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

This entry was posted on December 18, 2013 and is filed under Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

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
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- 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

This entry was posted on February 19, 2014 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

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

This entry was posted on August 13, 2014 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

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
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Coates' Canons Blog: The Mysteries of Comp Time Revealed

By Diane Juffras

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

This entry was posted on February 22, 2013 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act

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
- www.law.cornell.edu/uscode/text/29/207
- www.law.cornell.edu/cfr/text/29/553.20
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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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Coates' Canons Blog: Are Employees of Seasonal Recreational Establishments Exempt from Overtime?

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=8073

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

Many local governments hire additional employees for the late spring through early fall months. This period sees the opening of municipal and county pools and summer camps, increased activity at parks, golf courses, tennis courts, as well as beaches for communities on the coast or on one of North Carolina's many lakes, and the need for seasonal workers. Which of these employees will be exempt from overtime under the FLSA's exemption for employees working at a seasonal amusement or recreational establishment?

The Fair Labor Standards Act (FLSA) requires 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 is exempt under the FLSA's salary basis test and one of either the executive, administrative or professional duties tests. (On the duties tests, see here, here, here, here and here). The FLSA also provides for a limited number of other exemptions from overtime for employees who are nonexempt under the duties tests. I have discussed two of them in previous posts: the 207(k) scheduling exemption for law enforcement officers and firefighters (see here) and the fluctuating workweek (see here). This post addresses another exception to the overtime rule: the exemption for employees of a seasonal amusement or recreational establishment.

The Exemption for Employees of Seasonal Recreational Establishments

Some seasonal employees are not entitled to overtime pay even if we would normally think of their work as being nonexempt. Section 213(a)(3) of the Fair Labor Standards Act provides that the overtime rule shall not apply to:

> any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if
>
> (A) it does not operate for more than seven months in any calendar year, or
>
> (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year . . . .

The Meaning of "Establishment"

For a position to qualify for the seasonal employee exemption, its duties must be performed at a facility that it is a distinct, physical place of operations that is separate from the main administrative location of the organization. See 29 CFR § 779.23. As the U.S. Department of Labor explains in an opinion letter,

> A city or town's entire municipal government, for example, cannot qualify as an amusement or recreational establishment. Likewise, parks department employees who are employed by a central, non-recreational agency facility do not qualify for the exemption, even if they are employed only seasonally.

The letter lisst a number of examples of public-sector facilities that may qualify as separate establishments:

- beaches
- golf courses
- swimming pools

- boardwalks
- stadiums
- summer camps
- ice-skating rinks and
- zoos.

Other venues that may qualify as separate establishments may include nature centers, tennis courts, fairgrounds and museums.

The Meaning of "Seasonal"

To be a "seasonal" establishment, the facility must be one that *operated for no more than seven months in any calendar year.* Public employers who consult the U.S. Department of Labor regulation implementing this section of the FLSA – 29 CFR § 779.385 – may notice that there is another way that a facility may qualify as seasonal, namely, if "during the preceding calendar year, its average receipts for any 6 months of the year were not more than 33? percentum of its average receipts for the other 6 months of such year." The average receipts provision *does not apply to government establishments whose operating costs are met wholly* ***or primarily*** *from general tax revenues*. See U.S. Department of Labor Wage and Hour Division Opinion Letter 2009-5 (January 14, 2009).

Year-Round Employees Spending Part Year at the Seasonal Establishment

Year-round employees who spend part of the year working at a seasonal recreational establishment and the other part of the year working for the city or county's year-round operations are exempt for overtime for those duties performed at the seasonal establishment, but must be paid overtime during that part of the year that they are working at the main facility.

Employees Who Take a Second Job at the Seasonal Establishment

Some year-round employees may take a second job at city or county's seasonal recreational establishment. *Under these circumstances, the exemption from overtime for employees at a seasonal establishment will not apply*. Why not? Because the FLSA regulations require all hours worked by a nonexempt employee for the same employer count toward assessing the employee's right to overtime in a given workweek. This is true even where the employee is working two, unrelated jobs.

Conclusion

Governments who operate truly separate and seasonal establishments – pools, beaches, camps, recreational facilities and the like – may employ seasonal workers without paying them overtime for hours worked over 40 in a week.

Links

- www.law.cornell.edu/uscode/text/29/213
- www.law.cornell.edu/cfr/text/29/779.23
- www.dol.gov/whd/opinion/FLSA/2009/2009_01_14_05_FLSA.pdf
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Coates' Canons Blog: Permissible Deductions from the Salaries of Exempt Employees

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7879

This entry was posted on October 08, 2014 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

The federal Fair Labor Standards Act permits employers to exempt employees from the law's overtime requirements if their job duties meet one of three duties tests (discussed previously here, here, here, here, and here) and, crucially, if they are paid on a salary basis (discussed previously here). What happens if an employer makes deductions from the salary of an exempt employee? As a general rule, deductions violate the salary basis test and destroy the exemption, making the employee eligible for overtime. This rule does have exceptions. This blog post discusses four circumstances in which the FLSA allows public employers to make deductions from the salary of an exempt employee without destroying the exemption.

