

## Fair Labor Standards Act & Public Sector Employers

Presented by:  
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## Agenda

- Overview of the Fair Labor Standards Act (“FLSA”)
- Highlight provisions of the FLSA as they apply to employment relationships between the public sector employer and public sector employee
- Highlight developing areas and areas of increased dispute under the FLSA

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## Agenda cont.

- In this program we will not be addressing the various Massachusetts wage and hour laws, or how these various laws apply (or may be argued to apply) in different public sector workplaces
- Some Massachusetts Laws to consider include the following:

M.G.L. c. 41, §§ 108A & 111H  
M.G.L. c. 40, § 21A  
M.G.L. c. 149, §§ 30, 31, 33-33A  
M.G.L. c. 150E (and its preclusive effect)  
M.G.L. c. 48, §§ 58B & 58C  
M.G.L. c. 147, §§ 17B & 17C  
M.G.L. c. 151, § 1A (*Lemieux v. City of Holyoke*, 2010 U.S. Dist. LEXIS 101872 (Sept. 28, 2010), and other Decisions have discussed application of this Massachusetts Overtime Law to public sector employees. The decisions to date have found that it does not apply – stay abreast of the status)

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## Agenda *cont.*

- Please exercise caution in making wage and hour decisions
- Decisions call for fact intense inquiries and legal analysis
- Variations in regulations
- These materials highlight areas – not legal advise or representative of all law in the areas

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## Interplay of Massachusetts Law, CBAs, Other Laws or Agreements with FLSA

- The FLSA provides minimum standards that may be extended, but cannot be waived or reduced
- FLSA does not trump or undo separate obligations under other State law(s), CBAs, Agreements or other laws
- State law or a CBA, for instance, may require additional compensation, or prohibit a practice permitted by FLSA
- Massachusetts timely payment of wage act expressly applies to public sector employers
- Separately analyze obligations under other laws or agreements
- This presentation addresses FLSA obligations – Not other laws

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## Overview of FLSA

- A Federal Wage and Hour Law
- Administered by the U.S. Department of Labor, Wage and Hour Division (“DOL”)
- Website address: <http://www.dol.gov/whd/>

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## Authority of the U.S. DOL Wage Hour Division

- Authority to interpret the FLSA
- Authority to audit employers for compliance
- Authority to enforce the FLSA, and bring enforcement actions against employers

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## U.S. DOL *cont.*

- Promulgates regulations interpreting FLSA
- Regulations generally at 29 CFR §§ 500-800
- Publishes other sorts of guidance such as fact sheets, posters, compliance assistance, and elaws
- Tutorials on website

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## DOL Opinion Letters

- The DOL publishes Opinion Letters
- Opinion Letters are the DOL's response to specific employer inquiries
- Can provide useful guidance as to how a particular issue may be viewed by the DOL

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## FLSA Public Sector Regulations

Among its many regulations, DOL has published specific regulations regarding how the FLSA applies to State and local government employers at 29 CFR 553

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## Application of the FLSA to State and Other Public Employers

- Congress incrementally extended coverage of FLSA to State and local government employees, as described in the statute
- In 1985, in the case of Garcia v. San Antonio Metropolitan Transit Authority, the U.S. Supreme Court held that the FLSA applies to state and local governments. 469 U.S. 528
- In 1999, in the case of Alden v. Maine, the U.S. Supreme Court found that the States have *sovereign immunity* from civil suits by their employees under the FLSA. 527 U.S. 706

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## Application of the FLSA to State and Other Public Employers *cont.*

FLSA not extended to cover individuals in government who meet regulatory definitions of the following:

- “elected officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities.” 29 CFR 553.10
- Employees of legislative branches of state and local governments
- A condition for exclusion is that an employee must not be subject to civil service law of the employing State or local agency

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## Sovereign Immunity Applicable Only to the State under the FLSA

- While it has been held that Sovereign Immunity prohibits private civil action by employees against their State employer under the FLSA, sovereign immunity has not been extended to non-state public employers
- Non-state public employers (such as Cities, Towns or other subdivisions) remain subject to suit under the FLSA by their employees in private civil actions, and have not been protected from suit based upon sovereign immunity

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## FLSA Basics

- Sets minimum wage requirements
- Sets overtime requirements
- Generally does not mandate paid time off be provided, such as vacation, sick, severance, holiday, etc.\*
- Generally does not mandate lunch breaks or other types of breaks\*
- Massachusetts has laws relative to payment for paid time off and breaks

\*See 2010 Amendment to require break time for Nursing Mothers

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## FLSA Exemptions

- The FLSA classifies employees as either exempt or non-exempt from the provisions of the Act
- Non-Exempt means subject to the requirements of the FLSA
- Non-exempt employees must be paid minimum wage for all hours worked, and overtime at 1 ½ times the employee's "regular hourly rate" for work over 40 hours in a workweek
- Partial exemptions in the statute for some types of employees

