2019 Annual Ohio GFOA Conference

FLSA REVIEW

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Overview

- **Core Concepts**
  A. Minimum Wage
  B. Overtime Compensation
  C. Record Keeping
  D. Child Labor
  E. Retaliation
  F. Equal Pay

Who is Covered?

- **Covered Employers:**
    - Under the 1985 Amendments, the FLSA was extended to all public employers beginning April 15, 1986.
    - "Public Agency" includes the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States, a State, or a political subdivision of a State; or any interstate governmental agency. The public agency definition does not extend to private companies that are engaged in work activities normally performed by public employees."
- **Exclusions:**
    - Elected Officials;
    - Personal Staff of Elected Officials
    - Policymaking Appointees of Elected Officials
    - Advisors on Constitutional or Legal Powers;
    - Staff of the Legislative branch

Volunteers

- Performs hours of service for a public agency for civic, charitable, or humanitarian reasons;
- Offers their services freely and without pressure or coercion, direct or implied, from an employer;
- **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.**
- Receives no compensation, or is paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service.

Applying the Exemptions

- The FLSA provides certain exceptions to the minimum wage and overtime requirements. These positions are commonly referred to as "FLSA-exempt." These exemptions are narrowly defined and apply only to certain executive, administrative, and professional employees, outside sales personnel, and employees in certain computer-related occupations.
- The requirements to meet these exemptions are duty-driven and one's job title alone is not enough. Whether one is paid on a "salary basis" is also taken into consideration.
- Tip: www.dol.gov – Wage and Hour Fact Sheets

Applying the Exemptions

- 1. Salary Test
  - Employee must be paid at least $455/week
  - Must be paid on a salary basis. Meaning if an employee performs work in a work period, the employee must receive his or her full salary regardless of the number of days or hours unless:
    - Use of accrued paid leaves
    - Deductions for absences of a whole day or more for personal leave, sickness, disability
    - Partial day docking for sick / personal leave
    - Disciplinary deductions
    - Deductions for budget-required furloughs
    - Offsets (not deductions) for amounts paid for jury duty, witness time, military leave
    - Deductions for FMLA time used.

Applying the Exemptions

- 2. The Duties Test
  - The duties tests are based upon a determination of an employee's **primary duty**.
- **Executive:**
  i. Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
  ii. Customarily and regularly direct the work of two or more other employees (or the equivalent of two or more full-time employees); and
  iii. Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees.

Applying the Exemptions

- **Administrative:**
  i. Consists of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

  ii. Includes the exercise of discretion and independent judgment with respect to matters of significance

Applying the Exemptions

- **Professional:**
  i. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (i.e., the "learned" professional); or
  ii. Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (i.e., the "creative" professional)

Saving Yourself!

- The FLSA provides employer's with a "safe harbor" provision to avoid losing an employees exempt status by mistake.
- An employee's exempt status will only be lost if there is an actual practice of improper deductions by the employer.
- To qualify, an employer must:
  1. Maintain a clearly communicated policy prohibiting improper pay deductions, including a complaint mechanism;
  2. Reimburse its employees for any improper pay deductions; and
  3. Make a good faith commitment to comply in the future.
  4. The safe harbor provision applies regardless of the reason for the improper deduction. However, if an employer continues to violate its policy prohibiting improper deductions after receiving employee complaints, the employer will be barred from utilizing the safe harbor provision.

The Overtime Measuring Period

- For the majority of employees, outside of public safety and hospitals, overtime must be paid for all hours worked over forty hours in a seven day work period.
- The seven day period is a fixed regularly recurring period of 168 hours – seven consecutive 24 hour days.
- Alternative Measuring Periods – 7K Schedules
  - These work periods, described as 7(k) work periods, may be for periods of between 7 and 28 consecutive days.
  - Fire – 212 hours in a 28 day cycle
  - Police – 171 hours in a 28 day cycle

