



Municipal Technical Advisory Service  
INSTITUTE *for* PUBLIC SERVICE

# TGFOA

## Hot Topics in HR Risks to Cities

Betsy Cunningham– MTAS Human Resource Consultant



# Key HR Regulations by Employee Headcount

1

Fair Labor Standards Act of 1938 (*incl. P.U.M.P.*)

Equal Pay Act of 1963

Fair Credit Reporting Act of 1969

USERRA of 1994

TN Guard/Reservist Leave

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8

Employment of the  
Disabled  
(T.C.A. § 8-50-103)

15

Title VII of Civil Rights Act of 1964

Americans with Disabilities Act of 1990

Pregnant Workers Fairness Acts

Genetic Information Nondiscrimination Act  
of 1990



20

Age Discrimination  
in Employment Act  
of 1967

Consolidated  
Omnibus Benefits  
Reconciliation Act  
of 1986

50

Family and Medical  
Leave Act of 1993

Patient Protection  
and Affordable Care  
Act of 2010

100

## Tennessee Maternity- Paternity Leave Act

# HR Departments Statewide



## HR Reg Risk Clusters

	100+ EEs	50-99 EEs	15-49 EEs	8-14 EEs	0-7 EEs
Number of Cities	66	42	84	64	89
WITH Formal HR	64	10	1	0	0
NO Formal HR	2	32	83	64	89



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# HR Reg Risk Clusters

**37% of TN cities**

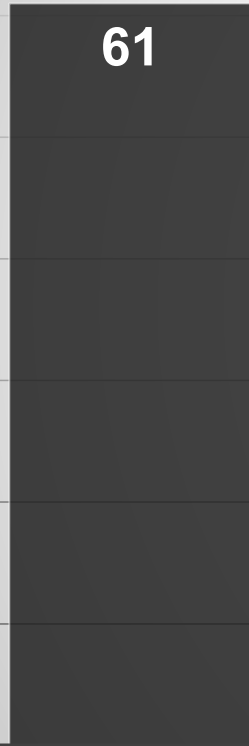
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**Only 9% have HR**

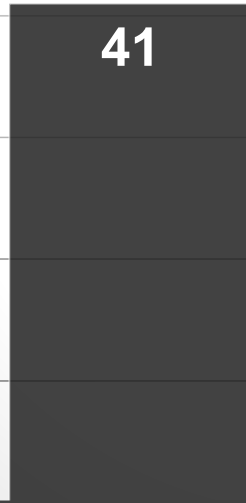


# Anecdotal Account of Issues

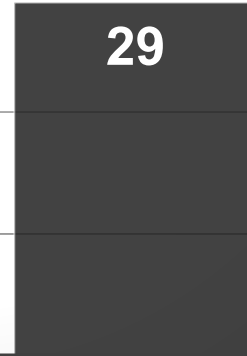
# OOPS Questions - 18 Month Snapshot



FLSA



ADA



FMLA



GUARD/RESERVE



# Guard and Reserve Leave

T.C.A. § 8-33-109 and Pub Ch 243  
– the ‘working day’


# The 160-hour problem:

Koppin v Strode 761 N.E.2d 455


20 Working days per calendar year



Until recently no legislation or caselaw in TN that had helped define...



Now Pub Ch 243 defines.



Some cities behind the curve.

https://www.esgr.mil/About-ESGR/Contact/Local-State-Pages/Tennessee

The screenshot shows the ESGR website interface. At the top, there is a navigation bar with links for Home, State Pages, and Contact Us, along with a search box. Below this is a secondary menu with links for About ESGR, Employers, Service Members & Family, Volunteers, Employer Awards, USERRA, News & Events, and Resources Library. The main content area features a breadcrumb trail: Home » About ESGR » Contact » Local/State Pages » Tennessee. The title 'Tennessee' is prominently displayed. On the left, there are links for 'Request Assistance' and 'Local/State Pages'. A banner image for Tennessee with the slogan 'We All Serve...' and the ESGR logo is shown. The 'Committee Leadership' section lists the following individuals and their roles:

