August 06, 2013 and is filed under Discipline & Discharge, Employment

If you go to work for someone else, the odds are great that you are an employee at will. That's the basic rule in North Carolina, as it is almost everywhere in the United States. In North Carolina, it applies whether you go to work for an individual or a private business or a unit of government.

So what? What does it mean to be an employee at will? It means that you can be fired at any time, for any reason or no reason, with notice or without notice. It means, as a legal matter, that your job hangs by the barest thread, subject to being snipped at any moment, with no recourse. It means, as a practical matter, that the employer holds all the cards in the employment arrangement.

But there is one more element to the law of employment at will: yes, it's true that an at-will employee may be fired for any reason or no reason. But even an employee at will may not be fired for an *unlawful* reason. The law puts in place some protections against dismissal even for at-will employees.

This blog post lists the unlawful reasons. If an employer, private or governmental, fires an employee for any reason not listed here, the law of employment at will prevails, and the employee is out of luck. But if one of these reasons is behind the dismissal, the employer has acted unlawfully and the employee may have legal protection.

Protections under federal statutes

Federal statutes provide protections to at-will employees, both in the private sector—businesses and non-profits above a minimum number of employees—and in government.

Race. Under Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.), it is unlawful for an employer to dismiss you (or to discriminate otherwise, such as in hiring, promotions, or compensation) because of your race. This protection applies fully to at-will employees. You can go to the Equal Employment Opportunity Commission and file a charge of discrimination. The EEOC will investigate your claim and, perhaps, make an effort on your behalf to reach an accommodation between you and your employer. If that effort fails, you will be issued a right to sue letter and you can take the employer to court. The effort and expense may be too great, but the legal remedy is there if you can take advantage of it.

Sex. Title VII protects you against dismissal—or other discrimination—on account of your sex just as it does on account of your race. The statute uses the term "sex." In common usage today, however, the term of choice is usually "gender." For this purpose, the terms are equivalent.

Religion. Title VII protects you against discrimination on account of your religion. If you can't work on Saturday because of religious beliefs, the employer is required to make an effort (but not go to great expense) to accommodate your religious need rather than simply fire you.

National origin. Title VII does not use the term "ethnicity," but it gets at the same notion by protecting you against dismissal on account of your national origin.

Color. The fifth, and final, protected characteristic under Title VII is "color." It correlates closely with race, of course, but it is not the same thing. The protection could apply, for example, if a light-skinned African American employer discriminates against a dark-skinned African American employee because of that employee's color.

Age. Three years after enacting Title VII, Congress passed the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq.. It prohibits dismissal—or other discrimination—on account of a person's age, once that person reaches 40. It is not unlawful to dismiss an employee who is 35 because that employee is too old, but it is unlawful to dismiss someone who is 41 for being too old. Go figure. When the ADEA was first passed, its protections ended at age 65, and employees were often subject to mandatory retirement at that age. After a few years the age limit was raised to 70, and then the upper limit was removed altogether. It is not unlawful to fire an older worker because she can no longer adequately perform the job, but it is unlawful to fire her just because of her age. The ADEA is administered through the EEOC, as Title VII is.

Disability. In 1990, Congress passed the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq. The ADA covers many kinds of situations in addition to employment, but its application to employment is its main feature. You may not be fired because of an impairment—mental or physical—that substantially limits you in a major life activity. And the ADA requires an employer to make an effort to accommodate your disability (perhaps at substantial expense). It is unlawful to dismiss you because of your disability or because the employer doesn't want to make the accommodation. The ADA is administered through the EEOC.

Genetic information. The most recent federal statute is the Genetic Information Discrimination Act, 42 U.S.C. 2000ff et. seq. It prohibits discrimination against you because of genetic information about you or information about your family medical history. See the Coates' Canons blog here.

Military service. With some limitations, your employer cannot fire you because you enter military service. The Uniformed Services Employment and Reemployment Rights Act, 39 U.S.C. §§ 4301 et seq., so provides, and also requires that, within limitations, the employer must hold a job for you when you get back from service.

Federal constitutional protections

Protections that stem directly from the United States Constitution apply only to employees of the government—state or local—and not to employees in the private sector. How come? Because the Constitution acts to constrain how government acts. That is, it describes the relationship between citizen and government. It does not directly control how private entities act. When the government becomes an employer and hires you to work for it, you don't stop being a citizen. Two relationships exist at once—employer/employee and government/citizen. When the government acts against you in the way that any employer might act—say, by firing you—the protections that you enjoy as a citizen may affect the legality of the employer's action. Employees in the private sector do not have these protections.

Free speech. When you go to work for the government, one protection that follows you as a citizen is the right to free speech embedded in the First Amendment. That right is not absolute, but if you believe you were fired because of what you said on a matter of public concern, you can pursue the matter with a lawsuit. The court will balance your interests in speaking out against the governmental employer's interest in getting the job done without unreasonable disruption. See Coates' Canons blog posts here and here.

Religion (again). The First Amendment also protects individuals in the free expression of their religion. When you go to work for the government you have the full protection of Title VII, described above, but you also have this constitutional protection and, if you believe your dismissal was based on their religion, you may sue directly under the constitution, in addition to pursuing your Title VII remedy.

Unreasonable searches. The Fourth Amendment protects individuals against unreasonable searches and seizures. If a governmental employer looks through your desk drawers or computer-usage records, or demands urine or blood for a drug test, and fires you for what it finds (or because you refuse to go along with the search), the possibility exists that you may sue under the Fourth Amendment. See Coates' Canons blog posts here and here.

Protections under North Carolina statutes

The North Carolina Retaliatory Employment Discrimination Act (REDA), G.S. 95-240 et seq., pulls together provisions scattered throughout the state General Statutes to protect employees against dismissal in particular circumstances. An employee with a claim under REDA goes first to the N.C. Department of Labor with a complaint and then may bring a lawsuit.

Workers' compensation, wage and hour, and mine safety claims. Under REDA, it is unlawful for your employer to fire (or otherwise to adversely treat) you because you file a workers' compensation claim or testify with respect to the claim of another employee. The same is true with respect to wage and hour claims under state law and to claims under the state's mine safety law.

Sickle cell. Under REDA, you may not be fired (or otherwise adversely treated) you because you possesses the sickle cell trait or hemoglobin C trait.

National guard service. Under REDA, you may not be fired (or otherwise adversely treated) you because you serve in the National Guard.

Genetic information (again). Under REDA, as under GINA, discussed above, you may not be fired because of genetic information about you or a family member.

Pesticide use. Under REDA, you may not be fired because you pursue your rights under the state statute on the regulation of the use of pesticides or testify with respect to the claim of another employee.

Drug paraphernalia sales. Under REDA, you may not be fired because you refuse to sell certain products banned by the state statute controlling sales of drug usage products.

Juvenile order compliance. Under REDA, you may not be fired because you attend a court proceeding or take other actions that a court may order in cases where your child is under the jurisdiction of the juvenile court for delinquency.

Domestic violence protection. Under REDA, you may not be fired if, with reasonable notice to the employer, you have to take time off work to obtain, through the judicial system, a domestic violation protection order or civil no-contact order. See G.S. 95-270.

How you vote. This prohibition is not in REDA–and it is the only crime in the bunch! G.S. 163-274(a)(6) makes it misdemeanor "to discharge or threaten to discharge from employment . . . any legally qualified voter on account of any vote such voter may cast or consider or intend to cast, or not to cast, or which he may have failed to cast." You can't be fired for how you vote. Another provision applies only to units of government. It is found at G.S. 163-271. If you work for the government, it says, you may not be fired for how you cast your vote. (Thanks to Don Wright, general counsel at the State Board of Elections, for pointing out G.S. 163-274(a)(6) to me.)

Serving on election day. This prohibition is also not in REDA, but is found at G.S. 163-41.2 As long as you give proper notice to your employer that you will be absent, you may not be fired because you agree to serve as a precinct official, appointed by the county board of elections, on election day.

Whistleblowing. The North Carolina Whistleblower's Protection Act, found at G.S. 126-84 et seq., protects employees of the state, of community colleges, and public schools from dismissal for reporting violations of law, fraud, misappropriation of resources, specific dangers, and gross mismanagement by their employers. It does not apply to other governemental employees or to employees in the private sector. See Coates' Canon blog post here.

Refusing to perform abortions. You can't be fired, if you are a health care provider, because you refuse to participate in an abortion procedure for moral, ethical, or religious reasons. G.S. 14-45.1(e). (Thanks to Gerry Cohen, special counsel, North Carolina General Assembly, for pointing out this provision to me.)

North Carolina common law protection

The vaguest, and oddest, of the legal provisions restricting the firing of employees is actually not a statute. It is instead a common law provision. That is, it was not developed by the legislature but by the courts, originally in *Sides v. Duke Hospital*, 74 N.C. App. 331 (1985). And it is not an outright prohibition on firing. Instead, it creates the possibility of a monetary recovery in court by someone who has been fired.

The public policy wrongful discharge tort. The *Sides* case and the many that have followed it have created this exception to employment at will: if I, the employer, fire you, my employee, because you refuse to do something that would violate the public policy of the state, I have committed the tort of wrongful discharge and you can sue me. If you win, you don't get your job back, you get money from me to compensate you for your lost job. Here is an example: I fire you because you testify against me in court, truthfully, in response to a subpoena. It is the public policy of this state that everyone is to tell the truth in court. I can't get away with firing you because you won't lie in court.

State constitutional protection. A rare protection is found under the North Carolina Constitution. Our courts have said, starting with *Corum v. University of North Carolina*, 330 N.C. 761 (1992), that where protections are laid out in the state constitution and are violated by a governmental employer, as in the dismissal of an employee for the legitimate exercise of free speech, the employee may sue directly in state court to remedy the violation, but only if no other provision of law gives the chance at a remedy. There have not been many successful employee lawsuits brought this way.

Anything I missed?

Do you know of other protections against firing at-will employees, in federal or state law, that I have missed here? I would love to hear about them.

Links

- canons.sog.unc.edu/?p=5361
- canons.sog.unc.edu/?p=5151
- canons.sog.unc.edu/?p=3319
- canons.sog.unc.edu/?p=3241
- canons.sog.unc.edu/?p=1415
- canons.sog.unc.edu/?p=2784

Discipline and Discharge

Understanding Just Cause

Providing a Constitutionally Adequate Grievance Process

1

UNSATISFACTORY JOB PERFORMANCE

Any work-related performance problem

- Performance consistently fails to meet the minimum requirements or expectations for the position
- Performance meets some, but not all, of the requirements or expectations for the position

2

UNSATISFACTORY JOB PERFORMANCE

Any work-related performance problem

- Quantity of work
- Quality of work
- Failure to meet deadlines
- Violating employer rules, procedures, policies

3

SOME EXAMPLES OF UNSATISFACTORY JOB PERFORMANCE

- Does not exhibit mastery of basic duties even after training
- Does not complete assignments
- Does not prioritize work appropriately
- Takes longer than it should to complete tasks

4

MORE EXAMPLES OF UNSATISFACTORY JOB PERFORMANCE

- Repeated mistakes due to inattention
- Disregards supervisor's direction or constructive feedback
- Performance does not improve even after repeated direction or feedback.

5

GROSSLY INEFFICIENT JOB PERFORMANCE

Same as UJP + employee's action or failure to act

- **results in or increases the chance of death or serious bodily injury**

or

- **causes loss of or damage to government property or funds.**

6

UNACCEPTABLE PERSONAL CONDUCT

- Violation of law
- Insubordination
- Arrest or criminal conviction
- Alcohol /drug use
- Theft / misuse of employer property
- Conduct unbecoming

7

UNACCEPTABLE PERSONAL CONDUCT

Supervisor needs to be satisfied that:

- employee actually committed misconduct
- there is nexus between conduct and effective functioning of department
- appropriate level of discipline is chosen

8

OFF-DUTY CONDUCT

There must be rational nexus between type of conduct and potential adverse impact on employee's ability to work for department.

9

OFF-DUTY CONDUCT

- Effect on clients and co-workers
- Relationship between job duties and off-duty conduct
- Likelihood of recurrence

10

OFF-DUTY CONDUCT

- How long ago did it happen?
- Extenuating or mitigating circumstances
- Motive of employee

11

SOME SUGGESTIONS FOR WRITTEN WARNING AND FOR THE PREDISCIPLINARY NOTICE

12

WRITTEN WARNINGS

13

NOTICE

1. Sets forth specific acts and omissions that form the basis for proposed action
   - ***specific dates, times, locations***
2. Sets out the evidence of employer

14

PROPOSED TERMINATION: UNSATISFACTORY JOB PERFORMANCE

- You failed to see the expected number of clients in a day.
- You failed to complete required reports in a timely manner.
- You were insubordinate.
- You have had excessive absences.

15

OPPORTUNITY TO BE HEARD

Before adverse action is taken:

- opportunity for employee to respond to charges in notice;
- determination of whether there are reasonable grounds to believe charges are true.

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Dealing with the Americans with Disabilities Act

Dealing with the Americans With Disabilities Act

Bob Joyce
UNC School of Government
November 14, 2019

1

Four Basic ADA Rules

2

Four Basic ADA Rules

1. Employers may not discriminate against qualified individuals on the basis of disability.

3

Four Basic ADA Rules

1. Employers may not discriminate against qualified individuals on the basis of disability.
2. A disability is a physical or mental impairment that substantially limits that person's ability to perform a major life activity.

4

Four Basic ADA Rules

1. Employers may not discriminate against qualified individuals on the basis of disability.
2. A disability is a physical or mental impairment that substantially limits that person's ability to perform a major life activity.
3. A qualified individual is someone who can perform the essential functions of a position with or without a reasonable accommodation.

5

Four Basic ADA Rules

1. Employers may not discriminate against qualified individuals on the basis of disability.
2. A disability is a physical or mental impairment that substantially limits that person's ability to perform a major life activity.
3. A qualified individual is someone who can perform the essential functions of a position with or without a reasonable accommodation.
4. Failure to provide a reasonable accommodation is itself a form of unlawful discrimination.

6

Employee # 1

Employee is a solid waste collector in Public Works

- Must lift 50-lb. trash can
- Gets in and out of truck

Employee injures back

- Has 20-lb. lifting limitation

"I'm disabled — you have to transfer me to another job in Public Works."

7

Employee # 2

Employee has a clerical position

- One-half typing; one-quarter filing; one-quarter copying

Employee injures back

- Can't stand for any length of time
- Walks with difficulty

"I'm disabled — I can only do typing now."

8

An Initial Question

Does the employee have a disability within the meaning of the ADA?

9

An Initial Question

a physical or mental impairment that substantially limits one or more of an individual's major life activities.

10

An Initial Question

- Caring for oneself
- Walking
- Standing
- Sitting
- Lifting
- Bending
- Reaching
- Performing manual tasks
- Seeing
- Hearing
- Breathing
- Speaking
- Interacting with others
- Thinking/Learning

11

An Initial Question

- Impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active.
- Even if a condition is not permanent, if it substantially limits a major life activity for more than a short period of time, it is an ADA-qualified disability.

12

An Initial Question

- Current alcoholism is a disability.
- Current drug addiction is NOT a disability.
  - A drug test is not considered a medical test for ADA pre-employment inquiry purposes.
- Past drug addiction is a disability.

13

A Way to Answer the Initial Question

Medical certification

14

A Way to Answer the Initial Question

Medical certification
Tied to job duties

15

A Way to Answer the Initial Question

Medical certification
Tied to job duties
Leave this to the professionals

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An Ongoing Obligation

The employer must engage in a good faith discussion regarding reasonable accommodation

17

An Ongoing Obligation

The employer must engage in a good faith discussion regarding reasonable accommodation
Not necessarily an ideal accommodation

18

An Ongoing Obligation

The employer must engage in a good faith discussion regarding reasonable accommodation

Not necessarily an ideal accommodation

Not necessarily the accommodation the employee prefers

19

An Ongoing Obligation

The employer must engage in a good faith discussion regarding reasonable accommodation

Not necessarily an ideal accommodation

Not necessarily the accommodation the employee prefers

But an accommodation that is reasonable

20

An Ongoing Obligation

The employer must engage in a good faith discussion regarding reasonable accommodation

Not necessarily an ideal accommodation

Not necessarily the accommodation the employee prefers

But an accommodation that is reasonable

If any available accommodation imposes an undue hardship, it is not reasonable

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Four Basic ADA Rules

1. Employers may not discriminate against qualified individuals on the basis of disability.
2. A disability is a physical or mental impairment that substantially limits that person's ability to perform a major life activity.
3. A qualified individual is someone who can perform the essential functions of a position with or without a reasonable accommodation.
4. Failure to provide a reasonable accommodation is itself a form of unlawful discrimination.

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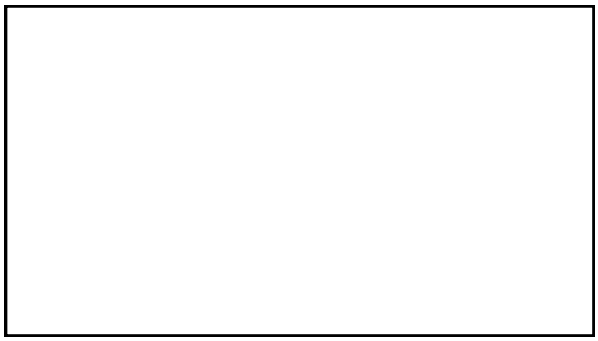

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The FLSA and Overtime Law

THE FAIR LABOR STANDARDS ACT AND OVERTIME LAW

SCHOOL OF GOVERNMENT
NOVEMBER 14, 2019

DIANE M. JUFFRAS

1

KEY FLSA CONCEPTS

- **Salaried** Paid the Same Amount Each Week Regardless of How Many Hours Worked or of the Quality of the Work
- **Exempt** Exempt from Overtime Pay
- **Nonexempt** Earns Overtime Pay
- **Overtime Pay** 1 ½ times the Regular Rate

2

EXEMPT EMPLOYEES

1. Must be salaried
2. Must earn the minimum weekly salary
3. Job duties must satisfy one of three "duties tests"
   - Executive
   - Administrative
   - Professional

3

False Thinking:

Just because I pay this employee a salary,

I don't have to pay him overtime.

4

Compensable Time

Overtime

5

JANE'S SCHEDULE: MON. – FRI. 8:30 – 5 WITH A ½ HOUR UNPAID LUNCH

Jane is a nonexempt employee.

This week, Jane

- takes 8 hours paid leave on Mon.
- works her usual schedule Tues. – Fri.
- works 8 hours on Sat. per supervisor's request

Does Jane earn overtime this week?

6

SUSAN'S SCHEDULE: MON. – FRI. 8:30 – 5 WITH A ½ HOUR UNPAID LUNCH

Susan is a nonexempt employee. This week, John

- comes in ½ hour early each day
- leaves ½ hour early each day

Does Susan get paid for the ½ hour she comes in early?

7

JOHN'S SCHEDULE: MON. – FRI. 8:30 – 5 WITH A ½ HOUR UNPAID LUNCH

John is a nonexempt employee. His employer has a policy that no one may work overtime without prior authorization.

This week, John

- comes in ½-hr. early each day
- leaves at his scheduled time

Does John earn overtime this week?

8

ON-CALL TIME

What is it?

- Time spent off the employer's premises, during which employees can pursue their own interests but are available to be called back into work on short notice if a need arises.

FLSA standard:

- Compensable when the time is spent predominantly for the employer's benefit.

9

ON-CALL TIME

- **Employee remains in a fixed location.**
  Usually compensable.
- **Employee must remain at home.**
  ***Probably* not compensable.**
- **Employee must leave phone or beeper #.**
  Usually not compensable.

10

BONA FIDE MEAL PERIODS: 29 CFR § 785.19

- Must be at least 30 minutes.
- Employee must be completely relieved of duties.
- Employee does not have to be allowed to leave the premises.

11

TRAINING TIME IS NOT CONSIDERED HOURS WORKED WHEN:

- **Attendance is outside regular working hours,**
- **Attendance is voluntary,**
- **The course, lecture, or meeting is not job related, and**
- **The employee does not perform any productive work during attendance**

12

TRAVEL TIME: CFR § 785.39

- Travel away from the workplace is during working hours is compensable.
- Travel time is worktime not only on regular working days during normal working hours but also during the corresponding hours on nonworking days.
- Time spent in traveling outside of regular working hours as a passenger in a car or on a plane is not worktime.
- Work performed while traveling is compensable. An employee who drives is working while riding.

13

OVERTIME = 1 ½ TIMES THE EMPLOYEE'S REGULAR RATE

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CALCULATING OVERTIME — REGULAR RATE OF PAY INCLUDES:

- Hourly rate/salary
- Retroactive salary increases
- On-call pay
- Nondiscretionary bonuses
- Shift differentials
- Longevity pay

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COMP TIME

- Rate: 1½ hours paid time off for every hour physically worked over 40
- Statutory Limit: 240 hours
- Public Safety Limit: 480 hours

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COMP TIME

- Employee agreement needed
- Cash-out at termination
- May require employee to use comp time before using other paid leave

17

SECOND JOB WITH THE SAME EMPLOYER

Ron is a nonexempt employee in the Finance Dept.

- His usual schedule is Mon. – Fri., 8:30 – 5 with a ½ hour unpaid lunch.
- Ron takes a second job in the Parks and Rec. Dept. He works Mon., Wed., Fri, 6 – 9 pm.

Does Ron earn overtime for his Park and Rec. hours?

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SECTION 7(P)(2): THE OCCASIONAL AND SPORADIC EXCEPTION FROM OVERTIME

- State and local government employees solely at their option may work occasionally and sporadically on part-time basis for the same employer but in a different capacity from their regular employment.
- Occasional/sporadic – infrequent, irregular, occurring in scattered instances
- Different capacity = not same general occupation

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PUBLIC SAFETY ISSUES

20

THE FEWER THAN FIVE RULE: FLSA SECTION 13(B)(20)

Law enforcement or fire protection employees of a public agency which employs less than five employees in law enforcement or fire protection activities are not subject to FLSA overtime.

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THE 207(K) EXEMPTION FOR LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS

22

- ***Law Enforcement***

  171 hours in 28-day cycle

- ***Firefighters***

  212 hours in 28-day cycle

23

THE 207(K) EXEMPTION

	LAW ENFORCEMENT	FIRE
28 days	**171 hrs.**	**212 hrs.**
14 days	**86 hrs.**	**106 hrs.**
7 days	**43 hrs.**	**53 hrs.**

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WHO QUALIFIES FOR THE 207(K) LAW ENFORCEMENT EXCEPTION?

- Uniformed or plainclothes members of a body of officers
- Who have the statutory power to enforce the law and
- Who have the power to arrest, and
- Who have completed BLET

Civilian employees do not qualify.

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EMPLOYEES QUALIFIED FOR THE 207(K) FIRE PROTECTION EXCEPTION ARE:

- Trained in fire suppression;
- Have the legal authority and responsibility to engage in fire suppression;
- Are employed by a fire department, and are engaged in either
  - preventing, controlling and extinguishing fires, or
  - responding to emergency situations where life, property or the environment is at risk.

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EMS: THE HEADACHE

Unless EMS personnel are cross-trained as LEOs or firefighters, they must be paid O/T if hours exceed 40 per week.

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THE FLUCTUATING WORKWEEK

- Use for employees whose hours vary from week to week.
- Employee paid fixed salary to cover whatever hours job demands in a given week, whe.
- Overtime hours paid at ½ the regular rate.
  - Note that regular rate will vary from week to week because fixed salary will be divided by a different number of hours worked each week.

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THE FLUCTUATING WORKWEEK

Use for employees whose hours

regularly vary from week to week.

29

HOW IT WORKS . . . .

Employee is paid a fixed salary to cover

whatever hours s/he works in a given week.

30

Overtime paid at ½ the regular rate.

31

Employee is paid $750/week.

Week 1: Employee works 40 hours.

Week 2: Employee works 45 hours.

Week 3: Employee works 50 hours.

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Week 1: $500

Week 2: $500/45 = $11.12/hr **$11.12 ÷ 2 = $5.56**
$5.56 X 5 hrs = $27.80
Total pay is $527.80

Week 3: $500/50 = $10/hr. **$10 ÷2 = $5**
$5.00 X 10 hrs = $50
Total pay is $550.00

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Coates' Canons Blog: Salaried Employees and the FLSA

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7385

This entry was posted on October 30, 2013 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act

Susan is a salaried employee and does not receive overtime pay no matter how many hours she works in a given workweek. Robert is a salaried employee and is paid overtime whenever he works more than 40 hours in a week. Both are paid in accordance with the requirements of the federal Fair Labor Standards Act (FLSA).

Can that be right? Salaried employees do not have to be paid overtime, do they? The answer to these questions requires an understanding of the difference between "salaried" and "exempt."

What does it mean to be salaried?

The relevant **FLSA regulation** issued by the U.S. Department of Labor defines an employee paid on a "salary basis" as one who is paid a predetermined amount each pay period without any reductions due to the quality or quantity of the employee's work. In other words, the employee must receive full salary for any week in which he or she performs *any* work — regardless of the total number of days or hours worked in that week. And that is all that "salary basis" means.

The definition of salary basis, though, doesn't explain how one employee can be paid on a salary basis and not be entitled to overtime pay, while another employee paid on a salary basis can have a legally enforceable right to overtime pay. As it turns out, the right to overtime does not depend upon salary basis. It depends upon a position's *exempt* status.

What does it mean to be exempt?

A position is *exempt* from the FLSA's overtime rules if it meets three requirements:

1. *the position is paid on a salary basis*; and
2. the position is paid a minimum of $455 per week; and
3. the duties of the position satisfy either the executive duties test, the administrative duties test, or the professional duties test.

The specific requirements of the FLSA's duties tests can be found at **29 CFR Part 541** and will be discussed in later blog post. You can also read more about them **here**.

To be exempt (that is, not entitled to overtime), an employee must be paid on a salary basis. That much is true. But just because an employee is paid on a salary basis does not by itself mean that the position is exempt. Both exempt and nonexempt employees can be paid on a salary basis. An exempt employee can be required to work in excess of his or her scheduled workweek without any additional compensation beyond the fixed weekly salary. Nonexempt employees, however, must always be paid overtime at a rate of time-and-one-half their regular rate of pay for every hour over 40 worked in a given workweek, even if they are paid on a salary basis (you can find the relevant FLSA section **here**). Since salary basis alone does not determine eligibility for overtime, nonexempt employees earn overtime whether they are compensated on a salary basis or an hourly basis.

How do leave policies affect being paid on a salary basis?

Just because an employee is considered salaried today does not mean that they will always be considered salaried for FLSA purposes. What happens when employees paid on a salary basis takes a day or two off because they are ill or take a vacation? Almost all – if not all – local governments provide their employees with some minimal amount of paid sick, vacation or personal leave. Federal appeals courts from around the country have long held that substitution of paid leave for salary does not affect salary basis or exempt status. Salary basis and exempt status are "only affected by monetary deductions for work absences and not by non-monetary deductions from fringe benefits such as personal or sick time." *Schaefer v. Indiana Michigan Power Co.*

, 358 F.3d 394, 400 (6th Cir. 2004). *See also Haywood v. N. Am. Van Lines, Inc.,* 121 F.3d 1066, 1070 (7th Cir.1997).

