

FLSA Hot Topics & Legal Updates

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Agenda

- Basic Requirements of FLSA
- Common Payroll System Errors
- Critical FLSA Compliance Considerations
- New DOL Regular Rate Rules
- Make Sure You...

Basic Requirements of FLSA

Basic Requirements of FLSA

- Pay minimum and overtime wages when due
 - “Straight time” for every hour actually worked up to maximum hours threshold
 - 1.5 x the regular rate for hours actually worked in excess of OT threshold
 - Wages are due on the regularly scheduled pay day
 - Late payment = failure to pay
 - FLSA compensation owed is measured on a workweek / work period basis (no offsetting)

Basic Requirements of FLSA

- For a payroll system to pay minimum and overtime FLSA wages when due, it must
 - Accurately measure hours worked
 - Measure overtime hours on a workweek / work period basis
 - Correctly calculate and pay overtime compensation due

On Time!

Common Payroll System Errors

Common Payroll System FLSA Errors

- Measures overtime hours on a pay period basis instead of workweek/work period basis
- Cannot measure hours actually worked in a day or workweek/work period
- Incorrect calculation of the FLSA regular rate
- Improper smoothing or averaging, and/or treats non-exempt employees like salaried-exempt
- Cannot administer “split days” and/or different workweeks for 9/80 schedules
- Cannot perform a dual calculation – calculate MOU overtime and FLSA overtime separately

Be Proactive!

Address FLSA-Specific Concerns at the Outset of Process

Ensure That Payroll System Can:

- Accurately record hours worked each day and on a workweek/work period basis
- Manage work periods with varying start/end dates (and of varying lengths for law enforcement/fire)
- Measure FLSA overtime on workweek or work period basis
- Correctly calculating overtime using MOU & FLSA methods (if different)

Case Study

- *Scalia v. Employer Solutions Staffing Group* (9th Cir. 2020) 951 F. 3d 1097
 - Low level payroll employee's erroneous decision not to pay overtime imputed to employer and sufficient for finding of willfulness and bad faith
 - "Because [employer's] violations were willful, employer could not have acted in good faith"

Critical Considerations for FLSA Compliance

Critical Consideration # 1 - Statutory vs. Contract OT

- Difference between statutory and non-statutory overtime
- Does your agency combine or separate statutory and non-statutory overtime?
- Dual calculation method?
- What overtime model is your agency using?

Critical Consideration #2 - Accuracy in Timekeeping

- FLSA requires employers to maintain accurate records of hours worked each workday and workweek/work period
- Accurate timekeeping records are also required to accurately pay employees their minimum & overtime wages

Critical Consideration #2 - Accuracy in Timekeeping

- How will hours data be entered into the payroll system?
 - Separate timekeeping system vs. all-in-one
 - Positive timekeeping
 - All time entered into system
 - Exception-based timekeeping
 - Only exceptions to regularly-scheduled time are entered into system

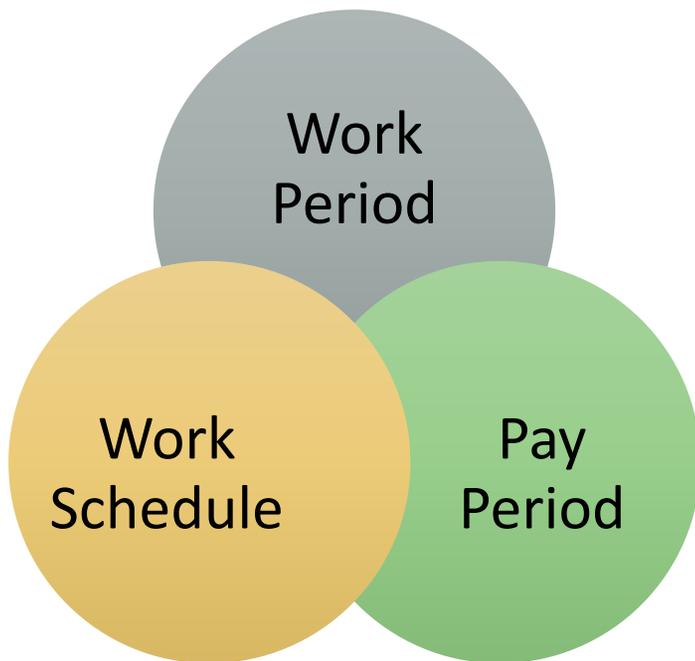
Important issue under telework arrangements!

Case Study

Danielle is a non-exempt employee who works a 9/80 schedule. Her “split day” is Thursday. Due to COVID-19, Danielle is teleworking. To help Danielle manage, her supervisor permits her to flex her time, starting later in the morning and finishing late at night. The agency has an exception-based timekeeping system. As long as Danielle works eight hours per day, she doesn’t enter anything into the payroll system. Even on Thursdays.

Any problems?

Critical Consideration #3 – Measuring Overtime by Work Period



- **Work Period**
 - Measures overtime under FLSA
 - Usually seven days in length with an overtime threshold of 40 hours / week
- **Work Schedule**
 - 48/96, 4/10, 5/8, 9/80, etc.
 - MOU may provide for OT for hours outside of work schedule
- **Pay Period**
 - 14 days, bi-monthly, monthly
 - System may calculate overtime based on pay period

Critical Consideration #3 – Measuring Overtime by Work Period

- FLSA overtime is measured on a “work period” basis - standard workweek is 7 consecutive 24-hour periods, i.e., 168 recurring hours
- Cannot offset excess hours in one week with lower hours worked in another
- If you have 9/80 employees, your system must be able to administer a “split day”

Measuring overtime on pay period basis alone may result in underpayment.