<b>Mr. Thomas Cauthen</b>	State Chair
<b>Mr. Jim Mungenast</b>	State Vice Chair
<b>Mr. John Dyess</b>	Employer Outreach Director
<b>Mr. Jim Mungenast</b>	Military Outreach Director
<b>Mr. Ken Tarkington</b>	Public Affairs Director
<b>Mr. Bruce Damrow</b>	Training Director
<b>Mr. Marcus Whitt</b>	Ombudsman Director
<b>Mr. Chuck Hill</b>	Assistant Ombudsman Director

# Fair Labor Standards Act - FLSA

# FLSA Frequent Process Failures

Using 'Job Title' not 'Duties' to Misclassify (Building Code Inspector, 'Volunteer' Firefighter, 'Director of XYZ' )



Mishandling Compensatory Time



Improper payment of wages (training travel, bonuses, etc.)

# Misclassification and Duties Tests

## Executive

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$684 per week;
- The employee's primary duty must be managing 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 or 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.

# Misclassification and Duties Tests

## Administrative

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 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 includes the exercise of discretion and independent judgment with respect to matters of significance.

# COMPENSATORY TIME



# Compensatory Time



Current Rate / 3 Year Avg payout

Can't lose it

Employer can require use

Employer can cash out early

# Travel (Non-exempt)

- Travel to alternate location that differs significantly in travel time from the employee's usual report location.

If an employer requires a non-exempt employee to report to a different work location (more than 30 miles from the usual site) for a single day, that travel time may be compensable, but the time spent commuting to the regular site may be deducted.

## Travel (Non-exempt)

- Travel that keeps an employee away from home overnight is travel away from home.
- The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days.
- Driving vs. passenger

# BONUSES and OT



NON-DISCRETIONARY



DISCRETIONARY

# Typical Situations

## NON-DISCRETIONARY

- Longevity Bonus\*
- P.O.S.T. Supplement
- Fire In-Service Incentive
- Attendance
- Safety Bonus

## DISCRETIONARY

- Holiday Bonus

Sums paid as gifts and payments in the nature of gifts made on holidays or on other special occasions as a reward for service may be excluded from the regular rate, provided the amounts of the gifts (or payments) are not measured by or dependent on hours worked, production, or efficiency.

*\* A longevity bonus is an excludable gift only if the bonus payment is not paid pursuant to an agreement or adopted policy and is not so substantial that it can be assumed that employees consider it a part of the wages for which they work.*

# Calculating Pay

What's the answer?

$$7(5 + 3 \times 2)$$

$$7(5 + 3 \times 2)$$

A. 112

B. 77

P

E

M

D

A

S

Parenthesis

Exponents

Multiplication

Division

Addition

Subtraction

$7(5 + 3 \times 2)$

# Order of Operations - Incorrect

*Calculating as follows is incorrect:*

*40 hours x \$8.00/hr. = \$320.00*

*4 hours x \$12.00/hr. = \$ 48.00*

*Total for hours worked = \$368.00*

*ADD On Call Bonus (\$100.00) for Total = \$468.00*

# Order of Operations - CORRECT

44 hours worked x \$8.00/hour = \$352.00

ADD \$100 (on-call bonus) = \$100.00

Total Compensation before OT calculation = \$452.00

**Regular rate of pay** (Tot. Straight Time Compensation/hrs. worked )

= \$452.00/44 =\$10.27/hr.

\$10.27 (regular rate) + \$5.14 (half-time premium) = \$15.41 (OT rate)

44 (total hours) x \$10.27 (regular rate) = \$451.88 (straight time earn.)

4 (overtime hours) x \$5.14 (half-time rate) = \$ 20.56 (overtime earnings)

**Total earnings = \$472.44**

Day	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
Hrs Worked		8	8	8	8	8	4	44

44 hours worked x \$8.00/hour	=	\$352.00
ADD \$100 (on-call bonus)	=	\$100.00
Total Compensation before OT calculation	=	\$452.00
<b>Regular rate of pay</b> (Tot. Straight Time Compensation/hrs. worked)	=	\$452.00/44 = \$10.27/hr.
\$10.27 (regular rate) + \$5.14 (half-time premium)	=	\$15.41 (OT rate)
44 (total hours) x \$10.27 (regular rate)	=	\$451.88 (straight time earn.)
4 (overtime hours) x \$5.14 (half-time rate)	=	\$ 20.56 (overtime earnings)
<b>Total earnings</b>	=	<b>\$472.44</b>

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\$4.44

# Labor

[www.dol.gov](http://www.dol.gov)

## Featured Stories

Explore the  
new DOL.gov  
beta site



### Welcome to the new DOL.gov

We are reinventing our online experience to be more dynamic, intuitive, and engaging. Explore our beta site and be among the first to see what's changing.