1. **Deductions for Absences in Excess of Accrued Sick or Vacation Leave**. This is probably the most frequently used of the permissible exceptions to the rule prohibiting deductions from the pay of an exempt employee. The exception may be used only by *public* employers and only if they have adopted a policy crediting employees with paid sick, vacation or personal leave **and requiring** that an employee's pay be docked when an employee is absent for personal reasons or because of sickness or injury and has no accrued paid leave available. The deduction from salary may be taken in full-day increments or on a pro rata basis for less than a full day.

A public employer may also apply this exception when an employee does not bother to ask for permission to take time off or when the employee asks for permission to take leave, it is denied and the employee takes time off anyway. The exception also applies when an employee has accrued paid leave, but asks to be put on unpaid leave and the employer agrees.

The regulation authorizing this most useful exception may be found here. Note that the regulation also authorizes employers to furlough exempt employees by temporarily categorizing them as nonexempt (and thus requires them to pay these employees for any overtime worked) in workweeks during which the jurisdiction wishes to furlough its employees for budgetary reasons.

2. **Deductions for Full-Day Disciplinary Suspensions for Exempt Employees**. Under this second exception, an exempt employee who violates a generally applicable rule of workplace conduct may be placed on an unpaid disciplinary suspension but only in increments of a full-day. In other words, the employer may dock the employee's salary in increments of one day, two days, three days etc. It may not dock the employee's salary for the equivalent of two-and-one-half days of work, for example.

The workplace misconduct must be a violation of a rule that is written and that applies to all employees. As was the case with the excess leave exception discussed above, an employer must have a written policy in place before it can use the unpaid disciplinary suspension exception. This exception is found at 29 C.F.R. § 541.602(b)(5).

The regulation does not define the term "workplace conduct." It gives two examples, however. The first is of a violation of the employer's sexual harassment policy, and the second is of a violation of a policy prohibiting workplace violence. Both examples involve serious misconduct with the potential for employer liability for damages suffered by other employees. In the Preamble Discussion that accompanied the publication of the rule in the Federal Register, the U.S. Department of Labor gave two additional examples — a violation of an employer's written drug or alcohol policy or a violation of the employer's written policy concerning off-duty conduct or violations of law. See 69 Fed. Reg. 22177 for this discussion.

Given these examples, discretion would say that employers should not place exempt employees on an unpaid disciplinary

suspension for insubordination, excessive tardiness or for the vague offense of “conduct unbecoming a government employee.”

3. Docking an Exempt Employee’s Pay for Safety Violations. The FLSA regulations have long included a provision allowing employers to dock an exempt employee’s pay as a penalty for violation of a safety rule of major significance. This exception is poorly understood and North Carolina public employers have not made much use of it.

This exception is found at 29 CFR § 541.602(b)(4). The rule explains that “[s]afety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.” The relatively few cases in which this regulation is at issue demonstrate that this is a rule intended to prevent serious danger *to the workplace or other employees*. *The exemption does not appear to cover violation of safety rules designed to prevent danger to the general public.*

So, for example, a law enforcement officer’s failure to remain at his assigned post, sleeping while or duty or failing to report the loss of his service weapon have been found to put fellow officers at risk and thus to be violations of safety rules of major significance. A police officer’s failure to respond to a traffic accident has been found to jeopardize EMTs working at the scene and to be a violation of a major safety rule. A fire truck’s failure to respond to the correct address was found to be a violation of a safety rule of major significance because the delay in its arrival at the scene endangered fellow firefighters already at the scene.

In contrast, law enforcement officers did not violate a safety rule when they accepted free sausage sandwiches from a merchant, nor did an employee who failed to report absences from work. A fire captain’s failure to prevent subordinates from downloading pictures of nude women from the internet was also not a violation of a safety rule of major significance.

The regulation provides that a deduction for a violation of a safety rule of major significance may be made in any amount and need not be tied to the employee’s salary rate. Thus, this rule may be used to fine exempt employees as well as to suspend them.

4. Deductions for Partial First or Last Week of Work or for Partial Week FMLA Leave. An exempt employee’s first or last week of work may not be a full workweek. The FLSA allows an employer to pay a proportionate part of an exempt employee’s full salary for the time actually worked in the first and last week of employment. This exception is found in subsection (b)(6) of 29 CFR § 541.602. Similarly, an employee may begin or end a block of unpaid Family and Medical Leave Act leave midweek or may take intermittent FMLA leave – blocks of time amounting to less than a full workweek because of the flare-up of chronic conditions or for scheduled medical treatments. Subsection (b)(7) allows employers to pay a proportionate part of an exempt employee’s full salary for the time actually worked in a week in which FMLA leave has been used.