Critical Consideration #3 – Measuring Overtime by Work Period

Example

- Analyst Suzanne is scheduled to work 36 hours in week one and 44 hours in week two, totaling 80 hours in the two-week pay period = 4 FLSA OT hours in week 2
- Dispatcher George is scheduled to work 37.5 hours in week one, 37.5 hours in week two, 37.5 hours in week three, and 47.5 hours in week four, totaling 160 hours per four-week work cycle = 7.5 FLSA OT hours in week 4

Can your payroll system calculate FLSA overtime hours owed in these scenarios?

Critical Consideration #3 – Measuring Overtime by Work Period

207(k) Work Period for Safety

- Law enforcement and fire protection personnel are eligible for work periods of 7 - 28 days with overtime thresholds between 43-171 (LE) & 53-212 (fire)
- If your agency has 7(k) work periods, payroll system should be capable of measuring overtime hours on a work period and workweek basis
 - e.g. 28-day work period for LE and 7-day for everyone else

Critical Consideration #3 – Measuring Overtime by Work Period

System MUST:

- Measure hours actually worked on a workweek/work period basis (not pay period)
- Calculate overtime hours on workweek/work period basis (not pay period)
- Administer “split days” – sometimes many different split days

Critical Consideration #4 – Overtime Calculations

Regular Rate of Pay (RRP)

- The average hourly value of all compensation paid to an employee in a work period
- Presumption – all remuneration for employment is included
 - Unless remuneration is excluded by statute
 - 29 C.F.R. §778.108

Critical Consideration #4 – Overtime Calculations

Average hourly value – RRP – is arrived at via equation:

Total
Compensation

Total Hours
Worked

Critical Consideration #4 – Overtime Calculations

Steps the System Should Perform

- Step 1
 - Identify applicable work period and FLSA threshold
- Step 2
 - Identify total hours actually worked in the work period; evaluate whether hours actually worked in excess of FLSA OT threshold
- Step 3
 - Identify total work period payments to include in the FLSA RRP calculation
- Step 4
 - Calculate the FLSA RRP by dividing total work period compensation by total hours worked

New Regular Rate Rules

New DOL Regular Rate Rules

- First update to DOL rules on the regular rate in over fifty-years
- Rules effective January 2020 address inclusions and exclusions
- Rules effective August 2020 address proper regular rate calculation methodology

New DOL Regular Rate Rules

- Regular rate overview

- Non-exempt employees must be compensated at a premium rate for FLSA overtime hours worked
- The premium rate paid for FLSA overtime hours must be time and one half an employee's FLSA Regular Rate of Pay
 - Only applies to FLSA overtime hours, not to MOU overtime hours

New DOL Regular Rate Rules

- Regular rate includes all forms of compensation unless statutory excluded
- Primary Statutory Exclusions:
 - Sums paid as gifts
 - Payments for periods of non-work
 - Payments made to reimburse for expenses incurred on behalf of the employer
 - Contributions irrevocably made to trustee/third person pursuant to a bona fide benefits plan
 - Extra compensation paid for hours worked in excess of eight in a day, for work performed on holidays, hours outside normal schedule per labor agreement, etc.

Polling Question

Which of the below must be included in the regular rate?

- a. Hazard pay
- b. Cash-in-lieu of health benefits
- c. Standby pay
- d. All of the above

New DOL Regular Rate Rules

NEW Regulations Permit Exclusion of the Following Fringe Benefits:

- Cost of providing parking benefits, wellness programs, gym access, tuition benefits, etc., even if more to the benefit of the employee rather than employer
- Certain reimbursed expenses for cell phone plan, credentialed exam fees, or membership dues, even where not solely incurred to benefit of employer
- Cost of office coffee and employee snacks
- Contributions to benefit plans for accident, unemployment, legal service, or other events that could cause financial hardship or expense
- Certain sign-on bonuses and longevity bonuses
- Clarification on call-back pay exclusions and discretionary bonus exclusions

New DOL Regular Rate Rules

Holiday Compensation Excluded

- In new rules, the DOL takes the position that all forms of holiday compensation are excluded from the regular rate as payment due to holiday that is not for hours worked per 29 USC 207(e)(2).
 - Including “holiday-in-lieu”

New DOL Regular Rate Rules

Sick Leave Cash Outs

- In the new rules, payments for forgoing sick leave, holiday leave, vacation leave may be excluded from the regular rate as pay for time not worked (29 CFR 778.219)
 - Same rules apply to all paid leave cash outs
 - Excluded as long as the sum paid depletes the leave bank in the amount bought back

New DOL Regular Rate Rules

New DOL Guidance on Calculation

- For each overtime hour worked, employees are entitled to their base hourly rate of pay and an additional one-half the regular rate
- There is an inverse relationship between the regular rate and the hours worked in a work period: “the overtime premium per hour decreases as hours increase”

Make Sure You...

Make Sure You

1. Do not rely on payroll vendor to ensure FLSA compliance
2. Calculate payroll based on workweeks not pay periods
3. Periodically review every form of additional compensation to see if it requires inclusion in regular rate. For example, standby pay.
4. Establish defined FLSA workweeks. Especially if you use a 9/80 schedule.
5. Take advantage of the Section 7(k) Partial Overtime Exemption for Law Enforcement if for no other reason than to establish an offset defense.
6. Have consistency agency-wide with payroll increments. E.g., 1/10th's.
7. Make plan for moving to bi-weekly pay periods if not already on them



Questions?

Thank You!

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