

Legally (Relevant



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

Changes Coming To Pay Requirements

New regulations concerning the Fair Labor Standards Act ("FLSA") set to take effect in December of 2016 apply to state and local governments, and may impact the way utilities pay some of their employees. The rules adopted by the United States Department of Labor substantially increase the salary threshold that must be paid to exempt employees in order to avoid paying overtime.

The FLSA, Overtime and Exempt Employees

The requirement that employers, including state and local governments, pay their employees for overtime is not new. The FLSA has been around since the 1930's, during the Great Depression. The FLSA

was designed to serve several purposes, not the least of which was to encourage employers to hire as many employees as possible. By requiring employers to pay their employees overtime at the rate of 1.5 times their regular rate of pay for more than 40 hours worked in a week, this discouraged employers from over-working a few employees, making it less expensive to hire more. Today these rules may mainly serve the Department of Labor's stated goals of leading to "better work – life balance" for employees and to "benefit employers by increasing productivity and reducing turnover".

In general, the FLSA requires that employers pay their employees at the rate of 1.5 times their regular rate of pay for all hours worked over 40 in a week. It is not sufficient to simply call the employee's pay as a fixed salary rather than hourly, as the regulations require conversion of this salary to an hourly rate.

There are exceptions to this overtime rule. These include an exception for certain fire protection and law enforcement personnel who work for small agencies. Other exceptions include the exceptions for executive, administrative and professional employees. Of these exceptions, the most applicable to water and wastewater systems are the executive and administrative exceptions.

Of these two, the administrative exception is still rather rare except in larger utilities. To be eligible for this exception, the employee must be performing administrative (office) functions, but with considerable authority to interpret and apply policies. Take care in relying on this exception as not

many office employees, particularly in smaller cities or districts, will satisfy the requirements.

By far the most common exception to the FLSA's overtime requirement is the executive exception. This exception applies to employees whose duties consist of supervising at least two other full-time employees and do not involve work that is mostly manual labor such as production, maintenance or repair. As with the administrative exception, care needs to be taken in relying on this exception. Job descriptions and performance reviews that accurately reflect the actual work performed may prove important in satisfying the requirements for this exception.

Why is it important to comply? In addition to the responsibility that elected officials and staff have to

Through enforcement action of the United States Department of Labor, or legal action by the employees themselves, the employer can be forced to pay back overtime for two or even three years, and substantial penalties for willful violation.

comply with the law, failure can be very expensive. Through enforcement action of the United States Department of Labor, or legal action by the employees themselves, the employer can be forced to pay back overtime for two or even three years, and substantial penalties for willful violation. Record keeping is vital. Jobs need to be reviewed periodically to see that an employees' responsibilities and work remain consistent with the way they have been classified.

The New Pay Threshold

The changes coming in December 2016 concern a second prong of the exception test – the minimum pay that must be paid to employees to qualify for the exceptions. In other words, not only must the duties of exempt employees satisfy the functional duties tests summarized above, but these employees

currently must be paid a minimum of \$455.00 per week (\$23,660 per year). This has not been a difficult threshold to meet as most all employees meeting the duties test for the exceptions have been paid at least \$23,660 per year.

But the new pay threshold is \$913.00 per week (\$47,476 per year), and will adjust with inflation every three years afterwards. The increase in this threshold, which applies to private employers as well as state and local governments, may impact many employers, particularly in food service and retail industries. It may impact more than a few utility workers, too.

As a result of this change, employees who functionally qualify for an exemption but who are not paid a salary of at least \$47,476 per year will not qualify for the exemption and must be paid overtime for hours



worked in excess of 40 during a work week. For these employers, the question may be which costs less – raising the employee's salary to at least the threshold or pay the overtime when it occurs.

Comp Time

For state and local government employers only (not private employers), there is an alternative to paying overtime. State and local government employers, like districts and cities, are allowed to give comp time in lieu of paying overtime under a comp time plan.

“Comp time” is a term with a very specific meaning in the context of the FLSA. As used here, comp time means compensation given in the form of 1.5 hours of paid time off work for each hour of overtime

As a result of this change, employees who functionally qualify for an exemption but who are not paid a salary of at least \$47,476 per year will not qualify for the exemption and must be paid overtime for hours worked in excess of 40 during a work week.

worked. Use of comp time in lieu of cash payments for overtime can help local governments control costs and stay on budget, and may prove to be popular with many employees. Accrued comp time must not exceed 240 hours per employee, and employees must be afforded considerable freedom in their use of the accrued time. Be sure to consult with the system's attorney or employment specialist in setting up a plan as the

requirements for the plan, including record keeping requirements and terms of comp time use, are very specific.

Conclusions

Cities and districts are covered by the FLSA and all need to be familiar with the rules as they apply to overtime. These rules are set to change effective December 2016 in an important way that may affect how many systems classify and pay certain employees. This is a change in Department of Labor regulations, and a new administration could decide to suspend or modify the regulation again. In the meantime, systems should familiarize themselves with the way their employees are classified and paid to ensure that they are in compliance now and in the future. Failure to comply with FLSA requirements can be a very costly mistake.

Note: On September 20, Kansas joined with twenty other states in challenging the legality of this new regulation. The case is pending in the Federal District Court for the Eastern District of Texas. At the time of this writing, no order had been entered in that case delaying the effective date of the regulation.

PEC

Today | Tomorrow | Together
WATER FOR OUR FUTURE

WATER + WASTEWATER ENGINEERING SERVICES
Water Well Design | Treatment Facilities | Distribution Systems
Water Storage Systems | Computer Hydraulic Models
Pumping + Telemetry Systems

PROFESSIONAL ENGINEERING CONSULTANTS PA