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THE BILL BLACKWOOD
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS

TIME MANAGEMENT FOR THE
EXEMPT STATUS EMPLOYEE

A
POLICY RESEARCH PROJECT

Submitted in Partial Fulfillment
of the Requirements for the Professional Designation
Graduate, Management Institute

by

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Webster Police Department
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ABSTRACT

The purpose of this policy research project is to examine the issue of time management of the exempt status employee. When the Fair Labor Standards Act of 1938 was passed, employees in management, professional and administrative positions were exempt from the protection of the Act; there was no mandate for employers to pay employees in these positions overtime wages for hours worked over the federally regulated hours. Consequently, exempt status employees have been expected to work many additional hours over their regular schedule, take work home and be available at all times of the day and night. In some cases, these employees have not been given the opportunity to manage their own time. As a result, management personnel are often stressed, physically and emotionally. Their family relationships suffer because they are unable to devote quality time outside the workplace. Economists, historians and commentators have written books and articles suggesting that the workforce of today has changed significantly. Review of case law and relevant articles from Payroll Legal Alert and Texas Law Letter will show that there is no legitimate reason not to compensate exempt status employees for their extended hours of work. Personal opinions expressed by Chief Michael Keller, City of Webster Police Department, and responses to a survey conducted for this research project will reveal that many supervisors, managers and administrators have the desire to receive some kind of compensation for their extended hours of work. The intended outcome of this project, will be to convince the City Manager of the City of Webster that the personnel policy should include specific provisions for exempt status employees. These provisions must allow these employees the flexibility to do their jobs without sacrificing a close family unit and/or emotional and physical wellness.

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INTRODUCTION

The purpose of this research project is to explore the issue of the exempt status employee and the common practice of expecting these employees to work unlimited numbers of hours without additional compensation or the opportunity to manage their time. In other words, allowing employees to work fewer hours in a day or within a week to compensate for hours worked in excess of the regular schedule. In the City of Webster, exempt employees work the customary forty hours, 7:30 am – 5:30 pm Monday through Thursday and 7:30 am – 11:30 am on Fridays; the same as all other city employees that do not work shift assignments. In addition, exempt employees work a lot of extra hours, take work home and make themselves available for evening Council meetings, board and committee meetings and emergency calls. When the Fair Labor Standards Act (FLSA) was passed in 1938, employees in managerial-professional positions were exempted from the protection of the Act. It is generally believed that the reason for this exemption was that these employees needed no protection; they had their own bargaining power to prevent excessive hours, held privileged positions in the workplace and were paid a premium salary. Consequently, exempt status employees have been required to spend more and more hours in the workplace - leaving less time for their families, the pursuit of non-vocational activities and adding to their stress and fatigue levels. In addition to no supplemental compensation for these excessive hours, in some cases exempt employees are not afforded the opportunity to flex these excessive hours and work less than a day without having to use time from their leave banks.

Current opinions and proposals suggest that exempt status employees should be paid overtime or allowed to accrue comp time (DeChiara, Schor, Rothberg, et al).

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Introduction (continued)

Opinions from Chief Michael Keller, City of Webster Police Department and other Texas police agency administrators surveyed reveal that the general consensus is that exempt employees deserve some form of additional compensation for their excessive work hours. Research collected from legal reviews, articles and books will reveal that the managerial and professional workforce of the past is quite different and suggests that there are no legitimate reasons to justify the managerial-professional exemption today. Economists, historians and other commentators have a growing interest in this issue and are proposing that Congress amend the FLSA to include exempt status employees under their umbrella of protection. The primary intent of this research project is to convince the City Manager that the City of Webster administrative staff deserves the flexibility to manage their time to fit their needs. In light of the additional hours they work, they should be allowed to be absent from the workplace for less than one day without having to draw from vacation or personal leave banks, receive overtime pay or be allowed to accrue comp time.

