



Frequent FLSA Liability Risks in Public Agencies

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GENERAL INFORMATION ABOUT THE FAIR LABOR STANDARDS ACT CAN BE FOUND IN THE MUNICIPAL LAW HANDBOOK, CHAPTER 4, "PERSONNEL," SECTION III, "WAGE AND HOUR LAWS."

[HTTP://ONLAW.CEB.COM/ONLAW/GATEWAY.DLL?F=TEMPLATES&FN=DEFAULT.HTM&VID=ONLAW:CEB](http://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=onlaw:ceb)

BACKGROUND OF FLSA LITIGATION AGAINST PUBLIC ENTITIES

Congress enacted the FLSA in 1937 to protect workers from substandard wages and oppressive working hours and conditions that were detrimental to the "health, efficiency, and general well being of workers."¹ The FLSA was "designed to give specific minimum protection to individual workers and to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of 'overwork' as well as 'underpay.'"² The Act was primarily aimed at protecting vulnerable workers - children and underpaid sweatshop employees. The Act did not apply to public agencies and the FLSA regulations initially issued by the United States Department of Labor ("DOL") did not contemplate the Act applying to public agencies.

The FLSA was originally drafted to apply to manufacturing and retail industries. The text of the statute itself, and many of the regulations, interpretations and opinion letters issued by the U.S. Department of Labor, are not easily applied to the diverse and unique types of services provided by municipalities.

Nonetheless, a few decades later Congress began attempting to apply the FLSA to public employers.³ The FLSA became fully applicable to public agencies after a Supreme Court decision in 1985 (*Garcia v. San Antonio Metropolitan Transit Authority*).⁴ Many public agencies were ill-prepared for the transition to an FLSA environment that the Court suddenly thrust upon them. But employees were prepared to sue their employers for violating the FLSA. The *Garcia* decision triggered a flood of FLSA litigation against public agencies that has continued through the present day.

In California, municipalities are generally not subject to California wage and hour laws⁵. However, the ubiquitous nature of wage and hour litigation in the private sector for missed meal breaks and non-compliant pay stubs under state wage law has resulted in many multi-million dollar settlements and verdicts. As a result of the awareness of the potential recovery in wage and hour cases, FLSA litigation continues to expand and evolve against municipalities. Additionally, liquidated (double) damages are mandatory in FLSA cases unless an employer can prove it acted in good faith, which is far more difficult to prove under Ninth Circuit precedent than one might expect.⁶ A further incentive for FLSA litigation is that a plaintiffs will recover attorney's fees and costs if an FLSA violation is proved.

OVERVIEW OF THE FLSA

Although the DOL has issued hundreds of pages of regulations and interpretations regarding the FLSA, the issues that most commonly present liability issues for municipal employers involve employees who are eligible to receive overtime under the FLSA, commonly referred to as “non-exempt” employees.

The FLSA issues that present a greater risk of liability to municipalities are those claims that can be brought as collective actions that include significant numbers of employees. Under the FLSA, an employee can ask the court to certify a collective action and send a notice out to all similarly situated employees to solicit them to join the lawsuit.⁷ The standard required for preliminary certification to send out a notice of collective action is a very low bar, and can result in large numbers of employees opting-in to the lawsuit. The most frequent FLSA liability issues for municipalities fall into the following categories:

1. Workweek and Work Period Designations
 - a. Designation of FLSA Workweeks for All Employees
 - b. Proper Designation of Public Safety Work Periods
 - i. Law Enforcement
 - ii. Fire Protection
 - c. Level Pay Plans for Firefighters
2. Regular Rate of Pay
 - a. Cash Back in Lieu of Health Insurance
 - b. Sick Leave Buy Backs
 - c. Holiday-in-Lieu Pay
3. Off the Clock Work
 - a. Remote Work Arrangements
4. Overtime Exemptions
 - a. Administrative Exemption
 - b. First Responders

