

Sonoma County Office of Education  
Business Services

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**EXTERNAL FISCAL SERVICES UPDATES**  
**DEBUG MEETING: SEPTEMBER 21, 2017**

***Follow-up to Recent Court Decision Regarding OT Pay Rate:***

It is important to understand, as a result of the Flores vs City of San Gabriel, the Ninth Circuit Court of Appeal's decision regarding regular rate of pay, for purposes of calculating the overtime rate, is specific to FLSA's regular rate of pay. The ruling does not affect the regular rate of pay used under Ed Code 45128. Attached are copies of Ed code 45128 and *applicable pages of Title 29 USC Chapter 8: Fair Labor Standards, Section 207: Maximum hours*. FLSA defines overtime as a workweek longer than forty hours, whereas Ed Code 45128 defines overtime "to include any time required to be worked in excess of eight hours in any one day and in excess of 40 hours in any calendar week."

The Public Employees' Retirement Law includes Government Code 20635.1 for which overtime is the service performed by the employee in excess of 40 hours of work per week. For part-time employees this means additional services rendered up to 40 hours per week are reportable at the employee's normal monthly rate of pay. This law remains in effect and unchanged by the Flores case.

Under FLSA, the total cash-in-lieu payments must be "bona fide". In the Flores decision the court did not give a clear definition of a "bona fide" plan, but held if the total amount of cash-in-lieu an agency pays to employees is more than 40% of the benefits plan payments as a whole, the plan is not "bona fide". If the plan is not "bona fide", all of the employer's contributions to the plan, in addition to cash-in-lieu, must be included in the regular rate. Please be reminded: Under both RESIG and CVT, "benefit eligible" employees are prohibited to receive a cash-in-lieu of benefits. *Please see back of this page steps for preparing a plan-wide analysis*

It is recommended LEAs reach out to their legal counsel for advice on how this court decision may impact your district and to ensure compliance.

***Upcoming Workshop Reminders:***

Registration for the CASBO Accounts Payable workshop closes on Monday, September 25<sup>th</sup> and the CASBO 1099 workshop closes on Monday, October 2<sup>nd</sup>.

**Excerpt from HR/Payroll User Group Meeting, 9/13/2017:**

CASBO presented at their annual conference last April the new potential pitfalls regarding cash-in-lieu of health benefits in relation to the regular rate of pay used to pay overtime. Likewise, School Service put out a report in September 2016 on how to calculate the overtime pay rate with longevity and cash-in-lieu. The regular rate of pay, for purposes of calculating the overtime rate, must include all forms of regular monthly compensation including longevity, cash-in-lieu, degree stipend and most other regular additions to base salary. This requires you to know what pay must be included, calculating the value of the pay on a workweek basis and including the value of the pay in the regular rate calculation. For purposes of calculating the overtime rate, the regular rate of pay is the total remuneration for employment in any workweek divided by the total hours actually worked by the employee in that workweek (see example below):

In this example, Jane earns \$20/hour and worked 44 hours in her 40 hours, 5 days work period. Jane is also paid \$100 per month in bilingual pay. Jane has also opted-out of medical coverage under the LEA's Section 125 and receives \$800/month in Cash in-Lieu.

1. Multiply total hours worked times base:  
 $44 \times \$20 = \$880.00$
2. Calculate the work week value of bilingual pay:  
 $\$100 \times 12 \text{ months divided by } 52 \text{ weeks} = \$23.08/\text{week}$
3. Calculate the work week value of the Cash in-Lieu:  
 $\$800 \times 12 \text{ months divided by } 52 \text{ weeks} = \$184.62/\text{week}$
4. Calculate Jane's Regular Rate by dividing the total amount earned by total hours worked:  
 $\$880 + \$23.08 + \$184.62 = \$1,087.70/44 \text{ hours} = \$24.72 \text{ Regular Rate of Pay}$

Another consideration requires looking at the cash-in-lieu payments relative to an employer's total contributions to the plan. Under FLSA, the total cash-in-lieu payments must be "incidental" to the total plan payments. If the total cash-in-lieu payments are greater than 40% of the total plan payments, the payments are more than "incidental" and the plan is not "bona fide". This means all payments to the plan must be included in the regular rate.

You must perform a plan-wide analysis (not employee-by-employee):

**Step 1:** Identify the plans and all plan participants (total number of employees)

**Step 2:** Identify Total Plan Payments:

Cash-in-lieu + Payments Employer made to the plan to cover premiums = Total Plan Payments

**Step 3:** Calculate cash-in-lieu payments as a percentage of the Total Plan Payments

**Step 4:** If the percentage is over 40%, this may be considered more than "incidental" (not bona fide) in which case all payments to the plan must be included in the regular rate.

It is strongly recommended LEA's reach out to their legal counsel for advice on how this court decision may impact your district, to ensure compliance with the OT regulations and for advice when developing policy.

# United States Code, Title 29

## USC Title 29

### Chapter 8. Fair Labor Standards. Maximum hours

207

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USC 201 et seq.] by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than \$ 1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any work-week at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6 [29 USC 206],

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) [Repealed]

(e) "Regular rate" defined. As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of

employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if--

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are--

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 [29 USC 206(a) or (b)] (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or



# California

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### EDUCATION CODE - EDC

**TITLE 2. ELEMENTARY AND SECONDARY EDUCATION [33000 - 64100]** (*Title 2 enacted by Stats. 1976, Ch. 1010.*)

**DIVISION 3. LOCAL ADMINISTRATION [35000 - 45460]** (*Division 3 enacted by Stats. 1976, Ch. 1010.*)

**PART 25. EMPLOYEES [44000 - 45460]** (*Part 25 enacted by Stats. 1976, Ch. 1010.*)

**CHAPTER 5. Classified Employees [45100 - 45460]** (*Chapter 5 enacted by Stats. 1976, Ch. 1010.*)

**ARTICLE 1. Employment [45100 - 45139]** (*Article 1 enacted by Stats. 1976, Ch. 1010.*)

**45128.** The governing board of each district shall provide the extent to which, and establish the method by which ordered overtime is compensated. The board shall provide for such compensation or compensatory time off at a rate at least equal to time and one-half the regular rate of pay of the employee designated and authorized to perform the overtime.

Overtime is defined to include any time required to be worked in excess of eight hours in any one day and in excess of 40 hours in any calendar week. If a governing board establishes a workday of less than eight hours but seven hours or more and a workweek of less than 40 hours but 35 hours or more for all of its classified positions or for certain classes of classified positions, all time worked in excess of the established workday and workweek shall be deemed to be overtime. The foregoing provisions do not apply to classified positions for which a workday of fewer than seven hours and a workweek of fewer than 35 hours has been established, nor to positions for which a workday of eight hours and a workweek of 40 hours has been established, but in which positions employees are temporarily assigned to work fewer than eight hours per day or 40 hours per week when such reduction in hours is necessary to avoid layoffs for lack of work or lack of funds and the consent of the majority of affected employees to such reduction in hours has been first obtained.

For the purpose of computing the number of hours worked, time during which an employee is excused from work because of holidays, sick leave, vacation, compensating time off, or other paid leave of absence shall be considered as time worked by the employee.

This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter.

*(Enacted by Stats. 1976, Ch. 1010.)*