

Overtime: pay now or PAY later

The *Kansas Lifeline* from September of last year included a story written by Scott Hooper about the Fair Labor Standards Act (FLSA). The FLSA was enacted in 1938. KRWA General Manager Elmer Ronnebaum related in the story about the complexities of dealing with and handling employee overtime matters in compliance with the law. "If ignorance of the law were a valid defense, the country wouldn't have need for bureaucrats or lawyers," surmised Gary Hanson, a law partner of Stumbo, Hanson and Hendricks of Topeka.

The articles in *The Kansas Lifeline* and seminars presented by Gary Hanson have attracted the attention of not only several of his clients but many of KRWA's

members concerned about how to handle personnel overtime policy. It was at a May board meeting in a north-central Kansas RWD that some pertinent details about employee overtime and the FLSA were discussed.

Since FLSA was passed, it was expanded in 1985 to include state and local municipal government employees. Not to fault state and local employers, but during the first 50 years of FLSA, they developed bad habits concerning overtime, mainly due to being excluded from the law. Water districts and cities didn't have to worry, but Congress changed all that in 1985 – now they worry! Since then, there's been a trickle down effect in the Department of Labor's (DOL)

"It must be emphasized that the law doesn't put any responsibilities on the employee concerning overtime; the employee has rights but not responsibilities. FLSA rules are mostly directed to how the employer manages employees and how that management has to be in compliance to the law." – Gary Hanson.

initial enforcement of the largest employers, where the most employees work, to their now looking closer at rural and local municipalities with fewer employees. "It's an area where I know all of our firm's clients aren't doing it right," said Gary Hanson. "It's sometimes a very hard law to apply."

a running liability that consists of paying unpaid overtime wages, the potential for costly penalties (which may be levied if it is determined that rules were "willfully" broken) and some scenarios that are even worse," exclaimed Hanson. "It would be much worse if the Department of Labor does not come in, you don't

Dan Knupp
Communications



A late work night for staff at the Pottawatomie County RWD 1 office on Hwy. 99 north of Wamego.

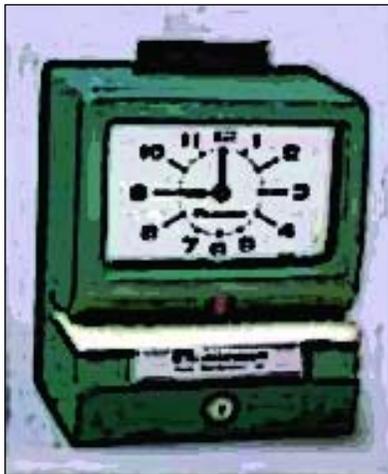
What's at stake?

"However, the problem is if you don't address these questions, the organization (city or RWD, PWWSD, local business, etc.) has

get a mediated settlement with an employee. Then it is an employee's right to hire an attorney and sue the organization for unpaid overtime, in which case

the employee's attorney can bill your organization or business for hours spent. Attorneys can be brutal when they bill time to their opponents."

"At one of my FLSA sessions it was noted that everything being



said was directed to the employer. It must be emphasized that the law doesn't put any responsibilities on the employee concerning overtime; the employee has rights but not responsibilities. FLSA rules are mostly directed to how the employer manages employees and how that management has to be in compliance with the law," says Hanson.

The non-exempt employee

In general terms, "non-exempt" employees are required to be paid overtime for any hours worked over 40, during an established work week. ("non-

exempt" refers to all employees covered by the minimum wage and overtime requirements of the law, i.e. those who are not exempt from it.) The rule is that employees are to be paid overtime at a rate of one-and-a-half times

The exempt employee

In general terms, the difference between exempt and non-exempt employees is that exempt employees do not have to be paid overtime. There are two kinds of exemptions recognized

In a nutshell, is it management or hands-on work? If it is more hands-on, then the employee cannot be exempt.

the regular rate of compensation for hours worked over 40, during the established work week.

