



**Tips and Tidbits**  
**Issue #: 06-2011**



**13 June 2011**

**Scenario: Without advising his supervisor of the need for additional time to complete assigned work, an employee comes in over the weekend to work on a major project. The following Monday morning, the supervisor accepts the completed project. Nine months from the date on which the [weekend] work was performed, the employee submits a claim for 18 hours overtime pay. Must the Agency pay the employee? \***

The 1938 Fair Labor Standards Act (FLSA), as amended, introduced a new concept regarding overtime work into the Federal Service. Under this concept, a *covered\*\** employee becomes entitled to overtime compensation for hours worked in excess of forty in a workweek for all work which management approves or "**suffers or permits**" to be performed. Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, appropriately approved or not, when the employee's supervisor accepts the benefits of that performed work.

An employee may voluntarily continue to work at the end of regular working hours. He or she may need to finish an assigned task, prepare reports, finish waiting on a customer, or take care of a patient in an emergency. An employee may take work home or some other location to complete in the evening or on weekends to meet a deadline. All of these are examples of hours worked under the FLSA and is commonly referred to as "working off the clock". Left unchecked, this practice could potentially lead to unexpected, financial obligations.

Under the FLSA, management cannot accept the benefits of a covered employee's work without compensating the employee for that work. FLSA covered employees who work for the benefit of the agency, prior to or after established shift hours or even during prescribed lunch periods, are entitled to compensation. Accordingly, if a manager/supervisor knows of or has reason to believe work is being performed and has not curtailed the work, overtime or compensatory\*\*\* time *must* be paid for the extra work. This principle applies whether or not the employee was specifically requested to do this work.

The same concept exists for employees who are exempt from FLSA; however, in these instances, the supervisor can *require* the employee to receive compensatory time in lieu of overtime pay for irregular or occasional work.

Suffer or permit to work situations occur when management "overlooks" employees answering the phone or scheduling work during lunch periods. Additionally, supervisors

may inadvertently fall into the payment of suffer or permit overtime by assigning a report at the end of the day with a suspense for the following morning when the report would obviously have to be accomplished after work hours [when the employee was *not* scheduled for work]. The circumstances under which off the clock work might occur are limitless; however, it is management's duty to exercise control and ensure that work is not accomplished if the employer does not want it to be performed.

For the examples above, in order to circumvent becoming prey to potential, future overtime claims, management could require workers to eat in a different area (i.e., not at the reception desk); prevent access to the reception area during lunch\*\*\*\*; or, simply direct that no work be done during the scheduled lunch period and follow up with progressive, disciplinary action as/if necessary.

Ignorance of the intricacies of suffer or permit to work conditions can have serious, costly repercussions. The American Federation of Government Employees (AFGE) won additional money for non-paid overtime to the tune of \$200 million from the Social Security Administration approximately 10 years ago. Twenty million was awarded in June 2005 to the Department of Security, Immigration and Customs Enforcement employees, [formerly a separate entity but now a part of DHS], due to "off the clock" lunch and travel to a duty station performed between June 2, 1991 through May 28, 1998.

Claims are subject to a two year statute of limitations, three years for willful violations.

For additional information, please contact your L/MER HR Specialist.

\*If the employee is [FLSA] nonexempt or "covered", the Agency would be liable for payment.

\*\*For additional information on employees covered under the FLSA, see "Tips and Tidbits 4-2007".

\*\*\* Compensatory time may be paid ONLY upon employee request if the employee is covered

\*\*\*\*May require impact and implementation bargaining/negotiation with the Union since this could constitute a change to the work conditions

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