

# THE FAIR LABOR STANDARDS ACT

by  
*Patricia F. Weisberg*

## I. INTRODUCTION

### A. Why the FLSA Matters to Employers

The election of Obama led to the appointment of Department of Labor (DOL) Secretary Hilda Solis. The current DOL has engaged in an aggressive campaign of identification, investigation and enforcement. The message is loud and clear, “There is a new sheriff in town.”

This spring, the DOL rolled out several programs designed to help workers feel less fearful of repercussions about filing grievances in accordance with Fair Labor Standards Act regulations, while putting extra onus on employers – the “We Can Help” campaign, the “Plan/Prevent/Protect” strategy, and more stringent misclassification rules. Combined, these changes will mean that even the most proactive employers should expect to see an increase in FLSA-related complaints from employees.

### B. “We Can Help”

In April 2010, the Department of Labor announced its “We Can Help” program, which seeks to assist low-income workers by educating them about their rights under the FLSA and to encourage employees and community groups to report possible wage violations without fear of reprisal. The campaign represents an active, vocal effort on the part of the DOL’s Wage/Hour Division to reach out to employees and seek their help in catching employers who violate wage/hour laws. In addition, the DOL has teamed up with employee advocacy groups, such as the AFL-CIO, to further educate employees and publicize their rights.

### C. Plan/Prevent/Protect

More recently, in May 2010, the DOL announced its “Plan/Prevent/Protect” strategy, which reflects an emphasis on preventing violations of laws that affect workers. This new strategy will require employers to do the following:

- Have written plans to comply with specific labor laws such as wage and hour statutes
- Prevent violation of laws by executing the plan and performing an analysis on its effectiveness
- Protect workers by disclosing a plan to their workforce and their government.

The initiative involves several agencies under the DOL's auspices, including the Wage and Hour Division, the Occupational Safety and Health Administration (OSHA), the Office of Federal Contract Compliance Programs (OFCCP), the Mine Safety and Health Administration (MSHA) and the Employee Benefits Security Administration (EBSA). The idea behind this new initiative is that employers must "find and fix" violations before a DOL investigator is called in for one reason or another to investigate a particular matter. The DOL wants employers to understand that the burden is on them to obey the law, rather than on the DOL to catch them violating the law. According to the DOL, they are moving from a "catch me if you can" strategy to a "Plan/Prevent/Protect" strategy.

#### **D. Current Statistics**

While most companies have seen assets decrease and have been required to cut staff, the DOL has an increased budget and is adding employees. The DOL's fiscal year 2010 budget requests an increase of 997 FTEs. DOL is hiring at a rate of 30% for enforcement agents (currently 582 authorized wage hour agents in the National office and 5 Regional offices) and is hiring/has hired 250 new wage and hour investigators. The DOL's current budget for wage hour is \$242.9 million.

Recent Trends also support increased attention to the FLSA. Wage-hour claims have tripled since 1997. FLSA cases filed in federal courts rose almost 23% in the second quarter of 2010 which is an increase of 25% from the first quarter of 2009. Some class settlements exceed \$100 million. A total of 3,230 FLSA cases were filed during the first six months of 2010 which reflects a 6% increase over the first half of 2009. This doesn't even include those matters that are addressed administratively or in the state courts.

The top ten 2009 *private* class action wage/hour settlements are 44% higher than in 2008. The top ten totaled \$364 million. And, in March 2010, 3M asked a court to approve a settlement of \$4.95 for workers who accused the company of denying workers regular and overtime pay for work-related activities (donning and doffing protective equipment and failing to keep accurate time records)

The DOL's 2010 agenda includes increased audit and enforcement proceedings related to:

- "off the clock" work and
- the misclassification of employees as "exempt"

## **II. APPLICATION**

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping and child labor standards in the private sector, as well as federal, state and local governments. The DOL Wage and Hour Division (WHD) administers and enforces the FLSA. Employees can be covered by the FLSA in two ways. *First*, the FLSA covers employers that have two or more employees and do at least \$500,000 a year in business, or hospitals, businesses providing medical or nursing care for residents, schools, preschools and government agencies. *Second*, the FLSA also covers employers if their work regularly involves them in commerce between states (interstate commerce). This is interpreted broadly so that producing goods to be shipped out of state, regularly making phone calls to persons in other states, handling records of interstate transactions, traveling to other states for work are all duties which make coverage apply. The FLSA also covers domestic service workers such as day workers, housekeepers, chauffeurs, cooks, or full time babysitters in some circumstances. A worker may not waive his or her right to FLSA coverage in order to enable his or her employer to escape the wage, hour and child labor provisions.

### III. **BASIC REQUIREMENTS**<sup>1</sup>

The FLSA regulates wages and hours of work of employees who fall within its scope.

The FLSA establishes minimum wages and overtime requirements, regulates child labor

and requires employers to keep certain records and reports. The FLSA does not regulate vacation, holiday, severance or sick pay, premium or holiday pay, raises or fringe benefits. Non-exempt workers covered by the FLSA are entitled to a minimum wage of \$7.25 per hour for all hours worked. State requirements often vary from the FLSA minimum wage requirement. In Ohio, the amount is subject to adjustment on an annual basis. Employers are typically required to pay the higher of the federal and state amounts. Non-exempt workers must also be paid overtime pay at a rate of not less than one and one-half times their regular rates of pay for all hours worked over 40 hours of work in a work week.

