

# LEGISLATIVE SPECIAL REPORT

## FAIR LABOR STANDARDS ACT EXEMPT EMPLOYEES OVERTIME AND HOLIDAY COMPENSATION STUDY

### REPORT OVERVIEW

- 23% of State agencies provide overtime cash payments to FLSA exempt employees
- 28% of State agencies allow FLSA exempt employees to accrue compensatory time off in lieu of overtime cash payments
- 3% of State agencies do not provide holiday compensation to FLSA exempt employees when they work on an official state holiday



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**WEST VIRGINIA LEGISLATURE**  
***Joint Committee on Government and Finance***

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The Joint Committee on Government and Finance:

Upon the request of the Legislative Post Audit Sub-Committee, we surveyed State agencies under the Executive and Judicial branches of government on policies for providing overtime, compensatory time, and holiday compensation to Fair Labor Standards Act (FLSA) exempt employees. We did not perform any additional audit procedures to ensure the agencies responses were accurate; we solely relied on the agencies responses for the basis of our report.

Respectfully submitted,

A handwritten signature in cursive script that reads "Stacy L. Sneed".

Stacy L. Sneed, CPA, CICA, Director  
Legislative Post Audit Division

**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

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**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

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**STATE AGENCIES SURVEYED**

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1. **Department of Administration (Office of Cabinet Secretary)**
2. Aviation Division
3. Children's Health Insurance Program
4. Consolidated Public Retirement Board
5. Ethics Commission
6. Finance Division
7. General Services Division
8. Personnel, Division of
9. Prosecuting Attorneys Institute
10. Public Defender Services
11. Public Employees Grievance Board
12. Public Employees Insurance Agency
13. Purchasing Division
14. Risk and Insurance Management, Board of
15. Technology, Office of
16. Real Estate Division
17. Fleet Management Office
18. \* **Department of Commerce (Office of Cabinet Secretary)**
19. \* Development Office, WV
20. \* Energy, Division of
21. Forestry, Division of
22. Geological and Economic Survey
23. \* Labor, Division of
24. Miners' Health, Safety and Training
25. Natural Resources, Division of
26. \* Tourism, Division of
27. Workforce West Virginia
28. **Department of Education and the Arts (Office of Cabinet Secretary)**
29. Culture and History, Division of
30. \* Educational Broadcasting, WV
31. Library Commission
32. \* Professional Development, Center for
33. Rehabilitation Services, Division of
34. **Department of Environmental Protection (Office of Cabinet Secretary)**
35. Abandoned Mine Lands
36. Administration, Office of
37. Air Quality Board

- 38. Air Quality, Division of
- 39. Environmental Enforcement
- 40. Environmental Quality Board
- 41. Explosives & Blasting, Office of
- 42. Land Restoration, Division of
- 43. Mining and Reclamation, Division of
- 44. Oil and Gas, Office of
- 45. Public Information Office (DEP)
- 46. Solid Waste Management Board
- 47. Surface Mine Board
- 48. Water and Waste Management, Division of
- 49. **Department of Health & Human Resources (Office of Cabinet Secretary)**
- 50. Behavioral Health and Health Facilities, Bureau for
- 51. Catastrophic Illness Commission
- 52. Child Support Enforcement, Bureau for
- 53. Children and Families, Bureau for
- 54. Deaf and Hard-of-Hearing, Commission for the
- 55. Developmental Disabilities Council
- 56. Health Care Authority, WV
- 57. Human Rights Commission, WV
- 58. Inspector General, Office of the
- 59. Medical Services, Bureau for
- 60. Public Health, Bureau for
- 61. Women's Commission, WV
- 62. **Department of Military Affairs and Public Safety (Office of Cabinet Secretary)**
- 63. Adjutant General's Office
- 64. Corrections, Division of
- 65. Fire Commission, State
- 66. Homeland Security and Emergency Management , Division of
- 67. Justice and Community Services, Division of
- 68. Juvenile Services, Division of
- 69. Parole, Board of
- 70. Protective Services, Division of
- 71. Regional Jail & Correctional Facility Authority
- 72. State Police, West Virginia
- 73. ^ Veterans Affairs, Division of
- 74. **Department of Revenue (Office of Cabinet Secretary)**
- 75. Alcohol Beverage Control Administration
- 76. \* Athletic Commission
- 77. Banking, Division of
- 78. Budget Office, State
- 79. Insurance Commissioner, Offices of the
- 80. Lottery Commission

- 81. Municipal Bond Commission
- 82. Racing Commission
- 83. Tax Appeals, Office of
- 84. Tax Department
- 85. **Department of Transportation (Office of Cabinet Secretary)**
- 86. Aeronautics Commission
- 87. Highways, Division of
- 88. Motor Vehicles, Division of
- 89. \* Parkways, Economic Development, and Tourism Authority
- 90. Public Port Authority
- 91. Public Transit, Division of
- 92. State Rail Authority
- 93. Agriculture, Department of (including Conservation Agency)
- 94. Attorney General, Office of
- 95. ^ Bar, WV State
- 96. Coal Heritage Highway Authority
- 97. Courthouse Facilities Improvement Authority
- 98. Economic Development Authority
- 99. Education, State Department of
- 100. Governor's Office
- 101. Hospital Finance Authority, WV
- 102. Network, WV
- 103. Public Service Commission
- 104. Real Estate Commission
- 105. School Building Authority
- 106. Secretary of State, Office of
- 107. Senior Services, Bureau of
- 108. State Auditor, Office of
- 109. State Treasurer, Office of
- 110. Supreme Court of Appeals
- 111. Water Development Authority
- 112. WV Board of Accountancy
- 113. WV Board of Acupuncture
- 114. WV Board of Architects
- 115. WV Board of Barbers and Cosmetologists
- 116. \* WV Board of Chiropractic
- 117. \* WV Board of Dental Examiners
- 118. WV Board of Examiners for Licensed Practical Nurses
- 119. WV Board of Examiners for Registered Professional Nurses
- 120. WV Board of Examiners for Speech, Language, Pathology, and Audiology
- 121. WV Board of Examiners in Counseling
- 122. WV Board of Examiners of Psychologists
- 123. WV Board of Funeral Service Examiners



- 124. WV Board of Landscape Architects
- 125. WV Board of Licensed Dietitians
- 126. WV Board of Medicine
- 127. WV Board of Occupational Therapy
- 128. WV Board of Optometry
- 129. WV Board of Osteopathy
- 130. \* WV Board of Pharmacy
- 131. WV Board of Physical Therapy
- 132. WV Board of Professional Surveyors
- 133. WV Board of Registration for Foresters
- 134. WV Board of Registration for Professional Engineers
- 135. WV Board of Respiratory Care
- 136. WV Board of Social Work Examiners
- 137. WV Board of Veterinary Medicine
- 138. WV Massage Therapy Licensure Board
- 139. \* WV Medical Imaging & Radiation Therapy Technology Board of Examiners
- 140. \* WV Real Estate Appraiser Licensing & Certification Board
- 141. WV Higher Education Policy Commission
- 142. Bluefield State College
- 143. Blue Ridge Community & Technical College
- 144. Bridgemont Community & Technical College
- 145. Concord University
- 146. Eastern WV Community & Technical College
- 147. Fairmont State University
- 148. Glenville State College
- 149. \* Kanawha Valley Community & Technical College
- 150. Marshall University
- 151. Mountwest Community & Technical College
- 152. New River Community & Technical College
- 153. Pierpont Community & Technical College
- 154. Potomac State College of WVU
- 155. \* Shepherd University
- 156. Southern WV Community & Technical College
- 157. West Liberty University
- 158. WV Northern Community College
- 159. WV School of Osteopathic Medicine
- 160. West Virginia State University
- 161. West Virginia University
- 162. WVU at Parkersburg
- 163. WVU Institute of Technology

\* Sixteen State agencies failed to respond to our overtime and compensatory time survey.

^ Two State agencies failed to respond to our additional survey regarding holiday compensation.

**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

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**INTRODUCTION**

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**POST AUDIT AUTHORITY**

This is the special report on overtime and holiday compensation policies and procedures of West Virginia State agencies. The study was conducted pursuant to Chapter 4, Article 2 of the West Virginia Code, as amended, which requires the Legislative Auditor to “make post audits of the revenues and expenditures of the spending units of the state government, at least once every two years, if practicable, to report any misapplication of state funds or erroneous, extravagant or unlawful expenditures by any spending unit, to ascertain facts and to make recommendations to the Legislature concerning post audit findings, the revenues and expenditures of the state and of the organization and functions of the state and its spending units.”

**DEFINITIONS**

For the purposes of this report, the following definitions apply:

- Overtime Pay:** Extra pay for hours worked in excess of the employee's agreed upon workweek, regardless of whether the pay rate for the extra hours is at an employee's regular hourly rate (straight pay) or at one and one-half the employee's regular hourly rate (premium pay).
- Compensatory Time:** Time off given to employees in lieu of cash payments for overtime hours worked.
- Holiday:** Official State or Federal day from which employees are scheduled off work with pay.

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**REPORT SCOPE**

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We have prepared a special report based on the results of two surveys sent to a majority of State agencies under the Executive and Judicial branches of government on overtime and holiday compensation policies for Fair Labor Standards Act (FLSA) exempt employees.<sup>1</sup> We did not perform any audit procedures to ensure the agencies responses were accurate; we solely relied on the verbal or written responses provided by each agency for the basis of our report.

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<sup>1</sup> This report does not include information on polices for providing overtime, compensatory time, and holiday compensation for employees of the Legislative Branch. Typically, Legislative employees of the Joint Committee on Government and Finance do not receive overtime pay or compensatory time. However, a Joint Committee employee will be credited with annual leave to compensate for the loss of a holiday or weekend day if the employee is required to work on such a day during Legislative sessions or during interim committee meetings. In addition, extraordinary hours worked by a Joint Committee employee in excess of a normal work day may be considered by management prior to requiring the employee take annual leave or leave-without-pay for a subsequent late arrival at work the following morning.

We did not conduct this special report in accordance with Generally Accepted Governmental Auditing Standards (GAGAS) because the information provided to us by the State Agencies was not audited.

The results of this report were limited by each agency's understanding or interpretation of the survey questions and terms. Further limitations were caused by State agencies having multiple definitions for leave, overtime, and compensatory time. Lastly, it seemed several State agencies were also confused about the definition of a FLSA exempt employee and did not know whether certain employees were considered exempt or nonexempt.

