
CAPLAW

Community Action Program Legal Services, Inc.

EVENTS AND TRAININGS

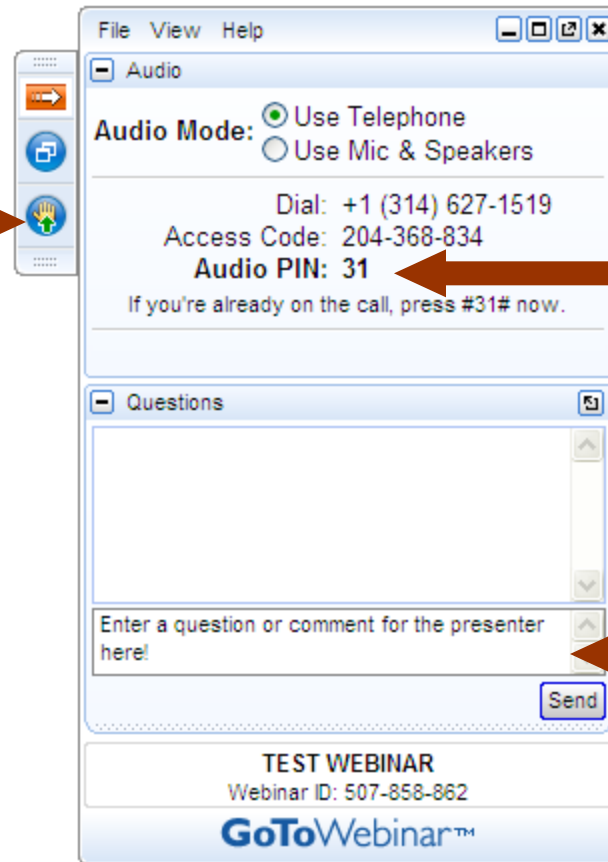
upcoming CAPLAW trainings on the legal and financial issues critical to CAAs



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Conquering Employment Law Conundrums Webinar Series

Registration Open Soon For:

- April 10: Navigating an Employee Request for Accommodation
- May 15: A Cup Of Alphabet Soup To Cure A Few FMLA Ills

Miss a Webinar in the Series?

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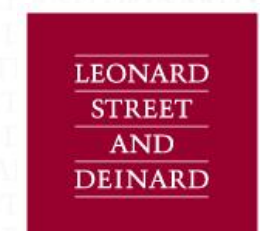
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UNCOMMON
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Tackling Tricky Wage and Hour Topics

Richard G. Pins
March 13, 2013

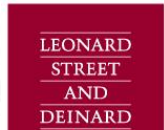


Coverage of the FLSA

- FLSA generally covers employees and employers engaged in interstate commerce
- FLSA includes pre-schools, nursing homes, and schools
- Also covers government employers
- Does not cover independent contractors, trainees or volunteers



Non-exempt Employees



Minimum Wage

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
- The minimum wage is \$7.25 per hour
- Must also pay overtime for all hours worked in excess of 40 per workweek

Overtime

- Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over 40 in a workweek
- Each workweek stands alone
- Regular rate
 - Payments excluded from rate
 - Payments other than hourly rates
- Deductions

Hours Worked: Suffered or Permitted

- If employer doesn't want to pay overtime, it must ensure that work is not performed
 - Simply telling employees that it is against the rules to work overtime is not good enough
 - Management has the power to enforce the rules and must make every effort to do so through discipline of employees and supervisors
- If the employer knows or has reason to believe that the work is being performed, the employer must count the time as hours worked.
- See 29 CFR 785.12, 785.13

Hours Worked: Issues

- Because the employer cannot determine the amount of money to pay an employee without knowing the number of hours worked, issues often arise regarding:
 - Suffered or Permitted
 - Waiting Time
 - On-Call Time
 - Meal and Rest Periods
 - Training Time
 - Travel Time
 - Sleep Time

Hours Worked: Meals and Rest Time

- Meal periods are not hours worked when the employee is relieved of duties for the purpose of eating a meal
- Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid
- See 29 CFR 785.18, 785.19

Hours Worked: Training Time

- Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless
 - Attendance is outside regular working hours;
 - Attendance is voluntary;
 - The course, lecture, or meeting is not job related; and
 - Employee does not perform any productive work during attendance
- See 29 CFR 785.28, 785.29, 785.30

DOL Opinion: Training Time \neq Hours Worked

- In-service training offered only after regular working hours
- Employer did not require attendance at the training; it was the employee's decision to participate
- Employer did not impose additional requirements on employee such as taking a particular course
- Where requirement is imposed by government, rather than employer, training is considered voluntary
 - ◆ Training required for employee to maintain state certification
- See DOL Opinion Letter 2009-1

