

FLSA: impact for systems and organizations alike

For many of us, memories of our first job are anything but fond: hard work, low pay — plus, in many cases, the feeling that the boss wasn't being fair about paying for every hour worked.

Back in the '30s, that kind of memory could have been what led to passage of the Fair Labor Standards Act (FLSA). The real reasons the law came about was first, the federal government needed a way to help create more jobs (because employers would not want to pay overtime they might hire more workers) and second, creation of a

many of us have grown up to be employers — managers, supervisors, bosses — it's surprising how little we may know about what's required of us under those laws.

considered exempt, that person also needs to exercise discretion and independent judgment on matters of significance, such as the right to hire and fire. The basic goal of FLSA is fairness.

In KRWA's case, both board and employees assumed KRWA staff was exempt from the wage and hours provisions of FLSA. Everyone was happy with the arrangement — and yet it was a violation of the law.

KRWA learned that when it was audited for its compliance with FLSA — they realized that they hadn't been doing things the right way in all cases.

Don't wing it

"To be quite honest about it," said Elmer Ronnebaum, general manager of KRWA, "we thought we were doing things correctly.

"We didn't fully understand the law, especially the classification of

exempt and nonexempt. We had assumed that an individual in an administrative position, who had other people working under him or her, was in an exempt position.

"That's the way the employees also preferred it to be. However, in order to be

After all, though most workers deserve to be paid overtime, many higher-level salaried people, senior employees with special responsibilities, shouldn't have to worry about filling out time sheets.

As one engineer of our acquaintance put it, "They can't stop me from coming up with ideas while I'm taking a shower, so what right do they have to make me come in on time in the morning or keep track of my hours?"

In KRWA's case, both board and employees assumed KRWA staff was exempt from the wage and hours provisions of FLSA. Everyone was happy with the arrangement — and yet it was a violation of the law.

The message here is pretty simple: Don't wing it.

Managers, boards, councils and employees may think they're doing it right, but don't make assumptions. Check out what's required under FLSA — reading this article is a good start — and then make any changes needed to get into compliance. Today, before a Department of Labor inspector knocks at the door, badge in hand.



The employee must be completely relieved from duty for the purposes of eating regular meals. The employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating.

minimum wage was a means of economic recovery from the great depression.

Many take it for granted today that there's a minimum wage, and that federal law guarantees fair treatment for all employees, particularly when it comes to overtime. Yet now that

Many realize they don't know all of this, they're not alone. Small businesses, including small water districts and municipalities, usually haven't taken the time to keep up. Plus, as Topeka attorney Gary Hanson notes, "Utility people have a different attitude about things."

"A lot of our employees — and for that matter employers in our water districts and cities too — have a get-it-done approach," said Hanson, whose clients include KRWA and numerous cities and rural water districts. "They do whatever it takes to get the job done."

"The public can't really enjoy their lives without what we provide, so maybe we're more inclined to work whatever time it takes," he added.

FLSA includes special rules for police and firefighters. So doesn't it seem logical to have them for people who may get called out in the middle of the night to repair a broken main? Logical as it may seem, if it isn't written into the statute, it's not

going to happen!

Exempt vs. nonexempt

The core of the regulations surrounds when and how workers get paid overtime (over 40 hours a week, at least time-and-a-half). With occasional exceptions, those requirements are pretty well understood.

Overtime pay is due only for

count the same toward the 40 hour weekly total.

When problems do arise, they usually arise over the question of who may be exempt from those overtime rules. In a large corporation, it's every bit as clear that the CEO doesn't get time-and-a-half for jetting overseas for a conference as it is that blue-collar workers back home

When problems do arise, they usually arise over the question of who may be exempt from those overtime rules.

more than 40 hours actually worked during the workweek. Days off, holidays (not actually worked) and vacation don't count toward that weekly total. On the other hand, for purposes of FLSA, it makes no difference when those hours are worked, whether they include a double-shift, Christmas Day or the employee's birthday — they all

assembling the widgets do get time-and-a-half.

