Computing Regular Pay and Overtime Compensation

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Reference Number:
MTAS-948

Multiple Jobs or Dual Employment?

Reference Number:
MTAS-949

“An employee paid on a hourly basis who performs two or more different kinds of work (multiple jobs) for the same employer, each with different pay scales, may be paid on the basis of regular rates calculated as the weighted average hourly rate earned during the week.” 29 C.F.R. § 778.115. That is, the employees total earnings are computed to include his/her compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs.

Where an employee performs two different jobs for the same employer (dual employment), the hours worked must be

combined together to determine what overtime over 40 hours is due. The regular rate should be fixed by one of the procedures previously described. As a general rule, any employee, who works for two different departments of the same city or county government, is a dual employee entitled to payment for which all compensable time has been totaled to determine the overtime rate. This means that employers must check their records carefully, and they must properly compensate such moonlighting or dual employees. “Such employees may agree with his/her employer in advance to be paid overtime for the type of work that is performed during the overtime hours.” 29 C.F.R. § 778.419.

No additional overtime pay will be due under the act provided that these general requirements are met:

1. The hourly rate upon which the overtime rate is based in a bona fide rate;
2. The overtime hours for which the overtime rate is paid qualify as overtime hours;
3. The number of overtime hours for which the overtime rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard.
4. An hourly rate will be regarded as a bona fide rate for a particular kind of work it is equal to or greater than the applicable minimum rate therefore and if it is at the rate actually paid for such work when performed during non-overtime hours.29 C.F.R. § 778.419.

Joint Employment

Reference Number:
MTAS-1530

When an employee works for two or more separate employers, there normally is no special FLSA problem. Each employer must separately consider and pay overtime for hours the individual worked for that particular employer in excess of 40 hours per week. However, in the case of governments that often work in conjunction with other government organizations, units or department, DOL has stated that “... various departments and agencies of the federal or state government, or of the political subdivisions of a state government, are to be treated as separate employers.” Wage and Hour Opinion Letter dated Aug. 23, 1974.

Even when the employee works for an entirely separate employer, there still may be questions of whether the two employers are so entangled as to create what is called a “joint employment” relation whereby, for the purpose of the FLSA, they are treated as one entity. “The test for joint employment includes (1) sharing employees’ services so as to interchange employees; (2) an employer acting in the direct interest of another employer; (3) and employers who are not so completely disassociated that they are deemed to be under common control and share employees.” 29 C.F.R. § 791.2(b).

In an October 10, 1985, opinion letter, DOL identified the following factors that would support a determination that two or more agencies are separate employers:

1. The agencies are treated as separate employers from other agencies for payroll purposes;
2. The agencies deal with other agencies at arm’s length concerning the employment of any individual;
3. The agencies have separate budgets or funding authorities;
4. The agencies participate in separate employee retirement systems;
5. The agencies are independent entities with full authority to perform all of the acts necessary to their function under state statute; and
6. The agencies can sue and be sued in their own names.

If the agencies are found to be separate employers, there still may be a “joint employment relationship” between them. If the agencies are considered joint employers, they are still treated as one under the act. The October 1985 opinion letter identified the following factors as important in determining if a joint employment relationship exists:

1. When employed by one agency, is the employment by another agency completely voluntary on the part of the employee, or is the employee led to believe in any way that he/she should accept additional work at the other agency?
2. When employed by one agency, is the employee assured, promised or led to believe that he/she will receive additional work from another agency?
3. Are employees of one agency given a special preference for additional work at another agency?
4. Does the work for one agency represent only part-time or irregular work?
5. What are the percentages of time in all workweeks in which the employee works for one agency as compared to the employee’s work for another agency or agencies?
6. What effect does the employee’s work in one job have on his/her other job or jobs? For example, has any employee ever been fired from or been disciplined by one agency because the employee failed to perform a job for another agency?

