**HUMAN RESOURCE AND PERSONNEL MATTERS AFFECTING ARKANSAS CITIES AND TOWNS**

**AGENDA**

**October 17, 2018**

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<th>Time</th>
<th>Session</th>
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<td>8:30 a.m. – 9:00 a.m.</td>
<td><strong>REGISTRATION</strong></td>
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<td>9:00 a.m.</td>
<td><strong>WELCOME</strong></td>
<td>Mark Hayes, Executive Director AML Staff</td>
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<td>9:05 a.m. – 10:00 a.m.</td>
<td><strong>Employment Law 101: Traps for the Unwary</strong></td>
<td>Mark Hayes, Executive Director AML Staff</td>
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<td>10:00 a.m. – 10:15 a.m.</td>
<td><strong>BREAK</strong></td>
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<td>10:15 a.m. – 11:30 a.m.</td>
<td><strong>Employment Law 101: Continued</strong></td>
<td>Mark Hayes, Executive Director AML Staff</td>
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<td>11:30 a.m. – 12:15 p.m.</td>
<td><strong>LUNCH</strong></td>
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<td>12:15 p.m. – 12:45 p.m.</td>
<td><strong>Before and After the Job Offer is Made:</strong> What You Can and Can’t Do</td>
<td>Lanny Richmond, Code &amp; Opinions Counsel, AML Staff</td>
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<td>12:45 p.m. – 1:30 p.m.</td>
<td><strong>The Importance of Correctly Completing I-9s</strong></td>
<td>Sheila Moss, President Information Solutions</td>
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<td>1:30 p.m. – 2:30 p.m.</td>
<td><strong>Suggested Personnel Policies</strong></td>
<td>Tracey Pew, HR Director AML Staff</td>
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<td>• What’s in Your Personnel Handbook</td>
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<td>• Personnel Files</td>
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<td>• What to Keep – What to Throw Away</td>
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<td>2:30 p.m. – 3:00 p.m.</td>
<td><strong>Freedom of Information Act:</strong> The Personnel File Exemption</td>
<td>Lanny Richmond, Code &amp; Opinions Counsel, AML Staff</td>
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<td>3:00 p.m. – 3:30 p.m.</td>
<td><strong>Q&amp;A Panel Discussion/Session</strong></td>
<td>Lisa Mabry-Williams, Tracey Pew, Lanny Richmond, Sheila Moss, Mark Hayes</td>
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Employment Law: Traps for the Unwary

MARK R. HAYES
EXECUTIVE DIRECTOR

ARKANSAS MUNICIPAL LEAGUE
FALL 2018
HR CERTIFICATION CLASS
Employment at-will:

Most employees in Arkansas are considered “at-will.”

Basically, as a general rule, either party can terminate the employment at any time.

The employee is allowed to quit without giving notice, and you can fire the employee for almost any reason.
Employment at-will:

• The way this has been phrased by some people is “you can fire them for any reason, or no reason at all.”
• The one exception is that if you fire them for an illegal reason, that can give rise to a lawsuit.
• I’m hear to cover as many of those illegal reasons as I can.
Examples

The employee, being 50% finished on a massive project that will make the mayor and the council city “officials for life…”

...QUITS despite previous promises to finish the project.

You’re toast. Per Travis Tritt: “Here’s a quarter, call someone who cares!”
Exceptions to At-Will

Personnel Manuals which make promises
- “for cause” provisions are the most common problem; and

Agreements with the employees can take them out of the “at-will” category.
- Agreements that they will only be removed “for cause;”
- Agreements for particular time frames.
Additional Exceptions to the Employment at-will Doctrine:

Cases in which the employee is discharged for refusing to violate a criminal statute.

Cases in which the employee is discharged for exercising a statutory right or a constitutional right.

Cases in which the employee is discharged for complying with statutory duty.

Cases in which an employee is discharged in violation of the general public policy of the state.

Employment contracts for time.
Due Process and the Municipal Employer

The Due Process Clause to the U.S. Constitution protects employees

*IF* the employee has a **PROTECTED** property right in their employment

Most employees should not have a protected property right in their employment.
What if the Employee is Protected?

In order to comply with procedural due process you must give employees two things before you make the decision to fire them:

1. **notice** of the pending decision, and

2. an opportunity to be **heard** in the decision making process.
Practical Considerations

• Notice and opportunity must be given **before you make the decision**.

• Giving notice or a chance to weigh-in after the decision is not looked upon kindly by the courts.

• A failure to give these things can likely lead to lawsuits in federal court.
Practical Considerations - Notice

• The more notice the better
• This means BE SPECIFIC in the notice.
• Specifically be specific in:
  • Time of the hearing;
  • The facts supporting your decision; and
  • The specific charges against them.
Practical Considerations - Notice

• Don’t say
  • “You’re fired for conduct unbecoming an officer”
  • This has no real notice of what the officer did to get punished.

• Say:
  • “A citizen offered a written complaint that on Oct. 17 you swore during a traffic stop, after investigation, I determined the complaint is credible and your behavior constitutes a violation of our personnel policy…….”
Practical Considerations - Hearings

• Suggestions:

  • Allow the employee to address any and all things.

  • Does not have to be before the city council.

  • Can be the mayor if the mayor is in charge of the decision.
Practical Considerations - Hearings

- If the individual wishes to allow others to make statements, allow but don’t go too far afield.

- No witnesses or cross examinations.

- No legal right to have an attorney at this hearing.
Sources for Help

Employee Handbook

FLSA, FMLA, ADA Lookie Here:

And Here:
https://static.ark.org/eeuploads/arml/FMLA_booklet_2017_05_WEB.pdf

And Here:

And Here:
A Note on State Law – Dep. Heads
Who Appoints...
Who Removes...

Department Heads versus Non-Department Heads
State Law dictates who appoints and removes department heads.
No State Law for non-department heads.
Non-department heads are a matter of local policy.
Local as in...YOUR POLICY or PRACTICE!
Department Heads; Appoint and Remove vs. Local Policy

Appoint = Hire
Remove = Fire
Ark. Code Ann. § 14-42-110 says department heads are appointed and removed by the mayor
But... the council can over-ride with a two thirds vote
But... the council CANNOT appoint and remove department heads
More Appoint and Remove

Non-department heads are a matter of local policy. What does your policy say? No policy? What’s your practice? And let’s carefully take a look... Recommendations versus decisions... Who’s actually hiring and firing?
A Non-Department Head Example: Remove/Fire

Practice is as follows... (the facts are very important)
Department head talks to Mayor.
Mayor mulls it over.
Mayor tells department head to go ahead and fire.
Who fired?
The Mayor! (Unless there is clear evidence that the department head actually made the decision.)
Ark. Civil Rights Act
Retaliation and Discrimination

Prohibits retaliation against those who opposed any act or practice made unlawful by the ACRA.

Prohibits discrimination for reasons similar to Title VII and the ADA.
Title VII: Federal Law that also prohibits discrimination

Prohibits harassment on the basis of a protected classification, and retaliation against anyone who files a complaint or grievance.

Protected Classes are:
Race, Color, Religion, Sex, National Origin.
Title VII – Agents and Liability

An employer includes an employer’s agents for purposes of the law.

If your supervisors know of discrimination then the city is much more likely to be in violation of the law.

If enough employees know of discrimination occurring a court may “impute” that knowledge to the city.
Elements of a Title VII Violation

- The issue must involve an adverse employment action causing the individual an injury (i.e., pay decrease, firing, demotion, etc.)

- There must be a LINK between the city’s use of the protected basis and the adverse action.
Elements of a Title VII Violation

The City is always given an opportunity to show it didn’t violate the law

*If the City* shows a legitimate reason for the adverse employment action then the employee must show additional evidence.

*The employee* given the opportunity to show that the reason the City has given for the employment action is false and discrimination is the real reason.
Hostile Work Environment

Hostile Environment:

- Making unwelcome sexual advances or

- other conduct of a sexual nature with the purpose of, or that creates the effect of,

- unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.
Hostile Work Environment

If a supervisor creates a hostile work environment then the City is much more likely to be liable.

The City *might* succeed if it can show it acted reasonably; and

The plaintiff failed to take advantage of a city policy to take corrective measures.

- (Notify the right people, file a complaint, etc).
Hostile Work Environment: Reminders

You MUST have some process to provide for corrective measures if an employee complains of harassment.

If the harasser is not a supervisor, the victim can still recover if the employer was negligent in correcting or trying to remedy the co-worker’s harassing behavior.
Quid Pro Quo Harassment

- Making the submission to unwelcome sexual advances or

- Submission to other verbal or physical conduct of a sexual nature a term or condition, implicitly, of an individual's employment.

- Basing employment decisions affecting the individual on his or her submission to or rejection of such conduct.
Retaliation: Most Litigated

There are many statutes/laws that prohibit retaliation.

Generally, To establish a prima facie case of retaliation a Plaintiff must show that:

1. Employee does something protected by statute or constitution; and

2. They are given discipline including but not limited to being terminated.
Retaliation Laws

These laws prohibit retaliation:
- Family and Medical Leave Act
- Fair Labor Standards Act
- Retaliation for exercising one’s First Amendment rights
- Title VII
- Age Discrimination in Employment Act
- Arkansas Whistleblower Act
Retaliation

▪ It is key to remember that when an employee files a complaint, lawsuit, or requests protections, they are not doing something wrong.