Links

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- www.law.cornell.edu/cfr/text/29/541.602
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Coates' Canons Blog: Deductions for the Cost of Training under the FLSA

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=7934

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

Few things are as aggravating to local government employers as paying for the cost of an expensive training program only to have the employee leave immediately to go to work for another local government employer. The new employer gets the benefit of the training for which the old employer paid. Small and rural cities and counties commonly suffer this loss among their entry-level law enforcement and firefighter ranks. Can local governments recoup the cost of training from employees who leave soon afterward? It seems only fair. But is it lawful?

Background

The federal Fair Labor Standards Act governs the payment of wages to local government employees. Generally, money may not be deducted from the wages of exempt employees (who are paid on a salaried basis and do not get paid overtime) without destroying the exemption. Amounts may not be deducted from the wages of nonexempt employees if the amount deducted would bring the employee's pay below the minimum wage or cut into their overtime pay.

There are, however, exceptions to these generally stated rules. Take, for example, the overpayment of wages. When an employer has accidentally paid more than it owes an employee in wages, it may deduct the amount of overpayment from the employee's wages either in a lump sum or over time. This will not destroy the exemption of an exempt employee. For nonexempt employees, the U.S. Department of Labor has said in a Wage and Hour Opinion Letter, "the principal may be deducted from the employee's earnings even if such deduction cuts into the minimum wage or overtime pay due the employee under the FLSA." A decision to advance wages to an employee is treated in the same way.

Isn't paying the cost of an employee's specialized training analogous to an overpayment or advance on wages? Many local governments seem to think so. They have adopted policies requiring police officers or firefighters to repay a portion of their training costs if they voluntarily leave before completing a specified number of years of service.

Deducting the Cost of Training Appears to Be Lawful

Given how frequently this issue arises here in North Carolina, I have been surprised to find no regulatory guidance and very few judicial decisions that address the lawfulness of deducting the cost of training. Neither the U.S. Department of Labor's FLSA regulations nor any federal Fourth Circuit Court of Appeals or North Carolina federal district court cases address deductions for the cost of training. Two cases from other circuits, however, provide a rationale for allowing such a practice.

Viewing Payment of the Cost of Training as a Loan

In the 2002 federal Seventh Circuit Court of Appeals case Heder v. City of Two Rivers, Wisconsin, the city funded its firefighters' mandatory paramedic training but required a firefighter to reimburse the city for the costs of training if the firefighter left before completing three years of service. The Seventh Circuit upheld the reimbursement agreement, comparing it to a loan; the cost of the training was a loan the city made to its firefighters, repayment of which was forgiven after three years. If, however, a firefighter left before three years of service, the loan became due. The court held that as long as the city paid departing firefighters at least the statutory minimum wage, it could deduct the training costs from wages.

In a 2010 decision from the federal Ninth Circuit Court of Appeals, Gordon v. City of Oakland, the Ninth Circuit adopted similar reasoning in holding that a city's deduction of the cost of training from an employee's final paycheck was lawful. The court noted that the city could choose to require applicants to obtain their police training independently prior to

beginning employment, which the city could do by hiring only individuals already possessing law enforcement certification. Instead, the city elected to make what was essentially a loan to police officer trainees of the cost of their police academy training. In this case, the conditional offer the plaintiff signed explained that the city would forgive her repayment obligation at a specified rate and that she would owe nothing after five years of service. Because the plaintiff chose not to serve the five years necessary to secure complete loan forgiveness, the city was the plaintiff's creditor. Because it satisfied the FLSA's requirements by paying her at least minimum wage for her final week of work, it did not violate the law.

Conclusion

Based on the Heder and Gordon decisions, it appears that the deduction of the cost of an employee's training from his or her paychecks is permissible so long as employees are advised of the policy at the outset of employment and the deduction does not bring the employee's regular rate of pay below minimum wage.

For more on deductions from employee wages, see Bob Joyce's January 4, 2011 post Public Employer Withholding from Last Paycheck at http://canons.sog.unc.edu/?p=3750 .

Links

- www.dol.gov/whd/opinion/FLSANA/2004/2004_10_08_19FLSA_NA_recoup.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/

This entry was posted on January 02, 2018 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

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.

Links

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Coates' Canons Blog: Is Training Time “Work” That Must Be Paid?

