An Ounce of Prevention: Using FLSA and PERS Audits to Minimize Agency Liability

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Introduction: Last Year in Review

Department of Labor, FLSA Statistics:
- 10,496 overtime violations (FY2015)
- 10,642 minimum wage violations (FY2015)
- $137,701,703 in overtime back wages (FY2015)

FLSA Lawsuits:
- 8,781 (FY2015), an 8% increase from 2014

CalPERS Audits:
- 125 Public Agency Reviews (FY2014-15)
- 125 scheduled for FY2015-16
Overview

- Cost of FLSA & CalPERS Violations
- Common FLSA & CalPERS Violations
- Preventative Measures
- Conducting Internal Audits
- Implementing Audit Recommendations
Costs
Cost of FLSA Violations

- Back wages (up to 3 years)
- Liquidated Damages (x 2)
- Attorney Fees
Cost of CalPERS Violations

• Over/under reporting PERSable compensation
  • Incorrect retirement benefit assessment
  • Over expenditure of public funds
  • Liability to under-compensated retiree

• Statutory penalties

• Reinstatement
Common Violations
Common FLSA Violations

- Exempt vs. non-exempt employees
  - Effective December 2016, exempt employee minimum salary: $913 /week or $47,476 /year

- Work week/work period designations

- Volunteers and independent contractors

- Off-the-clock work

- Regular rate of pay (see next slide)
Common FLSA Violations, cont.

• Regular rate of pay
  ◦ Special Pays
  ◦ Holiday in lieu (include!)
  ◦ Sick leave incentive (include!)
  ◦ Retroactive pay increases
  ◦ CTO cash out
Flores v. City of San Gabriel

• Medical benefit in lieu pay
  ◦ Cash payments must be included in FLSA overtime rate
    ◦ Does not impact contract overtime rate
  ◦ Incidental benefit assessment
  ◦ Willful violation

• Present Recommendation:
  ◦ Dual calculation method
  ◦ Higher of contract overtime or FLSA overtime
Common CalPERS Violations

• Special / Reportable compensation
  ◦ Types of pay; new vs. classic employee

• Salary / Pay schedule
  ◦ Properly approved
  ◦ Properly posted

• Cost Sharing and EPMC issues
  ◦ Resolutions, groups & classifications

• Health benefits

• Membership issues (see next slide)
Common CalPERS Violations cont.

Membership issues
- New vs. Classic employees
- Common law employees
- Independent contractors
- Optional membership
- Part-time and full-time employment
- Retired Annuitants
Preventative Measures
Preventative Measures

• Accurate / complete implementation

• Good record keeping

• **Recurring Internal Audits**
  ◦ Thorough review of agency’s practices
  ◦ More than a casual periodic “spot check”
Preventative Measures

• Consider Audit Timing:
  ◦ Before labor negotiations
  ◦ Before revisions to personnel rules, municipal code or charter
  ◦ Position reclassification or creation
  ◦ Grievances, complaints or lawsuits
  ◦ Periodic basis
Preventative Measures

• Consider Audit Scope
  ◦ Comprehensive, agency-wide
  ◦ Specific to department / classification of employees
  ◦ Specific issue
    ◦ Exemption analysis (FLSA)
    ◦ Regular rate assessment (FLSA)
    ◦ Special pay assessment (CalPERS)
    ◦ Membership status (new, classic, retired CalPERS)
Conducting an Audit
Conducting an FLSA Audit

- Assess Agency Documents:
  - Personnel rules and policies
  - Memorandum of understanding
  - Job descriptions (e.g. exempt vs. non-exempt)
  - Internal memos regarding job duties and expectations
  - Payroll records
Conducting an FLSA Audit

- Assess Agency Practices:
  - Meet with Human Resources
  - Meet with Payroll
  - Meet with Finance / Accounting
  - Meet with key department employees
    - Those with broad operational knowledge
    - Selected by upper level management
    - Avoid disgruntled employees

*Reminder: It’s about gathering information, not accusations.*
Conducting an FLSA Audit

• Assess Compliance:
  ◦ Complex rules & regulations (FLSA)
  ◦ Court opinions
  ◦ DOL letters
Conducting an FLSA Audit

• Prepare Audit Report
  ◦ Scope
  ◦ Methodology
  ◦ Details of each issue addressed, e.g:
    ◦ Exemption
    ◦ Hours worked / work periods / overtime
    ◦ Compensatory time off
  ◦ Findings
  ◦ Compliance recommendations
  ◦ Appendix of key documents
Conducting a CalPERS Audit

• Assess Agency Documents:
  ◦ CalPERS contract
  ◦ CalPERS contract amendments
  ◦ Board resolutions
  ◦ Salary / Pay schedules
  ◦ Memorandum of understanding
  ◦ Individual employment agreements
  ◦ Payroll records / time sheets
Conducting a CalPERS Audit

• Assess Agency Practices:
  ◦ Key staff interviews
  ◦ Key questions (issue specific)
    ◦ What is the level of control over employee’s work? (contractor vs. employee assessment)
    ◦ How is salary schedule maintained? Where posted?
    ◦ What board resolution, if any, authorized action?
    ◦ How is department/payroll staff applying MOU terms?
    ◦ When was employee enrolled as a member?
    ◦ What compensation items are being reported to PERS?
Conducting a CalPERS Audit

• Assess Compliance:
  ◦ Complex rules & regulations (PERL)
  ◦ Court opinions
  ◦ CalPERS circular letters
  ◦ CalPERS reference guides

• Prepare Audit Report
Implementing Recommendations

• After Audit Concludes:
  ◦ Review report & report recommendations
  ◦ Establish implementation plan
  ◦ Create and distribute compliance policies
  ◦ Update technical systems, if necessary
  ◦ Train supervisors & managers regarding requirements / policies
  ◦ Discipline employees who violate policies and supervisors who do not enforce them
Benefits of Conducting an Audit

• **Save money and avoid litigation**
  ◦ Fix noncompliant areas, cut off future liability
  ◦ Inform labor negotiations

• **Allows agency to take corrective action**
  ◦ Recoup over-expended public funds (maybe)
  ◦ Remit / settle under-payments

• **Creates defenses to claims**
  ◦ Reliance on DOL guidance, not a willful violation
  ◦ Reliance on CalPERS guidance, argue estoppel
Thank you!

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