

Ventura County Grand Jury 2015 - 2016



Final Report

Exempt Employees and Administrative Leave

May 31, 2016

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Exempt Employees and Administrative Leave

Note: See “**Glossary**” for definitions

Summary

The federal Fair Labor Standards Act (FLSA) of 1938 (aka: Wages and Hours Bill) introduced the 40-hour work week, established a national minimum wage, guaranteed time-and-a-half for overtime in certain jobs, and prohibited employment of minors in oppressive child labor. The intent was to protect workers from unscrupulous employers. President Franklin Roosevelt called it “...the most important piece of New Deal legislation since the Social Security Act of 1935.” The FLSA establishes minimum standards. State and local laws, as well as collective bargaining agreements, may provide additional protections for workers.

The 2015-2016 Ventura County Grand Jury (Grand Jury) received a complaint alleging the improper classification of certain Ventura County (County) employees as “exempt” employees under the FLSA. Additionally, the complaint alleged abuse of the County’s “Administrative Leave Policy” by some exempt employees. After opening an investigation, the Grand Jury read applicable portions of the FLSA, reviewed various websites intended to give employers guidance in correctly applying FLSA provisions, examined various County documents, and interviewed County personnel.

The majority of workers in the United States are covered by the FLSA. Under the Act, employees are classified as “non-exempt” or “exempt”. Non-exempt employees are entitled to overtime pay if they work more than 40 hours in a week. Exempt employees are not entitled to (exempt from) overtime pay no matter how many hours they work. The default classification is non-exempt. An employee may be classified as exempt *only* if he/she meets three specific criteria. Of these, the key criterion is job duties performed on a daily basis. Classifying employees as exempt exposes employers to substantial inherent risks if the classification is found to be incorrect. Even though 25% of all regular County employees are classified as exempt, the County’s Personnel Rules and Regulations manual does not explain the exempt and non-exempt classifications.

The County has a policy for exempt employees which allows for “Administrative Leave” – time off with pay – in addition to normal vacation and sick leave. “Satisfactory performance”, which is one of the criteria for granting Administrative Leave, is not clearly defined. Additionally, the application of the Administrative Leave policy is inconsistent across employee bargaining units.

The Grand Jury recommends that the Ventura County Board of Supervisors: include an explanation of the exempt and non-exempt classifications in the Personnel Rules and Regulations manual; define the level of performance required for granting Administrative Leave; take steps to ensure consistent application of the Administrative Leave policy; require a regular review of employee classifications; and require a study of the financial impact of having such a large number of exempt employees.

Background

The Grand Jury received a complaint alleging the improper classification of certain County employees as “exempt” employees under the federal Fair Labor Standards Act (FLSA). Additionally, the complainant alleged abuse of the County’s “Administrative Leave Policy” by some exempt employees. The Grand Jury learned that a large number of County employees are classified as exempt and therefore entitled to administrative leave. The Grand Jury saw a potential for significant abuse and decided to open an investigation into both of these issues.

Methodology

In conducting its investigation, the Grand Jury reviewed:

- Applicable portions of the FLSA
- Various websites intended to give employers guidance in correctly applying the provisions of the FLSA
- Applicable portions of the *Federal Register*
- The County of Ventura Administrative Policy Manual
- The County of Ventura Management, Confidential Clerical and Other Unrepresented Employees Resolution (dated June 2015)
- The Memorandums of Agreement (MOA) between the County and various employee unions

Additionally, the Grand Jury interviewed various County personnel.

Facts

Facts Related to Federal Regulations

- FA-01.** The majority of workers in the United States are covered by the FLSA and are classified as either non-exempt employees or exempt employees with respect to pay and overtime regulations. Classification depends primarily on salary and the type of work being done. In general, employees are classified as non-exempt *unless they meet certain exemption criteria*. [Note: In addition to exempt and non-exempt employees, there are several other classifications of workers including volunteers, trainees, interns, independent contractors, and temporary employees. These classifications are not the subject of this report.] (Ref-01, Ref-02)
- FA-02.** Under the FLSA, *non-exempt employees* are entitled to overtime pay if they work more than 40 hours in a given workweek. Most employees, particularly those being paid an hourly wage, are classified as non-exempt. However, many “salaried” employees must also be classified as non-exempt because of their job duties. The important point is that *all* non-exempt employees, whether paid an hourly wage or a salary, are eligible for overtime pay. (Ref-01, Ref-02, Ref-03)
- FA-03.** Under the FLSA, *exempt employees* are not entitled to (are exempt from) overtime pay even when they work more than 40 hours in a week. Their employer must provide a guaranteed salary which cannot be reduced if they work less than 40 hours in a week. According to *Business Management*

Daily, "This [requirement] reflects the understanding that exempt employees have the discretion to manage their time and are not answerable for hours worked or the number of tasks performed."