By Diane Juffras

Article: http://canons.sog.unc.edu/?p=8423

This entry was posted on February 26, 2016 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

Amanda works in the information technology department of Paradise County government. She is nonexempt under the Fair Labor Standards Act, meaning that she is entitled to overtime premium pay for hours worked over 40 in a week. But she is entitled to pay only for hours she actually works. Amanda has been accepted to the School of Government’s Municipal and County Administration course. She is excited to get a chance to understand the larger responsibilities and workings of local government, which will better enable her to design and code programs for the county’s very different departments. She is a little less excited when her department head tells her that she will not be paid for the time she spends in class. “That can’t be right!” she thinks. “After all, the class time all takes place during regular working hours and I’m attending the class as an employee of Paradise County.” Under the Fair Labor Standards Act (FLSA), is the time Amanda spends in the Municipal and County Administration course “work” for which she must be paid?

Yes. The time Amanda spends attending the Municipal and County Administration course is compensable. Her situation satisfies the FLSA’s standards for compensable training time: the training will take place during regular working hours and it is directly related to her job.

Background

The FLSA requires 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 is exempt under the FLSA’s salary basis test (see here) and one of either the executive, administrative or professional duties tests. (On the duties tests, see here, here, here, here and here). Exempt employees must be paid the same salary even if they work fewer than 40 hours, and they are not entitled to overtime pay when they work more than 40 hours.

When exempt employees attend continuing education or training courses, they continue to receive their regular salary, neither more nor less, whether the class is held during or after regular working hours. But because nonexempt employees are paid only for the hours they actually work, whether during or outside of regularly scheduled hours, the question necessarily arises: must nonexempt employees be paid for the time they are in classes and other forms of training and does that time count toward overtime? Is the training time “work”?

The General Rule

Under the FLSA, time employees spend on job-related training activities is generally compensable. The general rule is that employees do not have to be compensated for training time if:

1. attendance is outside the employee’s regular working hours;
2. attendance is voluntary;
3. the course is not directly related to the employee’s job; and
4. the employee does not perform any productive work during time in attendance at the course.

Time spent on training and similar activities must satisfy all four requirements for it to be treated as not compensable (keep in mind, however, that an employer may choose to pay nonexempt employees for their training time even if under the FLSA, they do not have to do so because these four conditions are satisfied). Let’s take a closer look at these requirements.

Outside Regular Working Hours

The requirement that attendance at the training be outside of an employee's regular working hours to be noncompensable is fairly straightforward. For Amanda, it is clear that her participation in the Municipal and County Administration course will be compensable to the extent that class time is all scheduled within the hours she regularly works. Should class time spill over into what would normally be Amanda's nonworking hours, the other three factors would have to be considered to determine whether those hours are compensable.

Voluntary Attendance

The FLSA regulations expressly state here that attendance is not voluntary if the employer requires the employee to take the class. It is also not voluntary if employees are led to believe that their present working conditions or their continued employment would be adversely affected by not attending the class.

Here's a tricky situation. Is training time voluntary when employees undertake the training outside of regular working hours in order to pass a test that is required by the employer? This question frequently arises in the context of public safety, where law enforcement officers, firefighters and sometimes paramedics and EMTs are required to pass a physical abilities test. In cases such as these, the training time would be compensable if the employer required its employees to take a particular fitness class outside of work or to follow a specific training regimen in preparation for the test. But where employees are not required to spend a specific amount of time training for the test or do specific exercises or activities, the training time is not compensable. This is true even where it would be quite difficult to pass the test without training or preparation. For cases with extended discussions of this issue, see here and here.

Training Not Directly Related to the Employee's Job

Whenever training is directly related to an employee's job it is compensable. The FLSA regulations explain that training is directly related to the employee's job if it is designed to make the employee handle his or her job more effectively. Training whose purpose is to prepare an employee for another job, or to teach an employee a new or additional skill is not considered directly related to the employee's job. As the regulations explain:

Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

This requirement has been the basis of no small amount of litigation. One court held that any training that does not apply to a specific job, but only to better performance in the workplace in general, is not work directly related to an employee's job. In that case, an employer required its operating engineers, who were not required to have college degrees, to pass a series of foundational skills assessments. Elsewhere, the federal Eleventh Circuit Court of Appeals found that off-duty fitness training undertaken by police officers in order to pass a required physical fitness test provided health benefits that extended beyond their employment and was not directly related to their job. In an earlier case, the Eleventh Circuit had found that training that related to work that represented only ten percent of an employee's job duties was not directly related to his job. Finally, the U.S. Department of Labor itself said in an opinion letter that where a job did not require proficiency in English, an employee's study of employer-provided written instruction in English outside working hours was not directly related to the employee's job. DOL agreed with the employer that while such instruction might enhance the employees' job satisfaction, improve morale at work and provide the employees with greater opportunities in the outside workplace, it did not help the employee perform his job more efficiently. The fact that the training may have had an indirect effect on an employee's current job (as one might assume greater facility in English would have) did not make it directly related to the job.