EMPLOYERS MUST DESIGNATE FLSA WORKWEEKS FOR ALL EMPLOYEES

Employers are required to designate FLSA work periods for each of their non-exempt employees that states the time of day and day of week on which the employee’s FLSA work period begins and ends.⁸ The most common work period for most civilian employees is a 7 day work week for which a non-exempt employee is entitled to overtime after actually working 40 hours.⁹ FLSA overtime is owed based upon whether the employee works in excess of the FLSA limit for that work period. The FLSA work week, not the calendar week or the pay period, is what must be used to calculate FLSA overtime for non-exempt employees.¹⁰

Many municipalities have a 9/80 work schedule in which they work nine days instead of ten in a two week period, with eight nine hour days and one eight hour day. The FLSA work week must be carefully designated so that employees on a 9/80 schedule do not cause the employer to incur automatic FLSA overtime every other week. The FLSA does not permit employers to average

overtime over multiple FLSA work weeks or work periods.¹¹ Thus, an overpayment of 4 hours in one FLSA work week cannot be used to offset an underpayment of 4 hours in a subsequent work week.

If the employee on a 9/80 work schedule typically has every other Friday off, the work week must be designated to start and stop four hours into the employee's Friday work shift. This means that if the employee's work shift normally starts at 8 a.m., overtime is calculated from noon on Friday until noon on the following Friday for FLSA purposes. Employers must insure that their payroll system is capable of paying FLSA overtime based on FLSA workweeks.

DESIGNATION OF PUBLIC SAFETY WORK PERIODS

Proper designation of a work period is even more critical for fire and police employees. Those employees may be eligible for a separate work period of between 7 and 28 days pursuant to section 207(k) of the FLSA, commonly known as a "7(k)" work period.¹² Overtime is paid based upon a ratio according to the length of the work period - 7.57 hours per day for firefighters and 6.11 hours per day for law enforcement.¹³ Typically municipalities adopt a 28 day work period for law enforcement and a 24 or 27 day work period for fire fighters, although any length of work period between 7 and 28 days is permitted.

Since most municipalities pay employees based on a 14 day pay period, the 7(k) work period may not precisely match up with the pay period. Computation of FLSA overtime for those safety employees requires that the payroll system calculate the hours worked over multiple pay periods to determine whether any FLSA overtime is owed. As noted previously, each FLSA work period stands alone for purposes of computing FLSA overtime, and FLSA overtime cannot be averaged over multiple FLSA work periods.

The FLSA contains a number of specific requirements that must be met for a public safety employee to be eligible for a 7(k) work period. For law enforcement, the most significant requirement is that the employee have the power to arrest.¹⁴ For fire protection employees, the most significant requirement is that the employee have an actual responsibility to engage in fire suppression.¹⁵ This requirement may render fire department employees who only perform EMS services ineligible for a 7(k) work period depending on the circumstances.

Municipalities must be careful to designate section 7(k) work periods that actually correspond to the schedules of public safety employees to avoid inadvertent overtime. For law enforcement employees, a 28 or 14 day work period will normally be the optimal schedule. For fire protection employees, a 27 or 24 day work period will normally be the optimal schedule if they work a platoon schedule that is based on 3 different platoons. If firefighters are placed on a 7(k) work period that does not match their platoon schedule, such as a 14 day or 28 day work period, calculation of hours worked and FLSA overtime owed will be extremely difficult because firefighters on each shift will be regularly scheduled to work varying amounts of hours within the 14 or 28 day work period.

LEVEL PAY PLANS FOR FIREFIGHTERS

Firefighters may negotiate level pay plans with their department, so they are paid as if they worked 56 hours each week. In fact, firefighters who work 24 hour shifts on an “ABC” platoon schedule will not work exactly 56 hours in a week. The assumption that a firefighter works an average of 56 hours per week will result in underpayment of FLSA overtime for some pay periods and overpayment for other periods. The FLSA strictly prohibits the averaging of FLSA overtime over work periods, and the DOL has specifically prohibited this practice regarding firefighters. While it may be possible to set up a level pay plan that is FLSA compliant by prepaying overtime, it requires a great deal of attention to how the level pay plan is created.¹⁶

