



CNIC Fair Labor Standards Act (FLSA) Training



For Employees

OVERALL CLASSIFICATION: UNCLASSIFIED
THIS PAGE: UNCLASSIFIED



Materials Developer

**For questions concerning these slides, please
contact your servicing CNIC Human Resources
Office**

Slides were developed by HQ CNIC, Code 132



OUTLINE

At the close of this session, you will be able to:

- ❖ Define what the FLSA is and exempt and non-exempt basics**
- ❖ Define hours of work**
- ❖ Understand basic rules for receiving Overtime/Comp Time/Travel Comp and Training Time**
- ❖ Review Suffer or Permit rules and responsibilities**
- ❖ Quiz on FLSA Facts or Fiction**
- ❖ Address basics of questioning your exemption status**
- ❖ Learn what CNIC is doing to address FLSA concerns**



FLSA Basics





What is FLSA?

- **The Fair Labor Standards Act (FLSA) provides overtime pay protection**
 - **Exempt – Not covered by FLSA**
 - **Non-exempt – Covered by FLSA**
- **Covers all CNIC employees within the United States as well as all US territories and commonwealths to include Puerto Rico, Marianas and Guam.**
- **Employees are presumed non-exempt until proven to be exempt. Don't know? Check your SF-50!**
- **Agency must prove exemption applies**





Who is Covered by FLSA?

- All CNIC enterprise-wide employees are overtime eligible unless you meet one of several FLSA exemptions:
 - Executive
 - Administrative
 - Professional
 - *Learned*
 - *Creative*
 - *Computer*
 - Overseas
 - Receive Law Enforcement Availability Pay (LEAP) (only applies to those in GS-1811 occupation)
- Human Resources makes FLSA determinations





Duties Test Exemption

Executive	Administrative	Professional
<p><u>Primary Duties:</u></p> <p><i>Managing a enterprise unit and supervising at least 2 full time employees with hiring/firing recommendation authority</i></p>	<p><u>Primary Duties:</u></p> <p><i>Includes independent discretion and judgment in matters of significance</i></p>	<p><u>Primary Duties:</u></p> <p><i>Performs work that requires advanced knowledge in science, learned or creative professional, or specialized computer work.</i></p>

Note: Overseas exemption applies to all those with permanent duty station in non-FLSA covered area



FLSA Basics Review

Question: To be covered by FLSA rules, you must be located in what part of the world?

- a. *Foreign areas such as Japan and Europe*
- b. *The United States as well as all US territories and commonwealths to include Puerto Rico, Marianas and Guam.*





FLSA Basics Review

To be covered by FLSA rules, you must be located in what part of the world?

- a. Foreign areas such as Japan and Europe
- b. *The United States as well as all US territories and commonwealths to include Puerto Rico, Marianas and Guam.*



The answer is b. All 50 states plus US territories and commonwealths.



Hours of Work





What are hours of work?

- **“Hours worked” includes all time during which an employee is required or allowed to perform any work for an employer, regardless of where the work is done:**
 - On the employer’s premises,
 - Designated work place,
 - At home or
 - Some other location
- ***If the time constitutes “hours of work”, employee is paid regular time w/o use of leave***





Hours of Work Also Includes:

Grievances/Representation

- Time spent adjusting a grievance (or any appealable action) during the time the employee is required to be on the agency's premises
- "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status.

Charitable Activities

- Time spent working for public or charitable purposes at an agency's request, or under an agency's direction or control
- Time spent voluntarily in such activities outside an employee's regular working hours is not hours of work

Receiving Medical Attention

- Time spent waiting for and receiving medical attention for illness or injury if:
 - The medical attention is required on a workday an employee reported for duty and subsequently became ill or was injured due to work causes; and
 - The time spent receiving medical attention occurs during the employee's regular working hours; and
 - The employee receives the medical attention on the agency's premises, or at the direction of the agency at a medical facility away from the agency's premises
- Time spent taking a physical examination that is required for the employee's continued employment with the agency.