The FLSA contains many exemptions under which specific categories of employees are excluded from overtime requirements. The most common exemptions are the white collar exemptions for administrative, executive, and professional employees, computer professionals, and outside sales employees.

(Ref-01, Ref-04)

FA-04. As stated in an article posted on the HR Web Café, "The concept of exempt vs nonexempt employees comes from the Fair Labor Standards Act (FLSA) as a distinction to protect employees from working long hours without extra payment. But the terms are often confused and misunderstood by employers and employees alike."

As stated in "Top 100 FLSA Overtime Q&As" published by Business & Legal Reports, Inc., "...a job title alone is insufficient to establish the exempt status of an employee. The determination is made only on the basis of whether the employee's salary and duties meet the exemption criteria."

(Ref-03, Ref-05)

FA-05. An employer can't simply decide to make the entire workforce exempt in an effort to get around overtime. An individual may be classified as exempt *only* if he or she meets *all three* of the following criteria:

- Is paid at least \$23,600 per year (or \$455 per week)
- Is paid on a salary basis (although this requirement does not apply to certain professions that are paid on an hourly basis)
- Performs exempt job duties

Generally, exempt employees tend to perform relatively high-level job duties with respect to the company's overall operations, regardless of job title.

(Ref-02, Ref-05)

FA-06. With respect to job duties, the "administrative exemption" applies to employees whose main duties involve the support of the business, such as human resource staff, public relations, or payroll and accounting. Such employees "...do not directly produce what the company sells; however, they are at a much higher level than those performing simple clerical work."
(Ref-02)

FA-07. With respect to job duties, the "executive exemption" applies to an employee who regularly:

- Supervises two or more employees
- Performs primarily management duties

- Has significant input into other employees' status (hiring, firing, assignments, etc.)

(Ref-02)

FA-08. With respect to job duties, the "professional exemption" applies to employees who perform work requiring advanced education or training. Typically these are "intellectual jobs" that require specialized education involving the use of discretion and judgement. They do not include skilled trades, mechanical arts or other work that does not require a college or postgraduate degree. (Ref-02)

FA-09. According to the *Federal Register*, the FLSA section 13(a)(1) exemptions do not apply:

- To workers who perform repetitive operations and have gained the skills and knowledge required for the performance of their routine work through apprenticeships and on-the-job training rather than through a prolonged course of specialized intellectual instruction
- Merely because an employee directs the work of other employees unless his/her primary duty is the performance of work directly related to the management or general business operations of the employer, requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

(Ref-06)

Facts Related to State and Local Regulations

FA-10. The FLSA establishes minimum requirements. State and local governments may have wage and hour laws that exceed these minimum requirements. Employers must make sure they abide by federal, state, and local wage and hours laws.

"As a rule, employers should follow the law that provides employees with the most protection. Some states have stricter wage and hour laws that guarantee more rights to employees, and in those cases, the state law will rule."

(Ref-01, Ref-03)

FA-11. According to the *Federal Register*, "...employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act [FLSA] from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium.... While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations...relieves employers from their contractual obligations under collective bargaining agreements." (Ref-06)

FA-12. According to the California Chamber of Commerce (Chamber), in order to be classified as exempt, employees "...generally must earn a minimum monthly salary of no less than two times the state minimum wage for full-time employment. *Paying an employee a salary does not make them exempt* [emphasis added], nor does it change any requirements for compliance with wage and hour laws." Employees who are classified as exempt must "...customarily and regularly exercise discretion and independent judgement in their jobs. Discretion and independent judgement involve comparing and evaluating possible courses of action and making a decision after considering various possibilities."

