INFORMATION MEMO
Fair Labor Standards Act (FLSA): An Overview

Describes the most common employee protections under this federal law requiring a minimum wage, and overtime compensation for extra hours worked under the Act. Understand city responsibilities for record keeping, child labor standards, how to define a workweek, and when you may offer compensatory time off in place of paid overtime.

I. Coverage

All cities are covered by the Fair Labor Standards Act (FLSA). However, some employees are “exempt” from the overtime provisions of the Act.

II. Requirements

The FLSA requires cities to:

- Pay at least the federal minimum wage (currently $7.25/hour) to all non-exempt employees for all hours worked. In situations where both the federal and the state FLSA address an issue, the employer is required to follow the law that is of greatest benefit to the employee. Effective January 1, 2020, Minnesota’s minimum wage will increase to $10.00 per hour for large employers (up from $9.86 per hour in 2019), and to at least $8.15 per hour for small employers (up from $8.04 per hour in 2019). The League generally advises cities with a total budget of $500,000 or more to comply with the higher Minnesota minimum wage rate (i.e., as of January 1, 2020 paying the $10.00 hour rate). Note that the definition of “employee” exempts certain types of city employees and that there is a separate minimum wage for small employers as defined by statute).

- Pay at least one-and-one-half times the employee’s regular rate of pay for all hours worked over 40 in the workweek OR grant compensatory time off at the rate of one-and-one-half hours off for each hour worked over 40 in the workweek (words in italics are defined below). While the Minnesota FLSA requires all employers, regardless of gross annual revenue, to pay overtime for all hours worked in excess of 48 hours in a seven-day period, local government employers are also covered under the federal FLSA rules. Thus, because in many cases both federal and state FLSA laws will apply to local governments, then the stricter requirement (overtime for over 40 hours in a workweek) would need to be followed.
• Pay overtime wages on the regular payday for the pay period in which the wages were earned.
• Comply with the child labor standards.
• Comply with the record-keeping requirements.

Many cities pay overtime for hours worked over eight in one day; however, this is not a requirement of the FLSA (except for certain municipal hospitals and nursing homes). Some cities have this requirement in their personnel policies or union agreements. These should be honored unless and until they are changed.

III. Definition of “hours worked”

“Hours worked” includes all hours the employee actually performs duties that are for the benefit of the city, including:

• Rest periods or “breaks” of 20 minutes or less.
• Meetings and training programs.
• Travel between work sites during the work day.
• Time spent performing duties after hours or on weekends due to emergencies (call backs).
• Any time performing duties outside of the normal shift, even if it is not “authorized.” (Although unauthorized hours must be compensated, nothing precludes an employer from taking disciplinary action for failure to follow a policy that requires prior approval before working overtime).

All of the “hours worked” must be added together to determine if the employee exceeded 40 hours in one workweek. When computing “hours worked,” a city does not need to include time the employee was gone for vacation, sick leave, or holidays, even if the time off is paid time off. Although some cities have policies or union contracts requiring such hours to be included, it is not required under the FLSA.

There are also several examples of time that does not have to be included as “hours worked:”

• On-call hours where the employee wears a pager and is free to come and go as he or she chooses, or merely leaves a telephone number where he or she can be reached, but is not required to wait by the phone. As a case in point, in the Department of Labor Opinion Letter linked to the left, the Department established on-call time was not considered “hours worked” for county ambulance service personnel since pager call-backs were relatively infrequent, the five-minute response was time was a not a significant hindrance to the employee’s personal time, and employees were not disciplined for failing to respond within five-minutes from the call to the ambulance garage.
• Meal periods of at least one-half hour where the employee is not performing any work.
• Ordinary home to work travel.

IV. Regular rate of pay

The regular rate of pay includes all compensation for employment, including base wages, longevity pay, on-call, or standby pay, educational incentive pay, and most other forms of pay.

On December 12, 2019, the U.S. Department of Labor (DOL) announced a Final Rule effective January 15, 2020, defining what forms of payment employers must include and may exclude in the FLSA’s “time and one-half” calculation when determining overtime rates.

The DOL addressed call back types of pay designed to compensate employees for unanticipated work after the employee’s scheduled hours have ended. The Final Regs stated call back pays made “without prearrangement” are excludable from the regular rate of pay, whereas call back pays for anticipated work are included in the regular rate of pay calculation. Previously there was a restriction in §§ 778.221 and 778.222 that “call-back” pay and other similar payments must be “infrequent and sporadic” to be excludable from an employee’s regular rate. In the Final Rule, the reference to “infrequent and sporadic” has been eliminated, but again, employers will want to determine whether there was a prearrangement or anticipated need for work. Only those call back pays without prearrangement are excludable from the regular rate of pay.

The Final Regulations also clarify that employers may exclude the following payments when calculating an employee’s regular rate of pay:

• Costs of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
• Payments for unused paid leave, including paid sick leave or paid time off;
• Certain penalties employers must pay under state and local scheduling laws (not currently common in Minnesota);
• Business expense reimbursement for items such as cellphone plans, credentialing exam fees, organization membership dues, and travel expenses that don't exceed the maximum travel reimbursement under the Federal Travel Regulation system or the optional IRS substantiation amounts for certain travel expenses.
Certain bonuses, but since cities are generally prohibited from awarding bonus pay because this may be considered a gift and, therefore, an unlawful city expenditure, this memo does not provide associated detail.

