



ZASHIN & RICH

**FLSA and Storms on the Horizon**  
Auditor of State – Local Government Officials  
March 23, 2018

Jonathan J. Downes  
17 South High Street, Suite 900  
Columbus, Ohio 43215  
jjd@zrlaw.com 614-565-2075



columbus | cleveland

---

---

---

---

---

---

---

---

---

---

**Jonathan J. Downes**

- More than thirty years of experience and expertise in representing public and private employers in labor and employment law and human resource management
- Negotiated over 500 labor contracts
- Represents employers in arbitrations, organizing campaigns, and administrative hearings
- Defends employers in state trial and appellate courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit
- Investigates Employee Conduct Matters
- AV Preeminent rated by Martindale Hubbell
- Fellow in the College of Labor and Employment Lawyers
- Ohio State Bar Association Certified Specialist in Labor and Employment Law
- Recognized many times over as a subject-matter expert, Jonathan was selected as one of the Top 50 Central Ohio Lawyers of 2015 and every year since 2004 has been named an Ohio "Super Lawyer"




columbus | cleveland

---

---

---

---

---

---

---

---

---

---

**About Zashin and Rich**

- Zashin & Rich Co., L.P.A. ("Z&R") has over 20 attorneys who specialize in labor and employment law with offices in Columbus and Cleveland, representing both private and public employers.
- Z&R represents its clients in labor negotiations, human resources matters, and civil service. Attorneys of Z&R have collectively negotiated over 1000 contracts and have represented private and public employers in arbitrations, impasse proceedings and litigation.
- Attorneys represent private employers, universities and colleges, state agencies, special districts, cities, counties, townships, housing authorities, hospitals and others. Attorneys handle matters at the National Labor Relations Board, the State Employment Relations Board, State Personnel Board of Review, and local civil service commissions.



columbus | cleveland

---

---

---

---

---

---

---

---

---

---

## About Zashin and Rich (continued)

- Z&R representation includes all federal and state discrimination laws, administrative and court proceedings, employee handbooks and manuals, contract administration, strike situations, and workers' compensation.
- The Firm has an extensive insurance defense practice representing several national insurance companies including Chubb, Travelers, AIG, Pools, PERSO and PEP among others. The firm represents clients before the EEOC, OCRC and in state and federal courts in all parts of Ohio.
- The Firm's Labor & Employment Group has received First Tier ranking in Employment Law-Management in the Cleveland Region and Labor Law-Management in both the Cleveland and Columbus Regions by U.S. News Best Lawyers® "Best Law Firms" in 2014 and 2015.



---

---

---

---

---

---

---

---

## Employment and Labor Law Group

- Zashin & Rich's Employment Group has extensive experience representing public sector entities, large and small businesses, and non-profit organizations. Zashin & Rich's Employment Group's expertise extends into many areas including:
  - Litigation and EPLI Defense
  - Discrimination and Retaliation
  - General Employment Counseling
  - Labor Law
  - Collective Bargaining
  - FLSA, Wage and Hour Issues
  - Worker's Compensation
  - Restrictive Covenants
  - Employee Handbooks
  - Unemployment Compensation
  - Civil Service Law
  - Public Records/Sunshine Laws

- Discrimination and Retaliation  
Laws Representation
  - Title VII
  - ADA
  - ADEA
  - FMLA
  - PDA
  - FLSA
  - §1983



---

---

---

---

---

---

---

---

## Agenda

- i. Overview of the Fair Labor Standards Act
- ii. Covered Employers and Employees
- iii. Overtime Requirements and Exemptions
- iv. Overtime Issues: The Work Period
- v. Overtime Issues: Hours Worked
- vi. Overtime Issues: Compensatory Time Off ("CT")
- vii. Overtime Issues: The Regular Rate of Pay
- viii. Recordkeeping
- ix. Litigation Issues



---

---

---

---

---

---

---

---

## FLSA Update

- OVERTIME RULE:
  - DOL has indicated it will not defend the much maligned “overtime rule” that would have raised salary thresholds for overtime exemption by over 100%
  - DOL will still defend its authority to set a ‘salary basis’ test
  - DOL engaging in new “notice and comment” rulemaking to revise existing OT rules. No changes at this time for employers to implement