The WV State Auditor's Office (WVSAO) supplied Post Audit with payroll (EPICS<sup>2</sup>) data which showed in fiscal year 2011 the State paid out a little over \$45.6 million in overtime. As a result of current practices, the WVSAO was unable to separate the amount paid to FLSA exempt employees from the amount paid to FLSA nonexempt employees. (See Appendix E) Thus, we are unable to cite the portion of the \$45.6 million which was paid to FLSA exempt employees during the fiscal year.

We provide no assurance that State agencies have (1) correctly applied the FLSA when deciding whether or not employees are exempt from receiving overtime compensation, and (2) correctly and/or consistently complied with WV State Code in compensating employees for state holidays. Payroll records (timesheets, OT forms, etc.) were not audited, therefore, we provide no assurance as to whether or not all State agencies sufficiently documented overtime, compensatory time, and holidays for FLSA exempt employees. Without audit evidence we cannot and do not attest that all overtime claimed by FLSA exempt employees was actually worked or that overtime was not abused.

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## OBJECTIVES AND METHODOLOGIES

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The objectives of our special report were to determine State agencies policies and procedures on FLSA exempt employees' overtime and holiday compensation, to ascertain facts, and to make recommendations to the Legislature concerning the functions of the State and its spending units.

In order to achieve the objectives noted above, we reviewed applicable sections of the West Virginia Code, Legislative Rules, Federal Fair Labors Standards Act, Code of Federal Regulations, as well as other rules, regulations, policies, and procedures as they related to overtime and holiday compensation for FLSA exempt employees. We sent a majority of State agencies an overtime survey (Appendix B) on May 27, 2011 to complete on their respective overtime and compensatory time policies and to submit back to us. We also sent a subsequent holiday compensation survey (Appendix D) on November 8, 2011 to those agencies who responded to the overtime survey. For both surveys, we followed-up on any questions, on an as needed basis, via e-mail and/or telephone interview.

Since the objective of this special report was to cite the results of inquiry, we did not evaluate each individual agency's internal controls.

Our reports are designed to assist the Post Audit Subcommittee in exercising its legislative oversight function and to provide constructive recommendations for improving State operations. As a result, our reports generally do not address activities we reviewed that are functioning properly.

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<sup>2</sup> EPICS is an acronym for Employee Payroll Information Control System. EPICS is the official payroll accounting system for WV State agencies.

This report is intended solely for the information and use of the Post Audit Subcommittee, the members of the WV Legislature, management of the spending units and others within the spending unit. However, once presented to the Post Audit Subcommittee, this report is a matter of public record and its distribution is not limited.

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## CONCLUSIONS

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We noted 51 State agencies provide overtime compensation in some form (cash payments or compensatory time off) to employees who are exempt from the FLSA requirement for overtime. We also noted four State agencies do not provide holiday compensation to FLSA exempt employees when employees are required to work on a state holiday.

Although the FLSA does not require overtime compensation to certain exempt employees, the FLSA does not disallow overtime compensation to those exempt employees. Most State wage-hour laws are patterned after the FLSA, but State standards can be more protective of workers than the FLSA. The West Virginia Division of Personnel (DOP) FLSA Interpretive Bulletin No. 5 states, "Exempt employees are not subject to the overtime provisions of the FLSA. Such workers need not be paid overtime. **Employers may choose to pay overtime or compensatory time if they wish**, but they are not required to do so by the FLSA."**(Emphasis Added)** This bulletin allows each agency to act independently, thus creating widespread inconsistencies throughout the State.

The inconsistencies throughout the State will adversely impact the time and cost of implementing and maintaining the new statewide Enterprise Resource Planning (ERP) system. The fiscal impact of the inconsistencies was not identified by the Department of Administration (DOA) because at the time of our inquiry (November 2011) a contract for the system had not been awarded. As stated in DOA's attached response, "It is the team's goal [ERP Project Team] to implement a single policy for the accrual and payment of compensatory time and the payment of overtime for exempt employees across all state agencies. (See Appendix F). In addition, the inconsistencies cited in this report appear to create an inequality between various State employees and may result in employee job dissatisfaction and low employee morale for those employees who receive no alternative compensation or days off when they are required to work beyond their standard workweek or on state holidays.

The Legislative Auditor recommends the following options as an opportunity for the Legislature to clarify its intent regarding the payment of overtime and compensatory time to FLSA exempt employees:

- Keep the current practice, where each agency can do something different;
- Treat FLSA exempt employees the same as non-exempt employees;
- Create a standardized policy specifically for FLSA exempt employees to be administered consistently across the agencies; or
- Prohibit paying overtime/compensatory to FLSA exempt employees.

In addition, DOP needs to provide more training to human resources and payroll coordinators in regards to standard definitions, policies, and procedures for FLSA exempt/non-exempt employees and DOP classified/classified-exempt employees. Lastly, the DOP should implement a system to ensure State

agencies are assessing FLSA exemption status by reviewing the white-collar exemption worksheet for each salaried employee and if applicable, maintaining the completed form in each employee's personnel file.

The current classification in EPICS only states an employee's exemption status from the State's civil service laws (i.e. classified-exempt [not under the authority of DOP] or classified). If the Legislature decides cash for overtime should be provided to FLSA exempt employees, then we recommend new type codes (or the equivalent) be added for use with the future ERP system (WV OASIS<sup>3</sup>), so overtime payments made to FLSA exempt and nonexempt employees can be identified for any future analysis or study. The type codes would be used by each agency when entering payroll information per employee.

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### EXIT CONFERENCE

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The objective of this report was to identify the practices and inconsistencies of various WV State agencies in regards to paying FLSA exempt employees' overtime and holiday compensation. Aside from the appearance of non-compliance cited in Issue 3, it was not our objective to test for agency non-compliance with any Federal or State laws, rules, or other regulations, therefore we did not report any additional agency non-compliance. Consequently, we deemed it unnecessary to hold exit conferences with survey participants or provide agencies the opportunity to respond to the issues addressed in this report with the exception of the agencies cited in Issue 3.

All four agencies cited in Issue 3 were given the opportunity to provide a response. For the agencies that did respond, the responses are included in Appendix G at the end of the report. The Attorney General's Office and the State Budget Office chose not to respond.

This report was also provided to DOP management and the ERP (OASIS) project Director. The DOP response is included in Appendix H. The ERP (OASIS) project Director did not respond.

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<sup>3</sup> Our Advanced Solution with Integrated Systems.

**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

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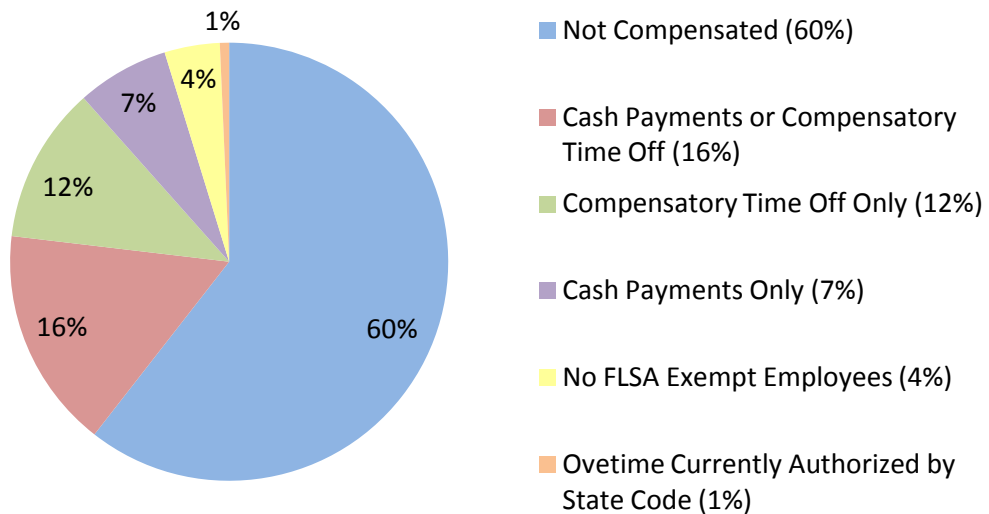
**CHART OVERVIEW**

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**Chart 1:** Of the 147 agencies that responded to our overtime survey, 89 agencies (60%) do not provide any form of overtime compensation to FLSA exempt employees.<sup>4</sup>

A total of 51 agencies (35%) provided overtime compensation to FLSA exempt employees by means of cash payments (10), compensatory time off (17), or both (24). A total of six agencies answered they have no FLSA exempt employees. One agency has the authority to provide overtime to some of its FLSA exempt employees.<sup>5</sup>

**FLSA Exempt Overtime Compensation  
(Unaudited)**



**Chart 1 Note:** Survey responses were not sufficient to identify whether or not the agencies in the “Not Compensated” category permit a policy similar to compensatory time off called “schedule adjustments”, “flexitime”, etc. , so actual work hours do not exceed the standard amount in a given workweek or pay period. For example: A FLSA exempt employee is required to work a schedule that results in 36 actual work hours prior to Friday. If the exempt employee is only required to work 4 hours on Friday to reach 40 hours, then a schedule adjustment has occurred.

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<sup>4</sup> Although 89 agencies do not provide any form of overtime compensation, most provide holiday compensation to FLSA exempt employees who work on an official state holiday. See Chart 2 and Issue 3.

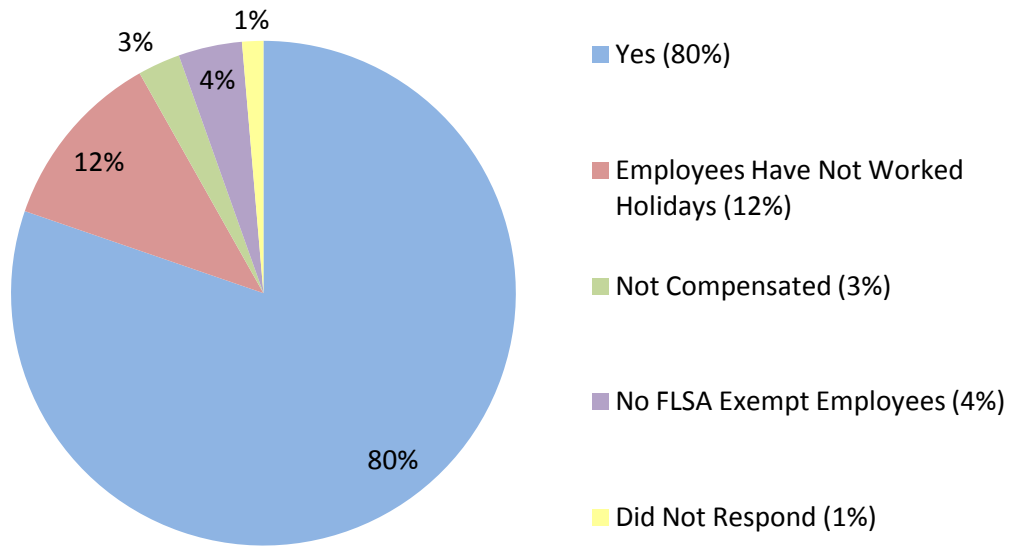
<sup>5</sup> The WV State Police provides “supplemental pay” to “members” (i.e. police officers), but are allowed to do so per W.Va. Code §15-2-5 and CSR 81-01. No overtime cash payments are made to any other FLSA exempt employees (i.e. civilians) employed by the WV State Police.