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## Non-Exempt Employees Qualifying for FLSA Section 207(K) Overtime Rule

- Non-Exempt employees engaged in fire protection or law enforcement activities
- Section 7(k) of the FLSA provides that with regard to public sector employees "engaged in fire protection or law enforcement activities," public employers are permitted to adopt a work period for any period of at least 7, but no more than 28 consecutive days for overtime purpose and as set forth (and for reasons set forth) in the law. The work period has different maximum hour requirements for overtime, as set forth in the regulations
- 7(k) is a form of exception to the rule that non-exempt employees in these categories must be paid overtime for over 40 hours of work in a work week, so long as all regulatory requirements are met for applying 7(k) work period

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## FLSA Section 207(K) *cont.*

- Overtime is not required to be paid in this 7(k) work time period until the number of hours that the employee works in the time period exceeds the ratio of 212 hours to 28 days for fire related, or 171 hours to 28 days for law enforcement officers
- Example: In a 7 day time period under 7(k), overtime is not due until the fire protection employee works over 53 hours, and in the case of law enforcement officers, until they have worked over 43 hours in the 7 day period, as further described in the regulations

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## FLSA Section 207(k) *cont.*

- Employers must properly elect a 7(k) complaint time period, as discussed later in this presentation, for the 7(k) overtime rules to apply
- Where a 7(k) election has not been made, the general rule applies that overtime is required whenever the non-exempt employee works over 40 hours in the workweek
- When considering 7(k) election employers must separately consider any Mass. Gen. L. Ch. 150E bargaining obligations. See City of Boston v. Comm. Employment Relations Board, 453 Mass. 389 (2009) (holding that in this case the FLSA did not preempt any separate 150E duty to bargain over wages, hours, and terms and conditions of employment)
- 7(k) referenced more below

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## FLSA Includes 3 Major Categories of Exempt Employees

- *Bona fide* Executive
- *Bona fide* Administrative
- *Bona Fide* Professional

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## Testing for Whether an Employee Meets an Exemption

Employee must generally meet both of the following:

- job duties and responsibilities of the employee must meet the ***DOL regulatory*** definition of those associated with a *bona fide* executive, administrative, or professional employee, and
- employee must be paid the statutory prescribed salary and be paid on a salary basis where applicable

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## Considerations in Applying the Exemption Tests

- ✓ The employer has the burden of showing the exemption criteria are met
- ✓ Salary alone does not determine an employee's exempt status
- ✓ Job titles alone do not determine exempt status
- ✓ Job descriptions alone do not determine exempt status
- ✓ Scrutinize job duties
- ✓ Engage in ongoing process of reviewing exempt status of position *and* employee

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## The *Bona Fide* “Executive”

All of the following must be met:

- Employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; and
- Employee must customarily and regularly direct work of two or more other full-time employees or their equivalent; and
- Employee must have authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight; and
- Employee must be paid on a salary basis (as defined in regulations), at a rate of at least \$455 per week

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## Executive Exemption *cont.*

- Does not apply to police, fire, rescue workers, EMTs, and similar employees regardless of rank or pay, who are acting as “first responders”
- Investigative work is not executive in nature even though at scene of crime or accident directing other employees

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## Job Titles Indicating Management as a Primary Duty

- Job titles do not determine exempt executive status (Manager, Supervisor, director, Department Head)
- Rank, alone, will not determine exempt executive status
- In all instances must be a factual analysis of actual job duties

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## Executive Exemption Examples

- Police Sergeants and Police Chiefs have been found to be exempt executives where they meet the criteria for exemption, according to various case interpretations
- Required fact specific analysis of job functions
- Mullins v. City of New York, 523 F. Supp. 2d 339 (S.D.N.Y. 2007) (holding police sergeants in this case were exempt executives); Murphy v. Natick, 516 F. Supp. 2d 153 (D. Mass. 2007) (holding sergeants and lieutenants exempt); O'Brien v. Agawam, 350 F.3d 279 (1st Cir. 2003)(sergeants, lieutenants and captain exempt)

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## Executive Exemption Examples *cont.*

- Fire Deputy Chiefs and Fire District Chiefs have also been found to be exempt executives, where they met the criteria for exemption
- See Simmons v. City of Ft. Worth, 805 F. Supp. 419 (1992), decided under former regulations and holding fire deputy chiefs and fire district chiefs in these cases were exempt executives

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## Executive Exemption: Department or Division Managers

- Apply the full test for exemption, including salary basis
- Primary duties as described in test
- Manage the work of two or more other full-time employees, or their equivalent
- Regulatory role in decisions regarding other employees change of status

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## Executive Exemption: Department or Division Managers *cont.*

Caution: pay particular attention when trying to apply this exemption to second-tier managers or supervisors who may not have the authority to direct enough people, or do not have management as a primary duty, or whose authority or roles in decisions as to change of status of other employees is not met

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## “Primary Duty” (See 29 CFR 541.700)

