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**10 Things That Every Local Government Needs to Know About the Fair Labor Standards Act**

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**1. Paying an Employee a Salary ≠ Exempt from Overtime Requirements**

- Being paid a salary is requirement for most exemptions
- But, that is just the beginning
- All exemptions are **exceptions** under FLSA to presumption that employees are entitled to overtime for all hours worked over 40 in a work week
- Exceptions are based on job duties actually performed

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**1. Paying an Employee a Salary ≠ Exempt from Overtime Requirements**

- Employee preference for being “salaried” is irrelevant
- “We’ve always done it that way” is also not relevant

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## 2. Misclassification of Employees as Exempt Can Be Costly

- Assume have an assistant manager of a department who is classified by employer as exempt
- Assume individual is paid annual salary of \$38,000 (\$730 per week) and works an average of 44 to 48 hours per week
  - Assume average of 45 hours/week
- If improperly classified as exempt, assistant manager is entitled to time and one-half for every minute worked over 40 in the workweek



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## 2. Misclassification of Employees as Exempt Can Be Costly

- Hourly rate would be calculated at  $\$730 \div 40 = \$18.25$
- Time and one-half rate is \$27.38
- For one week:  $\$27.38 \times 5 = \$136.92$
- For one year:  $\$136.92 \times 52 = \$7,120$
- For two years:  $\$7,120 \times 2 = \$14,240$
- For three years:  $\$7,120 \times 3 = \$21,360$
- For one employee



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## 2. Misclassification of Employees as Exempt Can Be Costly

- What if you have five misclassified employees?
- What if they typically work 50 hours a week?
- Also on the hook for attorney's fees
- Burden is on employer to prove exemption applies
- Burden is on employer to have records of hours worked
- For local governments, added cost of bad publicity if story gets picked up in local weekly newspaper



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### 3. Who is Covered?

- Local government bodies of any size are covered employers
- Exclusions from coverage
  - Excluded employees include:
    - Elected officials
    - Certain members of their political staff
    - Certain policy-making appointees
    - Legal advisors



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### 3. Who is Covered?

- Excluded employees (continued):
  - Volunteers
  - Independent contractors
  - Prisoners
  - Certain trainees
- Employees who are subject to the civil service laws of the employing state are covered by the FLSA



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### 4. What is the No. 1 “Hot Button” FLSA Issue for ALL Employers?

- Misclassification of covered employees
- Covered employees are exempt from FLSA overtime requirements if they meet one of the statutory exemptions
- To qualify for exempt status, employees must be paid at least \$455 per week on a salary basis



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**4. What is the No. 1 “Hot Button” FLSA Issue for ALL Employers?**

- Meet exemption requirements for Executive, Administrative, Professional, Outside Sales, or Computer Employee occupation exemptions
- Countless number of lawsuits and claims filed in past three years challenging employees’ exempt occupation status



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**5. What is the No. 2 “Hot Button” FLSA Issue for ALL Employers?**

- Misclassification of covered individuals
- Confusing employees with contractors
- “Economic reality” or “control test”
  - Nature and degree of control exercised by alleged employer
  - Amount the alleged contractor has invested in facilities and equipment
  - Alleged contractor’s opportunity for profit/loss



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**5. What is the No. 2 “Hot Button” FLSA Issue for ALL Employers?**

- Skill and initiative required to perform the job
- Permanency of the relationship
- Extent to which the work performed is an integral part of the business



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## 6. What is the One Type of Break Time Mandated by the FLSA?

- Break time for nursing mothers
- Health care reform law passed in 2010 amended the FLSA to require "reasonable" break times
- General requirements are:
  - Non-exempt employees
  - Nursing mother's child must be 1 year old or younger

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## 6. What is the One Type of Break Time Mandated by the FLSA?

- General requirements (continued):
  - Breaks must be provided as frequently as needed
  - A place must be provided that is "shielded from view and free from intrusion from co-workers and the public" that is not a bathroom
- Law does not apply to employers with fewer than 50 employees if compliance would impose an "undue hardship" on the employer

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## 7. Another Reoccurring Issue Under the FLSA

- Failing to pay for working lunches
- The problem:
  - Most employers intend to give employees a lunch break. It's not unusual for employers to assume that break was taken and automatically deduct 30 or 60 minutes from an employee's daily hours worked. It's also not unusual, however, for employees to spend their lunch break answering the phone, catching up on work, or filling in at the front desk.

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### 7. Another Reoccurring Issue Under the FLSA

- The solution:
  - If you have meal periods built into your schedules, be sure your front-line supervisors understand that employees should not be performing work during these times
  - Implement periodic "reality checks"



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### 8. and 9. What is Compensatory Time and Who is Eligible for it?

