OFFICE OF INSPECTOR GENERAL
City of Chicago

INSPECTOR GENERAL'S OFFICE ADVISORY CONCERNING THE CLASSIFICATION OF EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT

JUNE 2013

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OFFICE OF INSPECTOR GENERAL
City of Chicago

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VIA ELECTRONIC MAIL

June 7, 2013

Rahm Emanuel
Mayor
City of Chicago
121 N. LaSalle St.
Room 509
Chicago, IL 60602

Dear Mayor Emanuel:

The Office of Inspector General (IGO) recently attempted to audit the City's overtime payments to employees for compliance with the federal Fair Labor Standards Act (FLSA). When we began our audit work in March 2013, we could not proceed with the audit because, for the majority of employees, the City had not yet determined whether their positions were covered by or exempt from the overtime compensation requirements of FLSA. The Department of Human Resources has made substantial progress since we began our inquiries, assigning FLSA classifications for a third of City job titles and over 80% of all City employees, but has not completed this task.

We draw this matter to your attention because the continuing lack of comprehensive employee FLSA classification unnecessarily exposes the City to significant legal and financial risks, described below. To ensure the City mitigates this risk, we suggest that the City prioritize prompt FLSA classification of all employees. Because this effort involves coordination of multiple departments and outside counsel, the intercession and express institutional support of the Office of the Mayor and the Department of Law will be required for timely and successful completion.

I. FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938 requires that employees be paid overtime for time worked over 40 hours per week at a rate of one and a half times the employee's regular pay rate.[1] The requirement applies to most municipal workers, except for five "exempt" classes of employees.[2]

[1] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 207(a), (o) (2010).
[2] 29 U.S.C. §§ 207(a)(1), (k), (o), § 213(a) (exempting bona fide executives, administrative employees, creative or learned professionals, criminal investigators, and computer professionals).

For some types of employees such as public safety employees,[3] the 40 hours per week can be adjusted to accommodate irregular hours and special pay arrangements.[4]

The general standards are the floor below which no employer can go.[5] However, state law, municipal ordinances, and individually contracted or collectively bargained agreements can set higher standards, such as compensation for time over 35 hours per week or for holiday or weekend time.[6]

The United States Department of Labor (U.S. DOL) implemented new regulations defining "exempt" in 2004.[7] It has also launched initiatives to increase enforcement in recent years. In September 2011, for example, the U.S. DOL and the Illinois Department of Labor signed an agreement to share information and conduct coordinated investigations to enforce the FLSA and other labor laws in Illinois.[8] Under this agreement, the agencies will work together to enhance enforcement by "conducting coordinated investigations and sharing information consistent with applicable law[s]."[9]

II. CITY'S RECENT EFFORTS TO ASSIGN FLSA CLASSIFICATIONS

The IGO spoke with staff at the City's Department of Human Resources (DHR) regarding the City's efforts to classify employees under FLSA. In 2010, DHR recognized that the practice of assigning classification to individual employees had resulted in inconsistencies, including employees with the same position (or "job title") being assigned different FLSA classifications.

The department began making FLSA classifications by job title in 2010 but, as of May 6, 2013, 16% of City employees—or two thirds (68%) of City job titles—still remain without a classification. DHR's plan for finalizing the FLSA classification project requires participation by multiple City departments and outside counsel. As we understand, the plan can be summarized as follows:

1) Complete FLSA classifications for all current City positions;
    a. DHR has created "FLSA Tests" to apply to position descriptions and is working through a list of job titles to make initial recommendations on FLSA exempt/non-exempt classifications; and
    b. After DHR's management reviews and approves the classifications, the Law Department, Labor Relations, and affected unions review more difficult classification determinations.
2) Establish ongoing procedures for assigning and monitoring FLSA classifications to new and changed positions;