- Requires review of actual job duties and responsibilities
- How much time is spent managing versus performing the production work of the department or division
- According to the regulations, the amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. The regulations provide that employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement. The regulations, however, also state that time alone, is not the sole test and that nothing in the regulations requires an employee spend more than 50% of their time in exempt duties

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## Executive Exemption *cont.*

(Regulations at 29 CFR 541.102 provides examples of job duties)

- interviewing, selecting, and training of employees;
- setting and adjusting their rates of recommending promotions or other changes in status;
- handling employee complaints and grievances;
- disciplining employees; planning the work;
- determining the techniques to be used;
- apportioning the work among the employees;
- determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- controlling the flow and distribution of materials or merchandise and supplies;
- providing for the safety and security of the employees or the property;
- planning and controlling the budget;
- monitoring or implementing legal compliance measures.

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## Bona Fide "Administrative" Employee

To qualify, employee must meet all of the following tests:

- Primary duty must be the performance of office or non-manual work directly related to *management or general business operations* of the employer or the employers customers; and
- Employee's primary duty must include the *exercise of discretion and independent judgment* with respect to matters of significance; and
- Employee must be paid on a salary basis, at a rate of at least \$455 per week

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## Functional Areas That May Involve Management or General Business Operations

- Tax
- Finance
- Accounting
- Procurement
- Budgeting
- Auditing
- Insurance
- Quality control
- Purchasing
- Legal and regulatory compliance
- Advertising
- Marketing
- Safety and health
- Personnel management
- Human resources
- Employee benefits
- Labor relations
- Public relations
- Government relations
- Computer/internet/database administration

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## Exercise of Discretion and Independent Judgment Required

Work in a Qualifying Functional Area Must Include Exercise of Discretion and Independent Judgment with Regard to Matters of Significance.....

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## Regulations Suggest Several Factors Be Examined

- Does the employee have the authority to formulate, effect, interpret or implement management policies or operations practices?
- Does the employee carry out major assignments in conducting the operations?
- Does the employee perform work that affects business operations to a substantial degree in the area?
- Does the employee have the authority to commit the employer in matters that have significant financial impact?

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## Regulations Suggest Several Factors Be Examined *cont.*

- Does the employee have the authority to commit the employer in matters that have significant financial impact?
- Does the employee have the authority to deviate from or waive established policies and procedures without approval?
- Does the employee provide consultation or expert advice to management?

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## Regulations Suggest Several Factors Be Examined *cont.*

- Is the employee involved in planning long or short-term business objectives?
- Does the employee investigate and resolve matters of significance on behalf of management?
- Does the employee represent the company in handling complaints, arbitrating disputes or resolving grievances?

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## Inspection or Investigative Work

- Under FLSA regulations, public sector employees performing inspection or investigative work are not performing exempt administrative job duties
- Fire prevention, safety, building and construction, and health and sanitation are examples of the types of investigative work the regulations state is not administrative

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## Administrative Exemption *cont.*

- Skill and experience must be distinguished from discretion and independent judgment required for exemption
- Applying known standards or prescribed procedures is not exercising independent discretion and judgment
- Just a thought and a point of caution - if an employee in one of these functional areas reports to a manager for supervision in his or her work, it is not very likely this employee meets the criteria?

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## *Bona Fide* “Professional” Employee The Learned Professional

To qualify as a “learned” professional, an employee must meet all of the following:

- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; and
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction; and
- Unless otherwise stated in the regulations, the employee must be paid on a salary basis (as defined in the regulations), at a rate of at least \$455 per week

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## Teachers as Learned Professionals

- Teachers can be exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment, as defined in regulations
- According to DOL, exempt teachers can include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers
- The salary and salary basis requirements generally do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge said to include, by its very nature, exercising discretion and judgment. See regulations

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## *Bona Fide* Professional Employee Creative Professional

To qualify as a “creative” professional, an employee must meet all of the following:

- Employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor; and
- In most instances, the employee must be paid on a salary basis (as defined in the regulations), at a rate of at least \$455 per week

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## Creative Professionals

DOL identifies the following list of fields where this exemption may apply:

- Music
- Writing
- Acting
- Graphic Arts

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## Highly Compensated Employees Variation on Duty Requirements

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if:

- they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption

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## “Blue Collar” Workers

- FLSA regulations provide that the exemptions apply only to “white collar” employees who meet the salary and duties tests set forth in the Part 541 regulations
- The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy, *no matter how highly paid they might be*

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## Computer Professional Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below (see next slide)

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## Computer Professional *cont.*

The employee's primary duty must consist of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills

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## The *Salary Basis* Requirement

- FLSA regulations provide specific criteria which can not be varied from if an employee is to be considered to be paid on a "salary basis", as required for the various exemption tests
- Salary Basis rules vary a bit for public sector employees, to create some flexibility, generally reflecting issues of public accountability