---

---

---

---

---

---

---

---

## FLSA Update

- Edwards v. City of Mansfield, No. 1:15-CV-959 (N.D. Ohio, May 16, 2016)
  - \$253,000 settlement of overtime miscalculation case for FOP officers
  - \$3500 to each officer named in complaint
  - \$36,000 to two FOP attorneys
  - Approved as reasonable by the Court (FLSA settlements generally must be court or DOL supervised)



---

---

---

---

---

---

---

---

## FLSA Case Updates

- *Meeks v. Pasco County Sheriff*, No. 16-16932 (11th Cir., May 15, 2017) (unpublished)
  - Sheriff violated FLSA by failing to pay wages (and OT incurred) for deputy’s time transporting vehicle to and from a secured lot and his patrol zone area.
  - 15 to 20 minutes travel, twice a day
  - Was “integral and indispensable” to his duties



---

---

---

---

---

---

---

---

**FLSA Case Updates**

- *Gonzalez v. Prince George's County, Md.*, No. PWG-17-159 (D. Md., July 5, 2017)
  - County liable for OT wages not paid for employee
  - Scheduled for half hour lunch break daily, but for years was engaged to work during lunches several days per week.
  - Employee note required to exhaust CBA grievance procedure before pursuing statutory claim because no clear and unmistakable waiver




---

---

---

---

---

---

---

---

**FLSA Case Updates**

- *Amador v. City of Ceres*, No. 1:17-cv-00552-DAD-MJS (E.D. Cal., July 13, 2017)
  - Employees stated facially valid claim under FLSA
  - City failed to include holiday pay benefits in regular rate for OT calculation.
  - Holidays were paid as lump sum if not used, but use was severely restricted. As such, employees had stated a claim even though holiday pay is typically excluded from regular rate.




---

---

---

---

---

---

---

---

**Section I:  
Overview of the Fair Labor Standards Act**





---

---

---

---

---

---

---

---

## Overview of the Fair Labor Standards Act

- Fair Labor Standards Act (“FLSA”) enacted in 1938
- Ohio Minimum Fair Wage Standards Act (2007)
  - Largely mirrors the provisions of the FLSA
  - Ohio Rev. Code § 4111 et seq.
- Core Components:
  - Minimum Wage (Federal \$7.25/hour, Ohio \$8.15/hour)
  - Overtime Compensation (“regular rate” x 1.5)
  - Recordkeeping and Posting (examples on next slide)



13  
columbus | cleveland

---

---

---

---

---

---

---

---

## Overview of the FLSA

The DOL has a version of the poster that is designed especially for State and Local Government Employees.

<https://www.dol.gov/whd/regs/compliance/posters/wh1385State.pdf>



14  
columbus | cleveland

---

---

---

---

---

---

---

---

## Overview of the FLSA

Ohio's Department of Commerce issues its own version of the minimum wage poster that must also be posted:

[http://www.com.ohio.gov/documents/dico\\_2017MinimumWageposter.pdf](http://www.com.ohio.gov/documents/dico_2017MinimumWageposter.pdf)



15  
columbus | cleveland

---

---

---

---

---

---

---

---

## Overview of the FLSA

- Core Components (continued)
  - Child Labor (proscribed, except special circumstances)
  - Retaliation
  - Equal Pay (Equal Pay Act of 1963)



16  
columbus | cleveland

---

---

---

---

---

---

---

---

## Overview of the FLSA

- COMMON MYTHS
  - Everyone who is “salaried” is exempt from overtime. **No!**
  - Employees can just “volunteer” their extra hours. **No!**
  - The job description indicates the position is exempt, so it is. **No!**
  - All supervisors are exempt. **No!**
  - The union contract exempts the employees from OT. **No!**
  - The job requires a college degree, so it is exempt. **No!**
  - Tracking time destroys exempt status. **No!**
  - Anyone handling a computer is exempt. **No!**
  - Unclassified civil servants are automatically FLSA exempt. **No!**
  - Individual classified as an ‘independent contractor,’ not an employee. **No!**



17  
columbus | cleveland

---

---

---

---

---

---

---

---

## Section II: Covered Employers and Employees



18  
columbus | cleveland

---

---

---

---

---

---

---

---

## Covered Employers and Employees

- Public agencies and their employees are subject to the FLSA
  - *Garcia v. San Antonio Metropolitan Transit District*
- In 1985, Congress amended the FLSA to address issues specific to public agencies such as the use of compensatory time off (“CT”) and volunteers



