FLSA Changes Are Coming: Is Your City Prepared?

Marnie Middleton, SPHR, Sr. Human Resources Consultant
Jessica Nikunen, Senior Consultant
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– J. Patrick Gallagher, Jr., Chairman, President and CEO, Arthur. J. Gallagher & Co.
Today’s Webinar Presenters

**Moderator – Laura Kushner**  
*HR Director, League of MN Cities*

**Marnie Middleton, SPHR**  
*Senior Human Resources Consultant*

Experienced HR professional supporting public and private sector clients on human resources, employment law compliance, employee relations, leadership, and organizational development.

**Jessica Nikunen**  
*Senior Consultant*

Leading benefits strategy development and supporting organizational wellbeing goals for public sector clients.
Today’s Webinar

Goal: Understand FLSA and how it applies to your city

- Non-Exempt Refresher
- Proposed FLSA Regulations
- Exempt Refresher
- Penalties & Recommendations
Non-Exempt Refresher
Non-Exempt

Cities are required to pay *minimum wages* and *overtime* for those hours worked in excess of 40 hours per *work week* for non-exempt *employees*.

- **Employment relationship**
- **Minnesota’s minimum wage**
  - $9.86 per hour for large employers
  - $8.04 per hour for small employers
  - New 2020 wages coming soon
  - LMC guidance: city budget > $500,000 = large employer

*LMC Resource - FLSA: An Overview*
Non-Exempt

- **Overtime** = one-and-one-half times the employee’s *regular rate of pay* for all *hours worked* over 40 in the *workweek* or,
  - FLSA *allows* comp time in lieu of OT pay
- **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.
  - excludes tuition/expense reimbursement, and premium pay for overtime hours required by the FLSA itself or by union agreement.
  - Some cities may specify the regular rate of pay will include such items either by policy or union agreement.
Non-Exempt

- **Work week** = 7 days in a row and begin at any time of day.
  - 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).
  - May also have different workweeks for different groups of employees.

*Document and Communicate*
Non-Exempt

Work Period and Overtime for Police and Fire Personnel

- A "work period" may be from 7 consecutive days to 28 consecutive days in length.
- For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28.
  - For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.
Non-Exempt

Calculating OT pay for employees with multiple jobs

**Option 1**
- With advance agreement of the employee, pay 1.5x the regular rate of pay for the actual work performed during overtime hours

**Option 2**
- Pay 1.5x weighted average

*Best practices recommend that these agreements be in writing.*

*Visit LMC website for more resources*
Non-Exempt

Federal FLSA Special Exemption Employees

- Employees at separate seasonal amusement and recreational establishments, if:
  - Physically separated OR
  - Not open more than seven months of the year or average receipts for any six months of the preceding year must not be more than 1/3 of its average receipts for the other six month (33-1/3 test)
Non-Exempt

Navigating Laws and Collective Bargaining

• The federal FLSA is the minimum standard
• Collective bargaining and state/local laws can exceed
• 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.
Proposed FLSA Regulations
Proposed FLSA Regulations

For January 2020

1. Exempt employee salary basis test increase
   - $455/week ($23,660 annualized)
   - $679/week ($35,308 annualized)

2. Highly compensated employee exemption salary threshold increase
   - $100,000
   - $147,414

3. Non-Discretionary bonuses, incentive payments and commissions can be included in the salary under certain circumstances.
Exempt

To be “exempt” from overtime rules, employees must meet both of two separate tests.

• **Salary basis:** be paid at least $455 per week (and up to $679 per week as of January 2020).

AND

• **Job duty:** meet the job duty criteria outlined in one of the following common city exemptions

  - Administrative
  - Computer
  - Executive
  - Professional
Salary basis + Job Duty = Exempt
Exempt

Salary basis requirements

• Must receive a predetermined amount of pay each pay period.
• Cannot be paid by the hour.
• Cannot be subject to variations in pay based on quality or quantity of work.
• Must receive the full salary for any week in which any work is performed.

Public sector unique it in its ability to require the use of leave time.

Visit LMC website for more resources.
Exempt

Guidelines for work duties

- **Customary and regular job duties** that empower the individual to exercise discretion and independent judgement.

- **Primary job duties** means the principal, main, major, or most important duty that an employee performs.

- **Closely related work** is typically necessary to facilitate the performance of exempt work. The tasks may be physical and/or menial.
Exempt

Administrative exemption job duty test

The employee must be compensated at a rate not less than $455* per week

The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer

The employee’s primary duty includes the exercise of discretion and independent judgment

Source: https://www.dol.gov/whd/overtime/fs17a_overview.pdf
Exempt

Computer exemption job duty test

Although several computer-related roles are recognized and allowed under federal law, Minnesota does not exempt the following from overtime requirements:

- Computer systems analysts
- Programmers
- Software engineers
- Other similarly skilled computer workers
Exempt

Other Common Exemptions

Executive
• Managing ops and people
• Authority or recommendation on hiring/firing

Professional
• Learned Professional
• Creative Professional

Combination
• Performs various exemptions - Executive, Administrative, Professional, Computer, etc.
Penalties and Recommendations for Compliance
FLSA and Cities

Good
Compliant

Better
Able to explain to employees and supervisors the reasons for FLSA and why it's important

Best
Record keeping and systems ready for successful audit
Penalties for Violating FLSA

Wage and hour violations

- Willful violators may be prosecuted criminally and fined up to $10,000.
- A second conviction may result in imprisonment.
- Employers that willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to civil money penalties of up to $1,100 per violation.

2019 YTD Penalties = $2,673,391

Source: DOL WHD 20190726 release, excluding child labor law violations.
Penalties for Violating FLSA

Non retaliation

- Under the FLSA, it is also a violation to terminate or in any other manner discriminate against an employee for filing a complaint or participating in a legal proceeding.
Recommendations

Record-keeping requirements

- Display a minimum wage poster in a conspicuous place in the work place
  FREE on DOL

- Maintain detailed records of hours worked and wages
- Retain payroll records and union agreements for at least three years under FLSA
  - Don’t forget MN Government Data Practices Act
Recommendations

Is your city ready?

- Review and update your job descriptions for compliance.
- Review and update time off policies.
- Document and communicate changes.
- Train employees and supervisors.

Don’t forget!
Effective 7/1/2019
MN Wage Theft Law
Accurate Job Descriptions
Job descriptions that accurately reflect the expected, day-to-day responsibilities, scope of position and educational requirements are a critical component of understanding how to classify jobs correctly.

Accurate Job Titles
Job titles that accurately reflect the position and not infer educational or professional expertise required to perform the job.

Example: “Maintenance Team Member” not a “Maintenance Engineer”
Recommendations

Review time off policies and practices

• Communicate pay status and job classification changes and expectations that require employee’s to record their time and attendance (or not).
• Train your employees to avoid contacting nonexempt employees while “off the clock” or implement a policy to track and compensate employees for these hours to be compliant with FLSA overtime requirements.
• Adopt a FLSA complaint overtime policy utilizing the Model Overtime Policy available on LMC website.
• Document and record these changes.
Key Takeaways

• Proposed minimum salary for exempt = $679/week
• Cities can make all employees non-exempt and control overtime expenses
• Ensure accurate overtime pay rate for non-exempt employees working multiple jobs
• Review overtime policies for FLSA compliance
• Review and update job descriptions

Visit LMC website for more resources
Q & A
Gallagher HR Advisory Services
On Demand HR and Project Support

Marnie Middleton, SPHR
602.715.6131
Marnie.Middleton@ajg.com

Jessica Nikunen
952.356.0714
Jessica_Nikunen@ajg.com

Thank you!