Additional information and clarification can be found in 5 CFR § 551.424/5/6



Hours of Work Also Includes:

Meal Time

- Meal times are NOT hours of work if:
 - Facilities, i.e., a distinct and separate space; exist to allow employees to get away from work, AND
 - Meal time is uninterrupted.
- **Note: Special provisions for firefighters who receive standby premium pay. See 5 CFR 551.411(c)**

Call Back Time

- If called in to work on day when not scheduled will be credited with at least 2 hours of work as OT.
- If called back to work after going home after shift will be credited with at least 2 hours of work as OT.

Sleep Time

- Sleep time is NOT hours of work if:
 - The work shift is 24 hours or more; and
 - Adequate facilities exist to allow uninterrupted sleep; and
 - There are at least 5 hours available for sleep during the period.
- **Note: Special provisions for firefighters who receive standby premium pay. See 5 CFR 551.432**

Doff and Don Time

- Putting on/taking off uniforms immediately before and after shift **IF** directly tied to work performance is covered
- Doing so at home before going to work is not covered

Additional information and clarification can be found in 5 CFR § 551.401/411



**Overtime,
Comp
Time,
Travel,
Training**



Overtime Pay Breakdown

Non-exempt employees: Per 5 CFR 551

- ✓ *Cannot be required to accept compensatory time in lieu of OT pay, but may request*
- ✓ *OT must be requested in advance however, work cannot be suffered or permitted without compensation*
- ✓ *OT rate includes other premium pay (i.e., Sunday or night shift).*
- ✓ *No maximum earnings limit.*

- ✓ *Special rules apply for when training and/or travel occurs outside normal work hours*

Exempt employees: Per 5 CFR 550

- ✓ *May be required to accept compensatory time in lieu of overtime if salary higher than GS-10*
- ✓ *OT/Comp time MUST be approved in advance*
- ✓ *OT rate does NOT include other premium pay (i.e., Sunday or night shift)*
- ✓ *Cannot earn more money than the maximum level of a GS-15 OT in a particular pay period.*
- ✓ *Special BUT DIFFERENT rules apply for when training and/or travel occurs outside normal work hours*



Overtime/Comp Time Decision Table

Salaried Appropriated Fund (APF) Employees		
Rate of Basic Pay*	FLSA Status	
	Non-Exempt	Exempt
Does not exceed the maximum rate for GS-10 (GS-10 and below)	<ul style="list-style-type: none"> Employee entitled to overtime Employee may request comp time in lieu of overtime 	<ul style="list-style-type: none"> Employee entitled to overtime Employee may request comp time in lieu of overtime
Exceeds the maximum rate for the GS-10 (GS-11 and above)	<ul style="list-style-type: none"> Employee entitled to overtime Employee may <i>request</i> comp time in lieu of overtime 	<ul style="list-style-type: none"> Employee entitled to comp time Employee may <i>request</i> overtime in lieu of comp time
Overtime Computation		
Rate of Basic Pay*	FLSA Status	
	Non-Exempt	Exempt
Does not exceed the <i>minimum</i> rate for GS-10 (GS-09 and below)	1.5 times hourly rate of basic pay	1.5 times hourly rate of basic pay
Exceeds the <i>minimum</i> rate for the GS-10 (GS-10 and above)	1.5 times hourly rate of basic pay	1.5 times the minimum rate for the GS-10, or employees hourly rate of basic pay – whichever is greater

*Rate of basic pay includes any applicable special rate or pay for law enforcement officers



Overtime Management – Non-exempt

- It is at the discretion of the supervisor to approve overtime hours for non-exempt employees.
 - Supervisors must consider the unit budget if OT hours are possible or if flexible scheduling is needed
 - Employees must request OT/Comp Time in writing in advance of working
 - *For the non-exempt employee, IF he/she chooses to work without prior permission AND without supervisory knowledge, they will not get paid*
 - *Working without advance approval may result in disciplinary action*