- Certain employees of state and local government employers can be compensated for overtime in the form of compensatory time off, rather than straight time and half payment for hours worked in excess of 40
- Compensatory time off must be at a rate not less than one and one-half hours for each hour of employment for which overtime pay would otherwise be required



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### 8. and 9. What is Compensatory Time and Who is Eligible for it?

- Any employee of state or local government is eligible
- For public safety, fire protection, emergency response personnel, and employees engaged in seasonal activities may accrue up to 480 hours of comp time
- For all other employees, maximum is 240



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### 8. and 9. What is Compensatory Time and Who is Eligible for it?

- Employee must be permitted to use comp time on date requested unless doing so is "unduly disruptive" to operations of the agency
- Ohio R.C. §4111.03 requires county employers to provide comp time within 180 after overtime is worked, unless county opts out and complies with requirements for alternative



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### 10. What About Hours "Worked" or "Volunteered" In More Than One Job

- What is unpaid "volunteer" work?
  - To be considered a volunteer, the individual's services must be offered freely and without pressure or coercion from an employer
  - Volunteers may be paid expenses, reasonable benefits, and nominal fees for service without losing volunteer status



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### 10. What About Hours "Worked" or "Volunteered" In More Than One Job

- Generally, avoid having individuals perform volunteer work for the same agency that employs him or her
  - If same agency, make sure services volunteered are significantly different than employee's paid job



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**Family Medical Leave Act:  
 The Employer's Dilemma**

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**Family Medical Leave Act:  
 The Employer's Dilemma**

- Accommodating legitimate time off needs
- Enforcing reasonable attendance rules
- Following detailed, convoluted regulations

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**Family Medical Leave Act:  
 The Employer's Dilemma**

The risk

- Having a termination or discipline overturned
- Expensive litigation/damages
  - Back pay (sometimes x 2)
  - Attorney fees

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## Family Medical Leave Act: The Employer's Dilemma

Federal law that mandates protected time off for specific reasons:

- Serious medical condition
- To care for family members
- Birth/adoption/placement
- Military care or exigency

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## Family Medical Leave Act: The Employer's Dilemma

### Who?

- Employees at workplaces with 50 or more people in a 75-mile radius

### What?

- Up to 12 weeks in any 12 months

### Eligibility

- Employed 12 months/1,250 hours worked

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## Family Medical Leave Act: The Employer's Dilemma

FMLA time off is unpaid, however:

- Must allow use of paid sick, vacation, or comp
- Can require use of paid vacation, sick (sometimes), but not comp

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**Family Medical Leave Act:  
The Employer's Dilemma**

Employers can require medical certification

- Can also require a second opinion
- Can require re-certification for return-to-work



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**Family Medical Leave Act:  
The Employer's Dilemma**

Intermittent Leave

- The HR "Headache" (Literally)
- In some cases, FMLA can be used one day at a time or even for partial days



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**Family Medical Leave Act:  
The Employer's Dilemma**

EASY - Right?

So why do Franck and I still get the FMLA question de jour?



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## Family Medical Leave Act: The Employer's Dilemma

### Coverage Questions

- ALL public employers are covered by the FMLA, regardless of the number of employees
  - BUT, 50-person/75-mile eligibility rule still applies to employee time-off rights
- In practical terms, this means some small public employers are required to comply with FMLA posting and notice requirements but may have no employees eligible for FMLA time off

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## Family Medical Leave Act: The Employer's Dilemma

### Sovereign Immunity

- Under sovereign immunity, a state government cannot be sued without its consent
- Congress can limit a state's ability to claim sovereign immunity
- County and local governments may not claim sovereign immunity

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## Family Medical Leave Act: The Employer's Dilemma

- State governments may not avoid FMLA lawsuits for damages based on the employee's care of another person by claiming sovereign immunity (*Nevada Dept of Human Resources v. Hibbs*, 538 U.S. 721 (2003)).

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## Family Medical Leave Act: The Employer's Dilemma

- The Supreme Court will decide in the next few months whether states may claim sovereign immunity for FMLA claims based on the employee's self-care (*Coleman v. Court of Appeals of Maryland*).

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## Family Medical Leave Act: The Employer's Dilemma

### Personal Liability

- Public employees may not be held personally liable for FMLA violations in the Sixth Circuit (which includes Ohio).