The Overtime Measuring Period

Maximum Non-Overtime Hours under the 7(k)Exemption for Fire Protection Employees

Work Period (days)	Maximum Non-Overtime Hours
28	212
14	114
7	53

Maximum Non-Overtime Hours under the 7(k)Exemption for Law Enforcement Employees

Work Period (days)	Maximum Non-Overtime Hours
28	171
14	86
7	43

Rounding and De Minimis Time

- The FLSA requires accurate timekeeping and the maintenance of records.
- In recording working time under the FLSA, infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such periods of time are *de minimis* (insignificant). This is commonly referred to as a grace period. Six (6) minutes is generally accepted as okay.
- Rounding is different than a grace period. Some employers track employee hours worked in 15-minute increments, and the FLSA allows an employer to round employee time to the nearest quarter (¼) hour. However, an employer may violate the FLSA minimum wage and overtime pay requirements if the employer always rounds down.
  - Employee time from 1 to 7 minutes may be rounded down, and thus not counted as hours worked
  - Employee time from 8 to 14 minutes must be rounded up and counted as one-quarter (¼) hour of work time
- See Regulations 29 CFR 785.48(b).

Engaged to Work

- **Waiting Time:** Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was:
  - Engaged to wait (which is work time)
  - Waiting to be engaged (which is not work time)
- For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."
- **On-Call Time:**
  - An employee who is required to remain on-call on the employer's premises is working while "on-call."
  - An employee who is required to remain on-call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on-call.
    - Additional constraints on the employee's freedom could require this time to be compensated.

Calculating the Regular Rate of Pay

- To calculate overtime, employers must determine an employee's regular rate of pay, which includes all remuneration related to their employment with the company, except certain payments that are expressly excluded by the FLSA. In determining the regular rate of pay, generally must take into consideration the following:
  - salary;
  - hourly rate of pay;
  - reasonable cost of employer provided room and board;
  - tips;
  - commissions;
  - piece rate;
  - nondiscretionary bonuses;
  - on-call pay;
  - longevity; and
  - shift differentials.
- Weighted average for employees working two (2) jobs at different rates for the same employer.

Travel

- **Going and Coming:** Travel to and from work is not hours worked, unless there is an employment agreement or custom or practice to pay under the circumstances.
- When an employee is required to report someplace before work (for example, to pick up work materials or to perform other work), the travel from the designated place to the workplace is compensable work time.
- Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked.

Training

- Time spent by employees in training-related activities is compensable unless all four of the following criteria are met:
    1. Attendance must be outside of the employees regular working hours;
    2. Attendance must be voluntary;
    3. The training program must not be directly related to the employee's job; and
    4. The employee must not perform any productive work during the training.
- ii. Specialized training that occurs outside of normal working hours and is required by the law of a higher governmental agency for certification is not compensable, even if the employer pays for the cost of the training course.

Improper Deductions (Union Dues)

- Initial Challenge:
  - *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)
    - Involved a Michigan law which permitted "agency shop" arrangements which required as a condition of employment, bargaining unit employees—who elected not to be union members—to pay a "service charge" that was equal in amount to Union dues.
    - Supreme Court of the United States held:
      - "Objecting" employees could only be charged for costs germane to collective bargaining, but not for other political or ideological causes. Id. at 235-236.
      - The Court also held that "dissent is not to be presumed." Noting that an employee must make such objections known to the Union. Id. at 238.

Improper Deductions (continued)

Where We Were:

Following *Abood* and subsequent cases that came out of litigation regarding "fair share fees," Employers and Unions were left with three (3) basic types of bargaining unit members and associated fees for each type.

- Union Members
  - Paid full dues, supported broader Union goals beyond their specific CBA.
- Non-objecting bargaining unit members
  - Paid same amount as full dues, but elected not to be Union Members.
- Objecting bargaining unit members
  - Paid a % of the full dues that covered the costs germane to the collective bargaining agreement, but money did not go toward supporting broader Union activity.

Improper Deductions (continued)

- *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).
- Background
  - Janus, state employee, who was part of a public sector bargaining unit represented by AFSCME.
  - Janus was not a member of the Union as he opposed many of the Union's positions including those taken in collective bargaining.
  - Pursuant to Illinois law and *Abood*, Janus was charged an "agency fee" that was a percentage of the full Union dues.
  - Janus filed suit alleging that the requirement he pay such a fee violated his constitutional rights.