For nonexempt employees, it hardly matters whether they are considered salaried. When a salaried nonexempt employee has used up all accrued paid leave and takes time off nonetheless, the employer is free to deduct from the employee's paycheck a pro-rata amount of the weekly salary – in effect, to treat the employee like an hourly employee. The primary reason for paying a nonexempt employee on a salary basis is convenience, both for the employer and the employee. The FLSA requires an employer to pay a nonexempt employee only for the time actually worked, so a deduction from wages for absences from work does not violate the law. The employee can be paid on a salary basis again the following week.

But for exempt employees, much depends upon whether they can still be considered to be salaried. When an exempt employee has used up all accrued paid leave and needs time off, things get a little hairier in the private sector – but not in the public sector! In the private sector, the employer who pays an exempt employee less than the agreed upon weekly salary because that employee has worked fewer than the agreed upon number of day or hours in a given workweek violates the FLSA and destroys the position's exemption. The exempt position becomes a nonexempt position not only for that workweek, but potentially for past and future workweeks as well. This is known as the no-docking rule.

But the FLSA provides an exception from this formidable rule for employees of a government agency. **29 C.F.R. § 541.710(a)** says,

"An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption . . . on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

1. Permission for its use has not been sought or has been sought and denied;
2. Accrued leave has been exhausted; or
3. The employee chooses to use leave without pay."

In other words, public employers are free to treat salaried exempt employees the same as salaried or hourly nonexempt employees for the purposes of paid leave policies. Unlike private employers, public employers may dock exempt employees who miss work and who have used up all paid leave.

There are no specific requirements that a local government employer must follow in order to avail itself of what is sometimes called the "public accountability exception to the no-docking rule" and no definition of "public accountability." The courts have interpreted the concept broadly, finding government employers to have established pay practices based on principles of public accountability where the government organization must regularly open its books to outside auditors (*Worley v. City of Cincinnati*, 2000 WL 1209989 [Ohio Ct. App. Aug. 2000]), where provisions of state or local law allow payment of government funds only where services have actually been rendered (*Demos v. City of Indianapolis*, 302 F.3d 698, 702-03 (7th Cir. 2002)), or where the practice is merely consistent with such a principle (*Conroy v. City of Chicago*, 644 F. Supp. 2d 1061, 1066-67 (N.D. Ill. 2009)).

The North Carolina Constitution requires all units of state and local government to be accountable for their use of taxpayer funds and prohibits the payment of state or local government funds unless services have actually been rendered. **Article I, Section 32** provides, "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." North Carolina public employers that have enacted pay practices that provide paid sick, vacation or personal days and allow for deductions from pay when no paid leave is available do so in accordance with state law and thus satisfy the principle of public accountability. Public employers may make deductions from the pay of exempt employees who do not report for work and either do not have accrued paid leave or do not satisfy the requirements for the use of their accrued paid leave just as they do from the salaries of salaried nonexempt employees.

Other allowable deductions

There are other allowable deductions from the salaries of exempt and nonexempt employees. Employers may suspend an employee without pay for violating a safety rule of major significance, for violations of rules governing workplace conduct, partial first or last weeks of work or partial weeks or days of work taken in accordance with FMLA leave, and to offset any amounts received by an employee for jury duty, testimony as a witness, or as military pay where the employee is also

receiving payment from their local government employer for that day. These exceptions will be discussed in a future blog post, as will those deductions that cannot be made from the wages of either exempt or nonexempt employees.

Links

- www.law.cornell.edu/cfr/text/29/541.602
- sogpubs.unc.edu/electronicversions/pdfs/pelb31.pdf
- www.law.cornell.edu/uscode/text/29/207
- www.law.cornell.edu/cfr/text/29/541.710
- www.ncga.state.nc.us/legislation/constitution/ncconstitution.html

Coates' Canons Blog: The FLSA's Executive Exemption from Overtime Pay

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7464

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Employees in "exempt" positions are not entitled to overtime pay, even if they work sixty hours or more in a single workweek. How does an employer determine whether a position is exempt under the Fair Labor Standards Act? A position is exempt from the FLSA's overtime rules if it meets three requirements:

1. the position is paid on a salary basis; and
2. the position is paid a minimum of $455 per week; and
3. the duties of the position satisfy either the executive duties test, the administrative duties test, or the professional duties test.

Each of the duties tests in the third requirement is distinct and independent; a position need only satisfy one of them to be considered exempt. The executive duties test evaluates whether the position is a management position with significant authority over other employees. The administrative duties test evaluates whether the position is an office position that supports management and has significant decisionmaking authority in areas other than supervision of employees. The professional duties test evaluates whether the position is one that requires an advanced academic degree or other high-level training. In this blog post, I will discuss the test for the executive exemption. I will discuss the administrative and professional exemptions in future posts.

Background

The practical difference between an employee's classification as exempt or nonexempt is that an exempt employee may be required to work in excess of his or her scheduled workweek without any additional compensation beyond their fixed weekly salary. In contrast, nonexempt employees must always be paid overtime at a rate of time-and-one-half their regular rate of pay for every hour over 40 worked in a given workweek. As I discussed in a previous blog post, both exempt and nonexempt employees may be paid on a salary basis. The fact that an employee is paid on a salary basis does not by itself make that employee an exempt employee. The position also must meet the other two requirements, including one of the duties tests. As the regulations make clear, for each of these categories, it is the specific duties and responsibilities of the individual position — not job title or job description — that determine whether or not the position is exempt from overtime.

The Executive Duties Test

The executive duties test is relatively straightforward. For an employee to be in an exempt executive position, he or she must:

1. have the primary duty of management of the organization or one of its recognized departments or subdivisions; *and*
2. customarily and regularly direct the work of two or more employees; *and*
3. have the authority to hire or fire other employees, or have his or her recommendations as to hiring, firing, promotion or other change of status be given particular weight.

The regulations require that the position meet *all three* requirements to be exempt.

The Primary Duty of Management

Most jobs have multiple duties. What does the term "primary duty" mean in the context of the FLSA overtime exemptions? The U.S. Department of Labor's FLSA regulations define the phrase "primary duty" as meaning the "principal, main, major

or most important duty that the employee performs." There is no minimum amount of time that an employee must spend performing the primary duty, although the regulation defining primary duty notes that employees who spend more than fifty percent of their time on exempt work are likely to be exempt. Still, employees who spend less than fifty percent of their time on exempt work may still qualify for an exemption. The determining factor is "the character of the employee's job as a whole."

In assessing whether a position has a primary duty of management, the regulations direct employers to consider:

1. the relative importance of the employee's management duties compared with his or her other duties;
2. the amount of time spent performing management work;
3. the employee's relative freedom from direct supervision; and
4. the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work, if any, performed by the employee.

The regulations also give examples of the particular kinds of duties that the Department of Labor considers to be "management" duties. The list includes:

- interviewing, training, and selecting employees;
- setting and adjusting pay and hours;
- planning, apportioning, directing the work of other employees;
- evaluating the productivity & efficiency of other employees;
- recommending promotions for other employees;
- handling employee complaints and grievances;
- planning and controlling the budget; monitoring legal compliance;
- imposing penalties for violations of rules;
- implementing training programs; and
- handling community complaints.

Supervising the Work of Two or More Employees

The FLSA regulations require that an employee direct the work of two or more full-time employees "or their equivalent" to qualify for the executive exemption. Thus, supervision of four half-time employees satisfies this requirement. The Department of Labor has said that in this context, it considers a full-time employee to be an employee who works forty hours each week. Where the normal full-time workweek of an individual employer is fewer than forty hours, however – thirty-seven hours, for example –, the Department will consider that to constitute full-time (see 69 Fed.Reg. 22135).

Authority to Hire or Fire

The final requirement for the executive exemption is that the position have actual hiring or firing authority, or at least significant influence over such decisions. The regulations require authority to hire *or* fire, not both. An employee who has authority to make new hires and promotions, but is not a decision-maker with respect to dismissals, may still qualify as an executive employee. Similarly, an employee who has authority to terminate another employee, but who is not involved in hiring decisions, would also qualify for the executive exemption.

Under the North Carolina General Statutes, the only employees who have final hiring and firing authority are city and county managers, the county sheriff and register of deeds, and the directors of county social services and health departments and area mental health authorities (LMEs). In all cases, the persons holding these positions will have management as a primary duty and will have the requisite supervisory authority to qualify for the executive exemption. These positions would therefore be the exception to the rule that it is job duties, not job title, that determines exempt status. These particular positions – and only these – may be considered to qualify for the executive exemption automatically.

Recommendations about Hiring or Firing Given Particular Weight

If a position has a primary duty of management and supervises two or more full-time employees, and does not have legal hiring or firing authority, but *does* have significant influence over hiring or firing, that position will also qualify for the executive exemption. What does "particular weight" mean in this context? In the regulation explaining "particular weight," the Department of Labor identifies three key factors: 1) whether making such recommendations is actually part of the

employee's job duties; 2) the frequency with which the employee makes these recommendations and/or the frequency with which the employer requests recommendations of the employee; and 3) the frequency with which the employer adopts the employee's recommendations. Merely making suggestions about hiring, terminations or promotions is not enough. If an employee's recommendations are not solicited or are not followed very often, the employee will not meet the requirements of the new executive duties test.

Which positions are likely to make recommendations about hiring or firing that are accorded "particular weight?" In many jurisdictions, assistant city and county managers, town administrators, and department and division heads will have such influence. In cities and counties of relatively larger size, it is usually a direct supervisor without final decisionmaking authority who evaluates an employee's performance or conduct and makes the initial, detailed recommendation to terminate, with the final decision made by the manager or a county department head with statutory authority to hire and fire.

Employees Who Perform Both Exempt Management and Nonexempt Duties: Which Are the Primary Duties?

Many departments and divisions are headed by employees who perform both managerial and nonexempt duties. The regulations provide that employers may still classify such employees as exempt executives provided that their *primary* duty is management. Employees who have both exempt and nonexempt duties should not be confused with "working supervisors" or "working foremen," whose primary duty consists of the regular work of the department or division, not management, while supervising those who are working alongside them. The regulations expressly state that working supervisors are not to be considered exempt employees.

Consider the example of an electrician whose primary duty is to perform electrical work, but who also directs the work of other electricians working in the same unit or at the same site, orders parts and materials for the job, and receives requests for electrical work. This electrician is nonexempt even though he carries out some management-related duties. Similarly, an otherwise nonexempt electrician who substitutes for an exempt supervisor when the supervisor is absent does not become an exempt executive by virtue of having the occasional responsibility to supervise others.

In contrast, true exempt executives who also perform nonexempt tasks perform their managerial responsibilities on a regular basis. They themselves decide when and for how long to perform managerial duties and when and for how long to perform nonexempt tasks — no supervisor determines this. Exempt executives typically remain responsible for the operations and personnel under their supervision even while they perform nonexempt tasks. Consistent with the definition of primary duty as discussed above, there is no limitation on the amount of time that an executive must spend on nonexempt tasks in order to qualify as exempt.

Case Law on Positions with Exempt Executive and Nonexempt Duties

The majority of the court decisions that address the proper application of the executive exemption to positions with concurrent exempt and nonexempt duties involve the position of store manager. Although "store manager" is a quintessentially private-sector position, the reasoning the courts adopt in these cases is applicable to local government positions.

Consider *Jones v. Virginia Oil Co.*, a Fourth Circuit Court of Appeals case from 2003. In that case, the court held that an assistant manager who spent 75 to 80 percent of her time performing nonexempt work could still be classified as an exempt executive because she could perform many of her management duties at the same time that she performed the nonexempt work. Both Terri Jones, the plaintiff, and her employer agreed that Jones supervised two full-time employees and that she performed both managerial and nonexempt work. At issue was whether her primary duty was management when she spent so much of her time flipping burgers, working the registers, and cleaning the bathrooms and parking lot.

The court reached the conclusion that Jones was exempt after considering the factors set forth by the Department of Labor for determining whether a duty is primary. The court found with respect to the first factor — the relative importance of the managerial tasks — that Jones was responsible for hiring, scheduling, training and disciplining employees, and for checking inventory and ordering supplies, handling customer complaints, counting daily receipts and making bank deposits. These responsibilities, and Jones' own testimony that she was "in charge of everything," convinced the court that the success of the store depended on Jones' performing her managerial tasks.

As for the second factor, the amount of time spent on management, the court noted that while Jones was doing nonexempt tasks she was simultaneously supervising employees, handling customer complaints, dealing with vendors

and completing daily paperwork. The court concluded that time, while important, could not be determinative in this case.

With respect to the extent of Jones' discretion, the court found that this factor also weighed in favor of finding management as her primary duty: Jones had the discretion to hire, supervise and fire employees, to handle customer complaints, and to run the day-to-day operations of the store as she saw fit. Finally, Jones earned significantly more than other employees performing the same nonexempt duties as she.

The court rejected Jones' claim that she was a "working supervisor" entitled to overtime, holding that "where an individual's responsibilities extend 'to the evaluation of . . . subordinates' and include 'the exercise of considerable discretion,' the working foreman exception does not apply."

The Fourth Circuit reached a similar conclusion in a more recent case, *In re Family Dollar FLSA Litigation*. Plaintiff Irene Grace was the store manager of a Family Dollar chain store. Grace claimed that a full 99 percent of her time was spent on nonexempt duties such as "putting out freight," working a cash register, "doing schematics" and performing janitorial work. The court, however, was not persuaded that this made her a nonexempt employee, noting that even while Grace performed these nonexempt tasks, she remained the person responsible for running the store and that she performed her managerial duties at the same time. Grace herself had testified that while running the cash register she simultaneously considered the condition of the front of the store and kept an eye out for theft. The success and profitability of the store (and the size of the bonus she received) depended on her decisionmaking and good judgment alone, which she exercised at the same time as she performed nonexempt duties.

The Fourth Circuit also emphasized the fact that her managerial duties were of greater importance than her nonexempt duties given that the district manager visited the store only every two to three weeks. It was Grace who decided how to handle customer or employee complaints, made and revised schedules, arranged the stock display, and decided when to sweep the floor, restock the shelves, or fill out required paperwork. There was no other person making those decisions at the store. Finally, the court noted that Grace was paid significantly more than other store employees in absolute terms and that she had the ability to influence the amount of her own compensation, a component of which was a bonus based on the profitability of the store she managed. For all of these reasons, the Fourth Circuit found that Grace's position as store manager was exempt from overtime.

How would the Fourth Circuit's analysis in *Jones* and *Family Dollar* apply to a public sector position with both exempt and nonexempt duties? Consider the following hypothetical:

The city of Paradise, North Carolina, needs to determine whether its chief code enforcement officer is an exempt executive or non-exempt position. The position's duties include assigning the daily work of five code enforcement officers, supervising and evaluating the officers and other staff of the division, resolving disputes, preparing information in support of budget requests and administering the division's budget, and reviewing and maintaining enforcement records prepared by other officers. The demands on the code enforcement division are such that it cannot afford to have one position devoted solely to management. Thus, in addition to managing the division, the chief also goes into the field on a daily basis to conduct inspections for compliance with applicable codes and standards, to identify violations and notify property owners of the violations and necessary corrective action, and to conduct follow-up investigations.

The city's human resources director determines that the chief spends only forty percent of his time on management duties, and a full sixty percent of his time doing enforcement work in the field. The *Jones* and *Family Dollar* cases say that the actual time spent on exempt duties is not determinative of exempt status, so the human resources director considers the relative importance of the managerial tasks themselves. The position's exempt duties are much more important than its nonexempt duties: it seems fair to say that without the chief's supervision of the other officers and assignment of their work in accordance with their individual skills and expertise, and without the chief's maintenance of records and budget work, the Paradise code enforcement division could not function effectively. Were the chief not to perform the nonexempt inspection work, the division might perhaps take longer to respond to complaints and might fall behind in its inspections, but it would continue to perform its core functions.

Does the chief exercise discretion in performance of management duties? This is one of the other factors the Fourth Circuit considered in determining whether a store manager was a true executive or merely a working supervisor. The human resources director correctly concludes that the position's scheduling duties, role in hiring, evaluation and firing, preparation of budget requests, and review of enforcement records requires significant exercise of judgment. The final factor also weighs in favor of classifying the chief position as exempt. The chief makes about $8,500 more than does the

highest-paid of the other code enforcement officers.

Numerous positions in local government involve the concurrent performance of both exempt and nonexempt duties, particularly positions in law enforcement above the rank of patrol officer or patrol deputy. I will discuss these, as well as the administrative and professional exemptions, in more detail in later blog posts.

Links

- www.law.cornell.edu/cfr/text/29/541.2
- www.law.cornell.edu/cfr/text/29/541.100
- www.law.cornell.edu/cfr/text/29/541.700
- www.law.cornell.edu/cfr/text/29/541.102
- www.law.cornell.edu/cfr/text/29/541.104
- www.gpo.gov/fdsys/pkg/FR-2004-04-23/pdf/04-9016.pdf
- www.law.cornell.edu/cfr/text/29/541.105
- www.law.cornell.edu/cfr/text/29/541.106
- www.ca4.uscourts.gov/Opinions/Unpublished/021631.U.pdf
- www.ca4.uscourts.gov/Opinions/Published/092029.P.pdf

Coates' Canons Blog: The FLSA's Administrative Exemption from Overtime Pay

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7537

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Under the Fair Labor Standards Act, a government employee is entitled to overtime pay after working 40 hours in a week, unless an exemption applies. If an exemption applies, the employee is said to be "exempt" and is not entitled to overtime pay even at 60 or 80 hours worked in a week. Positions are *exempt* from the FLSA's overtime rules if they meet three requirements:

1. the position is paid on a salary basis; and
2. the position is paid a minimum of $455 per week; and
3. the duties of the position satisfy either the executive duties test, the administrative duties test, or the professional duties test.

Each of the duties tests in the third requirement is distinct and independent; a position need only satisfy one of them to be considered exempt. The executive duties test, which I discussed in an earlier blog post, evaluates whether the position is a management position with significant authority over other employees. The administrative duties test, which is the subject of this blog post, evaluates whether the position is an office position that supports management and has significant decisionmaking authority in areas other than supervision of employees. The professional duties test, which I will discuss in a future post, evaluates whether the position is one that requires an advanced academic degree or other high-level training.

Background

Under the FLSA, exempt employees may be required to work in excess of their scheduled workweeks without any overtime pay. Nonexempt employees, however, must be paid overtime at a rate of time-and-one-half their regular rate of pay for every hour over 40 worked in a given workweek. As I discussed in a previous blog post, both exempt and nonexempt employees may be paid on a salary basis, but the fact that an employee is paid on a salary basis does not by itself make that employee an exempt employee. The position also must meet one of the duties tests. For the administrative duties test, as for the executive duties test, the specific duties and responsibilities of the individual position — not job title or job description —determines whether or not the position is exempt from overtime.

The Administrative Duties Test

To satisfy the administrative duties test, a position must meet two requirements in addition to being paid on a salary basis and earning a minimum of $455 per week. The position must:

1. have a primary duty of office or nonmanual work directly related to management or general business operations of the employer, and
2. perform work requiring the exercise of discretion and independent judgment on matters of significance to the employer.

These two requirements are anything but straightforward.

Primary Duty

Here, as in the executive duties test, "primary duty" means the "principal, main, major or most important duty that the employee performs." There is no set minimum amount of time that must be spent on administrative tasks for such work to be an employee's primary duty. The same factors applicable to executive employees — the relative importance of exempt tasks and the time spent on exempt tasks — are used to evaluate whether or not an employee is an exempt administrator.

Work Related to Management or General Business Operations

The U.S. Department of Labor's FLSA regulations define this element of the administrative exemption as meaning to "perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." The regulations give the following as examples of work related to "the running or servicing of the business:"

- finance, accounting, or auditing;
- tax;
- purchasing and procurement;
- personnel management, human resources and employee benefits;
- safety and health;
- insurance and quality control;
- public relations, advertising and marketing;
- computer network, internet and database administration; and
- legal and regulatory compliance.

Of course, local government employment encompasses a great deal more nonmanual or office work than just those associated with the fields in this list. What about the position of city or county clerk or the work done in the register of deeds office? City and county planners? Lieutenants and captains in a public safety agency and 911 telecommunicators? Social workers? To understand whether positions like these qualify for the administrative exemption, we must return to the regulations' definition of administrative exempt work as "work directly related to assisting with the running or servicing of the business, *as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment*" (emphasis added). In contrasting administrative duties with production or sales work, the regulations distinguish the basic work or mission of an organization with the other kinds of work necessary to allow it to do its basic work.

Think of production work as the mission work of the department or agency. What is the basic work, or mission, of a fire department, for example? Firefighting and fire prevention. The work done to hire and pay firefighters and to outfit the firefighters and their trucks is not the mission work of local government, but is the management and general business operations work that supports the mission. What is the mission of a public health department? To educate the public and to provide health services. Why does the register of deeds office exist? To record deeds and other documents in the public record. Thus, a firefighter, a public health nurse who staffs a clinic, and an employee of the register of deeds who records mortgages on the land records are each engaged in the production or mission work of their respective employers. None of these positions would qualify for the administrative exemption, even if their job duties required the exercise of discretion and independent judgment in matters of significance, as the positions of firefighter, nurse and assistant register surely do.

Other employees of the fire department, public health department and register of deeds office, whose work supports the fighting of fires, provision of health services and recording of documents, may well qualify for the administrative exemption. For example, the primary duties of a fire battalion chief may not be the fighting of fires — production or mission work — but rather the administrative work that she does in coordination with human resources and purchasing that allows her unit to be scheduled, outfitted, trained and ready to fight fires. If the person in this position exercises discretion and independent judgment on matters of significance, she may be administratively exempt. So too in the case of the office manager who runs the day-to-day operation of the clinic where the public health nurse practices. The assistant register of deeds who implements the policies adopted by the elected register and oversees operations of the office may also qualify as an administrative employee even if another assistant does not.

Discretion and Independent Judgment

If a position's primary duties qualify as office work directly related to management or general business operations, that is not the end of the question. To be exempt, the position must involve work that requires discretion and independent judgment in matters of significance. Fundamental to the concept of "discretion and independent judgment" is the question

of whether the employee has options from which to make a decision or choice. The DOL's FLSA regulations contain a non-exclusive list of factors to consider in determining whether a position satisfies the criteria for discretion and independent judgment. Many of the factors focus on *the extent of the employee's authority either to take action in the employer's name without prior approval or to take action that may deviate from established policy*. The list includes whether the employee:

- formulates, interprets, or implements management policies or operating practices;
- makes or recommends decisions that have a significant impact on general business operations or finances — this includes work that relates to the operation of a particular segment or department of the organization that nonetheless affects general business operations to a significant degree;
- is involved in planning long- or short-term objectives for the organization;
- handles complaints, arbitrates disputes or resolves grievances;
- represents the organization during important contract negotiations;
- has the authority to commit the employer in matters that have significant financial impact; and
- has the authority to waive or deviate from employer policies and procedures without prior approval.

In addition to these factors set forth in the FLSA regulations, courts have also considered whether a position has

- freedom from direct supervision;
- personnel responsibilities;
- trouble-shooting or problem-solving responsibilities;
- authority to set budgets;
- a degree of public contact; or
- involves advertising and promotion work.

Employers frequently make the mistake of assuming that an employee must have final decisionmaking authority in order for a position to qualify for the administrative exemption. The regulations, however, recognize that many organizations require that significant decisions must receive multiple layers of review or approval. The regulations therefore allow a position to satisfy the discretion and independent judgment requirement even if the employee's decisions or recommendations are subject to reviewed. This is an important allowance for local governments, where, for example, department or division heads may decide which candidate to hire, but final authority for the decision rests with the city or county manager. Similarly, an employee might narrow down the choices of what equipment to purchase to two competing products, with an explanation of the pros and cons of each, but may be required to leave the final choice to a department head or the manager. Where the cost of a purchase is large and the expenditure subject to the pre-audit requirement of the North Carolina General Statutes, the decision to purchase the specific item may be made by an administratively exempt employee even if the purchase must receive final approval from the finance director.

Matters of Significance

Unfortunately for employers, the FLSA regulations do not define the term "matters of significance" other than to say what they are not. The fact that poor job performance by an employee could have significant financial consequences for the employer does not, in and of itself, mean that the employee exercises discretion and independent judgment with respect to matters of significance. For example, the primary job duty of an employee working in accounts receivable may be processing incoming checks for deposit into the employer's account. The employee is supposed to double-check the amount of the check against the amount due. Suppose the employee processes a check bearing the notation "paid in full," but is distracted and neglects to check the amount due. The check is for substantially less — tens of thousands of dollars less — than the amount actually owed. Despite the fact that the mistake causes the employer to lose thousands of dollars, the employee's job duties are clerical and routine and do not involve the exercise of discretion and independent judgment in matters of significance. That employee is nonexempt. The potential for such an error cannot form the basis for classifying this position as administratively exempt.

Examples of Positions Satisfying the Administrative Duties Test

The regulations set forth examples of positions that would satisfy both the requirement that work be directly related to management or general business operations and that the work involve discretion and independent judgment. They include a human resources manager who formulates employment policies even though the decision to adopt the policies is made by others. The regulations contrast the position of human resources manager with that of a personnel clerk who collects

information about job applicants and rejects those who do not meet basic qualifications, but is not involved in further evaluation of qualifying applicants. DOL offers as another example a purchasing agent who makes major purchases, but is required to consult with top management before finalizing a major purchase. This position may well be exempt. In contrast, an employee who operates an expensive piece of equipment is not performing work involving the exercise of discretion and independent judgment on a matter of significance. Finally, an executive or administrative assistant to a city or county manager may be administratively exempt if the manager has delegated to the assistant the authority to arrange meetings, handle callers and answer correspondence without the need to follow specific instructions or particular procedures.

Examples of Positions Not Satisfying the Administrative Duties Test

The regulations contain specific examples of government employees who will not qualify for the administrative exemption, namely, “inspectors and investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees.” The regulations explain that the work of such employees does not meet the first element of the administrative duties test as it does not relate to management or general business operations. Their work also does not generally require the exercise of discretion and independent judgment, but instead involves the gathering of factual information and the application of established techniques or procedures or standards. The regulations make clear that clerical or secretarial tasks, recording or tabulating data, or doing other kinds of routine work does not qualify as work requiring the exercise of discretion and independent judgment on matters of significance.

Positions That Are Hard to Classify

Whether a position meets the requirements of the administrative duties test is the subject of much litigation. In the local government context, the issue in many contested classifications is whether the position satisfies the requirement that its duties be directly related to management or general business operations or whether the duties are better characterized as production or mission work. For positions that exist both in the public and private sectors, the issue more frequently involves whether the employee exercises discretion and independent judgment. In a future blog post, I’ll take a closer look at some examples.

Links

- www.law.cornell.edu/cfr/text/29/541.200
- www.law.cornell.edu/cfr/text/29/541.700
- www.law.cornell.edu/cfr/text/29/541.201
- www.law.cornell.edu/cfr/text/29/541.202
- www.law.cornell.edu/cfr/text/29/541.203

Coates' Canons Blog: The FLSA's Administrative Exemption from Overtime Pay, Part 2: Some Examples

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7765

This entry was posted on July 18, 2014 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

In previous blog posts, I discussed the executive and administrative exemptions to the Fair Labor Standards Act rule that an employee is entitled to overtime pay after working 40 hours in a week. When an exemption applies, the position is said to be "exempt" and the employee is not entitled to overtime pay even at 60 or 80 hours worked in a week. Whether a position is exempt under the executive duties test or the administrative duties test, it must satisfy the following requirements:

- the position must be paid on a salary basis; and
- the position is must be paid a minimum of $455 per week.