"I am used to keeping track of my hours worked and if a week includes overtime, I just take them off the next," noted the water system operator at the meeting.

"Those hours cannot be carried over and taken the following week," Hanson cautioned.

"However it is permissible if extra hours are worked early in the week, a like number of hours may be taken off later in the same designated work week. But if overtime hours are worked on the last day of the designated work week, when there is no time left to take off those similar hours, the time must be counted as overtime and paid as such," Hanson went on. "The work week designation is a steadfast rule for non-exempt employees."

by FLSA that frequently apply to rural water districts: the *executive* exemption and the *administrative* exemption.

The executive exemption's first test: is the employee paid at least \$455 per week? Next, does that person have at least two full-time employees or equivalent under his or her supervision? Finally, is the person working as a manager whose priority duties involve supervising, doing executive supervisory tasks like: developing budgets, scheduling workers time, dealing with vendors, addressing employee personnel or management issues, reviewing invoices and accounts payable? Or is the executive spending more time handling technical work issues, as in a water district's case, doing meter locates, reading meters, changing out meters, checking wells and chlorine residuals, which are not executive type work activities.



GREAT PLAINS METER, INC.

115 South 16th Street
Aurora, Nebraska 68818

LONNIE NUNNENKAMP
Sales & Service

Fax 402-694-6688
SERVICE, SALES & TESTING

McCROMETER
Propeller, V-cone, & Magnetic Meters

Phone 402-694-4114
FUJI
Ultrasonics
MASTER METER
Multi-jet & Turbine Meters

Client Focused.

**WILSON
& COMPANY**

- Water Treatment & Distribution
- Wastewater Treatment & Collection
- Water Reclamation

Salina
785-827-0433

Lenexa
913-492-6365

Kansas City, MO
816-701-3100

The rule says that even if the person is supervising two or more employees, if the majority of time spent is spent doing the technical work or “blue collar” duties rather than personnel, management or “white collar” duties, then the employee is not exempt. In a nutshell, is it management or hands-on work? If it is more hands-on, then the employee cannot be exempt.

The administrative exemption’s basic premise and test is: does the employee doing office work related to management have discretion and judgmental latitude, or the “right to act” on at least some of the work issues that occur during the course of his or her work? What that means for example, notes Gary, “in my office we have a secretary and bookkeeper that do administrative type work, but they don’t have discretion or empowerment to make decisions. Everything they do is dictated by administrative policy. We tell them what to do. As a result they are non-exempt.” The exempt person described is one who has the freedom to make decisions about such things as paying bills or deciding on customer billing complaints without having to ask anyone else. They also may have the ability to order materials, hire or fire employees or hire and dispatch contractors to do work – all without having supervision or the need to stop and ask. Some RWDs delegate this authority to the office person, and some don’t. Without such authority, the employee is not exempt. Administratively exempt employees, like executive exempt employees must earn at least \$455 weekly.

“For exempt classifications, an employer doesn’t have to pay overtime pay for over 40 hours,” said Gary. “But there are some things an employer has to watch. Exempt employees cannot be paid

hourly, and there are rules on when their pay may be reduced. Failure to follow these rules will endanger the exemption.

Hourly vs. salary

Employers many times want employees to be exempt because they need to know how much to budget for monthly salaries. They also don’t want pay periods with big overtime expenses that play havoc with the budget and conversely, employees want to know what the monthly paycheck will be.

An employer has to be pretty liberal about letting an employee use comp time. It’s not like vacation time that’s granted with the employer’s convenience in mind but as time off that has to be granted much like the overtime that was deemed necessary to earn it.