THE REGULAR RATE OF PAY

The FLSA requires that overtime compensation be paid at one and one-half times the employee’s regular rate of pay.¹⁷ Although the term “regular rate” is often associated with an employee’s base salary or pay, the FLSA has its own specific definition of the term. The FLSA requires that the regular rate of pay include “all remuneration for employment paid to, or on behalf of, the employee,” except those payments that are specifically excluded by statute. There are only seven statutory exclusions from the regular rate of pay, and employers must be careful to identify which statutory exclusion applies if remuneration is excluded from an employee’s regular rate of pay.¹⁸

The regular rate is generally calculated by dividing the compensation that goes into the regular rate in the work period by the hours worked in the work period that the compensation was intended to compensate.¹⁹ Payments for shift differentials, hazardous duty pay, bilingual pay, special assignment pay, and educational incentive pay are examples of specialty pay types that must be included in the regular rate of pay. Payments made to employees for being on unrestricted standby or on call time must be included in the employees’ regular rate of pay.²⁰ Correct computation of the regular rate of pay requires that the on-call amount be included with the compensation for normally scheduled hours for that workweek to determine the regular rate of pay. These payments will result in an FLSA regular rate of pay for overtime purposes that is higher than the employee’s base hourly rate.

Municipalities are obligated to review all payments made to employees to determine whether they must be included in the employee’s FLSA regular rate of pay. Whether a payment is reportable compensation for retirement purposes or considered taxable income for IRS purposes will not be determinative of its FLSA regular rate treatment. The Ninth Circuit recently found an employer to have willfully violated the FLSA because of an erroneous decision made by a junior level payroll employee about payment of overtime.

REGULAR RATE AREAS OF CONCERN

1. CASH BACK IN LIEU OF HEALTH INSURANCE

Payments made to employees who opt-out of an employer's health insurance plan have been a major source of litigation against municipalities since the Ninth Circuit's decision in *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016). *Flores* held that a cash payment made to an employee for opting out of health insurance is remuneration for employment that must be included in that employee's regular rate of pay. Additionally, if the cash payment is made pursuant to a cafeteria plan, and the plan permits employees to recover more than an incidental amount of the plan benefits in cash, the plan is not considered "bona fide" for FLSA purposes.²¹ If the plan is not bona fide, **all** of the employer's contributions to the cafeteria plan must be included in the employees' regular rates of pay.²² A non bona fide plan could result in significant increases in the overtime rates for all of the non-exempt employees in the municipality.²³

The issue of how much cash back from a cafeteria plan is "incidental" is currently unsettled. The Ninth Circuit held in *Flores* that forty percent or more of the plan benefits being paid back to employees in cash is not incidental, but declined to specify what percentage would be incidental. The DOL has opined that cash back payments are incidental if no more than twenty percent of the plan benefits are paid back in cash.²⁴ While DOL opinions are not binding on courts and are only entitled to respect by courts to the extent that the opinion is persuasive, at least one federal court decision has found that providing cash back around twenty percent of plan benefits is incidental.²⁵ Additionally, an employer has a good faith defense to liability under the FLSA if it can prove that it relied upon an official interpretation of the DOL.²⁶

2. SICK LEAVE BUY BACK PAYMENTS

Federal circuit courts have split on the issue of whether buy backs paid to employees for unused sick leave must be included in their regular rate of pay. However, the DOL has taken the position that all leave buy backs are excluded from an employee's regular rate of pay.²⁷ For sick leave buy backs to be excluded, the DOL opines that each sick leave hour must be cashed out at its full value and the employee's sick leave bank must be reduced by an hour. Nonetheless, the DOL also opined that sick leave buy backs should be included in the employee's regular rate of pay if they operate as a de facto attendance bonus.

3. HOLIDAY PAY

Holiday pay may be excluded from the regular rate of pay if it is provided to an employee for not working on a holiday.²⁸ However, some employers provide "holiday in lieu" pay, where an employee receives a fixed amount of holiday pay in a lump sum or percentage amount each pay period or each year, regardless of when the holiday occurs or whether the employee worked that holiday. Several courts have held that holiday in lieu pay is not excludable as pay for time not

worked and must be included in an employee's regular rate of pay.²⁹ However, the Department of Labor has opined that holiday in lieu pay may be excluded from the regular rate of pay.³⁰ Given the number of federal court decisions holding that holiday in lieu pay should be included in the regular rate, and the lack of Ninth Circuit guidance, municipalities should be cautious about relying on the DOL's guidance on this issue.