HISTORICAL, LEGAL OR THEORETICAL CONTEXT

The Fair Labor Standards Act of 1938 (FLSA) was President Franklin D. Roosevelt's second attempt to regulate broad hours of workers. (FLSA of 1938, ch 676, 52 Stat 1060) This Act included a nationwide minimum wage, prohibited oppressive "child labor" and required employers to pay a premium overtime wage for each hour worked beyond the standard workweek. The overtime wage amounted to no less than one and one-half times the employee's regular, hourly wage. (FLSA of 1938, ch 676, ss 6,7,12, 52 Stat at 1062-64, 1067)

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Historical, Legal or Theoretical Context (continued)

The purpose of the overtime provision was to,

- (1) reduce unemployment by encouraging employers to hire more workers instead requiring their current employees to work excessive hours, and
- (2) compensate employees for the burden of working excessive hours.
(Walling v Youngerman-Reynolds Hardwood Co., 325 U.S. 419,(1945) 423,24)

However, the FLSA did not apply to all employees. The Managerial-Professional exemption excluded from coverage, “any employee employed in a bona fide executive, administrative or professional capacity. (FLSA of 1938 ch 676, ss 13, 52 Stat at 1065) The most commonly expressed justification for the FLSA’s managerial-professional exemption is simply that managerial and professional employees did not need the government to regulate their work hours.

Before we can visit the issue of whether or not exempt employees deserve additional compensation, we must examine if they can in fact be given additional compensation as exempt status employees. Several Federal Courts of Appeals over the last seven years have held that overtime compensation, by itself, does not fail the “salary basis” test and will not defeat the professional, administrative or executive exemptions under the FLSA. In 1991, the Fifth Circuit affirmed that “paying an hourly rate for each hour worked beyond the regular schedule does not defeat FLSA exemptions”. (York v. Wichita Falls, 944F.2d at 242).

“Last year, the U.S. Supreme Court ruled in Auer v Robbins that exempt employees will fail the salary test and lose their exempt status under the Fair Labor Standards Act, if their pay is actually docked or a pay policy creates a significant likelihood of docking. Now a new issue has arisen – whether

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Historical, Legal or Theoretical Context (continued)

mandatory deductions from employees' paid leave banks, if they work less than a full day, violate the salary test. The answer from one federal trial court is that they do not. (Cooke V. General Dynamics Corp., Electric Boat Div.) Exempt employees who worked less than a full day had to make up the time during the week or have their paid leave banks charged for the time not worked. In addition, they had to charge time when the plant closed over Christmas week. If paid leave ran out, they could borrow up to 40 hours of time. When borrowed time ran out, they had to take unpaid personal leave. Their pay, however, was never docked for partial-day absences.

"Several employees sued, contending that the required use of paid time, and the potential for unpaid time, violated the salary test. The employer's defense was that reducing benefits, as opposed to reducing salary, didn't affect employees' exempt status.

"A Federal trial court ruled for the employer. It relied in part on several opinion letters from the Department of Labor, which concluded that 'mandatory deductions for partial-day absences are to employees paid leave banks, and the employer's policy forbids salary deductions for these absences, employees exempt status isn't jeopardized'.

"Mandatory docking from accrued time for partial-day absences may be the next area of dispute between exempt employees and their employers. Not too

Historical, Legal or Theoretical Context (continued)

many courts have ruled so far. Of the circuits which have, the 4th (Maryland, North Carolina, South Carolina, Virginia, and West Virginia), 9th (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon & Washington), 10th (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, and 11th (Alabama, Florida, and Georgia) have ruled that these deductions are OK. Only the 7th Circuit (Illinois, Indiana and Wisconsin) has ruled otherwise.” (Payroll Legal Alert, 1998)

“According to the Department of Labor and most federal courts, requiring an exempt employee to use accrued paid time off – such as vacation time – to cover such absences does *not* rise to the level of an impermissible salary deduction. This means the employee doesn’t lose exempt status. Why? Well, the employee is still deemed to have received her full salary.

