FLSA "Activity" Increasing

The Fair Labor Standards Act (FLSA), enforced by the Department of Labor, is the federal law that governs minimum wage and overtime requirements in the workplace. An employee who is not exempt must be paid one-and-one-half the employee's rate of pay for any time worked during a week above 40 hours. The FLSA does recognize several categories of workers who are "exempt" from this overtime requirement. To be exempt an employee must be paid at least $455 per week (the "salary test") and must carry out executive, administrative, professional, outside sales, or computer-related responsibilities (the "duties test"). These employees are essentially paid a salary to perform the work assigned, regardless of whether or not more than 40 hours a week is required.

Litigation under the FLSA brought by employees has seen a dramatic increase in recent years. Some of this activity relates to claims that an employee's "off the clock" work was not counted in determining whether overtime is due. All of the time an employee is on duty at the employer's premises or at any other prescribed place of work and any additional time the employee is allowed (*i.e.*, suffered or permitted) to work must be identified, recorded, and compensated. Time spent working through lunch, working before or after regular shifts, working at home and/or handling job-related telephone calls at home, taking care of work-related equipment, etc. may fall within the definition of "hours worked and may place an employee in an overtime status for a particular week.

Much of the litigation, however, has involved claims that one or more employees have been misclassified - that is, erroneously classified as exempt and improperly denied payment for overtime worked. Misclassification claims from mid-level employees are becoming more common. Of perhaps the greatest concern to employers, because of the potential for large monetary awards, is the rise in class action employee claims, in which an entire group of employees will sue on the basis of an employer misclassification of the group. These collective claims increased by 10% from 2009 to 2010. According to one report, FLSA class actions now outnumber employment discrimination class action claims. Classification of workers as independent contractors when they should be considered non-exempt employees is also an area of focus for the Department of Labor.

The Department has announced for 2011 a "Misclassification Initiative" and last year hired 200 additional field investigators to help carry out this enforcement initiative. In addition, it is proposed new federal "Right to Know" regulations that will required employers maintain and disclose the exemption analysis used with respect to employees not qualifying for overtime.

These trends and the penalties imposed under the FLSA for violations indicate that compliance must continue to be a priority for the University and its various employment units.