The executive duties test evaluates whether the position is a management position with significant authority over other employees. The administrative duties test evaluates whether the position is an office position that supports management and has significant decision making authority in areas other than supervision of employees. To satisfy the administrative duties test, a position must meet an additional two requirements. The position must also:

- have a primary duty of office or nonmanual work directly related to management or general business operations of the employer, and
- perform work requiring the exercise of discretion and independent judgment on matters of significance to the employer.

As I noted in my earlier blog post on the administrative duties test, these two requirements are anything but straightforward. In this blog post, I'll continue the discussion of the administrative duties test by taking a close look at some examples.

Background

Under the FLSA, exempt employees may be required to work in excess of their scheduled workweeks without any overtime pay. Nonexempt employees, however, must be paid overtime at a rate of time-and-one-half their regular rate of pay for every hour over 40 worked in a given workweek. The fact that an employee is paid on a salary basis does not by itself make that employee an exempt employee. The position also must meet one of the duties tests. For the administrative duties test, as for the executive duties test, the specific duties and responsibilities of the individual position — not job title or job description —determines whether or not the position is exempt from overtime.

Positions That Are Sometimes Hard to Classify

In the public sector, one of the most frequent issues arising in contested FLSA classifications is whether the position satisfies the requirement that its duties be directly related to management or general business operations, or whether the duties are better characterized as core government or mission work. When the job is one that exists in both the public and private sectors, the issue is most often whether the employee in the position exercises discretion and independent judgment in matters of significant to the employer. To better understand these issues, let's take a look at three positions found in the imaginary city of Paradise, North Carolina: city planner, accountant and management analyst.

The City Planner

City and county planners are one of linchpins of local government. The U.S. Department of Labor Bureau of Labor Statistics' occupational dictionary describes urban and regional planners as positions that "develop plans and programs for the use of land. Their plans help create communities, accommodate population growth, and revitalize physical facilities in towns, cities, counties, and metropolitan areas." In the city of Paradise, the city planner position performs the following duties:

- handles the subdivision process;
- conducts site plan reviews for compliance with setback uses, zoning, landscaping, and parking codes;
- recommends approval or disapproval of plans or site plan modifications;
- administers zoning, subdivision, open space and other planning regulations;
- works with applicants, citizens, and industrial and commercial representatives in preparing development applications; and
- appears before planning boards and governing boards.

Paradise had long classified the non-supervisory positions in its planning departments as exempt. The city's human resources director and attorney have recently concluded that this classification is incorrect and that the positions of City Planner 1, City Planner II and Senior Planner should all be classified as nonexempt and should be paid overtime when they work in excess of 40 hours in a workweek. How did they reach this conclusion?

The first prong of the administrative duties test asks whether the position has a primary duty of office or nonmanual work directly related to management or general business operations of the employer. The duties of city (and county) planners clearly qualify as nonmanual work and take place, for the most part, within an office setting. So far, so good. But the work of local government planners is not related to the management or general business operations of the employing government unit. I discussed the meaning of management here in an earlier blog post on the executive exemption to the Fair Labor Standards Act. Examples of the particular kinds of duties that the U.S. Department of Labor considers to be "management" duties includes:

- interviewing, training, and selecting employees;
- setting and adjusting pay and hours;
- planning, apportioning, directing the work of other employees;
- evaluating the productivity and efficiency of other employees;
- recommending promotions for other employees;
- handling complaints and grievances;
- planning and controlling the budget;
- monitoring compliance with laws regulating the operation of the government unit;
- imposing penalties for violations of workplace rules;
- implementing training programs; and
- handling community complaints about employees and the overall operation of the organization.

The duties of the Paradise planners (and of most local government planners) do not directly relate to any of the items on the Department of Labor's list of management duties.

The planner's duties fall squarely within the boundaries of what I refer to as a local government's mission work. In an earlier blog post, I discussed the distinction between the basic work or mission of an organization and the other kinds of work that is necessary for the organization to be able to do its basic work. The mission work of local government is to provide those services that only local government provides: public safety, roads, utilities and the like. What is the basic or mission work of the Paradise planning department? When asked, the Paradise planning director replies that it is to develop and implement land use plans within the jurisdiction and to develop plans related to the need and placement of community facilities, parks and open spaces, to coordinate land use plans with transportation and transit plans, to work with the jurisdiction's economic development team and to review development proposals, to coordinate rezoning and approve subdivision plans, and sometimes, to facilitate the annexation process.

The work of the Paradise planning department is the basic work of local government, as core a form of mission work as is

law enforcement and firefighting. It is what local government exists to do. As such it is not work related to the management or business operations of city. Rather, the management and business operations of the city exist to facilitate the work of planners, as well as that of police, firefighters, emergency medical crews, sanitation workers, road crews and economic development teams, to name just a few examples of local governments' mission work. The position of city planner does not satisfy the first prong of the administrative duties test. It is, as the Paradise human resources director and attorney conclude, a nonexempt position.

The Accountant

The city of Paradise has a position in its finance department called "accountant," whose FLSA classification has recently been called into question. The primary job duties of the position are several. They are to:

- post and balance the general and subsidiary ledger;
- prepare a variety of financial records, reports and analyses;
- provide technical guidance to technical accounting staff;
- update fixed asset system for additions and deletions, assign asset numbers and reconcile fixed asset detail to fixed asset account group;
- interpret and enforce fiscal policies and practices;
- assist and respond to requests by external auditors;
- supervise the processing and accounting for payroll and related reports such as state and federal withholding reports, balancing and calculating payments by fund category; calculate health insurance payments;
- issue quarterly and annual tax reports and W-2 yearly withholding for employees;
- prepare quarterly fuel tax reports, and prepare oil and gas analyses;
- review and distribute end-of-the-month reports to department heads;
- participate in budget preparation and administration as requested by finance director; and
- serve as acting finance director in the absence of the finance director.

The accountant position clearly satisfies the first prong of the administrative duties test – the work is nonmanual office work that is directly related to management and, perhaps more so, to general business operations. So the Paradise human resources director and attorney must move on to the second prong of the administrative duties test and consider whether the position entails work requiring the exercise of discretion and independent judgment on matters of significance to the city. The accountant position includes both duties that do not require the exercise of discretion and independent judgment and those that do.

The duties that do not appear likely to include the exercise of discretion and independent judgment (although they may require training and skill) are:

- posting and balancing the general and subsidiary ledgers;
- providing technical guidance to technical accounting staff;
- updating fixed asset system for additions and deletions, assigning asset numbers and reconciling fixed asset detail to fixed asset account group;
- supervising the processing and accounting for payroll and related reports such as state and federal withholding reports, balancing and calculating payments by fund category; calculating health insurance payments;
- issuing quarterly and annual tax reports and W-2 yearly withholding for employees;
- preparing quarterly fuel tax reports; and
- reviewing and distributing end-of-the-month reports to department heads.

The duties that seem likely to involve the exercise of discretion and independent judgment are:

- preparing a variety of financial records, reports and analyses;
- interpreting and enforcing fiscal policies and practices;
- assisting and responding to requests by external auditors;
- preparing oil and gas analyses;
- participating in budget preparation and administration as requested by finance director; and
- serving as acting finance director in the absence of the finance director.

The above-listed duties seem likely to involve the exercise of discretion and independent judgment. But how will the human resources director and city attorney know that they do? Their dilemma illustrates well the limited utility of job descriptions in accurately classifying positions as exempt or nonexempt for FLSA purposes. The list of job duties says that the person in this position will prepare “a variety” of financial records, reports and analyses. What this means is anyone’s guess. What it means in the city of Paradise may be different from what it means in Paradise County government. Some records and reports may require the employee to discern important differences in data trends, draw conclusions from data or exercise judgment about whether or not an asset or a practice fits into a given category. Other reports may require only that the employee plug in data to an already existing framework or formula.

In the job duty described as “interpreting and enforcing fiscal policies and practices,” the word “interpret” suggests that the person in the position will be exercising discretion and independent judgment. That might not be the case, however. Not all policies are written in such a way as to allow for interpretation. The human resources director and attorney must ask whether the particular policies with which the accountant will work likely to need interpretation in different sets of circumstances. They must ask whether the use of the word “enforce” means that the person in this position has the authority to override a decision made by a subordinate or to choose among different practices?

To accurately classify this position as exempt or nonexempt in a particular city or county, the human resources director will have to interview the person currently holding this position, his or her supervisor and department head and, possibly, people who previously held this position.The human resources director will have to ask similar kinds of questions about the next two sets of duties, as well: assisting and responding to requests by external auditors and preparing oil and gas analyses. Correctly classifying the position requires an understanding of what these duties entail on a day-to-day basis.

The last two items on the list of the accountant’s primary duties — participating in budget preparation and administration as requested by finance director and serving as acting finance director in the absence of the finance director — *strongly imply* use of discretion or independent judgment in matters of significance to the city. Does that mean that their inclusion in the job description automatically makes this position exempt? No, it does not. Whether or not these duties make the position exempt turns on how frequently they are performed and how important it is that they be performed and be performed by the person in this position.

The human resources director must also consider whether the position makes decisions on matters of significance to the employer. Although it is easy (and correct) to say that “finance” is a matter of significance to the city, that answer is not good enough. The question of whether the particular judgments this employee makes are on matters of significance cannot be determined on the basis of this general list of duties. Once again, the human resources director will have to dig deeper into the meaning of this duty to make the correct call on classification.

Once the human resources director determines that a job duty requires the exercise of discretion and independent judgment on matters of significance to the city, he or she must evaluate whether this duty or a set of duties requiring discretion and independent judgment are important enough in the overall scheme of the job to make that position exempt. When the U.S. Department of Labor revised the regulations setting forth the duties tests for FLSA exemptions in 2004, it eliminated from the analysis any measure of percentage of time spent on a duty or group of duties. Instead, the rules now advise employers to consider only the job’s *primary* duty or duties in classifying it as an executive, administrative or professional position.

The FLSA regulations define the phrase “primary duty” as meaning the “principal, main, major or most important duty that the employee performs.” The regulation goes on to say that while employees who spend more than fifty percent of their time on exempt work are likely to be exempt, there is no minimum time requirement. Employees who spend less than fifty percent of their time on exempt work may still qualify for an exemption. The time spent on exempt duties may be a factor in determining the primary duty, the rule says, but the emphasis should be on “the character of the employee’s job as a whole.”

In determining whether a duty is a primary duty, important factors are:

- the relative importance of the this duties compared with the employee’s other duties;
- the amount of time spent performing this duty or group of duties;
- the employee’s relative freedom from direct supervision in performing this duty; and

- the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work, if any, performed by the employee.

Applying this framework to the accountant position, the Paradise human resources director will want to know how important the position's budget responsibilities are – in other words, does this position play an integral role in budget development? How does this position's contributions to budget development compare to those of others in the department? How frequently are this position's budget recommendations adopted?

The human resources director will also want to know how frequently the person in this position is called upon to act as acting finance director and whether the person is actually called upon to exercise the finance director's duties and make decisions when acting in that role. The Paradise human resources director and the city's attorney agree that more work needs to be done. The accountant position cannot be correctly classified as exempt or nonexempt under the FLSA based on the job description alone.

The Management Analyst

The last position that the city is reevaluating is that of "management analyst," a title that suggests exempt status. "Don't let the position title fool you into prejudging its exempt status," the human resources director warns the human resources trainee who is assisting on this project him"Whether or not a position is exempt under the FLSA is solely a function of whether the duties as performed by the incumbent satisfy one of the executive, administrative or professional duties tests." The job duties of the Paradise management analyst position are to:

- find and research grant opportunities and work with departments with the relevant substantive expertise to prepare grant applications;
- gather information for the city's annual report;
- assist with budget analysis;
- recommend outside vendors for the city's recycling program and options for single-stream recycling; prepare contracts for single-stream recycling; maintain Big Company's corporate sponsorship of the recycling program;
- draft reports about various city initiatives for legislators in order to garner support and funding;
- engage in marketing work, such as drafting the content of flyers distributed to citizens with their utility bills;
- coordinate community outreach projects, such as chamber of commerce events and events to encourage citizens to participate in government programs; and
- perform preparatory and clean-up work for meetings, such as cleaning coffee mugs, making coffee, serving food at meetings and cleaning up after meetings.

The human resources director quickly and correctly concludes that the management analyst position qualifies for an exemption under the administrative duties test.

Why does this position clearly qualify for the administrative exemption while there were so many open questions about the accounting position? First, as was the case with both the accountant and the city planner, the management analyst position involves nonmanual office work. Second, all of the position's duties, with the exception of coffee preparation, are clearly related to management and general business operations as all of them are related either to the generating revenue for the city (grantwriting, budget analysis, supporting chamber of commerce economic development, maintaining corporate sponsorships, legislative outreach) or spending it (budget analysis, recommending vendors and preparing contracts). The FLSA regulations expressly recognize the development of marketing projects and materials, such as that done for community outreach events and for flyers, as a type of work directly related to management or general business operations of the employer.

Finally, all but two of the duties appear by their very nature to involve the exercise of discretion and independent judgment in matters of significance to the city. Finding grant opportunities appropriate for a range of departments requires the employee to make judgments about which funding opportunities are most appropriate and most likely to be successful for a variety of different departments, as does determining the substantive content of marketing projects (in contrast, doing the graphic design of marketing material does not involve discretion and independent judgment within the meaning of the FLSA). Even if the person in the management analyst position is not the final decision maker, sifting through possible vendors, identifying the most promising candidates and explaining why they are the best choices are classic examples of the exercise of discretion and independent judgment. So too is the drafting of contract terms. Furthermore, the decision

about whom the city should contract with for recycling is a matter of significance. Similarly, where the purpose of a report is to gain the support of legislators for a city program, the author of the report will necessarily have to exercise good judgment about what to highlight and what to minimize is a necessary part of the job. Persuading legislators of the value of the city's programs is not only generally significant, but sometimes of paramount importance.

"What about the job duty identified as assisting with budget analysis?" asks the human resources trainee. "Excellent question!" says the human resources director. "In general, the use of the term "assist" or "assisting" in a job description should raise a red flag, because it means that the position does not have the responsibility for the task or project in question but is merely working in a subordinate capacity with someone who does. The person "assisting" is therefore unlikely to be exercising discretion and independent judgment on matters of importance to the employer," the human resources director explains. That being said, depending on the circumstances, the position may have significant responsibility for a part of the project.

The use of the word "assist," therefore, is a sign that the human resources director should be asking questions of the employee in that position and his or her supervisors in order to understand that particular job duty correctly. Here, in the case of the management analyst, there appear to be enough other job duties that satisfy the discretion and independent judgment requirement that the classification of the position as exempt is not in doubt. If, however, the primary job duty were assisting in budget analysis, and the other duties were but a small part of the position's responsibilities, the answer might be different.

The trainee pipes up again, noting that making coffee is not an exempt job duty. The trainee is, of course, correct. "Thankfully," says the attorney, "the inclusion of some nonexempt duties, such as those involving the preparation and cleaning up of coffee, does not turn what would otherwise be an exempt position into a nonexempt position." The touchstone of FLSA classification is the concept of the primary duty. If the primary duty of the management analyst position were to be a barista, and the other revenue-generating and business-related duties were secondary, the position would be nonexempt. But that is not the way the position in structured in Paradise (and I dare say not in any other jurisdictions either).

The administrative duties test is, by far, the most challenging and difficulty of the three tests for exempt status. More than either the executive exemption or the professional exemption, the administrative duties test frequently requires a local government's human resources staff to investigate the details of the way in which a job is actually performed in order to understand whether it qualifies for exempt status. That is not to say that the professional duties test, which evaluates whether the position is one that requires an advanced academic degree or other high-level training, does not also have its challenges. I will discuss those in a future post.

Links

- www.law.cornell.edu/cfr/text/29/541.102
- www.law.cornell.edu/cfr/text/29/541.700
- www.law.cornell.edu/cfr/text/29/541.201

Coates' Canons Blog: The FLSA's Professional Duties Test – Part 1

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7812

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The FLSA's Professional Duties Test – Part 1

The Fair Labor Standards Act (FLSA) generally requires that employers pay employees a time-and-half premium wage for hours worked past 40 in a workweek. Many employees are not entitled to this premium overtime pay, however, because they are "exempt." In previous blog posts **here**, **here** and **here**, I have discussed two of the three kinds of exemptions from overtime pay – the executive exemption and the administrative exemption. This post introduces the professional exemption, the last of the three. The professional duties exemption involves not one kind of exemption but is actually several exemptions gathered together in one name. It will take me two posts to cover them all, this post and one more to come. That last one will by my last post in this series on FLSA exemptions.

Background

Under the FLSA, every position is non-exempt (and thus entitled to overtime pay) unless it satisfies the following three requirements:

- the employee is paid on a salary-basis, which means that the employee receives the same wages from pay period to pay period and that there are no changes to that amount based on variations in quality or quantity of work (the "salary basis test"); and
- the employee is paid at least $455 per week (the "salary threshold test"), and
- the position's duties satisfy either the executive, administrative or professional duties tests set forth in United States Department of Labor regulations (the "duties tests").

The general requirements for satisfying the professional duties test are set out in the U.S. Department of Labor's regulations at **29 CFR § 541.300**. These requirements apply to all of the subcategories of the professional exemption: the learned professional, the creative professional, the teaching professional and the computer professional. To qualify as an exempt professional, an employee must have a primary duty of performing work that requires:

- knowledge of an advanced type in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction; or
- invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

In subsequent sections, the regulations set out more specific requirements for each category of exempt professional. Because public school teachers and creative professionals such as actors, musicians, painters and novelists are not positions generally found in city or county government, I will not discuss these duties tests on this blog. Readers may find the regulations governing the exemptions for teacher and creative professionals **here** and **here**.

Duties Test for the Learned Professional Exemption:

The test for the learned professional exemption is set out in the U.S. Department of Labor's FLSA regulations at **29 CFR § 541.301**. To qualify for this exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

- the employee must perform work requiring advanced knowledge;
- the advanced knowledge must be in a field of science or learning; and
- the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

In most cases, this means a graduate degree. A bachelor's degree will not usually suffice except with respect to a nursing degree that leads to a RN license or an engineering degree.

Let's break this test down.

Advanced Knowledge

"Work requiring advanced knowledge" means work that is predominantly intellectual in character. It is further defined as work that "includes work requiring the consistent exercise of discretion and judgment," and is contrasted with performance of routine mental, manual, mechanical or physical work. To quote the rule directly, "an employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances."

A Field of Science or Learning

The regulations define fields of science or learning as including the study of law, medicine, teaching, accounting, actuarial science, engineering, architecture, pharmacy, and the physical, chemical and biological sciences.

A Prolonged Course of Specialized Intellectual Instruction

This generally means a graduate degree of some kind. In most cases, a bachelor's degree does not suffice to meet this requirement as the regulations instruct that the exemption "is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field."

The learned professional exemption does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. Nevertheless, employees who work in fields where specialized academic training is a standard requirement but who do not have the requisite degree may qualify for the exemption if they have obtained similar knowledge through a combination of work experience and intellectual instruction. For example, a certified public accountant would qualify for the professional exemption. Accountants who are not CPAs but whose job duties require knowledge that is the same as that acquired by a CPA would probably qualify for the professional exemption.

It is important to note that a position may qualify for the professional exemption only if it ***requires*** the person to have advanced knowledge in a field of science or learning acquired by prolonged course of specialized instruction. If the person in the position possesses an advanced degree, but the position does not requires the person to have such a degree, it will not qualify for the professional exemption.

Two local government positions where this issue frequently arises are those of planner and social services caseworker. A planning department position that requires a job applicant to have a master's degree in planning in order to even be considered for the position will qualify for the professional exemption. A planning position in which a master's degree is a preferred qualification, but where applicants with bachelor's degrees will be considered will not qualify for the professional exemption.

Similarly, a social services position that requires a master's degree in social work will satisfy the professional duties test. A position that requires either a bachelor's degree or a master's degree in social work will not qualify for the exemption.

Some Examples of Local Government Positions Likely to Satisfy the Learned Professional Duties Test

Certain local government positions will automatically satisfy the learned professional test: city and county attorneys, physicians and licensed pharmacists on the staff of county health departments, and city and county engineers. At **29 CFR § 541.301**, the Department of Labor sets out some examples of occupations whose typical primary duties make them likely to satisfy the learned professional test. For local governments, these occupations are most likely found in the health sciences field, and include registered nurses, medical technologists, dental hygienists and physician assistants.

Registered Nurses But Not Licensed Practical Nurses

The regulations recognize registered nurses as learned professionals on the basis that registration by the appropriate state examining board (here the North Carolina Board of Nursing) attests to their having completed the requisite advanced

study. The rule makes the position of licensed practical nurses (LPNs) clear: LPNs generally do not qualify as exempt learned professionals "because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations." Although LPNs must also be licensed by the state, typical LPN training is a one-year post-high school course of study, usually in a community or technical college. Registered nurses, by contrast, must have completed a minimum 2-3 year academic course of study; some will have completed a 4-5 year program.

Medical Technologists, Dental Hygienists and Physician Assistants

The regulations explicitly recognize dental hygienists and physician assistants, like registered or certified medical technologists, as likely to meet the requirement for the professional exemption if they their training satisfies specific criteria set out **here**.

Paralegals Unlikely to Satisfy the Professional Duties Test

The Department of Labor has provided examples of occupations whose primary duties make them unlikely to satisfy the new learned professional test. For public employers, the most relevant example is that of the paralegal supporting the work of in-house or staff attorneys. Paralegals and legal assistants do not qualify because they are generally not required to have an advanced, specialized academic degree to work in the field.

In my next blog post, I will discuss the exemption for computer professionals. This test is one that causes considerable confusion and merits a separate post.

Links

- www.law.cornell.edu/cfr/text/29/541.300
- www.law.cornell.edu/cfr/text/29/541.303
- www.law.cornell.edu/cfr/text/29/541.302
- www.law.cornell.edu/cfr/text/29/541.301

Coates' Canons Blog: The FLSA's Professional Exemption – Part 2: The Computer Professional

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7840

This entry was posted on September 10, 2014 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

This is the final post in my series about exemptions to the Fair Labor Standards Act's requirement that employees be paid a premium time-and-one-half overtime wage for hours over 40 in a workweek. There are three types of exemptions: the executive exemption (discussed here), the administrative exemption (discussed here and here) and the professional exemption. The professional exemption has several distinct tests (not of all of which are relevant to local government). In my last blog post (here), I discussed the learned professional exemption in detail. In this post, I look at the exemption for computer professionals.

Salaried or Hourly?

The exemption for the computer professional is different from all the other exemptions in that it does **not** require that the employee be paid on a salary basis (see my blog post on the salary basis test here). Instead, a position may be paid either on a salary basis or on an hourly basis, provided that the hourly rate is a minimum of $27.63 per hour. Like all other exempt employees, however, a computer professional paid on a salary basis will have to earn a minimum of $455 per week. For the hourly rate and salary basis provisions of the regulation, see here.

The Computer Professional Duties Test

The primary duty test for the computer professional requires that an employee's work focus on:

1. the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. 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;
3. the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. a combination of these duties, requiring the same level of skills.

As explained in earlier posts about the executive and administrative duties tests, "primary duty" means "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a) says:

> Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Educational Requirements

Unlike the learned professional exemption, a person holding a position that is exempt as a computer professional is not required to have any particular degree. Employees frequently have a bachelor's degree or more advanced degree because the level of expertise and skill required to do the work covered by this exemption is generally gained through education. But the requisite expertise may be acquired through a combination of education and experience or through experience alone.

Positions That Typically Satisfy the Computer Professional Exemption

The computer professional exemption is available for information technology directors, provided that their actual job duties satisfy the primary duties test, and for systems analysts, programmers and software developers. The regulations note that many systems analysts and computer programmers will have additional responsibilities that qualify them for the general administrative exemption, and some of the lead people in those areas will likely have management and supervisory responsibilities that qualify them for the executive exemption, as well.

Positions That Do Not Qualify for the Computer Professional Exemption

The regulations expressly exclude those involved in the operation, manufacture, repair or maintenance of computer hardware and related equipment from qualifying for the computer professional exemption, as they do those whose work is dependent upon the use of computers and computer software, such as draftsmen and those working with computer-assisted design (CAD) software.

Exempt or Nonexempt?

Local government employers trying to determine whether a particular position is exempt as a computer professional should keep in mind a pair of distinctions. The first is between highly specialized knowledge in computer systems analysis, computer programming and software engineering, on the one hand, and highly specialized knowledge about computers and software on the other. The second distinction is between designing, creating and modifying computer systems and programs and identifying the computer needs and solutions of a department or unit of government. In both instances, the former are knowledge and skills needed to perform work qualifying for the computer professional exemption, while the latter are not.

Links

- www.law.cornell.edu/cfr/text/29/541.400
- www.law.cornell.edu/cfr/text/29/541.700
- www.law.cornell.edu/cfr/text/29/541.402
- www.law.cornell.edu/cfr/text/29/541.401

Coates' Canons Blog: The New Overtime Rule is Here and Effective January 1, 2020

By Diane Juffras

Article: https://canons.sog.unc.edu/the-new-overtime-rule-is-here-and-effective-january-1-2020/

This entry was posted on September 25, 2019 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

On Tuesday, September 25, 2019, the U.S. Department of Labor released the final rule raising the minimum salary an employee must make to be exempt from overtime and, as a result, making more salaried employee eligible for overtime compensation. The rule may be found here. The changes to the rule closely track the proposed rule published last March. The most significant change is, as expected, an increase in the amount an employee must earn to qualify for exempt status. It increases from the current $455 per week to $684 per week –on an annual basis, that's an increase from $23,600 to $35,568. The new salary minimum will be effective January 1, 2020.

Background

Under the Fair Labor Standards Act, an employee is entitled to overtime premium pay of one-and-one-half times their regular rate of pay after working 40 hours in a week, unless an exemption applies. If an exemption applies, the employee is said to be "exempt" and is not entitled to overtime pay no matter how many hours they work in a week. An exemption applies if the employee is salaried and the position meets the requirements of the executive duties test, the administrative duties test, or the professional duties test.

But even if the employee is salaried and the position satisfies one of the three duties tests, the exemption does not apply if the employee is paid less than $455 per week, or $23,660 on an annualized basis. Such a low-paid, salaried employee is entitled to overtime pay after 40 hours.

For an explanation of the salary basis test, see here. For discussion of the executive duties test, see here, the administrative duties test, see here and here, and the professional duties tests, see here and here.

The Final Rule

The final rule deviates from the proposed rule only in detail. In a nutshell, the final rule

- raises the minimum salary necessary for an employee to be exempt from overtime from the current $455 per week ($23,660 annually) to $684 per week ($35,568 annually);
- raises the minimum salary necessary for an employee to be exempt from overtime as a highly-compensated employee from $100,000 annually to $107,432 annually;
- allows employers to include nondiscretionary bonuses in an amount up to 10% of the minimum salary level;
- makes no changes to the duties tests; and
- makes no changes to any of the other rules regarding compensable time and overtime.