---

---

---

---

---

---

---

---

## Covered Employers and Employees

### Exclusions from FLSA Coverage

- Statutorily excluded positions (e.g., elected officials)
- Independent Contractors
- Trainees
- Volunteers



---

---

---

---

---

---

---

---

## Covered Employers and Employees

### Statutory Exclusions

The FLSA explicitly excludes certain public employees from coverage:

- Elected Officials;
- Personal Staff of Elected Officials
- Policymaking Appointees of Elected Officials
- Advisors on Constitutional or Legal Powers;
- Staff of the Legislative branch



---

---

---

---

---

---

---

---

**Covered Employers and Employees:  
Independent Contractors**

**Independent Contractors**

- Not covered by the FLSA
- Misclassification of employees as independent contractors can result in litigation and substantial liabilities
- Must meet criteria established by the DOL's "totality of the circumstances" test




---

---

---

---

---

---

---

---

**Covered Employers and Employees:  
Volunteers**

Under the FLSA, a **volunteer** is an individual who

- Performs hours of service for a public agency for civic, charitable, or humanitarian reasons;
- Offers their services freely and without pressure or coercion, direct or implied, from an employer;
- Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. **[KEY FACTOR]**
- Receives no compensation, or is paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service.




---

---

---

---

---

---

---

---

**Covered Employers and Employees:  
Volunteers**

**Permissible payments to volunteers**

- "Allowable Expenses"
  - Uniforms, cleaning, wear and tear on personal clothing
  - Out of pocket expenses
- Reasonable Benefits"
  - Group insurance plans, pension plans
  - Length of service awards
  - Keeping up police commissions




---

---

---

---

---

---

---

---

## Covered Employers and Employees: Volunteers

Permissible payments to volunteers (continued)

- "Nominal Fees"
  - Incidental, insubstantial, not intended as compensation
  - Not tied to productivity
  - No more than 20% of the amount employer would pay an employee for performing comparable services
  - Viewed under an "economic realities" test




---

---

---

---

---

---

---

---

---

---

## Covered Employers and Employees: Volunteers

When is an employee that volunteers for a public agency performing the "same type of services"

- DOL considers two criteria: (1) the relationship of the positions in the O\*Net classification system, and (2) all of the facts and circumstances of the case, including whether the volunteer service is closely related to the employee's duties
- DOL Opinion Letters imply that the services must be classified in different chapters of O\*Net system




---

---

---

---

---

---

---

---

---

---

## Covered Employers and Employees: Volunteers (O\*Net Comparison)



**Summary Report for:**  
33-3091.01 - Police Patrol Officers

Patrol assigned area to enforce laws and ordinances, regulate traffic, control crowds, prevent disorderly conduct, investigate and report crimes, and enforce laws and ordinances.

Sample of required job skills: National Law Enforcement Agency (NLEA) Agent, Law Enforcement Police Officer, Public Safety Officer, State Trooper, Uniformed Patrol Police Officer

**Tasks**

- Enforce laws and ordinances
- Identify, pursue, and arrest suspects and perpetrators of criminal acts
- Provide for public safety by maintaining order, responding to emergencies, conducting searches and investigations
- Respond to requests for assistance

**Technology Skills**

- Data base user interface and query software -- Integrated Automated Fingerprint Identification System (IAFIS)
- Office suite software -- Microsoft Office Suite, Microsoft Office Word, Microsoft Office Excel, Microsoft Office PowerPoint
- Operating system software -- Microsoft Windows
- Spreadsheet software -- Microsoft Excel



**Summary Report for:**  
33-2011.01 - Municipal Firefighters

Control and extinguish fires, protect life and property, and conduct rescue efforts.