OFF THE CLOCK WORK

Generally, “[w]ork not requested but suffered or permitted is work time” under the FLSA.³¹ If an employer allows an employee to work, such time will be considered “hours worked” even if the work is carried out before or after normal work hours, during an unpaid meal break or away from the work premises. Work that an employer allows employees to perform will count toward hours worked, even if the employee performs the work on a voluntary basis. The interpretative bulletins provide that work time includes hours an employee voluntarily continues to work at the end of a shift in order to finish an assigned task, correct errors, or prepare time reports or other records. The reason is immaterial. If the employer knows or has reason to believe the employee is continuing to work, the time is work time. This is true even if the employee does not report the time worked on a timesheet or in a timekeeping system.

The FLSA permits employers to adopt overtime policies that prohibit employees from performing unapproved work before or after work hours. However, those policies must be enforced to prevent liability for an employer for off the clock work. The FLSA imposes a stringent burden on management to exercise control and ensure that work is not performed. The DOL interpretative bulletins provide that an employer cannot sit back and accept the benefits of an employee's work without compensating for them even if it has a rule prohibiting that work.³² An employer must show it has enforced its policy through disciplinary and corrective measures to avoid FLSA claims for off the clock work time.

However, an employer that does issue good overtime policies and trains its employees on the importance of following those policies may have a defense to off the clock work claims. If an employer issues a policy requiring employees to accurately record their hours worked including overtime hours worked, the employer has the right to expect their employees will follow the policy, absent some indication to the contrary.³³ An employer is not liable for overtime if the employee affirmatively prevents the employer from learning about the overtime worked by not reporting it despite a strong overtime policy.

The Portal to Portal Act of 1947 was enacted to limit the definition of compensable work under the FLSA to avoid unintended and absurd results. Under that Act, activities that are preliminary or postliminary to the employee's principal activity are only considered hours worked if they are “integral and indispensable to the principal activities that the employee is employed to perform.”³⁴ However, in practice it can be difficult to determine whether an activity is truly integral and indispensable to the employee's principal activity. This poses challenges for municipalities in several respects, particularly for non-exempt employees who work independently or work in the field or at a remote location.

The following are examples of claims non-exempt employees have made for off the clock work that could result in liability for the municipality:

- Working through an unpaid meal break
- Preparing reports after hours or at home
- Coming in early to obtain equipment or supplies for the work shift
- Off-duty maintenance of City equipment
- Answering emails or phone calls outside of work hours
- Monitoring work equipment, machines or events remotely over a computer
- Working after hours from home on a City-issued laptop or mobile device
- Travel that requires an overnight stay
- Attending trainings or classes that are required or recommended by the employer
- Coming in early or staying late to train or mentor employees
- Opening up or closing down a facility
- Waiting for residents or citizens to leave a City facility after hours

In each instance, the municipality may face liability for the activity if the municipality either knew, or should have known, that its employees were performing this uncompensated work. Knowledge can be imputed to the city through its managers, even if top city management does not know of the uncompensated work. Thus, an employer should also consider procedures to monitor that no uncompensated work is being performed, including regular training of employees on overtime procedures and audits of timekeeping and computerized records.

REMOTE WORK ARRANGEMENTS

If an employee resides on an employer's premises, the employee need not be paid for the entire time spent on the premises. In those situations, when an employee engages in personal activities where the employee has complete freedom from job duties, such as eating, sleeping, entertaining, or in some instances leaving the premises, the employee may not be considered to be working. Because it is difficult to determine actual work time, any reasonable agreement of the parties as to what time is and is not hours worked that takes into consideration all pertinent facts is accepted by the DOL.³⁵

When an employee is working at home, it is difficult if not impossible for an employer to monitor the employee's time and determine when the employee is working and when the employee is engaging in personal pursuits. Thus, an employer must rely on an employee to accurately report their time worked in the employer's timekeeping system. Employees who are working remotely should receive training on and be required to acknowledge the importance of accurately reporting their time worked.