The final rule is effective January 1, 2020.

Minimum Salary Threshold of $913 Per Week

The new threshold of $684 per week represents the 20th percentile of earnings for a full-time, full-year salaried worker in the South (the lowest wage region) and/or the retail industry (based on pooled data). This is the same methodology used in setting the 2004 minimum salary threshold of $455 per week. (DOL departed from this methodology when it issued the ill-fated and now defunct 2016 overtime rule, which used the 40th percentile mark to set the minimum salary at $913 per week).

The rule setting forth the new minimum salary threshold will be found at 29 CFR § 541.600 beginning on January 1, 2020.

New! Inclusion of Nondiscretionary Bonuses in the Minimum Salary

One additional change will affect public employers who use longevity pay plans. Like the defunct 2016 rule, the new salary basis test will allow nondiscretionary bonuses and commissions to be included – to a limited extent – in the calculation of an employee's minimum salary. In the final rule, DOL limits the amount of nondiscretionary bonuses and commissions that may be used to satisfy the minimum salary threshold to ten percent of the minimum required salary, that is $68.40 per week or $3,556.80 annually, provided that the bonus or commission is paid annually or more frequently.

What is a nondiscretionary bonus?

To better understand what this provision offers local government employers, let's first discuss what counts as a nondiscretionary bonus. The distinction between discretionary bonuses and nondiscretionary bonuses is explained at 29 CFR § 778.211. A discretionary bonus is one which may be given or not in the sole judgment of the employer. It is up to the manager to decide to which employees and in what amount to award a bonus. A nondiscretionary bonus, in contrast, is one which accrues to the employee automatically as a function of policy or ordinance. Bonuses that DOL considers nondiscretionary are:

- bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the organization;
- attendance bonuses;
- individual or group production bonuses;
- bonuses for quality and accuracy of work;
- bonuses contingent upon the employee's continuing in employment until the time the payment is to be made (longevity pay, for example).

Among public employers, longevity pay is the most frequently used form of nondiscretionary bonus. Public employers have traditionally paid longevity bonuses once a year. To make use of longevity payments in meeting the salary threshold for exempt status, those employers will have to change their practices and make longevity payments on either a weekly or a quarterly basis. A once-a-year payment may not be in calculating compliance with the salary threshold. Relatively few public employers, award nondiscretionary merit bonuses based on meeting productivity metrics and there are few public-sector positions that involve commission-based compensation.

How Will the Inclusion of Nondiscretionary Bonuses Work in Practice?

Effective January 1, 2020, the amount of nondiscretionary bonus payments that may be credited toward the salary minimum for exemption will be $68.40 per week or $3,556.80 annually (that is, 10% of the salary threshold). An employer may designate any 52-week period as a "year" for this purpose. If it does not make a designation, DOL will treat the year as a calendar year. Whenever an employer uses nondiscretionary bonuses to meet the salary threshold, it will need to double-check at the end of each year that employees for whom they are claiming exempt status on this basis are in fact being paid the required minimum salary. If they are not, DOL will allow employers to make a "catch-up" payment to bring an employee within the required salary level within one pay period of the end of the 52-week period that comprises the employer's year. Here's how it will work:

1. Each pay period an employer must pay the exempt salaried employee at least $615.60 (that is, 90 percent of the minimum salary threshold).
2. At the end of the year, if the sum of the salary paid plus the nondiscretionary bonuses and/or incentive payments paid does not equal $35,568 (that is, the minimum salary of $684 per week on an annualized basis), the employer

is allowed one pay period to make up for shortfall.

3. Any catch up payment counts toward only the prior year's salary amount. It will not count toward the salary amount in the year in which it ends up actually being paid.

An Additional Clarification

The inclusion of nondiscretionary bonuses in the minimum salary threshold does not change any other aspect of the salary basis or salary threshold tests. *As has always been the case under the FLSA, discretionary bonuses, employer contributions to health, disability and life insurance and employer contributions to LGERS and the North Carolina 401(k) Plan may **not** be included in the calculation of whether an employee's salary meets the minimum salary threshold*.

The provision allowing the use of nondiscretionary bonuses and commissions in up to 10% of the amount of the minimum salary threshold will be found at 29 CFR § 541.602(a)(3 beginning on January 1, 2020.

The Highly Compensated Employee Salary Threshold

DOL also increased the minimum salary necessary for a position to qualify as exempt under the special highly-compensated employee exemption from $100,000 to $107,432 annually. The new threshold is set at the 80th percentile of earnings of all full-time employees nationally (the defunct 2016 rule used the 90th percentile of earnings).

Currently, employees can be exempt if they are paid $100,000 annually and perform *just one of the exempt duties* of the executive, administrative or professional duties tests. The idea behind the highly-compensated employee exemption is that the very high salary threshold offsets this exemption's minimal duties test. The current highly-compensated exemption allows for compensation in excess of $455 per week to be in the form of nondiscretionary bonuses or commissions and allows employers to make a final "catch-up" payment to bring the employee's salary up to $100,000 per year within one month after the end of the year.

As before, employers making use of the highly-compensated employee exemption will be able to use nondiscretionary bonuses and commissions in any amount in calculating the minimum salary, provided that the employee makes at least $684 per week (in other words, the ten percent limitation applicable to the standard salary threshold does not apply here). Employers will also be allowed to make a final "catch-up" payment to bring the employee's salary up to $107,432 by the end of 52-week period making up the year.

The new minimum salary threshold for highly compensated employee will be found at 29 CFR § 541.601 beginning January 1, 2020.

No Automatic Update of the Minimum Salary Threshold

In the past, the minimum salary threshold has been updated sporadically. In the defunct 2016 rule, DOL announced its intention to institute a regular, automatic update to the minimum salary threshold every three years. DOL has not included this provision in the 2019 rule. Instead, in the preamble to the 2019 rule, DOL announced its intention to update the minimum salary every four years through regular notice and rulemaking practice.

The Duties Tests Have Not Been Revised

In the proposed rule, DOL floated the possibility of revising the executive, administrative and professional duties tests. The Department expressed concern that the current tests allow exempt employees to performing a disproportionate amount of nonexempt work along with their exempt work. ***The new rule does not include any changes to the duties tests***.

Overtime Provisions That Will Not Change

The new rule will have a significant impact on public employers, turning many employees who are currently exempt from overtime into nonexempt employees. These newly nonexempt employees will now need to be compensated at one-and-one-half times their regular rate of pay whenever they work more than 40 hours in a workweek. The new rule will not, however, change any of the other FLSA provisions relating to overtime:

- Public employers may continue to use compensatory time-off or “comp time” in lieu of cash overtime. On comp time, see here.
- Public employers may still use the 28-day work cycle of the 207(k) exempt for paying overtime to law enforcement officers and firefighters. On the 207(k) exemption, see here.
- The fluctuating workweek will continue to be available as a method of paying overtime to those employees who sometimes work fewer than 40 hours per week and sometimes work more than 40 hours per week. On the fluctuating workweek method, see here.
- Small employers who have fewer than five law enforcement officers on the payroll in any workweek or fewer than five firefighters on the payroll in any workweek continue to be exempt from paying overtime to those officers and firefighters in those workweeks.
- The rules governing what time is compensable and what is not remain the same.

If you want to read more about the new overtime rule, DOL has a Fact Sheet and a Question and Answer section on its website. Check them out.

And if you are an old-hand at the FLSA and want to do a deep dive into some of its more vexing issues, join us for our Advanced FLSA class at the School of Government this December 11 – 12. Registration will open in a few weeks. If you want to be notified as soon as registration is open, sign up here.

Links

- www.dol.gov/whd/overtime2019/overtime_FR.pdf
- canons.sog.unc.edu/?p=7385
- canons.sog.unc.edu/?p=7464
- canons.sog.unc.edu/?p=7537
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Coates' Canons Blog: The Mysteries of Comp Time Revealed

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7019

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The Fair Labor Standards Act (FLSA) requires all employers to pay employees time-and-one-half their regular rate of pay for all hours over 40 that employees work in a given week, unless an employee satisfies the FLSA's salary basis test and one of either the executive, administrative or professional duties tests. Employees who meet the requirements of these tests are called "exempt employees" (that is, exempt from the FLSA's overtime requirements) and need not be paid overtime if they work in excess of 40 hours in a week (for how to determine whether an employee is exempt or nonexempt under the FLSA, see my article **here**).

The FLSA (at **section 207(o)**) allows government employers an alternative way to compensate nonexempt employees for hours worked in excess of 40 that it does not allow private-sector employers: use of compensatory time-off or, as it is more commonly known, comp time. Comp time allows public employers to provide paid time-off in lieu of the cash overtime. When a government employer uses compensatory paid time-off instead of cash overtime, ***the time-off must be credited at the rate of one and one-half hours of compensatory time for each hour of overtime work*** — just as the cash rate for overtime is calculated at the rate of one and one-half times the regular rate of pay. ***It is a violation of the Fair Labor Standards Act for an employer to compensate a nonexempt employee for overtime hours with hour-for-hour comp time.*** See **here** for the U.S. Department of Labor's comp time regulation.

This post addresses common issues related to the use of comp time by government employers.

Deciding to Use Comp Time

Public employers may use comp time instead of cash overtime for all employees or for only some employees. Employers may use comp time in lieu of cash for all overtime worked by a given employee or group of employees or only in connection with certain assignments, such as weather emergencies or public festivals. An employer must meet only one pre-requisite before using comp time: before any overtime hours are worked on this basis, it must secure the *agreement* of an employee who is to be compensated with comp time instead of cash overtime.

What agreement means in this context is something less than what we might ordinarily understand. An employer may make receipt of comp time in lieu of cash overtime an express condition of employment at the time of hiring. It may provide either oral or written notice of its decision to use comp time to affected employees and ask for written acknowledgement from each. An employer does not have to ask for written acknowledgement, but may assume lack of objection from the fact that an employee has reported for work and worked assigned overtime hours after notification. Where there is no formal written agreement, the regulations require that "a record of its existence must be kept" nonetheless – presumably through some form of documentation that the employee has been notified or through a provision of the personnel policy.

Although the regulation stresses that an employee's agreement to receive compensatory time-off must be freely and voluntarily made, the reality is that where receipt of comp time is a condition of employment, an employee who is unwilling to receive time-off in lieu of cash has only one option – to find another job. On the agreement between employer and employee to use compensatory time-off, see **here**, at section (o)(2)(A)(ii), **here** and **here.**

Cap on the Number of Comp Time Hours That May Be Accrued

The **regulations** specify that employers may allow nonexempt employees to accrue only up to 240 hours of comp time, with the exception of employees working "in a public safety activity, an emergency response activity, or a seasonal activity," who may accrue up to 480 hours. Note that employers may only apply the 480 hour limit to employees engaged in public safety and emergency response activities as a regular part of their work. Thus, law enforcement officers, firefighters, emergency medical personnel, as well as 911 dispatchers and telecommunicators may be subject to the

higher limit. Employees whose regular work does not involve public safety or emergency response, but who undertake such duties during the course of an emergency remain subject to the lower cap of 240 hours (see **here**). If employees work more than 240 or 480 hours of overtime — as they often do in emergency situations — employers must either begin to payout overtime hours in cash or send employee home to use their paid time-off (although in emergencies, that is not generally an option) (see **here** at section (o)(3)(A)).

For law enforcement officers and firefighters who are scheduled under a section 207(k) 28-day work cycle, the statutory limit to the number of comp time hours that may be accrued is still 480 hours. Employers may use comp time to compensate officers and firefighters at a rate of one and one-half hours paid time-off for every hour worked over 171 and 212 respectively. There is a mistaken belief among some local government employers that they do not need to pay law enforcement officers for the hours between 168 and 171 (sometimes called "gap time hours") or that the hours between 168 and 171 may be compensated through the use of comp time. Neither practice is lawful under the Fair Labor Standards Act. The hours between 168 and 171 must be compensated by a cash payment at the officer's regular rate. For the use of comp time for law enforcement officers and firefighters scheduled under the 207(k) 28-day work cycle, see **here** , at subsection (o)(3)(A), **here**, at subsection (b), and **here**.

Using Accrued Comp Time

Another condition upon a public employer's use of comp time instead of cash overtime is the requirement that it allow an employee to use his or her accrued paid time-off "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." Most employers find this easier said than done. One reason that employees accrue comp time in the first place is because there is generally more work to be done or shifts to be covered than there are people or regularly scheduled hours in which to do the work. Allowing employees to take time-off may only exacerbate the problem. Nevertheless, an employer must allow an employee who has requested the use of accrued comp time to take time-off absent an undue hardship.

One way in which employers can manage accrued comp time is to send employees with accrued comp time home when their departments or sections are experiencing slower work periods. An employee may not object to being sent home since they are not being sent home without pay – comp time is *paid* time-off. Employers may also adopt policies that either allow or require employees to use comp time before they use accrued paid sick or vacation leave. Similarly, either employer or employee may require that accrued comp time run concurrently with FMLA leave, turning unpaid leave into paid leave. Finally, employers can set limits lower than 240 or 480 hours on the amount of comp time employees may accrue. They will necessarily have to pay overtime in cash once the lower limit is reached, but there will be fewer days of time-off that require accommodation. On using accrued comp time, see **here**, at section (o)(5), **here**, and **here**.

Accrued Comp Time That Remains at Separation

Comp time may only be used in the manner authorized by the statute and the U.S. Department of Labor's implementing regulations. Because neither the statute nor regulations authorize its use in this way, **accrued FLSA comp time may not be made subject to a "lose it or use it" policy. Nor may it be converted to sick or vacation leave**. Comp times accrues indefinitely until the statutory maximums of 480 hours for public safety employees and 240 hours for all other nonexempt employees is reached. At that point, the accrued hours remain credited to the employee indefinitely until used and any additional overtime hours must be paid out in cash.

The statute is clear that **upon separation from service**, whether because of retirement, a voluntary departure for a position with another employer, or because the employee has been fired, **employers must pay out any accrued comp time** "at a rate of compensation not less than—

> (A) The average regular rate received by such employee during the last 3 years of the employee's employment, or
>
> (B) The final regular rate received by such employee, whichever is higher."

See **here**, at subsection (o)(4), and **here.**

Overtime or Comp Time for Exempt Employees

The **FLSA regulations** expressly allow employers to pay exempt employees additional compensation for hours worked beyond what is expected without jeopardizing an employee's exemption. The rules allow such additional compensation to

be paid on any basis, including paid time-off. North Carolina local government employers typically refer to this additional or bonus time-off for exempt employees as a form of "comp time," or compensatory time-off, although they would be wise to give it another name in order to avoid confusion. For this reason, this blog post will refer to additional paid time-off for exempt employees as "bonus time-off."

Although comp time for nonexempt employees must be granted on the basis of one-and-one-half hours off for every hour worked in excess of 40, bonus time-off for exempt employees may be structured in whatever way the local government employer chooses. Bonus time-off may be granted to exempt employees when they have worked in excess of 40 hours, in excess of their scheduled hours, or in excess of a certain number of hours per month. The time-off may be calculated on the basis of one-and-one-half hours off for each extra hour worked, or on an hour-for-hour basis. It may also be calculated on the basis of a half-hour off for each extra hour worked. Because this is a benefit that is not required by law, employers may structure it however they choose.

Unlike comp time for nonexempt employees, which cannot accrue in excess of 240 hours (480 hours for public safety employees), bonus time-off for exempt employees may accrue without limit. Bonus time-off for exempt employees does not have to be cashed out when an employee separates from service. Employers may restrict the carry-over of accrued bonus time-off for exempt employees from year to year, in contrast with comp time for nonexempt employees, which remains on the books indefinitely. There is no requirement that bonus time-off for exempt employees be paid out to employees when they leave or retire from the employer's service.

Conclusion

Here is a brief summary of the rules regarding comp time:

1. Comp time is accrued at the rate of 1 and ½ hours paid time-off for every hour of overtime that is worked.
2. Employee "agreement" is required.
3. When an employer uses comp time instead of cash overtime, it may not allow employees to accrue more than 240 hours of comp time, 480 hours if the employee works in public safety or a seasonal activity. Once an employee accrues 240 or 480 hours, as the case may be, any additional overtime must be paid in cash.
4. Employers must allow employees to use accrued comp time within a reasonable time of their making a request.
5. Employers may send employees home or require them to use comp time before sick or vacation leave.
6. Comp time never goes away. Upon separation, it must be paid out.
7. Employers may award exempt employees who work a greater number of hours than scheduled with paid time-off. In contrast to FLSA comp time for nonexempt employees, exempt employee bonus time-off may be credited at any rate and subject to any conditions the employer chooses.

Links

- sogpubs.unc.edu/electronicversions/pdfs/pelb31.pdf
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Coates' Canons Blog: Waiting to Be Engaged or Engaged to Wait? When is On-Call Time Compensable under the FLSA?

By Diane Juffras

Article: https://canons.sog.unc.edu/waiting-engaged-engaged-wait-call-time-compensable-flsa/

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Most local governments require at least some employees to be on-call to return to work in the event of an emergency. Departments with on-call requirements may include water, sewer and other utilities, public works, law enforcement, fire, EMS, emergency management, social services and information technology. Whether such employees must be paid for the time they are on-call time can be a vexing question. This blog post sets out the Fair Labor Standards Act rules governing compensation of on-call time.

Background

Both employees who are exempt from overtime and nonexempt employees may be scheduled for on-call duty. Employers never have to pay exempt employees for on-call hours, regardless of whether they perform any work during that time or not. Exempt employees are by definition paid on a salary basis and are never entitled to any additional compensation beyond their regular salary, no matter how many hours beyond their stated schedule they may work. (On exempt employees see here, here, here, here, and here; on what it means to be salaried, see here).

Nonexempt employees are another matter. They must be paid for all of the hours they work and, when they work more than 40 hours in a single workweek, they are entitled to time-and-one-half overtime premium pay. But what about time spent on-call? Is it "work" that counts toward the 40 hours necessary for overtime? Is it time-and-one-half "work" after 40 hours? Here's how to figure it out.

The DOL's On-Call Regulation

The U.S. Department of Labor's (DOL's) FLSA regulations devote only one section to on-call time, 29 CFR § 785.17, which reads:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

In interpreting this section, DOL's Wage and Hour Administrators and the federal courts have said that in determining whether a nonexempt employee must be paid for time spent on-call, the most important question is whether the time is being spent primarily for the benefit of the employer or the employee. In other words, as a practical matter, can the employee, while waiting for a call, use the time for his or her own benefit? Time can still be considered for the employee's own benefit even where employers impose some restrictions on employees who are on-call – such as requiring them to abstain from alcohol consumption. Modest restrictions do not make on-call time compensable.

Factors in Determining the Compensability of On-Call Time

The fact that employees may not use on-call time precisely as they might wish or even that they may have to spend some time at home that they otherwise might spend elsewhere does not by itself turn on-call time into compensable time. Nor does the frequency of calls. Determination of whether on-call time must be paid is made by consideration of a number of factors in light of all of the circumstances. Factors include:

- any agreement between the employer and employee;
- whether the employee may carry a phone or beeper and leave home or whether the employee must remain in one place;
- how quickly an employee must take action in response to a call, whether that action involves driving back to the workplace or taking some action electronically – the shorter the response time, the more likely it is that the on-call time is compensable;
- whether employees can easily trade on-call shifts;
- how restricted the employee is geographically;
- the extent to which an employee is able to engage in personal activities; and
- the number and frequency of calls during an on-call period in relation to the time spent without having to respond to calls.

On the relevant factors, see, for example, here and here. Reported cases provide a far greater number of examples in which on-call time has been found not to be compensable than they have examples of compensable time.

Some Examples of Compensable On-call Time: Engaged to Wait

In a 2000 case involving a utility company as employer, the U.S. Court of Appeals for the Tenth Circuit found that electronics technicians employed by a gas and electric company were entitled to compensation for on-call time. The technicians were on call to monitor building alarms weekdays from 4:30 p.m. to 7:30 a.m. and 24 hours a day on weekends – in other words, they were on-call whenever they were not on-duty. Each technician typically fielded three to five calls per on-call period. The technicians did not always have to return to the workplace, but when they did not have to do so, they had to take action by computer within 15 minutes.

In an earlier 10th Circuit case involving municipal firefighters, the court found on-call time compensable where the firefighters were called back into work an average of three to five times per 24-hour on-call period and were required to report to the station house within 20 minutes. The firefighters could trade on-call shifts only with great difficulty and were effectively precluded by their schedules from obtaining a second job. Indeed, the court found that they could not effectively use their on-call time for personal pursuits at all.

Finally, in a federal appeals court case from Arkansas, the court found on-call time compensable for state forestry service firefighters who were required to remain within 50 miles of their work site while on-call and had to respond to an emergency call within 30 minutes. The firefighters were on-call 24 hours per day and could not, therefore, trade shifts. In addition, they were unable to take part in social or other activities that did not allow them to simultaneously monitor radio transmissions.

In each of these three cases, the employer scheduled employees for long stretches of on-call with little opportunity for relief under circumstances in which the employees regularly received at least a handful of calls that required some action on their part during every on-call shift. Two of the three cases feature response times on the order of 15-20 minutes, and in two of the three cases the court expressly found that number of calls and relatively short response time rendered the employees effectively unable to use the on-call time for their own purposes.

Some Examples of On-call Time That Is Not Compensable: Waiting to Be Engaged

Law enforcement officers and firefighters figure predominantly in on-call cases. The practices of the jurisdictions represented in these cases vary substantially, which allows us to gain a better idea of why in most instances on-call time is not compensable. The most important factors in rendering on-call time noncompensable appear to be:

- the ability of employees to trade on-call shifts,
- the ability of employees freely to move about geographically when a cellphone or pager is used as the method of

contact,
- the relative frequency of calls that necessitate a response from the on-call employee, and
- whether or not the employee was, in fact, able to engage in personal activities.

In *Whitten v. City of Easley*, an unpublished 2003 case from the federal Fourth Circuit Court of Appeals (which covers North Carolina), the court found that municipal firefighters' spent their on-call time predominantly for their own benefit and were not entitled to compensation. The court reached this conclusion because 1) firefighters were on-call only to respond to relatively rare second-alarm calls, 2) firefighters were allowed to trade on-call shifts, 3) firefighters carried pagers 4) firefighters responded to an average of only 6 second-alarm calls per month, and 5) the fire department did not require firefighters to respond to a set percentage of second-alarm calls. *See Whitten v. City of Easley*, 62 Fed. Appx. 477 (4th Cir. 2003).

Similarly, in *Ingram v. Cty. of Bucks*, the Third Circuit held that where county sheriffs were not required to remain at the sheriff's office or wear their uniforms, carried beepers, could trade on-call shifts, and experience call frequency that was not so great as to keep deputies from engaging in personal activities, on-call time was not compensable.

Even a five-minute reporting time does not render on-call time compensable where the other factors give employees the freedom to pursue their own interests. In one small Iowa town, EMTs had the ability to choose which shifts to be on-call. In the majority of on-call shifts, two EMTs worked two or fewer hours of their twelve hour on-call shift and one EMT did not have to respond to single call during fifty-five percent of his shifts. The second EMT did not respond to a single call during thirty-nine-five percent of his shifts. Because this was a small town, the EMTs lived less than a five-minute drive from the EMS station where they worked and even when they were not at home while on call, the town's small size meant the EMTS could freely move around town and engage in number of personal activities quickly and efficiently.

Two other cases in which the court emphasized the infrequency with which employees were actually called back are *Reimer v. Champion Healthcare Corp.*, and *Dinges v. Sacred Heart St. Mary's Hosps., Inc.*. The *Reimer* case involved on-call nurses, who were required to be reachable by telephone or beeper, and had to be able to report to hospital within 20 minutes. Other than a requirement that they abstain from alcohol or recreational drug use, the nurses could do what they pleased while on call. The court noted that over a three-year span, only about one-quarter of nurses were called in more than once during their scheduled on-call times. In the *Dinges* case, rural EMTs were required to report into the hospital within seven minutes of a page. The court nevertheless found the on-call time not to be compensable, primarily because EMTs had less than a 50% chance of being called in any 14- to 16-hour time period.

Conclusion

Evaluating whether on-call time is compensable should be an on-going project, not a once-and-done determination as the relevant circumstances may change over time. Employers should periodically investigate how frequently on-call employees are being called to take action or to return to work. Employers should also know whether employees do, in fact, engage in personal pursuits while on-call. Those in charge of determining compensable time should know not only whether there is a standard reporting time, but also whether the department penalizes employees who do not meet the reporting standard, as this may be a factor in making the time compensable. Even if supervisors prefer having regular, assigned on-call shifts, human resources should encourage all departments to allow employees to trade on-call shifts.

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Coates' Canons Blog: The FLSA's Overtime Pay Provisions for Law Enforcement and Firefighting Employees

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=8043

This entry was posted on March 18, 2015 and is filed under Compensation & Benefits, Fair Labor Standards Act, General Local Government (Miscellaneous)

The Fair Labor Standards Act has two exceptions from its overtime pay rules for nonexempt employees who work different numbers of hours from week to week: the fluctuating workweek method and the section 207(k) exemption for law enforcement officers and firefighters. Look here for a post I wrote about the fluctuating workweek method, which can be used for any employee whose hours fluctuate. This post discusses the 207(k) exception, which is limited to law enforcement officers and firefighters. It is called the 207(k) exemption because it is found at 29 U.S.C. § 207(k) (it is sometimes called the 7(k) exemption after its location in the original bill). The 207(k) exemption is well-liked by law enforcement agencies and fire departments because it makes calculating the overtime of their employees more efficient and because it reduces overtime costs in a small, but real, way.

Background

The FLSA requires employers to pay employees at a rate of one-and-one-half times their regular rate of pay for each hour worked over 40 in a week (unless they are exempt). Law enforcement officers and firefighters present a bookkeeping and payroll challenge because they frequently work shifts of 12- or 24-hours and may be scheduled to work these shifts several days in a row, piling up a lot of hours quickly. In that sense, law enforcement officers and firefighters work the ultimate fluctuating workweek.

How the 207(k) Exemption Works

The 207(k) exemption allows public employers to figure overtime compensation for law enforcement and fire employees on the basis of work periods longer than the one-week work periods that apply to all other employees. The work period can be as long as 28 days. The employer still maintains whatever payroll schedule that it prefers – weekly, bi-weekly or monthly – and law enforcement officers and firefighters still get paid on that schedule. But overtime premium pay for law enforcement officers and firefighters is determined and paid out at the end of the 207(k) work period.

When a law enforcement agency adopts the longest possible work period – 28 consecutive days – officers earn time-and-one-half overtime pay only after they have worked 171 hours within that 28-day work period. For firefighters on a 28-day work schedule, overtime is earned only after 212 hours.

The FLSA regulations allow law enforcement and fire departments to use the 207(k) exemption for work periods of ***any*** length between seven and 28 days, and to prorate accordingly the number of hours that must be worked before overtime kicks in. Most departments use work periods that are multiples of seven. Those multiples work out this way:

	Law Enforcement	Fire Protection
28 days	171 hrs.	212 hrs.
14 days	86 hrs.	106 hrs.
7 days	43 hrs.	53 hrs.