Overtime Management – Exempt

- It is at the discretion of the supervisor to approve overtime hours for exempt employees making more than GS-10/step 10 rate. Comp time, in lieu of overtime, is the usual default decision.
 - Supervisors must consider the unit budget if Overtime/Comp time hours are possible or if flexible scheduling is needed
 - Employees must request Comp Time in writing in advance of working
 - *For the exempt employee, work performed outside normal shift does not get paid IF not approved in advance*
 - *Exempt employees cannot “trade” unofficial time off today for unapproved work performed yesterday*



Training as Hours of Work

- Time spent in training during regular work hours are considered hours of work
- Time spent in training outside regular work hours are considered hours of work if:
 - The employee is directed to participate in the training by the agency, and
 - The purpose of the training is to improve the employees performance of the duties and responsibilities of his/her current position
 - **NOTE (1):** Time spent in an apprenticeship or other entry level training outside of regular work hours is *not* hours of work
 - **NOTE (2):** If working a compressed work schedule, employee is required to revert to normal 8 hour day for entire two-week pay period during which class occurs

Additional information and clarification can be found in 5 CFR § 551.423 & 5 CFR § 410.402



Travel Hours of Work Decisions

Time Spent in Travel as Hours of Work		
if the employee is required to:	FLSA Status	
	Non-Exempt	Exempt
Travel during regular working hours	Hours of work	Hours of work
Drive a vehicle or perform other work while traveling;	Hours of work	Not hours of work
Travel as a passenger on a <i>one-day assignment</i> away from the official duty station	Hours of work	Not hours of work
Travel as a passenger on an <i>overnight assignment</i> during hours on nonwork days that correspond to employee's regular working hours	Hours of work	Not hours of work
Or, if the travel:		
Involves the performance of work while traveling;	Hours of work	Hours of work
Is incident to travel that involves the performance of work while traveling;	Hours of work	Hours of work
Is carried out under arduous and unusual conditions	Hours of work	Hours of work
Results from an event that could not be scheduled or controlled administratively	Hours of work	Hours of work

Note: Hours of work are compensable as either Regular time (RG) or Overtime (OT), refer to the Overtime/Comp Time decision table for more information



Travel Comp Time Decisions

Time Spent in Travel under Travel Comp Time Rules		
if the employee is required to:	FLSA Status	
	Non-Exempt	Exempt
Travel during regular working hours	Hours of work	Hours of work
Drive a vehicle or perform other work while traveling	Hours of work	Hours of work
Travel as a passenger on a <i>one-day assignment</i> away from the official duty station	Hours of work	Hours of work
Travel as a passenger on an <i>overnight assignment</i> during hours on nonwork days that correspond to employee's regular working hours	Hours of work	Travel Comp Time Applies
Travel as a passenger on an <i>overnight assignment</i> during hours on nonwork days that do NOT correspond to employee's regular working hours	Travel Comp Time Applies	Travel Comp Time Applies
Home-to-work travel is not work time and not compensable	NOT hours of work	NOT hours of work
NOTE: Hours of Work means employee either receives regular pay or overtime – see previous charts.		



FLSA Hours of Work Review

Question: As a non-exempt employee, can I be required to work comp time in lieu of overtime?

- a. *Yes. Management has the right to order me to work comp time.*
- b. *No. Management has the right to order me to work, but I have the choice of overtime versus comp time.*





FLSA Hours of Work Review

As a non-exempt employee, can I be required to work comp time in lieu of overtime?

- a. Yes. Management has the right to order me to work comp time.
- b. No. Management has the right to order me to work, but I have the choice of overtime versus comp time.**



The answer is b.

Management retains the right to order me to work extra hours even as a nonexempt employee. They just cannot require me to accept comp time in lieu of overtime. It is my choice to accept comp time.



Suffer or Permit





What is “Suffer Or Permit “?