▪ These actions by an employee are frustrating but they shouldn’t result in punishment;

▪ Even when you think you can get away with it.
Family Medical Leave Act (FMLA)
Family Medical Leave Act
Handbook Requirement or Other Writing

If an employer is covered by FMLA and has any eligible employees you must put in writing:

*A general notice* that the employer recognizes and honors FMLA leave and

*General statements* of FMLA leave rights of the employee.
Family Medical Leave Act
Who is covered

Local Governments with 50 or more employees;

Must have 50 employees for at least 20 calendar workweeks in the current or preceding calendar year.
29 C.F.R. § 825.104(a).
Family Medical Leave Act
Who is covered - Employees

Those employees:

- who have completed at least 12 months of employment and
- worked at least 1,250 hours within the prior 12 months.
- Hours are determined the same as the FLSA.
Family Medical Leave Act
How much leave can employees receive?

The rule of 12.

Employees entitled to 12 weeks of unpaid leave in a 12 month period. 29 C.F.R. § 825.200(a)

The 12 weeks can be intermittent. 29 C.F.R. § 825.200(c)
Family Medical Leave Act
Is the Employee entitled to leave?

Reasons for leave: 29 C.F.R. § 825.112(a)

**Birth** of child or care for a newborn

**Placement** with employee of adoptive or foster child

Spouse, child or parent is on **active duty** (or notified) and causes a “qualified exigency” to occur
Family Medical Leave Act
Is the Employee entitled to leave?

Care for an **injured or ill armed services** member in the line of duty

*Employee has “serious health condition”* that causes employee to be unable to perform functions of the job

*Employee’s* spouse, son, daughter or parent has “**serious health condition**”
Family Medical Leave Act

Caring for Family Injured in the Line of Duty on Active Duty

26 weeks of leave to care for immediate family member (spouse, son, daughter, parent or next of kin) if seriously injured; or

Suffering from a serious illness, in the line of duty on active duty. 29 C.F.R. § 825.127(b).
An illness, injury, impairment, or physical or mental condition that involves inpatient care requiring an overnight stay in a hospital or residential medical care facility.

29 C.F.R. § 825.113(a).
What is a Serious Health Condition?

This includes follow ups regardless of whether the follow up is inpatient care, as well as days prior to the first inpatient setting.

This also includes continuing treatment by health care provider. 29 C.F.R. 7 825.113(c).
Family Medical Leave Act

What is a Serious Health Condition?

“Continuing treatment...includes any one or more of the following”:

- Period of incapacity and treatment for more than 3 consecutive days; and
- Period of incapacity due to pregnancy.
- 29 C.F.R. § 825.115.
Family Medical Leave Act

What is Continuing Treatment?

➢ **Period of incapacity** due to a chronic serious health condition (periodic visits of at least twice a year, continues over an extended period of time, etc.)

➢ **Period of incapacity** that is permanent or long-term (may not need active treatment, i.e.: Alzheimer’s)

➢ **Any absences** to receive multiple treatments (includes periods of recovery, i.e.: chemo, physical therapy etc.)
Family Medical Leave Act

What Notice should the Employee Provide?

*Exception* all employee notice requirements may be waived by the employer.

29 C.F.R. § 825.304(e).
Family Medical Leave Act

What Notice should the Employee Provide?

Foreseeable Leave – Requires 30 days advance notice if:

➢ Expected birth or placement for adoption/foster care,

➢ Planned medical treatment for serious health condition of employee or family member

➢ Planned medical treatment for the serious injury or illness of a covered service member

➢ In event employee fails to notify, the employer may ask why the employee failed to meet deadline
Family Medical Leave Act

What Notice should the Employee Provide?

➢ If 30 days isn’t practicable then notice as soon as is practicable (generally the same day or next business day)

➢ Notice need only be given one time but must advise employer should leave logistics change in as practicable manner as possible (i.e.: spouse with terminal cancer but actual leave dates unknown)
Family Medical Leave Act

What Notice should the Employee Provide?

Unforeseeable Leave — Requires:

➢ Notice as soon as is practicable under the particular circumstances of the case; and
➢ That notice must meet all employer required notice provisions.
➢ (i.e.: calling of immediate supervisor and mayors office etc.)
Family Medical Leave Act

Some things to remember about employee notices......

Notice need not specify the FMLA
Notice can be done verbally
Initially notice may only contain minimal information (remember the term “when practicable”)
Make sure you review 29 C.F.R. §§ 825.302(c) & 303(c) for a more complete description of content of employee notices.
Family Medical Leave Act

What notice should the Employer Provide?

Employers should notify w/in 1 or 2 days after receiving employee’s notice the following:

That the leave will be counted as FMLA leave; and

Any requirement of providing medical certification, 29 C.F.R. §§ 825.305-308; and
Family Medical Leave Act

What notice should the Employer Provide?

Employees right to use accrued paid leave, or employers decision to use accrued paid leave, 29 C.F.R. § 825.207; and

Any requirement that the employee make co-premium payments on health coverage; and

Any requirement to present fitness for duty certification before job restoration.
**Family Medical Leave Act**

*What to do when the employee returns?*

Return the employee to their position or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.
Family Medical Leave Act

What to do when the employee returns?

Equivalent Benefits: 29 C.F.R. § 825.215(d).

- Benefits must be resumed in the same manner and at the same levels as provided when the leave began,

- An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.
Family Medical Leave Act

What to do when the employee returns?

Equivalent Benefits: 29 C.F.R. § 825.215(d).

- With respect to pension and retirement plans, any period of unpaid FMLA is not a break in service for vesting and eligibility to participate.

- They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period.
Family Medical Leave Act: Pay

What to do when the employee returns?

Equivalent Pay

An employee is entitled to any unconditional pay increases, such as cost of living increases.

Pay increases conditioned upon seniority, length of service, or work performed must be granted.

Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees.
Fair Labor Standards Act
21 Things you need to know!!


Examples:
- $8.50 minimum wage via Arkansas law.
- Overtime is paid at time and half of regular pay. (Salaries averaged)
- Be careful about folks volunteering...
- Exempt versus non-exempt.
- Prisoners are generally not employees.
- Special rules for uniform employees.
Fair Labor Standards Act
Who is entitled to overtime pay?

Generally, every employee is entitled to overtime compensation. However, there are key exemptions to this general rule.

**Key exemptions**

Elected officials and their personal staff; executive employees, administrative, and professional employees. 29 U.S.C. § 203(e)(2)(C).

Title of position is not the determining factor of whether an individual is exempt.
Fair Labor Standards Act – Elected Officials

Elected Officials aren’t just exempt, they aren’t even employees under the FLSA!
  ◦ Not entitled to overtime or minimum wage.

Also excluded are:
  ◦ Personal staff of elected officials,
  ◦ Persons appointed to serve as policy makers, and
  ◦ Advisors on Constitutional or legal powers of elected official’s office.
Elected Officials’ Personal Staff

This exception appears to be rarely used, and is “narrowly construed.” Don’t rely on it applying except in very rare instances.
Elected Officials’ Personal Staff

Some factors to consider in determining “Personal Staff Exemption:”

1) whether the elected official has plenary powers of appointment and removal,

2) whether the person in the position at issue is personally accountable to only that elected official,

3) whether the person in the position at issue represents the elected official in the eyes of the public,

4) whether the elected official exercises a considerable amount of control over the position,

5) the level of the position within the organization's chain of command, and

6) the actual intimacy of the working relationship between the elected official and the person filling the position. *Rutland v. Pepper*, 404 F.3d 921, 924 (5th Cir. 2005)
Fair Labor Standards Act

Executive Employees: 29 C.F.R. § 541.100

http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

(1) Compensated on a **salary basis** at a rate of not less than $455 per week, or $23,660 annually; ($ 913 per week $47,476 per year if the Obama rule gets life); and

(2) Whose **primary duty** is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and

(3) Who **customarily and regularly** directs the work of two or more other employees; and
Fair Labor Standards Act

Executive Employees: 29 C.F.R. § 541.100

http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

EXAMPLES: Police Chiefs, Fire Chiefs, and Department Heads
(1) Compensated on a **salary basis** at a rate of not less than $455 per week, or $23,660 annually; ($ 913 per week $47,476 per year if the Obama rule gets life); and

(2) Whose **primary duty** is 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
(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

**EXAMPLES:** HR Director, Computer/Systems Administrator, Financial Officer
Professional Employee Elements:

(1) Compensated on a **salary basis** at a rate of not less than $455 per week, or $23,660 annually; ($913 per week $47,476 per year if the Obama rule gets life); and

(2) Whose **primary duty** is the performance of work:

- (i) Requiring **knowledge of an advanced type** in a field of science or learning customarily acquired by a **prolonged course of specialized intellectual instruction**; or
- (ii) **Requiring invention, imagination, originality or talent** in a recognized field of artistic or creative endeavor

**EXAMPLES:** City Engineer, Wastewater Professionals, Planning Directors, City Attorneys
Highly Compensated Employees

A highly compensated employee is deemed exempt if:

1. The employee earns total annual compensation of $100,000 or more.

2. The employee’s primary duty includes performing office or non-manual work; and
Highly Compensated Employees

3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.
Things to Consider

The DOL may change the rules in the future:
You may need to raise salary;
Hire extra help to prevent workers going overtime;
Figure out an hourly rate which doesn’t change an employees salary
  ◦ This might be unpopular

What works will always depend on the situation, don’t expect a one size fits all solution.
Fair Labor Standards Act

Are all non-exempt employees the same?

There is a key difference between uniformed (police and fire) and non-uniformed employees and their entitlement to overtime.

What is a uniformed employee?