As noted earlier, an employer does not have to alter its pay schedule to align with a 207(k) work period. For example:

- Suppose the employing department has chosen a 28-day work schedule and the employer pays its employees on a weekly basis. In that case, employees working under the 207(k) exemption receive their regular straight-time rate for all of the hours they have worked on each of the first three weekly pay periods on the 28-day cycle. They receive their regular straight-time compensation and any overtime due for that 28-day pay period on the final weekly pay period of that cycle.

- Suppose the employing department has chosen a 28-day work schedule and the employer pays its employees on a bi-weekly basis. In that case, employees working under the 207(k) exemption receive their regular straight-time rate for all of the hours they have worked during the first two weeks on the first bi-weekly pay period of the 28-day cycle. They receive their regular straight-time compensation for the second two weeks and any overtime due for that 28-day pay period on the second bi-weekly pay period of that cycle.

The 207(k) Exemption and Comp Time

Employees scheduled in accordance with section 207(k) may be compensated for overtime hours worked with compensatory time off rather than with cash overtime pay, just like employees on a regular one-week work period. For the regulation, see here.

Establishing the 207(k) Exemption

Law enforcement agencies and fire departments do not have to obtain permission from either the U.S. Department of Labor or their employees to adopt a 28-day work schedule and use the 207(k) exemption. The do, however, have to satisfy two requirements. First, the adoption of the schedule must be documented in the employer's payroll records, along with the length of the work period (that is, 28-days, 14-days, or whatever it is) and the starting date and time of each work period. Second, the payroll notation must state that the schedule has been adopted "pursuant to section 207(k) of the FLSA and 29 CFR Part 553" (see here for this requirement).

Who Qualifies as a Law Enforcement Officer or Firefighter for 207(k) Purposes?

Not every employee of a law enforcement agency or fire department may be compensated using the 207(k) exemption. The exemption is limited to sworn law enforcement officers and to those with the legal authority to fight fires.

For the purposes of the 207(k) exemption, the FLSA regulations define law enforcement officers as:

- uniformed or plainclothes members of a body of officers,
- who have the statutory power to enforce the law, and
- who have the power to arrest, and
- who have participated in a special course of law enforcement training.

The regulations provide that an unsworn jailer counts as a law enforcement officer for 207(k) purposes, ***but other civilian employees of the police or sheriff's department do not.***

A firefighter is defined for 207(k) purposes as "an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker," who—

- is trained in fire suppression, and
- has the legal authority and responsibility to engage in fire suppression, and
- is employed by a fire department of a municipality, county, fire district, or State; and
- is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

No other employees of a fire department may be compensated using the 207(k) exemption.

Other Public Safety Employees

Some jurisdictions place emergency medical personnel under the supervision of a law enforcement agency or a fire department. This arrangement is lawful and makes organizational sense for some cities and counties. But employees whose primary job duties are the provision of emergency medical services do not qualify for the 207(k) exemption unless they meet the statutory and regulatory definitions of either a law enforcement officer or a firefighter. Several North Carolina local governments cross-train and cross-utilize their public safety personnel in this way, but they are the exception and not the rule.

Citations

The regulations covering the issues discussed in this blog post and not otherwise linked in the text may be found here, here, here, here, here, and here.

Links

- www.law.cornell.edu/uscode/text/29/207
- www.law.cornell.edu/cfr/text/29/553.231
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Coates' Canons Blog: Understanding the Fair Labor Standards Act's Fluctuating Workweek

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7961

This entry was posted on January 15, 2015 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

John is an EMS dispatcher whose hours vary unpredictably from week to week. John always works at least 40 hours per week, but some weeks John works 42 hours, some weeks he works 48 hours and occasionally he works close to 60. Ellen is a water plant operator who weekly hours vary as well, but they vary on a scheduled basis. Ellen works 32 hours every first and third week of the month and 48 hours every second and fourth week. Both John and Ellen are nonexempt employees. The city for which John and Ellen work pays cash overtime instead of using compensatory time off. Yet neither John nor Ellen earns overtime at the rate of time-and-one-half. Without violating the FLSA, the city pays both John and Ellen at just one-half their regular rate of pay for each hour over 40 that they work in a given work week. How can that be?

Background

The Fair Labor Standards Act (FLSA) requires employers to pay time-and-one-half the regular rate of pay for all hours over 40 that an employee works in a given week, unless the employee is "exempt." That is, unless the employee meets either the executive, administrative or professional duties tests (for how to determine whether an employee is exempt or nonexempt under the FLSA, see my previous blog posts here**,** here, here, here and here).

But for some employees, there is another way to go about it.

The Fluctuating Workweek Alternative

The text of the Fair Labor Standards Act itself says nothing about fluctuating workweeks, but the U.S. Department of Labor's regulations implementing the FLSA set out an entire section—29 CFR § 778.114—explaining the circumstances under which employers may use an alternate method of calculating overtime when employees work hours that fluctuate from week to week. This method is called the "fluctuating workweek method." It provides for a) the payment of an unchanging salary that compensates the employee for all hours worked that week regardless of whether the employee works fewer or greater than 40 hours a week, and b) payment for overtime hours at a rate of one-half the employee's regular rate of pay.

To use the fluctuating workweek method of payment, five requirements must be met:

1. the employee must work hours that fluctuate from week to week;
2. the employee must be paid a fixed salary that serves as compensation for all hours worked;
3. the fixed salary must be large enough to compensate the employee for all hours worked at a rate not less than the minimum wage;
4. the employee must be paid an additional one-half of the regular rate for all overtime hours worked; and
5. there must be a "clear *mutual* understanding" that the fixed salary is compensation for however many hours the employee may work in a particular week, rather than for a fixed number of hours per week.

Let's look at each of the requirements in turn.

1. The Employee Must Work Fluctuating Hours.

The regulation says that this method of payment may be used for employees with "hours of work which fluctuate from week to week," and that it is "typically" used to pay "employees who do not customarily work a regular schedule of hours." Nevertheless, nothing in the regulation *requires* that the employee's hours be unpredictable or unknowable in advance. Two federal Fourth Circuit Court of Appeals decisions make that clear. In both Flood v. New Hanover County and Griffin v. Wake County

, the court found that a work schedule in which the employee's hours varied on a regular, predictable basis satisfied the requirement that the employee's hour fluctuate from week to week.

In addition, nothing requires that the fluctuation include some weeks where the hours worked are fewer than 40 and some where the hours worked are greater than 40. All the regulation requires is that the employee's hours fluctuate from week to week. In the *Flood* case, the Fourth Circuit held that the employer could the fluctuating workweek method to compensate employees working a rotating schedule of 48.3, 56.3, 64.45 and 72.45 hours per week. The Seventh Circuit Court of Appeals reached a similar conclusion in the case Condo v. Sysco Corp.

Thus, in the example above, both John (who works unpredictable hours, but always more than 40 hours per week) and Ellen (whose schedule varies on a regular basis) may be compensated using the fluctuating workweek method of payment.

2. The Employee Must Be Paid a Fixed Salary.

The fluctuating workweek method of payment requires that the employer pay the employee a fixed salary for each week. The amount cannot vary based on the number of hours worked. In the example above, John, the EMS dispatcher, is paid $675.00 week, while Ellen, the water plant operator, is paid $800 per week. John is paid $675.00 whether his work week is 42, 48 or 57 hours in any given week. Ellen is paid $800.00 whether she is working one of the 32-hour weeks or one of the 48-hour weeks on her schedule. And, it should be noted, Johna's salary for a week would still be $675.00 if, during that particular week, he worked only 30 hours for some reason.

3. The Rate Must Be At Least That of the Minimum Wage.

The salary used to compensate an employee under the fluctuating workweek method can be of any amount with only one proviso: the salary must be large enough that the regular rate—the amount found by dividing the fixed salary by the total number of hours worked in any week—is at least equal to the minimum wage. The regular rate of pay will vary due from week to week because the hours that the employee works fluctuate from week to week. Even in a week where John the dispatcher works 57 hours, his regular rate of pay remains above the minimum wage ($675.00 ¸ 57 = $11.85/hour).

4. Overtime Hours Are Compensated at One-Half the Regular Rate.

Under the fluctuating workweek method, the fixed salary is defined as compensation for ***all*** hours that an employee has worked in any workweek. That is, the payment of the salary is compensation at the regular rate of pay for all of the hours the employee works in that week, including overtime hours. In other words, for the hours below 40, the employee is compensated by the fixed salary and for hours over forty, the employee is compensated for the "time" in "time-and-one-half" the regular rate by the fixed salary. Since employer has already paid the employee the regular rate for all of the hours he or she has worked by payment of the salary, the employer owes the employee only one-half of the regular rate for the hours over 40.

Thus, if John, the EMS dispatcher, works 49.5 hours one week, his employer must pay him his fixed salary of $675.00 and 9.5 hours of overtime pay at one-half his regular rate of pay for that week. On weeks during which Ellen, the water plant operator, works 32 hours, she receives her fixed salary of $800.00 – no more and no less. On weeks in during which Ellen works 48 hours, her employer must pay her fixed salary of $800.00 and 8 hours of overtime pay at one-half her regular rate of pay.

5. Employer and Employee Must Have a "Clear, Mutual Understanding" That the Salary Is for All Hours Worked, Not for a Specified Number of Hours.

Usually, when an employer pays a nonexempt employee on a salaried basis (for a discussion of what "salary basis" means, see here), employer and employee understand that the salary is meant to compensate the employee for a regular schedule with a fixed set of hours. An employer may only use the fluctuating workweek method only if it has been made clear to the employee—before he or she works any hours under this payment method—that a) the fixed salary will be compensation for however many hours the employee works in a week and that the salary will not increase in weeks in which the employee works a greater number of hours; and b) any hours over 40 will be compensated at one-half the regular rate for that week.

The Fourth Circuit has made clear that employees do not have to "agree"—in the sense of "consent"—to the use of the fluctuating workweek method. They merely have to be told about its use.

Why Use the Fluctuating Workweek Method?

For most employers, the primary reason for using the fluctuating workweek method is to reduce overtime costs. The U.S. Department of Labor and the federal courts take pains to emphasize that the fluctuating workweek method is not an exception to the overtime rule, but is merely an alternative method of paying overtime. Theoretically, an employer using the fluctuating workweek method is already paying some of the costs of overtime upfront in the fixed salary and neither employer nor employee is receiving a break or being cheated.

In reality, however, employers pay only a third (one-half of the regular rate) of the additional amount that must be paid to a nonexempt employee working more than 40 hours a week. Where overtime hours are unpredictable, this reduces the amount of potentially unbudgeted overtime liability. Because the regular rate is calculated anew each week based on the total number of straight and overtime hours worked that week, the cost of overtime to the employer goes down the greater the number of overtime hours an employee works.

From an employee's perspective, on the other hand, it looks like the greater the number of hours worked, the less the employee is paid. Not surprisingly, the fluctuating workweek is not popular for employees who work a substantial amount of overtime. For those employees who work fewer than 40 hours a week on a recurring basis, however, the fluctuating workweek can provide a more predictable income.

Conclusion

Local government employers who have employees whose hours vary from week to week may choose to use the fluctuating workweek method of payment, but they do not have to. This method may be used to compensate dispatchers, emergency medical services personnel, law enforcement officers and firefighters, water and wastewater plant operators and any other positions where operating needs require scheduling that results in workweeks in which the number of hours worked changes from week to week. It may not be used for employees (law enforcement officers and firefighters) who are being compensated under the section 207(k) exemption.

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Stupid Things Employees Say on Social Media

Stupid Things Employees Say on Social Media

Bob Joyce
UNC School of Government
November 14, 2019

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

1

Public employee free speech

2

The legal test

3

The legal test

Three questions the court will ask when a government employee makes a free speech claim.

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The legal test—three questions

5

The legal test—three questions

Outside of job duties?

6

The legal test—three questions

Outside of job duties?
Touch on matter of public concern?

7

The legal test—three questions

Outside of job duties?
Touch on matter of public concern?
Balance of interests?

8

A real world example

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A real world example

College hits financial trouble

10

A real world example

College hits financial trouble
President announces plan that will eliminate 50 jobs

11

A real world example

College hits financial trouble
President announces plan that will eliminate 50 jobs
Professor McGettigan sends email to all students:
- President thinks you students are losers
- Believes educational resources are wasted on you
- This is “the onslaught of a merciless enemy”

12

A real world example

College hits financial trouble

President announces plan that will eliminate 50 jobs

Professor McGettigan sends email to all students:

- President thinks you students are losers
- Believes educational resources are wasted on you
- This is "the onslaught of a merciless enemy"

College takes away email privileges and cancels scheduled sabbatical

UNC

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A real world example

College hits financial trouble

President announces plan that will eliminate 50 jobs

Professor McGettigan sends email to all students:

- President thinks you students are losers
- Believes educational resources are wasted on you
- This is "the onslaught of a merciless enemy"

College takes away email privileges and cancels scheduled sabbatical

McGettigan sues

UNC

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The legal test—three questions

Part of job duties?

Touch on a matter of public concern?

Balance of interests?

UNC

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The legal test—three questions

Part of job duties?

Touch on a matter of public concern?

Balance of interests?

- College claims fear of violence
- Court: inadequate grounds to fear violence

Professor's case survives

McGettigan v. Di Mare, 173 F. Supp.3d 1114 (D. Colo. 2016)

16

An example closer to home

17

An example closer to home

North Carolina town has fire, police, EMS, and water rescue combined

Chief is quoted saying all but two officers are fully certified in all four

Officers begin a group text message exchange

18

An example closer to home

Maybe she is going to Colorado for a math class, or maybe they are all just complete liars

19

The legal test—three questions

Part of job duties?

Touch on a matter of public concern?

Balance of interests

20

The legal test—three questions

Balance of interests:

"This Court has recognized on several occasions that 'police officials are entitled to impose more restrictions on speech than other public employers because a police force is a paramilitary—discipline is demanded, and freedom must be correspondingly denied."

Cannon v. Village of Bald Head Island, 891 F.3d 489 (4th Cir. 2018)

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A question over the phone

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A question over the phone

County EMT on Facebook:

"I'm back working at this God-forsaken place. Nothing has changed except for the worse. I can't take any more of the hospital folks."

23

A question over the phone

"If you want good quality care, go to [another county's] hospital where the good folks will help you! We had great service there. Not like [our county] hospital, where you lay for hours and never get treated."

24

The legal test—three questions

Part of job duties?

Touch on a matter of public concern?

Balance of interests?

25

Preventing Unlawful Harassment

ELIMINATING HARASSMENT IN THE WORKPLACE

1

Unlawful Harassment

1. ***Quid pro quo*** **sexual harassment**
2. **Hostile environment harassment based on any protected-class status**

2

1. **Race and Color**
2. **Sec**
3. **Religion**
4. **National Origin**
5. **Age**
6. **Disability**

3

What is Unlawful Harassment?

1. Unwelcome conduct
2. Based on victim's race, color, sex, religion, national origin, age, or disability
3. So severe or pervasive that it alters complainant's conditions of employment and creates an abusive work environment.

4

Unwelcome Conduct: Physical	❑ Pinching, patting, stroking, fondling ❑ Kissing, hugging, grabbing ❑ Revealing "private" parts of the body ❑ Physically coercing sexual activity of any kind ❑ Massaging the neck or shoulders ❑ Unnecessary touching of hair, clothing, body.

5

Unwelcome Conduct: Nonverbal	❑ Displaying derogatory pictures/articles/calendars ❑ Pranks ❑ Making facial expressions ❑ Blocking a person's path ❑ Following a person ❑ Isolating another person.

6

Unwelcome Conduct: General Verbal

- ❑ Threats
- ❑ Ridicule
- ❑ Put downs
- ❑ Offensive jokes or names
- ❑ Slurs
- ❑ Gossip

7

Unwelcome Conduct: Verbal Sexual Harassment

- ❑ Requests for sexual favors
- ❑ Repeated requests for dates
- ❑ Sexual comments, jokes, stories
- ❑ Sexual comments about one's body or clothing
- ❑ Recounting sexual exploits
- ❑ Discussion of sexual fantasies
- ❑ Whistling, catcalling, smacking lips or howling

8

Definition of Unlawful Harassment

1. Unwelcome conduct
2. Based on victim's race, color, gender, religion, national origin, age or disability
3. That is so severe or pervasive that it alters complainant's conditions of employment and creates an abusive work environment.

9

Don't tolerate a sexually-charged environment.

Don't tolerate a racially-charged environment.

Demand civility and respect for everyone.

10

Act immediately to stop harassment.

11

EMPLOYER LIABILITY FOR HARASSMENT

12

Supervisor Harasses Subordinate and Takes a Tangible Negative Action

- **Employer is liable.**
- **Supervisor may be personally liable.**

13

Supervisor Harasses Subordinate and Takes No Tangible Negative Action

Employer is liable . . . unless it can show that it

1) exercised reasonable care to prevent and promptly correct harassment and
2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities.

Supervisor may be personally liable.

14

Co-Worker or Outsider Harasses an Employee

- Employer not liable if it exercised reasonable care to prevent and promptly correct harassment and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities.
- Employer is liable if someone in authority knew of the harassing conduct and failed to stop it.
- May be liable even if no one in authority knew but, because of the nature of the conduct, should have known.

15

The All-Important Harassment Policy

- Make it easy for employees to make harassment complaints.
- Should have two routes to report harassment.
- Management should regularly inform employees about the policy and ways to file complaints.

16

What Supervisors Should Do

- **Take every complaint seriously.**
- **Encourage victims of harassment to follow the harassment reporting policy.**
- **Never agree to to keep a report of harassment secret.**
- **Follow the policy: Take all evidence of harassment to the designated person.**
- **Don't gossip.**

17

Some Things to Keep in Mind

- **Conduct must be unwelcome –** the employee did not solicit or incite the conduct and regarded it as unreasonable.
- Unlawful harassment may occur **without economic injury to or discharge of the victim.**
- **Harasser can be the anyone in the workplace: immediate supervisor, another supervisor, a co-worker, or a non-employee.**

18

- **The gender of the harasser as compared to the target is irrelevant.** Sexual harassment does not have to be based on desire. Title VII prohibits same-sex sexual harassment if it is based on gender stereotyping.
- **Complainant** does not have to be the person at whom the offensive conduct is directed but **can be anyone affected by the conduct.**

19

U.S. Equal Employment Opportunity Commission

Promising Practices for Preventing Harassment

As many employers recognize, adopting proactive measures may prevent harassment from occurring. Employers implement a wide variety of creative and innovative approaches to prevent and correct harassment.[1]

The Report of the Co-Chairs of EEOC's Select Task Force on the Study of Harassment in the Workplace ("Report") identified five core principles that have generally proven effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.[2]

The Report includes checklists based on these principles to assist employers in preventing and responding to workplace harassment.[3] The promising practices identified in this document are based primarily on these checklists.[4] Although these practices are not legal requirements under federal employment discrimination laws, they may enhance employers' compliance efforts.[5]

A. Leadership and Accountability

The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated. This commitment may be demonstrated by, among other things:

- Clearly, frequently, and unequivocally stating that harassment is prohibited;[6]
- Incorporating enforcement of, and compliance with, the organization's harassment and other discrimination policies and procedures into the organization's operational framework;[7]
- Allocating sufficient resources for effective harassment prevention strategies;
- Providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies;
- Allocating sufficient staff time for harassment prevention efforts;
- Assessing harassment risk factors and taking steps to minimize or eliminate those risks;[8] and
- Engaging organizational leadership in harassment prevention and correction efforts.[9]

In particular, we recommend that senior leaders ensure that their organizations:

- Have a harassment policy that is comprehensive, easy to understand, and regularly communicated to all employees;[10]
- Have a harassment complaint system that is fully resourced, is accessible to all employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;[11]
- Regularly and effectively train all employees about the harassment policy and complaint system;[12]

- Regularly and effectively train supervisors and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, may rise to the level of prohibited harassment;[13]
- Acknowledge employees, supervisors, and managers, as appropriate, for creating and maintaining a culture in which harassment is not tolerated and promptly reporting, investigating, and resolving harassment complaints;[14] and
- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment and/or related conduct, such as retaliation, when it determines that such conduct has occurred.

In addition, we recommend that senior leaders exercise appropriate oversight of the harassment policy, complaint system, training, and any related preventive and corrective efforts, which may include:

- Periodically evaluating the effectiveness of the organization's strategies to prevent and address harassment, including reviewing and discussing preventative measures, complaint data, and corrective action with appropriate personnel;[15]
- Ensuring that concerns or complaints regarding the policy, complaint system, and/or training are addressed appropriately;
- Directing staff to periodically, and in different ways, test the complaint system to determine if complaints are received and addressed promptly and appropriately; and
- Ensuring that any necessary changes to the harassment policy, complaint system, training, or related policies, practices, and procedures are implemented and communicated to employees.

To maximize effectiveness, senior leaders could seek feedback about their anti-harassment efforts. For example, senior leaders could consider:

- Conducting anonymous employee surveys on a regular basis to assess whether harassment is occurring, or is perceived to be tolerated;[16] and
- Partnering with researchers to evaluate the organization's harassment prevention strategies.

B. Comprehensive and Effective Harassment Policy

A comprehensive, clear harassment policy that is regularly communicated to all employees is an essential element of an effective harassment prevention strategy. A comprehensive harassment policy includes, for example:

- A statement that the policy applies to employees at every level of the organization, as well as to applicants, clients, customers, and other relevant individuals;[17]
- An unequivocal statement that harassment based on, at a minimum, any legally protected characteristic is prohibited;[18]
- An easy to understand description of prohibited conduct, including examples;
- A description of any processes for employees to informally share or obtain information about harassment without filing a complaint;[19]
- A description of the organization's harassment complaint system, including multiple (if possible), easily accessible reporting avenues;[20]
- A statement that employees are encouraged to report conduct that they believe may be prohibited harassment (or that, if left unchecked, may rise to the level of prohibited harassment), even if they are not sure that the conduct violates the policy;
- A statement that the employer will provide a prompt, impartial, and thorough investigation;
- A statement that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible and permitted by law, consistent with a thorough and impartial investigation;
- A statement that employees are encouraged to respond to questions or to otherwise participate in investigations regarding alleged harassment;
- A statement that information obtained during an investigation will be kept confidential to the extent consistent with a thorough and impartial investigation and permitted by law;[21]
- An assurance that the organization will take immediate and proportionate corrective action if it determines that

harassment has occurred; and
- An unequivocal statement that retaliation is prohibited, and that individuals who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation.[22]

In addition, effective written harassment policies[23] are, for example:

- Written and communicated in a clear, easy to understand style and format;
- Translated into all languages commonly used by employees;[24]
- Provided to employees upon hire and during harassment trainings, and posted centrally, such as on the company's internal website, in the company handbook, near employee time clocks, in employee break rooms, and in other commonly used areas or locations;[25] and
- Periodically reviewed and updated as needed, and re-translated, disseminated to staff, and posted in central locations.

C. Effective and Accessible Harassment Complaint System

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

For example, an effective harassment complaint system:

- Is fully resourced, enabling the organization to respond promptly, thoroughly, and effectively to complaints;
- Is translated into all languages commonly used by employees;[26]
- Provides multiple avenues of complaint, if possible,[27] including an avenue to report complaints regarding senior leaders;
- Is responsive to complaints by employees and by other individuals on their behalf;[28]
- May describe the information the organization requests from complainants, even if complainants cannot provide it all, including: the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;[29]
- May include voluntary alternative dispute resolution processes to facilitate communication and assist in preventing and addressing prohibited conduct, or conduct that could eventually rise to the level of prohibited conduct, early;
- Provides prompt, thorough, and neutral investigations;
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;
- Includes processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;
- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and
- Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and, where appropriate and consistent with relevant legal requirements, the preventative and corrective action taken.[30]

We recommend that organizations ensure that the employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system, among other things:

- Are well-trained,[31] objective, and neutral;
- Have the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;
- Take all questions, concerns, and complaints seriously, and respond promptly and appropriately;

- Create and maintain an environment in which employees feel comfortable reporting harassment to management;
- Understand and maintain the confidentiality associated with the complaint process; and
- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

D. Effective Harassment Training

Leadership, accountability, and strong harassment policies and complaint systems are essential components of a successful harassment prevention strategy, but only if employees are aware of them. Regular, interactive, comprehensive training of all employees may help ensure that the workforce understands organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.

Harassment training may be most effective if it is, among other things:

- Championed by senior leaders;
- Repeated and reinforced regularly;
- Provided to employees at every level and location of the organization;[32]
- Provided in a clear, easy to understand style and format;
- Provided in all languages commonly used by employees;
- Tailored to the specific workplace and workforce;
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and
- Routinely evaluated by participants and revised as necessary.

In addition, harassment training may be most effective when it is tailored to the organization and audience. Accordingly, when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations.

Effective harassment training for all employees includes, for example:

- Descriptions of prohibited harassment, as well as conduct that if left unchecked, might rise to the level of prohibited harassment;
- Examples that are tailored to the specific workplace and workforce;
- Information about employees' rights and responsibilities if they experience, observe, or become aware of conduct that they believe may be prohibited;
- Encouragement for employees to report harassing conduct;
- Explanations of the complaint process, as well as any voluntary alternative dispute resolution processes;[33]
- Explanations of the information that may be requested during an investigation, including: the name or a description of the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;
- Assurance that employees who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation;
- Explanations of the range of possible consequences for engaging in prohibited conduct;
- Opportunities to ask questions about the training, harassment policy, complaint system, and related rules and expectations; and
- Identification and provision of contact information for the individual(s) and/or office(s) responsible for addressing harassment questions, concerns, and complaints.

Because supervisors and managers have additional responsibilities, they may benefit from additional training. Employers may also find it helpful to include non-managerial and non-supervisory employees who exercise authority, such as team leaders.[34]

Effective harassment training for supervisors and managers includes, for example:

- Information about how to prevent, identify, stop, report, and correct harassment, such as:
  - Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment;[35]
  - Easy to understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;
  - Clear instructions about how to report harassment up the chain of command; and
  - Explanations of the confidentiality rules associated with harassment complaints;
- An unequivocal statement that retaliation is prohibited, along with an explanation of the types of conduct that are protected from retaliation under federal employment discrimination laws, such as:
  - Complaining or expressing an intent to complain about harassing conduct;
  - Resisting sexual advances or intervening to protect others from such conduct; and
  - Participating in an investigation about harassing conduct or other alleged discrimination;[36] and
- Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

To help prevent conduct from rising to the level of unlawful workplace harassment, employers also may find it helpful to consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training.[37] In addition, employers may find it helpful to meet with employees as needed to discuss issues related to current or upcoming events and to share relevant resources.

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[1] *See, e.g.*, EEOC, *Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/index.cfm. Promising practices may vary based on the characteristics of the workplace and/or workforce.

[2] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [hereinafter *Select Task Force Co-Chairs' Report*].

[3] *See Select Task Force Co-Chairs' Report*, *supra* note 2, at 79-82 (noting that the checklists are intended as a resource for employers, rather than as a measurement of legal compliance).

[4] This document focuses primarily on several practices identified in Select Task Force testimony and the subsequent Select Task Force Co-Chair Report. While EEOC believes that these practices may help employers prevent and address harassment, these practices do not represent an exhaustive list of promising preventative and corrective actions. We encourage employers to continue to develop, implement, and share additional promising practices.