### IV. **FLSA EXEMPTIONS**

The Fair Labor Standards Act contains some exemptions from the basic minimum wage and overtime standards. Certain employees are exempt from both minimum wage and overtime pay requirements. They are as follows:

- executive, administrative and professional employees (including teachers and academic administrative personnel in elementary and secondary

---

<sup>1</sup> Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off instead of overtime pay.

schools), outside sales employees, and employees in certain computer-related occupations (as defined in the regulations) (“White Collar Exemptions”);

- employees of certain seasonal, amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery;
- farm workers in certain circumstances;
- casual babysitters and persons employed as companions to the elderly or

infirm.

There are also certain employees that have exemptions from overtime pay only. These include, but are not limited to, certain commissioned employees of retail or service establishments, domestic service workers living in the employer’s residence, news editors and others.

#### **A. The 2004 Regulations**

In 2004, the DOL issued revisions to the “White Collar Exemptions” to the overtime requirements of the FLSA. The DOL’s overhaul of the White Collar Exemptions was the first significant revision since 1949. The rules still present some ambiguity and, while their implementation was an attempt to deal with the workforce issues faced by modern employers and the uncertainty arising from the application of the old rules, there are still many uncertainties and there still seems to be a failure to address modern concerns.

#### **B. White Collar Exemptions**

The white collar exemptions are classifications of the employees to whom the overtime requirements of the FLSA do not apply. Generally, the two tests apply. *First*, an employee must meet the duties test. *Second*, the employee must be paid on a salary basis.

1. ***Executive.*** In order for an individual to qualify as an Executive under the Fair Labor Standards Act, the individual’s primary duty (principal, main, major or most important) must be the management of the business or a customarily recognized department or subdivision of the business and one who customarily and regularly directs the work of two or more full-time employees (or their equivalent), and who has the authority to suggest and recommend hiring, firing, advancement, promotion or any other change in employee status of other employees. Customarily and regularly is defined

as a “frequency that is greater than occasional, but which may be less than constant.” It does not include an isolated or one-time task.

2. **Administrator.** In order for an individual to qualify as an Administrator, the individual must perform office or non-manual work which is directly related to the management or general operations of the employer, the employer’s customer. In addition, the individual’s primary duties (principal, main, major or most important) must include the exercise of independent judgment with respect to matters of significance (level of importance of the work performed, i.e., developing policies, advice to management). The important factors under the administrative exemption are discretion and independent judgment, which means the comparison and evaluation of possible courses of conduct, and the ability to act or make a decision about the various possibilities. This discretion and independent judgment must be exercised with respect to “matters of significance.” This does not mean that a decision or recommendation may not be reviewed at a higher level, but if it always has to be approved, the chances are less likely that the individual will fall under the administrative exemption.
3. **Professional.** In order to qualify for the professional exemption, an individual must perform work requiring knowledge of an advanced type (work which is predominantly intellectual in nature and which includes work requiring the consistent exercise of discretion in judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination or originality or talent in a recognized field of artistic or creative endeavor. The salaried basis requirement does not apply to doctors, lawyers, teachers, computer professionals paid hourly.

Case Law: ***Koplowitz v. Labaton Sucharaw LLP*** (S.D. NY 2010)

Attorney says he is not exempt because he is paid hourly and duties assigned are typical of paralegal. This case is pending.

4. **Computer Professional.** In order to qualify for the computer professional exemption, an individual must be paid on a salary or fee basis at not less than \$455 per week or \$27.63 an hour, and the employee is a systems analyst, programmer, software engineer or other similarly skilled worker in the computer field performing whose primary duty consists of:
  - application of system analysis techniques and procedures, including consulting with users, to determine hardware, software, system function and specifications;
  - design, development, documentation, analysis, creation, testing or modification of computer systems and programs, including

prototypes, based on and related to user or system design specifications;

- design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- combination of the above-stated duties, the performance of which requires the same level of skills.

There are other exemptions as well.

5. **20% Rule.** The 20% rule applies to equity owners. Any employee who owns 20% equity interest in the employer and who is actively engaged in management is exempt. The person does *not* have to be paid on a salaried basis.
6. **Outside Sales.** In order to be exempt from the overtime provisions of the FLSA, an individual's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and the individual must be customarily and regularly *engaged away from the employer's place or places of business*. Outside sales people do not need to be paid on a salaried bases.

Case Law: ***Jirak v. Abbott Laboratories, Inc.*** (N.D. Ill. 2010)  
Pharmaceutical sales representatives not "making sales" and, therefore, not exempt. They were performing promotional activities that stimulated sales.

**In re Novartis Wage and Hour Litg.** (2<sup>nd</sup> Cir. 2010)  
Pharmaceutical sales representatives not exempt as outside sales or administrative employees. Many earned in excess of \$100,000.

## 7. **Salary Basis/No Docking Rules**

For most of these exemptions, an individual must not only meet the duties requirement, but, in addition, must be paid on a salaried basis of at least \$455 per week.

Employers are expressly prohibited from making deductions from exempt employees:

- for absences caused by the employer or by the operating requirements of the business;

- leave for part of a week for jury duty, to be a witness, or for temporary military service (the employer may offset any jury or witness fees or military pay from the employee's salary).<sup>2</sup>

Employers are permitted to make deductions when:

- employees are absent from work for a day or more for personal reasons other than sickness or accident;
- employees are absent for a day or more for sickness or disability provided the deduction is made in accordance with the employer's bona fide plan, policy or practice of providing compensation for lost salary due to sickness or disability;
- employees are absent due to an industrial incident and are compensated for the loss of salary under workers' compensation. Law;
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules (i.e., violation of sexual harassment policy – typically not performance issues), but the suspensions must be imposed pursuant to a written policy applicable to all employees;
- employees are absent for a full or partial day for Family and Medical Leave.