The CEO is exempt. And so are the chief financial officer, the plant manager, and the director of human resources. Also included is the plant doctor, with his or her M.D., and of course the general counsel with his or her own professional degree. But how about the foreman, wearing

FLUID EQUIPMENT

CHEMICAL FEED

CLARIFICATION

DISINFECTION

FILTRATION

HEADWORKS

PROCESS

SCADA

SOLIDS



Water and Wastewater SOLUTIONS

WWW.FLUIDEQUIP.COM

Western MO & Northeast KS

4225 NE Port Drive
Suite 200
Lee's Summit, MO 64081
816.795.8511

Kansas & Oklahoma

3500 North Rock Rd.
Building 100
Wichita, KS 67226
316.630.0075

the same blue collar as the line workers, sharing the noise and heat of the shop floor, yet supervising nonexempt workers?

Under FLSA — to be exact, under Section 13(a) (1) of FLSA — a person is exempt only if they're a bona fide executive, administrative or professional employee.

Does salaried vs. hourly matter? Well, to be exempt one has to be paid a salary of more than \$455 a week. But remember, just because a person is paid that salary doesn't necessarily make him or her exempt.

How about job title? Nope, sorry, it's job duties that count.

To be considered an "executive" under the law, there are three tests that must be met (on top of the salary minimum), and we quote the regulations:

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.

- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.

- And the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. For "administrative," there are two tests (again on top of the salary minimum):

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

- And the employee's primary duty must include the exercise of discretion and

independent judgment with respect to matters of significance.

So-called "learned professionals" must meet three tests:

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.

- The advanced knowledge must be in a field of science or learning. [There's also an exemption for "creative professionals," whose work includes music, writing, acting and the graphic arts.]

- And the advanced knowledge must be customarily acquired by a prolonged course

of specialized intellectual instruction.

The wording above is of course open to interpretation. Just what does it mean to "manage," just how much weight is "particular weight"? While these phrases can be difficult to interpret and apply, the Department of Labor, in its newly revised regulations, defines many of the key terms such as "primary duty", "discretion and independent judgment", and "matters of significance".

Severe Penalties

For the most part, a careful reading of those three sets of rules will keep an organization out of trouble.

It's easy to say that. Yet realistically, the number of

people who have ever sat down and read the rules is probably about the same as the number of people who have read their homeowners or auto insurance policy cover to cover.

Ideally, one would run through the legalistic language in an insurance policy just before the tornado touches down in the neighborhood, but one would certainly want to know afterwards what's covered and what's not. If people think a tornado is an odd analogy for violating the provisions of FLSA, it's only because they've never been through a review.

Ronnebaum remembers well what it was like when the examiner from the Department of Labor showed up.

"I gritted my teeth and bit my tongue — a lot," he said.

History of the Fair Labor Standards Act

- Congress enacted the FLSA in 1938 to guarantee employees of private employers certain minimum wages and time-and-one-half overtime standards.
- The FLSA was adopted as a means of economic recovery from the Great Depression. The FLSA sought to ensure a maximum number of jobs, which paid a minimum livable wage. By requiring overtime pay, the FLSA created a monetary penalty for employers who did not spread their existing work among a greater number of employees.
- Coverage of the Act was extended to state and local governments in 1985.
- Nationally, over 90 million employees are covered by this Act.
- Although amended, the Act essentially remains the New Deal legislation, born out of the depression. Many of the requirements of the statute are premised upon increasing employment by penalizing overtime.

There are two ways to earn a visit like that. One is the luck of the draw, for examiners from the Wage and Hours Division of the Employment Standards Administration of the Department of Labor do make random inspections of workplaces. For many employers, though, the visit follows a complaint by a disgruntled employee.

If a disgruntled employee has complained, the inspector won't explain in any case. And the results are the same — an extremely thorough review of organizational records.

No job descriptions or records of hours worked? Oops.

Penalties can be severe. If an employee has been misclassified as exempt and thus been working overtime but not being paid for it, your business or organization can be liable for two years' back pay. And that jumps to three years if the violation was a willful one. But wait, it gets worse.

"That's just what the agency can do," said Hanson.

