



Issue Brief: FAIR LABOR STANDARDS ACT

Updated April 2009

Background

On August 23, 2004, the Department of Labor's (DOLs) revised Fair Labor Standards Act (FLSA) regulations governing overtime compensation became effective, (29 C.F.R. Part 541). Both private and public sector employers and their national associations have been working for years to have these regulations revised in order to curtail the costly lawsuits that have been brought against employers as a result of the regulations' applicability. In the case of public sector employers, the new regulations should bring some clarity and relief, particularly in the area of "disciplinary suspensions." However, in other cases, the regulations have created new areas of concern.

Revised Regulations

Under the revised regulations, workers earning less than \$23,600 per year are automatically entitled to overtime compensation. Those earning between \$23,600 and \$100,000 must also meet a "duties test" – that is, perform duties that meet certain definitions of executive, administrative or professional employee in order to be exempt from overtime compensation. Those earning more than \$100,000 per year must satisfy an abbreviated "duties test" in order to be exempt from overtime.

The revised regulations amend the "disciplinary suspension rule" and, in doing so, address a long-standing area of concern for public employers. Under the revised regulations, employers are now permitted to suspend employees for certain misconduct without pay in full-day increments rather than full-week increments, without affecting the employee's exempt status. This is significant for public employers because prior attempts to suspend employees without pay in less than full-week increments, (for example, a one-day unpaid suspensions for certain misconduct), meant that an employee or an entire category of employees would lose the overtime exemption. This was quite costly for public employers, and led to either insufficient (suspended with pay) or overly harsh (suspended without pay for a full week) penalties in order to avoid running afoul of the overtime exemption requirements. The revised regulations address this issue by allowing employers to suspend employees without pay in full-day increments without violating the overtime exemption.

Recent Legal Victory

In another matter involving an interpretation of the FLSA and its implementing regulations, GFOA along with several other local government associations scored a significant victory on June 1, 2006, when the DOL found that dual-function firefighters (those who operate as both firefighters and paramedics) are exempt from the overtime compensation requirements of the FLSA when they are assigned to paramedic vehicles.

The local government associations had submitted an opinion letter request to the DOL asking for such clarification after the U.S. Supreme Court denied review of the Ninth Circuit Court of Appeals case, *Cleveland v. City of Los Angeles*, in 2005. Here, the Ninth Circuit had ruled that dual-function firefighters/paramedics were entitled to overtime compensation under the FLSA regulations.

This decision by the DOL is a significant victory for local governments since the cost to localities of having to pay dual-function firefighters/paramedics overtime compensation was predicted to reach nearly \$500 million per year.

The opinion letter issued by Alfred B. Robinson, acting director of the DOL wage and hour division, was unequivocal. Robinson wrote, "Based on a review of the information provided, it is our opinion that the dual-function firefighter/paramedics described in your letter qualify for the partial overtime exemption."

New Areas of Concern

While the 2004 regulations address some long-standing public sector problems, they unfortunately also create some new ones. One of these problems relates to the definition of an “exempt executive” employee. Under the revised regulations, an employee classified as an “exempt executive” must have “the authority to hire or fire other employees, or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees.” This definition may be unworkable in the public sector because hiring, firing and changes in employment status are often governed by state civil service laws, which require state and local governments to follow specific procedures when making changes in employment. If states and local governments are required to reclassify many of their currently well-compensated exempt executive managers and supervisors because most do not exercise authority over hiring and firing, or make decisions regarding changes in employment status, the new regulation could create a considerable expense for public sector employers in annual overtime liability to these currently exempt employees.

Another area of concern to public sector employers is the requirement set forth in the revised regulations relating to “first responders.” The regulations explain that police, fire, emergency medical services personnel and other similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; or conducting investigations or inspections for violations of law, or other similar work will be non-exempt employees, and thus eligible for overtime compensation. Some jurisdictions have indicated that high-ranking police officers and firefighters such as police lieutenants and captains and fire-lieutenants and battalion chiefs are often dispatched to emergencies, and may engage in the types of activities discussed above. As a result, these employees may be entitled to overtime compensation, with estimated overtime costs to public sector employers running into the hundreds of thousands of dollars.

In October 2004, GFOA and other National Associations representing public sector employers, including the National Association of Counties, the National Employer Labor Relations Association and the International Public Management Association for Human Resources, met with Mr. Alfred Robinson to express public sector concerns about some of the issues discussed above. Mr. Robinson noted that while DOL could not, at this time, publish any new regulations to address these concerns, he encouraged public sector employers to work with their national associations to draft opinion requests or contact him or his staff about any confusing or outstanding issues that may exist.

Recommendations

State and local leaders should work with their attorneys, personnel directors and finance officers to review the new regulations to determine if it is necessary to reclassify any employees as non-exempt employees, and to consider any resulting financial impact from these reclassifications.

Related GFOA Public Policy Statements (see www.GFOA.org)

- Federal Workplace Initiatives Eroding State and Local Government Authority (1996)

Additional Resources

- To view the regulations and for more information on the issue go to:
<http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm>.