California labor laws are enforced by the California Labor Commissioner who examines the specific job duties performed during the workweek to determine if an employee has been properly classified.

As noted by the Chamber, "Some of the most significant class action lawsuits [filed against employers] have been the result of an employer's misclassification of nonexempt employees as though they were exempt from California overtime."

(Ref-07)

FA-13. Under federal [and State] laws, "The salary test required for exempt employees provides that the *full weekly salary be paid for any week in which any work is performed* [emphasis added], with only very limited exceptions.... Do not make deductions when work is unavailable because of the operational requirements of the business, provided exempt employees are ready, willing, and able to work. Thus, if July 4 falls on a Tuesday and you shut down the business for the balance of the week, any exempt employee who worked on Monday of that week is entitled to a full week's pay." (Ref-07)

Facts Related to Ventura County

FA-14. The Ventura County Board of Supervisors (BOS) has adopted a "Personnel Rules and Regulations" manual. Article 1, Section 101 states: "This resolution describes the definitive guidelines which are adopted to provide a consistent, equitable, effective and efficient program of personnel administration for management, employees and the citizens of the County of Ventura. This Resolution, along with Memoranda of Understanding and Memoranda of Agreement and [a] separate document for unrepresented employees, describes the employment plan for employees of the County of Ventura and shall be known as the Personnel Rules and Regulations." While this document defines a myriad of terms, the index reveals that there is no explanation/definition of exempt and non-exempt employees.

Chapter VIII (B) – 6 of the County of Ventura 2005 Administrative Policy Manual states: "An exempt salaried employee is an executive, administrative or professional employee as defined by the FLSA..." However, this chapter does not explain the qualifications to be designated as executive, administrative, or professional nor does it mention non-

exempt employee. It does not clarify the distinction between exempt and non-exempt employees.

In reviewing County documents, the only other mention of exempt and non-exempt employees that could be found was in Section 3-1 of a document titled "County of Ventura County Clerk and Recorder Employee Handbook", dated October 2012 and imprinted with the General Services Agency emblem. However, relevant County employees interviewed had no knowledge of the document and had to do a Google search to find it. Because the document sometimes refers to the Clerk and Recorder and other times to the GSA Director, it is unclear who was responsible for the document and to whom it applies. The web address for the document includes the phrase "inProgress" so it is unclear whether it was actually approved for issuance.

(Ref-08, Ref-09, Ref-10)

FA-15. The County designates positions (rather than the specific person who fills that position) as exempt or non-exempt. Within the County, similar jobs are categorized in classifications, and whole classifications are designated as exempt or non-exempt. The Human Resources Classification and Compensation (HRCC) group in the County Executive Office utilizes a Position Description Questionnaire to perform an analysis and recommend the FLSA designation. *Occasionally* a review of an FLSA designation is requested. Individuals currently holding the position complete the Position Description Questionnaire and a full study of the position is conducted by the HRCC. A recommendation is then made and, if necessary, vetted through the appropriate labor organization and/or County executive management. A study has not been done to determine/estimate the financial effects of designating positions as exempt rather than non-exempt.

FA-16. The County recognizes 10 employee organizations/unions, each of which has a Memorandum of Agreement (MOA) with the County:

- Service Employees International Union (SEIU)
- Ventura County Deputy Sheriffs' Association (VCDSA)
- Ventura County Professional Firefighters Association (VCPFA)
- International Union of Operating Engineers (IUOE)
- Ventura County Professional Peace Officers Association (VCPPOA)
- Specialized Peace Officers Association of Ventura County (SPOAVC)
- California Nurses Association (CNA)
- Criminal Justice Attorneys' Association of Ventura County (CJAAVC)
- Ventura County Sheriff's Correctional Officers Association (VCSCOA)
- Ventura Employees' Association (VEA)

Additionally, the County has a “Management, Confidential Clerical and Other Unrepresented Employees Resolution” (MCCOUER) dated June 2015 which covers employees not covered by an employee organization and an MOA with the Air Pollution Control District (APCD).

(Ref 11)

FA-17. Approximately 85% of all regular County employees are covered either by the MOAs with the three largest employee unions (SEIU, VCDSA, and CNA) or by the MCCOUER.