[5] We note, however, that refraining from taking certain actions recommended here as promising practices may increase an employer's liability risk in certain circumstances. For example, failing to develop and implement an adequate anti-harassment policy and complaint procedure may preclude an employer from establishing an affirmative defense to a supervisory harassment complaint, or a defense to a coworker harassment complaint.

Moreover, state and/or local laws may impose certain harassment prevention-related responsibilities on covered employers that are similar to specific promising practices described in this Appendix; failing to comply with those laws may result in liability. *See, e.g.*, Cal. Gov. Code §§ 12950 - 12950.1 (West 2017) (requiring California employers to provide information to employees regarding sexual harassment, internal complaint procedures, and remedies; and requiring California private sector employers with at least 50 employees and all California public sector employers to provide sexual harassment training to supervisors); Conn. Gen. Stat. Ann. § 46a-54(15) - (16) (West 2017) (requiring Connecticut employers with at least three employees to prominently post information about sexual harassment prohibitions and remedies, requiring Connecticut employers with at least 50 employees to provide sexual harassment training to supervisors, and requiring Connecticut public sector employers to provide discrimination training to supervisory and nonsupervisory employees);Me. Rev. Stat. tit. 26, § 807 (2017) (requiring Maine employers to

prominently post information about sexual harassment and the external complaint process, and to annually provide employees with a written notice regarding sexual harassment and internal and external complaint processes; and requiring Maine employers with at least 15 employees to provide sexual harassment training to employees and supervisors); Mass. Gen. Laws Ann. ch. 151B, § 3A (West 2017) (requiring Massachusetts employers with at least six employees to develop a written sexual harassment policy and to provide the policy to new employees upon hire, and to all employees annually).

[6] For example, in addition to regularly disseminating the organization's harassment policy and complaint procedure, senior leaders could notify employees about relevant policies and resources in response to high profile events.

[7] *See, e.g.*, Patti Perez, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/perez.cfm [hereinafter *Perez Task Force Testimony*] (observing that companies that are committed to preventing inappropriate conduct develop, implement, and incorporate "robust" and "creative" programs into "the fabric of their being").

For example, leaders could direct human resources staff to request information from supervisory and managerial applicants and/or their references about applicants' demonstrated commitment to and experience with enforcing harassment policies and other EEO policies, practices, and procedures. Leaders could also instruct HR to ensure that employee orientation and training material includes information about the organization's harassment policy, complaint procedure, and any related rules, policies, and expectations. In addition, leaders could ensure that enforcement of, and compliance with, the organization's harassment policy and related policies and procedures is included in executive competencies and performance plans for employees with supervisory or managerial responsibilities.

[8] *See Select Task Force Co-Chairs' Report*, *supra* note 2, at 25-30, 83-88 (identifying select risk factors for harassment and proposing strategies to reduce the risk of harassment); *see also, e.g.*, *Preventing Unlawful Workplace Harassment in California*, Soc'y for Human Res. Mgmt. (Apr. 16, 2016) (noting that human resources and information technology staff can monitor workplace communications for prohibited or unacceptable conduct, such as transmission of pornography, obscenities, and threats); Alexander et al., United States Army Research Institute for the Behavioral and Social Sciences, *Best Practices in Sexual Harassment Policy and Assessment* 29 (2005) [hereinafter *Army Research Institute Best Practices Report*] (explaining a practice at one company in which Human Resources staff and managers make unannounced visits during night shifts, which tend to have less managerial supervision and therefore greater opportunity for harassment).

[9] *See, e.g.*, Heidi-Jane Olguin, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm [hereinafter *Olguin Task Force Testimony*] (noting that senior leadership involvement is "crucial" in "set[ting] the tone for the entire organization" and describing an organization in which corporate executives were promptly notified of harassment complaints (assuming no conflict of interest), updated about investigation determinations, and involved in prevention analysis).

For example, organizations could include harassment prevention and corrective activity, as well as other equal employment opportunity-related information, in reports submitted to Boards of Directors or similar advisory or oversight entities. Employers should consult with legal counsel as necessary regarding any relevant legal considerations, such as confidentiality restrictions associated with complaints or disciplinary action.

[10] *See infra* section B for additional information about promising practices related to harassment policies.

[11] *See infra* section C for additional information about promising practices related to complaint procedures.

[12] *See infra* section D for additional information about promising practices related to training.

[13] *See infra* section D for additional information about promising practices related to training.

[14] *See Olguin Task Force Testimony*, *supra* note 9 (explaining that appropriate acknowledgement of well-handled

complaints - such as by privately praising complainants and managers who promptly reported complaints - may help create a compliance-oriented culture, and noting that senior leaders' willingness to critically examine and "aggressively deal with" managers who participate in harassment or who refrain from properly reporting harassment may enhance workplace morale and productivity).

[15] *See, e.g., Perez Task Force Testimony*, *supra* note 7 (describing a company that tracked complaint trends, discovered multiple complaints of racial harassment and discrimination, and implemented a training program to address the perception of race-based conduct)*; Army Research Institute Best Practices Report*, *supra* note 8, at 30 (describing a company's efforts to measure the success of its sexual harassment policy, including tracking sexual harassment questions and allegations and conducting periodic employee surveys that included questions regarding sexual harassment).

When evaluating the effectiveness of harassment prevention and correction strategies, it may be helpful for organizations to carefully analyze complaint trends. A relatively high number of internal complaints may signify that harassment has occurred or was perceived to have occurred, but may also indicate employees' awareness of and confidence in the internal complaint process. *See, e.g., Perez Task Force Testimony*, *supra* note 7 (discussing a company that perceives increases in internal complaints positively as a "testament to the comfort and trust employees put in the [complaint] system"). A relatively low number of internal complaints may result from employees' lack of awareness or trust in the complaint process, or, alternatively, from the absence of harassing conduct in the organization. Organizations may find it helpful to solicit information from employees in anonymous surveys, harassment training sessions, or other settings in which employees may feel comfortable, regarding their awareness of and confidence in the organization's harassment policies and complaint procedures. Organizations could also solicit suggestions from employees about how to enhance employees' knowledge of and faith in the organization's harassment prevention and correction efforts.

[16] *See, e.g., Select Task Force Co-Chairs' Report*, *supra* note 2, at 33 (addressing the development and use of climate surveys to assess perceptions of harassment among employees and members of the military).

[17] It may be helpful to explain and/or provide examples of the non-employees covered by the policy, who may include individuals who interact with the organization's employees during the course of business, such as delivery or repair workers, security guards, and food service workers, as well as individuals otherwise affiliated with the organization, such as members of Boards of Directors or similar advisory or oversight entities.

[18] Federal law prohibits workplace harassment based on race, color, national origin, religion, sex, age, disability, and genetic information. State and/or local laws may prohibit workplace harassment on additional bases. *See, e.g.,* Cal. Gov. Code § 12940(a) (West 2017) (prohibiting workplace harassment based on, among other things, marital status and military and veteran status); D.C. Code Ann. § 2-1402.11 (West 2017) (prohibiting workplace harassment based on, among other things, marital status, personal appearance, family responsibilities, political affiliation, and matriculation); Mich. Comp. Laws Ann. § 37.2202 (West 2017) (prohibiting workplace harassment based on, among other things, height, weight, and marital status); N.J. Stat. Ann. § 10:5-12 (West 2017) (prohibiting workplace harassment based on, among other things, marital status, civil union status, domestic partnership status, and military service); Wis. Stat. Ann. § 111.321 (West 2017) (prohibiting workplace harassment based on, among other things, arrest or conviction records, marital status, and military service). Employers may wish to consult with legal counsel as necessary to ensure that their harassment policies cover, at a minimum, all applicable legally protected bases.

[19] To encourage employees to share and obtain information about harassment, employers may find it helpful to provide a process, such as a phone line or website, that enables employees (anonymously or identified, at their discretion) to ask questions or share concerns about harassment.

[20] *See infra* note 27.

[21] For example, the National Labor Relations Act restricts the circumstances under which employers may require employees to keep information shared or obtained during ongoing disciplinary investigations confidential. *See, e.g.,* Banner Health System d/b/a Banner Estrella Medical Center, 362 NLRB 137, 2015 WL 4179691, at *3 (2015) (holding that employers may restrict employee discussions regarding discipline or ongoing disciplinary investigations involving

themselves or their coworkers only if employers can establish a "legitimate and substantial business justification that outweighs employees' Section 7 rights"), *enforced in part*, 851 F.3d 35, 40 (D.C. Cir. 2017) (describing employees' right to discuss investigations with coworkers as "settled Board precedent" (quoting *Inova Health Sys. v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015))).

[22] *See, e.g.*, EEOC, *Facts About Retaliation*, https://www.eeoc.gov/laws/types/retaliation.cfm (last visited Nov. 20, 2017).

[23] Small businesses may be able to prevent and correct harassment without the use of formal, written harassment policies, though they may develop and use such policies at their discretion. For example, small business owners may verbally inform employees that harassment is prohibited; encourage employees to report harassment promptly; advise employees that harassment may be reported directly to the owner; conduct a prompt, thorough, impartial investigation; and take swift and appropriate corrective action. For additional information about how small businesses can prevent and address harassment, *see* EEOC, *Frequently Asked Questions #5: How can I prevent harassment?*, https://www.eeoc.gov/employers/smallbusiness/faq/how_can_i_prevent_harassment.cfm (last visited Nov. 20, 2017); EEOC, *Tips for Small Businesses: Harassment Policy Tips*, https://www.eeoc.gov/employers/smallbusiness/checklists/harassment_policy_tips.cfm (last visited Nov. 20, 2017).

[24] It may also be helpful for employers to periodically determine whether to translate the policy and complaint system into additional languages as a result of any changes in workforce composition and employees' linguistic abilities.

[25] *See, e.g., Army Research Institute Best Practices Report, supra* note 8, at 35 (noting the importance of a coordinated communications campaign to disseminate information about the harassment policy to employees, including policy distribution and strategic, sequenced use of a variety of communication methods and strategies, including bulletin board postings, newsletter and magazine articles, training sessions, and internal website postings); *Olguin Task Force Testimony, supra* note 9 (suggesting that distributing pens or magnets with the complaint hotline phone number or website address may help remind employees about their complaint filing options); *cf. Perez Task Force Testimony, supra* note 7 (describing a company that posted the diversity program mission statement in every elevator in the corporate office).

Employers may need to take additional steps to ensure that employees who work off-site or outside of regular business hours, or who otherwise may have limited access to the organization's employee handbook, internal website, or relevant officials, receive information about harassment policies and complaint systems, participate in harassment training, and are able to communicate with relevant officials. For example, employers could include information about the policy and complaint procedure with employees' schedules or paychecks; schedule training at a time and location convenient for these employees, if possible, or offer online training; provide contact information for appropriate individuals and/or offices;and ensure that employees receive prompt responses to questions, concerns, and complaints.

[26] *See supra* note 24.

[27] *See, e.g., Olguin Task Force Testimony, supra* note 9 (describing a "multifaceted" complaint system as "critical," and recommending that organizations provide multilingual complaint hotlines and online complaint systems, in addition to traditional management and Human Resources Department complaint options). Smaller organizations may have fewer avenues of complaint available, due to their size, but may still consider designating multiple individuals to receive harassment complaints, if possible.

[28] *See, e.g.*, HR Specialist, *Preventing and Handling Workplace Harassment of Teen Workers*, Ill. Emp't Law 7, 7 (2012) (observing that teenagers may not be comfortable discussing harassment and recommending that employers train supervisors to be receptive to harassment complaints from teenage workers' parents).

[29] Organizations that allow employees to submit anonymous complaints telephonically, online, or through some other process, may find it helpful to include a summary of this information in an introductory message for employees, while recognizing that anonymous complainants may not provide all of the requested information.

[30] To address potential Privacy Act concerns related to sharing corrective or disciplinary action with complainants, federal agencies may either: (1) maintain harassment complaint records that include information about corrective or disciplinary action by complainants' names; or (2) ensure that the agency's complaint records system includes a routine use permitting disclosure of corrective or disciplinary action to complainants.

[31] *See, e.g., Perez Task Force Testimony*, *supra* note 7 (describing a company that provides "comprehensive investigation and conflict resolution training" to internal investigators annually that includes, among other things, information about how to recognize and eliminate implicit or unconscious bias in investigations).

[32] To facilitate participation and communication and to ensure that relevant information is shared with the appropriate audience, organizations may find it helpful to train employees, managers, and Human Resources staff separately. *See, e.g., Olguin Task Force Testimony*, *supra* note 9 (noting that this approach may enhance participation and enable organizations to obtain information about potential compliance issues).

[33] *See* EEOC, *Best Practices of Private Sector Employers* sections 2.B, 2.G, 3.F (1997), https://www.eeoc.gov/eeoc/task_reports/best_practices.cfm (identifying several creative dispute prevention and resolution strategies used by employers).

[34] *See, e.g., Army Research Institute Best Practices Report*, *supra* note 8, at 29 (noting a company that designated several workers with long-standing positive reputations who were perceived as trustworthy and good listeners as points of contact for their fellow employees, and trained those workers about how to refer sexual harassment complaints to Human Resources).

[35] *See supra* note 8.

[36] *See, e.g.*, EEOC, *Facts About Retaliation*, https://www.eeoc.gov/laws/types/retaliation.cfm (last visited Nov. 20, 2017).

[37] Broad workplace civility rules that may be interpreted to restrict employees' conduct and/or speech may raise issues under the National Labor Relations Act. Employers may wish to consult with legal counsel prior to implementing training and/or policies to ensure that they do so in a legally compliant manner.

See also Select Task Force Co-Chairs' Report, supra note 2, at 54-58 (describing workplace civility and bystander intervention training, and noting that such trainings "show[] significant promise for preventing harassment in the workplace"); Lilia Cortina, *Written Testimony for the June 20, 2016 Commission Meeting*, https://www.eeoc.gov/eeoc/meetings/6-20-16/cortina.cfm (describing and providing examples of workplace civility training); Dorothy J. Edwards, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/edwards.cfm (describing bystander intervention training Green Dot); Melissa Emmal, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/emmal.cfm (describing the successful implementation of Green Dot training in Anchorage).

Every Note You Take:
Personnel Files for Public Employer Supervisors

Every Note You Take: Personnel Files for Public Employer Supervisors

Bob Joyce

November 14, 2019

1

Ten Things to Know about Personnel Records

2

First Thing to Know

There are lots of different statutes.

3

First Thing to Know

There are lots of different statutes.
But they amount to about the same thing.

4

Second Thing to Know

A document is part of the personnel file even if it is not in a manila folder in HR or the boss's office.

5

Third Thing to Know

Most of the information in an employee's personnel file is confidential, in contrast to government records generally.

6

Fourth Thing to Know

Some information in a personnel file is always open to the public.

7

Fourth Thing to Know

Some information in a personnel file is always open to the public

Name	Current salary
Age	Each salary increase or decrease
Date of employment	Date/type of each promo, demo, etc.
Terms of contract	Date/reasons for each promotion
Current position	Date/type of each disciplinary action*
Title	Current office

8

Fifth Thing to Know

The employee is entitled to see [almost] all of his or her own personnel file.

9

Sixth Thing to Know

Supervisors in the chain of command are entitled to see employees' personnel files.

10

Seventh Thing to Know

Other governmental officials may have access where access is "necessary and essential to the pursuance of a proper function" of that official.

11

Eighth Thing to Know

Files of applicants are confidential in their totality.

12

Ninth Thing to Know

In special circumstances, confidential personnel file information may be disclosed.

13

Tenth Thing to Know

Nothing is very very very often the right thing for a supervisor or department head to say.

14

Tenth Thing to Know

Nothing is very very very often the right thing for a supervisor or department head to say.

But when the proper spokesman for the employer must say something:

15

Tenth Thing to Know

Nothing is very very very often the right thing for a supervisor or department head to say.

But when the proper spokesman for the employer must say something:

Don't say: "I can't talk about that. It's a personnel matter."

16

Tenth Thing to Know

Nothing is very very very often the right thing for a supervisor or department head to say.

But when the proper spokesman for the employer must say something:

Don't say: "I can't talk about that. It's a personnel matter."

Instead say: "The law prohibits me from disclosing that information."

17

Managing Employee Leave

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MANAGING EMPLOYEE LEAVE: WHAT DEPARTMENT HEADS AND SUPERVISORS NEEDS TO KNOW ABOUT THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

The Family and Medical Leave Act (the FMLA) requires employers to grant eligible employees a total of twelve workweeks of job-protected, **unpaid** leave during any twelve-month period for one or more of the following reasons:

- the **birth** of a son or daughter of the employee;
- the **adoption** of a son or daughter by the employee or placement of a child with the employee for foster care;
- the need for the employee **to care for a spouse, child, or parent with a serious health condition** (this does not include in-laws); or
- **the employee's own serious health condition** where the condition makes the employee unable to perform his or her job.

It also requires the employer to maintain the employee's group health insurance benefits on the same basis as if the employee were reporting for work rather than on a leave of absence.

I. The FMLA applies to *all* public employers, regardless of size.

II. To be eligible for FMLA leave, an employee:

- must have a total of at least twelve (12) months of service with the employer, although the twelve months need not be consecutive;
- must have worked at least 1,250 hours during the last 12 months; and
- must work at a worksite that has at least fifty (50) employees within a seventy-five (75) mile radius.

III. *A serious health condition means an illness, injury or impairment, or* physical or mental condition that involves any period of incapacity:

- any period of incapacity requiring an absence from work of more than **three full, consecutive calendar days** that also involves **continuing treatment** by a health care provider;
- any period of incapacity or treatment connected with inpatient care;
- any period of incapacity due to pregnancy;

- any period of incapacity or treatment due to a chronic health condition such as asthma, diabetes, epilepsy;

- any period of incapacity that is long-term or permanent due to a condition for which treatment may not be effective (e.g., cancer; AIDS)

- any absence to receive multiple treatments (and to recover from the treatments) for a condition that would likely result in an incapacity for more than three consecutive days if left untreated (e.g., physical therapy, chemotherapy, dialysis).

FMLA leave is not available for colds, stomach viruses, the flu or similar conditions unless they require inpatient care *or continuing treatment by a healthcare provider*.

IV. Employee Notice Requirements. An employer may require an employee to give notice of the need for FMLA leave 30 days in advance, when the need for FMLA leave is foreseeable.

- If 30 days' notice is not possible, because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.
- An employer may require an employee to give notice of the need for FMLA leave either the same day or the next business day, **when the need for FMLA leave was not foreseeable**.

V. Employer Notice Requirements. An employer must notify an employee that s/he is eligible for FMLA leave within five business days after receiving a request for FMLA leave or within five days of acquiring knowledge than an employee is absent for an FMLA-qualifying reason. ***Supervisors are considered the employer. This is why you need to let HR know about an employee who has been absent for more than three days on Day 4!***

- The employer notice of eligibility should be in writing.
- If an employee who has requested FMLA leave is **not** eligible**,** the eligibility notice must give at least one reason why the employee is not eligible (for example, the employee has not yet worked for the employer for 12 months).
- At the same time that the employer notifies an employee that s/he is eligible for FMLA leave, it must also give the employee a notice that details the specific rights and the specific expectations and obligations of the employee on FMLA leave.

VI. Requests for intermittent or reduced-schedule leave must be granted when they are medically necessary. Some serious health conditions do not require an employee to be absent from work for continuous blocks of time. Treatments for chemotherapy, for example,

usually take place periodically during regular business hours. Similarly, employees recovering from an illness or a surgical procedure may not be able to work a full day upon their initial return to work.

VII. Substitution of Paid Leave: FMLA leave is unpaid, but FMLA leave may run concurrently with accrued sick or vacation leave, comp time and with absences taken in connection with workers' compensation claims.

VIII. An employer may require employees to provide medical certification of the need for FMLA leave from the employee's health care provider.

- If the employee does not return the certification within 15 days, the employee loses his or her right to FMLA leave and to return to the same or a substantially equivalent job. It would not be a violation of the FMLA to either deny FMLA leave or to fire an employee who has not returned a medical certification after 15 days.

IX. Can an employer restrict the activities of employees on FMLA leave? May employees work another job while on FMLA leave? Employers sometimes learn to their dismay that an employee is working another job while on FMLA leave. What can they do?

- Employers may only restrict the kinds of activities that an employee on FMLA leave may engage in if there is a uniform policy of this kind applicable to all employees on leave of whatever kind. Thus, an employer may have a policy that says no employee on a leave of absence may be employed in any capacity during the leave and that violation of this policy may result in immediate termination of both the leave of absence (including FMLA leave) and employment.

X. Under the FMLA, employees have the right to return to the same or an equivalent job upon the conclusion of FMLA leave.

THE FAMILY AND MEDICAL LEAVE ACT

What Department Heads and Supervisors Need to Know

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

1

What is FMLA leave?

A total of **twelve weeks** of
unpaid, **job-protected** leave
during a single *twelve-month period*
for a **qualifying reason**.

2

Eligible Employee

- Must have at least 12 months of service
- Must have worked at least 1,250 hours during the preceding 12 months
- Must work at a worksite that has at least 50 employees within a 75-mile radius.

3

FMLA leave may only be granted for:

- birth/care of employee's newborn child
- placement of child with employee for adoption/foster care
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;
  - *or*
- when the employee is unable to work because of his/her own serious health condition.

UNC SCHOOL OF GOVERNMENT

4

Serious health condition means

- inpatient care, *or*
- a period of incapacity necessitating absence from work for more than 3 days and requiring treatment by health care provider 2 or more times
  - Includes chronic conditions such as asthma, diabetes, epilepsy that may cause episodic rather than continuing incapacity.

UNC SCHOOL OF GOVERNMENT

5

How Does FMLA Leave Get Initiated?

- Request
- ***Employer*** is notified of a qualifying condition

UNC SCHOOL OF GOVERNMENT

6

Employer Response

- Employers MUST respond w/in 5 business days

  Absences do not count against FMLA leave where the employer does not timely respond, although employee retains FMLA protections during those absences.

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7

EMPLOYERS MAY REQUIRE MEDICAL CERTIFICATION

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8

What the "Employer" Is Entitled to Know

- Date condition began
- Probable duration
- Medical facts "sufficient to support need for leave"
- Info sufficient to establish employee cannot perform essential duties of job; duration
- Other work restrictions; duration
- Info to establish need for intermittent/reduced schedule leave

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9

What the "Employer" Should Do with This Information

- Use this information to decide on leave request
- Guard the confidentiality of this information

⇨ ⇨ in a separate file available **only** those who need-to-know

10

What a Supervisor is Entitled to Know

- **Not** all the medical facts known to the "employer"
- Just "need to know" stuff such as:
  - Anticipated duration of leave
  - Intermittent leave or reduced leave schedule
  - Work restrictions

11

What a Supervisor is Entitled to Know

"Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations."

12

Intermittent Leave

- *Intermittent leave* is FMLA leave taken in separate blocks of time due to a single qualifying reason.
- *Reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday.
- *Medical necessity.* ***The medical certification should address the medical necessity of intermittent leave or leave on a reduced leave schedule.***

UNC

13

Transferring an Employee on Intermittent Leave to Another Position

- An employee on intermittent leave or on a reduced leave schedule may be transferred temporarily to an available alternative position that better accommodates recurring periods of leave than does the employee's regular position.
- The alternative position must have equivalent pay and benefits.

UNC

14

The Return from FMLA Leave

UNC

15

Fitness for Duty Certification - FMLA

One Opportunity

16

On the Designation Notice

17

Fit for duty exams under the ADA

Job-related and consistent with business necessity

18

Fit for duty exams under the ADA

Employer must have a reasonable belief, ***based on objective evidence***, that:

1) an employee's ability to perform ***essential job functions*** will be impaired by a medical condition; or

2) an employee will pose a ***direct threat*** due to a medical condition."

19

Fit for duty exams under the ADA

Direct threat **means a significant risk**
of substantial harm
to the health or safety
of the individual
or others
that cannot be eliminated or reduced
by reasonable accommodation.

20

Coates' Canons Blog: Small Towns and the FMLA

By Robert Joyce

Article: https://canons.sog.unc.edu/small-towns-and-the-fmla/

This entry was posted on July 05, 2011 and is filed under Employment, Family & Medical Leave Act

Does Anytown, N.C.—a town with fewer than 50 employees—owe to its employees the leave rights set out in the federal Family and Medical Leave Act (FMLA)? The answer is No, I think, but it takes a little explaining to get to that answer. And even though Anytown does not have to provide the rights, it still must post the FMLA notice as if it did.

First, let's think for just a moment about what the FMLA does. It requires employers to allow employees to take a considerable chunk of time off from work, up to 12 weeks, and to keep their jobs waiting for them when they return—job protected guaranteed leave. The leave must be necessary because of the employees' own serious illness, the illness of a family member who needs care, childbirth or adoption, or certain needs of family members on active military duty.

For the obligations to apply, an employer must be a "covered" employer. Small private sector employers are simply not covered. To be covered, a private employer must have at least 50 employees. **29 U.S.C. 2611(4)(A)(i)**. But the rule is different for governmental employers. The FMLA defines "employer" to include any "public agency" as defined in the Fair Labor Standards Act, and the Fair Labor Standards Act defines "public agency" to include states and political subdivision of states—such as counties and cities. **29 U.S.C. 2611(4)(A)(iii).** All governmental employers are covered employers. So, a North Carolina town, no matter how many or how few employees it has, is a covered employer. Anytown is covered.

Nonetheless, Anytown, despite being a covered employer, has no "eligible employees" within the meaning of the act. An "eligible employee" is an employee who has met certain time conditions (that is, has worked at least 1,250 hours in the past year for the employer), but, the statute says, the term does not include someone "who is employed at a worksite at which [the] employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." **29 U.S.C. 2611(2)(B)(ii)**. Since Anytown has fewer than 50 employees total, it clearly has fewer than 50 at any worksite and fewer than 50 within 75 miles of that worksite, so none of its employees are "eligible employees."

This conclusion is bolstered by the language in **29 C.F.R. 825.108(d)**:

"(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles."

The consequence is a funny one: Anytown is a covered employer, but it has no covered employees. That means, as far as I can tell, that Anytown is responsible for meeting the information posting requirements of the FMLA ["Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act." **29 C.F.R. 825.300(a)(1)**] but not for providing to employees the leave rights of the act. ["Covered employers must post this general notice even if no employees are eligible for FMLA leave." **29 C.F.R, 825.300(a)(2)**]

Go figure.

Links

- frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=%24%24xa%24%24busc29.wais&start=4599194&SIZE=7087&TYPE=PDF
- edocket.access.gpo.gov/cfr_2010/julqtr/pdf/29cfr825.108.pdf
- edocket.access.gpo.gov/cfr_2010/julqtr/pdf/29cfr825.300.pdf

Public Employment and Drug Testing

Public Employment and Drug Testing

1

Three Fundamental Rules

1. A public employer needs reasonable, *individualized* suspicion that the employee is using illegal drugs to require an employee to take a drug test.
2. Only safety-sensitive employees may be subject to random drug-testing.
3. Pre-employment drug testing is ok for all applicants.