- Complimentary office coffee and snacks; and
- Contributions to benefit plans for accidents, unemployment, legal services, or other events that could cause future financial hardship or expense.

Because this rule was just recently finalized and involves somewhat complex interpretations of payroll and human resources policies and practices, we strongly suggest your city request review by your attorney prior to implementing any changes.

The regular rate of pay also does not include tuition. The final rules effective in January 2020 note provided tuition reimbursements not tied to an employee’s hours worked, services rendered, or other conditions related to the quality or quantity of work performed are indeed excludable from the regular rate of pay. Nor does it include expense reimbursement, or premium pay for overtime hours required by the FLSA itself or by union agreement. However, some cities may specify the regular rate of pay will include such items either by policy or union agreement. In such cases, the policy or agreement must be honored until it is changed.

V. Workweek

The workweek can be any period of time the city chooses consisting of seven days in a row. It can begin at any time of day. However, the city must consistently use the same seven-day period (for example, Sunday at 12:00 a.m. through Saturday at 11:59 p.m. of every week). The city can also have different workweeks for different groups of employees as long as each employee group is told what their workweek is, and it is documented in writing. In addition, police officers and firefighters can have a longer work week, up to 28 days.

VI. Compensatory time off

Cities are not required by the FLSA to provide the option of compensatory time off in lieu of paid overtime. (Be aware that a city policy or union contract may require the city to provide this option). As noted above, under certain circumstances, a city may give compensatory time off in lieu of paid overtime. Cities may do this when it is:
Established as a term or condition of employment (at time of hire).
• Negotiated under a collective bargaining agreement.
• Mutually agreed upon with individual employees, before the overtime hours are worked (a record of the agreement must be retained).

Some cities establish a “checkbox” on their employee timesheets whereby a non-exempt employee can indicate his or her preference to be paid for overtime either through cash payment or compensatory time off. Since the employee is given the choice, this method is likely to be seen as meeting the intent of the law.

Unless modified by the collective bargaining agreement, the employee must be allowed to take compensatory time within a reasonable time period, unless it “unduly disrupts” the city’s operation.

(Courts have found that cities are not “unduly disrupted” if cities are required to pay one employee overtime in order to allow another employee to use compensatory time off).

Cities cannot establish “use it or lose it” policies for compensatory time earned in lieu of overtime because compensatory time is a replacement for earned overtime and therefore is owed to the employee, as required by the law.

The FLSA sets an accrual limit of 240 hours of compensatory time for most employees (160 hours at time-and-one-half). Certain “public safety,” “emergency response,” and “seasonal” employees may be subject to a higher limit of 480 hours. Most cities set a lower limit (e.g., 40 hours) because of the difficulty of granting employees so much time off.

Remaining compensatory time must be paid at the time the employee terminates employment at what may be a higher rate of pay, so the cost of payout increases over time.

To avoid this, some cities periodically cash out compensatory time (for example, paying off all compensatory time balances each December before starting the new year). This should be established in writing as a city policy and/or in a union agreement.

VII. Child labor standards

The FLSA has certain restrictions on the type of work and the hours of work that may be performed by minors. The requirements of the FLSA must be coordinated with state laws on child labor.
VIII. Youth minimum wage

Cities may 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. The city cannot displace an employee to hire someone at the youth minimum wage. This federal youth wage must also be coordinated with a new law at the state level establishing a youth minimum wage (employees under the age of 18) applicable only to “large employers” as defined under the law. Under Minnesota Law, the “youth wage rate” as of January 1, 2020, is set at $8.15/hour (up from $8.04 in 2019). The rate may increase again on January 1, 2021.

Another change in state law increases the 90-day training wage for employees under age 20 to $8.15/hour on January 1, 2020, for large employers, with another possible increase on January 1, 2020. Following the first 90-days, an employee of a large employer aged 18 or older, would then be paid $10.00/hour.

A small employer is not eligible for an under 20 years wage reduction rate, since the small employer minimum wage rate in 2020 is already $8.15/hour for small Minnesota employers.

IX. Record-keeping requirements

The FLSA requires employers to:

- Display a minimum wage poster.
- Maintain detailed records of hours worked and wages paid to non-exempt employees and similar records on exempt employees, including: name, employee number, home address, birth date if under 19, sex, occupation, workweek, regular rate of pay, hours worked each day and total for week, total daily or weekly straight time earnings, total premium pay for overtime, total additions to or deductions from wages each pay period, total wages paid each pay period, and date of payment and the pay period covered.
- Maintain records on compensatory time earned, used, and paid in cash as well as union agreements regarding compensatory time, even if they are verbal agreements.
- Preserve payroll records and union agreements for at least three years.

X. Further assistance

If you have any additional questions, please contact the League’s Human Resources and Benefits Department.