FA-18. Roughly 90% of the regular employees covered by the MCCOUER are classified as exempt. Equally important, close to 25% of *all* regular County employees are classified as exempt employees.

FA-19. According to Chapter VIII (B) – 3 of the County of Ventura 2005 Administrative Policy Manual, “Administrative leave was created in recognition of a need for an *occasional outlet* [emphasis added] for exempt employees who, by the nature of the work they do, their training and education as well as the responsibilities and pressures of their positions, are employed to perform a professional or management function.” Among the provisions set forth are the following:

- “The agency/department head or his/her representative may grant administrative leave to employees in FLSA exempt classifications. In no event shall any exempt employee accrue any rights inconsistent with the purposes or policies as set forth herein.
- Administrative leave shall be granted only to those employees who maintain satisfactory or better performance, such as that reflected in performance reviews, employee development records and other types of performance evaluations.
- Administrative leave must be approved by the appointing authority or his/her designated representative prior to being taken.
- Under normal circumstances, administrative leave shall be granted for no more than three consecutive days. However, if unusual circumstances exist, the agency/department head may grant approval for longer than three days as long as prior approval of the extended time is obtained.
- Employees should use the appropriate hours code for reporting Administrative Leave [taken] on their time cards.”

(Ref-12)

FA-20. Article 10 Administrative Leave of the MCCOUER reads as follows:

“Sec. 1001 Purpose: To provide for granting time off with pay for employees who are not eligible to be compensated for overtime.

Sec. 1002 Eligible Employees: Any employee whose *position* is excluded by the Fair Labor Standards Act (FLSA) from accruing and being compensated for overtime is eligible for administrative leave.

Sec. 1003 Granting Of Administrative Leave: Employees shall be granted paid administrative leave *in no less than full day increments* [emphasis added] upon approval of their supervisor in accordance with the County Administrative Manual.

Sec. 1004 Payment For Overtime Worked: Nothing herein shall prevent the payment of straight-time compensation to employees eligible for administrative leave in times of stress or unusual workload situations. Such compensation shall require the authorization of the Board of Supervisors.

Sec. 1005 Use, Accruals, And Record Keeping: Employees exempt from overtime shall not accrue or record hours worked beyond the regular workday or biweekly work period. Employees exempt from overtime shall be eligible to receive administrative leave for personal business in addition to vacation, sick leave, annual leave, and holidays. Administrative leave is not an accrual and has no cash value. It is not earned, but is allowed exempt employees, subject to supervisory scheduling.”

(Ref-13)

- FA-21.** Although Article 11 of the MOA with SEIU contains slight wording differences from the MCCOUER Article 10, the overall meaning is essentially the same. However, one difference is in Sec. 1103 of the MOA which states: “Administrative Leave may be granted in increments not to exceed twelve hours (or the regular shift). For example, an employee who works a 4/10 schedule may be granted 10 hours of Administrative Leave on his/her usual workday.” (Ref-14)
- FA-22.** The Administrative Leave provision (Article 12) of the MOA with CNA also essentially duplicates those in the MCCOUER. It states that, “Administrative Leave may only be granted in increments of eight hours (or the regular shift) or more.” Additionally, Sec. 1102 states, “Any employee who is FLSA exempt shall not be paid overtime of any type unless specifically provided herein.” (Ref-15)
- FA-23.** Article 10 of the MOA with CJA AVC contains provisions relating to administrative leave which essentially duplicate the MCCOUER with one notable exception – Section 1003 Granting of Administrative Leave makes absolutely *no* mention of time increments. It simply states, “Employees shall be granted paid administrative leave upon approval of their supervisor.” (Ref-16)
- FA-24.** The Administrative Leave provision (Article 12) of the MOA with VEA states, “Administrative Leave may be granted in increments not to exceed twelve hours (or the regular shift). For example, an employee who works a 4/10 schedule may be granted 10 hours of Administrative Leave on his/her usual

workday.” Additionally, Section 1105 states, “Employees occupying the classifications designated as exempt in accordance with FLSA as of October 16, 2001 shall not have their pay or their vacation/leave banks reduced by absences of less than one day.” (Ref-17)