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## The *Salary Basis* Requirement *cont.*

- Intro Rule: employee will be considered to be paid on a salary basis within the meaning of the regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation

Which amount can not be subject to reduction because of the variations in the quality or quantity of the work performed, which meets minimum salary requirements

- General rule states, salary must be paid in any week where any work performed {See, however, and compare rule prohibiting deductions for absences occasioned/caused by employer}

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## The *Salary Basis* Requirement *cont.*

- Predetermined amount of compensation each pay period; meeting minimum salary requirement in exemption
- Not subject to reduction on account of quality or quantity of work
- Any impermissible deductions from an employee's salary will cause him or her to fail the salary basis requirement for exemption
- Most executive, administrative and professional employees must be paid on a salary basis to be exempt
- If employee's are not paid on a salary basis, then he/she will be deemed non-exempt from the FLSA regardless of whether or not their job duties and responsibilities meet the requirements of the exemption

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## *Salary Basis:* Impermissible Deductions

- Deductions may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability {See also additional rule applicable to public-sector referenced below}
- Deductions may be made for absences of one or more full days occasioned by sickness or disability, as set forth in regulations if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned for these reasons, as set forth in regulations. Where section complied with employer is not required to pay any portion of the employee's salary for full-day absences for which the employee received compensation under the plan, policy or practice

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## *Salary Basis:* Impermissible Deductions

- No deduction for absences occasioned by jury duty, attendance as a witness, or temporary military leave, but may offset any amounts received as jury or witness fees, or military pay, for a particular week against salary due
- Result must be that employee still receives full salary, though part may be from jury fee, for instance

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*Salary Basis:*  
**Impermissible Deductions**

- Deductions from pay may be made for penalties imposed in good faith for infractions of *safety rules of major significance*, as defined by the regulations
- Deductions from pay may be made for unpaid disciplinary suspensions of one or more full days imposed in *good faith for infractions of workplace conduct rules*, as defined by the regulations, Suspensions must be imposed pursuant to a *written policy* applicable to all employees

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*Salary Basis:*  
**Impermissible Deductions**

- Not required to pay full salary in the initial or terminal week of employment
- May pay in proportion to time actually worked in initial or terminal week, in accordance with regulations
- As further described in regulations - not required to pay full salary in weeks in which exempt employee takes unpaid leave under the Family Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week

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**Salary in Week Where No Work is Performed**

- Regulations require salary be paid in any week where any work is performed, with the exception of the deductions permitted by the regulations
- Required in full in any week where any work is performed, at all, subject only to regulatory permitted deductions
- If the full week absence is occasioned by the employer (as opposed to the employee), the argument exists that the employee should be paid the salary, even though there was no work performed. But see discussion of public sector furloughs

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## Additional Regulations on Salary Basis and Permissible Deductions For Public Sector Employees 29 CFR § 541.710

An employee of a public agency who otherwise meets the salary basis requirements of the regulations is not disqualified from exemption on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

- (1) Permission for its use has not been sought or has been sought and denied;
- (2) Accrued leave has been exhausted; or
- (3) The employee chooses to use leave without pay

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## Furloughs and Deductions from Salary of Public Sector Employee

Deductions from the pay of an employee of a public agency for absences due to a **budget-required** furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced, if regulatory requirements for finding a qualifying furlough, and making a deduction for furlough time off are met. See 29 CFR § 541.710(b)

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## Other No Work Issues - (for instance, snow days)

- **General Rule** - An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, general rule is that deductions may not be made for time when work is not available.
- The regulations, however, generally do not prohibit an employer from charging accrued time off banks

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## Reducing the Leave Bank of a Exempt Employee

- According to a DOL publication, an employer can substitute or reduce an exempt employee's accrued leave (or run a negative leave balance) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis payment, provided...
- the employee still receives payment equal to the employee's predetermined salary in any week in which any work is performed even if the employee has no leave remaining

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## Safe Harbor Policy For Addressing Improper Deductions From Salary

- Improper Deductions can result in a complete loss of exempt status where employee no longer qualifies as being paid on a "salary basis"
- As described in regulations, DOL has stated the FLSA exemption will not be lost completely if (among other requirements) an employer has a clearly communicated safe harbor policy that includes a complaint procedure, in accordance with regulations
- Improper deductions must still be isolated or inadvertent, and must be corrected, as described in regulations
- Inadvertent deductions are unintentional deductions
- Regulations outline criteria for safe harbor policy, etc.