- **“Suffer or permit” work includes:**
 - Performed for the benefit of the agency
 - The supervisor knows or has reason to believe work is being performed, AND
 - The supervisor has an opportunity to prevent the work from being performed
- **If yes, then work has been “suffered or permitted” and is payable.**



Suffer Or Permit Examples

- **“Suffer or permit” or off-the-clock time when worked with supervisor’s knowledge includes:**
 - Maintaining equipment
 - Staying late after normal shifts without “putting in” for overtime
 - Doing job-related paperwork “at home”
 - Making and responding to job-related phone calls before or after work or at lunch time
 - Working through meal periods



Suffer Or Permit - Responsibilities

Management

- ✓ *Duty to exercise control & see that work is not performed if the employer does not want it to be performed.*
- ✓ *Cannot sit back & accept benefits of an employee's work without considering the time spent to be hours worked.*
- ✓ *Merely making a rule against such work is not enough.*
- ✓ *Has the power to enforce the rule and must make every effort to do so.*

Employee

- ✓ *Must request OT/Comp time from supervisor in advance of working*
- ✓ *You are responsible for making sure you do not work OT without prior approval*
- ✓ *Be diligent in following your work schedule and communicating any changes with your supervisor.*





FLSA Suffer or Permit Review

Question: If I work overtime without prior approval of my boss, do I get paid under suffer or permit?

- a. *Yes. "Suffer or permit" means that if I work I must get paid.*
- b. *No. "Suffer or permit" means that if I work without prior approval but my boss has knowledge that I'm working anyway, only then must I be paid.*





FLSA Suffer or Permit Review

Question: If I work overtime without prior approval of my boss, do I get paid under suffer or permit?

- a. Yes. "Suffer or permit" means that if I work I must get paid.
- b. *No. "Suffer or permit" means that if I work without prior approval but my boss has knowledge that I'm working anyway, only then must I be paid.*



The answer is b. Your supervisor must have reason to believe you worked, even without approval, to be paid under "suffer or permit." If no knowledge, then no "suffer or permit."



FLSA





FLSA Fact or Fiction?

“Our policy says overtime must be pre-approved. I’m going to work as long as it takes to get the job done. It’s ok if I choose to not tell my supervisor and not record the time.”

FACT OR FICTION?



FLSA Fact or Fiction?

“Our policy says overtime must be pre-approved. I’m going to work as long as it takes to get the job done. It’s ok if I choose to not tell my supervisor and not record the time.”

FACT OR FICTION?

If OT is worked without permission or knowledge of the supervisor, it does not have to be compensated. If done repeatedly, you could be subject to disciplinary action.



FLSA Fact or Fiction?

“Wow! I worked 80 hours this past period – 36 hours the first week and 44 hours the second week. Because 80 divided by 2 is 40, I won’t receive any OT pay because the hours average out to 40 per week.”

FACT OR FICTION?



FLSA Fact or Fiction?

“Wow! I worked 80 hours this past period – 36 hours the first week and 44 hours the second week. Because 80 divided by 2 is 40, I won’t receive any OT pay because the hours average out to 40 per week.”

FACT OR FICTION?

- You will be paid 36 hours for week 1. You must request 4 hours leave for week 1. For the 2nd week, it will be 40 hours regular pay plus 4 hours OT.
- Be sure to get approval to work OT in advance.
- You cannot average hours between weeks unless on FLEXTIME!



FLSA Fact or Fiction?

“If I go to training outside of work hours, and it is required for my job, the time I spend at the training must be considered time work and therefore paid.”

FACT OR FICTION?



FLSA Fact or Fiction?

“If I go to training outside of work hours, and it is required for my job, the time I spend at the training must be considered time worked and therefore paid.”

FACT OR FICTION?

If the time spent in training is considered a requirement for your on-going employment relationship (that is, the training is not voluntary), the hours spent in training must be considered time worked. It is NOT time worked for those in career ladder/internship/developmental positions



FLSA Fact or Fiction?

“As a non-exempt employee, if I choose to eat lunch at my desk and end up answering the phone a few times, I don’t need to report this as time worked.”

FACT OR FICTION?



FLSA Fact or Fiction?

“As a non-exempt employee, if I choose to eat lunch at my desk and end up answering the phone a few times, I don’t need to report this as time worked.”