“But note this: If the employee has no further accrued paid time off and *then* is docked for taking off a few hours, the employee’s otherwise exempt status would be destroyed. The bottom line? If you require exempt employees to use paid time off for less-than full day absences, you need to ask yourself what happens if the employee has zeroed out the accrued time off. If reducing the employee’s salary is your answer, you’ve got a problem.” (Texas Employment Law Letter, 1998)

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REVIEW OF LITERATURE OR PRACTICE

Exempt status employees of the City of Webster are expected to work increasingly longer hours without additional compensation or the use of flextime. The writer of this research project conducted a survey of twenty-five Texas police agencies to compare their practices of time management for the exempt status employee. The survey consisted of eight questions related to exempt status employees, their privileges and their ability to manage their own time. Of the twelve responses, 100 % advised that exempt status employees in their agency are allowed to flex their time as they see fit. While some agencies allow the exempt status employees to accrue comp time and draw from that time, others simply allow them to flex their time; take the time off once they have worked forty hours for the time period. A Chief of Police from a small suburb of Dallas who wished to remain anonymous, stated, "If you trust and rely on your command staff and know anything about human behavior, you as a Chief will allow your command staff these types of privileges without question" (Edwards, 1998).

At least two other authors have recently called for comp time for managerial and professional employees. Rosabeth Kanter, in her study of modern American business, urges companies to voluntarily give their managers and professionals time off in order to "make space for" their personal lives (Kanter, Rosabeth M. 268). Juliet Schor goes beyond, suggesting that employers voluntarily provide such periods of "relaxation and renewal," and calls for a legal mandate requiring employers to provide their salaried employees with comp time (Schor, Juliet B. 66-67).

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Review of Literature or Practice (continued)

In addition to a concern for exempt employee's personal lives, a related concern is the relationship involving their families. In a memo to the City Manager of the City of Webster dated July 27, 1998, Chief Keller wrote:

"Being committed doesn't mean that the organization has to monopolize your life. As a leader I am just as concerned with my employees personal well-being as their professional. I encourage them to maintain an even balance. Actually, as far as I am concerned, family comes first. There are those times, more so in the policing profession, when we have to make sacrifices for the organization that put us at odds with our families, especially our children. That is why this profession has such a high suicide, alcoholism and divorce rate. I would much rather have an employee that gives the organization a solid eight hours, every day for the duration of their career as opposed to an employee that is so committed that they burn out in five years and become disgruntled (Keller, Michael).

Regarding the issue of stress/burnout mentioned by Chief Keller, William Mathis, Ph.D., a management psychologist providing services to local government managers in change management, organizational restructuring and reengineering, wrote an article titled, "**Reclaiming a Balanced Life: Reinventing Our Schedules**". The article, published in the January 1999 issue of *Public Management*, discusses the "pressures of the chaotic and changing environment in the management field" and describes the resulting pace as a creation of a "crisis-oriented lifestyle". Of his seven basic principles developed to guide executives through the perils of personal change

Review of Literature or Practice (continued)

management, principle #3 is to “encourage family support and involvement”. Mathis quotes a fired City Manager from California, “this business could easily be a 24-hour-a-day operation. You must physically get away from it for perspective” (Mathis, William, 7).

DISCUSSION OF RELEVANT ISSUES

There are two major issues that can be shown to no longer justify the managerial-professional exemption of FLSA. First is the idea that “managerial and professional employees do not need government regulation because they have sufficient bargaining power on their own to withstand demands from their employers to work excessive hours” (Rubhuhn, Harry, 965). “Due to equal bargaining power between the two parties, Congress saw no need to invade the right of employer and manager to fix contracts of employment. (DeChiara, Peter D.). Second is the idea that excessive hours do not constitute a problem for managerial and professional employees because they enjoy certain privileges on the job; they have a certain amount of discretion to manage their time and do not have to punch a time clock. (Rubhuhn, Harry 974).

“It appears clear that most managers and professionals lack sufficient bargaining power to resist employer demands for longer hours. Indeed, the very fact that such employees work excessive hours attests to their lack of bargaining power. The threat of unemployment makes managers and professionals eager to comply with, or even exceed, their employers’ demands; fearing for their jobs, many managers and professionals now work long hours simply to demonstrate their value to the company. Professor Rosabeth Kanter has explained that recent changes in American businesses have ‘multiplied the pressures people feel to prove they are

Discussion of Relevant Issues (continued)

contributing – to prove that their job adds value in case the company plays musical chairs with the structure.’ In such an environment, an employer can easily replace any given managerial or professional employee according to Juliet Schor, ‘For every aspiring manager determined to limit his or her hours, there are usually many more willing to give the company whatever time it demands’. The simplification of many professional and managerial jobs, and the corresponding loss of stature suffered by employees holding such jobs, can only serve to reduce further the bargaining power of managers and professionals” (De Chiara, Peter).