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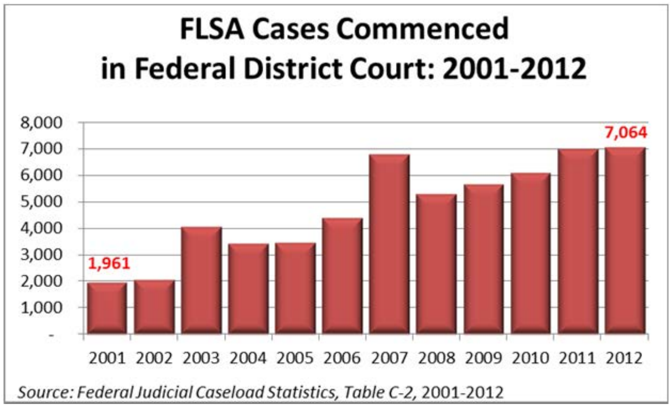
[3] 29 U.S.C. § 207(k).
[4] 29 U.S.C. § 207(f).
[5] 29 C.F.R. § 541.4 (2013).
[6] 29 U.S.C. § 207(b).
[7] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).
[8] Partnership Agreement Between the U.S. Department of Labor, Wage and Hour Division and the Illinois Department of Labor, Sept. 28, 2011, accessed on May 6, 2013, http://www.dol.gov/whd/workers/MOU/il.pdf.
[9] *Id*. at 1.

3) Implement changes in the Chicago Integrated Personnel and Payroll Systems (CHIPPS) to reflect the appropriate overtime and compensatory-time eligibility for each employee; and
4) Institutionalize compliance through training for HR Liaisons, administrative personnel, and other citywide personnel on new processes and procedures.

As of the date of this letter, the City had not set a deadline for completion of FLSA classifications for all current positions.

III. RISK OF UNDERPAYMENT: LAWSUITS

The FLSA allows a collective lawsuit by "similarly situated" employees who share and are subject to a common policy or practice affecting their pay structure.[10] One of the most common allegations is that the employees have been misclassified as exempt from overtime. As discussed more fully below, the City has three pending FLSA lawsuits. These lawsuits can result in large damage awards or settlements. For example, in 2009, a jury awarded $900,000 to New York City police sergeants, and the City was ordered to pay $500,000 in plaintiff's attorney fees in a FLSA collective action.[11] As the chart on the right shows, since 2001, the number of FLSA lawsuits filed annually in federal court has more than tripled, from roughly 2,000 to 7,000.[12]



FLSA violations can result in adverse findings against employers which can result in stiff fines and even imprisonment (in the event of a repeated violation). If an employer willfully violates the law, courts can impose a penalty equal to the unpaid wages, reasonable attorney's fees, court costs, and up to $1,100 per violation.[13] Courts can also award plaintiffs the interest accrued through the final judgment.[14] Individuals who willfully violate FLSA can be subject to a $10,000 fine and, if there is a second violation, up to six months in jail.[15] All of these damages can only be applied for incidents occurring within the past three years (or two years if not willful).[16]

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[10] 29 U.S.C. § 216(b).
[11] *Scott v. City of New York*, 2011 WL 867242, (S.D.N.Y., Mar. 9, 2011), attorney fee award vacated and matter remanded 643 F.3d 56 (2d Cir. 2011) .
[12] U.S. Courts, Caseload Statistics 2012, Table C-2, accessed on May 7, 2013, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2012.aspx.
[13] *See* Penalties/Sanctions, U.S. Department of Labor, accessed on May 6, 2013, http://www.dol.gov/compliance/guide/minwage.htm#Penalites.
[14] *See Astor v. United States*, 79 Fed.Cl. 303, 320 (Fed.Cl. 2007) (applying the federal Back Pay Act, 5 U.S.C. § 5596, as justifying interest awards).
[15] 29 U.S.C. § 216(a).
[16] 29 U.S.C. § 255(a).

Willful violations and the related double damages can be avoided if (1) the employer believed the employment was in compliance with FLSA (i.e., acted in good faith) and (2) that belief is reasonable.[17] However, FLSA presumptively authorizes courts to award the double damages against employers who violate the law.[18]

Currently, the City faces several pending FLSA claims from City employees, including:

- The Seventh Circuit remanded to federal district court an FLSA collective action lawsuit by a set of Fire Department Paramedics. These paramedics claimed that the City incorrectly calculated their overtime compensation by not including duty availability, acting pay, driving pay, and specialty or fitness pay in the base pay used to calculate overtime.[19]

- Two other groups of Fire Paramedics have sued the City, who allege similar incorrect calculations of their overtime compensation.[20]

