

Legally (Relevant



by Gary Hanson, JD
Stumbo Hanson, LLP, Topeka, Kan.

Avoiding Problems in Paying Employees

Small cities and RWDs continue to struggle with rules governing payment of their employees. These rules stem from both federal and state law, but this article will focus on two aspects of federal law that are vitally important to every city or RWD. This importance stems from the fact that pay is always of importance to employees, but also because these rules are strict and the penalties are severe for systems that fail to comply. Although the penalties can be made worse for intentional noncompliance, ignorance is no excuse.

Distinguishing between employees and independent contractors

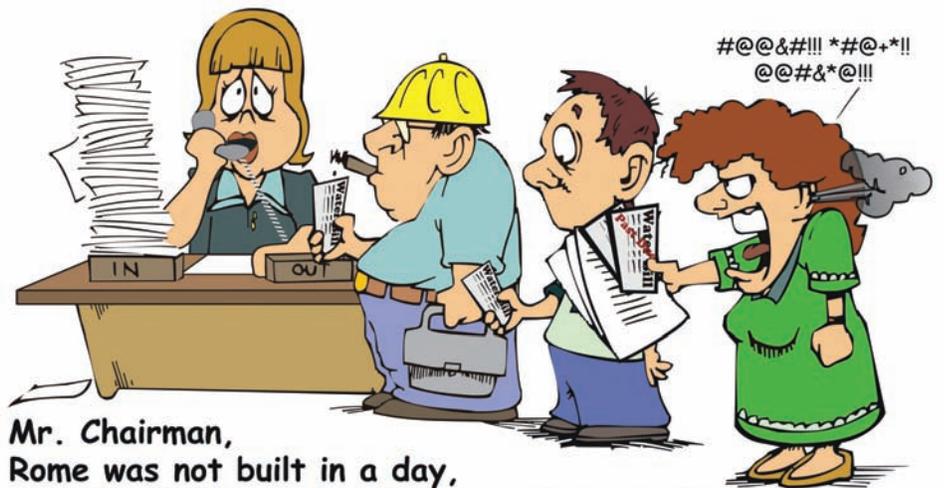
Some RWDs particularly, continue to mischaracterize workers as independent contractors when they are in fact employees. The importance here lies primarily in the collection and payment of taxes. Employees are subject to employment taxes (federal unemployment, federal and state withholding, FICA and Medicare) while independent contractors are not. Some systems prefer to treat workers as independent contractors in order to avoid the effort involved in withholding and paying those taxes, as well as the added cost the employer's share of those taxes makes to the system. Some workers prefer to be treated as independent contractors so that their net pay is higher than if taxes were withheld.

However, the distinction between employee and independent contractor is not one that the system and the worker can simply decide as they wish. The federal law prescribes criteria that must be met in order for a worker to be determined to be an independent contractor, and simply calling a relationship one of "independent contractor" when the criteria clearly points to it being one of employer-

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employee can result in the IRS recharacterizing the relationship and assessing taxes, interest and penalties on the amounts improperly paid. There are twenty such factors considered, and weighing them can be a difficult chore. Services provided by accountants, auditors, lawyers, excavating companies and the like who have places of business of their own and who provide these services for others in addition to the utility in question are fairly easily categorized as independent contractors. On the other end of the spectrum, system operators, office staff and others who work primarily from the system's facilities will almost always be employees and not independent contractors. The basic test for an employee is one in which the employer has the right of control and supervision over the work and the right to direct the manner in which the work is to be performed as well the result to be accomplished. It does not matter if the employer actually exercises this control, as long as the right or authority to interfere or control exists.

Systems need to consult with their accountant/auditor and attorney if they believe they have working relationships that are being mischaracterized as independent contractor. There is no question that there is a bias in federal and state law toward categorizing workers as employees rather than as independent contractors. The safer approach in close cases is to err on the side of treating these workers as employees and insuring them, and withholding and paying the taxes on them as such.



**Mr. Chairman,
Rome was not built in a day,
nor will all this work get done in the board's mandated
three-hour-a-day time limit. Perhaps there are board
members who would like to help prepare these easements?
Hello ... Hello ... Mr. Chairman ... Mr. Chairman?**

Paying overtime when due

Water and wastewater systems are subject to the Federal Fair Labor Standards Act (FLSA). This is hardly a new law, having been around for over seventy-five years, but systems, particularly small systems, continue to fail to recognize how it applies to them.