Sample of required job skills: Fire Captain, Fire Chief, Fire Engineer, Fire Fighter, Fire Inspector, Fire Marshal, Fire Officer

**Tasks**

- Respond to requests for assistance
- Search burning buildings to locate fire victims
- Administer first aid and cardiopulmonary resuscitation to injured persons
- Operate and maintain fire-fighting equipment
- Operate and maintain fire-fighting equipment
- Operate and maintain fire-fighting equipment

**Technology Skills**

- Data base user interface and query software -- Microsoft Access
- Office suite software -- Microsoft Office Suite, Microsoft Office Word, Microsoft Office Excel, Microsoft Office PowerPoint
- Operating system software -- Microsoft Windows
- Spreadsheet software -- Microsoft Excel




---

---

---

---

---

---

---

---

---

---

**Covered Employers and Employees:  
Case Examples**

DOL Opinion Letter FLSA 2008-16

- Latino Victim Specialist could volunteer as reserve police officer

DOL Opinion Letter FLSA 2006-2

- Code Compliance Officer could volunteer as reserve police officer

*Mendel v. City of Gibraltar* (6th Cir. 2013)

- "volunteer" firefighters received more than a 'nominal fee' for responding to calls, and were employees for FLSA purposes



---

---

---

---

---

---

---

---

**Covered Employers and Employees:  
Case Examples**

*Cleveland v. City of Elmendorf* (5th Cir.. 2004)

- Police department maintained commissions for unpaid officers; they were volunteers, not employees

*Todaro v. Township of Union* (D.N.J. 1999)

- Unpaid officers were still volunteers, even though they continued volunteering with the hope of having their eligibility restored to bid on 'jobs-in-blue' security/safety jobs with private entities



---

---

---

---

---

---

---

---

**Section III:  
Overtime Requirements and Exemptions**



---

---

---

---

---

---

---

---

## Overtime Requirements & Exemptions

General Rule: employees must be paid at least one and one-half (1.5) times the regular rate of pay, or "overtime" (OT), for all hours worked in excess of a certain threshold of hours

- For most non- public safety employees, the threshold is a forty-hour (40) workweek.

The OT requirement is subject to a complex series of exceptions and exemptions



31  
columbus | cleveland

---

---

---

---

---

---

---

---

## Overtime Requirements & Exemptions

- The most commonly-known exemptions to the OT requirements of the FLSA are the so-called "White Collar" exemptions for executive, administrative, and professional employees
- The "White Collar" exemptions were expected to be radically affected by the DOL's "Final Rule" published in 2016.
- However, federal courts enjoined the implementation of the Final Rule, and its future in the Trump administration is uncertain



32  
columbus | cleveland

---

---

---

---

---

---

---

---

## Overtime Requirements & Exemptions

"White Collar" Exemptions: a two-part test

- Salary Test
  - Must be paid at least \$455/week (\$23,660 annualized)
  - Not pro-rated for part-time employees
  - Must be paid on a "salary basis" (not hourly)
  - Certain deductions from pay are permissible
- Duties Test
  - Employee's "primary" duty must fall into the definitions the DOL has issued for "executive," "administrative," or "professional"



33  
columbus | cleveland

---

---

---

---

---

---

---

---

## Overtime Requirements & Exemptions: First Responders

“First Responders” are not eligible for white collar exemptions

- The primary duty of a safety employee who fights fires, rescues victims, apprehends criminal suspects, or investigates crimes or fires cannot be deemed as executive, administrative, or professional in nature
- A person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be a first responder under this rule



---

---

---

---

---

---

---

---

## Overtime Requirements & Exemptions: “Small Employer” Public Safety Exception

- Section 13(b)(20) of the FLSA establishes a complete overtime exemption under very limited circumstances.
- The 13(b)(20) exemption only applies to fire protection and law enforcement employees of small public agencies, where those agencies employ fewer than five (5) total employees during any given workweek in either law enforcement or fire protection activities.



---

---

---

---

---

---

---

---

## Overtime Requirements & Exemptions: Safe Harbor Provisions

- An employer who violates the salary basis test by making improper pay deductions may avoid liability by utilizing a “safe harbor” provision in the DOL regulations.
- To qualify for the safe harbor, an employer must:
  - Maintain a clearly communicated policy prohibiting improper pay deductions, including a complaint mechanism;
  - Reimburse its employees for any improper pay deductions; and
  - Make a good faith commitment to comply in the future.



---

---

---

---

---

---

---

---

## Overtime Requirements & Exemptions: Case Examples

*Watkins v. City of Montgomery, AL* (11th Cir. 2014)

- 54 fire suppression lieutenants were “executive” employees and were not entitled to overtime compensation under the FLSA – even though they had been subject to certain deductions from their pay.

*Morrison v. County of Fairfax, VA* (4th Cir. 2016)

- County’s fire captains were not exempt and were legally entitled to overtime.