- Generally, uniformed employees are police and fire personnel, but does not include radio operators, clerks, secretaries, or janitors. 29 C.F.R. §§ 553.210 & 211.
- EMTs may qualify if their services are substantially related to firefighting or law enforcement activities. 29 C.F.R. § 553.215.
To what overtime provisions are non-uniformed employees entitled?

Time-and-a-half for every hour of work over 40 for a workweek. 29 U.S.C. § 207.

What is a workweek; does it need to be Monday thru Sunday?

Any 7-day period; the employer can establish a workweek that does not coincide with the calendar week. Generally, a workweek beginning and ending at 5pm on Friday is appropriate. 29 C.F.R. § 778.104.
Does every city owe its uniformed employees overtime?

- There is an exemption for police and fire departments that have less than 5 employees, including chiefs. 29 U.S.C. § 213(b)(20).
- Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees.
- Part-time Employees are considered employees. 29 C.F.R. § 553.200(b).
- Employees who are on leave and not working are also considered employees. 29 C.F.R. § 553.200(b).
To what overtime provisions are uniformed employees entitled?

The FLSA provides a partial overtime exemption to the 40 hour work week for law enforcement officers and firefighters who work a “work period” of no fewer than 7 days and no more than 28 days. 29 U.S.C. § 207(k).
What is a uniformed employees “work period”?

An employer can establish a uniformed officers work period as anywhere between 7 and 28 days consecutively. 29 U.S.C. § 207(k).
What is a uniformed employees “work period”?

The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel. Law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171. Fire department employees working in excess of 212 hours within a 28-day period must also be compensated for overtime hours in excess of 212. These amounts are prorated for shorter work periods. 29 C.F.R. § 553.201.
Is there an option other than paying overtime? Yes, but be careful...

Instead of paying overtime pay, an employer can compensate an employee with compensatory time ("comp time"), and that time must accrue at time-and-a-half. 29 U.S.C. § 207(o)(1).
Is there an option other than paying overtime? First be careful...

The City may only elect to provide “comp time” if an agreement or understanding existed between the employer and the employee before the performance of that work; the employee must understand that the city has a policy of giving compensatory time. 29 U.S.C. § 207(o)(2)(A)(ii).

The agreement between the employee and employer can be made individually or collectively (i.e. collective bargaining agreement), although the employee must understand prior to performing the work. See generally, United Food & Commercial Workers Union, Local 1564 of New Mexico v. Albertson's, Inc., 207 F.3d 1193 (10th Cir. 2000).
Comp Time: BE CAREFUL’s

When can employees use “comp time”? An employee can request the use of “comp time” at any time; the employer is obligated to allow the use of that “comp time” within a reasonable time unless by doing so, it would disrupt the operations of the employers. 29 U.S.C. § 207(o)(5)(B).

Is there a limit on the amount of “comp time” an employee can accrue?

A non-uniformed employee can only accrue a total of 240 hours of “comp time” (160 actual overtime working hours) before the employer is required to pay the additional hours of overtime in cash. 29 U.S.C. § 207(o)(3)(A).
Is there a limit on the amount of “comp time” an employee can accrue?

A uniformed employee can only accrue 480 hours of “comp time” (320 actual overtime working hours) before the employer is required to pay the additional hours of overtime in cash. 29 U.S.C. § 207(o)(2)(A)(ii).

Do not eliminate unused comp time without paying the employee for that overtime!
Comp Time: BE CAREFUL’S

How do I pay accrued “comp time” when the employee quits or is terminated?

Payment of “comp time” at termination is time-and-a-half at a wage equaling the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher. 29 U.S.C. § 207(o)(4).
How do I pay accrued “comp time” when the employee quits or is terminated?

Because unused “comp time” must be paid at the time of termination, it is advised to “pay as you go.” Compensate employees for their unused “comp time at the end of each year, or mandate that the employees use their comp time at your discretion.
The Americans With Disabilities Act Recent Amendment Act.... ADAAA
The American’s with Disabilities Act: Recent Amendment Act...ADAAA

Major shift in the law.

Prohibits employers from considering mitigating measures (other than eyeglasses and contact lenses) when considering whether a job applicant is “substantially” limited in a major life activity.

It rejected the need for a medical condition to significantly limit a major life activity or affect an entire class of jobs in order to be considered a covered disability.
Finally, the Act expanded the list of major life activities to include major bodily functions and cognitive skills, and requires a broad interpretation of “disability” in favor of ADA coverage.

In other words, virtually anything is a disability.
ADA Post-Employment

Once an employee begins work, medical testing and medical inquiries must be job-related and consistent with business necessity.

This usually takes the form of a “fitness for duty” examination.

Reasonable Accommodations!
The First Amendment and the Arkansas Whistle-Blower Act

ARK. CODE ANN.
§§ 21-1-601 THROUGH 21-1-609
FIRST AMENDMENT
RETALIATION CLAIMS

Under the First Amendment, an employee can sue if they commented on matters of *public concern, and* their interest in making such comments outweigh the employer’s interests in maintaining workplace harmony.
The main defenses are:

(a) where the employee is speaking as part of their job, it’s not considered a matter of public concern; and

(b) if the employer can show it would have taken the same action, i.e., termination for instance, whether the employee spoke or not.
How does Social Media Come into it?

The Fourth Circuit held clicking the “like” button was both “pure speech” and a form of symbolic expression for First Amendment purposes. *Bland v. Roberts, 730 F.3d 368 (4th Cir.2013)*.

“Liking” a Facebook comment generates a “pure speech” textual statement, and is symbolic expression because the person liking the statement conveys a message of agreement with the statement likely to be so understood by persons who see it. Id.
Law Summary

These are the basic rules which determine if you can limit speech, rather it's in a memo or a Facebook post.

Courts have noted that Facebook, and even “likes” on Facebook can be speech under the 1st Amendment.

First, is the speech on a matter of public concern?

Next, is the speech as an employee (unprotected) or as a citizen (protected)?
Arkansas Whistle-Blower Protection Act

Offers protections to public employees who try to report in good faith:

waste of public funds, property, or manpower, including federal funds, property, or manpower administered or controlled by a public employer; or

a violation or suspected violation of a law, rule, or regulation.
Ark. Code Ann. § 21-1-603
Retaliation prohibited

Cities cannot punish employees for:

1. giving information in an investigation,
2. hearing,
3. court,
4. legislative or other inquiry,
5. or any form of administrative hearing.
Ark. Code Ann. § 21-1-603
Retaliation prohibited

Cities cannot punish employees for:

1. the employee’s refusal or objection to a directive that the employee reasonably believes violates a law, rule, or regulation adopted by the state or City.
Ark. Code Ann. § 21-1-603

Elements

Public employment relationship

Good faith communication of waste or violation

Reasonable basis in fact

To an appropriate authority

Provide reasonable notice of the need to correct

Adverse action based on the communication
What is Waste? A Violation?

WASTE: “a public employer’s conduct or omissions which result in substantial abuse, misuse, destruction, or loss of public funds, property, or manpower belonging to or derived from state or local political subdivision’s resources.

VIOLATION: “an infraction or a breach which is not of a merely technical or minimal nature of a state statute or regulation, of political subdivision ordinance or regulation, or of a code of conduct or code of ethics designed to protect the interest of the public or a public employer.
What Constitutes Good Faith?

“Good faith is lacking when the public employee does not have personal knowledge of a factual basis for the communication or when the public employee knew or reasonably should have known that the communication of the waste or of the violation was malicious, false, or frivolous.”

Ark. Code Ann. § 21-1-603(a)(2): reasonable notice...sort of a defense

A protected communication must give the employer “reasonable notice” of the need to correct the alleged waste or violation.
Act 1103 of 2015 POSTING REQUIREMENT

Requires Employers to post in a conspicuous place, a printed sign at least 8 ½ X 11 that:

◦ Informs a public employee of the provisions of the Whistleblower Act;

◦ Describes an appropriate authority to whom the public employee may communicate waste or a violation of law;

◦ If a telephone hotline exists for the reporting of fraud, waste, or abuse in government, contains the number of the telephone hotline
Act 1103 continued . . .

The Act also requires employers (Cities included) to “obtain a state criminal background check,” conducted by the State Police, before finalizing hiring of any applicant for a position with “supervisory fiduciary responsibility over all fiscal matters.”

The applicant must sign a release of information to the public employer.

Upon completion of the check, the State Police must furnish all “releasable information obtained concerning the applicant.”
Drug Testing
Non-CDL Employees
Drug Testing
NON-CDL Employees

See this link:
http://www.arml.org/pdfs/publications/Drug_testing.pdf

Quick thoughts
Drug Testing
NON-CDL Employees

Safety Sensitive Employees May be Randomly Tested.

Who are the safety sensitive folks?
- Law enforcement officers
- Motor vehicle operators who carry passengers, including, but not limited to, ambulance drivers
- Fire department employees who directly participate in fire-fighting activities.
- Medical personnel with direct patient care responsibilities including physicians, nurses, EMT’s etc
- Mechanics etc who work on vehicles designed to carry passengers i.e.: buses, ambulances, police cruisers, vans etc
Drug Testing
NON-CDL Employees

Security Sensitive Employees May be Randomly Tested.

Who are the security sensitive folks?

Those with access to information concerning ongoing criminal investigations and criminal cases, which information could, if revealed, compromise, hinder or prejudice the investigation or prosecution of the case. (police officer, jailer, dispatcher and police department employee, including clerical workers)

(2) Law enforcement officers may also be considered security-sensitive by reason of their duty to enforce the laws pertaining to the use of illegal substances.
Some Things to Watch and Do... Be Smart

Emotional decisions are bad decisions

Be consistent (do things the same way, even if it's your buddy!)

