



# Wisconsin County Highway Association



**Winter Road School  
January 18, 2012**



## **FLSA Primer for County Highway Departments**

**PRESENTED BY ANDY PHILLIPS AND CHRISSY VAN BERKUM**

**PB** phillipsborowski, s.c.  
*...relationship focused*

# Fair Labor Standards Act - Background



- Enacted to ensure a national minimum wage and to provide overtime pay for certain employees
- Two primary requirements
  1. Employers compensate hourly wage employees no less than the prevailing minimum wage (currently \$7.25 per hour)
  2. Employers pay overtime to their employees at the rate of one and one-half times the employees normal hourly rate for all hours worked in excess of forty in a week

# Exempt vs. Non-Exempt



- Non-Exempt Employees
  - Subject to the requirements of the FLSA
  - Paid on an hourly basis
  - Must be paid overtime
  - Includes “blue collar” workers
- Exempt Employees
  - Must satisfy the salary basis test
  - Satisfaction of exemption specific short-test
  - Exemption applies based on an employee’s particular job duties, not simply a job title

# Exemption Categories



- Executive
- Administrative
- Professional
- Computer Employee
- Highly Compensated Employee
- Outside Sales Employee
  - Rarely, if ever, will county employees fall under this exemption category

# Salary Basis



- Paid on salary basis at no less than \$455 per week
- Employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation; and
- The amount is not subject to reduction because of variations in the quality or quantity of the work performed

# Executive Exemption



- **4 Part Test**
  - Meets the salary basis test;
  - Primary duty is managerial;
  - Direct supervision of 2 or more full-time employees; and
  - Has the authority to hire and fire.
- **Examples – Highway Commissioner, Highway Superintendent**

# Administrative Exemption



- **3 Part Test**
  - Meets the salary basis test;
  - Primary duty must be the performance of office or non-manual work directly related to the management or general business operations; and
  - Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- **Example – Highway Office Manager, if the employee meets the above test**

# Professional Exemption



- **4 Part Test**
  - Meets the salary basis test;
  - Primary duty must be the performance of work requiring advanced knowledge, predominantly intellectual in character, which includes the consistent exercise of discretion and judgment;
  - The advanced knowledge must be in the field of science or learning; and
  - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- **Example - Engineer**

# 3-Part Short Test to Qualify for Exempt Status



## 1. Salary Basis Test

- ✦ Paid on salary basis at no less than \$455 per week
- ✦ (1) regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation and (2) amount is not subject to reduction because of variations in the quality or quantity of the work performed.

## 2. Primary Duties Test

- ✦ Consider: (1) the relative importance of the exempt duties as compared with other types of duties; (2) the amount of time spent performing exempt work; (3) the employee's relative freedom from direct supervision; and (4) the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

## 3. Exemption Specific Test

# No Docking Rule



- Where an employee is classified into one of the exemption categories, his pay is no longer subject to deductions
- An exempt employee must receive the full salary for any week in which the employee performs any work
- Exempt employees need not be paid for any workweek in which they perform no work
- If an employee is ready, willing and able to work, deductions may not be made for time when work is not available

# Exceptions to the “No Docking” Rule



- Absences of one or more full days for personal reasons, other than sickness or disability
- Absences of one or more full days for sickness or disability if made in accordance with a plan, policy or practice
- Absences for jury duty, attendance as a witness, or military leave – no deductions for absences, but can offset amounts
- Deductions for infractions of safety rules
- Deductions for unpaid disciplinary suspensions
- Deductions for days not worked during the initial and terminal week of employment
- Deductions for unpaid FMLA leave

# Public Accountability Exception to the “No Docking” Rule



- An employee of a public agency who otherwise meets the salary basis requirements of the FLSA will not be disqualified from an exemption when that employee is paid according to a pay system established pursuant to principles of public accountability
- Employee may accrue personal leave and sick leave and the employee's pay may be reduced or the employee may be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because: (1) permission for its use has been sought or has been sought and denied; (2) accrued leave has been exhausted; or (3) the employee chooses to use leave without pay.