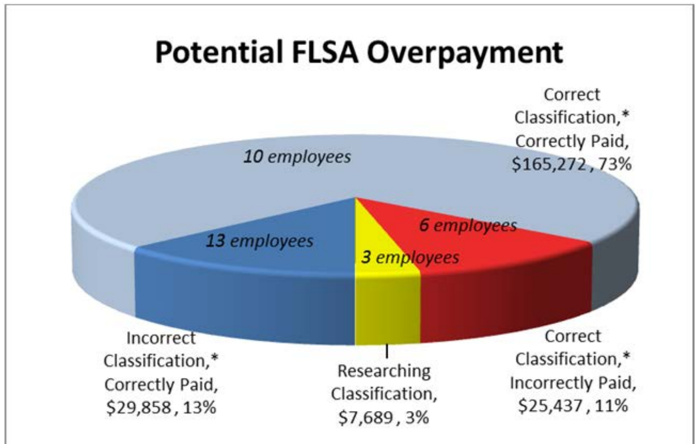
- The City also faces a lawsuit by a group of Police Department detectives alleging that the City impliedly prohibited overtime.[21] The issue of the case is whether the City pressured FLSA non-exempt police on desirable assignments to not request overtime for checking and responding to BlackBerry messages.[22] Although the issue is FLSA overtime, the case is awaiting arbitration as required by the collective bargaining agreement.

In addition, we note that inconsistencies in the status and treatment of otherwise similarly situated employees foster preferential treatment and *Shakman*-based allegations and claims.

[17] *Bankston v. Illinois*, 60 F.3d 1249 (7th Cir. 1995) (analyzing whether a public employer's conduct was willful).
[18] *Id.* at 1254.
[19] *Alvarez v. City of Chicago*, No. 06-CV-4639 (N.D. Ill., filed Aug. 28, 2006), and *Caraballo v. City of Chicago*, No. 07-CV-2807 (N.D. Ill., filed May 18, 2007), consolidated Sept. 9, 2007.
[20] *Baley v. City of Chicago*, No. 09-CV-228 (N.D. Ill., filed Jan. 13, 2009); and *Canby v. City of Chicago*, No. 12-CV-669 (N.D. Ill., filed Jan. 31, 2012).
[21] *Allen v. City of Chicago*, No. 10-C-3183 (N.D. Ill., filed May 24, 2010).
[22] *See Allen v. City of Chicago*, No. 10-C-3183, 2011 WL 941383, at *5 (N.D. Ill., Mar. 15, 2011) (denying motion to dismiss).

IV. RISK OF OVERPAYMENT

Without FLSA classifications in CHIPPS, the City risks inadvertently paying employees overtime payments that are not required under FLSA or bargained agreements.[23] The IGO identified 1,440 City employees who have FLSA "exempt" classifications in CHIPPS between January 2012 and March 2013. Using this set of employees, we calculated that the City paid $228,257 in overtime to 30 individuals classified in CHIPPS as FLSA exempt. DHR explained that, according to its analysis, some of the FLSA classifications were incorrect and should have been non-exempt, meaning 13 employees had correctly received $29,858, as shown in the graph to the right. Ten more individuals were correctly classified as FLSA exempt but, under their labor contracts and other agreements, appropriately received $165,272 in overtime. For the remaining $33,126, DHR confirmed that the City paid $25,437 in overtime to six employees who were FLSA-exempt—i.e., DHR analysis indicated these employees were not eligible for FLSA overtime or covered by another contract. DHR was still researching and classifying three employees who had received $7,689 in overtime.[24]



Source: City of Chicago, Department of Human Resources
* Classification status determined by DHR

V. CONCLUSION

The continuing failure to assign and monitor accurate FLSA classifications for all City employees unnecessarily exposes the City to significant legal and financial risks. DHR has a project plan for assigning FLSA classifications to all City employees and institutionalizing the process, but it requires coordination by multiple departments and outside counsel. Timely and effective completion of DHR's project plan thus requires the direct involvement and institutional support of the Office of the Mayor and the Department of Law. To date, the City has not set a deadline to complete the project. We encourage the City to make prompt FLSA classification of all employees a priority and dedicate the necessary resources across departments to ensure successful mitigation of possible litigation exposure.