### Self-Audit Programs

Learn how our self-audit programs can help employers, unions, and benefits plans managers proactively improve compliance.

# Self-Audit Programs

The U.S. Department of Labor is committed to providing smooth paths to compliance. Self-audit programs aim to help employers, unions and employees identify and resolve potential violations – without formal investigations or litigation. Select a topic below to learn more.

TOPICS ▾ WORKER RIGHTS FOR EMPLOYERS ▾ RESOURCES ▾ INTERPRETIVE GUIDANCE ▾ STATE LAWS ▾ NEWS RELEASES

WHD > Payroll Audit Independent Determination (PAID)

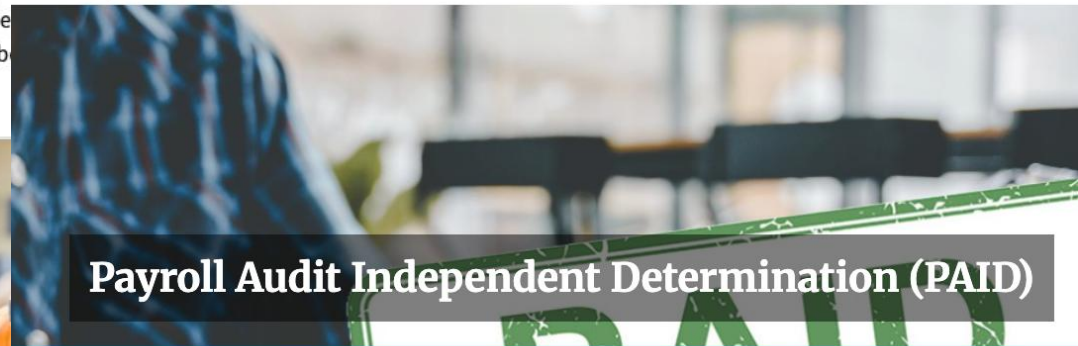


## Wage and leave issues

Employers can independently identify and resolve minimum wage, overtime, and leave violations under the Fair Labor Standards Act and Family and Medical Leave Act through the [Payroll Audit Independent Determination program](#).



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## Payroll Audit Independent Determination (PAID)

### Resolve FLSA and FMLA Violations Quickly and Avoid Litigation

The Wage and Hour Division (WHD) offers the Payroll Audit Independent Determination (PAID) program to help employers resolve potential minimum wage and overtime violations under the Fair Labor Standards Act (FLSA), as well as certain potential violations under the Family and Medical Leave Act (FMLA). This program allows employers to correct mistakes efficiently and ensure employees receive back wages or other remedies promptly, all while avoiding litigation.

Under PAID, employers are encouraged to conduct audits and, if they discover FLSA or FMLA violations, to self-report those violations. Employers may then work in good faith with WHD to correct their mistakes and to quickly provide 100% of the back wages due or other remedies to their affected employees.

Expand All ▾

How PAID Works

+

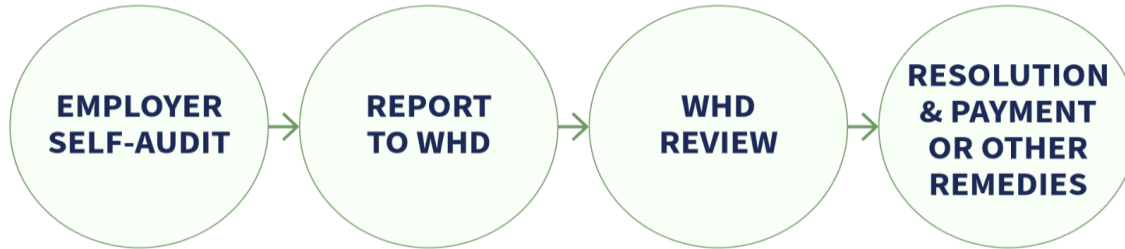
Can I Participate in PAID

+

# Payroll Audit Independent Determination

<https://www.dol.gov/agencies/whd/paid>

## How PAID Works



The PAID program allows employers to identify and correct potential minimum wage, overtime, and certain FMLA violations efficiently while working with us to ensure employees receive back wages.