Documentation

KISS Method (Keep It Simple Stupid)

Follow your policies. (You must know if you have policies and also WHAT THEY SAY)

Politics. Remember you work for government no matter how much you'd like to believe to the contrary
Be Smart

Don’t ignore bad behavior
Bad behavior starts with little things and always leads to VERY BIG THINGS
You must manage
De-certify or not to de-certify
Common sense and initial reactions
Get involved
Stay informed
Understand what your employees are doing
You Must Discipline in These Cases

Actual Harassment

Un-reasonable use of Force, Deadly or Not (ASP, mace, gun, Taser, etc.)

False Arrest

Theft or Other Illegality (Liberty Interest)
The End!

Mark R. Hayes
Executive Director
Arkansas Municipal League
mhayes@arml.org
Americans with Disabilities Act: Top Areas of Non-Compliance

**Public Buildings**
- City Hall
- Local Courts
- Police Department
- Fire Department
- Libraries
- Rec, Community, Youth, Senior Centers

**Outdoor Areas**
- Parks & Playgrounds
- Pools & Splashpads
- Concessions
- Trails
- Golf Courses
- Tennis Courts
- Basketball Courts
- Fishing Piers / Ponds
- Sports Complexes (baseball, softball, soccer)

**Services**
- Council meetings or other meetings
- Bill pay in person or online
- Online / website
- Annual “fests”
- Lifeguards
- Police Department
- Fire Department

**Sidewalks, Curb Ramps, & Ramps**
- Physical impediments
- Visual impediments
- Edge protection, thresholds
- Too steep
- Too narrow / access aisle
- Poorly maintained
- Curb Ramps
- Accessible routes
- Handrails
Parking

- Number of spots
- Correct signage
- Too narrow
- Slopes
- Poorly maintained

Signage, Generally

- Services available
- How and to whom do are issues reported
- Raised characters

Entrances, Generally & Paths of Access

- Accessible route from designated parking
- Entrance doors: correct hardware
- Tripping hazards, mats
- Accessible route throughout the building / outdoor area

Lavatories

- Toilets
- Sinks
- Mirrors
- Door clearance
- Locks
- Grab bars
- Soap
- Protrusions & room to maneuver
BEFORE AND AFTER THE JOB OFFER IS MADE

LANNY RICHMOND, STAFF ATTORNEY
LRICHMOND@ARML.ORG

ARKANSAS MUNICIPAL LEAGUE
FALL 2018
THE AMERICANS WITH DISABILITIES ACT
THE AMERICAN’S WITH DISABILITIES ACT: RECENT AMENDMENT ACT...ADAAA

• Major shift in the law.
• Prohibits employers from considering mitigating measures (other than eyeglasses and contact lenses) when considering whether a job applicant is “substantially” limited in a major life activity.
• It rejected the need for a medical condition to significantly limit a major life activity or affect an entire class of jobs in order to be considered a covered disability.
Finally, the Act expanded the list of major life activities to include major bodily functions and cognitive skills, and requires a broad interpretation of “disability” in favor of ADA coverage.

In other words, virtually anything is a disability.
ADAAA “MAJOR LIFE ACTIVITIES”

• Under the ADAAA, “major life activities” is expanded to include “major bodily functions.” Specifically, the ADAAA provides that:

  • Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

  • Major Bodily Functions include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
ADAAA “REGARDED AS”

• To satisfy the “regarded as” standard an individual need only show that he or she has been subjected to an action prohibited under the statute (e.g., termination; failure to hire) because of an actual or perceived impairment. It is no longer necessary that the impairment be perceived by the employer to limit or “substantially limit” a major life activity.

• However, to satisfy the “regarded as” standard, an impairment must not be one that is “transitory and minor.”

• The ADAAA defines a “transitory” impairment as an impairment with an “actual or expected duration of 6 months or less.”

• Meeting the “regarded as” standard does not mean that a person has been the victim of unlawful discrimination. It means only that a person is an individual with a disability entitled to the protections of the ADA or Rehabilitation Act. Whether unlawful discrimination occurred is a separate determination.
ADAAA AND PRE-OFFER LIMITATIONS

- The ADA applies to all aspects of the employment relationship, including the recruitment and selection process. You should be aware of the ADA’s impact on each of the following areas:
  - Advertising
  - Applications
  - Job Descriptions
  - Interviews
  - Testing
  - Medical Exams
ADAAA AND RECRUITMENT

• **Job Announcements:** Nothing suggestive of a preference for non-disabled persons.

• **Job Applications:** Nothing asked about an applicant’s physical or mental condition.

• **Job Descriptions:** Include all essential physical, mental, and emotional requirements of the job, including regular work attendance. Essential job functions can include those rarely used.
ADAAA AND RECRUITMENT

- The recruitment process begins with letting people know that a job is available.

- There are a number of ways in which employers can ensure that the advertising and application processes are accessible to people with disabilities.

- Job information should be posted or advertised in locations that are accessible to persons with mobility disabilities.
ADAAA AND RECRUITMENT

- Similarly, large print on job notices posted at work sites or in employment offices may help a person with a visual disability to become aware of the job.

- A job advertisement should include a TTY (telecommunications device for the deaf) phone number (whether or not an address is also given).

- Although the ADA does not require an employer to initially provide all applicants with written information in a variety of accessible formats, an employer should make such formats available upon request.
ADAAA AND PRE-OFFER LIMITATIONS

Job Interviews & Questions

• You can explain what the job application process entails, ask if reasonable accommodations are needed to complete the application process, and require documentation supporting the accommodation requested;

• You can ask if an applicant can perform the essential functions of the job with or without accommodation;
ADAAA AND PRE-OFFER LIMITATIONS

Job Interviews & Questions

- You can ask about non-medical qualifications, certifications and skills;

- You can ask applicants to explain how they would perform their job tasks, as long as you ask this of all job applicants in that job category.
ADAAA AND PRE-OFFER LIMITATIONS

Job Interviews & Questions

Don’t ask general questions about disabilities.

Stick with job-related questions. You can tell an applicant that the job requires employees to lift 30-pound boxes and move them down a flight of stairs 20 times a day.

You can then ask, "Can you do that with or without a reasonable accommodation?"
ADAAA AND PRE-OFFER LIMITATIONS

Job Interviews & Questions

Do not ask questions if you reasonably expect the answers to relate to disabilities.

You may ask, "How well do you handle stress on the job?"

That's acceptable because people without disabilities may not handle stress well.

But you cannot ask, "Have you ever been treated for your inability to handle stress?"
ADAAA AND PRE-OFFER LIMITATIONS

Job Interviews & Questions

If an applicant volunteers information about a disability, don't follow up with a disability-related question.

Sometimes applicants volunteer information about disabilities, even when interviewers haven’t asked about them.

An applicant may volunteer that she has multiple sclerosis.

Do not ask questions like, "How does that affect your work?" or "What's your prognosis?"
PRE-OFFER LIMITATIONS/JOB INTERVIEWS

Obvious or Disclosed Disabilities

• You may ask what accommodations may be needed to perform job duties.

• You **may not** ask about an applicant’s disability, any accommodation needs for non-job related activities, or possible future accommodation needs.
Interview Site

- For telephone interviews, you must provide a TDD number or a telephone relay service.

- Printed application forms and test materials should be available on cassette, in Braille or in large print.

- Similar Rules for tests if you have them.
Questions and Exams

• After a conditional job offer has been made, but before an applicant begins work, you may ask medical-related questions and conduct medical tests, so long as this is required of all applicants in that job category.

• Your medical tests and questions do not necessarily have to be job-related or consistent with business necessity. You can ask about prior worker’s compensation claims, sick leave usage, illnesses, diseases and impairments, and general mental and physical health.

• If an applicant’s drug tests come back positive, you can also ask about current legal drug use if this could have affected the test results.
“Real” Job Offer Required

• Make an applicant a “real” job offer before asking medical questions or requiring a medical examination.

• A “real” job offer means one offered after all relevant non-medical information that can reasonably be obtained is received and analyzed.
ADA POST-OFFER, PRE-EMPLOYMENT

**Individualized Assessments**

- Your health care provider must perform an “individualized risk assessment” on each applicant’s ability to perform the essential functions of the job, with or without accommodation.

- Reliance upon a medical option that is itself based upon a stereotype or an unfounded assumption can result in ADA liability.
Rescinding The Job Offer

- The reason for the withdrawal is job-related and consistent with business necessity, and

- That no reasonable accommodation is available to enable the applicant to perform essential job functions without a “significant risk” to health or safety, or
ADA POST-OFFER, PRE-EMPLOYMENT

**Rescinding The Job Offer**

- The applicant is being excluded to avoid a “direct threat” to the health or safety of the applicant or others, and

- No reasonable accommodation is available to reduce the risk of harm to the applicant or to others below the “direct threat” level, or

- Any reasonable accommodation that does exist would cause undue hardship to the employer.
Q’S AND A’S
Presentation information should not be construed as legal advice!
Under federal law, employers are required to verify the identity and employment eligibility of all individuals they hire, and to document that information using The Employment Eligibility Verification Form I-9.

Ensuring each of its employees is legally authorized to work in the United States is one of many responsibilities facing every American business, from small start-up operations to our country’s largest and most prosperous corporations.