We thank DHR for their cooperation during this review and applaud DHR's continuing efforts. We hope that this advisory is useful to the City in completing and institutionalizing FLSA classification for all employees. To afford the City adequate time to respond and take such corrective action as it may deem appropriate, the IGO will delay publication of this advisory to

[23] For example, a 2001 overtime audit by the Federal Deposit Insurance Corporation (FDIC) Office of Inspector General calculated that the FDIC overpaid 31 computer specialists misclassified at the time as FLSA non-exempt by $145,000 in one year alone. Federal Deposit Insurance Corporation, Office of Inspector General, Audit of the Use of Overtime Within the FDIC, No. 01-005, Jan. 6, 2001, accessed on May 21, 2013, http://www.fdicoig.gov/reports01/01-005.pdf .

[24] Two employees were promoted during 2012, which resulted in them counting as both (a) correctly classified, correctly paid and (b) correctly classified, incorrectly paid.

September 2013. We ask that you respond in writing by September 3, 2013. We will publish your response together with this advisory on the IGO website.

Respectfully,

Joseph M. Ferguson
Inspector General
City of Chicago

CC: Lisa Schrader, Chief of Staff
Stephen Patton, Corporation Counsel
Soo Choi, Commissioner of the Department of Human Resources

DEPARTMENT OF HUMAN RESOURCES

CITY OF CHICAGO

Memorandum

To: Joseph M. Ferguson, Inspector General

From: Soo Choi, Commissioner, Department of Human Resources

Date: October 3, 2013

Re: Advisory Concerning the Classification of Employees under the Fair Labor Standards Act

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We have reviewed your June 7, 2013 Advisory Concerning the Classification of Employees under the Fair Labor Standards Act ("FLSA"). This memorandum is to provide you with an update on what has taken place since you issued your advisory and to respond to your recommendations.

But first, we would like to thank you for recognizing Department of Human Resources' ("DHR") continuing efforts in classifying all City employees under FLSA. A substantial amount of effort has gone into this project, most notably from our Managing Deputy Commissioner Leo Burns, who oversees the Classification and Compensation Unit in DHR. Our Classification Analysts received extensive training on the FLSA in 2011 and created the FLSA tests to apply to position descriptions. In addition, the Classification and Compensation Division completed all of the initial reviews of every job classification at the City. We cannot emphasize enough the amount of time that it takes to evaluate each job title at the City. As you noted in your report, finalizing the classifications requires participation from multiple City departments and outside counsel.

Given that there are currently 1,435 job titles at the City, we have found it easiest to group titles into phases or rounds in order to move this project towards completion. Since your memorandum, we have completed a fourth round of titles which brings us to 1,071 out of 1,435 titles classified (74.63%) covering 32,077 employees out of 34,187 (93.83%). We have been updating the Chicago Integrated Personnel and Payroll Systems ("CHIPPS") as we complete each round of reviews. Our next round, which will be finished by early October, will bring the number of classified titles to 1,361 (94.84%) covering 33,569 employees (98.19%). We are hoping to have our review fully completed by November 2013, but the few remaining titles will require additional input from managers in the departments where these positions are located, and they may also require input from the relative bargaining units, which could delay finalizing those classifications.

In addition, the Classification and Compensation Division has assumed ownership over the FLSA classification process and has already instituted ongoing procedures for assigning and monitoring FLSA classifications to new and existing positions. We are working with outside counsel on FLSA training for employees in DHR, the Department of Law, the Office of Budget and Management, and the Department of Finance. The training is tentatively scheduled for November. Finally, we will be working on a City-wide policy to assist the City in maintaining compliance with FLSA. Additional training will be provided once the policy is finalized.

City of Chicago Office of the Inspector General

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- Reviews of City programs, operations and policies

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The authority to produce reports and recommendations on ways to improve City operations is established in the City of Chicago Municipal Code § 2-56-030(c), which confers upon the Inspector General the following power and duty:

> *To promote economy, efficiency, effectiveness and integrity in the administration of the programs and operations of the city government by reviewing programs, identifying any inefficiencies, waste and potential for misconduct therein, and recommending to the mayor and the city council policies and methods for the elimination of inefficiencies and waste, and the prevention of misconduct.*