There is a safe harbor rule which allows employers who have a written policy which includes a complaint procedure under which they reimburse employees for improperly deducted amounts. These employers will not lose the exemption unless the policy is repeatedly and willfully violated after it receives complaints.

## V. **TIME WORKED**

Under the FLSA, employees must be paid for all time worked. If an employer requires or allows employees to work, the time spent is generally hours worked. Work includes: "re-work" (when an employee must correct mistakes, even when the employee voluntarily does the re-work); "waiting for work" – employees must be paid for all the time spent in "physical or mental exertion" (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business). The hours worked include all of the time during which an employee is required or

---

<sup>2</sup> The employer may not deduct the jury duty or attendance as a witness to a case in court, but an employer may deduct for an employee's absences to attend a trial as a party to the trial.

allowed to perform work for an employer regardless of where the work is done. The work can be done on the employer's premises, at other designated work places, at home or some other location.

The DOL's position is that it is the duty of the employer to exercise control and see that work is not performed if the employer does not want it to be performed. In other words, an employer cannot sit back and accept the benefits of their employees' work without considering the time spent to be hours worked. Merely making a rule against work is not enough. The employer has the power to enforce the rule and must make every effort to do so. As such, the employer must enforce this policy through discipline as opposed to withholding pay.

Case Law: ***Samual v. Kindred Healthcare, Inc.*** (D.C. Mass.), May 2010  
Hospital/nursing home accused in a proposed class action of not properly paying employees because the employer has an automatic lunch deduction system which automatically deducts 30 minutes from an employee's pay. Employees argue they work through lunch. Tough for employers if no records!! Case is pending.

***TBM Corp*** (Class action SD NY 2010)  
Sued for time spent before their shift booting up computers, logging into IBM's software system and opening software applications. Takes 15 minutes and must arrive early to be ready. Case is pending.

## **The Virtual Office**

The modern workplace has generated many concerns and issues in this area. Employees are often using their blackberries or other hand held electronic devices throughout the day and evening wherever they are. Using these devices for work purposes is work. This is often the case with employees who need to respond to after hour emails and calls, conference calls on the way home and those that remotely access the computer or other office systems. There is a diminimus exception which basically states that a few minutes here and there does not have to be counted. The problem, however, occurs when an employee is *regularly* working a few minutes here and there. Six ten-minute calls, or three ten-minute calls and three ten-minute emails plus the time the employee accesses the employer's computer system, can happen regularly and easily. This time adds up and when it does, it must be included in the time worked.

Other issues arise when employees are on vacation or when a salaried exempt employee on an unpaid leave day checks email. If the exempt employee is working for any part of the day, the employee must be paid his or her salary for the day unless one of the salary deduction rules apply.

The best way for employers to manage the virtual office issues is to have a policy in place and to enforce that policy. Employers should directly address the use of technology, who can use it, when and how. The employer should have a policy about how to document the time worked and also a manner in which to confirm the hours worked. An employer needs to manage the time worked and enforce its rules. In other words, there must be disciplinary consequences for non-compliance. Educating managers is an important part of the process.

## **VI. REGULAR RATE AND OVERTIME**

The FLSA requires that all non-exempt employees be paid at least minimum wage and overtime at time and one-half their "regular rate" for all hours worked over 40 in a work week.

The "regular rate" is the rate at which overtime is calculated and includes more than just the employee's regular wages. The regular rate also encompasses all compensation provided to the employee as part of his or her employment. Employers must, therefore, be sure to calculate overtime properly, particularly when the non-exempt employee receives additional compensation outside of the normal hourly/salary base pay rate. Generally, a bonus given to employees which is used to motivate performance, productivity, quality or accuracy must be included in the regular rate. Bonuses such as commissions, incentive pay, gain sharing and perfect attendance awards are considered "bonuses" and must be included when calculating overtime rates. The most common exceptions to this

bonus rule are holiday/gift bonuses, as long as they are not linked to hours worked or production and impromptu discretionary bonuses, as long as it is not known or announced in advance. Other payments that must be included in the regular rate are shift differentials, nighttime pay, premium pay for hazardous, arduous or dirty work.

Employers also need to make sure that employees are being properly paid if they work two different jobs at two different wage rates. There are various ways to calculate the regular rate of pay.

Finally, employers do not have to include in the 40 hours any hours for which the employee was paid, but did not work. For instance, if an employee takes a day off and is paid for vacation or sick leave, those hours are not included in the 40. Thus, an employee must actually work more than 40 hours a week to be entitled to overtime under the Fair Labor Standards Act.

If an employee's wages vary from week to week because of bonuses or other incentive type pay, the employer will have to calculate the regular rate on a weekly basis. That rate may differ from week to week depending on the employee's wages. The employee is entitled to overtime at the regular rate of pay for that week for all hours worked over 40.

