

**State of Wisconsin**

**OFFICE OF STATE EMPLOYMENT RELATIONS**

***DIVISION OF MERIT RECRUITMENT AND SELECTION BULLETIN***

**Date:** October 27, 2004

**Locator No:** OSER-0054-MRS

**Subject:** Ensuring Compliance with Federal Fair Labor Standards Act Regulations and State Overtime Provisions; Partial-Day Absences and Disciplinary Suspensions of FLSA Exempt Employees; and Effect of Change in FLSA Status on Certain Part-Time Employees

The United States Department of Labor (DOL) implemented new Fair Labor Standards Act (FLSA) regulations pertaining to the white-collar exemption tests effective August 23, 2004. However, the State of Wisconsin Department of Workforce Development (DWD) has not adopted the new federal regulations and will continue to apply many of the state overtime regulations that existed prior to August 23, 2004. This bulletin provides state agencies with policy guidance on: (1) ensuring compliance with the federal and state overtime regulations; (2) partial-day absences and disciplinary suspensions for exempt employees; and (3) changes in exempt status for certain part-time employees and the effect on their accelerated vacation schedules.

Please note that the Office of State Employment Relations (OSER) is not responsible for administering the FLSA provisions for faculty and academic staff of the University of Wisconsin System or unclassified employees in the judicial and legislative branches other than executive salary group employees. As a result, this bulletin does not apply to those employees, although they may be eligible for the same consideration under the FLSA as it relates to leave without pay for absences of less than one full day for exempt employees. Questions pertaining to the FLSA status of such unclassified employees should be referred to in-house agency or campus legal counsel.

**BACKGROUND**

The FLSA is the most generally applied federal law concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage per hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

The law applies to all State of Wisconsin employees who are not specifically excluded (i.e., exempt) from the minimum wage and/or overtime pay provisions of the FLSA. Title 29, Code of Federal Regulations, Part 541, defines the “exemptions” allowable under the FLSA as “Executive, Administrative, Professional and Outside Sales.” Employees must meet both the “payment on a salary basis test” and “duties and discretion test” within Part 541 in order to qualify for “exempt” status.

**ENSURING COMPLIANCE WITH THE FEDERAL AND STATE OVERTIME REGULATIONS**

Prior to August 23, 2004, the Wisconsin salary overtime exemptions very closely paralleled the similar federal exemptions. With the adoption of the federal FLSA changes effective August 23, 2004, that will no longer be the case. In order for a Wisconsin employer to comply with both federal and state overtime regulations on the salary overtime exemptions, it will be necessary for the employer to ensure that they meet both sets of criteria for the exemption. Usually an employer may accomplish that by meeting the more stringent requirement of each law that provides the employee with the greater benefit. The following link leads to a chart developed by the Wisconsin Department of

Workforce Development that compares the federal and state laws and identifies the more stringent requirement:

[http://www.dwd.state.wi.us/er/labor\\_standards\\_bureau/ls\\_pdf\\_files/ot\\_doc\\_for\\_website.pdf](http://www.dwd.state.wi.us/er/labor_standards_bureau/ls_pdf_files/ot_doc_for_website.pdf)

**PARTIAL DAY ABSENCES AND DISCIPLINARY SUSPENSIONS OF EXEMPT EMPLOYEES**

Based on discussions between OSER, DOL, DWD, and Department of Justice Assistant Attorneys General, it has been determined that the employer must continue to apply the State's current policy on partial day absences and disciplinary suspensions of exempt employees. Exempt employees cannot be suspended without pay for disciplinary purposes for periods of less than a full workweek (five work days) without losing their exempt status for that time period.

These policies are described in Bulletin CC/POL-27, CBB-15 (16.1026 and 16.1500) dated February 5, 1996, which prohibits all salary reductions for absences of less than one full day by exempt employees; and Bulletin OS-66, CC/POL-18, CBB-7 (07.110 & 13.0400) dated July 6, 1995, which states that exempt employees who are subject to disciplinary suspensions without pay for periods of less than a full workweek (five work days) must be considered to be nonexempt employees under the FLSA.