Tasked with enforcing the business community’s compliance with federal employment eligibility requirements, U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) developed a comprehensive worksite enforcement strategy that
Worksite enforcement targets employment law violators

Worksite enforcement investigations often involve egregious violations of criminal statutes by employers and widespread abuses. Such cases often involve additional violations such as alien smuggling, alien harboring, document fraud, money laundering, fraud or worker exploitation. ICE also investigates employers who employ force, threats or coercion (for example, threatening to have employees deported) in order to keep the unauthorized alien workers from reporting substandard wage or working conditions.

By uncovering such violations, ICE can send a strong deterrent message to others who knowingly employ illegal aliens. - Per ICE News Release
ICE worksite enforcement investigations already double over last year

From Oct. 1, 2017, through July 20, 2018, HSI opened 6,093 worksite investigations and made 675 criminal and 984 administrative worksite-related arrests, respectively.

In fiscal year 2017 – October 2016 to September 2017 – HSI opened 1,716 worksite investigations; initiated 1,360 I-9 audits; and made 139 criminal arrests and 172 administrative arrests related to worksite enforcement.

-Per ICE News Release 7/30/18
ICE delivers more than 5,200 I-9 audit notices to businesses across the US in 2-phase nationwide operation

WASHINGTON — U.S. Immigration and Customs Enforcement’s (ICE) Homeland Security Investigations (HSI) announced Tuesday the results of a two-phase nationwide operation in which I-9 audit notices were served to more than 5,200 businesses around the country since January. A notice of inspection (NOI) informs business owners that ICE is going to audit their hiring records to determine whether they are complying with existing law.

From July 16 to 20, the second phase of the operation, HSI served 2,738 NOIs and made 32 arrests. During the first phase of the operation, Jan. 29 to March 30, HSI served 2,540 NOIs and made 61 arrests.

-Per ICE News Release 7/24/18
“Immigration Agents Target 7-Eleven Stores in Push to Punish Employers” - NY Times Headline

January 2018
98 stores in 17 states
21 arrested

“Today’s actions send a strong message to U.S. businesses that hire and employ an illegal work force: ICE will enforce the law, and if you are found to be breaking the law, you will be held accountable.”
- Thomas Homan, ICE Acting Director
Asplundh Tree Experts Co. pays largest civil settlement agreement ever levied by ICE - Per ICE News Release

September 2017

“Today marks the end of a lengthy investigation by ICE Homeland Security Investigations into hiring violations committed by the highest levels of Asplundh’s organization,” said ICE Acting Director Thomas Homan. “Today’s judgement sends a strong, clear message to employers who scheme to hire and retain a workforce of illegal immigrants: we will find you and hold you accountable. Violators who manipulate hiring laws are a pull factor for illegal immigration, and we will continue to take action to remove this magnet.”
ASPLUNDH

Penalties

- $95 Million  Recovery
- $80 Million  Forfeiture of Profit
- $15 Million  Civil Penalties
Form I-9 Employer Internal Audits

https://www.uscis.gov/faq-page/i-9-central-self-audits#t17081n50196

https://www.justice.gov/crt/file/798276/download
Form I-9 Employer Internal Audits Tips

• Gather All I-9 Forms On File
• Organize Employee Communication and be Transparent
• Run Payroll Report (Active Employee List) with Name, SSN, Hire Date
• Make Sure There is an I-9 For Each Active Employee
• Start Spreadsheet (Audit Log for Permanent Record)
  • Employee Name
  • Error
  • Action Taken
• Move All Correct I-9s to One Location
• Accomplish Missing I-9s ASAP!!
• Section 1 Errors Require Employee Changes and Authorizations (Initial/Date)
• You May Correct Section 2 and 3 (Initial/Date)
• Check OSC I-9 Audit Guidelines
  • Watch I-9 Version
  • Be Consistent if New Documentation is Needed (4 days? 10 days?, etc.)
  • NO WHITE OUT or WRITING OVER!
• No Backdating
• Use Single Lines to Mark Out
• Blue or Black Ink Works Best
• Only Do a New I-9 When Absolutely Necessary
• Check I-9 / Check Documents Presented / Check E-Verify Case
WHAT’S IN YOUR PERSONNEL HANDBOOK; PERSONNEL FILES; AND WHAT TO KEEP - WHAT TO THROW AWAY

Human Resource and Personnel Matters Workshop
October 17, 2018
Employee Handbooks

• Employment law is heavily litigated and constantly changing. Do not rely solely on the sample included in your meeting materials. You are encouraged to monitor and update your city’s handbook to ensure that it continuously meets the needs of your city from a legal and employee standpoint. It should be reviewed annually by city officials and city attorneys.

• If your city adopts an employee handbook, failing to follow and enforce its guidelines may result in legal liability.

• Policies are of no use if city employees, supervisors, department heads and city officials don’t follow them. When policies and/or updates are distributed, make sure that all employees and city officials sign the acknowledgement.
Employee Handbooks - Do I Need One?

• YES!

• An Employee Handbook is an effective way to communicate policies, procedures and work rules to employees. It can be used to:
  • Properly orient new employees;
  • Maintain consistency among managers and supervisors;
  • Minimize misunderstandings over workplace policies;
  • Support disciplinary action and avoid charges of unlawful discrimination;
  • Outline employee benefits.
Writing an employee handbook is a daunting task. There are also many software packages available, but be cautious. Even the electronic formats need to be reviewed by your city officials and city attorneys.
Chapter 1 - An Overview

• CHAPTER 1:
  • Chapter 1 should contain general overview of what’s to come, such as the purpose and scope of the personnel policies.
  • It should also include definitions of terms frequently used through the handbook.
  • Chapter 1 should outline how amendments and revisions to the Employee Handbook will be made and communicated.
    • Note: Always have employees sign an Acknowledgement of Receipt when the policy is provided and another for any amendments or revisions.
Chapter 2 - The Legal Stuff

• Equal Employment Opportunity
  • EEO Statement.
  • American’s With Disabilities Act
  • Policy Regarding Unlawful Discrimination
    - defining prohibited conduct!
• Sexual Harassment
• Complaint Reporting and Investigation
  • Complaint Procedure
  • Investigation Protocol
  • Retaliation
  • False Accusations
  • Consequences
Chapter 3 - Employment Policies & Practices

- General Employment Policies
  - At-Will Employer
  - Authority to Hire and Fire
  - Job Posting & Advertising
  - Employment Applications & Resumes
  - Post-Offer Pre-employment Physicals
  - Fitness for Duty Exams
  - Drug and Alcohol Testing
  - Genetic Information (GINA)
Chapter 4 - Compensation & What Can Affect It

- Compensation and Matters Affecting Employment Status
  - Attendance
  - Work Hours
  - Unauthorized Work Time
  - Compensation - reporting time, payroll records, payday, withholding
  - Salary Basis Policy - FLSA, Exempt vs. Non-Exempt
  - Overtime & Compensatory Time
  - Emergency Situations
  - Temporary & Seasonal Employees
  - Vacancies and Promotions
  - Training
  - Performance Evaluations
  - Job Safety
  - Refusal to Work
  - Resignation/Termination
  - Exit Interviews
  - Job Descriptions - IMPORTANT
Chapter 5 - Benefits or What’s In It for Me?

- Benefits
  - Vacations (Uniformed vs. Non-Uniformed Employees)
  - Holidays & Holiday Pay
  - Inclement Weather Policy
  - Sick Leave (Uniformed vs. Non-Uniformed Employees)
  - Funeral or Bereavement Leave
  - Maternity Leave
  - Uniformed Services
  - Family and Medical Leave
  - Leave for Witness or Jury Duty
  - Health Benefits
  - Occupational Injuries
  - Accidental Injury
  - Disability
Chapter 6 - Work Behavior

- Standards of Conduct
  - Communicating with the Public
  - Personal Communications
  - Uniforms and Personal Appearance
  - Guidelines for Appropriate Conduct
  - Sexual Harassment
  - Anti-Bullying
  - Absenteeism and Tardiness
  - Outside Employment or Moonlighting
  - Outside Compensation
  - Use of Narcotics, Alcohol & Tobacco
  - Drug-Free Workplace
  - Use of City Access & Resources
  - Waiver of Privacy
  - City Vehicles
  - Political Campaigns
  - Disciplinary Action
  - Procedure for Review of Disciplinary Action
This IS my helpful face and I’m very happy to help you.
Consider Adding An Anti-Bullying Policy

• Although it is not illegal, bullying can be a problem in the workplace. The way to combat bullying is to have a anti-bullying policy in place.
• Bullying causes both an individual and corporate impact.
• An effective bullying prevention policy should include: a definition in precise concrete language; provide clear examples of unacceptable behavior; clearly state your organization’s view and its commitment to prevention; reporting protocol; procedures for investigating and resolving complaints.
• A sample policy has been included in your materials.
• AML can provide training – “Achieving Respect and Understanding in the Arkansas Municipal Workplace.” Contact Whitnee V. Bullerwell at 501-374-3484 ext. 206 or wvb@arml.org if you are interested.
Chapter 7 - More Legalese!

- Miscellaneous Information
  - Policy Statement
  - Conflicts - Federal, State or Local Law takes precedence.
- Severability
- Policy Changes
- Change of Address
Employee Files

Fun, Fabulous Filing!
• All organizations have files where important employee information is kept. Each filing system is specific to the individual employer.

• All organizations have their own policies regarding employee records and filing systems. In fact, many organizations have employee records maintained in many different areas. For example, general and confidential employee files may be maintained by Human Resources; and payroll records and documentation may be contained by a Payroll Administrator. Perhaps you are a small city or organization and all files are maintained by one person.