*Example: Employee makes \$8.00 an hour. He receives a bonus of \$9.20 for the week. He works 46 hours. The regular rate of pay for overtime purposes is recalculated to be \$8.20 an hour.*

*Compensation w/o bonus: 46 hrs. x \$8.00 (base pay) = \$368.00*

*Total compensation: \$368.00 + \$9.20 (production bonus) = \$377.20*

*Divide \$377.20 by 46 hrs. (total hrs.) = \$8.20*

*RR x 0.5 x overtime hours: \$8.20 x 0.5 x 6 = \$24.60*

*Because this employee worked an additional 6 hrs. of overtime (46 hours – 40 hours = 6 hours), the overtime pay due him is \$24.60*

*Total gross pay equals total compensation + overtime:*

*\$377.20 equals \$377.20 (total compensation)  
plus \$24.60 (overtime pay) = \$401.80 (total gross pay)*

## **VII. FAIR LABOR STANDARDS ACT-APPLICATION TO PUBLIC EMPLOYERS**

### **A. Coverage**

Section 3(s)(1)(C) of the FLSA covers all public agency employees of a State, or  
a

political subdivision. However, Section 3(e)(2)(C) of the Act excludes from the definition of “employee”, and thus from coverage, certain individuals employed by public agencies.

- elected public officials, their immediate advisors/personal staff members, and certain individuals whom they appoint or select to serve in various capacities;
- employees of legislative branches of State and local governments;
- the individuals in question must not be subject to the civil service laws of their employing agencies. A “member of personal staff” are:
  - persons who are under the direct supervision of the elected official
  - who serve solely at the pleasure or discretion of the elected official
  - who have regular contact with such official

(Typically does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official.) Examples: the term might include the elected official's personal secretary, but would not include the secretary to an assistant.

## **B. Occasional or Sporadic Employment**

The FLSA provides that where State or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the *same* public agency in a *different capacity* from their regular employment, the hours worked in the different jobs *shall not be combined* for the purpose of determining overtime liability under the Act

**Occasional or sporadic** means infrequent, irregular, or occurring in scattered instances (i.e. when there is an occasional need for additional resources in the delivery of certain types of public services which is at times best met by the part-time employment of an individual who is already a public employee); must do it *freely and solely* at their own option

Such hours worked are to be *excluded* from computing overtime compensation due only where the occasional or sporadic assignments are not within the same general occupational category as the employee's regular work.

**Examples:** *Public recreation and park facilities, and stadiums or auditoriums* utilize employees in occasional or sporadic work (the taking of tickets, providing security for special events (e.g., concerts, sports events, and lectures), officiating at youth or other recreation and sports events, or engaging in food or beverage sales at special events, such as a county

fair. An activity does not fail to be occasional merely because it is recurring. In contrast, for example, if a parks department clerk, in addition to his or her regular job, also regularly works additional hours on a part-time basis (e.g., every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does *not* constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

*Different capacity*-must be in a different capacity, i.e., it must not fall within the same general occupational category. (example: a bookkeeper or bus driver or mail clerk for a municipal park agency or a city occasionally referees for an adult evening basketball league sponsored by the city, BUT any activity traditionally associated with teaching (e.g., coaching, career counseling, etc.) will **not** be considered as employment in a different capacity.

### **C. Exemptions: Specific Employees**

#### **Police Officers, Fire Fighters and Other First Responders**

Generally, police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees ("first responders") who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and other similar work *are not exempt* under Section 13(a)(1) or the regulations and thus are protected by the minimum wage and overtime provisions of the FLSA. Although some first responders have college degrees, a specialized academic degree is not a standard prerequisite for employment.

Section 7(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a "work period" basis. A "work period" may be from 7 consecutive days to 28 consecutive days in length. For example, fire protection personnel are due overtime under such a plan after 212 hours worked during a 28-day period, while law enforcement personnel must receive overtime after 171 hours worked during a 28-day period. For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours which bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28.

### **D. Compensatory Time**

Although the use of compensatory time or “comp time” in lieu of paying overtime wages, is not available to private-sector employers, Congress made the option available to public-sector employers to address financial hardship to states, cities and other public entities caused by having to pay overtime wages

A State or local government agency may give compensatory time at a rate of not less than one and one-half hours for each overtime hour worked, in lieu of cash overtime compensation. Employees engaged in police and fire protection work may accrue up to 480 hours of compensatory time.

1. The FLSA also sets other guidelines for the accumulation and use of compensatory time.
  - Some type of agreement or understanding regarding compensatory time must be reached between the employer and the employee **prior to the performance of the work** for which compensatory time is granted
  - When an employee has a bargaining representative, the agreement or understanding concerning compensatory time must be executed by the employer and the representative either through a collective bargaining agreement, memorandum of understanding, or other agreement.
  - When a public employee does not have a bargaining representative, the agreement or understanding regarding compensatory time must be executed between the employer and the individual employee. The agreement or understanding between the employer and non-represented employee need not be in writing. However, the employer is required to keep a record of the existence of the agreement. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be granted in lieu of overtime pay. If the employee does not voice an objection to receiving compensatory time off in lieu of overtime pay after the employee has received the notice, an agreement or understanding will be presumed to exist.
  - An employer need not adopt the same agreement with each of its non-represented employees.
  - No agreement or understanding is required for employees who have no bargaining representative and who were hired prior to April 15, 1986, if the employer had a regular practice of granting compensatory time off in effect. The employer and such employees

are considered to have reached an agreement or understanding as of April 15, 1986.