FA-25. While some employees of the Ventura County Air Pollution Control District (APCD) apparently are covered by the MOA with VEA, the APCD also has a separate Management, Confidential Clerical And Other Unrepresented Employees Resolution dated June 2014. Article 10 (Administrative Leave), Section 1003 provides that exempt employees “shall be granted paid administrative leave in no less than full day increments...” (Ref-18, Ref-19)

FA-26. The MOAs with VCDSA, VCPFA, IUOE, VCPPOA, SPOAVC, and VCSCOA contain no provisions related to administrative leave. (Ref-20, Ref-21, Ref-22, Ref-23, Ref-24, Ref-25, Ref-26)

Facts Related to Implementation of FLSA

FA-27. According to the website *HRHero*: “The primary advantages [for employers] of classifying employees as exempt are that you don’t have to track their hours or pay them overtime, no matter how many hours they work...However, [employers must be careful when classifying employees because] exemptions from the overtime requirements of the FLSA are just that – exceptions to the rule. They are very narrowly construed, and as the employer, you will always bear the burden of proving that you have correctly classified an employee as exempt... The provisions of the FLSA are interpreted and enforced by the U.S. Department of Labor (DOL) which investigates complaints and sometimes sues when it finds violations.”

Statistics released by the Administrative Office of the U.S. Courts showed that 8,160 FLSA cases were filed between October 1, 2013 and September 30, 2014, an 8.8% increase from the prior 12-month period.

(Ref-01, Ref-05)

FA-28. If the DOL finds that employees have been misclassified as exempt and requires that they be reclassified as non-exempt, the employer may be liable for back pay awards for unpaid overtime, and possibly penalties and interest.

Additionally, employees may file lawsuits against employers for incorrect classification and resulting failure to pay overtime [e.g., *Little v. Belle Tire Distributors* (6th Cir. 10/23/14)]. According to Business Management Daily, “For employers, the stakes are high. Employees misclassified as exempt can be eligible for two years’ worth of back wages (three if the violation was “willful”) at 1.5 times the hourly rate, plus liquidated damages equal to the unpaid wages. This means employees can collect up to three times their regular rate of pay.”

(Ref-06, Ref-27)

FA-29. In July 2015 the DOL issued a Notice of Proposed Rulemaking which "...focuses primarily on updating the salary and compensation levels needed for white collar workers to be exempt." The proposed change, expected to be adopted by July 2016, would more than double the salary threshold that makes "white-collar managers" eligible for overtime pay as well as establishing a mechanism for automatically updating the compensation levels going forward.

According to Business & Legal Reports, Inc., "Changing employees from exempt to nonexempt offers overtime options but may appear to be a loss of status to the individual employee. While some employees will welcome the chance to receive overtime pay, others may see the need to track actual hours worked as a loss of executive, administrative, or professional power or recognition."

(Ref-04, Ref-05, Ref-28)

FA-30. According to *Business Management Daily*, "Just because a worker is exempt doesn't mean your company is freed from keeping records on him or her. With exempt employees, you should keep records that describe the workweek and the wages paid for that period.... Your records for exempt employees can also track which days are used for sick days, vacation days or *personal days* [emphasis added]." (Ref-04)

FA-31. According to attorney Robin Thomas, "The Fair Labor Standards Act (FLSA) and its implementing regulations do not specifically prohibit employers from requiring exempt employees to work a particular schedule or to track the hours they work. In fact, the Department of Labor (DOL), in the preamble to revised exemption regulations, stated that employers may require exempt employees to work a specific schedule and to record and track hours without affecting their exempt status.... You generally may track hours worked for purposes unrelated to the employee's pay...and may record daily attendance." This holds true as long as the exempt employee's salary does not fluctuate based on hours worked. "Accordingly, if you require exempt employees to work a specific number of hours or arrive at a specific time (and have them clock in and out to show that they are complying with these requirements)...your best practice...is to show that these job requirements are directly related to the exempt employees' job duties." (Ref-29)

FA-32. According to Business & Legal Reports, Inc., "Employers may require exempt employees to clock in and out for lunch periods and at the beginning and end of their work day. There are a number of reasons why an employer may want to require exempt employees to "punch a time clock" in the same way that non-exempt employees are required to do so. One reason involves the equitable treatment of all employees regardless of level in the company. Another reason is that a time clock provides a record of exempt employees' attendance. However, in order to continue to be classified as exempt, these employees must be paid...a fixed salary each week.... The amount paid may not be reduced because of a variation in the

quality or quantity of the work performed.... Accordingly, if an exempt employee clocks in late to work or leaves early at the end of the day, the employer may not dock his or her pay as it does for a non-exempt, hourly employee.”