FACT OR FICTION?

To be considered unpaid time, an employee must be relieved of duties during that period. If you answer the phone while eating AND this is suffered or permitted, you are performing employment-related tasks and this time must be reported as time worked.



FLSA Fact or Fiction?

“I was stuck in traffic on the way to work yesterday (Monday) and didn’t get in until 0930. My normal start time is 0730. An option is to talk to my boss and see if I can adjust my schedule so I can make up the time by extending my work day by 30 minutes Tuesday through Friday.”

FACT OR FICTION?



FLSA Fact or Fiction?

“I was stuck in traffic on the way to work Monday and didn’t get in until 0930. My normal start time is 0730. An option is to talk to my boss and see if I can adjust my schedule so I can make up the time by extending my work day by 30 minutes Tuesday through Friday.”

FACT OR FICTION?

Flexing your schedule is an option once approved by your supervisor.

- **Because you came in late on a Monday and need to make up two hours of time, you could extend your workday by 30 minutes Tuesday through Friday.**
- **Note that the time must be made up in same week.**
- **You could also use two hours of annual leave, if available.**



Questioning Your FLSA Exemption

(for the exempt employee)





Informal FLSA Questions

Address your FLSA concerns by:

- ✓ **Discussing with supervisor what your concerns are. Verify PD duties are accurate.**
- ✓ **IF duties are accurate, the supervisor will:**
 - ✓ **Talk to servicing HR Specialist for FLSA explanation.**
 - ✓ **Request new FLSA review be performed, if needed.**
- ✓ **IF duties are not accurate, the supervisor will:**
 - ✓ **Work with you to write a new PD based on changes in major duties of 25% or more.**
 - ✓ **Have a new FLSA review done as part of classification process**



Formal FLSA Challenges

You can challenge FLSA in 5 Ways:

Represented by a Union? You have two options IF the union's grievance procedures do *not exclude* FLSA overtime pay claims:

- **Negotiated Grievance Procedure (NGP). Check your Collective Bargaining Agreement!**
- **File in court.**

Not represented by a union or are represented by a union whose grievance procedure *excludes* FLSA claims:

- **File with your Command (CNIC HQ) OR**
- **File with the Office of Personnel Management (OPM) OR**
- **Can also file in an United States Court (judicial review)**



Steps CNIC is Taking to Address FLSA





What is CNIC Doing About Potential FLSA Issues? Part 1

Conduct Major Review Of FLSA For All CNIC Positions/Employees

- *HQ N13 conducting 100% review of FLSA (started April 2016)*
- *Group 1 Review – N3 Community*
 - *First Responders (Police, Firefighters and Guards)*
 - *Initial Review – GS-09 and below employees*
 - *Changes worked April 2017*
 - *GS-10 and above next (completion date Oct 2017)*
- *Group 2 – N9 Community*
- *Group 3 – N00 Workforce (Command and Staff and Special Assistants)*
- *Then continue until all CNIC APF reviewed (including all Overseas positions)*
- *NOTE: The review is a multi-year effort*



What is CNIC Doing About Potential FLSA Issues? Part 2

Educate Entire Command

- ✓ **All APF civilians and supervisors (including military) of civilians training on FLSA Rules and Responsibilities**
 - **Conduct VTCs for HRO Staffs and Region EDs & N1s (Completed winter 2017)**
 - **Region EDs/N1s (with HRO assistance) train all IPMS Managers who, in turn, will provide training to their respective staffs at installations (FY 2017)**
 - **Employee training completed via TWMS (By fall 2017)**
- ✓ **Establish Annual FLSA Training Requirement by FY 2018**



What is CNIC Doing About Potential FLSA Issues? Part 3

Reinforce Quality And Consistency Of FLSA Determinations Across Enterprise

- ✓ **Increase Use of Standardized PDs**
 - ✓ **Affirm requirement for PD accuracy review**
- ✓ **HROs to provide tips & training as part of Annual Performance Review process**
 - ✓ **(Start FY2017-4th Qtr.)**
- ✓ **Establish Regular Review of All PDs**
 - ✓ **10% annual PD accuracy review (Start FY2018-1st Qtr.)**
- ✓ **Establish Regular Review of FLSA Exempt Positions**
 - ✓ **10% annual sampling (Start FY2018-1st Qtr.)**



Questions?