- Employees generally may accrue up to 240 hours of compensatory time. Because compensatory time is accumulated at time and one-half, 240 hours of compensatory time is earned upon 160 hours of actual overtime work.
- Employees who are engaged in public safety, emergency response, or seasonal activities may accumulate up to 480 hours of compensatory time or 320 hours of overtime worked. Employees engaged in a seasonal activity include those who work during periods of significantly increased demand that occur on a regular and recurring basis.
- Monetary overtime compensation must be paid for overtime in excess of the 240 or 480-hour compensatory time limits. The FLSA and accompanying federal regulations further provide that an employee must not be coerced into accepting more compensatory time off than the employer realistically, and in good faith, expects to be able to grant.

## **2. Use of Compensatory Time**

Public employers often find themselves between a rock and a hard place when it comes to administering the overtime provisions of the FLSA. Those public employers who necessarily utilize significant amounts of overtime, such as safety forces and other twenty-four hour, seven day week, operations have had two choices: (1) pay the overtime at one and one-half times the regular rate of pay; or, (2) permit the employee to accrue compensatory time off at the rate of one and one-half hour for each hour of overtime worked. Although compensatory time may, in theory, be used to ease the immediate financial burden of overtime payments, compensatory time comes with its own set of difficulties.

In addressing compensatory time, 29 U.S.C. §207(o) (5) provides, in pertinent part:

[a]n employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency

—

(A) who has accrued compensatory time off . . .

and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time 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.

This language has generally been construed by the Department of Labor ("DOL"), and by courts, as requiring the employer to grant compensatory time off on the date and time specifically requested unless the request would "unduly disrupt" the employer's operations. Not surprisingly, the DOL has also construed the "unduly disrupt" language in the statute quite narrowly. Specifically, the DOL has stated that an undue disruption must be more than a mere inconvenience. The DOL has found that the necessity of paying one employee overtime to cover a second employee's compensatory time off is insufficient reason to deny the compensatory time request. [8/19/94 Wage and Hour Opinion Letter]. The legislative history provides the following example of what may constitute an "unduly disruptive" request for compensatory time off:

A request by a snow plow operator in Vermont to use 40 hours of compensatory time in February probably would be unduly disruptive. This would be true whether the request was made 8 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June probably would not be unduly disruptive.

An employee who has accrued compensatory time and requests use of the time must be permitted to use the time off within a reasonable period after making the request if the time off would not unduly disrupt the operations of the employer. A determination of whether a request to use compensatory time has been granted within a "reasonable period" is based upon the circumstances of a particular case after considering : 1) the normal schedule of work; 2) anticipated peak workloads based on past performance; 3) emergency requirements for staff and services; and 4) the availability of qualified substitute staff.

State and local employers can force employees to use accumulated compensatory time, according to the U.S. Supreme Court;

### **3. Cases Addressing the Use of Comp Time**

#### **a. *Christensen v. Harris County – U.S. Supreme Court***

In ***Christensen v. Harris County***, 2000 U.S. LEXIS 3003, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), employees of the Harris County Sheriff's Department sued, claiming that the FLSA prohibits a public employer from forcing employees to use compensatory time. The U.S. Supreme Court held that nothing in the FLSA or its implementing regulations prohibits an employer from compelling the use of compensatory time.

In ***Christensen***, the Court held that if the employer and employee agreed to compensatory time, then the employer was within its rights to force the use of that "comp" time. The agreement or understanding does not need to be formally reached or memorialized in writing. There does not need to be a specific pre-existing agreement about employees using accrued "comp" time. The FLSA protects the employee's right to **request** and use "comp" time in a reasonable period of time, and the Court clarified that it also gives the employer the right to **force** use of "comp" time in a reasonable period of time. Public employers may schedule nonexempt employees to use their accrued FLSA compensatory time as long as there was a prior agreement for "comp" time in lieu of cash overtime.

b. ***Beck v. City of Cleveland, 390 F. 3d 912 (6<sup>th</sup> Cir. 2004)***

In Cleveland, the police department kept a book in which officers who accrued overtime hours could sign up to take a particular day off. Once the officer-in-charge determined that there a sufficient number of officers would be on duty that day, comp-time leave was awarded on a first-come, first-served basis. The City denied a request if it was going to result in the City having to pay a substitute officer overtime wages to cover a shift for an officer who was using comp time.

In ***Beck v. City of Cleveland***, the Sixth Circuit Court of Appeals held that the City of Cleveland violated the FLSA by denying compensatory leave to avoid paying overtime to substitute employees. The Court found the phrase "unduly disrupt" to be ambiguous and relied on the Secretary of Labor 's opinion that paying overtime to substitute employees is not unduly disruptive. The Court found that the financial impact to the City's budget was not a sufficient reason under the FLSA to deny a worker's request to use a particular day as "comp time." Rather, the court said, the City would have to demonstrate that the police department's operations would be unduly disrupted by granting an officer's request to use accrued comp time. An employer therefore may not deny a compensatory leave request solely for economic reasons

Other federal appeals courts have ruled differently on public employers' flexibility when deciding whether to deny an employee's request to use comp time. (See Case No. 3) The U.S. Supreme Court may, therefore, have to settle the dispute among the Circuits.

c. ***Houston Police Officers' Union v. City of Huston, No. 01-21117 (5th Cir., April 29, 2003)***

On April 29, 2003, the Fifth Circuit Court of Appeals determined that the DOL's restrictive view of the use of compensatory time off was contrary to plain statutory language. The Houston Police Department developed a system where an officer wishing to use his accrued comp time had to sign his name in his unit's Red Book for the day(s) he wished to take off. If the Red Book's limit for the requested day had not been reached, the officer received his requested comp time. If the available slots on the day in question were filled, the employee was not permitted to use comp time on that day. The available time-off space in the Red Book was limited to ten percent of the unit's staff.

