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LEAGUE OF CALIFORNIA CITIES 2016 MUNICIPAL FINANCE INSTITUTE

Assessing FLSA Overtime Liability for Municipal Public Safety Workers

11/30/2016

PRESENTED BY:

Richard Bolanos & Nicholas Briscoe

Assessing FLSA Overtime Liability for Municipal Public Safety Workers League of California Cities 2016 Municipal Finance Institute | November 30, 2016

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Presented by: Richard Bolanos, Liebert Cassidy Whitmore, and Nick Briscoe, Briscoe Economics Group

Agenda

- FLSA Overview
- Critical Steps for Managing FLSA Overtime for Public Safety
- Refresher on Regular Rate Formula
- Review of Dual Calculation Method

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FLSA Overview

- Exempt vs. Non-Exempt Employees.
- Work Periods:
 - Non-Exempt 7-day (168 recurring hours).
 - Safety 207(k) work periods.
- FLSA Overtime:
 - Paid for hours worked in excess of the work period.
 - Paid at 1.5 times the “Regular Rate of Pay.”

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Critical Steps for Managing FLSA Overtime for Public Safety

- Declare Extended work period under FLSA Section 207(k)
- Distinguish Contract overtime from FLSA overtime
- Comply With FLSA minimum requirements
- Adopt Dual Calculation Method

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Refresher: The Regular Rate

Basic Overtime Pay Calculation

- Chris earns \$20/hour and works 44 hours in his 40-hour / 7-day work period.
- How much is Chris owed for the week?
 $\$20.00 = \text{hourly base rate} / 44 \text{ hours worked}$
 $40 \times \$20.00 = \800.00
 $4 \times \$20 \times 1.5 (\$30) = \underline{\$120.00}$
 $\$920.00$

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Regular Rate of Pay with Additional Type(s) of Pay

- The FLSA requires most additional types of pay to be included in the Regular Rate of Pay calculation.
- This requires you to:
 - Know what pay must be included.
 - Calculate the value of the pay on a work week / work period basis.
 - Include the work week / work period value of the pay in the Regular Rate of Pay calculation.

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Regular Rate of Pay Calculation with Additional Type of Pay

Chris is also paid \$150 per month in bilingual pay.

1. Multiply total hours worked times base: $44 \times \$20 = \880
2. Calculate the work week value of bilingual pay. Add \$34.62 bilingual pay for the week: $\$880 + \$34.62 = \$914.62$
3. Calculate the Regular Rate by dividing total amount earned by total hours worked: $\$914.62/44 \text{ hours} = \20.79

FLSA Regular Rate of Pay = \$20.79

Note: For employees paid on a salary basis, the Regular Rate calculation may be different. The method of calculation should be evaluated prior to implementation.

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Dual Calculation Method

- Most agencies pay overtime above and beyond what is required under the FLSA.
- MOU overtime, contract overtime, or non-statutory overtime are all terms for this type of compensation and can be paid at any rate established under the MOU.
- Examples of MOU OT:
 - Pay overtime on hours in excess of those that are regularly scheduled.
 - Include use of leave as hours worked in calculating overtime eligibility.
 - Paying overtime for the hours between scheduled hours and the overtime threshold for employees subject to the section 207(k) partial overtime exemption.

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Dual Calculation Method, cont.

- The FLSA guarantees minimum overtime compensation; it is not a supplement to contract overtime.
- If an employee's contract overtime exceeds FLSA overtime there is no additional FLSA liability (29 U.S.C. sec. 216(b)).
- The FLSA authorizes employers to calculate overtime under the FLSA and under the applicable labor agreement and then pay the greater of the two. (*Chavez v. City of Albuquerque* (10th Cir. 2011) 630 F.3d 1300.)

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Dual Calculation Method, con't.

- The methodology examines total overtime actually paid per contract and compares this amount to the amount of overtime that would have been paid under a strict application of the FLSA.
- The Dual Method would need to be examined for each section 7(k) work period (ie. 14-day, 24-day, 28-day)

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Application of Dual Calculation Method

- Calculate all scheduled shift hours worked during work period.
- Calculate all overtime hours worked.
- Calculate the total hours actually worked for all scheduled shift hours and overtime hours worked during the work period.

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Application of Dual Calculation Method, con't.

- Calculate the actual contract overtime paid for all overtime hours worked.
- Add to the amount any premiums that were paid during the work period that are attributable for overtime payment.
- Then compare this amount to what would be owed strictly under FLSA.

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Application of Dual Calculation Method, con't.

- To find what would be owed under FLSA, we need to determine the FLSA Regular Rate that would be paid on overtime hours.
- Calculate all hours worked in work period including overtime hours.
 - This is your divisor.

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Application of Dual Calculation Method, con't.

- Add up all base pay and premiums earned during the work period.
 - This might include premiums such as holiday pay, shift differentials and cash in lieu of health benefits.
- Divide all base pay and applicable premiums earned in the work period by the total hours actually worked in the work period.
 - This is your FLSA Regular Rate used to calculate overtime.

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Application of Dual Calculation Method, con't.

- Now calculate the number of overtime hours there would be under FLSA for the work period.
- Calculate total hours actually worked including overtime hours for the work period.
- Compare total hours actually worked to the applicable FLSA 207(k) overtime threshold for the work period (ie. 182 for 24-day work period).
 - This is the number of overtime hours under FLSA.

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Application of Dual Calculation Method, con't.

- Multiply the number of FLSA overtime hours by the calculated FLSA overtime regular rate.
 - This gives the overtime that would be owed under FLSA.
- Some adjustments might be required depending on the circumstances.
 - Adjustments to account for base pay paid on non-overtime hours.
 - Adjustments for scheduled overtime hours for firefighters.
 - Other adjustments.

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Application of Dual Calculation Method, con't.

- Compare what was paid in overtime under contract versus what would have been paid under strict FLSA.
- The Dual Calculation can be performed as an ongoing payroll practice to determine FLSA liability each pay period.
- The Dual Calculation can be performed to assess back pay liability if applicable.

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Dual Calculation Example

- A police officer is subject to 28-day FLSA 207(k) work period.
- FLSA overtime threshold is 171 hours in the 28-day work period.
- Labor agreement provides for overtime at time and a half for all hours worked over regular shift, or 40 hours in a week.
- Labor agreement requires all paid leave hours, e.g., sick, vacation, holiday leave, to count as "hours worked" for overtime purposes.

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Dual Calculation Ex. continued

- Police officer works under a 28-day 207(k) work period:
 - During first week she takes 4 vacation days, totaling 40 hours of vacation leave.
 - During second week she works an extra 10 hour shift, for which she receives 10 hours of contract overtime at time and one half.
 - During third week she works another extra 10 hour shift, for which she receives another 10 hours of contract overtime.
 - During the fourth week she works 40 hours.
- Pursuant to the labor agreement, the police officer was paid for 20 hours overtime; under the FLSA the police officer actually worked 140 hours, or 31 hours under the 171 FLSA threshold.
- Because total of actual hours worked is less than 171, no FLSA overtime is owed.

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Questions?

Thank you

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