Additional Information

- **References**

- 29 USC § 201-219
- 5 CFR § 551.501, Overtime pay under the FLSA
- 5 CFR § 550.113, Computation of overtime pay
- 5 CFR § 550.114, Compensatory time off
- DoDI 1400.25, v-550 Pay Administration (General)
- SECNAVINST 12550.1 Pay Administration (General)
- CNICINST 12550.1A Pay Administration



- **U.S Office of Personnel Management Links**

- FLSA Overview (www.opm.gov/flsa)



General FLSA Questions

- **Q. What activities are considered "work?"**
- **A. The courts have held that work time under the FLSA includes all time spent performing job-related activities which (a) genuinely benefit the employer, (b) which the employer "knows or has reason to believe" are being performed by an employee, and (c) which the employer does not prohibit the employee from performing. These can include activities performed during "off-the-clock" time, at the job site or elsewhere, whether "voluntary" or not.**
- **Courts have awarded FLSA damages for "off-the-clock" time spent by employees maintaining equipment, staying late after normal shifts without "putting in" for overtime, doing job-related paperwork "at home," making and responding to job-related telephone calls, working through meal periods, and many other activities. Employees sometimes underestimate the amount of "off the clock" time they spend performing compensable tasks.**
- **Q. What is "overtime?"**
- **A. The word overtime has a technical definition under the FLSA, and means all time actually worked over a "threshold." The usual threshold is 40 hours per work week. Some government or medical jobs may have alternative thresholds.**
- **Q. Does leave time count as work time?**
- **A. No. "Hours not worked" need not be counted as "hours worked" for purposes of FLSA wage computations, even if they are counted as work time for some other purpose such as pensions or for pay computations under employment agreements.**



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- **Courts have awarded FLSA damages for "off-the-clock" time spent by employees maintaining equipment, staying late after normal shifts without "putting in" for overtime, doing job-related paperwork "at home," making and responding to job-related telephone calls, working through meal periods, and many other activities. Employees sometimes underestimate the amount of "off the clock" time they spend performing compensable tasks.**
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General FLSA Questions (cont'd)

- **Q. What is an FLSA threshold?**
- **A. *The FLSA generally requires overtime for hours worked in excess of 40 hours per week. In a regular, 40 hour week situation, the FLSA "threshold" is thus 40 hours per week. Some government employees, and some medical employees, may have different thresholds. For FLSA purposes, only "actual" work time counts toward the overtime threshold. Leave time does not count as work time under the FLSA, even if the time is paid for and considered working time for other purposes. For example, suppose an employee works 4 of his or her 5 regularly scheduled eight-hour days in a week, and takes leave on the fifth day. The employee will have worked 32 "regular" hours that week. Any additional time worked by the employee during that week (whether "on the clock" or "off the clock") will not "count" for FLSA overtime until (and to the extent that) the total number of hours worked that week exceeds 40 – in the example, the first 8 "extra" hours need not be paid as overtime under the FLSA.***
- **Q. At what rate must FLSA overtime be paid?**
- **A. *Time and one-half the "regular hourly rate."* (For employees whose normal pay is not an "hourly" rate, their regular rate requires converting pay to an hourly equivalent. There are some peculiar FLSA arithmetic rules about how to do this.) Longevity pay, shift differentials, and similar nondiscretionary wage augments paid for work should generally be included in calculating the FLSA overtime rate. There are provisions which may permit arrangements to pay for some work at a different rate, but only if the work is different from the employee's regular job, and only by agreement before the work is performed.**