There are no rules saying that a non-exempt employee has to be paid an hourly rate and not a salary. Anyone can be paid a salary but if an employee is on a salary, non-exempt and works more than 40 hours in a week – the employee must be paid time-and-a-half overtime pay based on the salary. The DOL has a formula that can be used to compute the overtime due. It’s simple, if someone is paid a \$400 a week salary it means that he or she is going to get \$400 no matter what, except if the employee works overtime. To calculate this, the \$400 divided by 40 hours comes to \$10 per hour. If the employee worked 42 hours during a designated work week, the employer will have to pay \$430. This is the \$400 salary plus two hours of overtime figured at \$15 per hour (time-and-a-half).

Comp time

“Unlike KRWA, RWDs and cities can have a comp time

policy,” said Gary. “KRWA is not a municipality and can’t utilize this rule. Instead of paying overtime at time-and-a-half, a municipality can pay with comp time, figured at one-and-a-half hours per hour of overtime worked. The policy cannot be informal. It must be formally adopted by the board for inclusion in the employee handbook.”

“Secondly there are some strict limits on the way these policies work. Employers cannot allow an employee to accrue more than 240 hours of comp time. If

the total hits 240, every hour over has to be paid at time-and-a-half,” added Gary.

An employer has to be pretty liberal about letting an employee use comp time. It’s not like vacation time that’s granted with the employer’s convenience in mind but as time off that has to be granted much like the overtime that was deemed necessary to earn it. An employee has to be allowed to take it pretty much when he or she wants as long as it doesn’t materially interfere with the business of the district. “They don’t have to comply with a vacation policy or request permission in the usual way for taking comp time,” Gary noted. “There should be much more give and take here.”

“Currently only municipalities use this rule. Private employers do not have that option,” explained Gary. “And those hours can be held indefinitely.”

Record keeping

"Your district also has a record keeping responsibility of three running years for each employee," said Gary. "If you're not keeping that time record now, now is the time to start. You'll eventually get to the good side of the three year rule."

The records are not burdensome and need not have much more than what a time card would reveal. The number of hours worked per day, and those tracked on a weekly basis by employees are the basic data needed, along with an employee's payrate, adjustments to pay, amount of pay and date of payment. Records need to be kept showing weekly overtime accrued and paid and comp time accounting.

The Department of Labor can come in and look at records at any time. Resistance is futile because the Department has subpoena power. In a few hours a court order will make the organization records available.

"The DOL representative will look back at least two years and if there are weeks that any employees were not paid properly figured overtime, a calculation of what should have been paid will be made," exclaimed Elmer Ronnebaum, KRWA general manager.

"In KRWA's case, KRWA had employees who were very satisfied with their jobs and pay scales and kept logs of daily work. But when DOL arrived to review our personnel issues, those logs were never intended to be timesheets," Ronnebaum explained to the District. In KRWA's case, most of the field staff was determined to be non-exempt. In early 2004, KRWA paid employees about \$35,000 in total overtime wages for the previous two years. We even had

several employees offer to not accept the payment. Instead the Association treated it as a bonus and didn't make any salary adjustment the next year. In the end, things are working out much better for everyone being on an hourly rate," Elmer said.

As you might expect from a law that was passed right in the middle of the depression, FLSA was meant to urge employers to hire additional workers and not overwork existing employees. It was a time when the economy dictated that more jobs become available. FLSA's penalties for working people harder made it attractive for employers to hire more employees. These FLSA rules have evolved into an insurance policy for workers against abuse and something to rely on for stability and security in their jobs.

When employers can understand these rules and be prepared for a visit from the Department of Labor, security and stability for the organization can be enjoyed as well.

**Call KRWA
Associates First!**

Associate Members
are supporting your
Association. Support them!
When shopping for
products and services,
call Associates first!

Got LayneOx™?



*Exceptional
Hi-Rate Catalytic
Filter Media
for treatment of*

- Arsenic
- Manganese
- Iron
- Hydrogen Sulfide
- Radium/Uranium

For LayneOx™ and Other
Water Treatment Technologies
Contact Layne Christensen Company

913-321-5000

treatment@laynechristensen.com



Layne Christensen Company
Water Resource Division