# Deductions for Furloughs



- Deductions for furlough do not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.
- Public employees who are normally exempt from minimum wage and overtime pay requirements are not exempt from the requirements during the week they have their pay reduced because of a furlough.
- During the weeks that exempt employees are not furloughed, they retain their exempt status.

# What Constitutes “Work?”



- Compensation for “Work”
- “Work,” is defined by the Supreme Court as an activity involving “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”
  - *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).
- Congress modified FLSA by enacting the Portal-to-Portal Act to limit employer liability for “effortless” preliminary or postliminary activities.
  - 29 U.S.C. § 254(a).
- Activities that take place before or after an employee commences their regular workday are compensable, “if those activities are an integral and indispensable part of the principal activities.”
  - *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); 29 C.F.R. § 790.7(a).

# FLSA Overtime Compensation



- Overtime is required for hours in excess of 40 in a workweek
- Overtime rate is one and one-half times the individual's regular rate of pay
- Overtime pay is not required for work on weekends, holidays or regular days of rest, unless overtime hours are worked on such days

# Regular Rate of Pay



- The FLSA defines the “regular rate” as all remuneration for employment paid to or on behalf of the employee, although some items of compensation do not have to be included in the calculation.
  - Bonuses and incentives that are dependent on hours worked, productivity, or efficiency must be included in determining an employee’s “regular rate” of pay. E.g., a weekly “productivity bonus” or attendance bonuses
  - Bonuses that do not have to be included in the regular rate of pay are those received on special occasions (such as Christmas) as a reward for service and which are not measured by, or dependent on, hours worked, productivity, or efficiency.
- In addition, premium pay for working on holidays, Saturdays, or Sundays does not have to be included in overtime calculations, if the amount is at least one and one-half times the employee’s regular rate of pay.
- Regular rate of pay does not include payments made for vacation, holiday, illness, or failure of employer to provide sufficient work.

# Hours Worked



- Overtime pay is provided for “hours worked” over 40 in a workweek
- Hours Worked ordinarily includes all the time during which an employees is required to be on the employer’s premises, on duty, or at a prescribed workplace
- Hours worked encompasses the first principal activity of the work day to the end of the last principal work activity of the work day
- Hours Worked does not include vacation days, sick days, or comp time
- Employee must actually work more than 40 hours to be entitled to overtime

# Policy Considerations for Hours of Work



- Different work schedules may be in existence in different departments.
- Department Head may approve flex schedules (adjusting weekly work schedule as needed) to accommodate for work related adjustments as well as requests based on personal needs, i.e., doctor appointment.
- Change break periods to two 10 minute breaks per day versus current two 15 minute breaks per day for employees who receive two breaks.
- Address ability of employees to “trade” work days.
- Highway Department employees may be scheduled to start work at any time. E.g., start at 6 AM, 4 PM, etc.

# Workweek Defined



- Workweek is the standard for computing overtime pay due
- A workweek is a period of 168 hours during 7 consecutive 24-hour periods, but may begin on any day of the week and at any hour of the day
- Each work week stands alone, and thus, a non-exempt employee's time worked "vests" at the end of each workweek
- Work time may not be averaged from workweek to work week
  - E.g., Employee who works 44 hours in week one, followed by 36 hours in week two, is entitled to 4 hours of FLSA overtime pay for week one and may not be paid based on an "average" of 80 hours in the two week period.
- Workweek may be adjusted to account for "extra" time worked early in a work week

# Additional Duties Outside Job Description



- Counties may require employees to perform work which is not listed on the job description.
- The FLSA does not limit the types of work that an employee may be required to perform.
- However, with “dual employment,” we must consider....