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## Other Laws and CBAs

- The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced
- In addition to the FLSA, Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA
- Employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA
- Collective bargaining agreements cannot waive or reduce FLSA protections, however, nothing in the FLSA or the Part 541 regulations relieves employers from their contractual obligations under such bargaining agreements

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## Overtime Requirements Under FLSA



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## Break Time – 20 Minutes



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## Overtime Under the FLSA



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## Overtime Requirements Under the FLSA

- Under FLSA if an employee is not exempt (non-exempt), the employee must be paid overtime for all time worked in excess of 40 hours in a workweek
- Note: Mass law is not addressed here. To avoid overtime requirements, employers must additionally ensure the employee is exempt from overtime under any applicable Massachusetts law
- Other Laws, CBA's policies, etc., may provide for more overtime than required by FLSA

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## Overtime is Triggered By Hours Worked

- Under the FLSA, an employee is entitled to overtime when he or she works in excess of 40 hours in a workweek
- Work time does not include paid time off such as sick, vacation, personal or holidays where the employee does not work, as that term is defined by the FLSA and regulations
- Work time generally does not include unpaid breaks of greater than 20 minutes (30 minutes is a recommended benchmark) where the employee is relieved of all duties and allowed to leave the work place. Breaks of 20 minutes or less are considered work time regardless of whether or not the employee is relieved of all duties and allowed to leave the workplace

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## Overtime May be Different Under Policy or CBA

- FLSA overtime arises when work time exceeds 40 hours
- Some policies include paid time off as work time in determining when policy overtime is triggered, resulting in more instances where overtime must be paid by policy
- CBAs may include paid time off as work time in determining when an employee becomes entitled to overtime

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## Hours Worked

- All time an employee must be on duty
- All time the employee must be on the employer's premises
- All time the employee must be at a place prescribed by the employer as his or her workplace
- All time the employee is suffered or permitted to work, i.e. allowed to work.

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## Hours Worked

Can include:

- Work at home
- Work before or after shifts
- Study time related to compensable training See - DOL Opinion Letter 2009-15 discussing limits and compensability
- Changing Clothes See DOL Opinion Letter 2010-2 discussion donning and doffing of clothing

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## Hours Worked *Cont.*

- Waiting Time, where employee is engaged to wait
- Training or time spent in educational courses on behalf of employer can be included in work time, as set forth in the regulations
- On-call time where criteria to be considered non-compensable work time are not met
- Unauthorized work time that is permitted by a manager
- Telephone calls made for work, outside of work
- Checking emails
- Issues associated with carrying PDA devices

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## Overtime Rate

- FLSA Overtime rate is 1.5 times the employees Regular Hourly Rate of Pay
- “Regular Rate of Pay” is defined in the FLSA
- Regular rate of pay includes all compensation received by an employee that is not specifically excluded by the Act
- Great deal of litigation involving regular hourly rate of pay, and requiring public employers go back and recalculate overtime based upon FLSA regular hourly rate of pay

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## Regular Hourly Rate of Pay

- Definition of overtime rate in a CBA or policy does not trump FLSA definition for purposes of determining FLSA overtime
- CBA or policy may require more overtime, and require overtime be *paid greater than required under the FLSA*, but not less
- Can not reduce the amount of overtime due under FLSA
- Can not change the FLSA definition of regular hourly rate
- Calculation issues = compare CBA to FLSA

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## Regular Rate of Pay to Be Used For Calculating FLSA Overtime

Any “remuneration for employment paid to, or on behalf of, the employee,” that does not fit into any of the statutory exception at 29 U.S.C. § 207(e).

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## Regular Rate: Examples of Items that Have Been Included

- Shift Differential pay
- Educational Incentive pay (Quinn Bill or other types)
- Longevity pay
- Pay for completing a set period of Military Service
- Certain bonus payments (non-discretionary)

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## Regular Rate: Examples of Items that Have Been Included

- Community Service pay
- CompStat Technology pay (for use of the Comp-Stat Community Policing Program)
- Assignment Differentials (extra compensation for special work, such as Detectives, and EMTs)
- Personal Time Buy-Back pay (recent Massachusetts U.S. District Court decision finds that it is included where, under the express terms of the CBA, the bought back time is compensated at a higher rate than the employee's standard hourly rate, and thus considered "an incentive bonus for employees who forgo taking personal days") See Lemieux v. City of Holyoke, 2010 U.S. Dist. LEXIS 101872 (D. Mass.)

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## Regular Rate: Examples of Items that Have Been Included

- Sick Leave Buy-Back pay (recent Massachusetts U.S. District Court decision followed the 8<sup>th</sup> Circuit in Acton v. City of Columbia, 436 F. 3d 969 (8<sup>th</sup> Cir. 2006) and held that sick leave buy-back pay was like an incentive bonus payment to employees for coming to work consistently. But see Featsant v. City of Youngstown, 70 F.3d 900, 905 (6<sup>th</sup> Cir. 1995) (holding that sick leave buy-backs are similar to payments made when no work is performed due to illness, which is excluded from the regular rate)
- Stand-By pay
- Reimbursements for expenses incurred on the employer's behalf or where the employee is required to expend sums solely by reason of action taken for the convenience of the employer to be included if "disproportionately large" to the expense incurred, the excess amount will be included in the regular rate, or if the reimbursement is for expenses personal to the employee, such as traveling to work, paying for lunch and the like
- On-call pay

