

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
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Overview

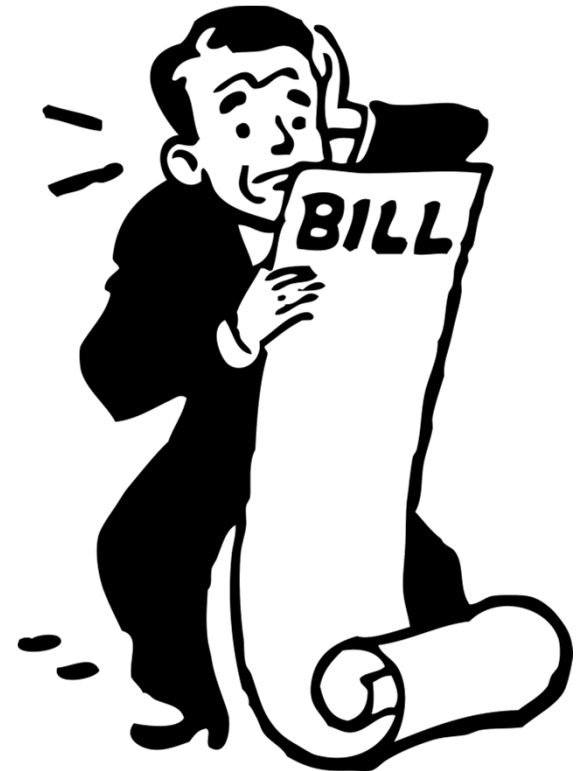
- Cost of FLSA & CalPERS Violations
- Common FLSA & CalPERS Violations
- Preventative Measures
- Conducting Internal Audits
- Implementing Audit Recommendations

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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