A special joint employment provision for law enforcement, fire protection and security correctional employees was added to

the FLSA. 29 U.S.C. § 207(p)(1). This provision "allows public safety employees on a voluntary basis, to be employed by special detail to a separate and independent employer in fire protection, law enforcement or related activities without combining together the employees' hours of work for the two or more employers." 29 C.F.R. § 553.227. Even if the governing body requires the second employer to hire its public safety employees for particular work or is in any other way involved (for example, approved the job, collects compensation from the second employer, then directly pays the employee), the hours of the public safety employee still are not totaled. Thus, for firefighters and more importantly police, the agency can facilitate the employment of its officers by other separate agencies without creating a joint compensation problem.

Half-Time for Salaried Employees

Reference Number:
MTAS-951

"The FLSA permits employers to pay non-exempt employees a fixed salary for a fluctuating workweek and to compensate them for their overtime hours on a 'half-time' basis." 29 C.F.R. § 778.114(a). Under this method, an employee is paid a fixed salary covering whatever number of hours the job demands in a given week. With straight time already compensated in the salary, only one-half the basic rate (half time) must be paid for overtime. The amount of the half-time payment will vary depending on the number of hours worked in excess of 40 hours in the workweek.

An employer may use the half-time method of calculating overtime only if:

1. The employee understands that his/her salary is meant to cover all hours worked;
2. The parties have a clear understanding that the salary (apart from the half-time payments) will not fluctuate even though the job demands that the employee work more or less than 40 hours in a given week (to avoid confusion, it is recommended that the understanding be in writing or a policy is distributed to employees); and
3. The salary is large enough to assure that the average hourly wage never falls below the FLSA minimum wage.

"To calculate half-time, one must first determine the regular rate of pay by dividing the weekly salary by the number of hours actually worked during the week. The employee's half-time premium would be determined by multiplying the regular rate by one-half. Thus the extra half-time pay would be calculated by multiplying the half-time premium by the number of hours over 40 worked in a week." 29 C.F.R. § 778.114(a).

Example:
A salaried employee works 50 hours in a week at a salary of $500. The employees' regular rate of pay would be $10 an hour. Under half-time, the employee would be entitled to one-half the $10 regular rate for all overtime hours worked. Thus the employee would be entitled to $5 an hour multiplied by the 10 hours of overtime worked, or $50 in extra overtime pay.

In this example, the half-time overtime premium is $50 while the regular time-and-a-half overtime premium would be $187.50. Thus, half-time pay is considerably more advantageous to the employer. The advantage of half time for the employer becomes greater the more hours that are worked because the hourly premium pay goes down. The disadvantages of using half time include problems of employee morale, difficulty in retaining good personnel, and administrative problems in calculating pay.

Belo Plans

Reference Number:
MTAS-952

Belo Plans are another wage option under the FLSA that can benefit some employers. A Belo Plan is a form of guaranteed compensation that includes a pre-determined amount of overtime. It offers the employee the security of a set weekly income, with the employer able to anticipate and control labor costs and bookkeeping calculations. 29 C.F.R. § 778.404

There are a number of requirements for an enforceable Belo Plan:

1. There must be a specific agreement/contract (Section 7(f) Contract) between the employer and the employee, although such an agreement need not be in writing. 29 C.F.R. § 778.407.
2. The employee's duties must necessitate irregular hours of work. 29 C.F.R. § 778.405. This has been interpreted to mean that the employee's work must fluctuate such that the employee sometimes works more than 40 hours a week and other times fewer than 40 hours during the week.
3. The weekly overtime payment must be guaranteed. 29 C.F.R. § 778.413. In other words, if the Belo Plan calls for 60 hours of work and the employee works 40 hours, the employee still gets full payment;

4. The guaranteed number of weekly hours worked cannot exceed 60. 29 C.F.R § 778.412. All hours worked beyond 60 per week must be compensated at an additional time and a half. The type of employees who might qualify for a Belo Plan include “outside buyers, on-call servicemen, insurance adjustor, newspaper reporters and photographers, **firefighters**, trouble-shooters and the like. 29 C.F.R. § 778.405.