The question arises, “If an exempt employee comes into work for half an hour and needs to leave due to personal reasons [is the employer] required to pay the employee for the entire day or can [the employer] use available PTO time?” The DOL has issued an Opinion Letter which states, “Where an employer has a benefits plan (e.g., vacation time, sick leave), it is permissible to substitute or reduce accrued leave in the plan for the time an employee is absent from work, whether the absence is a partial day or a full day, without affecting the salary basis of payment, if the employee nevertheless receives in payment his or her guaranteed salary. Payment of the employee’s guaranteed salary must be made, even if an employee has no accrued benefits in the leave plan and the account has a negative balance, where the employee’s absence is for less than a full day.... Thus, if an employee is absent for a day or longer to handle personal affairs, his or her salaried status will not be affected if deductions are made from his or her salary for such absences. If an employee is absent for less than a day, he or she must be paid for the full day.”

(Ref-30)

FA-33. According to Jon Hyman, a labor and employment practice attorney, when deciding whether to classify an employee as exempt or non-exempt, “In close cases, err on the side of caution and classify as non-exempt. You will end up paying more overtime as you go, but will avoid the windfall (and related legal fees) if a court later re-classifies an employee or group of employees.” (Ref-27)

FA-34. In the event an employee protests his/her classification as exempt, the employer must be able to show that any mistake was made in good faith. *Business Management Daily* suggests that employers “...host an annual classification review. Have a team compare all employees’ job descriptions (and actual duties) against the FLSA exemption regulations. ...your annual classification audit would likely be enough proof of your good-faith efforts to ward off double damages.” (Ref-04)

FA-35. According to Business & Legal Reports, Inc., “Instituting a formal compensatory time off [comp time] policy for exempt employees is legal...[but] they may create the expectation that exempt employees work set hours and that certain work is “extra.”...Instead, many employers opt to grant additional leave to exempt employees on an individual and discretionary basis, *based on exceptional performance* [emphasis added].”

Among other things, the policy should:

- “...limit and define the employees eligible for comp time to those that are exempt from overtime provisions of the FLSA [and] ...specifically state nonexempt positions are entitled to overtime pay...”

- State that the employer has no legal requirement or obligation to grant compensatory time off to exempt employees...
- Require supervisory approval.... Consider requiring recordkeeping of hours worked, use of timesheets, etc., depending on the work environment...
- Set time periods for use of comp time...[and] set limits on when an employee can use comp time
- Set limits on the number of hours of comp time an employee can accrue in a set period.”

(Ref-30)

Findings

- FI-01.** At first glance, the definitions of “non-exempt employee” and “exempt employee” seem simple and straight forward. However, the regulations relating to the placement of positions into the correct classification are quite complex. Terminology is often open to differing interpretations. As a result, both employers and employees often do not understand the distinction between the two classifications. The County’s Personnel Rules and Regulations manual does not explain these classifications; nor does the Administrative Policy Manual. (FA-01, FA-02, FA-03, FA-04, FA-05, FA-06, FA-07, FA-08, FA-09, FA-12, FA-14)
- FI-02.** State laws, local laws, and/or collective bargaining agreements may exceed the minimum requirements of the FLSA. Employers must apply whichever provides employees with the most protection. While some employees may feel that being entitled to overtime provides more protection, others may feel that a guaranteed salary with no overtime provides more protection. Based on class action lawsuits filed, it seems that the majority of employees feel they have more protection if entitled to overtime pay. (FA-10, FA-11, FA-12, FA-13)
- FI-03.** Because 25% of the County’s regular employees are classified as exempt, the County faces substantial inherent risks associated with incorrectly classifying employees as exempt. These risks to the County include:
- The US Department of Labor may open an investigation and file a lawsuit if it believes a classification was incorrect. (FA-27)
 - The California Labor Commissioner may take action if he/she believes a classification is incorrect. (FA-12)
 - Individual employees may file a lawsuit if they believe their classification is incorrect. (FA-28)
 - A class action suit may be filed for alleged misclassification. (FA-12)
 - If a classification is challenged, the employer bears the burden of proving the classification is correct. (FA-27)