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## Best Practices for Avoiding FMLA Snares

### Manager Awareness

- A good FMLA notice procedure
  - Poster
    - Written policy

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### Best Practices for Avoiding FMLA Snares

Employees need not ask for FMLA

- Manager and HR awareness is key
- Control and documentation of call-off procedures



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### Best Practices for Avoiding FMLA Snares

Beware the lurking discrimination claim

- FMLA is the "new" protected class



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### Best Practices for Avoiding FMLA Snares

Beware the "fraud" conclusion

- Just because your employee can go bowling, that does not mean they can come to work



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### Best Practices for Avoiding FMLA Snares

Beware the temptation to “ignore it all”

- Even employees with ample paid sick leave and vacation “need” FMLA
- And, it is to your advantage to call it “FMLA”



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### Best Practices for Avoiding FMLA Snares

12 weeks are over – what now?

- The end of FMLA does not mean the end of employment (usually)
- What about COBRA?
- When is “enough” really enough?



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### Best Practices for Avoiding FMLA Snares

Do not forget the Americans with Disabilities Act

- An FMLA condition might also be a covered “disability”
- Employers have a duty to “interact” with disabled employees about possible accommodations



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## Best Practices for Avoiding FMLA Snares

What about light duty?

- Employees are entitled to take time off for FMLA conditions; they cannot be required to work light duty
- Note, however, certain kinds of paid time off might be forfeited by refusing light duty



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## Best Practices for Avoiding FMLA Snares

A few pregnancy-specific issues:

- How much time off must be given for pregnancy?
- Is it a pregnancy-related medical condition or time to care for newborn?



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## Fact Sheet #7: State and Local Governments Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the FLSA to State and local government employees.

### Characteristics

State and local government employers consist of those entities that are defined as public agencies by the FLSA. "Public Agency" is defined to mean 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.

### Coverage

Section 3(s)(1)(C) of the FLSA covers all public agency employees of a State, a political subdivision of a State, or an interstate government agency.

### Requirements

The FLSA requires employers to:

- pay all covered nonexempt employees, for all hours worked, at least the Federal minimum wage of \$7.25 per hour effective July 24, 2009;
- pay at least one and one-half times the employees' regular rates of pay for all hours worked over 40 in the workweek;
- comply with the youth employment standards; and
- comply with the recordkeeping requirements

Youth Minimum Wage: The 1996 Amendments to the FLSA allow employers to pay a youth minimum wage of not less than \$4.25 an hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment by their employer. The law contains certain protections for employees that prohibit employers from displacing any employee in order to hire someone at the youth minimum wage.

Compensatory Time: Under certain prescribed conditions, employees of State or local government agencies 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. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to 480 hours of comp time; all other state and local government employees may accrue up to 240 hours. An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency.

In locations with concurrent State wage laws, some States may not recognize or permit the application of some or all of the following exemptions. Since an employer must comply with the most stringent of the State or

Federal provisions, it is strongly recommended that the State laws be reviewed prior to applying any of the exclusions or exemptions discussed herein.

For certain employees in the following examples, the calculation of overtime pay **may** differ from the general requirements of the FLSA:

- employees who solely at their option occasionally or sporadically work on a part-time basis for the same public agency in a different capacity than the one in which they are normally employed
- employees who at their option with approval of the agency substitute for another during scheduled work hours in the same work capacity
- employees who meet exemption requirements for Executive, Administrative, Professional or Outside Sales occupations
- hospital or residential care establishments may, with agreement or understanding of employees, adopt a fixed work period of 14 consecutive days and pay overtime after 8 hours in a day or 80 in the work period, whichever is greater
- mass transit employees who spend some time engaged in charter activities
- employees working in separate seasonal amusement or recreational establishments such as swimming pools, parks, etc.

#### Employees Engaged in Fire Protection and Law Enforcement Activities

Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who:

1. are trained in fire suppression;
2. have the legal authority and responsibility to engage in fire suppression;
3. are employed by a fire department of a municipality, county, fire district, or State; and
4. are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform. So long as the employee meets the criteria above, he or she is an employee “employed in fire protection activities” as defined in section 3(y) of the FLSA.

Law enforcement personnel are employees who are empowered by State or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement.

Employees engaged in law enforcement activities may perform some nonexempt work that is not performed as an incident to or in conjunction with their law enforcement activities. However, a person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under the FLSA.

Fire protection and law enforcement employees may at their own option perform special duty work in fire protection and law enforcement for a separate and independent employer without including the wages and hours in regular rate or overtime determinations for the primary public employer.

- Fire Departments or Police Departments **may** establish a work period ranging from 7 to 28 days in which overtime need be paid only after a specified number of hours in each work period.

- Any employee who in any workweek is employed by an agency employing less than 5 employees in fire protection or law enforcement may be exempt from overtime.

For more information on law enforcement and fire protection employees under the FLSA, see Fact Sheet #8.

#### **Where to Obtain Additional Information**

**For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

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