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## Regular Rate of Pay

- Scrutinize every type of compensation an employee is being paid
- All compensation(s) must be included in regular rate for FLSA overtime unless it is specifically excluded by statute or interpreting regulation
- Consistently review regulations, law, and recent holdings

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## Excess Overtime Paid Under Policy or Agreement

- As described in the regulations, excess overtime premiums paid to an employee (though not required by FLSA) may in some instances be creditable toward the employers FLSA overtime liability
- Regulations are specific about where/when excess overtime has been paid and can be credited
- Carefully scrutinize regulations and practices in this area

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## 207(k): Variation for Calculating When Overtime is Due To Specified Employees

- While most fire protection and law enforcement employees will be non-exempt and required to be paid overtime, the FLSA recognizes that fire protection and law enforcement personnel often have less typical work hours and workweeks.....
- FLSA has created a rule applicable to “fire protection or law enforcement” in “public agencies” which provides public sector employers some relief in dealing with these less typical work hours, work weeks, and overtime

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## 207(k)

- Provides employer has not violated the maximum hours worked requirements for overtime under the FLSA (40 hours) as long as police or fire employees work an aggregate of less than 212 hours in 28 days for fire-related employment and 171 hours to 28 days for law enforcement officers, where a compliant schedule and other FLSA requirements for application are met, including a proper election to apply this section of the law, instead of the regular 40 hour rule
- To use a 7(k) work period, an employer must have a compliant schedule and make the proper election in advance of work being performed, as described in the Act, regulations and cases

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## FLSA 207(k) cont.

7(k) alternative overtime work schedule and requirements is available to "public agencies" and to those employees in the public agency who are engaged in "fire protection or law enforcement"

- Cities and Towns
- Correctional officers are law enforcement; dispatchers are not (Baker v. Stone Cnty., Mo., 41 F.Supp. 2d 965 W.D. Mo. 1999)
- Civilian workers in departments do not qualify for 7(k)
- Can apply to Paramedics and EMTs who respond to fires and are considered fire protection (Justice v. Metro. Gov't of Nashville, 4 F.3d 1387 (6<sup>th</sup> Cir 1993); Bond v. City of Jackson, 939 F.2d 285 (5<sup>th</sup> Cir. 1997). *But see* Cleveland v. City of Los Angeles, 420 F.3d 981(9<sup>th</sup> Cir. 2005)(if not routinely engaged in fire suppression, then 207(k) inapplicable).

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## 207(k) – Fire Protection Defined

- Regulatory Tests
  - Fire Protection Activities as defined in regulations (29 CFR § 553.210)
    - Employed by organized fire department or fire protection district
    - Trained to extent required under state law
    - Who has legal authority to engage in prevention, control or extinguishment of fire and
    - Who performs activities required for and directly concerned with prevention, control or extinguishment of fires (including fire inspections)
    - Not included- dispatchers, maintenance workers (i.e., "civilian" employees of department or district)

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## 207(k) –Law Enforcement Defined

- Law Enforcement Activities as defined in regulations(29 CFR § 553.211)
  - Unformed or plainclothes
  - Empowered by state statute to enforce laws
  - Has power to arrest
  - Undergone law enforcement training

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## 207(k) – Ambulance Employees as Fire Protection or Law Enforcement

- Regulations- Ambulance employees are covered if:
  - Activities substantially related to firefighting or law enforcement, as defined in regulations (29 CFR § 553.215)
    - Received training in rescue of fire or crime victims, or rescue of law enforcement or firefighters, and
    - Are regularly dispatched to fires, crime scenes, accidents, etc.

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## 207(k): Position Related to or Supporting Fire Protection or Law Enforcement

- DOL states 7(k) does not apply to administrative employees in fire or police departments
- DOL states it does not apply to dispatchers in departments
- Limited application. Must fall within specific statutory definition of public employee meeting criteria for varied schedule.
- Regulatory examples of where 207(k) does not apply:
  - (1) Building inspectors (other than those defined in § 553.213(a));(2) Health inspectors; (3) Animal control personnel; (4) Sanitarians; (5) civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points; (6) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices; (7) Wage and hour compliance officers; (8) Equal employment opportunity compliance officers; (9) Tax compliance officers; (10) Coal mining inspectors; and(11) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building, dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers

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## 207(k): Otherwise Exempt Positions

207(k) does not preclude the applicability of other section 207 exemptions (such as administrative, executive, etc.). See 29 CFR § 553.216

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## 207(k) *cont.*

- Meaningful FLSA option, if properly applied and *elected*.
- No overtime violation under FLSA for not paying overtime for hours worked in excess of 40 in a work week if the municipality adopts and elects to pay overtime in accordance with a compliant 7(k) schedule for eligible employees, and pays in accordance with 7(k) requirements.
- Election of a 7(k) work period for FLSA can implicate bargaining obligations under Mass Labor Relations Act, Chapter 150E. Check obligations under 150E. See City of Boston case referenced on other slides