Training That Is a Precondition of Employment

What if training of a certain kind is a precondition of employment, but the employer will allow applicants to complete the training on their own time after they have begun work? In one case, Chao v. Tradesmen International, Inc., the federal Sixth Circuit Court of Appeals found that such time was not compensable. The employer, Tradesmen International, was a

skilled tradesmen leasing company that required all field employees to have completed a 10-hour OSHA general construction safety course. It allowed applicants to complete the training post-hire, after regular working hours, with the understanding that Tradesmen would terminate their employment if they did not register for the training course within sixty days of hire and complete it within a reasonable amount of time afterwards.

The court in this case did not analyze the situation under the training time regulation we have considered so far. Instead, it looked at the provisions of the Portal-to-Portal Act, an amendment to the FLSA that requires employers to compensate employees for activities that may occur before or after the workday proper, but are nonetheless an integral and indispensable part of the principal activities for which they are employed. The court found that the safety course, although required by the employer, was not an integral and indispensable part of the tradesmen's duties. See here for a case where the court found that the time spent by members of private campus police force in EMT training, which was a precondition to their hiring, was not an integral and indispensable part of their job duties.

A Special Rule Applicable to Government Employers Only

The FLSA regulations, here as elsewhere, make a concession to the ways in which public-sector employment sometimes differs from private-sector employment. In 29 CFR § 553.226, the DOL identifies as noncompensable time any time a state or local government employees spends outside of working hours in a class or training session that is required for certification of persons performing their jobs. Thus, the training that the state of North Carolina requires for certification and recertification of paramedics and EMTs is not compensable time. This is true even if the local government employer is paying for the cost of the training (again, the employer is not forbidden from treating the training time as compensable work; it just does not have to do so under the FLSA).

Similarly, when a local law enforcement officer is attending class at a law enforcement training facility or a firefighter is attending a fire academy, the hours not spent in class are not compensable, even where the participants are residing on-campus for the period of the training program. Although employees are not "home" and are not free to pursue their usual off-duty activities while at the training site, they may still use the hours not spent in class for their own purposes: reading, sleeping, surfing the internet or watching TV. If Amanda, in the opening hypothetical, is not returning home each night, but is staying in a hotel in Chapel Hill for each night during the Municipal and County Administration course, her time outside of class is not compensable even though she is not home. Of course, if she performs work that she would otherwise be doing back in her office in Paradise County in her hotel room at night, the time she spends on that work would be compensable.

Note that an employer that takes advantage of this special local government exception does not have to satisfy the general rules for compensating training time discussed above.

When Employees Enroll in Classes or Training at Their Own Initiative

The FLSA regulations also address both training that employees enroll in of their own accord and special employer-offered courses of which employees may voluntarily take advantage. When an employee enrolls in a course or college program after working hours at his or her own initiative, the time is not compensable even if the coursework is directly related to the employee's job. Occasionally, an employer will offer a free class or training opportunity after working hours for the benefit of its employees. If attendance is not required and the employee's participation is voluntary, the time spent in such classes would not be considered hour worked. For the regulations, see here and here.

Links

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Coates' Canons Blog: Must Travel Time to Training and Conferences Be Paid?

By Diane Juffras

Article: http://canons.sog.unc.edu/must-travel-time-training-conferences-paid/

This entry was posted on July 25, 2016 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

In a previous blog post, I explained the Fair Labor Standards Act rules that govern paying for nonexempt employees for training time. Much of an employee's training, of course, is done on-site. But what happens when an employee travels to attend a training or a conference? Is the time spent driving to the training event compensable? Does it matter whether the employee is the driver or is a passenger in a vehicle driven by another? You bet it does. The rules governing the compensability of travel time are among the most confusing that the U.S. Department of Labor has issued under the FLSA.

This blog post is not about exempt employees. When exempt employees travel to another location for a conference or training program, whether that travel is near or far doesn't affect compensation. Exempt employees are paid the same amount each week regardless of how many hours they work. So if they work their regular schedule during the workweek, but spend three hours Friday evening driving to the site of a conference that takes place on Saturday, their compensation is unaffected.

Nonexempt employees, however, are generally paid by the hour or are paid on the basis of a regular hourly rate and must be paid time-and-one-half premium overtime pay for every hour over 40 in a workweek. So if s nonexempt employee works her regular schedule during the workweek, but spends three hours Friday evening driving to the site of a conference that takes place on Saturday, she will be paid more than she is usually paid for a regular workweek because she has worked more.

Travel Time Rules

There are four basic rules governing whether time spent traveling for work must be compensated. They are:

1. Travel away from home must be paid when it occurs during the employee's regularly scheduled hours.
2. Travel away from home must be paid when it occurs during what would be working hours, but on nonworking days.
3. Time traveling away from home outside of regular working hours as a passenger on in a car or on an airplane, train or bus does not have to be paid.
4. Time traveling away from home outside of regular working hours as the driver of an automobile must be paid.