**Chart 2:**

We sent an additional holiday survey requesting information on holiday compensation given to FLSA exempt employees.

118 agencies (80%) provided compensation to FLSA exempt employees for working on holidays. Exempt employees of 17 agencies (12%) have not worked on holidays.<sup>6</sup> Four agencies do not provide compensation for working on holidays. Six agencies have no FLSA exempt employees. Two agencies did not respond to our additional holiday survey.

### FLSA Exempt Holiday Compensation (Unaudited)



<sup>6</sup> Two of these agencies (WV Board of Barbers and Cosmetologists and the WV Board of Medicine) have not worked on an official holiday, but responded they would provide holiday compensation to FLSA exempt employees if a situation required work on a holiday.

**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

**REPORTABLE INCONSISTENCIES AND OTHER MATTERS**

**Issue 1                      Inconsistent Overtime Cash Payments**

**Condition:**                      Our study revealed 34 State agencies (23%) provide overtime cash payments to FLSA exempt employees when such payments are not required by Federal or State Law.<sup>7</sup> Agencies are cited regardless of the frequency of overtime cash payments. (See Informational Items 1-2 for additional inconsistencies found concerning overtime cash payments.) The following table lists these agencies and the corresponding letter for the rate of pay used.

**A    One-and-One-Half Pay After 40 Hours – 28 State Agencies**

*-40 hours could include a 30 minute paid lunch. Employees on paid lunch may or may not be on duty working.*

*-Two of these agencies (Public Service Commission and Workforce WV) also provide straight pay for overtime hours worked beyond the agency's standard workweek up to 40 hours. (i.e. For example: Straight pay for the hours worked between the 37.5<sup>th</sup> hour and 40<sup>th</sup> hour)*

**B    All Straight (Hourly Rate) Pay – 6 State Agencies**

*Straight pay begins immediately after a FLSA exempt employee's standard workweek, regardless of whether the workweek is 37.5 or 40 hours.*

| <b>Agency<sup>8</sup></b>               | <b>Rate</b> |
|---|-------------|
| Abandoned Mine Lands                    | A           |
| Adjutant General's Office ^             | A           |
| Administration, Office of               | A           |
| Air Quality Board                       | A           |
| Air Quality, Division of                | A           |
| Alcohol Beverage Control Administration | B           |
| Corrections, Division of *              | A           |
| Environmental Enforcement               | A           |

<sup>7</sup> Survey responses were not sufficient to identify whether or not any of these agencies pay FLSA exempt employees in excess of salary for sick or annual leave at a straight rate when the use of leave during a given workweek would extend payroll hours beyond a standard workweek. See Appendix A for legislation governing this issue.

<sup>8</sup> Table Legend:

\* Only "lower level" exempt employees are paid overtime compensation. Lower level was defined differently by each of the agencies that responded.

^ The agency only gives overtime to FLSA exempt employees when they perform non-exempt job duties.

+ This agency is currently unaware of whether the civilian employees are exempt from the FLSA overtime provisions.



| <u>Agency</u> <sup>8</sup>  | <u>Rate</u> |
|---|-------------|
| Environmental Quality Board   | A           |
| Environmental Protection, Department of (Office of Cabinet Secretary) | A           |
| Explosives & Blasting, Office of                                      | A           |
| Highways, Division of *   | B           |
| Juvenile Services, Division of  | A           |
| Land Restoration, Division of   | A           |
| Mining and Reclamation, Division of                                   | A           |
| Motor Vehicles, Division of   | B           |
| Natural Resources, Division of ^                                      | A           |
| Oil and Gas, Office of  | A           |
| Parole, Board of  | A           |
| Protective Services, Division of +                                    | A           |
| Public Information Office (DEP)                                       | A           |
| Public Service Commission ^   | A           |
| Public Transit, Division of   | B           |
| Racing Commission ^   | A           |
| Regional Jail & Correctional Facility Authority                       | A           |
| Revenue, Department of (Office of Cabinet Secretary)                  | A           |
| Secretary of State, Office of   | A           |
| Solid Waste Management Board  | A           |
| State Rail Authority  | B           |
| Surface Mine Board  | A           |
| Transportation, Department of (Office of Cabinet Secretary)           | B           |
| Water and Waste Management, Division of                               | A           |
| Workforce West Virginia ^   | A           |
| WV Board of Professional Surveyors                                    | A           |
| <b>34 State Agencies</b>  |             |

**Issue 1 Note:** As noted in the Report Scope, the total dollar amount of overtime cash payments given to FLSA exempt employees was not identified due to the limitations of the payroll data pulled from the State’s computerized system, EPICS, which does not categorize employees or overtime payments by Federal exemption status.

**Criteria:**

The West Virginia Division of Personnel’s FLSA Interpretive Bulletin DOP-5: FREQUENTLY ASKED QUESTIONS, question 24 states:

“24. Must exempt employees who work overtime be paid for that overtime?

Exempt employees are not subject to the overtime provisions of the FLSA. Such workers need not be paid overtime. **Employers may choose to pay overtime or compensatory time if they wish**, but they are not required to do so by the FLSA.”(Emphasis Added)

The West Virginia Division of Personnel Legislative Rule Title 143, Series 1, Section 14.7, states:

**“Overtime Work and Holiday Work - An appointing authority or his or her designated representative may require an employee to work in excess of the prescribed working hours or on holidays when the work is considered necessary to the public interest. Compensation shall be made in accordance with the Federal Fair Labor Standards Act and relevant Federal regulations and W.Va. Code §21-5C-1 et seq.”**  
**(Emphasis Added)**

**The Fair Labor Standards Act also exempts certain types of employees from both the minimum wage and overtime pay requirement.**

Fair Labor Standards Act, Sections 13(a)(1) and 13(a)(17), as amended, respectively state in part:

**“(a) The provisions of sections 6 ... and 7 shall not apply with respect to- (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman...”(Emphasis Added)**

**“(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker”**

Title 29, Code of Federal Regulations, §553.32, states in part:

**“...(c) ... An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary...”**

**The Fair Labor Standards Act generally does not require overtime compensation for nonexempt work performed by an exempt employee, as long as: (1) the exempt employee’s primary duty is exempt work (2) the exempt employee earns incrementally more than nonexempt employees and (3) the nonexempt work is directly and closely related to the exempt work.**

Title 29, Code of Federal Regulations, §541.700, states in part:

**“(a)...an employee's “primary duty” must be the performance of exempt work. The term “primary duty” means the principal, main, major or most important duty that the employee performs ... (b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in**

this section requires that exempt employees spend more than 50 percent of their time performing exempt work.” **(Emphasis Added)**

“(c)... However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.”

Title 29, Code of Federal Regulations, §541.703, states in part:

“(a) Work that is “**directly and closely related**” to the performance of exempt work is also considered exempt work...” **(Emphasis Added)**

**Certain types of workers are not included in the exemption from overtime regardless of rank or pay level.**

Title 29, Code of Federal Regulations, §541.3, states in part:

“(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy.”

“(b)(1) **The section 13(a)(1) exemptions** and the regulations in this part also **do not apply to** police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, **regardless of rank or pay level**, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.” **(Emphasis Added)**

The Higher Education Policy Commission Procedural Rule Title 133, Series 8, Section 2.25 states,

“Exempt. Employees not covered by the Fair Labor Standards Act (FLSA) for overtime purposes.”

**Cause:**

There is no State statute or DOP rule which specifies how State agencies are to handle overtime hours of FLSA exempt employees. The DOP Interpretive

Bulletin No. 5, as quoted in part in the Criteria section above, delegates the authority for each State agency to decide for itself on the question of whether or not to provide cash payments for overtime hours worked by FLSA exempt employees. In addition, there is no guidance on the methodology agencies should follow if they decide to grant cash payments.

**Effect:**

There is no consistency among State agencies in their application of overtime compensation for FLSA exempt employees. This lack of consistency may be construed as unfair by State employees who have similar job duties, but do not receive similar compensation. For example, an attorney (i.e. professional) at one State agency may get paid cash for hours worked beyond 40, while an attorney at a different State agency may receive no other compensation beyond salary.

**Recommendation:**

The Legislative Auditor recommends the following options as an opportunity for the Legislature to clarify its intent regarding the cash payment of overtime to FLSA exempt employees:

- Keep the current practice where some agencies pay cash to FLSA exempt employees working overtime and other agencies do not;
- Treat FLSA exempt employees the same as non-exempt employees;
- Create a standardized overtime policy specifically for FLSA exempt employees to be administered consistently across the agencies; or
- Prohibit cash payments for overtime worked by FLSA exempt employees.

In addition, the following information should be noted before legislation or a statewide policy is created for overtime cash payments to FLSA exempt employees:

All FLSA exempt employees do not receive similar salary compensation. Per the FLSA, an exempt employee's gross annual income may be as low as \$23,660 (not less than \$455 per week) to as high as over \$100,000 for those exempt employees categorized as "Highly Compensated"<sup>9</sup>. Therefore, a statewide policy does not necessarily need to treat all levels of FLSA exempt employees the same. The policy could specifically identify cases where overtime cash payments would be allowable. For example, only those FLSA exempt employees who make less than a given amount, with a cap on the maximum of cash payments allowed before compensatory time must be accrued.

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<sup>9</sup> See the White-Collar Exemption Worksheet in Appendix C.

**Issue 2**

**Inconsistent Compensatory Time Off**

**Condition:**

Our study revealed 41 State agencies (28%) allow FLSA exempt employees to accrue compensatory time off in lieu of cash payments for working in excess of the agency’s standard workweek. Agencies are cited regardless of the frequency of compensatory time accrual. (See Informational Items 3-5 for additional inconsistencies found concerning compensatory time off.) The following table lists these agencies and the corresponding letter for the rate of time accrued for each hour of overtime worked.