As with work on an employer's premises, employers can enter into reasonable agreements with employees to define what time spent at home is considered hours worked, provided that the agreement takes into consideration all pertinent facts. Courts have rejected agreements between employees and employers that were found to not consider all pertinent facts and shortchange the employee.³⁶ In one case involving a police K9 officer, the Ninth Circuit found that the agreement was not reasonable because the city failed to consider the actual time that the K9

officer was spending off-duty caring for his police dog, and instead just relied on the amount of time that neighboring cities were paying. Thus, any agreement between a city and employee regarding work from home must include some reasonable inquiry into how much time an employee is actually working.

Under the DOL's continuous workday rule, all time spent by an employee from the beginning of their first principal activity during the workday until the completion of their last principal activity is hours worked under the FLSA, except for bona fide meal breaks.³⁷ An additional issue with remote work is that some employees are now working in a hybrid arrangement where part of their work day is at home and part of their work day is at their employer's premises. The DOL issued an opinion letter on December 31, 2020 to address the dilemma posed by the continuous workday rule for hybrid work arrangements.³⁸ That opinion letter opines that travel time between an employee's home and the work site is still considered non-compensable commute time, even if the employee starts or finishes the employee's workday at home. Nonetheless, employers should attempt to account for commute time in any remote working agreement.

OVERTIME EXEMPTIONS

Although there are many exemptions from FLSA overtime requirements, the three most common exemptions are the so-called white collar exemptions for executive, administrative and professional employees.³⁹ An employee must meet both the salary and the duties test to qualify for one of those overtime exemptions.

The salary test generally requires that an exempt employee receives a pre-determined amount of pay that is not subject to reduction because of the quality or quantity of work performed.⁴⁰ There is much confusion regarding pay deductions from overtime-exempt public employees for partial day absences. Requiring an employee to use accrued leave for partial day absences is not an improper deduction from pay.⁴¹ Additionally, public sector employers may actually deduct pay for partial day absences if they have a pay system based on principles of public accountability and certain other requirements are met.⁴²

The duties test tends to present more issues for FLSA compliance for public employers. There are specific duties that must be actually performed by the job as its primary duty to meet the executive, administrative or professional exemptions. Although there are multiple requirements for the executive exemption, the key test is generally whether the position supervises two or more full time employees. For the professional exemption, the key requirement is generally whether the position requires a specific degree or course of specialized intellectual study. The administrative exemption tends to present the most issues for public employers because of the vague definition of administrative duties. An employee must perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and exercise discretion and independent judgment with respect to matters of significance. The job classification or bargaining unit is not determinative of exempt status. Rather, exempt status is based upon actual job duties performed by that specific position. A common example of an administrative employee in a municipality is an analyst. Analyst positions can perform a wide range of functions in a municipality. Some analysts may perform

high level duties such as budgeting or human resources that require significant exercise of discretion and independent judgment. Other analyst positions may perform more routine clerical work or data tabulation that does not have sufficient independent judgment to meet the administrative duties test. Employers must insure that each analyst position actually meets the duties test above.

Another area of concern regarding overtime exemptions is first responders. The regulations specify that if the primary duty of an employee is fighting fires, rescuing victims, apprehending criminal suspects, or investigating crimes or fires, the employee is a non-exempt first responder who cannot satisfy any of the white collar exemptions.⁴³ However, high level fire or police employees can still be considered overtime-exempt if their primary duty is executive or administrative even though they respond to major fire or crime scenes.⁴⁴

CONCLUSION

While FLSA compliance can seem like a daunting and complex task for municipalities, many of the potential liability issues for municipalities can be prevented or largely mitigated through a systemic FLSA compliance plan. A critical step in ensuring FLSA compliance is to regularly review the municipality's FLSA compliance through internal reviews of payroll and timekeeping records and exemption classifications. Attorney oversight of the FLSA compliance review is important to both ensure legality and to maintain privilege for the findings of the review process. Additionally, a key proactive measure to avoid liability that is often overlooked is to provide regular FLSA compliance training to the payroll personnel who are actually processing timekeeping data and calculating payroll. These steps can greatly reduce the potential FLSA liability for a municipality and avoid the double damages and associated attorney's fees from an FLSA lawsuit.