• Your city attorney should be included in any recordkeeping policies and decisions.
Whether in paper or electronic format, it is important to keep employee records. Documentation is needed so the employer has an accurate employment history. Documentation supports the employer’s decisions about the employee and his or her career. The documentation may protect an employer from a lawsuit - if maintained correctly. Not to mention record retention regulations...
Personnel File Storage

Are your file cabinets:

• Locked? Secure?
• Fire Proof? Water Proof?
• Meet Requirements of the organization’s Disaster Recovery Plan?
• Meet HIPAA Privacy Rule Guidelines?
• Meet HIPAA Security Rule Guidelines?
Types of Files - Generally

- General Personnel File
- Confidential Employee File
- Payroll File
- Common File

Others:
- WC File
- Medical File
- Department File
What Goes Where??
Consider access.

- Consider whether or not the document contains sensitive information such as date of birth, marital status, dependent information, SSN, medical information, etc. Protected information should be stored in a confidential file with restricted access.

- Consider who will need access to the file. A supervisor may need access when making employment decisions. Is it related to an employee's performance, knowledge, skills, ability or behavior? If so, it may go in the general file.

- Each type of personnel file may have different access requirements.

- Employee access to his or her personnel file is allowed, but most employers set up guidelines for access.

- **Note:** Even though an immediate supervisor or HR staff may access an employee file, there has to be a bona fide reason to do so.
General Personnel File Contents

- Recruiting and screening documents such as applications, resumes, transcripts, licensure.
- Job description. (Did employee acknowledge and sign?)
- Records related to job offer, promotion, demotion, transfer, layoff or training.
- Acknowledgements or Agreements such as an acknowledgement of receiving employee handbook or new policy.
- Emergency contact information.
- Letters of recognition.
- Disciplinary notices.
- Performance evaluations.
- Termination documentation.
Confidential Personnel Folder Contents

- EEO information.
- Reference checks, background checks.
- Drug testing results.
- Medical insurance applications and records. Supporting documentation - divorce decrees, child support orders, marriage license, etc.
- Doctors notes, accommodation requests.
- Child support or other garnishments.
- Litigation documents.
- Workers compensation claims.
- Investigation records related to disciplinary actions.
- Requests for employment/payroll verifications.
Payroll File

- Salary information.
- Benefit selection - both medical and supplemental.
- Pay rate changes.
- Garnishments.
- Legal documentation that affects an employee's paycheck.
- W-4.
- State withholding form.
Common File Contents

- I-9 documentation (Allows easy access for auditing purposes)
- Equipment assignments.
- Special skills in case of a disaster/emergency. For example, employees trained in CPR; bilingual employees and languages spoken; employees with medical training and licensure. Often this information is kept in an Emergency Action Plan File.
Filing systems vary from place to place and no one system is better than another if it works for your organization.

Paper files have to been manually maintained and take up a large amount of space.

Electronic storage systems have to be set up properly and documents must be scanned and organized so that they are easily accessible.

Both types of systems must be securely maintained to ensure each employee’s privacy.
Electronic Personnel File Audit

• Do you have a good document management system?
• Have you established clear parameters around which employees have access?
• Have you implemented proven security and password protections?
• Do you have a backup system in place?
• Do you have a secondary backup system in the event the software and backup are destroyed?
• Has everyone been adequately trained on the system?
Personnel File Audit

• Are files maintained in a locked and secure cabinet?

• Have all documents containing confidential information been removed from the general personnel file?

• Are personnel files organized in a logical manner so that information is easy to find?

• Is there a policy or consistent practice regarding employee access to personnel files?
• Are medical/confidential files maintained in a locked and secure cabinet?
• Do you restrict access to only those with a need to know?
• Are the contents organized in a logical manner so that information is easy to access?
Terminated Employee Files

- Are terminated files locked and secured with limited access?
- Does your organization have a regular disposal plan for documents that have exceeded record retention guidelines?
- Are employment records that have met or exceeded record retention requirements disposed of via shredding, burning or fully destroying these records prior to disposal?
- Are files related to current or potential lawsuits maintained by legal counsel or in some way marked to be exempted from any disposal process until the suit is closed?
- Does your company have a written record retention and destruction policy or procedure?
I-9 File (Common File)

- I-9 forms should be maintained in a separate file from the employee personnel file.
- Access is highly restricted.
- It should be kept in a locked cabinet or secured electronic database.
- I-9 forms and supporting documentation should be easily accessible if required by U.S. Citizenship and Immigration Services personnel.
Record Retention

• Your organization should have a record retention policy. If not, work with your city attorney to establish one.

• Record retention varies depending on the law that applies to the document.
General Guideline for Electronic and Paper-based Records

- Personnel: 7 years after termination
- Medical/Benefits: 6 years after plan year - except in the case of exposure to hazardous material, then 30 years
- I-9 Forms: Not more than 3 years after termination.
- Hiring Records: 2 years after hiring decision.
<table>
<thead>
<tr>
<th>Law</th>
<th>Record/Document</th>
<th>Retention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age Discrimination in Employment Act (20 employees)</td>
<td>Payroll or other records showing name, address, date of birth, occupation, rate of pay and weekly compensation</td>
<td>Three years for payroll or other records showing basic information; one year for applications or other personnel records</td>
</tr>
<tr>
<td>Equal Pay Act</td>
<td>Payroll records, timecards, wage rates, additions/deductions from wages paid, records explaining gender-based wage differentials</td>
<td>Three Years</td>
</tr>
<tr>
<td>Immigration Reform and Control Act</td>
<td>INS Form I-9</td>
<td>Three years after date of hire or one year after termination</td>
</tr>
<tr>
<td>Law</td>
<td>Record/Document</td>
<td>Retention</td>
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<tr>
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</tr>
<tr>
<td>Fair Labor Standards Act (FLSA)</td>
<td>Payroll or other records containing: Employee’s name, address, DOB, gender and occupation. Time of day/day of week for beginning of workweek. Regular hourly rate of pay. Daily hours worked and total hours for each workweek. Total daily or weekly straight-time earning. Total additions/deductions from wages for each pay period. Total wages per pay period. Date of each payment of wages.</td>
<td>Three Years</td>
</tr>
<tr>
<td>Law</td>
<td>Record/Document</td>
<td>Retention</td>
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</tr>
<tr>
<td>Americans with Disabilities Act (15 employees)</td>
<td>Application and other personnel records; requests for reasonable accommodation.</td>
<td>One year from making the record or taking action. In case of lawsuit, until final disposition.</td>
</tr>
<tr>
<td>Title VII - Civil Rights Act (15 employees)</td>
<td>Applications or other personnel records, including records for temporary or seasonal positions.</td>
<td>One year from making the record or taking action.</td>
</tr>
<tr>
<td>COBRA</td>
<td>Provide written notice to employees/dependents of their option to continue coverage following certain qualifying events such as termination, layoff or reduction in working hours.</td>
<td>No requirements, however, experts recommend 6 years from the date of the record.</td>
</tr>
<tr>
<td>Law</td>
<td>Record/Document</td>
<td>Retention</td>
</tr>
<tr>
<td>-----------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Employee Polygraph Protection</td>
<td>Polygraph test results and reason for administering.</td>
<td>Three years.</td>
</tr>
<tr>
<td>Employee Retirement Income Security Act (ERISA)</td>
<td>Maintain and report to DOL, IRS and PBGC certain reports, documentation and materials. Applies to all pension and welfare plans.</td>
<td>Minimum of 6 years.</td>
</tr>
<tr>
<td>Equal Pay Act</td>
<td>Payroll records, including timecards, wage rates, additions to/deductions from wages, records re: gender based wage differences.</td>
<td>Three years.</td>
</tr>
</tbody>
</table>
# Laws and Retention Requirements

<table>
<thead>
<tr>
<th>Law</th>
<th>Record/Document</th>
<th>Retention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fair &amp; Accurate Credit Transaction (FACT) Act</td>
<td>Consumer Credit Reports. (Employer may retain employee’s consent form but cannot retain the credit report.)</td>
<td>As of June 1, 2005, every employer that employs one or more must shred documents that contain information derived from a credit report. Non-compliance could result in civil penalties for non-compliance up to $1,000; punitive damages for willful noncompliance; attorneys fees; and federal fines up to $2,500 per violation. (Class Action could be a possibility).</td>
</tr>
<tr>
<td>Family and Medical Leave Act (FMLA) (50 employees)</td>
<td>All FMLA documentation.</td>
<td>Three years.</td>
</tr>
<tr>
<td>Law</td>
<td>Record/Document</td>
<td>Retention</td>
</tr>
<tr>
<td>-----------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Federal Insurance Contribution Act;</td>
<td>Records containing basic employee data.</td>
<td>Four years after later of when tax was paid or due.</td>
</tr>
<tr>
<td>Federal Unemployment Tax Act; and</td>
<td>Compensation data such as amounts and dates of payment; straight time and over time hours/pay; annuity and pension payments; fringe benefits paid; and deductions and additions.</td>
<td></td>
</tr>
<tr>
<td>Federal Income Tax Withholding</td>
<td>Tax records including: wage amounts subject to withholding; actual taxes and dates withheld; withholding forms (W-4, W4-E).</td>
<td></td>
</tr>
</tbody>
</table>
Tracey L. Cline-Pew, SPHR, SHRM-SCP
Director of Human Resources
www.tpew@arml.org
501-978-6111
Anti-Bullying Policy

October 2018
The purpose of this policy is to communicate to all employees, including supervisors, managers and executives, that [City/Entity Name] will not in any instance tolerate bullying behavior. Employees found in violation of this policy will be disciplined, up to and including termination.