"The employees can hire private counsel, and then can get those same damages plus attorneys' fees. Basically unlimited attorneys' fees, and that's the real downside."

After all, if employees learn about rules violations before managers, they may have unwanted leverage over their employer because they can't be fired, lest they call Wage and

Changes? What Changes?

The worker protection features of the Fair Labor Standards Act (FLSA) have been around for more than half a century. And despite efforts to ease the burden on employers, it can still be awfully onerous to comply with all the rules and regulations.

That's still true after changes to FLSA that went into effect several months ago.

People may recall the flurry of news stories over the summer. We're here to encourage folks to not worry about all that.

Yes, there were some changes in overtime eligibility, and yes they'll mean either more or fewer American workers getting time and a half over 40 hours (1.3 million more, if you believe the Bush administration, 1.5-2.7 million fewer if you believe Department of Labor numbers that were removed from the final regulatory language).

Despite some political rhetoric about maybe revisiting the legislation, the changes went into effect as scheduled.

Those changes were primarily in the pay level at which employees may be able to be exempted from the law.

The main point of contention in most workplaces, though, is who is and is not exempt. And with a teensy exception here and there, that hasn't changed.

After the revisions, as before, the only folks exempt from Wage and Hours are those with professional, administrative or executive status. And the guidelines for being one or the other of those categories have hardly budged.

Here's the short version: If an organization was out of compliance before, they still are - and managers had better get it fixed before they come to regret it.

Hours — or hire a lawyer
"Managers just don't want to put themselves in a position where that could occur," Hanson said. That's a good reason in itself [to get into compliance]."

At times, the rules can seem awfully rigid.

For instance, if an employee routinely eats lunch at his or her

desk and answers the phone or does other work, the employer may be in violation of the law. And no one is allowed to donate time, so even if a worker wants to continue working after quitting time, or wants to come in on the weekends, they have to be told no (or make certain they're on the clock for the extra time).



316-262-3322

Ground Water Associates, Inc.

EXPERTISE IN WATER & WELLS

ROBERT L. VINCENT, C.P.G.
GROUND WATER GEOLOGIST

610 N. MAIN, P.O. BOX 3834
WICHITA, KANSAS 67202



**Carbon
Central, LLC.**

1703 Johnson Industrial Drive
Suite A
Excelsior Springs, MO 64024
Phone: 816-637-0116
Fax: 816-637-4549
E-mail: dlonsingercc@aol.com

Deborah Lonsinger
President

What to do

In the KRWA case, the association had time logs, but they weren't time sheets as FLSA recognizes them.

In addition, KRWA had mistakenly listed some of the association's people as professionals, since they went around the state offering advice to water systems at irregular times of the day and night. Turns out, though, that as a rule of thumb, the "advanced knowledge" referred to in the description of a professional usually equals a four-year college degree. Many of KRWA staff have years of experience but not always, a 4-year degree.

Technical training generally doesn't count, and work experience definitely doesn't cut it. "As long as the typical employee can get to that same level, they'll never make it [as exempt professionals]," said Hanson.

Once you understand the limitations built into the law, there are ways to work around them. For instance, if a person who functions in a somewhat administrative, managerial or professional manner needs to work occasional overtime, convert them to hourly and adjust the rate so they reach the desired pay level with base pay plus a defined number of overtime hours.

KRWA now has three professional employees who definitely meet the definition: a degreed communications person, a licensed geologist and a person with a master's degree in environmental biology.

But that's a professional association with a fair-sized staff. For a small municipal operation or the typical RWD, it may simply not be possible.

Many systems might be better off doing as Rita Moore, city clerk in Edgerton, has done.

"Here everyone is hourly," she said, "and everyone gets overtime."

You can be sure that the Edgerton city fathers keep a close eye on overtime expenditures, yet if after-hours

Shove them out the door

Despite all the best intentions, despite all the good that FLSA does for employees, many managers get a bitter taste in their mouth after an encounter with the law.

"Compliance is going to have to occur, and hopefully it will occur sooner rather than later."

— Topeka attorney Gary Hanson

work is needed to keep the system up and running, employees are properly compensated.