Let's examine these rules.

Travel Away from Home during an Employee's Workday

Travel away from home or from the employee's worksite is compensable when it takes place during an employee's regularly scheduled hours of work. The easiest way to think about this is to remember that here, the employee is simply substituting travel for other duties. It doesn't matter whether the employee is traveling from worksite to worksite, as a building inspector might do, or to a meeting across town or across the country. The employee is entitled to be paid for the time. See 29 CFR § 785.39.

Travel during a Non-Workday

The rules governing travel away from home or from the employee's worksite on a non-workday are less intuitive than the rule that applies to travel during the workday because it makes a distinction between travel that occurs during the hours that employee would be scheduled to work if it were a workday and the hours that an employee would be off-duty if it were

a regular workday.

Imagine that Phil and Patti, both nonexempt employees, drive from Paradise, NC, to Chapel Hill on late Sunday afternoon. They are attending a class in public employment law at the School of Government and need to be there by 9 a.m. Since it is a good five-hour drive from Paradise to Chapel Hill, they need to leave the day before. They set out at 3 p.m. Patti drives. Phil sits in the passenger seat and sings along to the radio to entertain Patti.

Patti and Phil's regular hours are Monday to Friday, 9 a.m. to 5 p.m. 29 CFR § 785.39 directs that Phil be paid for two hours of work on that Sunday, from 3 p.m. to 5 p.m. His employer does not have to pay him for the additional three hours he spends in the car from 5 p.m. to 8 p.m. Patti, on the other hand, gets paid for the entire trip from 3 p.m. to 8 p.m.

Why the difference?

To start with, 29 CFR § 785.39 provides that travel away from home is compensable when it occurs during what would be working hours on a nonworking day. In other words, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, travel time on from 9 a.m. to 5 p.m. on Saturday and Sunday is also compensable time. So both Phil, who is the passenger, and Patti, who is the driver, are paid for the hours between 3 p.m. and 5 p.m.

Different Rules for Passengers and Drivers Who Travel Outside of Regular Work Hours

Different rules apply to the roles of driver and passenger. 29 CFR § 785.41 provides that anyone driving is working while traveling. But 29 CFR § 785.39 makes clear that the U.S. Department of Labor, which enforces the FLSA and issues the FLSA regulations, will not "consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile." This is why Patti is paid for the hours from 5 p.m. to 8 p.m. and Phil is not. Had more of their trip taken place between the hours of 9 a.m. to 5 p.m., Phil's would have been paid more for the trip.

Working on an Employer Project While Passenger in an Automobile

What if Phil owed the city manager a report first thing when he returns from Chapel Hill and instead of regaling Patti during the ride works on his report on his laptop during the entire ride? In that case, Phil would be paid for the entire trip – from 3 p.m. to 8 p.m. – because he was performing work for the employer's benefit during that time. It isn't any different than if Phil were sitting on his couch at home working on the report. The time would be compensable. Any time a nonexempt employee performs work at the direction of and for the benefit of the employer, the time must be paid, whether on-site or at home, whether in town or traveling. See 29 CFR § 785.7 and 29 CFR § 785.11.

Links

- www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol3/xml/CFR-2011-title29-vol3-sec785-39.xml
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Coates' Canons Blog: Gap Time and the FLSA

By Diane Juffras

Article: https://canons.sog.unc.edu/gap-time-flsa/

This entry was posted on December 01, 2017 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

What is “gap time?” The term does not appear in the Fair Labor Standards Act (FLSA) or in the U.S. Department of Labor’s (DOL’s) FLSA regulations. It is, however, used by human resources and payroll professionals and appears in a number of DOL Administrator Opinion Letters. “Gap time” refers to the hours that fall between a nonexempt employee’s regularly scheduled hours and the 40 hours that an employee must work before becoming entitled to time-and-one-half overtime premium pay (for law enforcement officers and firefighters working on a 28-day work schedule it’s 171 and 212 hours respectively). When an employee is scheduled to work 40 hours per week, there is no gap time. But for employees working fewer than 40 hours –37.5 hours per week, for example – gap time is time worked between 37.5 and 40 hours. Do nonexempt employees get paid for gap time?

Background

The Fair Labor Standards Act (FLSA) requires 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 is exempt under the FLSA’s salary basis test and one of either the executive, administrative or professional duties tests. (On the duties tests, see here, here, here, here and here). This post addresses the situation where an employee works fewer than the 40 hours required for premium overtime pay (or the 171 or 212 hours for law enforcement officers and firefighters) but more than the number of hours for which they were hired.

Let’s imagine two local government employees: Susan, a nonexempt helpdesk support specialist in the city of Paradise’s information technology department, and Will, a nonexempt planner in the planning department.