**Definition**

[City/Entity Name] defines bullying as repeated, health-harming mistreatment of one or more people by one or more perpetrators. It is abusive conduct that includes:

- Threatening, humiliating or intimidating behaviors.
- Work interference/sabotage that prevents work from getting done.
- Verbal abuse.
- Such behavior violates [City/Entity Name]'s [standards of conduct/employment policies], which clearly state that all employees will be treated with dignity and respect.

**Examples**

[City/Entity Name] considers the following types of behavior examples of bullying:

- **Verbal bullying.** Slander, ridiculing or maligning a person or his or her family; persistent name-calling that is hurtful, insulting or humiliating; using a person as the butt of jokes; abusive and offensive remarks.
- **Physical bullying.** Pushing, shoving, kicking, poking, tripping, assault or threat of physical assault, damage to a person's work area or property.
- **Gesture bullying.** Nonverbal gestures that can convey threatening messages.
- **Exclusion.** Socially or physically excluding or disregarding a person in work-related activities.

In addition, the following examples may constitute or contribute to evidence of bullying in the workplace:

- Persistent singling out of one person.
- Shouting or raising one's voice at an individual in public or in private.
- Using obscene or intimidating gestures.
- Not allowing the person to speak or express himself or herself (i.e., ignoring or interrupting).
- Personal insults and use of offensive nicknames.
- Public humiliation in any form.
- Constant criticism on matters unrelated or minimally related to the person's job performance or description.
- Public reprimands.
- Repeatedly accusing someone of errors that cannot be documented.
- Deliberately interfering with mail and other communications.
- Spreading rumors and gossip regarding individuals.
- Encouraging others to disregard a supervisor's instructions.
• Manipulating the ability of someone to do his or her work (e.g., overloading, underloading, withholding information, setting deadlines that cannot be met, giving deliberately ambiguous instructions).
• Assigning menial tasks not in keeping with the normal responsibilities of the job.
• Taking credit for another person's ideas.
• Refusing reasonable requests for leave in the absence of work-related reasons not to grant leave.
• Deliberately excluding an individual or isolating him or her from work-related activities, such as meetings.
• Unwanted physical contact, physical abuse or threats of abuse to an individual or an individual's property (defacing or marking up property).

Individuals who feel they have experienced bullying should report this to their supervisor or to Human Resources before the conduct becomes severe or pervasive. All employees are strongly encouraged to report any bullying conduct they experience or witness as soon as possible to allow [City/Entity Name] to take appropriate action.
Personnel Files and the Arkansas Freedom of Information Act

Lanny Richmond, II
Arkansas Municipal League
Fall 2018
It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy.
Brief Introduction to FOIA

- Basically, all **public records** and all **public meetings** shall be open to inspection and copying by any citizen of the State of Arkansas, **except when FOIA says otherwise.** A.C.A. section 25-19-105(a)
  
- Section 105 – public records
  
- Section 106 – public meetings
“Custodian” – the person having administrative control of a public record, NOT a person who holds public records for storage, safekeeping, or data processing. ACA 25-19-103 (1)(A and B)

First question of the day: who is your employers custodian? Custodians perhaps?

Second question of the day: does your employer, and thus do you, have a process for processing FOI requests?

Third question of the day: does your process involve a legal review?
The Exceptions...

(1) State income tax records;

(2) Medical records, adoption records, and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g, unless their disclosure is consistent with the provisions of that act;

***
The Exceptions...

(6) Undisclosed investigations by law enforcement agencies of suspected criminal activity;

***

(8) Documents that are protected from disclosure by order or rule of court;
The Exceptions...

(9) (A) Files that if disclosed would give advantage to competitors or bidders and records maintained by the Arkansas Economic Development Commission related to any business entity's planning, site location, expansion, operations, or product development and marketing, unless approval for release of those records is granted by the business entity.
The identities of law enforcement officers currently working undercover with their agencies and identified in the Arkansas Minimum Standards Office as undercover officers.

(B) Records of the number of undercover officers and agency lists are not exempt from this chapter;
The Exceptions...

(12) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy;
What constitutes a clearly unwarranted invasion of personal privacy?

- Arkansas Supreme Court utilizes **a balancing test, balancing**:
  - The interest of the public in accessing the records against
  - The individual’s interest in keeping the records private.
  - Public’s interest > individual’s interest = no clearly unwarranted invasion of personal privacy.
Specific Personnel Exemptions

- Personal contact information of public employees, including personal telephone numbers, personal e-mail addresses, and home addresses (Ark. Code Ann. § 25-19-105(b)(13));

- Marital status of employees and information about dependents (Op. Att'y Gen. 2001-080);
  - The AG has repeatedly relied upon federal courts' opinions on these topics
  - Which interpret the Federal FOIA
Medical information (Op. Att’y Gen. 2003-153);
- “Medical records, adoption records, and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act;” Section (b)(2).

Leave Information (Op. Att’y Gen. No. 91-003 (Jan. 10, 1991);
- Leave records should, in my opinion, be considered personnel records, thus triggering this exception. . . .As a general rule, however, to be exempt the information must be of an intimate nature or contain some fact about an individual’s private life that would not otherwise be made public except by the individual.
Dates of birth of public employees (Op. Att’y Gen. 2007-064);
  “birth dates, like social security numbers, are private information and provide significant identifying information allowing access to extensive personal data in a computerized society” and stating that “[l]ike social security numbers, birth dates may be used to gather great amounts of private information about individuals”

Social Security numbers (Ops. Att’y Gen. 2006-035, 2003-153);
Psychological evaluations (Op. Att'y Gen. 2009-096);

In the psychological evaluation context, my predecessor has opined that “substance of the evaluation” should be scrutinized more carefully before a decision is made to release it. E.g., Op. Att'y Gen. Nos. 2000-226, 98-202. My predecessor concluded that, in the context of psychological evaluations, such scrutiny would likely reveal that the employee has an overriding privacy interest in withholding the record from release. In the context of a drug test, we must use a similar approach.

Drug test results (Op. Att’y Gen. 2009-096);

I assume from this that you have decided not to release the types of drugs present in the officer's blood if he failed the drug test. This suggests that you believe the employee has an overriding privacy interest in this information. Clearly, the disclosure of specific drug information could subject the affected officer to embarrassment or could affect future employment. Therefore, a substantial privacy interest is evident.
Insurance coverage (Op. Att'y Gen. 2004-167);

- *i.e.*, records reflecting the fact that a public official receives insurance coverage and the amount paid by the public entity for that coverage - is releasable. This is a part of the official's compensation for which the public is paying, and the public therefore has a substantial interest in it.

- *i.e.*, records reflecting the personal details of coverage, such as whether dependents are covered and the amount that is deducted from the official's compensation for coverage - is not releasable. This is personal information in which the public does not have a counter-balancing interest.
Tax information or withholding (Ops. Att'y Gen. 2005-194, 2003-385);

If the records in question in fact contain . . . state income tax withholding information, § 25-19-105(b)(1) will likely apply to prevent disclosure.

This office has repeatedly opined that to release payroll deduction information would amount to a clearly unwarranted invasion of privacy, as would the release of any record containing intimate financial details.

Payroll deductions (Op. Att'y Gen. 98-126);

I agree with your provisional decision as to these records. In authorizing a direct deposit, an employee typically provides a void check that reflects the employee's bank-account routing number and, frequently, his home address. In my opinion, the public interest in access to such information is minimal, whereas the employee's privacy interest therein is not insubstantial.
The Attorney General has not opined whether or not a volunteer’s personnel file is protected to the same degree an employee’s is.

The AG has specifically not answered this question: “It is unclear whether a volunteer job-application constitutes a personnel record because it is unclear whether volunteers are “personnel.” Ark. Op. Att'y Gen. No. 2009-063 (Apr. 20, 2009).

At this stage I would presume the files are “personnel files” for the purpose of the FOIA.
Timeline for Personnel File Requests

- Additionally, you should determine what you intend to release and redact within 24 hours.

- Once you have identified this information you should notify the requester and the employee whose records are requested of your decision.

- This provides you, the requester, and the employee with the opportunity to request an opinion from the Attorney General. Ark. Code Ann. § 25-19-105(c)(3)(B)(i).
Employee Evaluation or Job Performance Records

- Finally, The AG opined that under Ark. Code Ann. § 25-19-105(c)(1), which applies to “employee evaluation or job performance records,” has a specific test for releasing these documents.

- This exception exempts out employee evaluation or job performance records:
  - “generated for purposes of investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.”

Employee Evaluation or Job Performance Records

- According to the AG a document which meets this definition cannot be released unless all the following elements have been met:
  - 1. The employee was suspended or terminated (i.e., level of discipline);
  - 2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
  - 3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., basis); and
  - 4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).
Employee Evaluation or Job Performance Records

- As it related to the subject of an employee being investigated based upon a complaint of another employee the AG had this to say:
  - Mr. Natali (and Mr. Morehead, as Mr. Natali’s representative) would be entitled to disclosure of the personnel or employee-evaluation records of other persons to the same extent that an Arkansas citizen requesting such records would be under the FOIA. As the custodian, you must properly classify the documents responsive to Mr. Morehead's request and apply the appropriate test for disclosure. Ark. Op. Att'y Gen. No. 2017-100 (Sept. 25, 2017).
  - This relates to what do you do when you have records that appear to apply to more than one person.
Questions?
The Fair Labor Standards Act
“21 Things You Should Know”

All Employees

1. The minimum wage in Arkansas is $8.00 per hour effective January 1, 2016; and $8.50 per hour effective January 1, 2017 (A.C.A. § 11-4-210).
   - Note: The federal minimum wage for covered, non-exempt employees is $7.25 per hour. However, states are entitled to set a higher minimum wage. Accordingly, the higher Arkansas wage rates are applicable.