The Union sued, arguing that the Police Department's method of distributing compensatory time was in violation of federal law. A district court judgment in favor of the employer was subsequently appealed to the Fifth Circuit. The City contended that the phrase 'within a reasonable period after making the request' obliges an employment public agency to authorize an employee's use of accrued comp time with a certain temporal range (a "reasonable period") following the date on which the request is made. The Union argued that the employer must allow the employee's use of comp time on the day specifically requested, unless it would 'unduly disrupt' the agency's operations.

The Fifth Circuit supported the City's construction of the statutory language. The court held that "the statute does not require a public employer to authorize comp-time use as specifically requested by an employee (subject to the undue disruption clause), but instead requires that the comp time be permitted within a reasonable period after the employee requests its use."

The Fifth Circuit decision broadened the employer's options regarding an employee's use of compensatory time off so that an employer need only grant compensatory time off within a "reasonable" period of time after its request. The court also suggested that financial and general staffing / safety concerns may be sufficient reason to deny the use of compensatory time as being "unduly disruptive."

No discussion took place concerning the possibility of raising staffing levels by filling all vacancies over ten percent with overtime.

This decision is inconsistent with DOL regulations and other federal and state court holdings.

**C. Payment for Unused Compensatory Time**

Upon termination of employment an employee must be paid for unused compensatory time calculated at: 1) the average regular rate received by such employee during the last three years of employment; or 2) the final regular rate received by such employee, whichever is higher. The phrase "last three years of employment" means the three year period immediately prior to termination. Where the final period of employment is less than three years, the average rate must be calculated based upon the rates in effect during the final period of employment.

**D. Deductions in Pay for Furloughs for Exempt Employees**

29 CFR 541.710(b) states that a public exempt employee will **not** lose his/her exemption because the employee is subject to a deduction in pay for absences due to a budget required furlough except for the week in which the **furlough** occurs.

This means the employee doesn't lose his/her total exemption but does lose it for the week in which the furlough occurs (if the employee works more than 40 hours in the week in which the furlough occurs, the employee must be paid overtime).

In order to qualify, the employee must be 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**. The comments to the revised rule in the federal register further state the rule applies to budget-required furloughs **that are not regular and recurring**.

This was a rarely utilized tool until very recently. It seems clear however at this point that a public employer may require exempt employees to take a certain number of days off without losing their exemption for all weeks in which there is no furlough so long as it is accomplished with an ordinance, regulation or policy and it is not regular and recurring.

## **E. Public Employees and Volunteer Activities**

### **1. Individuals May Volunteer Services to the City**

*Individuals* may volunteer or donate their services for public service, religious or humanitarian objections, not as employees and without contemplation of pay. An individual will be considered a volunteer under the FLSA if the individual:

- performs hours of service for a public agency for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation for services rendered; although a volunteer can be paid expenses, reasonable benefits, or a nominal fee to perform such services;
- offers services freely and without pressure or coercion; and
- is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

(29 C.F.R. § 553.101)

The FLSA places no limitations or restrictions on the types of services that these private individuals may render. The regulations provide the following list of permissible service activities for private individuals:

- helping out in a sheltered workshop;
- providing personal services to the sick or elderly in hospitals or nursing homes;
- assisting in school library or cafeteria;
- driving a school bus to carry a football team or band on a trip;
- volunteering as fire fighters or auxiliary police;
- working with children with disabilities or with disadvantaged youth;
- functioning as camp counselors in youth programs;
- soliciting contributions;
- participating in civic or charitable benefit programs;

- performing services to carryout charitable or educational programs.

(29 C.F.R. § 553.104)

## **2. Employees May Volunteer Services to the City in Certain Circumstances**

Public sector *employees* may (1) volunteer to do work in the jurisdiction in which they are employed so long as they volunteer to perform work that is *not* the same or similar work they perform as an employee; or (2) volunteer to do similar work in different jurisdictions. (29 C.F.R. § 553.101) If the individual is going to volunteer in the same jurisdiction in which he/she works, a determination should be made as to whether the volunteer services are closely related to the actual duties performed by or responsibilities assigned to the employee who “volunteers.” The phrase “same type of services” means similar or identical services. (29 C.F.R. § 553.103) Examples of volunteer services which do not constitute the same type of services are as follows:

- a city police officer who volunteers as a part-time referee in a basketball league sponsored by the city; or
- an employee of the city parks’ department who serves as a volunteer city fire fighter;

To the contrary, a fire fighter cannot volunteer as a fire fighter for the same public agency and a nurse employed by a state hospital may not volunteer to perform nursing services at the state operated health clinic. The purpose of this requirement is to reduce the possibility of coercing employees to perform unpaid services. (29 C.F.R. § 553.103)

## **3. Volunteers May Be Paid A Stipend**

Although “true volunteers” may expect no compensation in exchange for service, some may still receive reasonable benefits, a nominal fee, or any combination thereof, without losing their volunteer status. (29 C.F.R. § 553.106) No specific amount of compensation separates an employee from a volunteer. The DOL regulations, however, address this issue in relation to some of the questions raised for volunteers of public agencies. These offer a number of examples of payment, reimbursement benefits and awards that will not deprive an individual of his volunteer status including:

- uniform allowance or reimbursement for reasonable cleaning expenses paid to volunteers requiring a uniform to perform their duties;

- reimbursement for out-of-pocket expenses incidental to providing volunteer services, including costs of meals and transportation;
- reimbursement for tuition, transportation and meal costs involved in attending classes to learn how to affectively perform volunteer services;
- reimbursement for books, supplies and other materials essential to volunteer training;
- reasonable benefits, including inclusion in a group liability, health, life, disability and workers' compensation insurance plans and pension plans;
- awards such as length of service awards.