The idea that exempt employees have sufficient bargaining power to prevent working excessive hours can be further dispelled when considering the recent passage of the Family Medical Leave Act of 1993 (FMLA). This Act provides employees the right to take up to twelve weeks of unpaid leave to care for newborn children or sick family members without the possibility of losing their jobs. There is no specified exclusion for exempt status employees in the FMLA. This fact indicates that possibly Congress does not believe that these employees have sufficient bargaining power to take this leave nor that these employees have the benefits and privileges on the job that would make such leave an unnecessary issue.

The idea that exempt status employees do not need limited hours because they enjoy higher salaries, better working conditions and more privileges than other employees is also flawed. Proponents of this proposition ignore the fact that many managers and professionals enjoy little autonomy and prestige on the job and receive low wages. More important, they ignore one of the main purposes of limiting work hours: employees need limited work hours so that they can spend more time away from work with family or in nonvocational activities. High

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Discussion of Relevant Issues (continued)

pay, good working conditions, and privileges on the job may make work more tolerable, or even enjoyable, but they have no bearing on the amount of time an employee can spend away from the workplace. Clearly, decent salaries and favorable working conditions cannot substitute for quality time away from the job.

“The challenge of maintaining quality, or prime time for managers and their families without compromising service is intense. People need nurturing and a sense of belonging as never before. We all want personal stability in a time of increasing uncertainty and change”. (Mathis, William D., 7) “Stress can contribute to the secretion of high levels of detrimental hormones causing physiological changes such as attitude, low morale and distress at home and/or on the job” (West, Barbara). Without a balance between the workplace and family, stress can result in burnout. Burnout as defined by Dishkin (1989) is “our unsuccessful efforts to cope effectively with our daily life situations, resulting in a state of physical, mental and emotional exhaustion” (Diskin, 12).

For Congress to amend the FLSA and require employers to provide overtime pay to exempt employees, would impose a cost to employers, “but the overall benefits to be gained, such as increasing productivity and enriching the lives of affected employees, would more than justify the increased costs”. (DeChiara, Peter)

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CONCLUSION/RECOMMENDATIONS

Over the past fifty years, the composition of the workforce has changed greatly. The number of employees in managerial positions has increased sharply, due in part to the fact that employers have been allowed to demand excessive hours and not pay overtime wages. Although FLSA exempts these employees and does not require they be given extra compensation for excessive hours, it does not mandate they cannot. In fact one of the requirements of FLSA's managerial-professional exemptions requires "consistent exercise of discretion and judgment" (FLSA 29 C.F.R ss 541.305 (a), (b)). Numerous court rulings over the years have affirmed that paying overtime wages or providing comp time does not affect the exempt status.

Due to the increased, hectic pace of management responsibilities, there should be more concern for employees in these high stress positions. If they can be trusted to do the job exercising their discretion and judgment, they should be trusted to use their time as needed.

In the conclusion of his memo, Chief Keller states:

"In any organization, establishing a standard of accountability is critical for checks and balances. Like anything, taken to an extreme this accountability can have just the opposite desired effect; fostering a perception of distrust. I think the key to exempt employee status is an understanding of trust. You trust us with the responsibility of millions of dollars, the lives, careers, and futures of our employees. Are we not trustworthy enough to take a day off, knowing we have put in the extra hours?"(Keller, Michael)

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Conclusion/Recommendations (continued)

The majority of the sources located during this research project propose that FLSA be amended, mandating that exempt status employees be paid overtime wages or allowed to accrue comp time for hours worked over forty. My intent in this research project is to propose to the City Manager of the City of Webster that the personnel policy specifically address the exempt status employee, allowing staff the flexibility in management of their time, imposing no extra cost to the City. It is this writer's opinion, the City Manager's display of trust and faith in his staff would result in a fresh, re-energized group of people with a greater ability to produce.

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