- **Employer Self-Audit** -- Employers should review compliance assistance materials; specifically identify the potential violations, employees affected, and timeframes each employee was affected; calculate the amount of back wages owed to each employee, if applicable; and specify any other FMLA remedies that are necessary for compliance.
- **Report to WHD** -- Employers then contact WHD to discuss their findings, back wage calculations, remedies due, supporting evidence, and methodology. Employers must also submit a concise statement of the scope of the potential violations for inclusion in a release of liability, and certification that the employer reviewed and meets all the program's requirements.
- **WHD Review** -- WHD will evaluate the submission and provide guidance on next steps, including any additional information required to review the back wages and other remedies due for the identified compensation and leave practices.
- **Resolution & Payment or Other Remedies** -- Employers pay back wages and/or remedies within 15 days of receiving the summary of unpaid wages and provide proof of payment and documentation of other remedies to WHD.



**U.S. Department of Labor**  
**Wage and Hour Division**



June 27, 2025

Field Assistance Bulletin No. 2025-3

MEMORANDUM FOR: Regional Administrators  
District Directors

FROM: Donald M. Harrison, III  
Acting Administrator

**SUBJECT: Prohibition on Seeking Liquidated Damages in Administrative Settlements  
under the FLSA**

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This Field Assistance Bulletin (FAB) rescinds FAB 2021-2 and clarifies that the Wage and Hour Division (WHD) may not supervise the payment of liquidated damages in any administrative matter under the Fair Labor Standards Act (FLSA). Section 216(c) of the FLSA authorizes WHD to “supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee.” The statute does not authorize the Department to compromise claims for or recover liquidated damages except where an enforcement action is brought in litigation.

Accordingly, effective June 27, 2025, WHD must limit all supervised payments under § 216(c) to the recovery of unpaid minimum wages or overtime compensation. The Department may no longer request liquidated damages in any pre-litigation investigation or resolution, including that the Solicitor’s Office will not seek liquidated damages prior to filing a lawsuit.

# ERRORS TO AVOID



Misclassification

Conflating 'Comp' Time

Incorrect Calculations (Shorting)

Failure to Pay for ALL Hours

FMLA

ADA

Employer  
Coverage  
Concerns



**ADA** – 15 or more employees for 20 weeks during current or preceding calendar year




**FMLA** – *ALL governments are 'covered', but not all employees are 'eligible'....*

# FMLA Frequent Process Failures

Failure to recognize a leave request



Improper, delayed, or non-existent designation notices



Poor or incorrect medical certification handling



Inconsistent policy application

# Eligibility

**ADA** – an employee (or applicant) who is disabled as defined by the ADA, is qualified for the position and can perform the essential functions of the position with or without a reasonable accommodation.

**FMLA** – an employee who has worked at least 12 months and 1250 hours prior to the start of the leave and who works at a worksite where there are 50 or more employees within a 75-mile radius. *(ALL governments are 'covered', but not all employees are 'eligible')*

# FMLA Frequently Misunderstood Items

1

FMLA: Eligibility,  
qualifying  
reasons,  
duration

2

Kicking the  
FMLA 'can'  
down the road

(DOL WHD Op FMLA2019-1-A)

3

ADA: disability,  
reasonable  
accommodation,  
undue hardship

# ADA

A disability under ADA is defined as having 3 parts:

- A physical or mental impairment that substantially affects one or more Major Life Activities
- A record of such impairment
- Being regarded as having such impairment



Often overlaps with FMLA

**Substantially limits** must be made on an individual basis, case by case, ...and an impairment that is episodic or in remission may also meet the definition of ADA if it would substantially limit one or more major life activity when active.

# Accommodation

No requirement for light duty under ADA



May include time off (unpaid)

May include intermittent time off

May involve technology (i.e., telecommuting)

May be something very simple

May require different clothing

May be providing a different work schedule

May involve interpreters or readers

## BONUS TOPIC – Fairly Frequent: Safety Sensitive Drug Testing

Testing ALL pre-employment



Incorrect pools for random selection



Not training supervisors for reasonable suspicion

# MTAS HR Consultants



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Q&A