**A One-and-One-Half Compensatory Time After 40 Hours – 20 State Agencies**

*-40 hours could include a 30 minute paid lunch. Employees on paid lunch may or may not be on duty working.*

**B All Straight (Hour for Hour) Compensatory Time – 21 State Agencies**

| <u>Agency</u> <sup>10</sup>   | <u>Rate</u> |
|---|-------------|
| Abandoned Mine Lands  | A           |
| Administration, Office of   | A           |
| Air Quality Board   | A           |
| Air Quality, Division of  | A           |
| Aviation Division   | A           |
| Education, State Department of  | B           |
| Environmental Enforcement   | A           |
| Environmental Protection, Department of (Office of Cabinet Secretary) | A           |
| Environmental Quality Board   | A           |
| Ethics Commission   | B           |
| Explosives & Blasting, Office of                                      | A           |
| Geological and Economic Survey  | B           |
| Health Care Authority, WV*  | B           |
| Highways, Division of   | B           |
| Justice and Community Services, Division of                           | B           |
| Land Restoration, Division of   | A           |

<sup>10</sup> Table Legend:

- \* Exempt staff can accrue compensatory time at hour for hour for any time worked in excess of two hours beyond their regular work day.
- ^ This is a rare occurrence for salaried personnel, but is earned on a case by case basis where circumstances present a need.
- ~ Rarely accrued, typically for attendance at out of town conferences which take place on weekends.
- \*\* The Legislative Auditor’s wife is the general counsel for the Secretary of State (SOS) and has received compensatory time off. Exempt employees of the SOS have the option to choose between compensatory time off or cash payments for overtime hours worked.
- + This agency is currently unaware of whether the civilian employees are exempt from the FLSA overtime provisions.

| <u>Agency</u> <sup>10</sup>                                 | <u>Rate</u> |
|---|-------------|
| Mining and Reclamation, Division of                         | A           |
| Motor Vehicles, Division of                                 | B           |
| Natural Resources, Division of                              | B           |
| Oil and Gas, Office of                                      | A           |
| Protective Services, Division of <sup>+</sup>               | A           |
| Public Information Office (DEP)                             | A           |
| Public Service Commission                                   | B           |
| Public Transit, Division of                                 | B           |
| Real Estate Commission                                      | B           |
| Secretary of State, Office of**                             | A           |
| Senior Services, Bureau of                                  | B           |
| Solid Waste Management Board                                | A           |
| State Auditor, Office of                                    | A           |
| State Treasurer's Office                                    | B           |
| Surface Mine Board  | A           |
| Tax Appeals, Office of ^                                    | B           |
| Transportation, Department of (Office of Cabinet Secretary) | B           |
| Water and Waste Management, Division of                     | A           |
| WV Board of Examiners for Licensed Practical Nurses ~       | B           |
| WV Board of Examiners for Registered Professional Nurses    | B           |
| WV Board of Examiners of Psychologists                      | B           |
| WV Board of Medicine  | B           |
| WV Board of Physical Therapy                                | B           |
| WV Board of Professional Surveyors                          | B           |
| WV Board of Registration for Professional Engineers         | A           |
| <b>41 State Agencies</b>                                    |             |

**Criteria:**

The West Virginia Division of Personnel's FLSA Interpretive Bulletin DOP-5: FREQUENTLY ASKED QUESTIONS, question 24 states:

"24. Must exempt employees who work overtime be paid for that overtime?

Exempt employees are not subject to the overtime provisions of the FLSA. Such workers need not be paid overtime. **Employers may choose to pay overtime or compensatory time if they wish**, but they are not required to do so by the FLSA." **(Emphasis Added)**

Title 29, Code of Federal Regulations, §553.28, states in part:

"...(b)Compensatory time which is earned and accrued by an employee working hours which are **"overtime" hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA** is also considered **"other" compensatory time...**" **(Emphasis Added)**

“... (d)The **FLSA does not require that the rate at which “other” compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment.** The rate at which “other” compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself...” **(Emphasis Added)**

**Cause:** There is no State statute or WV DOP rule which specifies how State agencies are to handle compensatory hours of FLSA exempt employees. The DOP Interpretive Bulletin No. 5, as quoted in part in the Criteria section above, delegates the authority for each State agency to decide for itself on the question of whether or not to provide compensatory time off for overtime hours worked by FLSA exempt employees. In addition, there is no guidance on the methodology agencies should follow if they decide to grant compensatory time off.

**Effect:** There is no consistency among State agencies in their application of compensatory time off for FLSA exempt employees. This lack of consistency may be construed as unfair by State employees who have similar job duties, but do not receive similar compensation. For example, an attorney (i.e. professional) at one agency may accrue compensatory time off for hours worked beyond 40, while an attorney at a different agency may receive no other compensation beyond salary.

**Recommendation:** The Legislative Auditor recommends the following options as an opportunity for the Legislature to clarify its intent regarding compensatory time to FLSA exempt employees:

- Keep the current practice where some agencies provide compensatory time in lieu of cash payments to FLSA exempt employees working overtime and other agencies do not;
- Treat FLSA exempt employees the same as non-exempt employees;
- Create a standardized overtime/compensatory time policy specifically for FLSA exempt employees to be administered consistently across the agencies; or
- Prohibit compensatory time for overtime worked by FLSA exempt employees.

If the Legislature decides to create a statewide policy for FLSA exempt employees, the following parameters should be considered for compensatory time off:

- Overtime hours should be authorized in writing by supervisor before work is performed;
- Overtime hours should be adequately recorded and subsequent use of compensatory time off should be recorded and tracked;
- A standard accrual rate for compensatory time should be determined;
- Whether or not compensatory time would accrue for nonworking time such as lunch, holidays, leave, vacations, or jury duty;

- Overtime assignments should be limited to situations where they are unavoidable. Avoiding overtime helps to reduce employee burn-out and ensure that services are provided effectively;
- Use of compensatory time by the exempt employee should not unduly disrupt the operations of the agency;
- Ensure agencies provide employees the opportunity to use compensatory time;
- Determine whether schedule adjustments and/or flextime within the same week or pay period would be acceptable;
- Determine if compensatory balances should have a cap and what the cap would be;
- Determine if compensatory time will be forfeited if not used prior to the effective date of separation from employment;
- Determine if compensatory time should be transferable to another State agency; and
- Determine if compensatory time should be eligible for conversion to cash payout upon retirement, termination, or other separation from employment.

It should be noted compensatory time off<sup>11</sup> seems to be the most fiscally responsible way of providing overtime compensation to exempt staff in order to keep highly skilled employees in the workforce of State agencies.

Lastly, we have noticed the confusion caused by the use of multiple terms to refer to compensatory time. Thus, all agencies should use the same terminology when referring to compensatory time accrued by FLSA exempt employees.

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<sup>11</sup> Time off from work to be taken at the request of the employee, without loss of pay, granted in return for hours worked in excess of a standard workweek.



**Issue 3**

**Inconsistent Holiday Compensation**

**Condition:**

Our study revealed four State agencies do not provide holiday compensation to FLSA exempt employees when they are required to work on an official state holiday.<sup>12</sup> (See Informational Items 6-8 for additional inconsistencies found concerning holiday time.)

| <u>Agency</u>                             |
|---|
| Attorney General, Office of               |
| Budget Office, State <sup>13</sup>        |
| Coal Heritage Highway Authority           |
| Water Development Authority <sup>13</sup> |
| <b>4 State Agencies</b>                   |

Furthermore, the State Budget Office and the Water Development Authority have DOP classified employees and, as a result, these agencies appear to be in non-compliance with the DOP Legislative Rule (cited below) because they fail to offer alternative holiday observances for classified employees who work on state holidays.

The Office of Attorney General and the Coal Heritage Highway Authority are exempt from the DOP's classified service by statute and therefore, are not required to follow DOP rules. Still, we noted several agencies with employees exempt from DOP's rules that gave alternate days off when FLSA exempt employees were required to work on holidays.

Also, since there is no clear guidance applicable to all State agencies on the issue of holidays worked by FLSA exempt employees, there is a variety of methods used by agencies in compensating employees when such holiday work occurs. The following table summarizes the inconsistent methods and rates applied to holiday compensation for the 118 agencies that provide holiday compensation to FLSA exempt employees.

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<sup>12</sup> We provide no assurance that agencies not cited always provide holiday compensation for every occurrence of holiday work.

<sup>13</sup> All classified employees of these agencies are governed by DOP. There are only a few positions within these agencies that are exempt from DOP, such as an agency's director.

| <u>Holiday Compensation Rate</u> <sup>14</sup>               | <u>No. of Agencies</u> | <u>Percentage (%)</u> |
|--|------------------------|-----------------------|
| Straight Time Off  | 72                     | 61.02%                |
| Straight Time Off or Straight Pay                            | 42                     | 35.59%                |
| Straight Time Off or Premium Time Off <sup>15</sup>          | 1                      | 0.85%                 |
| Straight Time Off or Premium Pay <sup>15</sup>               | 1                      | 0.85%                 |
| Straight Time Off, Straight Pay or Premium Pay <sup>15</sup> | 1                      | 0.85%                 |
| Straight Pay   | <u>1</u>               | <u>0.85%</u>          |
| <b>Total</b>   | <b><u>118</u></b>      | <b><u>100.00%</u></b> |

**Criteria:**

West Virginia DOP Legislative Rule Title 143, Series 1, Section 14.1(b), states in part:

“...When an agency must modify holiday observances to accommodate around-the-clock shifts or other special needs, the agency shall notify employees in advance of the modification and shall schedule alternate holiday observances on days as close as possible to the holidays. The total amount of paid time off for holidays shall not exceed eight hours per full day holiday.” (Emphasis Added)

The Higher Education Policy Commission Procedural Rule Title 133, Series 8, Section 5.3 states:

“When an exempt employee is required to work on any designated board or institution holiday, that employee shall be given substitute time off on an hour-for-hour worked basis.”

**Cause:**

The WV Department of Personnel rule, as quoted in the Criteria section above, only specifies how State agencies are to handle holiday hours worked by “classified employees”. The rule defines a classified employee as, “an employee who occupies a position allocated to a class in the classified service.” Therefore, the DOP rule does not appear to provide guidance for agencies/employees not covered (or classified) under DOP’s Rule. The fact there is no clear guidance on how to handle holidays worked by employees not covered by DOP’s Rule may have contributed to the failure of DOP non-covered agencies (Office of Attorney General and the Coal Heritage Highway Authority) to offer their employees alternative days off work when such employees are required to work on holidays. DOP non-covered agencies have the discretion to choose whether or not to give holiday pay or time off for hours worked on holidays by FLSA exempt

<sup>14</sup> DEFINITIONS:

Straight Time Off- One hour worked equals one hour of time off.

Straight Pay - One hour worked equals one hour of cash payment at the employees regular rate.