2

REASONABLE SUSPICION DRUG TESTING

3

What a Public Employer Needs

Reasonable, individualized suspicion of illegal behavior or workplace misconduct

4

Reasonable Suspicion Must Be Based on *Specific Objective Facts*

5

Direct observations of drug use or possession

6

Report of
observed drug use by
a reliable and credible source

7

Direct observation of
the physical symptoms of
being under the influence of drugs

8

Pattern of
abnormal conduct
or
erratic behavior

9

Arrest or conviction
for a drug-related offense

10

On-the-job accident
where evidence indicates
drug use played a role

11

On-the-job accident
where evidence indicates
drug use played a role

12

Newly discovered evidence that employee tampered with a previous drug test

13

1. **Must a public employer have a drug-testing policy before it can do reasonable suspicion drug testing?**

2. **Does an employer's failure to follow it's own drug-testing policy render a positive drug test invalid?**

14

The Role of Drug-Testing Policies

Employer has **no** drug-testing policy;

has reasonable, individualized suspicion

⇒ **No 4th Amendment violation**

- **Employer can fire at-will employee**
- **Employer can fire employee w/ property rights in accordance with due process**

15

The Role of Drug-Testing Policies

Employer violates its own drug-testing policy or ordinance; but has RIS

- **No 4th Amendment violation**
- **Possible claim under NC Constitution "Fruits of Their Own Labor" Clause**

16

Random Drug Testing

17

RANDOM DRUG TESTING

Only employees

in safety-sensitive positions

may be subject to

random drug testing.

18

Who Is Safety Sensitive?

Focus on the immediacy of the threat posed by a potential drug-induced mistake or failure in the performance of the employee's job duties.

19

Who Is Safety Sensitive?

A safety-sensitive position is one where the duties involve "such a great risk of injury to others that even a momentary lapse of attention can have disastrous consequences."

20

Who Is Safety Sensitive?

"A single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before harm occurs."

21

Random Drug Testing Permissible?

Law Enforcement Employee	Parks & Rec	EMT
Health Dep't Nurse	City or County Manager	Zoning Enforcement Officer
City or County Clerk	Wastewater Treatment Plant Employees	Finance Officer

22

Random Drug Testing Permissible?

HR Director	Firefighter	Social Services social worker
Social services caseworker	Sanitation Worker	Vehicle Maintenance
IT employees	Dispatcher	

23

Pre-employment Drug Testing

Permissible

24

Safety versus Privacy:

When May a Public Employer Require a Drug Test?

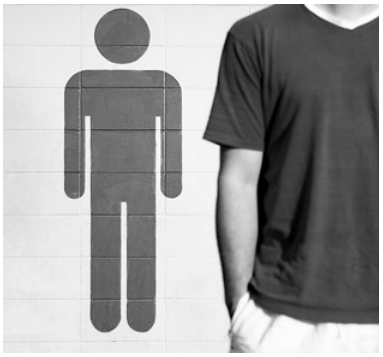
Diane M. Juffras

Few personnel policies are as eagerly embraced by employers as drug-testing policies, but for public employers, few are as fraught with constitutional issues. Imagine that you are a human resources director. Your manager tells you that the governing board wants him to draft a drug-testing policy and he needs your help. Can the board require all employees to undergo random drug testing, he asks? If not, what is the standard for determining who may be required to do so? Can the board test for off-duty drug use? And shouldn't the policy include alcohol as well? This article reviews the law governing the random testing of public employees for the use of drugs and alcohol, discusses current law regarding other bases for substance-abuse testing, and suggests ways for public employers to develop policies that will withstand legal challenges.

Basic Rules

Three basic rules govern drug testing of public employees. First, a public employer may engage in random drug testing only of employees in safety-sensitive positions. It may not require employees whose primary duties are not likely to endanger the public or other employees to submit to random drug testing. Second, a public employer may ask *any* employee—in a safety-sensitive position or not—to take a drug test if it has a reasonable, individualized suspicion that the employee is using illegal drugs. Third, a public employer may, the law seems to say, require applicants for employment to submit to drug testing as part of the application process.

The rules regarding drug testing are not nearly as strict for private employers. They may test whenever they want unless a contract or a collective bargaining agreement restricts them. Why the distinction? Because the Fourth Amendment to the U.S. Constitution, which protects people from unreasonable searches and seizures, applies to public employers but not private employers.[1] The Supreme Court has held that urinalysis (the most commonly used method of drug testing)—or any other forced collection of bodily fluids or breath samples—is a search within the meaning of the Fourth Amendment.[2] And what the government may not do in the context of its police power, it may not do as an employer.[3]



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Special Needs of Public Employers

This means that a public employer's drug-testing policy must meet the Fourth Amendment's requirement that it be reasonable. In most criminal cases, police searches must be authorized by a warrant issued on probable cause to be considered reasonable and thus legal. The Supreme Court has recognized, however, that governments have special needs or interests that arise outside the context of regular law enforcement—for example, governmental employment. In such a context, warrant and probable cause requirements are simply not practical.[4] Rather, the test of the reasonableness of a practice, or search, is whether the intrusion on the individual's Fourth Amendment privacy interests is outweighed by the legitimate government interests that the practice furthers.[5] When the special interest is compelling and the intrusion minimal, a public employer may engage in random drug testing not only without a warrant or probable cause but also without any individualized suspicion.[6]

The Supreme Court has analyzed the special needs exception for drug testing of public employees in three cases: *Skinner v. Railway Labor Executives' Association*, *National Treasury Employees Union v. Von Raab*, and *Chandler v. Miller*.

In *Skinner* the Court held that Federal Railroad Administration regula-

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tions requiring blood and urine tests for railway workers following certain types of train accidents, whether or not reasonable suspicion was present, were constitutional because their value in promoting public safety outweighed their intrusion into employees' privacy.[7]

In *Von Raab* the Court upheld as constitutional a U.S. Customs Service requirement that employees seeking promotion to certain positions involved in halting the flow of illegal drugs undergo drug testing, even in the absence of individualized suspicion. The Court found three compelling government interests: maintaining the integrity of the Customs Service workforce, protecting the public from public employees carrying firearms, and regulating the types of people with access to classified information.[8] Indeed, the government's interest in ensuring that personnel working on the front lines of the drug war were of unimpeachable integrity was by itself sufficiently compelling to outweigh the privacy interests of the employees involved. Employees engaged in drug control efforts are routinely exposed to organized crime and illegal drug use, have access to contraband, and are the targets of bribery by drug smugglers and dealers to a far greater extent than other employees.[9]

Finally, in *Chandler* the Court held that a Georgia law requiring all candidates for state office to pass a drug test was unconstitutional. The state presented no evidence that drug use among public officials was widespread, and made no showing that public safety was in jeopardy. The Court found that, in contrast to the needs of the Customs Service in *Von Raab*, Georgia's interest in ensuring that its public officials were not drug users was merely symbolic of its commitment to ending drug abuse, rather than special within the meaning of the exception to the warrant requirement of the Fourth Amendment.[10]

Development of a Drug-Testing Policy

Neither *Skinner*, *Von Raab*, nor *Chandler* sets forth a rule by which constitutional drug-testing policies can be easily distinguished from unconstitutional policies. So how can a public employer develop a legal but workable drug-testing policy? By keeping in mind the general principles that emerge from *Skinner*, *Von Raab*, *Chandler*, and the lower court decisions that have followed them.

First and most important, each decision to require an employee to undergo drug testing (random or otherwise) is subject to the Fourth Amendment balancing test. That test asks: what government interest is served by requiring drug testing under these circumstances, and is that interest so compelling as to outweigh the intrusion that drug testing imposes on the privacy interests of the employee holding the position?

Second, the courts have generally found that urine and blood tests pose a minimal invasion of employees' privacy interests, given the widespread use of such tests in regular medical examinations. This is especially true when a urine sample is collected in conditions approximating those people routinely encounter at a doctor's office: in an enclosed bathroom where others can neither see nor hear the act of urination. When employees must urinate in the presence of a monitor, the intrusion is more substantial but generally still not enough to tip the balance in favor of privacy when the government's interest is otherwise compelling.[11]

In addition, because certain industries and professions already are extensively regulated for safety purposes, some employees start with a diminished expectation of privacy. For example, as a condition of employment, law enforcement officers typically agree to take medical examinations, consent to criminal background and credit checks, and authorize the employing agency to see otherwise confidential information. The courts have therefore held, without exception, that such employees have a diminished expectation of privacy.[12]

Because certain industries and professions already are extensively regulated for safety purposes, some employees start with a diminished expectation of privacy. For example, as a condition of employment, law enforcement officers typically agree to take medical examinations, consent to criminal background and credit checks, and authorize the employing agency to see otherwise confidential information.

Third, and on the other side of the balancing test, courts almost always find that protection of the public from immediate threats to its safety is a compelling government interest that outweighs any intrusion on employees' privacy, whatever the type of drug testing involved. In fact, for most public employers, the potential threat to either public safety or the safety of other employees is likely the *only* interest that will justify a random drug-testing program. The cases make clear that a government's general interest in maintaining the integrity of its workforce is not a sufficiently compelling interest to justify random drug testing of its entire workforce. Only when employees are actually involved in enforcement of drug laws is the government's interest in workforce integrity compelling enough to outweigh privacy interests.[13]

Finally, no matter how compelling a government's interest, random drug testing is permissible only if the employer gives employees general notice, preferably at the start of their employment, that they are subject to the testing requirement.[14] A newly adopted drug-testing

The courts have generally found that urine and blood tests pose a minimal invasion of employees' privacy interests, given the widespread use of such tests in regular medical examinations. This is especially true when a urine sample is collected in conditions approximating those people routinely encounter at a doctor's office.

policy may apply to old and new employees alike. The employer must simply give affected employees—current and incoming—notice and an explanation of the random drug-testing policy before the first employee is called in for a test.

Random Drug Testing

Testing of Employees in Safety-Sensitive Positions

Given that random drug testing of public employees is illegal in the absence of an immediate threat to public safety, for most public employers, identifying positions that may legitimately be deemed safety-sensitive is one of the most critical parts of developing a drug-testing policy. What makes a position safety-sensitive? In short, the specific job duties assigned to that position.

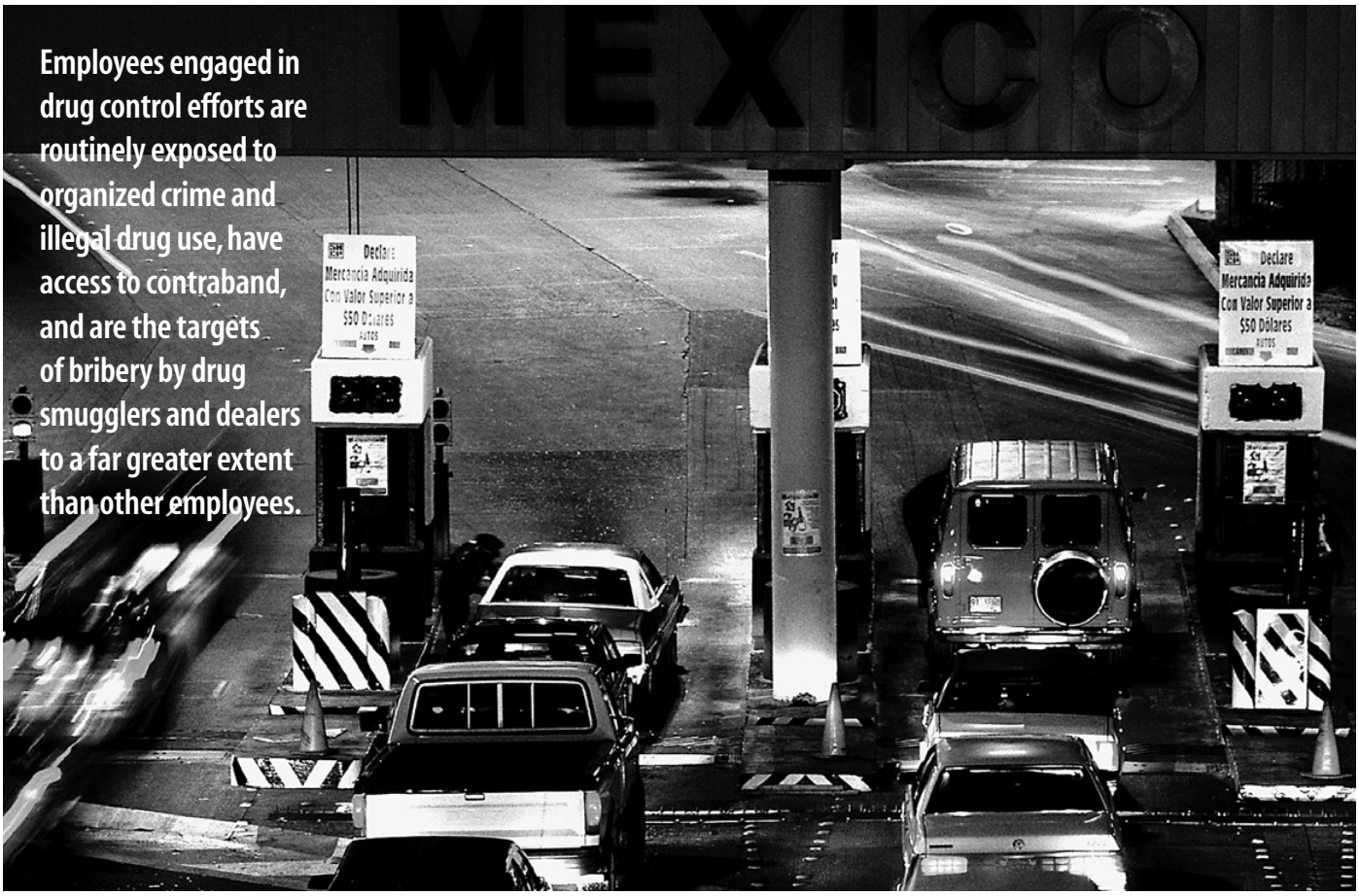
When asked to decide whether a particular position is safety-sensitive, the courts focus on the immediacy of the threat posed by a potential drug-induced mistake or failure in the performance of specific job duties. As the Supreme Court expressed it, a safety-sensitive position is one in which the duties involve "such a great risk of injury to others that even a momentary lapse of attention can have disastrous consequences."[15] Or, as a lower court said, "The point . . . [is] that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before harm occurs."[16]

There is no dispute about whether an error by an armed officer could result in the death or the injury of another. Hence the courts have considered armed law enforcement officers safety-sensitive positions,[17] as they have firefighters;[18] emergency medical technicians;[19] other health care professionals responsible for direct patient care;[20] people who operate, repair, and maintain passenger-carrying motor vehicles;[21] drivers of sanitation trucks;[22] and employees with access to chemical weapons and their components.[23]

Identifying a position's implications for public safety is not always so easy, however. What about a 911 dispatcher, for example? If this position is responsible for relaying directions and other preparatory information to first responders, a mistake could result in a delay that costs people their lives. So the position would likely be considered safety-sensitive.

A bus dispatcher, then? A police department receptionist? A police department desk sergeant? Although a bus dispatcher whose performance is impaired might give incorrect information to a driver, possibly leading to a delay, in the ordinary course of events, an immediate threat to public safety is unlikely. Each position in each jurisdiction is unique, however. The decision not to classify the position of bus dispatcher as safety-sensitive might well change if the duties included, for example, emergency management and evacuation responsibilities.[24]

As for the police department receptionist and desk sergeant, the mere fact that an employer is a law enforcement



Employees engaged in drug control efforts are routinely exposed to organized crime and illegal drug use, have access to contraband, and are the targets of bribery by drug smugglers and dealers to a far greater extent than other employees.

agency does not render all its positions safety-sensitive. A law enforcement agency could not legitimately include in a random drug-testing program a receptionist who simply greeted visitors and transferred telephone calls or a law enforcement officer whose duties were all administrative, unless the officer was expected to carry a gun.

The threat posed by an employee's drug-impaired performance does not have to be a threat to individual safety for the government's interest to be compelling. A threat to public health generally or to the environment can justify random drug testing. Employees of sewage and wastewater treatment plants also may occupy safety-sensitive positions. Sewage disposal is heavily regulated by both state and federal environmental protection agencies, precisely because of the harm that sewage spills can cause. In addition, depending on the position, wastewater treatment plant employees may regularly use hazardous chemicals and equipment that pose great danger, and may have responsibility for responding to emergency situations.[25]

Driving as a Safety-Sensitive Activity

For many public employees, driving is a regular part of the workday. For some it is a primary duty, as with bus, sanitation truck, or ambulance drivers. For others it is a means of carrying out their primary duties, as with a visiting nurse employed by a health department or a traveling caseworker for the department of social services. Still others drive on an occasional basis—for example, when a deadline makes dropping something off more efficient than mailing it, or when employees cannot wait to reorder a needed supply that runs low.

May all these categories of "driving employees" be required to undergo random drug testing? The courts have said no.

In determining whether an employee who drives on the job is in a safety-sensitive position, the test is not merely whether the employee's primary job duty is to drive, but whether performance of the employee's job duties requires driving on a regular basis, as compared with a position in which an employee might on occasion decide or be asked to drive.[26]

A comparison of two cases helps illustrate the difference. In the first case (one of the few reported North Carolina cases to consider safety-sensitive positions), the court held that a ventilation system mechanic employed by an airport authority held a safety-sensitive position because to access the terminals' heating and cooling equipment, he regularly had to drive a vehicle on the flight area apron near jetliners.[27]

In contrast, in the second case, the court found that secretary to the Leavenworth County, Kansas Commission on Aging was not a safety-sensitive position. The secretary's duties were primarily clerical, but occasionally she drove a car to deliver meals-on-wheels to senior citizens when regularly scheduled volunteers did not show up. Because of this occasional on-duty driving, the county classified her position as safety-sensitive and required her to submit to random drug testing. The court, however, held that "when the employee's duties require driving, such as the duties of one who patrols or makes pick-ups, that employee's position is safety-sensitive. When driving

is only incidental to other duties that engage no safety concern, the employee's position is not safety-sensitive."[28]

To return to the examples set forth earlier, because of the role that driving plays in the performance of their duties, bus driver, sanitation truck driver, and ambulance driver may be considered safety-sensitive positions and included in a random drug-testing program. So may the human services employees who drive vehicles to reach their clients. But the employee who drives occasionally, whether to fill in, in a pinch, or to pick up something urgently needed, may not be required to submit to random drug testing in the absence of individualized, reasonable suspicion that he or she has been using illegal drugs.

Custodians, Technicians, and Repairmen

The law is much less clear when it comes to employees who use and service equipment and systems. Consider a transportation system custodian, whose regular job duties include cleaning transit-stop locations, facilities, and equipment; painting facilities and equipment; cleaning vehicles; and removing trash and debris. One court found that the position was not safety-sensitive because it did not involve an unusual degree of danger to the employee or others.[29] Another court, however, found that elementary school janitor was a safety-sensitive position because (1) the janitor handled potentially dangerous machinery such as lawn mowers and tree-trimming equipment, and hazardous substances like cleaning fluids, in an environment that included a large number of children between the ages of three and eleven, and (2) the presence of someone using illegal drugs could increase the likelihood that the children might obtain access to drugs.[30] The distinguishing factor in the second example was the presence of young children, which some courts see as transforming jobs that are otherwise not fraught with risk and danger into bona fide safety-sensitive positions.[31]

Some positions whose duties do pose safety risks may nonetheless be deemed *not* to be safety-sensitive because the personal conduct of the employees and their job performance are subject to day-to-day scrutiny by supervisors and co-workers, who are likely to notice any impairment. In one case a federal district court found that elevator mechanics working for a transit authority were in safety-sensitive positions, not simply because elevators might fail, but also because the mechanics were subject to little supervision on the job. On the other hand, carpenters, masons, ironworkers, plumbers, and painters working for the transit authority were not in safety-sensitive positions because they either worked in pairs or were subject to direct supervision.[32]

Drug Testing Based on Reasonable Suspicion

Drug testing based on a suspicion that a particular public employee is using illegal drugs also is considered a Fourth Amendment search. Like random drug testing, drug testing based on reasonable suspicion is subject to the Fourth Amendment balancing test that weighs the government's interest against the employee's. Testing based on reasonable suspicion is considered less intrusive than random testing because the employee's own action or conduct triggers it.[33]

Reasonable suspicion is determined case by case. The courts agree that it takes less for an employer to meet the standard of reasonable suspicion than it does for police to show probable cause for a criminal search warrant. Yet reasonable suspicion must amount to more than a hunch. Supervisors must point to specific, objective facts and be able to articulate rational inferences drawn from those facts in light of their experience.[34]

A parent called the school system to complain that her child's school bus had arrived late and that when the bus doors opened, she smelled marijuana. The mother identified both herself and her child. The school system reported the mother's complaint to the driver and asked him to take a drug test. Not once did the driver suggest that there was any reason to doubt the mother's reliability. The court ultimately held that the drug test did not violate the Fourth Amendment, given the nature of the driver's job, but noted that it was a close case.

An employer does not need a formal policy defining reasonable suspicion before it can test employees on that basis, but a written policy can be useful. By making known its criteria for finding reasonable suspicion, an employer gives employees fair notice of the circumstances in which they will be required to submit to a drug test. It also provides guidance to supervisors who are confronted with the possibility that an employee is using drugs and are uncertain whether they should require the employee to submit to a drug test. Giving guidance to supervisors, in turn, helps ensure uniform administration of the drug-testing program.

For all these reasons, a policy that sets forth the circumstances under which supervisors can require drug testing also increases the chances that a court will uphold a drug test as reasonable if the employee challenges it. Criteria that the courts have found constitutional include the following:

- Direct observation of drug use or possession.
- Direct observation of the physical symptoms of being under the influence of a drug, such as impairment of motor functions or speech.
- A pattern of abnormal conduct or erratic behavior.
- Arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a

criminal investigation into illegal drug possession, use, or distribution.

- Information that is provided by reliable and credible sources or that can be independently corroborated.
- Newly discovered evidence that the employee tampered with a previous drug test.[35]

Some courts have found the third criterion just listed to be too broadly worded and to invest too much discretion in an individual supervisor's judgment to make drug testing reasonable.[36] But drawing up a comprehensive list of abnormal behavior that would justify drug testing is not practical. What is "abnormal" or "erratic" in one individual or one situation may be quite normal in another. Some employers have dealt with this problem by requiring that any observation of erratic or unusual behavior be made by a supervisor (or sometimes by two supervisors) trained to recognize the signs of drug use.[37]

Federal Railroad Administration regulations requiring blood and urine tests for railway workers following certain types of train accidents, whether or not reasonable suspicion was present, are constitutional because their value in promoting public safety outweighs their intrusion into employees' privacy.

The Problem of the Tip

A difficult situation arises when someone other than a trained supervisor reports possible drug use. Three cases illustrate the difficulty of evaluating such reports and the importance of corroborating evidence. In the first case, a public hospital employee, R., noticed a cut straw with some white powdery residue at the tip in the chart room. Two coworkers, A. and B., also were in the room. When R. returned to the room a short time later, the straw was gone. R. could not identify the powdery residue, had no training in identifying drug use or even in identifying medicines, and later admitted that she could not tell the difference between cocaine and powdered milk. R. nevertheless reported to her supervisor that she suspected A. and B. of using illegal drugs. No other employee had reported that he or she suspected drug use by A. and B., and no one had observed any erratic behavior or performance problems on their part. The chart room was an all-purpose room in which food was sometimes stored and employees sometimes used straws to mix patients' medications. Nevertheless, the hospital asked A. and B. to submit to a strip search. The search turned up no evidence of drug use. R., however, had a reputation for honesty, so hospital management told A. and B. that pursuant to its drug-free workplace policy, they would have to submit to a drug test. When they refused, they were dismissed.

The North Carolina Court of Appeals overturned the dismissal. There was nothing wrong with the hospital's drug-free workplace policy on its face, the court said, but the hospital had not satisfied any of the criteria set forth in the policy for finding reasonable suspicion. The hospital had demanded that A. and B. take a drug test solely on the basis of another employee's hunch, not on the basis of specific facts.[38]

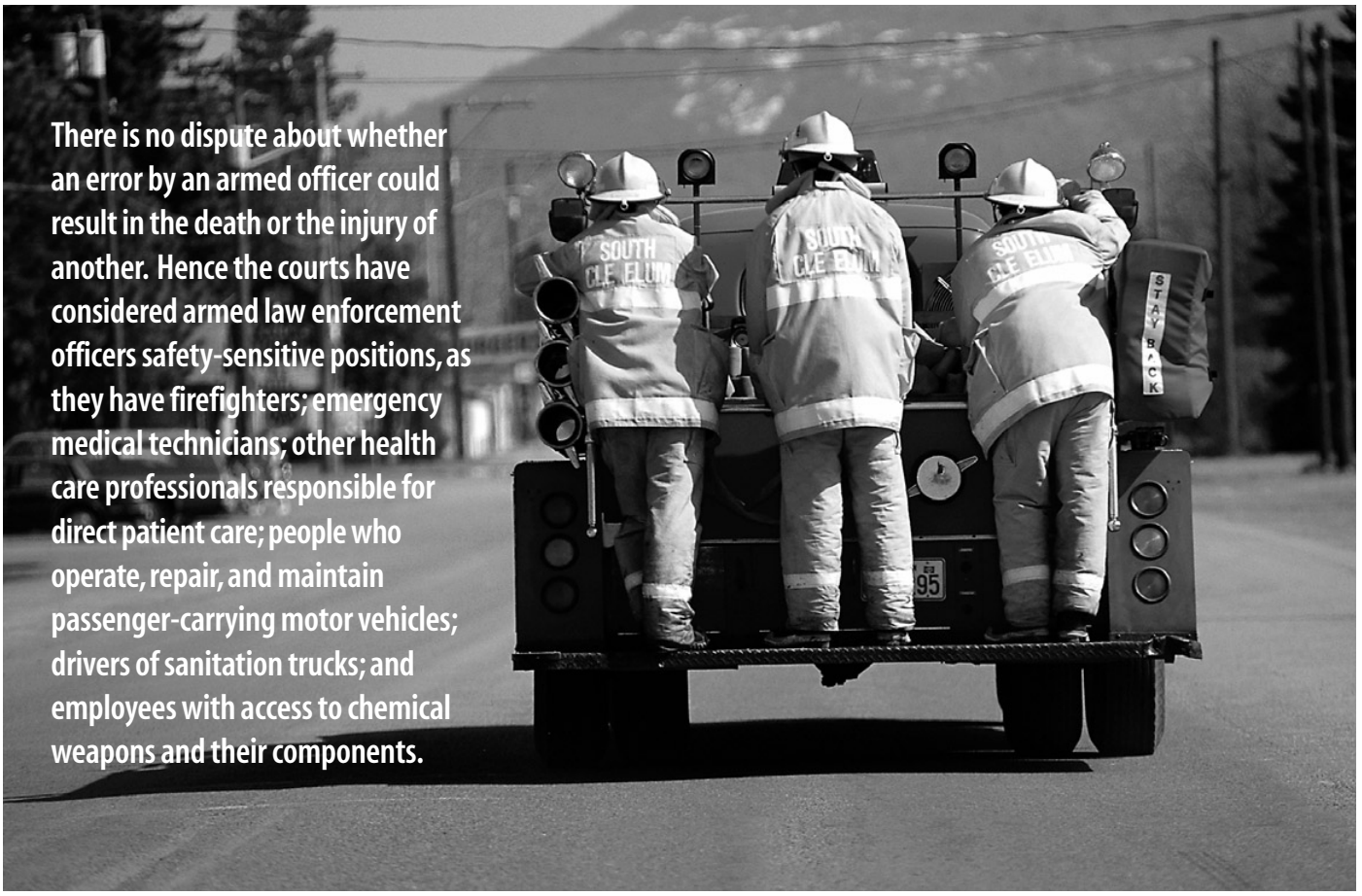
In the second case, a chief of police received a phone call from a man who claimed that he had known C., one of the city's police officers, for twelve years and had seen him coming off a heroin high the previous day. The caller said that was why C. had called in sick that day (and indeed he had). This was not an anonymous tip: the caller gave his name and phone number. The chief had previously received an anonymous tip that C. had been seen at a known drug bazaar, but had decided not to investigate the allegation without more evidence. This time the city administered a drug test to C., which he failed. The city terminated C. The court held that the city had reasonable suspicion, so the drug test was legal, as was C.'s termination for illegal drug use.[39]

In the third case, a parent called the school system to complain that her child's school bus had arrived late and that when the bus doors opened, she smelled marijuana. The mother identified both herself and her child. The school system reported the mother's complaint to the driver and asked him to take a drug test. Not once did the driver suggest that there was any reason to doubt the mother's reliability. The court ultimately held that the drug test did not violate the Fourth Amendment, given the nature of the driver's job, but noted that it was a close case.[40]

As these three cases show, an employer must evaluate both the nature of a report of drug use or suspicious behavior, and the reliability of the informant. Is the report based on personal observation or on inference? Does the informant have any training in recognizing the signs of drug use? In general, the more detailed the tip, the greater its credibility for Fourth Amendment purposes. When the information is less detailed, corroboration can give it greater credibility.