1 *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981).

2 Id. (quoting President Roosevelt from the Congressional Record and *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942)).

3 Pub.L. 89-601, § 102(b).

4 *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

5 For example, state overtime laws do not apply to municipalities. (IWC Wage Order 4, 1(B)). State meal and rest break provisions do not apply to municipalities except for commercial transit drivers. (IWC Wage Order 9, 1(B)). However, state minimum wage law does apply to municipalities. (*Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552, 576.)

6 29 U.S.C. § 216(b); *Flores v. City of San Gabriel*, 824 F.3d 890, 905-06 (9th Cir. 2016).

7 29 U.S.C. § 216(b); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1099-1100 (9th Cir. 2018).

8 29 C.F.R. § 516.2(a)(5).

9 29 U.S.C. § 207(a)(1).

10 29 C.F.R. § 778.103.

11 29 C.F.R. § 778.104.

12 29 U.S.C. § 207(k).

13 29 C.F.R. § 553.230(c).

14 29 C.F.R. § 553.211.

15 29 U.S.C. § 203(y); *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005).

16 29 C.F.R. § 778.104; See DOL Administrative Letter Rulings, October 17, 1995 and February 12, 1998.

17 29 U.S.C. § 207(e).

18 29 U.S.C. § 207(e).

19 29 C.F.R. § 778.109.

20 29 C.F.R. § 778.223.

21 29 C.F.R. § 778.215(a)(5).

22 *Flores v. City of San Gabriel*, 824 F.3d 890,903 (9th Cir. 2016).

23 For example, if a cafeteria plan that provides \$1,000 per month in cafeteria benefits to its employees is found to not be bona fide, an employee who earns \$30 per hour could see an increase of the employee’s overtime rate from \$45 per hour to \$53.65 per hour.

24 84 Fed. Reg. 68760-61.

25 *In Re City of Redondo Beach FLSA Litigation*, 2019 WL 6310264 (C.D.Cal. 2019); See *Flores v. City of San Gabriel*, 824 F.3d 890, 903 (2016) (“opinion letters are ‘entitled to respect’ under *Skidmore* only to the extent that the agency’s interpretation has the ‘power to persuade.’”)

26 29 U.S.C. § 259.

27 84 Fed.Reg. 68741-42; See also *Balestrieri v. Menlo Park Fire Protection Dist.*, 800 F.3d 1094 (9th Cir. 2015).

28 29 U.S.C. § 207(e)(2).

29 See *Hart v. City of Alameda*, 2009 WL 1705612 (N.D.Cal. 2009); *McKinnon v. City of Merced*, 2018 WL 6601900 (E.D.Cal. 2018).

30 84 Fed.Reg. 68736, 68742-43.

31 29 C.F.R. § 785.11.

32 29 C.F.R. § 785.13.

33 *Forrester v. Roth’s IGA Foodliner*, 646 F.2d 413 (9th Cir. 1981); *Newton v. City of Henderson*, 47 F.3d 746 (5th Cir. 1995).

34 *Integrity Staffing Solutions v. Busk*, (2014) 574 U.S. 27.

35 29 C.F.R. § 785.23.

36 *Leever v. City of Carson City*, 360 F.3d 1014 (9th Cir. 2004).

37 29 C.F.R. § 790.6(b).

38 DOL Administrative Letter Ruling, December 31, 2020 (FLSA 2020-19).

39 29 C.F.R. Part 541.

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- ⁴⁰ 29 C.F.R. § 541.602(a).
⁴¹ *Barner v. City of Novato*, 17 F.3d 1256, 1261 (9th Cir. 1994).
⁴² 29 C.F.R. § 541.710(a).
⁴³ 29 C.F.R. § 541.3(b)(1).
⁴⁴ *Emmons v. City of Chesapeake*, 982 F.3d 245 (4th Cir. 2020).