Premium Time Off- One hour worked equals one and 1/2 hours of time off.

Premium Pay - One hour worked equals cash payment at the employee’s regular rate times 1 and 1/2.

<sup>15</sup> Premium time off or premium pay is used when work hours exceed 40 in a given workweek.

employees—even though most non-covered agencies choose to follow DOP’s Rule regarding holiday compensation.

Although we cannot say definitively, the failure of DOP covered agencies (State Budget Office and the Water Development Authority) to comply with the DOP Rule is likely a result of a lack of awareness or understanding of the specific provision in the Rule requiring the agencies to offer classified employees (regardless of FLSA overtime exemption status) an alternative day off work for any holidays such employees are required to work.<sup>16</sup>

**Effect:** There is a lack of consistency among State agencies in their application of holiday compensation for FLSA exempt employees. The lack of consistency extends to some DOP covered agencies, as noted above, even though they have definitive guidance on how such holiday work should be compensated.

This lack of consistency may be construed as unfair by State employees who do not receive similar holiday compensation.

**Recommendation:** We recommend consistency among State agencies in their application of holiday time for FLSA exempt employees. It is the opinion of the Legislative Auditor that holiday compensation (in the form of time off on an hour-for-hour basis) should be given to all State employees exempt from the FLSA regardless of DOP classification status (covered or non-covered).

We further recommend the DOP add additional questions and answers to the FLSA Interpretative Bulletin No. 5 to address matters concerning time worked on holidays.

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<sup>16</sup> It is important to understand the distinction between employees exempt from DOP’s classified system (non-covered) and adherence to DOP’s rules and regulations as opposed to employees exempt from the Federal Fair Labor Standards Act (FLSA). The fact that an employee is exempt from overtime as required by the FLSA has no bearing on whether or not the employee is exempt from the DOP’s Rules.

**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

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**SUPPLEMENTAL INFORMATION FOR ISSUE 1  
FLSA EXEMPT STAFF PAID OVERTIME**

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**Informational Item 1    Lack of Limitations on Overtime Hours Accrued**

**Condition:**                    The 34 agencies that have FLSA exempt employees who work overtime do not have pre-determined limits on the number of overtime hours any such employee may accrue for any given work period.

**Recommendation:**        If the Legislature approves overtime cash payments for FLSA exempt employees, the Legislature should consider if a pre-determined limit needs to be set for the amount of overtime hours a FLSA exempt employee may accrue or if there should be a limit on the amount of cash payments FLSA exempt employees can receive.

**Informational Item 2    Lack of Consistent Calculation of Overtime Hourly Rate**

**Condition:**                    Four State agencies do not include annual increment in the calculation of FLSA exempt employees' overtime pay.

**Recommendation:**        If the Legislature approves overtime cash payments for FLSA exempt employees, we recommend annual increment be included in the calculation of overtime pay for FLSA exempt employees so as to be consistent with the calculation used for non-exempt employees.

**Cause:**                         For Informational Items 1 and 2 refer to the cause for Issue 1.

**Effect:**                        For Informational Items 1 and 2 refer to the effect for Issue 1.

**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

**SUPPLEMENTAL INFORMATION FOR ISSUE 2  
FLSA EXEMPT STAFF COMPENSATORY TIME OFF**

**Informational Item 3 Lack of Limitations on Accrual of Compensatory Time**

**Condition:** Seventeen State agencies (41%) which allow compensatory time do not impose a limit on the amount of compensatory time a FLSA exempt employee may accumulate.

| <b>Limited Accrual<br/>of Compensatory Time</b> | <b>No. of<br/>Agencies</b> | <b>Percentage (%)</b> |
|---|----------------------------|-----------------------|
| No  | 17                         | 41.46%                |
| Yes, 80 Hours                                   | 17                         | 41.46%                |
| Yes, 240 Hours                                  | 4                          | 9.76%                 |
| Yes, Other                                      | <u>3</u>                   | <u>7.32%</u>          |
| <b>Total</b>                                    | <b><u>41</u></b>           | <b><u>100.00%</u></b> |

**Recommendation:** The Legislature should determine if compensatory time needs to have an accrual limit for FLSA exempt employees and whether or not the limit will apply to all agencies.

**Informational Item 4 Lack of Expiration for Accrued Compensatory Time**

**Condition:** Twenty-four State agencies (59%) do not require FLSA exempt employees to use compensatory time within an allotted time period.

| <b>Compensatory Time Expires</b>        | <b>No. of Agencies</b> | <b>Percentage (%)</b> |
|---|------------------------|-----------------------|
| No                                      | 20                     | 48.78%                |
| No, Only prior to separation            | 4                      | 9.76%                 |
| Yes, Less than 1 Month                  | 5                      | 12.20%                |
| Yes, 1-3 Months                         | 3                      | 7.32%                 |
| Yes, 6 Months-1 Year                    | 1                      | 2.44%                 |
| Yes, Other                              | 5                      | 12.20%                |
| Yes, Within a Reasonable Period of Time | <u>3</u>               | <u>7.32%</u>          |
| <b>Total</b>                            | <b><u>41</u></b>       | <b><u>100.00%</u></b> |

**Recommendation:** The Legislature should determine if compensatory time for FLSA exempt employees will expire and whether or not the expiration time frame will apply to all agencies.

**Informational Item 5    Compensatory Time Converted into Cash Payments**

**Condition:**                     Nineteen State agencies (46%) pay FLSA exempt employees for accrued compensatory time when not used by expiration or before separation from the agency.

| <u>Compensatory Time Paid</u>                    | <u>No. of Agencies</u> | <u>Percentage (%)</u> |
|--|------------------------|-----------------------|
| Yes, Upon Expiration                             | 1                      | 2.44%                 |
| Yes, Upon Separation from Agency <sup>17</sup>   | 18                     | 43.90%                |
| No, Compensatory Time is Forfeited <sup>18</sup> | <u>22</u>              | <u>53.66%</u>         |
| <b>Total</b>                                     | <b><u>41</u></b>       | <b><u>100.00%</u></b> |

**Recommendation:**        The Legislature should determine if conversion of unused compensatory time into cash payments is allowable.

**Cause:**                         For Informational Items 3-5 refer to the cause for Issue 2.

**Effect:**                         For Informational Items 3-5 refer to the effect for Issue 2.

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<sup>17</sup> These agencies pay cash for accrued compensatory time upon an employee’s resignation, retirement, or other permanent separation from the agency.

<sup>18</sup> Two of these agencies sometimes extend expiration, so that compensatory time can be fully used and the need for cash payment would not arise.

**FLSA EXEMPT EMPLOYEES  
OVERTIME AND HOLIDAY COMPENSATION STUDY**

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**SUPPLEMENTAL INFORMATION FOR ISSUE 3  
FLSA EXEMPT STAFF HOLIDAY COMPENSATION**

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**Informational Item 6    Lack of Consistent Terminology for Holiday Time**

**Condition:** State agencies are using many different terms to refer to work performed on state holidays by FLSA exempt employees.

| <u>Terms Used by Agencies</u> | <u>No. of Agencies</u>  | <u>Percentage (%)</u> |
|-------------------------------|-------------------------|-----------------------|
| Holiday Equivalent Time (HET) | 6                       | 5.13%                 |
| Holiday Leave (HL)            | 27                      | 23.08%                |
| Substitute Time Off (STO)     | 28                      | 23.93%                |
| Other <sup>19</sup>           | 56                      | 47.86%                |
| <b>Total</b>                  | <b>117<sup>20</sup></b> | <b>100.00%</b>        |

**Recommendation:** We recommend all agencies use the same term when referring to work performed on state holidays. To achieve this, the DOP should provide guidance to agencies by means of a rule, bulletin, or policy. We further recommend the terminology chosen by the DOP include the word “holiday” so to specifically identify time worked on a holiday from other overtime, compensatory time, etc.

**Informational Item 7    Lack of Consistent Expiration for Accrued Holiday Time**

**Condition:** There is much variation in the length of time State agencies allow before expiring accrued holiday time earned by their FLSA exempt employees. Such time periods range from as little as within the same workweek as earned, to the calendar or fiscal year end, to no expiration at all.

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<sup>19</sup> Other includes: Holiday Equivalent Leave (HEL), Holiday Earned Time (HET), Compensatory Day Off (CDO), No term, etc.

<sup>20</sup> Supplemental Information for the Division of Homeland Security and Emergency Management is not included because the division only has one FLSA exempt employee who chooses not to utilize holiday compensation.

| <b>Approximate Expiration of<br/>Accrued Holiday Time</b> | <b>No. of Agencies</b>         | <b>Percentage (%)</b> |
|---|--------------------------------|-----------------------|
| No Expiration   | 41                             | 35.04%                |
| Week/Pay Period/Month                                     | 19                             | 16.24%                |
| 1-3 Months  | 30                             | 25.64%                |
| 3-6 Months  | 14                             | 11.97%                |
| Calendar Year   | 3                              | 2.56%                 |
| Fiscal Year   | 4                              | 3.42%                 |
| Other <sup>21</sup>                                       | 5                              | 4.27%                 |
| N/A- No Time Off, Paid Only                               | <u>1</u>                       | <u>0.85%</u>          |
| <b>Total</b>  | <b><u>117</u><sup>20</sup></b> | <b><u>100.00%</u></b> |

**Recommendation:** The Legislature should determine whether or not FLSA exempt employees use accrued holiday time within a set time frame. The Legislature should also determine whether or not holiday expiration will be the same for all State employees regardless of classification status.

**Informational Item 8 Lack of Consistent Payment for Unused Holiday Time**

**Condition:** As noted elsewhere in this report, the majority of agencies allow FLSA exempt employees to take a subsequent work day off when those employees are required to work on a state holiday. Some agencies pay for unused holiday compensatory time after the expiration of a stated time period or if employment is terminated.

The various agency treatments for unused holiday compensatory time are noted in the following table:

| <b>Holiday Time Paid if Not Used</b>               | <b>No. of Agencies</b>         | <b>Percentage (%)</b> |
|--|--------------------------------|-----------------------|
| No, hours forfeited                                | 44                             | 37.61%                |
| Yes, upon expiration or separation from employment | 63                             | 53.85%                |
| Other <sup>22</sup>                                | 9                              | 7.69%                 |
| N/A- No Time Off, Paid Only                        | <u>1</u>                       | <u>0.85%</u>          |
| <b>Total</b>                                       | <b><u>117</u><sup>20</sup></b> | <b><u>100.00%</u></b> |

**Recommendation:** The Legislature should determine if all holiday time accrued should be used by the employee so as to eliminate the need to pay it out. This could be accomplished by requiring any holiday time accrued be used before annual leave is taken.