---

---

---

---

---

---

---

---

## Section IV: Overtime Issues: The “Work Period”



---

---

---

---

---

---

---

---

## The Work Period

For the majority of employees, outside of public safety and hospitals, this means that overtime must be paid for all hours worked over forty hours in a seven day work period.

Outside of public safety, an employee’s workweek is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods.

An employer can have different workweeks for different employees or groups of employees. It need not coincide with the calendar week but may begin on any day and at any hour of the day.



---

---

---

---

---

---

---

---

**The Work Period:  
Public Safety 7(k) Work Periods**

- In 1974, Congress amended the FLSA to authorize longer work periods if elected by a public employer for employees working in law enforcement activities or in fire protection activities.
- These Section 7(k) work periods, may be for periods of between 7 and 28 consecutive days.




---

---

---

---

---

---

---

---

**The Work Period:  
Public Safety 7(k) Work Periods**

7(k) Work Period must be expressly invoked by the employer

- DOL regulations require an employer who wants to establish a 7(k) exemption to make a notation in the payroll records of the employees indicating the length of the work period and the beginning date of the work period
- Best practice: include in a policy and/or CBA




---

---

---

---

---

---

---

---

**The Work Period:  
Public Safety 7(k) Work Periods**

- 7(k) work periods also apply for
  - Corrections officers
  - Ambulance and rescue service employees (not standalone)
- 7(k) work periods not available for
  - Dispatchers, radio operators, maintenance/repair, custodial, clerks, stenographers
  - Building inspectors, animal control, sanitarians, health inspectors, civilian traffic controllers, parking checkers, tax compliance officers, building guards




---

---

---

---

---

---

---

---

Section V:  
Overtime Issues: Hours Worked



---

---

---

---

---

---

---

---

Hours Worked

Overtime compensation under the FLSA is based on total hours worked, as opposed to some other standard (e.g., scheduled hours, or hours in paid status)

Generally, the rule is that “[w]ork not requested but suffered or permitted is work time”

Employees are not permitted to ‘volunteer’ their time to perform additional work in their position



---

---

---

---

---

---

---

---

Hours Worked

Best practice:

– Adopt work rules that prohibit employees from performing unauthorized work before or after regularly-scheduled work hours.

- The onus is on the employer to exercise control and ensure that work is not performed if it does not want that work to be performed.



---

---

---

---

---

---

---

---

**Hours Worked:  
Special Situations**

**Rounding and “De Minimis” Time**

- The FLSA does not require employers to record “insubstantial” or “insignificant” periods of time beyond the scheduled working hours, if those hours cannot as a practical administrative matter be recorded precisely for payroll purposes



---

---

---

---

---

---

---

---

**Hours Worked:  
Special Situations**

**Swapping or Trading of Shifts**

- The FLSA permits public employees to substitute for one another without increasing overtime liability.
- Where one employee substitutes for another each employee will be credited as if he or she had worked his or her normal work schedule for that shift.



---

---

---

---

---

---

---

---

**Hours Worked:  
Special Situations**

**Moonlighting in Another Department for the Same Employer**

- Where State or local government employees, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs are not combined for the purpose of determining overtime liability



---

---

---

---

---

---

---

---

**Hours Worked:  
On-Call / Waiting / Standby Time**

- Whether “on-call” or standby time is counted towards “hours worked” depends on the particular facts and circumstances of the case
- Key Question: was the employee “engaged to wait” or “waiting to be engaged”
  - The distinction matters because time spent while ‘engaged to wait’ is hours worked, but time spent ‘waiting to be engaged’ is not.




---

---

---

---

---

---

---

---

**Hours Worked:  
On-Call / Waiting / Standby Time**

- Employees are ‘engaged to wait’ if the standby time is primarily for the employer’s benefit.
- The key test is whether the employee is or is not able to use the time effectively for his or her own purposes.
- If the employee can use the time for his or her own purposes, then the time generally will not be considered hours worked.




---

---

---

---

---

---

---

---

**Hours Worked:  
Rest, Meal, and Sleep Periods**

The FLSA does not require employers to provide employees with rest periods;

If allowed, rest periods of short duration (5 to 20 minutes) must be counted toward hours worked.

It does not matter for FLSA purposes whether the employee’s rest period is for coffee, smoking, restrooms, etc.




