

## Client Advisory | April 2009

# Even the EEOC Is Not Exempt From FLSA Requirements

In an ironic twist, on March 23, 2009, an arbitrator ruled that the Equal Employment Opportunity Commission (EEOC), the Agency responsible for ensuring that the nation's workers are treated fairly, willfully violated the Fair Labor Standards Act (FLSA) by requiring that certain of its employees take compensatory time off rather than overtime pay for excess hours worked.



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Presented with an EEOC practice that amounted to “forced volunteering,” an arbitrator granted, in substantial part, a grievance filed by the EEOC employees’ union, finding that the EEOC knowingly had been violating its union contract and the FLSA since 2003. The violation surrounded the EEOC’s policy of offering nonexempt employees compensatory time off rather than overtime pay when they worked more than 40 hours per week or 80 hours per two-week pay period.

Specifically at issue in the arbitration was whether the EEOC had “suffered or permitted” employees in non-exempt positions working regular or compressed work schedules to work overtime without offering them a choice between extra pay or compensatory time. “Suffered or permitted” overtime is extra work hours performed by an employee for the benefit of the agency, whether requested or not, provided the employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

The arbitrator limited his decision by determining that only EEOC investigators, mediators and paralegals with regular or compressed work schedules must be allowed access to “suffered or permitted” overtime pay for hours worked in addition to their regular work schedules. Employees working a flexible schedule are not eligible for “suffered or permitted” overtime.

“There is an entitlement to overtime [pay], whereas compensatory time operates as an alternative, should the employees

request it. Put another way, it is incorrect to view the FLSA as providing non-exempt employees with the option of selecting either overtime or compensatory time. The right is to overtime; compensatory time is the option.” The arbitrator added that the option of receiving compensatory time “clearly” must be an “uncoerced” one, and that the EEOC’s practice of telling employees that overtime pay was not available, and that compensatory time was the only form of recompense available amounted to coercion.

The EEOC argued that any extra hours worked by eligible employees did not qualify as “suffered or permitted” because “most extra hours [worked] were either without knowledge of the manager or were completely voluntary and at the request of the employee for his or her convenience or personal desires.” The arbitrator rejected this argument as “disingenuous,” finding that EEOC employees worked extra hours “not because it was convenient or because it is what they wanted; they did so in order to ensure that their work was completed.” Moreover, the arbitrator found that, although EEOC management generally did not order overtime work by FLSA-covered employees, the EEOC’s supervisors “suffered or permitted” extra hours by requiring and/or expecting employees to complete work that could not be done within scheduled work hours and by approving compensatory time, without regard to whether the underlying overtime was solicited. Indeed, the arbitrator found that supervisors were aware that their subordinates frequently

were working overtime and did nothing to prevent the excess hours from being worked.

Not only did the arbitrator find that the EEOC violated the FLSA, but he also found that the Agency's action was willful and "went beyond mere negligence." As a result, in assessing damages, he may look back as far as three years instead of the two year limit applicable to claims not found to be willful. The arbitrator also made clear that liquidated damages (i.e. double damages) are available in addition to compensatory damages because of the willful nature of the violation. It remains an open issue as to whether attorneys' fees and costs will be assessed.

The EEOC has not yet decided whether to appeal the arbitrator's decision.

It is advisable for employers to look closely at their overtime policies and make

any changes necessary to ensure compliance with the FLSA's regulations regarding overtime pay. Employers might also consider providing additional training for supervisors whose job responsibilities include approving and regulating overtime work. It is important that these supervisors have the knowledge and skills necessary to adequately control potential overtime being worked and an understanding that they cannot permit or request that non-exempt employees perform work deemed to be overtime in the absence of available monies to fund such work. In addition it is important that supervisors understand the ways in which they can avail themselves of opportunities to prevent overtime from being worked if funds are unavailable. EAPD lawyers are available to assist employers in updating policies or to provide training to supervisors to ensure compliance with the FLSA.

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