# Dual Employment



- Situations where an employee does more than one job for the county
- Can be problematic for exemption status, as an exempt employee cannot spend more than 20% of the time in a workweek doing non-exempt work
- If more than 20% of the exempt employee's time is spent doing non-exempt work, the employee loses the exemption for that workweek.
- The county is a single employer for FLSA purposes, so if a highway department employee also drives a county school bus, the hours worked are combined for overtime purposes.

# Compensatory Time



- County highway workers may receive compensatory time off, at a rate of not less than one and one-half hours for each overtime hour worked, instead of cash overtime pay
- A policy or agreement of understanding regarding comp time must be in effect between the county and the employee prior to the work being performed
- Comp time is not considered “hours worked” for purposes of computing overtime pay

# Banking Compensatory Time



- County highway workers may accrue up to 240 hours of comp time, which is the equivalent of 160 hours of actual overtime
  - Monetary compensation must be paid for time in excess of the 240 hours allowed comp time limits
- Employees may bank hours that may later be used at the discretion of the employee OR the employer
- An employee must be permitted to use compensatory time on the date requested unless doing so would “unduly disrupt” the operations of the agency
- An employee may be required to use his or her comp time
- County may implement a “use it or lose it” policy, whereby any banked comp time is paid out at the end of the year if it has not been used by the employee

# On-Call Pay



- Whether on-call hours are treated as “hours worked” which require compensation depends on whether one has been “engaged to wait” or is “waiting to be engaged”
  - Engaged to Wait
    - ✦ Employee is required to remain on-call on the employer’s premises or so close that he cannot use the time effectively for his own purposes IS working while on call and must be compensated
  - Waiting to be Engaged
    - ✦ Employee is not required to remain on the employer’s premises but is merely required to leave word at his home or with supervisor where he may be reached IS NOT working and does not require compensation

# Travel Time



- As a general rule “home to work” and “work to home” travel time is not work time, which is true even if the employee uses a company vehicle for the trips
- Travel time is “all in a day’s work,” which means travel time is work time if it occurs between when the employee first arrives at the first work site and before the employee leaves the last work site at the end of the work day.
- Example:
  - Highway worker travels first to the County Highway Office to pick up equipment, and then travels to the work site to perform the day’s work.
  - The employee is considered working from the time she first arrives at the office. Picking up the equipment is considered the first work activity of the day.

# Shift Trades



- The FLSA allows an employee to substitute for another employee in the same capacity if the county approves the substitution and the substitution is solely at the option of the involved employees.
  - If these requirements are met, the employer is not required to pay overtime for the additional hours worked for which the substituting employee was not originally scheduled to work.
  - This exception applies only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied.
  - An employer may “suggest” a shift trade, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.
- Agreement between employees must be approved by the county, which requires that the county be aware of the arrangement prior to the work being done.

# Call-In Pay



- Call-in pay is not required by the FLSA
- Call-in pay, which is, in essence, supplemental pay, is not required
- Counties should consider policies that limit call-in pay or revise policies so that call-ins that result in work performed after a time certain, e.g., 5:00 AM, will result in the employee being paid at a regular rate of pay.
- Such call-in limitations will allow for flexibility and uniformity for schedules with adjusted start times.
  - For example, a highway employee whose regular work day begins at 6:00 AM will not receive call in pay if called an hour earlier than the start of the employee's regular shift.

# FLSA Does NOT Require



- Vacation, holiday, severance, or sick pay;
- Meal or rest periods, holidays off, or vacations;
- Premium pay for weekend or holiday work;
- Pay raises or fringe benefits; or
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

# County Highway Departments



- Service delivery providers
- Management policies allow for flexibility
- Overtime hours paid out can be drastically reduced by overtime payments for hours over 40 in a given week

# Common Misconceptions



- When does the FLSA require on-call pay?
  - NEVER!
- Does the FLSA require call-in pay?
  - No!
- When does the FLSA require overtime for hours worked over 8 per day?
  - NEVER!
- Does the FLSA require overtime on a daily basis?
  - No!
- Does the FLSA require premium pay for work on Saturdays, Sundays or holidays?
  - No! Unless overtime hours are worked on such days.