---

---

---

---

---

---

---

---

**Hours Worked:  
Rest, Meal, and Sleep Periods**

- Meal time is not compensable if the meal period is “bona fide” and the employee is not continuing to perform work duties
- Sleep time may be compensable depending on whether it is (1) sleep time during a duty of less than 24 hours; (2) sleep time during a duty of 24 hours or more; or (3) sleep time when employee resides on the employer’s premises or works at home.




---

---

---

---

---

---

---

---

**Hours Worked:  
Pre and Post Shift Activities**

- The Portal-to-Portal Act of 1947 amended the FLSA to create a specific exclusion for activities that are considered preliminary or postliminary to actual work.
- The key question is whether the activity at issue is an integral part of an employee’s principal activity at work. If the activity is an integral part of an employee’s principal activity, it is considered hours worked.




---

---

---

---

---

---

---

---

**Hours Worked:  
Travel**

- Ordinary travel to and from work is not hours worked, unless there is an employment agreement or custom or practice to pay under the circumstances
- Hours Worked
  - Travel time to report to another location before work
  - Travel as part of employee’s principal job duties (from one jobsite to another during workday)
  - Travel required outside of normal working hours, under certain circumstances




---

---

---

---

---

---

---

---

## Hours Worked: Training Time

Time spent by employees in training-related activities is compensable unless all four of the following criteria are met:

- Attendance must be outside of the employees regular working hours;
- Attendance must be voluntary;
- The training program must not be directly related to the employee's job; and
- The employee must not perform any productive work during the training

A separate exception applies for public employees when a higher agency than the public employer (e.g. state gov't) requires the training by law



---

---

---

---

---

---

---

---

## Hours Worked: K9 Issues

- Generally, courts find that off duty time spent by canine officers caring for animals used in the course of work is horus worked.
- The DOL has issued administrative letter rulings which allow a law enforcement agency to agree with canine officers, through their authorized representative, on
  - a reasonable estimate as to the amount of off-duty hours that they spend related to the care of their canine, and
  - a compensation rate for off-duty canine activities that is lower than the rate for other police work



---

---

---

---

---

---

---

---

## Hours Worked: Cases and Examples

*Misewicz v. City of Memphis, TN* (6th Cir. 2014)

- State mandated paramedic training time was not compensable

*Brock v. City of Cincinnati*, (6th Cir. 2001)

- canine officer off-duty care time was compensable

*Perez v. City of New York*, (2d Cir., Aug. 2, 2016)

- donning and doffing time was compensable



---

---

---

---

---

---

---

---

**Hours Worked:  
Cases and Examples**

*Balestrieri v. Menlo Park Fire Prot. Dist.* (9th Cir. 2015)

- time spent traveling to obtain fire gear was not compensable

*Integrity Staffing Solutions v. Busk*, (SCOTUS 2014)

- security screenings were noncompensable postliminary activities because the employer did not employ its workers to undergo security screenings, and the screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment.




---

---

---

---

---

---

---

---

**Hours Worked:  
Cases and Examples**

*Ruffin v. MotorCity Casino* (6th Cir. 2015)

- Casino guards' 30 minute lunch breaks not compensable even though employer requires them to remain in the building, carry their radios, and listen for emergency codes.

*Jones v. Yellow Enterprise Systems*, (6th Cir. 2015)

- an employer's automatic designation of an unpaid 30-minute lunch period per work day was lawful. Employees were not compensated if they chose not to take a lunch; if lunch was denied to workload, the company had a 'missed lunch' procedure to allow for compensation.




---

---

---

---

---

---

---

---

**Hours Worked:  
Cases and Examples**

*Mitchell, et al. v. JCG Industries & Koch Foods, Inc.*, 929 F.Supp.2d 827 (N.D. Ill. 2013)

- Seventh Circuit found that an employer and union may agree in a collective bargaining agreement that time spent "donning and doffing" at the beginning and end of a bona fide lunch break is not compensable




---

---

---

---

---

---

---

---

**Hours Worked:  
Cases and Examples**

*Allen v. City of Chicago*, (N.D. Ill. May 24, 2010)

- A group of Chicago police officers claimed that they were denied overtime pay for their off-duty use of work-issued BlackBerrys even though the City expected them to be on-call constantly and deal with frequent work-related emails, phone calls and text messages.
- The court rejected the claim, finding that the officers failed to prove at trial that there was an unwritten policy that they were expected to do such work without being compensated.