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## 207(k): Compliant Schedule

- No overtime violation under FLSA if the municipality elects 7(k), adopts a compliant schedule and complies with requirements. 29 CFR § 553.230
- Compliant schedule:
  - Work period of 7 to 28 days
  - Overtime only in excess of 212/28 (or equivalent ratio of total hours worked/work period) for fire
  - Overtime only in excess of 171/28 (or equivalent) for police

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## 207(k)

- First Circuit law:
  - Essentially, public employers can establish a 207(k) work period either by declaring their intent to do so or simply by demonstrating that their employees “actually work a regularly recurring cycle of between 7 and 28 days.”
    - Lemieux v. City of Holyoke, 2010 U.S. Dist. LEXIS 101872 (Sept. 28, 2010) (referencing Calvao v. Town of Framingham, 599 F. 3d. 10, 13 (1<sup>st</sup> Cir. 2010))

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## 207(k)

- Calvao v. Framingham, 599 F.3d 10 (1<sup>st</sup> Cir. 2010)
  - No express way under the law to adopt a 207(k) qualifying work period
  - Framingham adopted it by sending a memo to town counsel, HR director, police and fire chiefs (no evidence of notice to union or individual union member):
    - “Pursuant to section 207(k) of the Fair Labor Standards Act and 29 C.F.R. Part 553, the declared work period for Police and Fire regular shifts is 24 days. This declaration is effective with work periods commencing April 13, 1986.”

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## Cases Discussing 207(k)

- O'Brien v. Agawam, 350 F.3d 279 (1<sup>st</sup> Cir. 2003)
  - 207(k) NOT met because evidence showed town employed officer on a 6 day cycle, thus not meeting the requirements of 207(k)
    - 6 day schedule explicit in CBA. No other documents or statements showing intent of town to adopt 28 day schedule.

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## Mass Labor Relations under Chapter 150E and 207(k) Pay Period

- See City of Boston v. Comm. Employment Relations Board, 453 Mass. 389 (2009): City decided to adopt a 28/171 schedule. Union demanded bargaining as part of process to bargain over successor contract, city refused but offered to impact bargain. Held on these facts that the FLSA did not preempt MGL Chapter 150E bargaining requirements
- City Required to bargain 7(k) election for Chapter 150E purposes

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## Paying for Overtime

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## Compensatory Time Off – Public Sector Employer Option

- Rule is overtime must be paid in cash
- The FLSA permits Public sector employees be given a compensatory time earned at the rate of time and one half in lieu of payment for overtime hours, limited as set forth in the FLSA, if regulatory requirements for paying overtime with comp time are met. See 29 USC § 207(o)(5).
- Before deciding to pay overtime with Comp time, a public agency must consider several factors, such as:
  - Terms of any CBA
  - If Comp time would be consistent with any separate Massachusetts State law requirements
  - If there is compliance with FLSA to provide comp time – regulatory requirements are met

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## Comp Time – Agreement in Advance

- Municipality and employees must have a “mutual understanding” with employee that comp time applies to the work relationship and payment of overtime, in advance of paying overtime with comp time
  - CBA or other representative – where employees have a representative the agreement must be between the representative and the public agency, as set forth and compliant with the regulations (ex. in MOA or CBA or other writing)
  - For non union employees, must have an understanding prior to performance of work
    - Need not necessarily be in writing with the employee, but agreement must be recorded and kept, which essentially means it must be documented somewhere. Strongly recommend a writing with employees
    - No requirement in the FLSA or regulations that all employees must have an identical agreement.

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## Comp Time – Maximum Accrual

- Amount of Comp time an employee may earn is capped. 29 USC § 207(o)(3).
- After these limits, either time off must be given or overtime paid
  - 240 for “regular” employees
  - 480 for public safety, emergency response, or seasonal employees, as defined in the regulations in this context
  - Comp time payments = hours of comp time x regular rate at the time the employee receives the payment.
    - If terminated, comp time paid at either final regular rate or average rate of last 3 years, whichever higher, as defined in regulations

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## Comp Time

- Employees who request use of comp time must be allowed to use it within a “reasonable period” that does not “unduly disrupt” operations. 27 CFR § 553.25
- (1) Whether a request to use compensatory time has been granted within a “reasonable period” will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.
- For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency’s ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.
- “Mere inconvenience” to the employer is insufficient as a basis to deny an employee’s request for comp time.

