

PRACTICE TIPS

Overtime Rules Under the Fair Labor Standards Act—A Refresher Course.

By Daniel D. Crean

The Fair Labor Standards Act (FLSA) includes many provisions governing overtime. Bearing in mind that state law may treat employees more favorably than the FLSA, here are some useful guidelines.

Q: If an employer pays an employee a salary, is the employee automatically exempt from overtime?

A: Though salaried and exempt employees are sometimes viewed as the same, overtime must be paid even to a salary basis employee unless the employee is otherwise exempt by meeting very specific criteria, including being paid on a salary basis at prescribed levels, and meeting standards such as those set for administrative, professional, and executive employees.

Q: If overtime is not "authorized," must overtime rates be paid?

A: An employee who works overtime hours (in excess of 40 hours per week under the FLSA) must be paid overtime for the excess hours, regardless of whether the overtime was authorized. Even an employer's policy prohibiting overtime unless authorized will not relieve an employer from paying overtime. Discipline may be imposed in accordance with personnel policies for violating the requirement that overtime be authorized, but the employer must still pay overtime.

Q: May an employee waive the right to overtime, at least if the waiver is in writing?

A: Simply put, the right to overtime pay under the FLSA may not be waived by non-exempt employees by agreement with the employer.

Q: May an employee's hours be averaged over 2 workweeks to determine if overtime is due?

A: With the limited exception for first responders, the FLSA requires the use of a single workweek to determine if an employee is due overtime, regardless of the employer's pay cycle. For example, if the pay schedule is bi-weekly, and an employee works a total of 80 hours over the two workweeks, the employee would qualify for overtime if, for example, during week 1 the employee worked 45 hours and during week 2 worked 35 hours.

Q: Are overtime pay rates based solely on the employee's computed hourly pay rate?

A: The FLSA requires correct use of an employee's actual ("regular") hourly rate of pay (whether paid on a salaried or hourly basis). That "regular" rate of pay is calculated by dividing the total pay for employment in any workweek by the total number of hours actually worked. In so computing this regular rate of pay, the following must be included (or may be excluded where noted), with the further caveat that some of these would likely not apply to municipal employment:

- Salary or hourly rate of pay;
- Reasonable cost of employer-provided room and board;
- Tips;
- Commissions;
- Piece rate;
- Nondiscretionary bonuses (bonuses promised to employees before the work begins);
- On-call pay;
- Cash payments under a cafeteria plan; and
- Shift differentials. But there are some exclusions, including, but not necessarily limited to: Gifts;
- Discretionary bonuses;
- Payments made for vacation, holiday, or illness;
- Reasonable payments for traveling expenses;
- Contributions made to a retirement, life, accident, or health insurance plan; and
- Any value or income derived from employer-provided stock options.

Q: Must paid time off for holiday, vacation, or sick leave be included in determining when an employee is eligible for overtime?

A: If an employee is permitted to take time off for a holiday, a vacation, or due to illness, the time, off, even if the employee is compensated for that time does not constitute hours worked and need not be included when determining the total hours worked for overtime purposes. [*Note: State laws may differ and employers by policy, collective bargaining agreement or individual employment agreements may be more "generous."*]

Q: What about "rest" or "break" periods?

A: Under the FLSA as interpreted by the US Department of Labor (DOL), rest breaks are considered hours worked and therefore must be included in computing hours worked for overtime purposes. The DOL says a rest break is any period lasting 20 minutes or less which an employee is allowed to spend away from work. However, bona fide meal periods are not considered rest periods and are not deemed hours worked that must be included in the overtime calculation so long as the meal period lasts at least 30 minutes and the employee is fully relieved of all duties for the purpose of eating a regular meal.

Q: Has the DOL produced any reference materials to assist employers with the overtime issue?

A. The DOL recognizes that determining overtime pay issues are is not without problems. Accordingly, it has promul-

Continued on page 29



Dan Crean specializes in advising municipalities in land use, environmental, administrative and employment law. He is Executive Director of the New Hampshire Municipal Lawyers Association and a veteran presenter of CLE and related seminars to local government officials and counsel. He is a graduate of Yale University and holds a law degree from the University of Wisconsin.

Practice Tips *Cont'd from page 19*

gated a "Model Salary Basis Policy" under which an employer may be permitted to avoid the more drastic consequences that may arise from improper pay deductions for salaried employees. That sample policy reads as follows (taken from http://www.dol.gov/whd/regs/compliance/fairpay/modelPolicy_PF.htm).

Model Salary Basis Policy

Overtime Security for the 21st Century Workforce

The information below is designed to provide an example of what constitutes compliance for purposes of §541.603(d) (addressing "Effect of improper deductions from salary") and is for illustrative purposes only. Other policies may comply with §541.603(d) which contain more or less information.

The Model Policy:

The FLSA is a federal law which requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section (a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section (a)(1) and Section (a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week . . .. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least $455 on a salary basis or on an hourly basis at a rate not less than $27.63 an hour. Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see Company Policy on penalties for workplace conduct rule infractions). Also, an employer is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance; or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made.

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What To Do If An Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [*insert alternative complaint mechanism(s)*]. Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made. ML

Code Enforcement *Cont'd from page 17*

future rather than face that expense.

However your municipality deals with snow, I will offer one final thought. I would recommend not dealing with it like one mayor did. His response to not plowing snow was "God put it there and God will take it away." Such a response is not what a community and its citizens need in a time of crisis. Needless to say, that mayor was not re-elected. ML

Second Look *Cont'd from page 18*

exclusionary rule, the Department of Justice would face a difficult hurdle, because by law the relators must submit to DOJ a "written disclosure of substantially all material evidence and information the person possesses, 31 U.S.C. § 3730(b)(2), before the qui tam complaint is unsealed to enable DOJ to decide whether it wants to take over the litigation from the relator. 31 U.S.C. § 3730(b)(4). The Department would likely have to use an entirely new team of lawyers and investigators, and demonstrate that the new team had no access to information from the relator, if the courts imposed an exclusionary rule.

Could the *Quest Diagnostics* deference to state law potentially insulate local governments from qui tam suits brought by its professionals other than lawyers; perhaps by their auditors?

Auditors do not have a confidentiality duty under most states' laws, even if they have the right, and sometimes the duty, to keep their working papers confidential absent subpoena. *See generally,* Annot., Ownership of, and literary property in, working papers and data of accountant, 90 A.L.R.2d 784 (Originally published in 1963 and accessed on WestlawNext, Nov. 2, 2013).

However, auditors do have a professional and ethical duty of independence. *See* Comptroller General of the United States, Government Auditing Standards 3.02-.06 (July 2007), online at Government Auditing Standards--Chapter 3: General Standards, http://www.gao.gov/govaud/govaudhtml/d07731g-5.html (last visited Nov. 2,

Continued on page 34