**Cause:** For Informational Items 6-8 refer to the cause for Issue 3.

**Effect:** For Informational Items 6-8 refer to the effect for Issue 3.

<sup>21</sup> Other includes: Holiday time is scheduled on a specific date, holiday time must be used before annual leave, 12 months after accrual, etc.

<sup>22</sup> Other includes: All hours must be used, employees use holiday time before annual leave, never had an employee not use holiday hours, outstanding holiday time is considered last working day(s), etc.



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**APPENDIX A**  
**AMENDMENTS TO DOP ADMINISTRATIVE RULE**

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**Appendix A Note:** The Division of Personnel Legislative Rule Title 143, Series 1 was passed by the Legislature on March 10, 2012. This rule is effective beginning July 1, 2012.

The West Virginia Division of Personnel Legislative Rule Title 143, Series 1, Section 14.1(b), states:

“When a holiday falls on a Sunday, the following Monday shall be observed as the official holiday. When a holiday falls on a Saturday, the previous Friday shall be observed as the official holiday. When Christmas or New Year's Day occurs on Tuesday, Wednesday, Thursday, or Friday, the last half of the scheduled workday immediately preceding the holiday will be given as time off not to exceed four hours. ~~When an agency must modify holiday observances~~ **Agencies may schedule employees to work on the official holiday observance date** to accommodate around-the-clock shifts or other special needs, ~~the~~ **The agency** shall notify employees in advance of the modification and **shall schedule alternate holiday observances on days paid time off for a date as close as possible but not prior to the holidays official holiday observance date.** The total amount of paid time off for holidays shall **not exceed eight hours per full day holiday or four hours per one half day holiday.**” (Emphasis Added)

The West Virginia Division of Personnel Legislative Rule Title 143, Series 1, Section 14.7, states:

“Overtime Work and Holiday Work- An appointing authority or his or her designated representative may require an employee to work in excess of the prescribed working hours or on holidays when the work is considered by the employer to be necessary to the public interest. Compensation shall be made in accordance with the ~~Federal~~ federal Fair Labor Standards Act and relevant ~~Federal~~ federal regulations and W. Va. Code §21-5C-1 et seq. **Sick and/or annual leave requested in the same workweek in which additional hours are worked shall be reduced and credited back to the employee's accrued balances to reduce or avoid payment for hours in excess of the agency work schedule.**” (Emphasis Added)

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**APPENDIX B**  
**FLSA EXEMPT STAFF OVERTIME & COMPENSATORY TIME SURVEY**

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## LEGISLATIVE POST AUDIT DIVISION SURVEY

### FLSA EXEMPT STAFF OVERTIME & COMPENSATORY TIME

If you have any questions, please contact Elizabeth Kinsey or Tara Lane, at (304) 347-4880 or email your question to elizabeth.kinsey@wvlegislature.gov

#### INSTRUCTIONS

- Please distribute to the appropriate HR/ Payroll personnel that is familiar with these topics.
- Each question requires an answer before submitting form.
- Answer only for employees that are salary, and are exempt from the Fair Labor Standards Act (FLSA) overtime pay requirement.

FLSA Exempt Employees would fall under one of the following categories on the "White - Collar Exemption Worksheet":

- Executive
- Computer-Related Occupation
- Administrative
- Outside Sales
- Professional
- Highly Compensated

#### DEFINITIONS

**Overtime**- Any form of extra pay for hours worked in excess of the employee's agreed upon workweek, regardless of whether the pay rate for the extra hours is at an employee's regular hourly rate (straight time) or at one and one-half the employee's regular hourly rate.

**Compensatory Time**- Time off given to employee's in lieu of cash payment for overtime hours worked.

#### AGENCY

#### RESPONDENT NAME

#### JOB TITLE

#### TELEPHONE NUMBER

 - Ext 

#### EMAIL ADDRESS

#### Part 1 - FLSA Exempt Staff Overtime

1. Does your agency pay FLSA exempt employees' overtime?

- Yes
- Yes, Only on Holidays
- Yes, Only on Weekends/Evening Shifts
- Yes, Only when Performing Non-Exempt Job Duties
- No
- N/A-We do not have any FLSA exempt employees

[If the answer to question 1 is yes, questions 2-7 will appear.]

2. What rate of pay is used for FLSA exempt employees' overtime? (Mark all that apply.)

\*Straight time: regular rate of pay

- Time and one-half begins after  hours
- Straight Time for hours up to 40 (For example: If workweek is 37.5 hours)
- Other

Additional Information:

3. Do FLSA exempt employees' receive overtime pay of time and one-half for hours over 40 when actual hours worked are less than 40, but leave or holiday hours were calculated as part of the 40?

- Yes, but Holidays Only are counted toward the 40 work hours.
- Yes, but Leave Only is counted toward the 40 work hours.
- Yes, both Holidays and Leave are counted toward the 40 work hours.
- No, only time actually worked in excess of 40 hours would be eligible for overtime.

Additional Information:

4. Is overtime for FLSA exempt employees' approved prior to work being performed?  Yes  No

5. Is there a pre-determined limit on the amount of overtime a FLSA exempt employee may charge?

- Yes
- No
- Overtime charges are subject only to the agency's money reserves
- Any amount approved by the appropriate management
- Other

\*If yes, then what is the maximum hours?

6. Is annual increment included in the calculation of the FLSA exempt employees' overtime rate of pay?

- Yes
- No
- Other

7. Is the FLSA exempt employee's overtime accrual and use recorded?  Yes  No  
If yes, how is it recorded?

- Paper Based

- Electronic Based
- Both
- Other

Additional Information:

## Part 2 - FLSA Exempt Staff Compensatory Time

8. Do the FLSA exempt employees' in your agency accrue compensatory time?

- Yes
- No
- N/A-We do not have any FLSA exempt employees

[If the answer to question 8 is yes, questions 9-14 will appear.]

9. At what rate is a FLSA exempt employee compensatory time accrued? (Mark all that apply.)

\*Straight time: 1 hour over regular workweek = 1 hour of compensatory time

- Time and half begins after  hours
- Straight Time for hours up to 40 (For example: If workweek is 37.5 hours)
- All Comp Time is Straight Time
- Other

Additional Information:

10. Do FLSA exempt employees' accrue compensatory time at time and one-half for hours over 40, when actual hours worked are less than 40, but leave or holiday hours were calculated as part of the 40?

- Yes, but Holidays Only are counted toward 40 work hours.
- Yes, but Leave Only are counted toward 40 work hours.
- Yes, both Holidays and Leave are counted toward 40 work hours.
- No, only time actually worked in excess of 40 hours would be eligible for compensatory time.

Additional Information:

11. Is there a limited amount of compensatory time a FLSA exempt employee may charge?

- Yes
- No

If yes, what are the maximum hours?

12. Does a FLSA exempt employee have to use the compensatory time within an allotted time period before it expires?

- Yes
- No

If yes, specify how long an exempt employee has to use compensatory time.  
Please check box for general expiration period

- Less than 1 Month
- 1-3 Months
- 3-6 Months
- 6 Months- 1 Year
- End of Calendar Year (December 31)
- End of Fiscal Year (June 30)
- Within a "Reasonable Period of Time"
- Other

13. Is FLSA exempt employees' compensatory time paid if not used by expiration?

- Yes
- No
- Not Applicable "Comp Time Does Not Expire"

14. Is a FLSA exempt employee's compensatory time accrual and use recorded?

- Yes  No

If yes, how is it recorded?

- Paper Based
- Electronic Based
- Both
- Other

Additional Information:

\*\*\*Please e-mail an electronic example (e.g. a scan of the paper form, a screenshot of the program, etc.) of where overtime and/or compensatory time accrual and use are recorded.

- I will e-mail the examples noted above to "elizabeth.kinsey@wvlegislature.gov".
- I do not need to e-mail the examples noted above because we do not document such time.
- I do not need to e-mail the examples noted above because we do not allow overtime or compensatory time for FLSA exempt employees or we do not have any FLSA exempt employees.

Comments or Additional Information

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**APPENDIX C**  
**FLSA “WHITE-COLLAR EXEMPTION WORKSHEET”**

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## FAIR LABOR STANDARDS ACT FOR PUBLIC EMPLOYEES WHITE-COLLAR EXEMPTION WORKSHEET

Employee's Name: \_\_\_\_\_ Job Title: \_\_\_\_\_

Department: \_\_\_\_\_ Employee's Supervisor: \_\_\_\_\_

**Instructions:** Complete this form after reviewing the employee's current job description and consulting with the employee's supervisor. Employees can be classified as exempt under one or more of the following exemption categories: executive; administrative; professional; computer-related; outside sales; and, highly compensated. To qualify under any one of these exemptions, all items must be answered in the affirmative for the respective exemption test.  
**NOTE:** Only salaried employees are eligible for "white collar" exemption.

### **Executive Employees**

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week
- The employee's primary duty must be the managing of the enterprise, or managing a customarily recognized department or subdivision of the enterprise
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent, and
- The employee must have the authority to hire and 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 must be given particular weight

**NOTE:** Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

### **Administrative Employees**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week
- The employee's primary duty must be 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
- The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance

**NOTE:** The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or the head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading

standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities.

Whether they work for an insurance company or other type of company, insurance claims adjusters generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendation regarding litigation. The status of an insurance claims adjuster, however, does not rely on the "claims adjuster" job title alone. There must be a case-by-case assessment to determine whether the employee's duties meet the requirements for the exemption.

Employees in the financial services industry generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption. In applying the exemption, it does not matter whether the employee's activities are aimed to an end user or an intermediary. The status of financial services employees is based on the duties they perform, not on the identity of the customer they serve.

### **Professional Employees**

#### **Learned Professional**

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment
- The advanced knowledge must be in a field of science or learning, and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

**NOTE:** Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate state examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations, and are entitled to overtime pay.

Technologists and technicians, such as engineering technicians, ultrasound technologists, licensed veterinary technicians, avionics technicians and other similar employees are not exempt under Section 13(a)(1) from the minimum wage and overtime requirements of the FLSA because they generally do not meet the requirements for the learned professional exemption. Technologists and technicians do not meet the requirements for the learned professional exemption because they do not work in occupations that have attained recognized professional status, which requires that an advanced specialized degree is a standard prerequisite for entrance into the profession.

### **Creative Professional**

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate of not less than \$455 per week, and
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

### **Computer-Related Occupations**

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below
- The employee's primary duty must consist of:

The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications?

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?