Improper Deductions (continued)

- **Decision**
  - *Abood* was wrongly decided and is now overruled.
  - ". . . States and public-sector unions may no longer extract agency fees from nonconsenting employees. . . .
  - [The Illinois] procedure violates the First Amendment and cannot continue."
  - "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."

Improper Deductions (continued)

- **Decision (continued)**
  - The exaction of these fees without affirmative consent violates the employee's First (1st) Amendment rights.
  - "By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. (cites omitted) . . . to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. (cites omitted)

Improper Deductions (continued)

ISSUES MOVING FORWARD

- **If not already, employers should immediately stop deducting "fair share" fees.**
  - Fair share fees and Union dues are different, make sure you don't stop both!

Improper Deductions (continued)

ISSUES MOVING FORWARD (continued)

- **Employers should review their collective bargaining agreements.**
  - Identify any clauses dealing with severability and take the necessary steps to sever the fair share clause.

Improper Deductions (continued)

ISSUES MOVING FORWARD (continued)

- **Employers should review their collective bargaining agreements.**
  - This may involve meeting with the Union to discuss bargaining alternative language or the effects of severing the fair share clause such as:
    - Providing list of bargaining unit members and contact information
    - Time during new employee orientation to talk to new employee about the Union and CBA (time to make their pitch)
    - Rather than striking fair share language all together, adding a preceding clause which provides that if Janus is ever overturned the pre-existing fair share language will control

Improper Deductions (continued)

ISSUES MOVING FORWARD

- **Employers should review their collective bargaining agreements.**
  - As the Employer, there is beneficial language to get from this bargaining process:
    - Try to add language that clearly states an employee giving a written revocation of dues deduction authorization ends the employers obligation to deduct dues.
    - This will help shore up your position to halt deductions if or when an employee seeks to withdraw his or her dues deduction authorization.

Improper Deductions (continued)

What should the employer do if an employee comes in and says they want to stop paying dues?

- Ask them to put their revocation of the dues deduction in writing and provide copy to Union.
- Upon receipt of written revocation, review labor contract.
- Discuss with Counsel and/or Insurance Counsel (Grievance v Lawsuit).
- Union will ask Employer to enforce "check-off" agreement or "card."

Improper Deductions (continued)

Unanswered Questions

- Do the cards constitute a valid waiver of First (1st) Amendment rights and can the Employer also be sued?
- Can revocation of such waivers be limited to certain opt-out periods?
- Discuss Pending Litigation and Recent Decisions

Improper Deductions (continued)

- Two (2) were lawsuits have been filed in Federal Court in the Southern District of Ohio that challenge automatic dues for public employee unions
  - Smith, et al. v. AFSCME settled January 4, 2019

- Likely to have received notice of the new "dues check-off provision" from AFSCME
- Honoring revocation of employees/refunding dues

Improper Deductions (continued)

- *Fisk v. Inslee*, 2018 U.S. App. LEXIS 35317, the federal Court of Appeals for the 9th Circuit affirmed the federal District Court (Western District) of Washington's enforcement of a dues deduction agreement that only allowed union members to revoke dues authorizations once a year during a 15 day window period. Modified on January 9 to delete that initial agreement with SEIU qualified as a "knowing, voluntary, and intelligent waiver" and corresponding footnote.

Improper Deductions (continued)

- *Smith v. Superior Court*, 2018 U.S. Dist. LEXIS 196089, California employee tried to get an injunction to stop his public employer from continuing to deduct union dues. The federal district court for the Northern District of California denied the injunction and said *Janus* and First Amendment do not permit an employee to "wriggle out of" his contract with AFSCME.

Some Common Myths

1. Everyone who is salaried is exempt from overtime.
2. You can volunteer to perform extra hours
3. The job description indicates the position is exempt – so it is
4. All supervisors are exempt
5. Tracking time destroys exempt status
6. Flexing time between work weeks will help avoid OT

Questions?

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