One good bit of news: Municipalities have an easier time offering compensatory time than other kinds of organizations, such as KRWA. But there are limitations there too, so check before you leap. For starters, we recommend visiting www.dol.gov/esa/fact-sheets-index.htm, an excellent group of fact sheets on topics discussed here — and dozens more.

One middle manager we know had an experience earlier in his career with these laws, and then asked around and collected other people's stories about the seemingly arbitrary nature of the federal investigators.

Today, when an employee offers to stay a few minutes late to finish up a project, he politely tells them, "No, it can wait until morning. See ya."

"The way the law works, a manager pretty much has to shove them out the door," he said.



-WRIGHT SALES, INC.
 4823 N.W. Gateway
 Riverside, MO 64150
 Telephone: 816-468-9119 Fax: 816-468-9199
 statman@birch.net



Engineered Fluid, Inc.

- Booster Pump Stations
- Master Meter and Control Valve Stations
- Telemetry

Engineered Storage Products, Co.

- Water and Waste Water Tanks

FILTRONICS

- Industrial Municipal Filtration Systems



CLA-VAL Automatic Control Valves

- Pressure Reducing
- Altitude Valves
- Pump Control Valves
- Electronic Control Valves

VAL-MATIC

- Butterfly Valves • Check Valves
- Air Release Valves

DRESSER

- Piping Specialties

Service, Quality, & Dependability

One of this man's experiences involved an audit that occurred simply because an employee called the local Wage and Hour office to ask a question. He innocently told the person on the other end of the line where he was calling from, and it went downhill from there.

Fortunately, that no longer happens.

Just as the Occupational Safety and Health Administration offers to come out to the job site and help with workplace safety without fining anyone, the Department of Labor is happy to provide compliance assistance. They'll even come out and talk to managers about what's required, and how to accomplish it effectively.

That's a good thing, because like it or not, the provisions of FLSA must be complied with.

As Hanson put it, "Compliance is going to have to occur, and hopefully it will occur sooner rather than later."

As for KRWA, Ronnebaum said, "The transition from exempt to non-exempt has been more of a challenge for some staff than

others, but for the most part, the hourly rate is fairer to those who put in the extra time to get the jobs done."

Emergency Rate Increase?



This shouldn't happen if you have a long range plan in place. Plan for the future of YOUR water/wastewater system now - it's YOUR responsibility!

Let the professionals at Schwab-Eaton assist you with the development of a long range plan that addresses both infrastructure and fiscal concerns.

You have needs ... We Listen.

Schwab-Eaton
CONSULTING ENGINEERS

Serving Kansas RWD's and communities since 1957.

Manhattan, Wichita & Beloit • phone: (785) 539-4687 • www.schwab-eaton.com

CRITCH'S SEWER INSPECTION SERVICE

421 N. 6TH (785) 421-3371
Hill City, KS 67642 Cell: (785) 421-8275

CCTV 6" to 34" City Mainlines
Residential Lines Taped & Located
Septic Tanks Located

Serving Western Kansas, Southwest Nebraska & Eastern Colorado
Dennis Critchfield ~ Owner

1-800-327-9761 (except FL)
E-mail: chlorinc@aol.com

(772)288-4854
FAX (772)287-3238

DIANE M. HASKETT

 chlorinators
incorporated

PRESIDENT
REGAL GAS CHLORINATORS
1044 S.E. Dixie Cutoff Road, Stuart, FL 34994, U.S.A.

Cost-Effective
Telemetry Monitoring & Control
FM 2-Way Radios Scada Systems



Haug Communications, Inc.

Two HCI Locations to Serve You:
Seneca, KS St. Joseph, MO
Toll Free: 800-325-8646

WASTEWATER LAGOON LAND APPLICATION
DESLEUDGING & EVALUATION OF BIOSOLIDS

MCC DREDGING

THINKING ABOUT DESLEUDGING YOUR LAGOONS
AND HAVE QUESTIONS - VISIT OUR WEB SITE AT:

www.mccdredgin.com

PHONE: (316)775-3333

401 STATE STREET
AUGUSTA, KS 67010