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## Overtime Hours Second Jobs – Same Public Employer

- Combine hours in both jobs, unless a specific regulatory exception applies
- In general, where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates, in accordance with regulations (29 CFR 778.419)
- That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. In addition, section 7(g)(2) of the FLSA allows, under specified conditions, the computation of overtime pay based on one and one-half times the hourly rate in effect when the overtime work is performed. The requirements for computing overtime pay pursuant to section 7(g)(2) are prescribed in the regulations, generally at [29 CFR 778.415](#) through [778.421](#)

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## Second Job - Sporadic

- If a municipal employee works only “occasionally” or “sporadically” on a part time basis for the same agency in a “different capacity” the hours worked are not combined with the first job for purposes of overtime. 29 CFR § 553.30
  - Sporadic- infrequent, irregular, scattered, defined in regulations
  - Employee must be free to refuse the assignment
  - Different capacity- look at the dictionary of occupational titles and regulations
  - Among other things, if work occurs on a regular basis or as part of job duties it is not sporadic

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## Second Job-Sporadic *cont.* 29 CFR 553.30(b)(3)

Example provided in regulations:

Typically, public recreation and park facilities, and stadiums or auditoriums utilize employees in occasional or sporadic work. Some of these employment activities are the taking of tickets, providing security for special events (e.g., concerts, sports events, and lectures), officiating at youth or other recreation and sports events, or engaging in food or beverage sales at special events, such as a county fair. Employment in such activity may be considered occasional or sporadic for regular employees of State or local government agencies even where the need can be anticipated because it recurs seasonally (e.g., a holiday concert at a city college, a program of scheduled sports events, or assistance by a city payroll clerk in processing returns at tax filing time). An activity does not fail to be occasional merely because it is recurring. In contrast, for example, if a parks department clerk, in addition to his or her regular job, also regularly works additional hours on a part-time basis (e.g., every week or every other week) at a public park food and beverage sales center operated by that agency, the additional work does not constitute intermittent and irregular employment and, therefore, the hours worked would be combined in computing any overtime compensation due.

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## Second Job-Sporadic *cont.* 29 CFR 553.30(c) (3) – (4)

Example from regulations continued:

- a public park employee primarily engaged in playground maintenance also from time to time cleans an evening recreation center operated by the same agency, the additional work would be considered hours worked for the same employer and subject to the Act's overtime requirements because it is not in a different capacity
- a bookkeeper for a municipal park agency or a city mail clerk occasionally referees for an adult evening basketball league sponsored by the city, the hours worked as a referee would be considered to be in a different general occupational category than the primary employment and would not be counted as hours worked for overtime purposes on the regular job
- A person regularly employed as a bus driver may assist in crowd control, for example, at an event such as a winter festival, and in doing so, would be deemed to be serving in a different capacity

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## Second Job – Volunteer Work

- Persons performing volunteer services (as defined by regulations) for state and local governments not regarded as employees. 29 CFR § 553.101
- Volunteer only if services offered freely and without coercion, without expectation of compensation
- An employee may not volunteer to perform the same type of services for the same public agency he works for

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## Second Job-Volunteer Work

- Examples given of an individual performing services which constitute the "same type of services" is a nurse employed by a State hospital who proposes to volunteer to perform nursing services at a State-operated health clinic which does not qualify as a separate public agency. Similarly, a firefighter cannot volunteer as a firefighter for the same public agency.
- Examples given of volunteer services which do not constitute the "same type of services" include: A city police officer who volunteers as a part-time referee in a basketball league sponsored by the city; an employee of the city parks department who serves as a volunteer city firefighter; and an office employee of a city hospital or other health care institution who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours as an act of charity.

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## FLSA: Mandatory Break Time for Nursing Mothers

- FLSA amended in 2010 to require employers to provide “reasonable break time for an employee to express breast milk for her child for 1 year after the child’s birth each time such employee has a need to express milk”
- Provide breaks of reasonable duration and frequency to express milk – no statutory limit
- Employer must provide private place, which may not be the bathroom
- Employers of less than 50 employees may be exempt IF they can show the breaks would cause an undue hardship

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## Record Keeping

- The FLSA and regulations have very specific requirements regarding the types of records that must be kept regarding employee and employee work hours
- Incorrect records are non-compliant records
- Records must be available for inspection
- See regulations for further discussion

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## Examples of Major Topics in Recent Litigation

- Class action suits
- Suits for inclusion of various benefits into the regular rate,
- Attempts to classify Sergeants and Lieutenants, and other supervisors as exempt
- Misclassification Cases
- Application of Massachusetts Overtime Law Chapter 151, Section 1A
- Work time – inclusion of prep work
- Opinion Letter – paying for study time related to compensable training

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## Examples of Major Topics in Recent Litigation *cont.*

- Definition of work time
- Creditable excess overtime
- Election of 7k pay period
- Compliant 7k schedule
- Use of comp time, where permitted – unduly disruptive issues
- Definition of “Detail” work

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## DOL Audits

- The DOL has the authority to audit workplaces for FLSA compliance
- Be prepared.....

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## Next Steps

- Review wage and hour practices
- Check for compliance with FLSA, CBA, and any State law or other laws that apply
- Train managers on the importance of complying with record keeping requirements, controlling work time, etc.
- Read regulations and obtain legal advice.

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# Questions



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