**CHANGES IN EXEMPT STATUS FOR CERTAIN PART-TIME EMPLOYEES AND THE EFFECT ON THEIR ACCELERATED VACATION SCHEDULES**

OSER is working with state agency human resources staff in reviewing part-time employees who were exempt under the pre-August 23, 2004, federal FLSA regulations for appropriate FLSA status. In order to be exempt under the FLSA, an employee must meet both the new salary test that requires a salary level of at least \$455 per week **and** must meet one of the duties and discretion tests. There are a number of previously exempt part-time employees who do not meet the new \$455 per week federal salary test and as a result, their FLSA status will need to be changed from exempt to nonexempt status effective August 23, 2004.

The nonrepresented Compensation Plan and the following bargaining unit contracts provide an accelerated vacation schedule for employees who are exempt under the FLSA:

<u>Schedule</u>	<u>Unit</u>
07	Wisconsin Professional Employees Council
08	Professional Employees in Research, Statistics and Analysis
11	United Professionals for Quality Health Care
13	Wisconsin Education Association Council
15	Wisconsin Science Professionals
81	Nonrepresented

OSER management has discussed the impact of this change in FLSA status on the accelerated vacation schedule for employees whose status will change from exempt to nonexempt effective August 23, 2004. OSER has determined that such employees are no longer eligible to receive the accelerated vacation schedule effective August 23, 2004. These employees must have their accelerated vacation accounts pro-rated to reflect their nonexempt status effective August 23, 2004, through December 31, 2004. If employees have already used all of their accelerated vacation, then the agency must recoup that time.

Agencies have raised questions regarding the appropriate FLSA status of some part-time employees. To assist agencies in making appropriate FLSA status determinations, OSER is sharing some examples

of part-time employee scenarios that agencies identified. For all of these examples, assume that the employees meet one of the exemption duties and discretion tests.

**Example A:** Jane Smith is a half-time employee (.50 full time equivalent) who works five eight-hour days one week, earning a salary of more than \$455 for that week, and doesn't work any hours the second week. The appropriate FLSA status for Jane is exempt for the week in which she works five eight-hour days. Exempt employees do not need to be paid for any workweek in which they perform no work.

**Example B:** Mary Johnson is a half-time employee who earns \$460 one week and \$450 the second week. Can her agency average her biweekly pay to \$455 each week to enable her to meet the salary test? The answer is no; employers cannot average pay rates for employees over a biweekly pay period. FLSA status is determined on a week-by-week basis.

**Example C:** John Doe works three days one week and earns \$500 for that week. During the following week, John works two days and earns \$454 per week. John is exempt for the week in which he earns \$500 and is nonexempt for the week in which he earns \$454. If John's agency were able to increase his salary slightly by means of broadbanding pay flexibility, he would be able to meet the salary test in both weeks.

OSER is recommending that agencies consider the following possibilities in addressing some of these FLSA status issues for part-time employees.

1. Evaluate whether there is any flexibility in assigning work hours to part-time employees. Would the employee meet the salary and duties and discretion test if the part-time hours were split differently between the two weeks? Would this change in work hours address the operational needs of the work unit?
2. Could the employee be assigned additional work hours? Does the work unit need additional hours worked and could it afford to pay the additional compensation to the employee?
3. If the employee is in a broadbanded classification, would a slight pay increase enable the employee to meet the salary test? Would such a pay increase meet the necessary criteria under the broadbanding program? Could the work unit afford to pay the additional compensation to the employee? Would such a pay increase cause pay inequities with other employees in the work unit or department?

### **CONTACT INFORMATION**

Questions regarding the information contained in *Wisconsin Human Resources Handbook* Chapter 520 on FLSA Administration and/or this policy bulletin should be addressed to Wil Mickelson at (608) 266-0714. Questions regarding provisions contained within collective bargaining agreements should be addressed to Mark Wild at (608) 266-9564.

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