DOL Opinion: Training Time ≠ Hours Worked

- Met exception from the requirement that training not be directly related to employee's job because (1) training is for benefit of employee and (2) corresponded to courses offered by independent bona fide institutions of learning
 - *In child care industry, DOL finds training to be for benefit of employees when it provides instruction of general applicability that enables individual to gain or continue employment with any child care provider*
- Employee not performing any productive work during training
- See DOL Opinion Letter 2009-1

Hours Worked: Travel Time

- Ordinary commuting travel is not hours worked
- Travel between job sites during the normal work day is hours worked
- Special rules apply to travel away from the employee's home community
 - For example, passive travel outside regular work hours not hours worked
- See 29 CFR 785.37, 785.38, 785.39

Furloughs and Reduction in Pay and Hours

- Employer may reduce number of hours a non-exempt employee is scheduled to work
 - E.g., changing from full-time to part-time, initiating furloughs, etc.
- Employer may lower non-exempt employee's hourly rate as long as rate paid is at least minimum wage
- See DOL Fact Sheet #70 at <http://www.dol.gov/whd/regs/compliance/whdfs70.pdf>



Exempt Employees



Exemption Basics

- Specific criteria apply and it's the employer's burden to prove criteria met
 - If employer can't prove it, then lose it
- Exemptions relate to duties actually performed by individuals – not to job titles, job descriptions, pay classifications, job groups, etc.

White Collar Exemptions

- Executive
- Administrative
- Professional

Professional Employees Exemption – Teachers

- Primary duty must be teaching, tutoring, instructing or lecturing in the activity of imparting knowledge
- Must be employed and engaged in this activity as a teacher in an educational establishment
 - “Educational establishment” means an elementary or secondary school system, an institution of higher education or other educational institution
- No salary basis or pay level requirement for this exemption
- See 29 CFR 541.303

Professional Employees Exemption – Teacher

- Regulations indicate an elementary or secondary teacher's certificate is a clear means of identifying the individual is “contemplated as being within the scope of the exemption for teaching professionals.”
- *Ramos v. Lee County School Board* (Mid. Fl.)(Sept. 2005)
 - Court ruled: public school Head Start instructors exempt from overtime because taught rather than cared for children
 - Instructors qualified under new definition of “teaching” & used a sufficient level of discretion & judgment in how taught

Professional Employees Exemption – Teacher

- DOL opinion letter says childcare provider not educational establishment unless it provides grade school curriculums, introductory programs in kindergarten, or nursery school programs in elementary education, as determined under state law, but doesn't address whether it is “other educational institution”
 - Also suggests that if state educational agency licenses Head Start program, likely to qualify as educational establishment

Professional Employees Exemption – Learned Professional

- Must be paid on a salary basis at least \$455 a week
- Primary duty must be either imparting knowledge, or some other type of work which is intellectual rather than manual in nature; and
- Job being performed must require “advanced knowledge in the field of science or learning” which is “customarily acquired by a prolonged course of specialized intellectual instruction.”
 - Teaching position must require at least 4 year degree from accredited college or university in ECE, Elementary Education or a related field.
- 29 CFR 541.301

FLSA – The Salary Basis of Pay

- **General rule:** employee must receive a predetermined amount of pay for every workweek in which he/she performs any work
- If impermissible deductions made from weekly pay, “salary basis of pay”, requirement for exempt status will not be met

Salary Basis – Permissible Deductions

- Whole days missed for personal reasons
- Whole days missed for sickness or injury, if sick-pay plan exists
- First and last weeks of employment
- Unpaid disciplinary suspensions **of one or more full days** imposed in good faith for violations of major safety rules
- Amounts received as jury/witness fees or military pay
- FMLA leave
- **Whole week absences when no work is performed during the week**

Salary Basis – Impermissible Deductions

- Part-day absences (except if FMLA)
- Sickness or injury, if there is no sick-pay plan (except if FMLA)
- Disciplinary suspensions (**for less than a whole day**)
- Inventory or cash shortages
- **But, may deduct from leave banks**

Furloughs

- An exempt employee who works any part of a week must be paid for entire week
- Alternatively, an employer does not have to pay an exempt employee for a week in which **no work** is performed
- Employer may take salary deductions for one or more full days of missed work if the employer seeks volunteers to take time off due to insufficient work and an exempt employee volunteers to take days off for personal reasons (other than for sickness or disability)
 - Exempt employee's decision must be completely voluntary
- See DOL Fact Sheet #70 at <http://www.dol.gov/whd/regs/compliance/whdfs70.pdf>

Reductions in Pay and Hours

- Employer may reduce an exempt employee's predetermined salary amount and hours during a business or economic slowdown without destroying the employees exempt status, if the reduction:
 - Is prospective
 - Is bona fide and not intended to evade salary basis requirements
 - Reflects long-term business needs
 - Does not bring salary below the minimum exemption threshold (\$455 per wk/\$23,000 per yr)
- Note: Different rules may apply to public CAAs



Hypotheticals



Splitting Hairs?