In the first case, R.'s information was not very detailed: she saw an unidentified white powder in a hospital setting, but she did not see A. or B. handle the powder or otherwise engage in questionable activity. No one else reported anything out of the ordinary about A.'s and B.'s behavior. R. had a reputation for honesty, but the problem was not that what she reported was untrue. Rather, R. and hospital management made unwarranted inferences from facts that could lend themselves to a variety of interpretations. For example, the straw may have been used to mix a medication or to stir creamer into coffee.

In the second case, in contrast, the tipster said he had seen C. take heroin and



knew things about C. that tended to corroborate his claim. In addition, an earlier report had attributed drug use to C.

As for the reliability of the informants, in both the second and the third case, the informants said who they were and where they could be reached for further questioning. In neither case was there any evidence suggesting that the informant had an ulterior motive in making the report or was otherwise not likely to be credible.

On-Duty versus Off-Duty Use of Drugs

A public employer always may require its employees to submit to a drug test when it reasonably suspects drug use on duty. When an employee's duties involve public safety or welfare, the courts usually will find that the government has a compelling interest in having that employee refrain from narcotics use while off duty, because the impairment caused by earlier drug use may continue even after the employee has returned to work and may not be noticed until after an accident or an injury occurs. Therefore an employer is not required to demonstrate that the job performance of an employee in a safety-sensitive position is impaired in order to require a drug test based on reasonable suspicion of off-duty drug use.

Testing other employees based on a suspicion of off-duty drug use is another matter. Employees who do not hold safety-sensitive positions may be tested for use of illegal drugs only if there is reasonable suspicion of on-duty use or impairment. Why the different standard? Because outside a law enforcement context, the government's legitimate interest in whether its employees are using drugs extends no further than its interest in their workplace conduct and their performance of job duties.[41]

This limitation on a public employer's ability to require drug testing applies equally to "at-will employees" (those who can be fired for any reason or no reason) and to "employees with property rights in their employment" (those who are protected by a statute or an ordinance limiting their termination to circumstances in which there is just cause).

Testing after an Accident or an Unsafe Practice

Many jurisdictions make drug testing mandatory after an on-the-job accident or an "unsafe practice"(a practice that endangers the employee or others). Others include accidents among the criteria on which reasonable suspicion may be based. This certainly seems reasonable in the ordinary sense of the word, but is it legal? As with most other aspects of drug testing, the answer is that it depends on whether the personnel involved are in safety-sensitive positions.

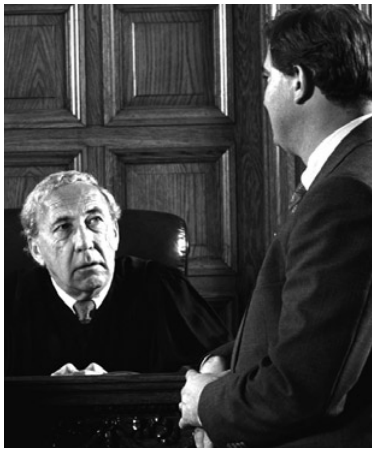
The reasons for requiring post-accident or unsafe-practice testing for employees in safety-sensitive positions are several. First, such a requirement has a great deterrent effect. As the Supreme Court put it in *Skinner*,

> *[B]y ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly*

increase the deterrent effect of the administrative penalties associated with the prohibited conduct, . . . [while] increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.[42]

Second, *positive* test results may suggest to investigators that drug impairment caused the accident, contributed to the severity of the injuries, or caused a delay in obtaining help for the injured.

Conversely, *negative* test results may allow investigators to rule out drug use as a cause. In most cases, discovering whether drug impairment may have been a cause is only possible by conducting a drug test soon after the accident.[43]



The government argued that because studies had shown drug users to have higher rates of absenteeism and dismissal than other employees, its mandatory pre-employment drug-screening program served a compelling government need.

In *Skinner*, where the specific issue before the Supreme Court was the constitutionality of post-accident testing of railway employees, the Court concluded that the government's interest in preventing train accidents and identifying their causes was compelling and would be hindered by a requirement that the railroad have individualized reasonable suspicion with respect to the employees involved.[44] Train accidents pose the threat of injury and damage on a large scale. Drafting a post-accident testing policy for a railroad is therefore easier than drafting one for a local government employer or a state agency, because state and local government employees may be involved not only in serious accidents but in minor fender-benders that do not result in personal injury or in major property damage. In the case of other types of public employees, the lower courts have generally found post-accident testing reasonable when immediate and significant threats to public safety are involved. But they have not found policies requiring testing of all employees after an accident or an unsafe practice to be constitutional because not all employees have a diminished expectation of privacy—an employee whose driving is incidental to his or her primary duties, for example—and because such policies are not responsive to an identified problem in drug use.[45] The policies are both underinclusive (because only people involved in accidents in the course of employment are to be tested) and overinclusive (because all people involved in accidents are tested, not just people injured under circumstances suggesting their fault).[46]

Suppose that a drug-testing policy provides for testing employees after every accident in which there is property damage of more than $1,000. A car driven by a county driver (a safety-sensitive position) is hit from behind at a red light, and repair obviously will cost more than $1,000. The police are called to make an accident report. The county driver clearly was not at fault. The other driver acknowledges that it was his mistake. Under these circumstances a court would be unlikely to find a compelling government interest in drug-testing the county employee that outweighs the employee's privacy interest.

Post-accident and unsafe-practice testing is subject to the Fourth Amendment balancing test. A good policy of this kind therefore should indicate the magnitude of personal injury or property damage that is sufficient to trigger a drug test. In general, for post-accident and unsafe-practice testing to be reasonable, the lower the threshold for triggering a test, the more safety-sensitive the position covered by the policy must be.[47] Courts have found, for example, that a policy calling for the testing of *any* employee in any accident involving $1,000 of damage is too broad.

The policy also should define its terms: Do "accidents" include dropping computers or other valuable items on the employer's premises, or are they limited to incidents involving motor vehicles? Are accidents in which fault lies with the other party included? Does the term "personal injury" mean any personal injury? Courts have generally found that policies providing for testing whenever an accident has caused a personal injury are too broad to be reasonable. On the other hand, they have found reasonable a policy calling for testing when there is "an injury demanding medical treatment away from the scene of an accident,"[48] and a policy requiring testing when there has been a personal injury requiring immediate medical attention.[49]

Likewise, it is advisable to put a dollar value on the amount of property damage that will trigger the need for a drug test. Using terms like "major" or "minor" accident leaves too much discretion to individual supervisors in deciding whether testing is reasonable.[50]

Testing of Job Applicants

May a North Carolina public employer require pre-employment drug testing of all applicants? The answer is unclear. Neither the U.S. Court of Appeals for the Fourth Circuit (the federal appeals court whose jurisdiction includes North Carolina) nor the North Carolina appellate courts have addressed this issue. Like every aspect of drug testing, the question is subject to the Fourth Amendment balancing test with respect to each position: is the government's need to conduct drug testing of a person in this position, under these circumstances, so compelling that it outweighs the individual's privacy interests?

It can be argued that mandatory drug testing of all applicants for government positions does not violate the Fourth Amendment. First, the privacy interests of applicants are not as great as those of current employees. Applicants have

Health care workers in public hospitals are subject to drug testing on the basis of reasonable suspicion that they are using drugs.

control over whether or not they will be subject to drug testing in that nothing compels them to apply for a job in the public sector. Instead, the obligation to undergo a drug test is triggered by the applicant's desire for a government job. This, several courts have noted, is very different from the position in which current government employees find themselves when a drug-testing policy is first adopted or an existing policy is newly applied to them: they must submit to the drug test or lose their jobs.[51]

Second, many state and local public employers require applicants to authorize a criminal or general background check before they can be considered for a position. This also diminishes applicants' expectations of privacy.[52]

Third, at the applicant stage, drug testing almost always is conducted under conditions similar to those found at the doctor's office.[53] Courts acknowledge that even under such conditions, mandatory urinalysis is an invasion of privacy, but they consider the intrusion to be minimal.

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Public employers should keep in mind, however, that many of the cases in which courts have approved of mandatory drug testing of *all* applicants for government positions have been ones in which the named plaintiffs have been applicants for safety-sensitive positions (or for positions relating to national security, not relevant here).[54] In a case involving an attorney applicant for a non-safety-sensitive position in the U.S. Department of Justice's Antitrust Division, the government argued that because studies had shown drug users to have higher rates of absenteeism and dismissal than other employees, its mandatory pre-employment drug-screening program served a compelling government need. The federal appeals court for the District of Columbia agreed.[55]

However, the court's conclusion is not uniformly shared. Other courts have focused more narrowly on the relationship between the duties of individual positions and the potential harm that could result from drug use by a person in a given position. A federal court found Georgia's Applicant Drug Screening Act to be unconstitutional. The act required *all* applicants for state employment to submit to a drug test. When challenged, the state cited as its compelling interest its general desire to maintain a drug-free workplace. This interest, the court held,

was not enough to tip the balance in favor of drug testing.[56]

Another federal court rejected a Florida city's claim that the need for public confidence in municipal government justified a mandatory pre-employment drug-testing policy that applied to all applicants for all positions without regard to the particular job duties involved and without distinguishing between positions that were safety-sensitive and those that were not.[57] Both the Georgia court and the Florida court noted that the intrusions on applicants' privacy were minimal but found the employees' privacy interests to be stronger than the government's concern with the public perception of its workforce.

The U.S. Supreme Court has never directly addressed this issue. *Von Raab* and *Chandler*, however, imply that mandatory pre-employment drug testing of all applicants would be unconstitutional. In *Von Raab* the Supreme Court pointedly distinguished between employees involved in drug control—who should expect an inquiry into personal information—and "government employees in general." In *Chandler*, in overturning the Georgia law that required all candidates for public office to undergo a drug test, the Court again stressed the unique circumstances of front-line drug interdiction that made the mandatory drug testing in *Von Raab* reasonable for Fourth Amendment purposes: "customs workers, *more than any other Federal workers*, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use."[58] But these are only observations that the Court made in explaining its holdings and are not considered "law."

In the absence of controlling law from the Supreme Court, the Fourth Circuit Court of Appeals, or North Carolina state courts, it is unclear whether North Carolina public employers may require all applicants to undergo pre-employment drug testing. The constitutionality of such a practice is an open question, and North Carolina public employers should periodically review their drug-testing policies with their attorneys to make sure that the policies remain within the bounds of any changes in the law.

Alcohol Testing

Drug and alcohol testing have identical purposes: to prevent, to the extent possible, the accidents, injuries, mistakes, and general poor performance attributable to impaired employees. But drug and alcohol testing differ in one important respect: alcohol testing is significantly limited by the Americans with Disabilities Act (ADA), whereas drug testing is not. The ADA prohibits discrimination in employment based on disability.[59] Under the ADA, alcoholism is considered a disability, but current illegal drug addiction is not.[60] The ADA does not allow employers either to ask applicants any questions designed to uncover a disability or to require applicants to undergo any sort of medical examination (such as a blood test) before a conditional offer of employment has been extended.[61] For that reason an employer may ask an applicant to take a pre-employment drug test without violating the ADA but may not require a pre-employment alcohol test.

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Once a conditional offer of employment has been made, an employer may require the successful applicant to have a medical examination, which may include a blood test for the presence of alcohol. However, any decision to withdraw an offer on the basis of the results of the medical examination must be job related and consistent with business necessity.[62] An employer may withdraw a conditional offer because of conduct-based reasons, such as the applicant's showing up for a pre-employment physical examination under the influence of alcohol, but not because it suspects that the applicant is an alcoholic.[63]

Once an applicant becomes an employee, an alcohol test may be required only if the employer has reasonable suspicion that the employee has reported to work while under the influence of alcohol, in violation of established workplace policy.[64] An employer may require holders of a commercial driver's license and certain mass transit employees to undergo random alcohol testing in accordance with federal requirements (see the next section).[65] Under any other circumstances, though, random alcohol testing—even of employees in safety-sensitive positions—is probably illegal under the ADA in the absence of individualized suspicion of alcohol use by a particular employee.[66]

Testing of Employees with a Commercial Driver's License and Mass Transit Employees

The federal Omnibus Transportation Employee Testing Act of 1991 requires employers to conduct drug and alcohol testing on employees who drive a vehicle requiring a commercial driver's license and on certain mass transit employees in accordance with the U.S. Department of Transportation's testing procedures.[67]

The Federal Motor Carrier Safety Administration (FMCSA), a division of the Department of Transportation, issues the rules governing substance-abuse testing of employees driving a commercial vehicle.[68] The FMCSA defines "commercial motor vehicle" as a vehicle that is used in commerce to transport passengers *or* property, when the vehicle (1) weighs more than 26,001 pounds, (2) is designed to transport sixteen or more passengers, or (3) is

used in the transportation of hazardous materials. "Commerce" is broadly defined as "(1) any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State . . . and (2) [t]rade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition."[69]

The Federal Transit Administration (FTA), another division of the Department of Transportation, issues the rules governing the substance-abuse testing of employees in safety-sensitive positions in agencies receiving federal transit funds.[70] The FTA's regulations contain a definition of "safety-sensitive" that is specific to mass transit.

Both sets of regulations are comprehensive. They require pre-employment, post-accident, random, reasonable-suspicion, and return-to-duty testing, as well as follow-up testing after a previous positive drug test. They also require education programs for covered employees and supervisors alike. The regulations specify how tests results are to be reported and maintained, and what actions employers should take in the event of a positive result.

Most public employers will have at least some employees who drive commercial vehicles and are covered by the FMCSA regulations. Larger employers and regional mass transit authorities also will have employees covered by the FTA's mass transit rules. Such employees may be made subject to both the federal rules requiring testing and the individual employer's drug-testing policy, provided that the policy is reasonable within the meaning of the Fourth Amendment. For ease of administration, public employers may incorporate into their own policies as many of the rules and procedures of the Department of Transportation, the FMCSA, and the FTA as are appropriate, again subject to the requirement that they be reasonable within the meaning of the Fourth Amendment as they are applied to employees not otherwise subject to the federal standards.

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Procedural Requirements

Regardless of how often and under what circumstances a North Carolina public employer decides to drug-test its workforce, the North Carolina General Statutes require that employers comply with the requirements set forth in Section 95-232 for the collection and retention of samples, chain of custody, use of approved laboratories, and retesting of positive samples. In accordance with Section 95-234(e), the secretary of labor has adopted additional rules governing drug-testing procedures. They may be found at Rules 20.0101–20.0602 of the North Carolina Administrative Code (volume 13).

Notes

1. The Fourth Amendment is applicable to state and local governments through the Fourteenth Amendment.

2. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616–17 (1989).

3. *See* O'Connor v. Ortega, 480 U.S. 709, 717 (1987).

4. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); *Skinner*, 489 U.S. at 619.

5. *Skinner*, 489 U.S. at 619, *citing* Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

6. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989).

7. *Skinner*, 489 U.S. at 628–29, 633–34.

8. *See Von Raab*, 489 U.S. at 669–71, 677.

9. *Id.* at 670, 674.

10. *See* Chandler v. Miller, 520 U.S. 305, 321–22 (1977).

11. *Skinner*, 489 U.S. at 625; Willner v. Thornburgh, 928 F.2d 1185, 1190–91 (D.C. Cir. 1991).

12. S*ee, e.g., Von Raab*, 489 U.S. at 667, 671–72; Carroll v. City of Westminster, 233 F.3d 208, 212 (4th Cir. 2000); Guiney v. Roache, 873 F.2d 1557, 1558 (1st Cir. 1989); National Fed'n of Federal Employees v. Cheney, 884 F.2d 603, 612 (D.C. Cir. 1989); Policemen's Benevolent Ass'n Local 318 v. Township of Washington, 850 F.2d 133 (3d Cir. 1988). *See also* Thomson v. Marsh, 884 F.2d 113, 115 (4th Cir. 1989) (holding that chemical weapons plant employees have reduced expectation of privacy due to job's special demands, requirement of extensive testing and probing, and need for security clearance).

13. *See Von Raab*, 489 U.S. at 670, 674; *Chandler*, 520 U.S. at 321; *Carroll*, 233 F.3d at 211. *See also* Harmon v. Thornburgh, 878 F.2d 484 (1989) (holding that federal government's interest in integrity of its workforce and in public safety did not justify random drug testing of all prosecutors and all employees with access to grand jury proceedings; only if there were separate category of drug prosecutors would random testing be justified under *Von Raab*).

14. *See Von Raab*, 489 U.S. at 672; *Carroll*, 233 F.3d at 211–12; Rutherford v. City of Albuquerque, 77 F.3d 1258, 1262 (10th Cir. 1996).

15. *See Skinner*, 489 U.S. at 628; *Von Raab*, 489 U.S. at 670.

16. *See Harmon*, 878 F.2d at 491.

17. S*ee Von Raab*, 489 U.S. at 667, 671–72; *Carroll*, 233 F.3d at 212; *Guiney*, 873 F.2d at 1558; *Cheney*, 884 F.2d at 612; *Policemen's Benevolent Ass'n*, 850 F.2d at 130.

18. *See, e.g.,* Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998).

19. *See, e.g.,* Saavedra v. City of Albuquerque, 917 F. Supp. 760, 762 (D.N.M. 1994), *aff'd,* 73 F.3d 1525 (10th Cir. 1996).

20. *See, e.g.,* American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1498, 1500 (N.D. Calif. 1991).

21. *See, e.g., id.*

22. *See, e.g.,* Solid Waste Drivers' Ass'n v. City of Albuquerque, 1997 WL 280761 *3 (D.N.M. 1997).

23. *See, e.g.,* Thomson v. Marsh, 884 F.2d 113, 115 (4th Cir. 1989).

24. On the difficulty of evaluating the safety-sensitive nature of a bus dispatcher position in the absence of a detailed job description, *see*

Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1022–23 (9th Cir. 1999).

25. *See* Kerns v. Chalfont–New Britain Township Joint Sewage Auth., 2000 WL 433983 *2 (E.D. Pa. 2000), *aff'd,* 263 F.3d 61 (2001). *See also* Geffre v. Metropolitan Council, 174 F. Supp. 2d 962, 967 (D. Minn. 2001); Bailey v. City of Baytown, 781 F. Supp. 1210 (S.D. Tex. 1991) (all holding that wastewater and sewage treatment plant operators are safety-sensitive positions).

26. Bannister v. Board of County Comm'rs of Leavenworth County, Kans., 829 F. Supp. 1249, 1253 (D. Kansas 1993).

27. *See* Boesche v. Raleigh-Durham Airport Auth., 111 N.C. App., 149, 154, 432 S.E. 2d 137, 141 (1993).

28. *Bannister*, 829 F. Supp. at 1253, *quoting* Watson v. Sexton, 755 F. Supp. 583, 589 (S.D.N.Y. 1991) (holding that sanitation department enforcement agent, whose primary job duties were inspection of commercial and residential establishments for violations of sanitation codes, did not hold safety-sensitive position simply because she occasionally drove car to and from her rounds). *See also* American Fed'n of Gov't Employees, AFL-CIO v. Sullivan, 787 F. Supp. 255, 257 (D.D.C. 1992), and American Fed'n of Gov't Employees, AFL-CIO v. Sullivan, 744 F. Supp. 294, 301 (D.D.C. 1990) (holding that random drug testing of employees classified as motor vehicle operators who drove infrequently was unconstitutional).

29. *See* Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 823 (3d Cir. 1991).

30. *See* Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559, 561, 564–65 (5th Cir. 1998).

31. The last example demonstrates the difficulties that both public employers and the courts have in deciding whether public school employees whose duties do not create a risk of danger to other adults should be deemed to be in safety-sensitive positions merely because they work in the presence of young children. A Tennessee court has held that school teachers occupy safety-sensitive positions, because even momentary inattention or a delay in dealing with a potentially dangerous or emergency situation poses a high risk of harm when children are involved. *See* Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 368–69 (6th Cir. 1998). In contrast, courts in New York, Georgia, and the District of Columbia have held that, although drug use can impair a teacher's ability to supervise children, that fact alone does not turn the position of teacher into a safety-sensitive one. *See* Patchogue-Medford Congress of Teachers v. Board of Educ. of Patchogue-Medford Union Free Sch. Dist., 505 N.Y.S. 2d 888, 891 (1986); Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990); Bangert v. Hodel, 705 F. Supp. 643, 649 (D.D.C. 1989).

32. *See* Burka v. New York City Transit Auth., 751 F. Supp. 441, 443–44 (S.D.N.Y. 1990).

33. International Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1464 (9th Cir. 1990); American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1501 (N.D. Calif. 1991).

34. Best v. Department of Health and Human Services, 149 N.C. App. 882, 893–95, *aff'd*, 356 N.C. 430 (2002); Nocera v. New York City Fire Com'r, 921 F. Supp. 192, 199 (S.D.N.Y. 1996).

35. *See, e.g., Best*, 149 N.C. App. at 893–94; *Knox County Educ. Ass'n*, 158 F.3d at 384–85; American Fed'n of Gov't Employees v. Martin, 969 F.2d 788 (9th Cir. 1992); *Derwinski*, 777 F. Supp. at 1501.

36. *See, e.g.,* National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.D.C. 1990); *Derwinski*, 777 F. Supp. at 1501.

37. *See, e.g., Martin,* 969 F.2d at 793.

38. *Best*, 149 N.C. App. at 884–88, 895–99.

39. *See* Carroll v. City of Westminster, 233 F.3d 208, 211–12 (4th Cir. 2000).

40. Armington v. School Dist. of Philadelphia, 767 F. Supp. 661, 667 (E.D. Pa. 1991), *aff'd*, 941 F.2d 1200 (3d Cir. 1991).

41. *See* Saavedra v. City of Albuquerque, 917 F. Supp. 760, 763 (D.N.M. 1994), *aff'd,* 73 F.3d 1525 (10th Cir. 1996); *Yeutter*, 918 F.2d at 974. *See also Martin*, 969 F.2d at 790–92.

42. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 630 (1989).

43. *See* Burka v. New York City Transit Auth., 739 F. Supp. 814, 829 (S.D.N.Y. 1990).

44. *See Skinner*, 489 U.S. at 633. *See also* International Bhd. of Teamsters, Chauffeurs, Western Conference of Teamsters v. Department of Transp., 932 F.2d 1292, 1308 (9th Cir. 1991).

45. *See* United Teachers of New Orleans v. Orleans Parish Sch. Bd. through Holmes, 142 F.3d 853, 856–57 (5th Cir. 1988); Stanziale v. County of Monmouth, 884 F. Supp. 140, 146–47 (D.N.J. 1995) (holding that mistake by sanitary inspector does not immediately jeopardize public health and safety).

46. *See United Teachers of New Orleans*, 142 F.3d at 856–57.

47. *See* Plane v. U.S., 750 F. Supp. 1358 (W.D. Michigan 1990); American Fed'n of Gov't Employees, AFL-CIO v. Sullivan, 744 F. Supp. 294 (D.D.C. 1990). *See also* American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1502 (N.D. Calif. 1991), *citing International Bhd. of Teamsters*, 932 F.2d at 1292.

48. *See Derwinski*, 777 F. Supp. at 1502.

49. *See* American Fed'n of Gov't Employees, AFL-CIO v. Roberts, 9 F.3d 1464, 1466 (9th Cir. 1993).

50. *See Derwinski*, 777 F. Supp. at 1502.

51. Harmon v. Thornburgh, 878 F.2d 484, 489 (1989) (comparing choice to apply for job requiring security clearance to choice to travel by air rather than by land and thus to subject oneself to FAA security inspections); Willner v. Thornburgh, 928 F.2d 1185, 1190 (D.C. Cir. 1991). Note that in *Von Raab*, one of the factors that lessened the privacy interest of the plaintiff-employees was that they were required to submit to a drug test only if they chose to apply for a promotion to a position involving drug interdiction.

52. *Willner*, 928 F.2d at 1190–91; National Treasury Employees Union v. Hallett, 756 F. Supp. 947, 948 (E.D. La. 1991).

53. *Willner*, 928 F.2d at 1189.

54. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); *Harmon*, 878 F.2d 454; *Hallett*, 756 F. Supp. 947.

55. *Willner*, 928 F.2d 1185.

56. *See* Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990).

57. *See* Baron v. City of Hollywood, 93 F. Supp.2d 1337, 1341–42 (S.D. Fl. 2000).

58. *See Von Raab*, 489 U.S. at 1394; Chandler v. Miller, 520 U.S. 305, 321 (1977) (emphasis added).

59. *See* 42 U.S.C. § 12112(a).

60. *See* 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).

61. *See* 42 U.S.C. 12112(d)(2); 29 C.F.R. §§ 1630.13(a), 1630.14(a), (b).

62. *See* 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.10.

63. Employers should consult with their attorneys before making any decision to withdraw an employment offer on the basis of the results of an alcohol screen. Even though the applicant has the burden of proving that the real reason for the failure to hire was the employer's perception that the applicant was an alcoholic, many juries would have little trouble making that inference.

64. *See* EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, No. 915.002 (July 27, 2000), available online at www/eeoc.gov/docs/guidance-inquiries.html.

65. 29 C.F.R. § 1630.15(e) provides that "it may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation."

66. The author has been unable to find a single case directly addressing this issue.

67. *See* 49 U.S.C. § 5331; 49 C.F.R. pt. 40.

68. *See* 49 C.F.R. pt. 382.

69. *See* 49 C.F.R. §§ 382.103, 382.107.

70. *See* 49 C.F.R. pt. 655.