---

---

---

---

---

---

---

---

**Section VI:  
Overtime Issues: Comp Time**



---

---

---

---

---

---

---

---

**Compensatory Time**

- Subject to a number of conditions and limitations, compensation for overtime under the FLSA may be made in the form of compensatory time off ("CT") instead of overtime pay
- Only applies to public employees
- The FLSA requires that CT be credited at time and one half



---

---

---

---

---

---

---

---

**Compensatory Time**

**Agreement in Advance**

The FLSA requires an agreement to compensate in the form of CT for FLSA overtime-eligible hours

- collective bargaining agreement
- individual agreement

Must be in place before performance of the work.



---

---

---

---

---

---

---

---

**Compensatory Time**

**Limits**

The FLSA caps comp time accruals at 240 CT hours (160 OT eligible hours)

- For "Public Safety" and "Emergency Response" activities (and also seasonal activities), the limit is 480 CT hours (320 overtime-eligible hours)

Lower caps may be negotiated by the employer and employee(s)



---

---

---

---

---

---

---

---

**Compensatory Time**

**Use of Compensatory Time**

Must allow employees to use within a "reasonable period" after request

- Exception: if CT unduly disrupts employer's operations

May require public employees to use CT



---

---

---

---

---

---

---

---

**Compensatory Time**

**Payouts**

Must be paid out at termination

May allow payouts before termination; must pay the CT hours at the regular rate at the time of payout



---

---

---

---

---

---

---

---

**Compensatory Time:  
Cases and Examples**

*City of Perrysburg, Ohio and FOP/OLC*, FMCS Case No. 06-001144 (Richard, 2006)

- CBA limitation on the use of CT

*Beck v. City of Cleveland* 390 F.3d 912 (6th Cir. 2004)

- CT use limited by “unduly disrupt” standard



---

---

---

---

---

---

---

---

**Section VII:  
Overtime Issues: The “Regular Rate” of Pay**



---

---

---

---

---

---

---

---

## Regular Rate of Pay

Employees are entitled to overtime compensation at the rate of at least one and one-half (1 ½) times the employee's "regular rate" of pay for hours worked in excess of a specified amount

- Regular rate ≠ Hourly Rate
- Working at 2 or more rates – use a weighted average
- DOL has given extensive guidance on what is included/excluded from the "regular rate"



---

---

---

---

---

---

---

---

## Section VIII: Recordkeeping



---

---

---

---

---

---

---

---

## Recordkeeping

The FLSA requires every employer to "make, keep and preserve such records of the persons employed by him and of the wages, hours and other conditions and practices of employment" of such employees

Certain records must be kept for both "non-exempt" and "exempt" employees

Most documents must be retained for 2 or 3 years.



---

---

---

---

---

---

---

---

Section IX:  
Litigation Issues



---

---

---

---

---

---

---

---

Litigation Issues

FLSA is enforced by the US Department of Labor,  
Wage & Hour Division

Typical Remedies for Violations

- Backpay Award
- Double Damages (may be avoided if employer acted in "good faith")
- Emotional Distress (for retaliation cases)
- Attorney fees



---

---

---

---

---

---

---

---

Litigation Issues

Remedies (continued)

- For "Willful Violations" of the FLSA, there may be criminal penalties up to \$10,000 for the first offense, up to six months imprisonment for subsequent offenses

Statute of Limitations

- 2 year statute of limitations on FLSA actions
- 3 years for willful violations



---

---

---

---

---

---

---

---

## Litigation Issues

### Class actions

Individual plaintiffs must give written consent or file a complaint in order to recover, which limits class actions

Disturbing trend in Ohio: in at least two jurisdictions in 2016, attorneys for public safety unions filed actions to recover unpaid wages on behalf of individual members of the unions. The suits are based on failure to include certain payments in the regular rate.



---

---

---

---

---

---

---

---

## Litigation Issues

- Most Employment Practices Liability Insurance (EPLI) coverage does not include FLSA wage and hour claims
- Waivers of employees' FLSA claims must be made under DOL or court supervision; not covered by routine settlement / separation agreements



---

---

---

---

---

---

---

---

## THANK YOU!

Jonathan J. Downes  
Zashin & Rich  
17 South High Street, Suite 900  
Columbus, Ohio 43215  
614-565-2075  
jjd@zrlaw.com



---

---

---

---

---

---

---

---