Flexible Work Schedule FLSA Questions

- **Q. What are "credit hours"?**
- **A. OPM defines "credit hours" as: "Those hours within a flexible work schedule that an employee elects to work in excess of his or her basic work requirement so as to vary the length of a workweek or workday."**
- **Q. What is a "flexible work schedule" (FWS)?**
- **A. A "flexible work schedule" is defined as: "A work schedule established under 5 U.S.C. 6122, that-1.in the case of a full-time employee, has an 80-hour biweekly basic work requirement that allows an employee to determine his or her own schedule within the limits set by the agency; and 2.in the case of a part-time employee, has a biweekly basic work requirement of less than 80 hours that allows an employee to determine his or her own schedule within the limits set by the agency."**
- **Q. Is there a maximum number of credit hours that can be earned 80-hour biweekly work week?**
- **A. By that, the maximum hours earned should never be more than 24 hours per 80-hour biweekly work period. All credit hours earned are required to be used within the SAME pay period they were earned and not carried over to another pay period.**
- **Q. If my employee is on a FWS, can I require them to work additional hours on a particular day without paying them overtime?**
- **A. Possibly. However, the 24-hour earned credit limitation still applies. Talk to your servicing HR Specialist to confirm when it is allowed.**



Suffer or Permit Common Questions

- **Q. Does it matter that an employee did not "put in for" the time spent performing work activities?**
- **A. Probably not. "Failure to ask" is not a defense for an employer in an FLSA case. Failure to ask might conceivably be relevant on the question of whether an employer knew or had reason to believe that an employee was performing off duty work, but even in this situation failure to ask would be only one factor on the question.**
- **Q. How does an employee prove that the employer knew or had reason to believe that off the clock work was being performed?**
- **A. An employer will be held to "know" what it "could have found out" if it had paid attention to what its employees were doing. The legal standard is whether an employer could have learned of the handler's activities by making reasonably diligent inquiries. According to the courts, it is a "rare" case in which an employer will be found to lack the requisite knowledge when the activities in question are "part and parcel" of an employee's job, unless the employee has deliberately hidden the fact that s/he is performing them.**
- **Q. How do I prove the amount of time spent doing off-the-clock compensable activities?**
- **A. It is up to the employer to control the work of its employees, and to maintain records of the time spent by employees performing compensable activities. If an employer does not maintain the required records, the employee is entitled to recover based on good faith, reasonable and realistic estimates.**



Suffer or Permit Common Questions (cont'd)

- **Q. Does it matter that I never reported the time or asked for overtime?**
- **A. Probably not. It is the employer's obligation to control the work. If an employer does not wish work to be performed it must prohibit it. "Failure to ask" for overtime is usually not a defense for an employer in an FLSA case. An exception might be if the employer has a requirement that generally all time be reported and actually has enforced it, or if an employee's failure to report means that the employers did not know the work was being performed.**
- **Q. I get "compensatory time" in lieu of cash for overtime. Is this allowed?**
- **A. Maybe, but only for public sector (government) employees. Comp. time in lieu of cash for FLSA overtime is not generally permitted in the private sector. A public sector employer may pay (at least some) FLSA overtime with comp. time.**
- **Q. What do I get if I win?**
- **A. Money. Successful FLSA plaintiffs are entitled to back pay for all unpaid overtime, usually beginning two years before the complaint is filed. In most cases, they are also entitled to double the amount of back pay. This is called liquidated damages, and is essentially in lieu of interest on the unpaid wages. The Act also requires the employer to reimburse out of pocket litigation expenses and pay an additional attorneys' fee award. Some pre-tax FLSA recoveries by employees have been quite substantial. For employees nearing retirement, back pay awards may increase pension benefits.**



Suffer or Permit Common Questions (cont'd)

- **Q.** Is money recovered in an FLSA case taxable?
- **A.** Yes.
- **Q.** What is the effect of an FLSA recovery on a pension?
- **A.** *This will depend on the pension system's rules. However, at least some of an FLSA award may be considered "back pay." Therefore, if pensions are based on a percentage of wages earned or "average salary," an FLSA recovery may increase the amount of pension an officer can receive. Thus, in some circumstances an FLSA award can be "the gift that keeps on giving."*