(29 C.F.R. § 553.106)

To determine whether a payment constitutes a "nominal fee" that will not result in a volunteer's loss of FLSA exempt status, the DOL may examine the following:

- the distance traveled and the time and effort expended by the volunteer;
- whether the volunteer has agreed to be available around the clock or only during certain time periods;
- whether the volunteer provides services as needed throughout the year.

The regulations further specify that an individual who volunteers to provide periodic services on a year round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status. (29 C.F.R. § 553.106[e])

The DOL reserves the right to examine each case on an individual basis in the context of the economic realities of the particular situation. (29 C.F.R. § 553[f]) Courts also look at the "economic realities" of a particular situation to determine an individual's employment status. Using the "economic realities" test, some courts have ruled that an employee is one who is dependent for sustenance upon the business for which he or she renders services. Thus, if a worker expects to receive compensation, whether as cash or as in kind benefits in exchange for the services rendered, the services constitute employment.

#### 4. Department Of Labor Opinion Letters

The Department of Labor (“DOL”) clarifies the definition of volunteer through the issuance of Opinion Letters.

a. ***Paid Fire Fighter Employed by Private Non-Profit Volunteer Fire Department***

On December 18, 2008, the DOL addressed whether a paid fire fighter employed by a private non-profit volunteer fire department may volunteer to perform duties similar to his or her paid duties for the *same* fire department during off-duty hours at no pay. The DOL concluded the fire fighters could not volunteer for the same employer doing the same work on off duty hours. The DOL clarified that office employees of a volunteer fire department may volunteer to provide fire fighting services to the same department during off-duty hours without being paid as this volunteer work is different in kind from the employee’s regular duties. On the other hand, a regular office employee may not volunteer to perform similar office work arising from a special fund drive or other operations of a volunteer fire department without being compensated in accordance with the FLSA. Thus, fire fighters may not work some shifts for pay and other shifts on a volunteer unpaid basis because the volunteer unpaid work consists of the same type of services.

b. ***Paid Emergency EMT’s May Volunteer to Provide the Same Services for the Local Volunteer Emergency CREW: The City and CREW Do Not Constitute the Same Public Agency***

In a somewhat strange Opinion, the DOL concluded on December 18, 2008 that paid emergency medical technicians (“EMT’s”) employed by the county may volunteer to provide the same services for the local volunteer emergency CREW under the FLSA.

The DOL opined that county-employed emergency medical technicians are able to volunteer to provide emergency medical services for local volunteer emergency CREW without violating the FLSA. The DOL found that the county and CREW did not constitute the same public agency. The relevant facts included:

- CREW members voted to elect officers;
- CREW had a board of trustees made of public citizens that maintained its own set of by-laws and policies;

- the county did not control the CREW's personnel decisions;
- and
- the county only paid for 20% of the CREW's operating expenses.

**c. *Volunteers Paid Nominal Fees***

On November 10, 2005, the DOL issued an Opinion Letter addressing what constituted a "nominal fee" that may be paid to a volunteer under the FLSA. The DOL clarified that a "nominal fee" is not a substitute for compensation and must not be tied to productivity. Whether a fee constitutes a substitute for compensation or whether it is tied to productivity depends on the "economic realities of the particular situation." In the context of the school coach or school advisor, the key factor is whether the fee varies depending on the time spent engaged in the volunteer activity or the success or failure of the team or activity. The DOL provided an economic realities test stating that a fee would be *presumed* nominal if it did not exceed 20% of what the public agency would otherwise pay to hire someone to provide the same services. Applying these factors to a school custodian acting as a volunteer sports coach, the DOL stated that as long as the custodian agreed to volunteer, without pressure or coercion from the school, a \$3,675 fee would be considered nominal if it did not exceed 20% of what the school would otherwise pay to hire a coach for the same activity.

**5. Volunteers May Be Covered By A Public Entity's Workers' Compensation Insurance In Ohio**

Volunteers are generally not covered by workers' compensation in Ohio because they receive no wages. However, public employers such as cities, townships and villages are required to carry workers' compensation coverage for the volunteer *emergency service personnel* they engage. Examples of volunteer emergency service occupations requiring coverage would be:

- volunteer fire fighters;
- volunteer police officers;
- volunteer emergency medical technicians.

In addition, public employers in Ohio *may elect* to cover volunteer workers who perform *non-emergency* duties and persons assigned volunteer work instead of a fine or jail sentence. The public employer would use Ohio

BWC Form Contract U-69 for individuals performing volunteer services. (A copy of the contract form U-69 is attached.) To initiate coverage, the employer's appointing authority must pass a resolution authorizing the public employer to enter into a contract with BWC. (See sample attached.) The employer must sign and date U-69 and submit a copy of the resolution and U-69 to BWC. The employer then creates, keeps and maintains a roster of individuals to be included in the contract. The employer does not, however, need to submit the roster to the BWC. The volunteer information must be submitted on a payroll report form.