Example:

If the parties agree upon a regular rate of $8 an hour and enter into a contract that provides a weekly guarantee of pay for 60 hours per week, every week the employee would be paid the regular rate of $320 ($8 x 40 hours) plus an overtime rate of $240 ($12.00 x 20 hours). Thus, every week, for all work performed up to and including 60 hours a week, the employee would be paid $560. In the event the employee worked more than 60 hours per week, an additional overtime premium would be payable at the $12.00 per hour rate.

Compensatory Time

Reference Number:
MTAS-1531

Compensatory time (comp time) is time off in lieu of monetary overtime compensation at a rate of not less than one and one-half hours of compensatory time for each hour of overtime worked. By definition it is hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

The law (29 C.F.R. § 553.21) “authorizes a public agency to provide compensatory time in lieu of overtime payments so long as there is an employment agreement or understanding to use comp time. If it was the employer’s practice prior to April 15, 1986, to pay existing employees compensatory time, then that practice shall suffice as an understanding permitting the use of compensatory time.”

“The agreement or understanding to use compensatory time for employees who do not have representation must be arrived at before the performance of the work.” 29 C.F.R. § 553.23(c)(1). “The agreement does not have to be in writing, but a record of its existence must be kept. The agreement doesn’t have to be the same for all employees and the employer does not need to make compensatory time available to all employees.” 29 C.F.R. § 553.23(c)(1).

“The compensatory time that an employee earns constitutes a legal liability for the employer.” 29 C.F.R. § 553.22(a). Employees may accrue up to 240 hours of compensatory time (160 hours actual overtime worked). Employees who work in public safety activities, emergency response activities and seasonal activities may accumulate up to 480 hours of comp time (320 hours actual overtime worked). 29 C.F.R. § 553.22(b).

“An employee who has accrued compensatory time and requests use of the time must be permitted to use the time off within a ‘reasonable period’ after making the request if it does not ‘unduly disrupt’ the operations of the agency.” 29 C.F.R. § 553.25(a). At the same time, the DOL emphasizes that “an employee has a right to use the compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically, and in good faith, expect to be able to grant.” 29 C.F.R. § 553.25(b).

The FLSA contains a provision (29 U.S.C. § 207(o)(5)) addressing an employer’s general obligation to honor an employee’s request to use compensatory time. The 9th Circuit Court of Appeals, in *Collins v. Lobdell*, 188 F.3d (1999), affirmed “an employer’s right to compel use of such time.” Then in May 2000, the U.S. Supreme Court resolved the issue, holding that “nothing in the FLSA or its implementing regulations prohibit a public employer from compelling the use of compensatory time.” *Christensen v. Harris County*, 120 S. Ct. 1655 (May 1, 2000).

Another important issue surrounding compensatory time has to do with payment for unused compensatory time in the event an employee leaves the public agency. According to DOL regulation “payments for accrued compensatory time earned after April 14, 1986, may be made at any time and must be paid at the regular rate earned by the employee at the time the employee receives payment.” 29 C.F.R. § 553.27(b). Upon termination of employment, an employee must be paid for unused compensatory time figured at:

1. The average regular rate received by such employee during the last three years of employment; or
2. The final regular rate received by such employee, whichever is higher.

Time Off Plans

Reference Number:
MTAS-1532

DOL allows the use of “time-off plans.” A “timeoff plan” is very similar to compensatory time but involves leave taken during the same pay period. “State and local governments may use the time-off plan in addition to compensatory time; however, for a public agency that uses the 207(k) exemption for police and fire, time off may be granted in the pay period for which the work is done up to the maximum hours specified in the regulations.” 29 C.F.R. § 553.231(a).

Time-off plans are allowed only under the following conditions (427 U.S. 909 (1976); also Wage and Hour Opinion Letter, Dec. 27, 1968):

1. The employee must get time off at time and one-half for all hours worked over 40 in a week; and
2. The employee must take the compensatory time off during the same pay period in which it was accrued.

Example:
An employee who works 50 hours the first week of a two-week pay period can take off (or be ordered to take off) 15 hours and, accordingly, work only 25 hours the second week without any overtime premium due. If the 50 hours occur during the second week, the overtime premium will be due.

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