2. Overtime or compensatory time must be paid at time and one-half of the employee’s regularly hourly rate (29 U.S.C. § 207(a)(1)). Even if the employee receives a salary, overtime or compensatory time must be granted unless the employee is exempt as explained below.

   Employers cannot avoid paying overtime or compensatory time by averaging hours over several workweeks. The FLSA requires that each workweek stand alone (29 C.F.R. § 778.104). (But see chart below for information on uniformed employee shifts).

3. If an employee volunteers to substitute shifts with another employee after first obtaining the employer’s approval and works more than the maximum hours for a given work period as a result of the switch, his employer is not responsible for paying the additional overtime. The regulations state that this may occur “only if employees’ decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ‘trade time’ with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.”

   Employers are not required to maintain a record of time traded and there is no specific period of time in which the switch must be paid back. Therefore, the employee’s paycheck for that period would not reflect the switch in additional hours or overtime pay (29 C.F.R. § 553.31).

4. Employees do not have to be paid for “on-call” time unless their activities are “overly restricted.” On-call time should not be counted as compensable unless the employee is required to remain at or near the employer's premises or otherwise cannot use his or her time freely (29 C.F.R. § 785.17). Providing electronic pagers or cell phones to employees can solve many on-call time problems.

Exempt Employees

5. Elected municipal officials, their personal staffs, persons appointed by elected officials to serve on a policy making level, and legal advisors are considered exempt employees and are excluded from coverage under the Fair Labor Standards Act (29 C.F.R. § 553.11).

6. Trainees and students are not employees within the meaning of the Fair Labor Standards Act if they meet all six criteria below:

   (1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;
   (2) The training is for the benefit of the individual;
   (3) The trainee does not displace regular employees, but is supervised by them;
(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training (5 C.F.R. § 551.104).

7. Volunteers are not employees and an employee cannot volunteer to do the same work for which he is being paid (29 C.F.R. §§ 553.100, 553.102).


9. Executive, administrative, and professional white collar employees are exempt from both minimum wage and overtime provisions if they meet all the requirements specified for their job category. These are not the only exemptions, but are the most typical in Arkansas cities and towns.

Note: The salary rate was scheduled to increase from $455 per week to $913 per week, effective December 1, 2016. However, a federal judge has temporarily halted enforcement of this rule pending further court proceedings. In addition, the new rule may be set aside or limited by Congress. As of this writing the existing salary rate of $455 is still in effect. Please consult with your city attorney or League legal staff for updates.

a. Executive employees

(1) The employee must be compensated on a salary basis at a rate not less than $455 per week;

(2) The employee’s primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;

(3) The employee must customarily and regularly direct the work of two or more other full-time employees or their equivalent; and

(4) 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 are given particular weight (29 C.F.R. § 541.100).

b. Administrative employee

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities;

(2) Whose primary duty is 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

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (29 C.F.R. § 541.200).
c. Professional employee

    (a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act shall mean any employee:
        (1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging, or other facilities; and
        (2) Whose primary duty is the performance of work:
            (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
            (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (29 C.F.R. § 541.300).

d. Computer Employee Exemption

    (a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

    (b) The (a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities, and the (a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:
        (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
        (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
        (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
        (4) A combination of the aforementioned duties, the performance of which requires the same level of skills (29 C.F.R. § 541.400).

10. Employees of amusement or recreational establishments are exempt from minimum wage and overtime if one of the following requirements is satisfied:

    (a) The establishment must not operate for more than seven months in any calendar year.
    (b) During the preceding calendar year, the establishment’s average receipts for any six months of that year must have been equal to or less than one-third of its average receipts for the other six months of that year (29 C.F.R. § 779.385).
Uniformed Employees-Police and Fire

11. Law enforcement officers in cities and towns with fewer than five (5) law enforcement officers, including the chief or marshal, are exempt from the overtime provisions (29 U.S.C. § 213(b) (20); 29 C.F.R. §§ 553.200, 553.211). To count as a law enforcement officer, the officer must be someone: (1) who is a uniformed or plain clothed member of a body of officers and subordinates who are legally authorized to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics (29 C.F.R. § 553.211).

Volunteers are not considered “employees” for this purpose however. No distinction is made between part-time and full-time employees.

This means that if you have four (4) or fewer than four (4) law enforcement officers (not including radio operators), the city does not have to pay overtime. You must be sure your officers receive at least the minimum wage for all hours worked in a work period.

12. Cities and towns with fewer than five (5) paid firefighters, including the chief (if paid), are exempt from paying overtime to those employees who meet the following definition: “Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who--

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk (29 U.S.C. § 203(y).

You must be sure your paid firefighters (four or fewer) receive at least the minimum wage for each hour on duty during the work period (29 U.S.C. § 213(b)(20); 29 C.F.R. § 210).

13. Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees under the 1985 Amendments to the Fair Labor Standards Act (29 C.F.R. § 553.104(b)).

14. The FLSA provides a partial overtime exemption for law enforcement officers and firefighters who work a “work period” established by the city of no fewer than seven days and no more than twenty-eight days. The city can establish separate work periods for the police department and the fire department. If the city fails to establish a work period, 207(k) does not apply and a fire or police employee working over forty hours will accrue overtime compensation (29 C.F.R. § 553.230).
The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel, determining that law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171 and that fire department employees working in excess of 212 hours within a 28-day period must also be compensated. These 28-day standards can be used as ratios to determine maximum hours for other approved work periods. See the following chart.

<table>
<thead>
<tr>
<th>Work period (days)</th>
<th>Fire protection</th>
<th>Law enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>212</td>
<td>171</td>
</tr>
<tr>
<td>27</td>
<td>204</td>
<td>165</td>
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<td>26</td>
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<td>49</td>
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<td>7</td>
<td>53</td>
<td>43</td>
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</table>

When determining compensatory time for either law enforcement personnel or firefighters who miss a shift due to illness, vacation, personal leave, or any other reason, hours missed will not count as hours worked and are not compensable for overtime purposes (29 C.F.R. §§ 553.201, 553.230).
15. Civilian radio operators, clerks, secretaries, and janitors of police and fire departments are on a 40-hour workweek with time and one-half for all hours over 40 hours per week. They do not qualify for the law enforcement officers or firefighters’ “work period” hours exemption (29 C.F.R. §§ 553.210, 553.211).

16. The city as employer has the option of paying overtime or of giving comp time off. The employee must understand that the city has a policy of compensatory time off. Compensatory time is accrued at 1 ½ hours for each hour worked. Public safety employees—police and fire—and emergency response employees can accrue a maximum of 480 hours of comp time or 320 hours worked. After an employee has accrued maximum compensatory time, the employee must be paid in cash for overtime worked.

An employee shall be permitted to use accrued comp time within a reasonable period after requesting it if to do so would not disrupt the operations of the employer. Payment of accrued comp time upon termination of employment shall be calculated at the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher (29 C.F.R. § 553.21).

If the employer pays cash wages for overtime hours rather than in compensatory time, the wages must be paid at one and one-half times the employee’s regular rate of pay (29 C.F.R. § 553.232).

The United States Supreme Court has held that a public employer may require its employees to use their accumulated compensatory time. Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655 (2000). If employees do not use accumulated compensatory time, the employer must pay cash compensation in some circumstances. In order to avoid paying for accrued compensatory time, Harris County, Texas, enacted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time.

The Court described Harris County’s policy as follows: “The employees’ supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee’s stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.” The Court held that, although § 207(o)(5) limits an employer’s ability to prohibit the use of compensatory time when requested, that does not restrict the employer’s ability to require employees to use compensatory time.

Non-Uniformed Employees

17. All non-uniformed employees are entitled to overtime or compensatory time off after 40 hours per week worked unless they are otherwise exempt (see, for example the categories discussed in No. 8 above) (29 C.F.R. § 778.101).

18. There is no FLSA limit on the number of hours per day worked (other than child labor) (29 C.F.R. § 778.102).
19. A work week under the FLSA is defined as seven consecutive 24-hour periods (although this may be altered for police and firefighters as discussed above). Note that this may not be the same as the city’s “pay period.” The city can determine the day and the time of day that the work week begins. Once the beginning time of an employee’s work week is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the work week may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act (29 C.F.R. § 778.105). We recommend that the city work week for water, sewer, street, sanitation, etc., employees begin at 5 p.m. on Fridays.

The city can schedule the hours worked within the work week to limit or prevent overtime. If an emergency occurs over the weekend and some employees must work 16 hours Saturday and 16 hours Sunday, then the city can (if their services are not absolutely needed) tell those employees to take off the rest of the week after working one eight hour shift each. This way each employee is limited to 40 hours per week for the week beginning 5 p.m. on Friday.

20. Only hours worked count in calculating overtime. Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked (29 C.F.R. § 778.102).

21. If an employee works more than 40 hours per week, the city could give him compensatory time off at the rate of 1½ hours for each hour worked over 40 hours per week. The compensatory time belongs to the employee and can accrue to a maximum of 240 hours (160 hours actual work).

The employee must be allowed to use his comp time when he desires unless it would unduly disrupt the city’s operations to do so at that particular time. For a discussion of requiring the employee to take accumulated compensatory time, see point 16 above.

In case of termination of employment, an employee shall be paid for all accrued comp time at his then salary or the average rate of pay for the final three years of employment, whichever is greater (29 C.F.R. §§ 553.21, 553.25).