Gap Time and the Nonexempt Hourly Employee: The Case of Susan

Susan’s position requires her to work from 8 a.m. to 4 p.m. Monday through Friday with a half-hour unpaid lunch break for a total of 37.5 hours per week. Susan is paid on an hourly basis at the rate of $20.00 per hour. She earns a total of $750 during a normal workweek. What happens when Susan works 40 hours in a workweek? Is she paid for the additional time she works? What if Susan works 45 hours in a workweek? It turns out that the answer depends on the agreement between Susan and the city – an agreement that they may not even fully realize they have.

Suppose the IT director asks Susan to stay late one day to help with a software installation. She stays until 6:30 p.m. that night, which brings the total number of hours she works that week to 40 hours. If Susan is paid an additional $50 for the two-and-one-half additional hours she works that week ($20.00 per hour x 2.5 hours), all is well and good from Susan’s perspective.

But suppose Susan isn’t paid anything for the two-and-one-half additional hours she has worked. She is simply paid her regular $750 for the regularly scheduled hours she has worked ($20.00 per hour x 37.5 hours). Susan thinks that there has been a mistake. Her supervisor tells her that it is the city’s policy not to pay employees for gap time – the time between their regularly scheduled hours of 37.5 hours per week and 40 hours (after which overtime rules would apply). “Whaat?” yells Susan.

"Whaat" indeed! If Susan and the city agreed at the outset of her employment that she would not be compensated for gap-time hours, the city will **not** be in violation of the FLSA when it does not provide her with additional compensation for the extra hours she works. That's because of a little known hole in FLSA coverage.

The Loophole That Permits the Gap Time Exception

Given its power over the American workplace, the Fair Labor Standards Act is a surprisingly compact statute. The core requirements of the law take up only two sections: section 206 establishes the minimum wage and section 207 establishes the maximum hours an employee may work without being paid overtime premium pay. Section 206(a)(1)(c) provides simply that "every employer" must pay wages at a rate of no less than $7.25 an hour. Section 207 sets forth the basic overtime rule in subsection (a)(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The rules do not address Susan's situation. DOL (in its Wage and Hour Administrator Opinion Letters) and the federal courts have interpreted this silence to mean that an employer may structure the terms of employment to provide that employees will receive their stated hourly rate for all of their regularly scheduled hours, but that for "gap" hours that do not cause the employee to exceed the 40-hour maximum, no additional compensation will be paid. This may seem shocking, but such a practice does not violate the FLSA as long as the employee's total compensation for the week remains above the minimum wage when it is divided by the total number of hours worked (the regular schedule plus the additional hours). For some DOL opinion letters on this topic, see here and here. For the leading Fourth Circuit case, see *Monahan v. County of Chesterfield, Va,* 95 F.3d 1263 (4th Cir. 1996).

If we take Susan's compensation for her regular schedule, namely, $750 per week ($20.00 per hour x 37.5 hours), and divide it by the total number of hours she has worked that week (40), we get an average hourly wage of $18.75, well above the minimum wage. So there is no violation of the FLSA, even though she received no extra pay for the gap-time hours worked. Compare Susan's situation with that of an employee earning only $7.50 per hour. That employee's weekly earnings would be $281.25 for a regular 37.5 hour per week schedule. If the employee were to work 40 hours this week without receiving any additional compensation for the gap time, his average hourly wage would be $7.03 per hour. Under these circumstances, the city would be violating the FLSA by not compensating the employee for the gap time hours worked, but only because the average hourly wage falls below the federal minimum, not because the city failed to pay the hours between 37.5 and 40.

Agreement Not to Pay for Gap Time

In this hypothetical, the city's ability to not compensate Susan for those extra two-and-one-half hours ultimately depends on whether Susan has agreed to this arrangement. "Agreement" is a relative term here: the issue is whether Susan knew in advance that she would not be compensated for the gap time hours and worked them anyway. About "agreement," the Fourth Circuit has said:

> Where the parties' actions and the circumstances demonstrate that the plaintiff was aware of a particular condition of employment, the employee's acceptance of, and continued, employment manifests acceptance of the condition. However, if the employee contemporaneously protests, there is no implied agreement to the condition.

If the city's policy not to pay for gap time is set forth in an employee handbook, and Susan has received a copy and given written acknowledgement of having read it, a court would likely say that Susan has impliedly agreed to its terms. Even if there is no written policy, a court will likely find employee agreement to a policy not to pay for gap time if, in actual practice, the city does not pay for gap time and employees like Susan work gap time hours without pay. On the other hand, if no one had ever tells Susan that this policy is part of the terms and conditions of her employment, and Susan complains in the first instance, a court will not say that Susan has agreed to those terms. Under those circumstances, Susan would be owed compensation for the 2.5 gap time hours at her regular $20.00 per hour rate.

