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SUBJECT: POLICY GUIDELINES - AMENDMENTS
TO THE FAIR LABOR STANDARDS ACT (FLSA)

On April 15, 1986 the FLSA, as amended, will officially be applicable to State government. The amendments require a revision in our policies concerning the administration of certain FLSA provisions.

Based on a review of Department of Labor (DOL) "draft" regulations the staff has prepared a revised set of policy guidelines which supersede the relevant sections in previous Department of Personnel Administration (DPA) Management Memoranda. In the near future we will consolidate all previous Management Memoranda with this memo and reissue one document when the DOL regulations become final. In order to correspond with the full April pay period, the following guidelines are to be effective April 1, 1986.

I. COMPENSATING TIME OFF UNDER THE FLSA

Department of Labor Regulations provide that employees of a public agency may receive, in lieu of cash, compensating time off (CTO) at a rate not less than 1 1/2 hours for each hour of overtime worked.

A. Conditions for Accrual of CTO

1. As a condition for use of compensatory time off in lieu of overtime payment in cash, the Act requires that an agreement or understanding between the public agency employer and employee must be reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a recognized representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. The agreement need not be in writing and may be an express condition of employment.
2. Agreements may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements may provide for any combination of compensatory time off and overtime payment in cash, e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked so long as the premium pay principle of at least "time and one-half" is maintained. However, payment for overtime hours in cash is always permissible

under the FLSA. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time off so long as these provisions do not conflict with any section of the Act.

We believe it is clear that past practice, DPA laws and rules and applicable provisions of current MOU's concerning overtime compensation meet the FLSA criteria as legitimate agreements between the employer and employee Thus, individual agreements with either represented or nonrepresented employees are not necessary. The State may again compensate overtime in cash or CTO basically as it did prior to April 15, 1985.

B. Maximum Accrual of CTO

Employees covered by the FLSA may accrue up to 240 or 480 hours of CTO depending on the nature of their job. The 240 and 480 hour limits on accrued CTO only apply to FLSA overtime hours worked after April 1, 1986. CTO accrued prior to April 1, 1986, and non-FLSA overtime earned after April 1, 1986, need not be counted toward these limits.

The majority of employees will only be allowed to accrue up to 240 hours of FLSA CTO. Employees allowed to accrue up to 480 hours include "public safety", "emergency response" and "seasonal" personnel.

1. The term "public safety activities" refers to law enforcement, fire fighting or related activities that qualify for a 7K exemption. An employee whose work regularly involves such activities will qualify for the 480 hour accrual limit. However, the 480 hour accrual limit will not apply to office personnel or other civilian employees who may perform public safety activities only in emergency situations, even if they spend substantially all of their time in a particular week in such activities.
2. The term "emergency response activity" includes rescue work and ambulance services. As is the case with "public safety" and "seasonal" activities, an employee must regularly engage in "emergency response" activities to be covered under the 480 hour limit. A city office worker who may be called upon to perform rescue work in the event of a flood or snowstorm would not be covered under the higher limit since such emergency response activities are not a regular part of the employee's job.
3. The term "seasonal activity" includes work during periods of significantly increased demand, which are of a regular and recurring nature.
 - a. In determining whether employees are considered engaged in a seasonal activity, the first consideration is whether the activity

in which they are engaged is a regular and recurring aspect of the employee's work. The second consideration is whether the projected compensatory time due to overtime hours during the period of significantly increased demand is likely to result in the accumulation of more than 240 hours (the number of compensatory time hours available under the lower cap). Such projections will normally be based on the employer's past experience with similar employment situations.

- b. Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. As an example, employees processing tax returns over an extended period of significantly increased demand whose overtime hours could be expected to exceed the lower cap may qualify as engaged in a seasonal activity.
- c. Road crews, while not necessarily seasonal workers, may have significant periods of peak demand, for instance during the snow plowing season or road construction season. The snow plow operator/road crew employee may be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap.

C. Conditions for Use of CTO

The FLSA provides that any employee of a public agency who has accrued CTO and has requested use of the time shall be permitted to use such time within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency.

- 1. 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.
- 2. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off.

For an agency to turn down a request from an employee for compensatory time requires that it should reasonably and in good faith anticipate that it will not be able to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

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D. Payments for Unused CTO

Regulations provide that upon termination of employment, an employee with unused FLSA CTO shall be paid at a rate of compensation not less than the average regular rate received by the employee during the last 3 years of the employee's employment, or the final regular rate received by such employee, whichever is higher.

(It is not clear whether the last three years of the employee's employment means the last 3 years the employee was covered by the FLSA or strictly the last three years regardless of status under FLSA. We have asked the DOL to clarify this issue.)