Walt and Skylar are a job-share duo working for Community Inaction's tax clinic. Per written agreement with Community Inaction, each works 20 hours per week toward the same goal. They are not at work at the same time, other than when one of them works beyond his or her assigned time. Some weeks, for instance, Walt will work all day Wednesday, and others Skylar will come in two hours early on Tuesdays to make sure she knows what Walt has done. In those weeks, Walt will have worked 24 hours and/or Skylar 22. Are Walt and Skylar entitled to overtime when they work beyond their agreed upon twenty hours?

Time is on My Side?

Ivy is a clerical employee CAP, Inc. She is paid on a two-week pay period. During one pay period, she works one workweek of 50 hours and one of 30 hours. She asks her supervisor to let her save five of her ten overtime hours so she can take them off around the July 4th holiday. Her supervisor agrees. In light of that agreement, how much FLSA overtime does CAP have to pay Ivy on the payday for that pay period?

Out to Lunch?

Kristen and Taylor both work as entry level caregivers at Community Action Upswing's community center for low-income senior citizens. Taylor is a social butterfly, and loves to chat it up throughout the day and over lunch. Kristen is the opposite. She rarely talks to her coworkers and routinely works straight through lunch. When Taylor doesn't go to Chotchkie's with his colleagues for lunch, he will often eat at his desk and alternately surf the internet and pour over paperwork relating to the needs of the senior citizens served by the center. Kristen never goes to lunch with colleagues, but rather works straight through on a daily basis. Kristen does from time to time eat an apple or a ham sandwich while working. Should Taylor and Kristen be treated the same on those days when Taylor doesn't go out to lunch?

Learning is Costly?

Alicia takes a job with CAP, Inc. in their computer recycling program. She doesn't know how to repair computers, but CAP will teach her. She signs an agreement saying that (1) this training is worth at least \$1,500, and (2) if she leaves before she has worked at least two years, she has to repay a pro rata part of the training cost out of her final paycheck. Are there any wage-hour problems?

On the Road Again

John is a nonexempt employee who works for Smalltown CAP. His normal work hours are from 9 a.m. to 5 p.m. His boss tells him to attend a two-day training session in Bigtown beginning on Monday morning. John leaves to fly to Bigtown on Sunday at 3 p.m., checks into his hotel at 8:00 p.m., has dinner on his own until 9:15 p.m., and then returns to his room, watches TV, and goes to bed at 10:30 p.m. How much of this is FLSA worktime?

Lessons Learned

Community Inaction, Inc. runs a Head Start program that employs approximately 10 Head Start teachers and has always classified these teachers as non-exempt. However, Brenda Lee, Community Inaction's new HR Director, recently attended a wage and hour training during which the presenter talked about how public school teachers are classified as exempt employees. Brenda is now wondering if Community Inaction's Head Start teachers may be reclassified as exempt employees because doing so would make her life so much easier – for starters, eliminating the task of enforcing overtime policies for these teachers would mean shorter work days for Brenda!

Rainy Days Are Here Again

The office was open today, but Diane Deluge, an exempt employee, couldn't make it in because of bad weather. Admittedly, Diane spent ninety minutes waiting for the bus before she gave up and trudged back home. While she was waiting, she checked emails, made a couple of work calls and read spreadsheets. When she arrived home, she spent ½ of the day working and the other ½ making cookies with her kids. Was Diane's waiting time work time, and how much, if any, should she be paid for the day?

In the Red

The economic downturn has really been difficult for Community Inaction. Within the last couple of months, two of Community Inaction's biggest funding sources cut the grants Community Inaction receives by 20%. As a result, Community Inaction is forced to reduce by 1/3 one of its major programs. In an effort to cut costs without jeopardizing services, Community Inaction is exploring money saving measures. Since the exempt employees who work for the program are the highest paid, Community Inaction is considering whether it may furlough some of these exempt employees and/or reduce the exempt employees pay and/or hours. What are the best options for Community Inaction during this very stressful time?

thank you

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Richard G. Pins » (612) 335-7007 » richard.pins@leonard.com

www.leonard.com

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