In summary, the FLSA requires that employees be paid overtime at the rate of one and one-half times their regular rate of pay for all hours worked in excess of forty per week. If workers are paid on a salary (meaning a fixed amount per week or month) then the employer needs to mathematically derive an hourly rate and pay for overtime at the time at the applicable hourly rate times one and one-half for those overtime hours.

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There are two exceptions to this rule that may be applicable to smaller water and wastewater systems. The first is the executive exception, generally available if the employee regularly supervises more than two other persons in the organization, and generally exercises control over the organization or

one or more of its functions. It is impossible for a rural water district that only has two employees to declare that one of them is exempt from overtime due to the executive exception. Systems that have more employees but require each employee to spend significant amounts of time working in the plant or in the field also fail to qualify for an executive exception.

A second exemption available to smaller systems is the administrative exception. The administrative exception is available for employees who perform administrative functions, usually in an office setting, in which they exercise authority over significant aspects of the system's business. In some instances

Practical pointers

- There is nothing to prevent an employer from taking measures to try and prevent overtime from occurring. One of the simplest of these is to encourage the use of time off (not to be confused with comp time) following an extraordinary period of work but within the same workweek. Employers are allowed to designate a regular workweek, for example beginning on Sunday morning at 12:01 a.m. and ending on Saturday night at 12:00 midnight. Then, when a waterline break on Tuesday night results in a non-exempt employee working four extra hours to repair that break, simply give that employee Wednesday morning off. Having occurred during the same workweek, unless there is some other event requiring overtime, the employee will have not worked more than forty hours during that workweek and the employer will not be liable for overtime for that week.
- Overtime in this business is inevitable. Whereas in some businesses there is nothing that cannot wait until the next day, when the public's expectations is for uninterrupted water and wastewater service 24/7, there will be occasions where employees will need to work outside of regular business hours. It is not always possible to give time off during that same workweek in order to avoid overtime. Cities and RWDs need to be thankful that they have employees who are dedicated enough to work when needed, and do not begrudge them payment for the overtime they have earned.
- Be careful with requirements for "on-call" time. This subject deserves an article all to itself, but excessively restrictive on-call requirements can result in the law regarding the on-call employees to in fact be "on duty" so that their time on-call is added to their regular workweek, resulting in overtime. Consult with your attorney about your on-call requirements to make sure that they are not exposing the system to this liability.

this may apply to a city clerk or office administrator, but by no means will it apply to all persons holding those kinds of positions. Care needs to be used in considering reliance on this administrative exception to the requirement of paying them overtime, and systems should consult with their attorneys before doing so.

Record keeping is vital to FLSA compliance, and unfortunately adequate record keeping is sadly lacking in many small systems' operations. Workers who are not FLSA exempt, whether paid hourly or salary, must have their work time tracked and records of such time kept by the employer in order to demonstrate FLSA compliance. This is true whether the employee is paid on an hourly or a salaried basis. Without such records, it is impossible to prove that the employee has been properly paid. There is effectively a three-year statute of limitations on FLSA claims, so records need to be kept for at least that long. In reality, employee records of time worked and amounts paid should be kept indefinitely.

Most employers and employees are familiar with the phrase "comp time". This phrase is often misused as it applies to FLSA. Public employers like counties, cities and rural water districts are authorized by FLSA to have comp time plans, plans by which employees who incur overtime can be awarded paid time off at the rate of one and one-half hours for each hour of overtime worked. These plans are not easy to setup or properly administer, and should not be attempted without consultation with an attorney. For most systems the best answer is to avoid comp time plans altogether and simply pay the overtime as it occurs.

Conclusion

This article is a summary of only two of the areas of employment law that present considerable challenges to many small systems for compliance. A warning is due here – this is a brief summary statement of the rules and by no means should be considered as the final word on keeping your system in compliance. Attend KRWA or League of Municipalities' programs, do additional reading on the subject, and by all means consult with your attorney and your accountant/auditor on these important questions.

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