The design, documentation, testing, creation or modification of computer programs related to machine operating systems? or

A combination of the aforementioned duties, the performance of which requires the same level of skills?

**NOTE:** The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

### **Outside Sales**

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and
- The employee must be customarily and regularly engaged away from the employer's place or places of business

**NOTE:** The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption is met.

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, by someone else is not exempt outside sales work.

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

### **Highly Compensated Employees**

The regulations contain a special rule for "highly compensated" workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(17) if:

- The employee must earn total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis
- The employee's primary duty must include performing office or non-manual work, and
- The employee must customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee

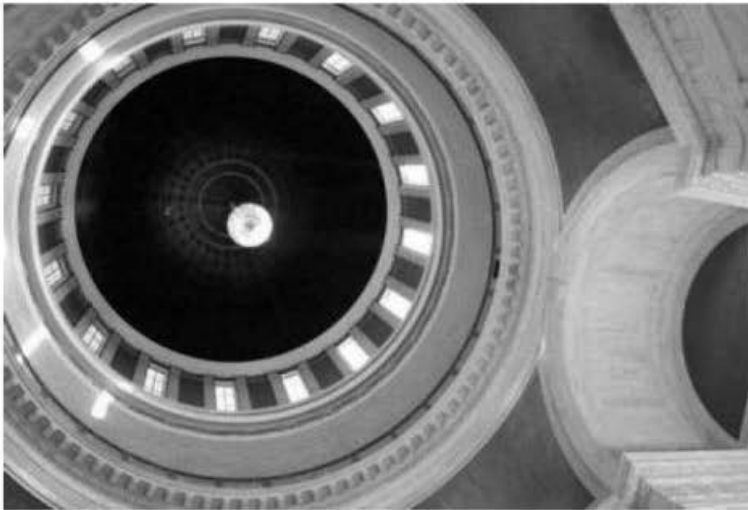
**NOTE:** An employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

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**APPENDIX D**  
**FLSA EXEMPT STAFF HOLIDAY COMPENSATION SURVEY**

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## FLSA Exempt Staff Holiday Compensation



WEST VIRGINIA LEGISLATIVE AUDITOR  
POST AUDIT DIVISION



Building 1, Room 329-W  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0610

Phone: (304)347-4880  
Fax: (304)347-4889  
Hours: 8:00 AM - 5:00 PM (EST)

### Survey Instructions

Please answer the seven survey questions in regards to employees who are salary and exempt from the Fair Labor Standards Act (FLSA).

The survey will not be submitted until you click the "Done" button on the last page. If for any reason the survey is closed without submitting, your answers will be saved until you complete the survey by clicking "Done". To access your partially completed survey, simply re-click the survey link that was provided.

Only one response may be submitted per computer. If your survey applies to more than one agency/division, please identify all agencies/divisions in the Comments and Additional Information field on the last page.

FLSA Exempt Employees would fall under one of the following categories on the "White - Collar Exemption Worksheet":

- Executive
- Computer-Related Occupation
- Administrative
- Outside Sales
- Professional
- Highly Compensated

If you have any questions, please contact Elizabeth Kinsey, Auditor II, or Tara Lane, Auditor I, at (304) 347-4880 or email your question(s) to [elizabeth.kinsey@wvlegislature.gov](mailto:elizabeth.kinsey@wvlegislature.gov) or [tara.lane@wvlegislature.gov](mailto:tara.lane@wvlegislature.gov).

**I have read the Survey Instruction page.**

YES

### Contact Information

## FLSA Exempt Staff Holiday Compensation

### Name of Spending Unit

### Contact Person

### Telephone Number (Input Numbers Only)

Area Code

Phone Number (i.e.  
3474880)

### E-mail Address

## Legislative Post Audit Division

#### DEFINITION:

Holiday - Official State or Federal day for which employees are scheduled off from work with pay.

### 1. Do FLSA exempt employees receive compensation for working on Holidays?

- Yes
- No
- Other (please specify)

## Legislative Post Audit Division

### 2. How does your agency define compensation for working on Holidays?

- Holiday Equivalent Time (HET)
- Holiday Leave (HL)
- Substitute Time Off (STO)
- Other (please specify)

## Legislative Post Audit Division

#### DEFINITIONS:

Straight Time - One hour worked equals one hour of time off.

## FLSA Exempt Staff Holiday Compensation

Straight Pay - One hour worked equals one hour of cash payment at the employees regular rate.

Premium Time - One hour worked equals one and 1/2 hours of time off.

Premium Pay - One hour worked equals cash payment at the employees regular rate times 1 and 1/2.

### 3. Is Holiday compensation given in the form of cash payments or time off? What rate of pay is used?

(Mark all that apply.)

Time off at hour for hour (straight time)

Cash payments at hour for hour (straight pay)

Time off at time and 1/2 (premium time)

Cash payments at time and 1/2 (premium pay)

Other (please specify)

### 4. Are 8 hours the maximum hours a FLSA exempt employee can be compensated for working on a Holiday? For example: If an exempt employee works 9 hours on a Holiday, then the employee is compensated for only 8 of those hours.

Yes, the maximum hours for which an employee is compensated does not exceed 8 hours

No, the employee is compensated for all hours worked on a holiday

Other (please specify)

## Legislative Post Audit Division

### 5. If you give Holiday time off, is there an allotted time period before it expires? If yes, how long?

No

N/A - Holiday time always paid if worked, no alternative time off

Yes



## FLSA Exempt Staff Holiday Compensation

### 6. If you give Holiday time off, are unused hours ever paid out to the exempt employee?

(Mark all that apply.)

- Yes, upon expiration
- Yes, upon separation from the agency [retirement, transfer to another agency, etc.]
- No - Holiday hours are forfeited if not used
- N/A - Holiday time always paid if worked, no alternative time off
- Other (please specify)

### 7. If unused Holiday time off is ever paid out, what rate of pay is used?

(Mark all that apply.)

- Paid out at the regular hourly rate
- Paid out at time and 1/2
- N/A - Holiday time not paid out
- N/A - Holiday time always paid if worked, no alternative time off
- Other (please specify)

## Legislative Post Audit Division

### Comments and Additional Information

Again, only one response may be submitted per computer. If your survey applies to more than one agency/division, please identify all agencies/divisions in the Comments and Additional Information field on this page.

If you have any questions, please contact Elizabeth Kinsey, Auditor II, or Tara Lane, Auditor I, at (304) 347-4880 or email your question(s) to [elizabeth.kinsey@wvlegislature.gov](mailto:elizabeth.kinsey@wvlegislature.gov) or [tara.lane@wvlegislature.gov](mailto:tara.lane@wvlegislature.gov).

Please select "Done" to complete and submit your survey.

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**APPENDIX E**  
**STATE AUDITOR'S RESPONSE TO EPICS INQUIRY**

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State of West Virginia

Office of the State Auditor
1900 Kanawha Boulevard, East
State Capitol Complex, Building 1, Room W 100
Charleston, West Virginia 25305

Glen B. Gainer III
State Auditor

Telephone: (504) 558-2251
FAX: (504) 558-5200
www.wvsao.gov

November 8, 2011

Mr. Aaron Allred
Legislative Auditor
West Virginia Legislature
Building 1, Room E-132
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

JOINT COMMITTEE
NOV 09 2011
POST-AUDIT DIVISION

Dear Aaron,

In response to your letter of November 7, 2011, please find enclosed a disk gleaned from the EPICS Payroll System to assist you in researching the information you requested. However, please note that each report on the disk contains a disclaimer stating that EPICS does not contain the necessary information to identify employees as "exempt" or "non-exempt." EPICS is also unable to identify any overtime that was paid under an improper-type code.

If my office can be of further assistance, please do not hesitate to contact me.

Sincerely,

[Handwritten signature of Glen B. Gainer III]

Glen B. Gainer III
State Auditor

GBGIII:cc

Enclosure

LEGISLATIVE

NOV - 9 2011

MANAGER

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**APPENDIX F**  
**ERP IMPLEMENTATION COST INQUIRY**

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STATE OF WEST VIRGINIA  
DEPARTMENT OF ADMINISTRATION  
OFFICE OF THE CABINET SECRETARY

EARL RAY TOMBLIN  
GOVERNOR

ROBERT W. FERGUSON, JR.  
CABINET SECRETARY

November 10, 2011

**LEGISLATIVE**

Aaron Allred  
Legislative Auditor  
Building 1, Room E-132  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0610

NOV 10 2011

**MANAGER**

Dear Mr. Allred:


The following information is provided in response to your letter dated November 7, 2011, wherein you requested information regarding the planned Enterprise Resource Planning (ERP) system and the impact of state agencies inconsistently handling compensatory time and overtime for exempt employees. Specifically, you asked what additional costs would be incurred to build these inconsistencies into the ERP system.

A reliable cost estimate cannot be provided without the involvement of the vendor(s) implementing the ERP system. This information can be requested from the vendor(s) once contract negotiations are completed and an award has been made.

The ERP project team completed a "Human Resources and Payroll Standardization Analysis" that was provided to the ERP Board. The analysis developed recommendations to standardize business practices to reduce the cost of configuring the planned ERP system. It is the team's goal to implement a single policy for the accrual and payment of compensatory time and the payment of overtime for exempt employees across all state agencies.

If you have additional questions or concerns, please do not hesitate to contact Ross Taylor or Todd Childers of the ERP Project Management Office.

Sincerely,

  
Robert W. Ferguson, Jr.  
Cabinet Secretary

RWF:trna

cc: Ross Taylor, Director, Finance Division  
Todd Childers, Director, OASIS Project

2. This ERP Project is an ERP implementation under HRSA 40.

1900 KANAWHA BOULEVARD, EAST • BUILDING 1, ROOM E-132 • CHARLESTON, WEST VIRGINIA 25305-0610 • (304) 558-1331 • FAX: (304) 558-2699

<http://del.state.wv.gov>

EQUAL OPPORTUNITY EMPLOYER

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**APPENDIX G  
AGENCY RESPONSES TO ISSUE 3**

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WEST VIRGINIA  
**Water Development Authority**  
Celebrating 38 Years of Service 1974 - 2012

June 12, 2012

Ms. Stacy L. Sneed, CPA, CICA, Director  
Legislative Post Audit Division  
Building 1, Room W-329  
1900 Kanawha Blvd. E.  
Charleston, West Virginia 25305-0610

Dear Ms. Stacy,

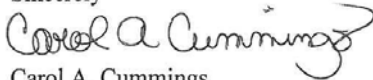
We would like to take this opportunity to respond to the findings of the Legislative Post Audit survey regarding overtime, compensatory time, and holiday compensation for FLSA exempt employees.