- The employer will be liable for back pay and possibly penalties and interest if a position is required to be reclassified. (FA-28)
- If pending federal legislation is passed, employers may be required to reclassify some exempt employees as non-exempt or increase their salaries. (FA-29)
- Reclassification – in either direction – may result in employee dissatisfaction, lower morale, and decreased productivity. (FA-29)
- Because the number of lawsuits alleging misclassification is increasing, employers face growing risk of being sued. (FA-27)

FI-04. Considerable judgement must be applied when deciding to classify a position as exempt rather than non-exempt. The focus must be on actual job duties performed on a daily basis rather than job title, job description, or salary level [Little v. Belle Tire]. Careful attention should be given to comparing the cost of paying occasional overtime to a non-exempt employee with the cost of paying a fixed salary to an exempt employee regardless of hours worked. (FA-04, FA-05, FA-09, FA-12, FA-13, FA-28, FA-29, FA-33)

FI-05. Due to the large number of County positions classified as exempt, there is a potential for significant financial impact if positions have to be reclassified or salaries increased to avoid reclassification. (FA-18, FA-28, FA-29)

FI-06. Due to the large number of County positions classified as exempt and therefore eligible for administrative leave, there is a potential for significant abuse of the Administrative Leave Policy. Exempt employees benefit from being paid their full salary for a week in which any work is performed. If the granting of administrative leave is not carefully controlled, classifying positions as exempt may be a financial disadvantage for the County. (FA-13, FA-18, FA-19)

FI-07. The County has not determined the financial impact of having 25% of its employees in positions classified as exempt. (FA-15)

FI-08. The application of the Administrative Leave provisions of the County’s Administrative Policy Manual is *inconsistent* across employee units. While the Administrative Policy Manual merely states that administrative leave shall be granted for *no more than three consecutive days*, some MOAs (SEIU and VEA) express increments for taking administrative leave in terms of *maximum hours per workday*. Still others express the increment in terms of a *minimum* (MCCOUER, CNA, APCD), or make no mention of time increments (CJAAVC). While the meaning may seem the same, the SEIU and VEA wording would allow the practice of granting administrative leave in increments as small as one hour while the wording in the MCCOUERS would prohibit the practice. (FA-16, FA-17, FA-19, FA-20, FA-21, FA-22, FA-23, FA-24, FA-25)

FI-09. The MCCOUER reflects the County’s position that exempt employees should not be required or even allowed to record actual hours worked beyond the

regular workday. However, exempt employees *may*, for a variety of reasons, be required to track their actual hours worked (as long as their pay is not reduced for working less than a full workday). (FA-20, FA-27, FA-30, FA-31)

- FI-10.** A periodic review (audit) of the classification of positions as exempt or non-exempt would reduce the risks associated with misclassification. The review should focus on actual job duties performed on a daily basis. (FA-34)
- FI-11.** The County’s Administrative Leave policy for exempt employees is not clearly stated. It does not have a provision related to “exceptional performance” but rather simply “satisfactory or better performance”. Furthermore, it does not define satisfactory performance, thereby leaving the term open to a wide range of interpretations. Requiring documentation of hours worked by exempt employees may be useful in substantiating exceptional performance. (FA-19, FA-35)
- FI-12.** The designation of a position as exempt or non-exempt is not discretionary in so far as employees in non-exempt positions may not be classified as exempt. To do so would deny them overtime pay. However, nothing was found that would prohibit positions that *could* be designated exempt from being classified non-exempt. This would allow the employee to be paid overtime. When in doubt, it may be advisable to err on the side of caution and classify a position as non-exempt. (FA-05, FA-32)
- FI-13.** Requiring exempt employees to utilize available Personal Time Off, rather than Administrative Leave, for absences of less than a full work shift would reduce non-exempt employees’ perception that exempt employees receive an unfair advantage. (FA-31)