Unpaid Gap-Time Claims Must Be Brought in State Court

Here's another FLSA fact that will knock your socks off: even if Susan is owed gap-time compensation because there was no "agreement", she cannot bring a claim for those unpaid hours under the FLSA. The Act is violated only when an employer either fails to pay an average of the minimum wage for all straight-time hours worked (a violation of section 206) or fails to pay time-and-one-half the employee's regular rate for hours worked over 40 (or fails to credit the employee with comp time) (a violation of section 207). The FLSA does not authorize a lawsuit to recover unpaid gap-time wages. The failure of an employer to live up to any non-FLSA promises it has made about wages is not a violation of the FLSA. An employer's promises about wages may be enforced only by bringing a breach of employment contract lawsuit in state court. It is there that Susan will have to seek back pay.

May the City Compensate Susan Anyhow?

If the city does not have to pay Susan for gap-time hours, could it compensate her with hour-for-hour paid time-off for the hours between 37.5 and 40? The answer to this question is "yes." The fact that the city does not have to pay Susan for gap-time hours does notprevent it from doing so. It could pay her regular hourly rate or a lower hourly rate or it could giv her paid time off.

Non-overtime versus Overtime Workweeks

What happens if Susan works overtime one week? Suppose Susan works 45 hours one week instead of her regularly scheduled 37.5. Must she be paid for the gap-time hours under these circumstances?

DOL addressed this issue in a 2004 opinion letter, in which it said that in an overtime workweek, an hourly employee must be paid the agreed-upon hourly rate for all straight time hours worked, as well as the premium due for all overtime hours. In an overtime workweek, the gap time hours must be paid in cash and cannot be compensated with comp time. This is true whether overtime is paid in cash or in FLSA compensatory time-off (one-and-one-half hours paid time off for every hour worked over 40). This is the conclusion that the Fourth Circuit has earlier reached in the *Monahan* decision. And in this situation, Susan could file a complaint with DOL or bring a lawsuit under the FLSA in state or federal court.

Gap Time and the Nonexempt Salaried Employee: The Case of Will

Is the result any different when a nonexempt employee is paid on a salary basis? Susan is paid on an hourly basis. But the FLSA permits employers to pay nonexempt employees on a salary basis Let's take a look at what happens to Will.

Will works as a planner for the city of Paradise. Although Will is a nonexempt employee, the city pays him on a salary basis for a 37.5 hour workweek. He earns $960 per week. In other words, Will earns $960 each week for as many hours as he works, up to and including 37.5 (on the salary basis test, see here). Like any nonexempt employee, Will earns time-and-one-half premium pay when he works more than 40 hours in a workweek. But with one of the other planners out on FMLA leave, Will lately finds himself working more than 37.5 hours per week. Some weeks he works no more than 40 hours, but in others he works overtime hours.

Whether Will is entitled to compensation for gap-time hours when he works between 37.5 and 40 hours depends on whether his salary is meant to compensate him for a fixed 37.5 hour workweek or for as many hours as he works in any given week. If Will's salary is meant to cover a fixed 37.5 hour workweek, then he should be compensated at his hourly rate for any additional non-overtime hours he works. (Note that like Susan, Will would have to file a breach of contract suit in state court to recover unpaid gap time compensation.) If Will has expressly or impliedly agreed to work for $960 per

week for ***all*** non-overtime hours worked, he is not entitled to additional compensation for any hours worked between 37.5 and 40. See 29 CFR §§ 778.322 and 778.323.

Sometimes employers fail to make clear whether a nonexempt employee's salary is meant to cover a fixed workweek or a variable workweek. In that case, courts will look to workplace practice to determine the terms of the employment contract. If Will does not complain the first time he is paid only his regular salary for weeks in which he works gap time hours, and he continues to work the gap time hours, a court would likely find that he has agreed to a fixed salary for a variable-hour workweek.

None of this changes when Will works overtime hours. If his salary is meant to only cover 37.5 hours, the city must pay Will his gap-time hours at the pro-rated hourly rate (see 29 CFR § 778.322). If his salary is meant to cover all of the hours he might work up to 40, however many they might be from week to week, then he is not owed any additional compensation for gap time hours. What is determining here is "agreement of the parties as to what the salary is intended to compensate." *See Monahan*, 95 F.3d at 1283; 29 CFR § 778.323.

Law Enforcement Officers and Fire Fighters Paid under the 207(k) Exemption

The gap-time compensation rules are the same for law enforcement officers and firefighters as they are for Susan and Will, whether they are paid on an hourly or salaried basis, and whether overtime is calculated on the basis of a 40-hour workweek or using the 207(k) exemption's longer work periods and high maximum hour threshold (on the 207(k) overtime exemption for law enforcement and fire personnel, see here).

Links

- www.law.cornell.edu/uscode/text/29/206
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