After careful review of Issue 3, (inconsistent holiday compensation to FLSA exempt employees) and the West Virginia DOP Legislative Rule Title 143, Series 1, Section 14.1(b), it was realized that it was a simple mistake in the interpretation of the applied rule. After reading through the criteria and Legislative Rule it is clear that all FLSA exempt employees be provided holiday compensation. For example, if the Water Development Authority must modify holiday observances and require a FLSA exempt employee to work, the employee will be offered a substitute day, as close as possible to that holiday and be paid for eight hours (not to exceed) which is the required number of hours per day for all Water Development Authority employees.

Furthermore, it is extremely important to the Water Development Authority to adhere to the application of the rules and regulations provided by the Department of Personnel and remain consistent with all other State Agencies.

We appreciate you allowing us to respond and work cooperatively with you in an effort to clarify and correct any misinterpretation or mistakes on our part.

Sincerely



Carol A. Cummings

cc: Chris Jarrett, WDA Executive Director  
Jim Ellars, IJDC Executive Director  
Samme Gee, Esquire, Jackson Kelly

180 Association Drive, Charleston, WV 25311-1217  
Phone (304) 414-6500 / fax (304) 414-0865  
[www.wvwda.org](http://www.wvwda.org)



Coal Heritage Highway Authority  
National Coal Heritage Area Authority

P. O. Box 15  
Oak Hill, WV 25931  
304-465-3720

June 12, 2012

Stacy L. Sneed, Director  
Legislative Post Audit Division  
Building 1, Room W-329  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0610

Dear Ms. Sneed:

Please accept this response to the findings in your report on overtime, compensatory time and holiday compensation for FLSA exempt employees in which the Coal Heritage Highway Authority was found to not be providing time off when FLSA exempt employees work on state holidays.

We are a very small agency with 5.6 full-time equivalent employees. Of those employees, only one, our Executive Director, is an exempt employee. As we provide services to the tourist market, it is often necessary to have staff working at our visitor center or at fairs and festivals on designated state holidays. The Executive Director is responsible for scheduling staff to work in these situations and, due to the limited number of staff members available, often works at those events herself.

As you have noted, the Coal Heritage Highway Authority is exempt from the requirement to follow the Division of Personnel rules regarding time-off for FLSA exempt employees. However, in the future we will comply with the recommendation of the Legislative Auditor that holiday compensation in the form of time off on an hour-for-hour basis be given to employees exempt from the FLSA.

Thank you very much for the opportunity to respond to these findings.

Sincerely,  
  
Christy Bailey  
Executive Director



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**APPENDIX H**  
**DIVISION OF PERSONNEL RESPONSE TO REPORT**

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JOINT COMMITTEE  
JUN 19 2012  
POSTAUDIT DIVISION

STATE OF WEST VIRGINIA  
DEPARTMENT OF ADMINISTRATION  
OFFICE OF THE CABINET SECRETARY

EARL RAY TOMBLIN  
GOVERNOR

ROSS TAYLOR  
ACTING CABINET SECRETARY

June 19, 2012

Stacy L. Sneed, CPA, CICA, Director  
West Virginia Legislature  
Building 1, Room E-132 – Capitol Complex  
Charleston, WV 25305-0610

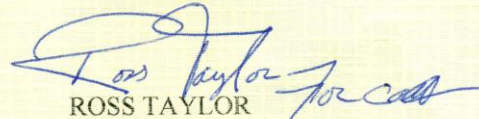
Via E-Mail and Hand-Delivery

Dear Ms. Sneed:

In response to your June 5, 2012 letter regarding the survey on overtime compensatory time, and holiday compensation for FLSA exempt employees, I have attached *revised* comments and concerns from the Division of Personnel regarding these matters.

If the Department of Administration can be of further assistance, please do not hesitate to contact me.

Very truly yours,

  
ROSS TAYLOR  
Acting Cabinet Secretary

RAT:CAG:jkj  
Attachment

## Comments from the Division of Personnel

### CONCERNS:

- Method of data collection and validity
  - We are concerned that there was no validation of the data collection to assure accuracy.
- Lack of evaluation of data
  - There are object codes used for payment of straight time and premium overtime in EPICS, which **if used by agencies** would allow for ad hoc reporting and show the overtime paid to employees.
  - There is also a mechanism within EPICS which **if used by agencies** would show which employees are eligible or exempt from overtime.
- Incorporation of holiday pay issue in this report is confusing. Holiday pay is not required under the FLSA.
- Within the report there is reference to the creation of a standardized overtime policy but it is not made clear that this would not be a DOP policy since the DOP does not have authority over exempt agencies.
- "Gap" time was not addressed in your audit. With limited exception, classified agencies that have a standard workweek of less than 40 hours are not obligated to compensate even non-exempt employees for time worked beyond their normally scheduled work hours up to and including 40 hours in the work week.
- The report encompasses an inherent supposition that time off does not cost the State anything so long as it was not paid when an exempt employee leaves employment. Time off is very costly to an agency. Exempt employees accruing the highest annual leave accrual rate accrue 2 days off per month. With the addition of paid holidays and sick leave, granting even more additional time off could potentially hamper the operational effectiveness of agencies.
- The question of payment for additional hours worked by exempt employees is clearly a question of fiduciary responsibility. Agencies have a responsibility to spend taxpayer dollars in a reasonable way and in compliance with their responsibility to safeguard the public interest. This is not recognized within the report or findings.
- A determination regarding FLSA exemption status, particularly as it relates to overtime eligibility, **cannot** be made based upon position classification/title only. While the FLSA includes a wide variety of partial and complete exemptions from its minimum wage and overtime requirements, most employer classification procedures are confined to evaluating employee status under the FLSA's white-collar exemptions for executive, professional, and administrative employees. A generic classification specification cannot be used to make such a determination since the analysis is of the actual duties performed.

## RECOMMENDATIONS:

In looking to provide constructive input to the Post Audit Subcommittee, an approach that aligns the DOP Administrative Rule (143CSR1) and statewide employment practices as well as encompassing both covered and non-covered agencies would be appropriate.

- Implement mandatory state-wide training of payroll and HR staff.
  - Much like DOP covered agencies have mandatory training requirements for managers to limit liability and enhance workforce effectiveness, mandatory training of staff who make payroll decisions would limit liability under FLSA and other statutes.
- Evaluate currently available data to determine current costs and trends in order to determine the magnitude of the overtime issue.
  - Current overtime payments from the EPICS payroll system should be evaluated using currently available ad-hoc reporting capability.
  - This data should be made available to the committee so that they have a clear picture of current costs of overtime for both non-exempt and exempt employees.
- Assign responsibility for FLSA oversight.
  - With each agency having autonomy to determine what they will and will not pay the inconsistency is understandable.
  - There are potentially at least two places where FLSA consistency can be enhanced: DOP and the State Auditor's Office. The Auditor's Office would assume this role with input and assistance from DOP, because they have payroll authority for both covered and non-covered agencies and employees.
  - Even for DOP covered agencies the DOP does not have oversight of their payroll. DOP does not have access to see payroll information for covered agencies or to oversee compliance with payroll related expenditures.
- DOP recommends that a framework be developed that allows the State Auditor's Office (in coordination with the DOP) to take on a more robust role in assuring that expenditures are in keeping with the state's fiduciary responsibility by establishing rules as follows:
  - Exempt employees are prohibited from receiving overtime/compensatory time.
    - In the alternative, a statewide rule could be implemented in conjunction with the ERP that allows for only straight time and only for hours worked over a standard number (such as 50) for exempt employees.
    - DOP does not recommend providing overtime pay to exempt employees who make less than a certain amount of money with caps on cash payments as this would muddy the waters and be administratively cumbersome, even given the capabilities of the ERP. DOP recommends instead, paying exempt employees a salary sufficient to compensate for their exemption from overtime.
  - Place a cap on compensatory time to prevent the accrual of large liabilities for payout at the time when non-exempt employees retire, or otherwise terminate employment.
    - FLSA provides that non-exempt law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities

- may accrue up to 480 hours of comp time; all other state and local government employees may accrue up to 240 hours.
- Even more limited caps could be put in place under statewide rules. (30, 60, 90, 120 hours for instance) This would insure that agencies not create an unmanageable liability.
  - Exempt employees not accrue compensatory time.
    - In the alternative, rules should clearly define any comp time accrual for an exempt employee, clearly limit total hours and ineligible for payout upon termination. This is clearly the interests of the state in avoiding long term and potentially unfunded liabilities.
  - The transfer of comp time for exempt employees from one agency to another be prohibited because of the potential to cause harm to a receiving agency that had no control or input into the accrual of the comp time.
  - DOP recommends the standardization of the FLSA exemption review process.
    - The U.S. Department of Labor has been working toward a requirement that employers have the evaluation forms available for audit by the DOL and getting those evaluations centralized and consistent would be of great benefit should the state undergo a DOL audit.
    - For covered agencies the DOP could require the exemption review forms be made a part of any WV-11 personnel transaction back-up documentation. However this does not help with non-covered agencies.
    - The State Auditor's Office, payroll section, could review employee status based upon the duties assigned to the employee's position, which would lead to a more consistent application of the FLSA statewide. With the advent of the ERP this responsibility could be more easily managed.

#### **RECOMMENDATIONS FOR ERP IMPLEMENTATION:**

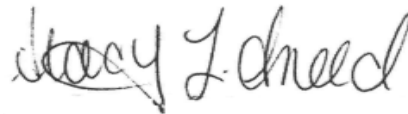
- All state employees should be given an alternate day off when they work a holiday in compliance with DOP's *Administrative Rule* (143CSR1). The DOP has no audit or enforcement mechanism to require agencies to do so. DOP recommends that this be included as a component in the ERP timekeeping system. Appropriate time entry rules in the ERP will allow for a more consistent enforcement in these areas and we eagerly look forward to that consistency.

**STATE OF WEST VIRGINIA**

**OFFICE OF THE LEGISLATIVE AUDITOR, TO WIT:**

I, Stacy L. Sneed, CPA, CICA, Director of the Legislative Post Audit Division, do hereby certify that the report appended hereto was made under my direction and supervision, under the provisions of the West Virginia Code, Chapter 4, Article 2, as amended, and that the same is a true and correct copy of said report.

Given under my hand this 22<sup>nd</sup> day of June 2012.



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Stacy L. Sneed, CPA, CICA, Director  
Legislative Post Audit Division

Notification of when the report was released and the location of the report on our website was sent to the Secretary of the Department of Administration to be filed as a public record. Report release notifications were also sent to the Governor; Attorney General; State Auditor; State Treasurer and the various other State agencies listed on pages three through six of this report.