# Record Keeping Requirements



- Personal information for each employee
- Time and day of week when the employee's workweek begins
- Hours worked each day – time in and time out
- Total hours worked each workweek
- Time in and out for meal periods, if deducted
- Basis on which wages are paid
- Regular hourly rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages and an explanation
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

# Prevailing Wage Law



- **Davis-Bacon and Related Acts**
  - Federal law which requires paying the prevailing wage on public works projects
  - All federal government construction contracts and most contracts for federally assisted construction over \$2,000 must include provisions for paying workers on-site no less than the prevailing wages and benefits paid on similar projects.
- **Wis. Stat. § 66.0903**
  - Prevailing wage rate is required for publicly funded private construction projects
  - Provides the prevailing wage rate on public works projects

# Prevailing Wage Rate



- The hourly basic rate of pay, plus the hourly contribution for health insurance benefits, vacation benefits, pension benefits and any other bona fide economic benefit, paid directly or indirectly for a majority of the hours worked in a trade or occupation on projects in an area.
- If there is no rate at which a majority of the hours worked in a trade or occupation on projects in an area is paid, then the prevailing wage rate shall be the average hourly basic rate of pay, weighted by the number of hours worked, plus the average hourly contribution, weighted by the number of hours worked, for health insurance benefits, vacation benefits, pension benefits and any other bona fide economic benefit, paid directly or indirectly for all hours worked at the hourly basic rate of pay of the highest paid 51% of hours worked in that trade or occupation.

# Employees Covered by the Prevailing Wage Rate



- All laborers, workers, mechanics, and truck drivers employed on the site of a project of public works;
- All laborers, workers, mechanics, and truck drivers employed in the manufacturing or furnishing of materials or equipment on the site of a project of public works or a facility dedicated exclusively to a project of public works;
- A laborer, worker, mechanic, or truck driver who is employed to process, manufacture, pick up, or deliver materials or products from a commercial establishment that has a fixed place of business from which the establishment supplies processed or manufactured materials; and
- A truck driver who is an owner-operator of a truck

# Prevailing Wage Position – Hours of Labor



- Overtime must be paid for hours worked over 10 per day and 40 hours per week.
- Premium pay for Saturdays, Sundays or any of the following holidays:
  - January 1
  - The last Monday in May
  - July 4<sup>th</sup>
  - The first Monday in September
  - The fourth Thursday in November
  - December 25<sup>th</sup>
  - The day before if Jan. 1, Jul. 4 or Dec. 25 falls on a Saturday
  - The day following if Jan. 1, Jul. 4 or Dec. 25 falls on a Sunday
- Employees do not receive hazardous pay for heavy traffic, snow storms, emergency responses, etc.

# Flexibility of the FLSA



- **Workweek can be defined as the highway department sees fit**
  - For example, workweek begins on Monday at 12:00 AM and ends Sunday at 11:59 AM, or workweek begins Saturday at 12:00 AM and ends Friday at 11:59 AM
- **Scheduled hours can vary**
  - For example, Employee A could work 4 – 10 hours days, Employee B could work 3 – 12 hour days and one 4 hour day, and Employee C could work 5 – 8 hours days, and all could work these hours without the County incurring overtime expenses
- **Dual Employment**
  - Allows employees to be assigned additional duties outside their job descriptions

# Policy Considerations



- Ensure proper classification of employees
  - Can non-exempt employees be reclassified as exempt to alleviate overtime cost?
- Flexibility in defining workweek and work hours
- Consider overtime paid after 40 hours per week, versus overtime administered by the day
- Consider dual employment to maximize output

# Contact Information



Andy Phillips, [atp@phillipsborowski.com](mailto:atp@phillipsborowski.com), (262) 241-7788

Chrissy Van Berkum, [ckv@phillipsborowski.com](mailto:ckv@phillipsborowski.com), (262) 241-7788