## **VIII. MISCLASSIFICATION AS INDEPENDENT CONTRACTOR**

The IRS, DOL and Ohio Attorney General have all announced their intent to increase enforcement efforts targeting employees misclassified as Independent Contractors. A report issued by the Ohio Attorney General's office estimated that the extent of annual costs to the state from worker misclassification totals \$100 million in payments for unemployment compensation, more than \$510 million in BWC premiums and almost \$180 million in forgone state income tax revenues. In addition, the IRS has advertised that it will be auditing 6000 companies over the next 3 years.

Companies classifying workers as independent contractors will need to show that they lack the necessary control over work that would indicate an employee-employer relationship. Before analyzing control, employers should look at two questions:

1. Does the hiring company pay its regular employees to perform essentially the same duties as the independent contractor?
2. Has that worker previously been paid by the company as an employee to perform essentially the same work?

### **A. 20 Factor Test – IRS**

The IRS typically uses a 20 Factor test:

- *No Instructions.* Independent contractors are not required to follow, nor are they furnished with, instructions to accomplish a job.
- *No Training.* Independent contractors typically do not receive training by the hiring firm. They use their own methods to accomplish the work.
- *Others can be hired.* Independent contractors are hired to provide a result and usually have the right to hire others to do the actual work.
- *Independent contractor's work not essential.* A company's success or continuation should not depend on the service of outside independent contractors. An example violating this would be a law firm which called their

lawyers independent contractors.

- *No time clock.* Independent contractors set their own work hours.
- *No permanent relationship.* Usually independent contractors don't have a continuing relationship with a hiring company. The relationship can be frequent, but it must be at irregular intervals, on call, or whenever work is available.
- *Independent contractors control their own workers.* Independent contractors shouldn't hire, supervise, or pay assistants at the direction of the hiring company. If assistants are hired, it should be at the independent contractor's sole discretion.
- *Other jobs.* Independent contractors should have enough time available to pursue other gainful work.
- *Location.* Independent contractors control where they work. If they work on the premises of the hiring company, it is not under that company's direction or supervision.
- *Order of work.* Independent contractors determine the order and sequence in which they will perform their work.
- *No interim reports.* Independent contractors are hired for the final result only. They should not be asked for progress or interim reports.
- *No hourly pay.* Independent contractors are paid by the job, not by time. Payment by the job can include periodic payments based on a percentage of job completed. Payment can be based on the number of hours needed to do the job times a fixed hourly rate. Payment method should be determined before the job commences.
- *Multiple Firms.* Independent contractors often work for more than one firm at a time.
- *Business expenses.* Independent contractors are generally responsible for their own business expenses.
- *Own tools.* Independent contractors usually furnish their own tools. Some hiring firms have leased equipment to their independent contractors so that they could show the independent contractor had their own tools and an investment in their business. This strategy won't work if the lease is for a nominal amount or can be voided by the hiring firm at will. The lease must be equivalent to what an independent business person could have obtained in the open market.
- *Significant investment.* Independent contractors should be able to perform their services without the hiring company's facilities (equipment, office furniture, machinery, etc.). The independent contractor's investment in his trade must be real, essential, and adequate.
- *Services available to the public.* Independent contractors make their services available to the general public by one or more of the following:
  - 1) having an office and assistants;
  - 2) having business signs;
  - 3) having a business license;
  - 4) listing their services in a business directory; or

- 5) advertising their services.
- *Profit or Loss possibilities.* Independent contractors should be able to make a profit or a loss. Employees can't suffer a loss. Five circumstances show that a profit or loss is possible:
  - 1) the independent contractor hires, directs, and pays assistants;
  - 2) the independent contractor has his own office, equipment, materials, or facilities;
  - 3) the independent contractor has continuing and recurring liabilities;
  - 4) the independent contractor has agreed to perform specific jobs for prices agreed upon in advance; and
  - 5) the independent contractor's services affect his own business reputation.
- *Can't be fired.* Independent contractors can't be fired so long as they produce a result which meets the contract specifications.

- *No compensation if the job isn't done.* Independent contractors are responsible for the satisfactory completion of a job or they may be legally obligated to compensate the hiring firm for failure to complete.

## **B. DOL Uses “Economic Reality” Test**

The DOL typically uses the Economic Reality test. The test focuses on the degree of economic dependence of the would be employee on the business with which she is connected. The more the worker financially relies on the business, the more likely an employment relationship exists.

### **The DOL and the courts consider:**

1. The Degree of employer’s right to control the manner in which the work is performed
2. Degree of skill required to perform the work
3. Worker's investment in the business
4. The permanence of the working relationship
5. The worker’s opportunity for profit/loss, and
6. The extent to which the work is an integral part of the business
7. CONTROL, CONTROL, CONTROL is the key

## **C. Misclassification Rules**

The DOL’s Wage and Hour Division also recently published an anticipated proposed rule addressing the misclassification of employees under the FLSA. As a part of the implementation of the “Plan/Protect/Prevent strategy,” the Wage Hour Department’s proposal establishes a requirement that employers provide workers with basic information about their employment, including how their pay is calculated. Further, any employer that seeks to exclude a worker from the FLSA’s coverage would be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to any Wage/Hour enforcement personnel who might request it. Specifically, companies that classify workers as independent contractors will have to prepare a written explanation of why these workers should be considered contractors as opposed to employees. These explanations must be provided to the contractors. What isn’t clear is whether this same procedure must be conducted for employees who are classified as exempt from the FLSA’s minimum wage and overtime provisions. The DOL announced that it plans to issue a formal notice of proposed rule-making for this rule in August. At that time, employers will have opportunities to make comments on the proposed rule.