Recommendations

- R-01.** The Grand Jury recommends that the Board of Supervisors update the Personnel Rules and Regulations to incorporate a definition/explanation of “exempt employee” and “non-exempt employee”. (FI-01)
- R-02.** The Grand Jury recommends that the Board of Supervisors review and revise Chapter VIII (B) – 3 of the County’s Administrative Policy Manual to better define the level of performance required for the granting of administrative leave and to clarify the minimum and maximum time increments for taking administrative leave. The Policy should require the use of PTO for absences of less than a full work shift. The Policy should also direct the tracking of actual hours worked by exempt employees. Furthermore, as the various MOAs expire, the replacement MOAs should be consistent in the application of the Policy. (FI-08, FI-09, FI-11, FI-13)
- R-03.** The Grand Jury recommends that the Board of Supervisors require the review of the Position Description Questionnaire to ensure that it focuses on actual job duties performed on a daily basis rather than on a generalized job description. (FI-04)

- R-04.** The Grand Jury recommends that the Board of Supervisors require a regularly scheduled audit of workforce classifications and job descriptions to ensure employees are correctly classified under current rules. (FI-03, FI-10)
- R-05.** The Grand Jury recommends that the Board of Supervisors require a study of the financial impact of having a large number of exempt employees. The study should compare the cost of potential overtime if exempt employees were reclassified as non-exempt with the cost of granting administrative leave to exempt employees. Additionally, the study should consider the cost of potential increases in salaries for exempt employees when the proposed new federal regulations take effect. (FI-04, FI-05, FI-06, FI-07)

Responses

Responses Required From:

Ventura County Board of Supervisors (FI-01, FI-03, FI-04, FI-05, FI-06, FI-07, FI-08, FI-09, FI-10, FI-11, FI-13) (R-01, R-02, R-03, R-04, R-05)

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Glossary

<u>TERM</u>	<u>DEFINITION</u>
Act	The Fair Labor Standards Act of 1938, as amended
Administrative leave	A term used in the Administrative Policy Manual of the County of Ventura to designate time off taken by exempt employees for personal business that is in addition to vacation, sick leave, annual leave, and holidays
APCD	Ventura County Air Pollution Control District; formed in 1968; a separate entity from the County of Ventura, responsible for ensuring that all State and federal air quality standards are achieved and maintained within Ventura County
BOS	Ventura County Board of Supervisors
CJAAVC	Criminal Justice Attorneys’ Association of Ventura County
CNA	California Nurses Association
Confidential employee	An employee who has access to confidential information in employee relations matters
County	Ventura County
DOL	Department of Labor; an entity of the U.S. government responsible for the enforcement of the Fair Labor Standards Act
Exempt employee	An employee who, under the FLSA, need not be paid overtime
Federal Register	A daily publication of the Federal government that reports proposed and final administrative regulations of federal agencies
FLSA	Fair Labor Standards Act; a federal law which sets out various labor regulations including requirements for overtime. In general, the FLSA is intended to protect workers against certain unfair pay practices or work regulations.
Grand Jury	2015-2016 Ventura County Grand Jury

<u>TERM</u>	<u>DEFINITION</u>
IUOE	International Union of Operating Engineers
Management employee	A department/agency head or any employee having the authority and responsibility for the formulation and administration of County policies and programs
MCCOUER	Management, Confidential Clerical and Other Unrepresented Employees Resolution
MOA	Memorandum of Agreement (also known as a Memorandum of Understanding); a formal document which outlines an agreement made between two or more parties; in Ventura County, MOAs are subject to approval by the Board of Supervisors
Non-exempt employee	An employee who, under the FLSA, must be paid overtime
PTO	Personal time off; e.g., vacation and sick leave
Regular employee	All employees who hold an allocated full time or part time position in the County budget excluding but not limited to extra help, fixed term, or intermittent employees, or enrollees in training programs, and independent contractors
SEIU	Service Employees International Union
SPOAVC	Specialized Peace Officers Association of Ventura County
State	State of California
Unit	A group of employees represented by a recognized employee organization/union and covered by its MOA
Unrepresented employee	An employee in a classification not represented by a recognized employee organization/union
VCDSA	Ventura County Deputy Sheriffs' Association
VCPFA	Ventura County Professional Firefighters Association

TERM

DEFINITION

VCPPOA

Ventura County Professional Peace Officers Association

VCSCOA

Ventura County Sheriff's Correctional Officers Association

VEA

Ventura Employees' Association