E. Records to be Maintained

Regulations specify that in addition to records on cash compensation the following information is also required on CTO:

- (1) the number of hours of compensatory time earned each workweek, or other applicable work period, by each employee at the rate of one and one-half for each overtime hour worked;
- (2) the number of hours of such compensatory time used each workweek, or other applicable work period, by each employee;
- (3) the number of hours of compensatory time compensated in cash, the total amount paid and the date of such payment; and
- (4) any collective bargaining agreement or written understanding or agreement with respect to earning and using compensatory time off. If such agreement or understanding is not in writing, a record of its existence must be kept.

II. MULTIPLE POSITIONS UNDER THE FLSA

In DPA Management Memorandum 85-25-12 departments were advised, effective December 1, 1985, to suspend the payment of overtime for hours worked by full-time employees in an additional part-time position.

Effective April 1, 1986, the guidelines provided in DPA Management Memorandum 85-15-12 regarding employees in multiple positions will again be applicable to State employees with one modification. The amended FLSA regulations provide that hours worked by an employee in a second job shall not be combined with the employee's primary job for purposes of determining overtime when the second job is in a different capacity and is occasional or sporadic.

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A. Employment in a Different Capacity

In determining whether employment is in a different capacity the DOL will be guided by the criteria of education, experience, duties, skills, and knowledge contained in the definitions of occupations in the Dictionary of Occupational Titles, as well as by all the facts and circumstances in a particular case.

For example, if 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". This would be the case even though the work was "occasional and sporadic" and, was not regularly scheduled. Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a "different capacity".

In State service we should be guided by our class specifications and occupational schematic groupings when determining if the job is in a different capacity.

B. Occasional or Sporadic

The term "occasional or sporadic" means infrequent, irregular, or occurring in scattered instances. There may be an occasional need for additional resources in the delivery of certain types of public services which is at times best met by the part-time employment of an individual who is already a public employee. Where employees freely and solely at their own option enter into such activity, the total hours worked will not be combined for purposes of determining any overtime compensation due on the regular, primary job.

In order for an employee's occasional or sporadic work on a part-time basis to qualify for exemption, the employee's decision to work in a different capacity must be made freely and without coercion, direct or implied, by the employer. An employer may suggest that an employee undertake another kind of work for the same unit of government when the need for assistance arises, but the employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

In order to be occasional or sporadic it is essential that the employee's additional employment not be prescheduled on a regular continuous basis. If an employee knows he/she will be working part-time on a specific regular recurring schedule each week or each month, the additional work does not constitute occasional or sporadic employment and the hours must be counted in computing any overtime compensation due.

C. Considerations in Hiring a Current Employee in a Second Position

Because of the additional expense involved in hiring a current employee in an additional part-time position, departments should be aware that the fact an employee must be paid overtime for all hours worked in a second position is a legitimate consideration in not hiring the employee.

Additionally, if an employment list is blocked because only currently employed eligibles are reachable, departments may request a withhold action if an eligible's primary employment is at the same or a higher level.

III. TRADING TIME

The FLSA provides that two individuals employed in any occupation by the same public agency may agree solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee is entitled to overtime compensation.

These provisions apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

A public agency which employs individuals engaged in substitute work is not required to keep a record of the hours of the substitute work. Further, there is no limit on the period of time during which hours worked may be traded or paid back among employees.

In order to qualify, an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

IV. VOLUNTEERS

Volunteers under the FLSA are defined in DPA Management Memorandum 85-15-12. The amended FLSA regulations provide additional guidance in determining what type of benefits, reimbursements, and stipends volunteers may receive without becoming employees.

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Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their hours of service without losing their status as volunteers.

A. Clothing and Equipment Allowances

An individual who performs hours of service as a volunteer for a public agency may receive payment for expenses without being deemed an employee for purposes of the FLSA. A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service.

B. Training expenses

Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers. Likewise, the volunteer status of such individuals is not lost if they are provided books, supplies, or other materials essential to their volunteer training or reimbursement for the cost thereof.

C. Benefit programs

Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance (i.e., health, life, disability, workers' compensation) or retirement funds otherwise maintained by the public agency for their employees who perform similar services as the volunteers.

D. Fees and stipends

Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. In order to be considered nominal, a fee must be less than the actual or reasonable market value of the services with which it is associated. A nominal fee is not a substitute for compensation. The following factors may be considered in determining whether a given amount is nominal: the distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

Management Memorandum 86-05-12

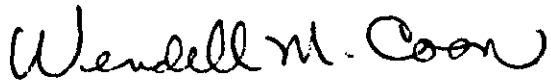
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The examples, interpretations, and quotations provided in this memo are based on the Department of Labor draft regulations. We do not expect significant change when the final regulations are adopted, but will inform you as quickly as possible if major changes are made.

Work Week Group 2 has been revised to reflect these changes and should continue to be used when overtime payments are processed for employees covered by the FLSA.

Each department is expected to be in full compliance with the Fair Labor Standards Act, as currently interpreted, by the end of the April pay period. Please contact Bruce Crain of my staff if you have questions or need assistance. He may be reached on (916) 324-0530 or ATSS 454-5030.



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