



Municipal Technical Advisory Service
INSTITUTE *for* PUBLIC SERVICE

TMAA

HR Compliance Landmines

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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



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



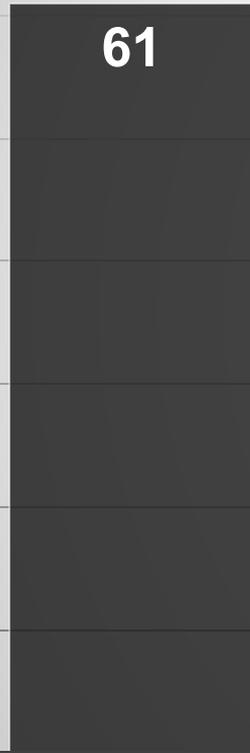
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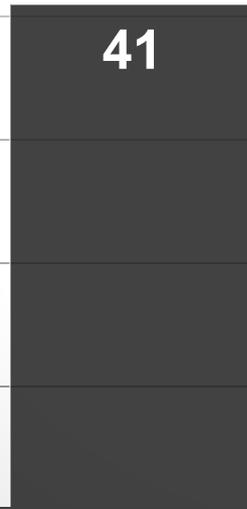


Anecdotal Account of Issues

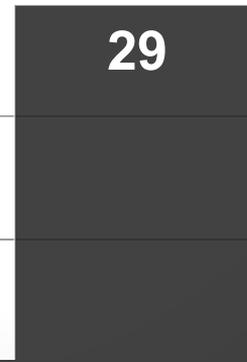
Panic Questions - 18 Month Snapshot



FLSA



ADA



FMLA



GUARD/RESERVE

Guard and Reserve Leave

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

The 480-hour problem:

Koppin v Strode 761 N.E.2d 455

No legislation or caselaw in TN that helped define traditionally;



Now Pub Ch 243 defined;



Some cities panicking

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

ERRORS TO AVOID



Assuming Salary = NO OT

Applying Wrong Exemption

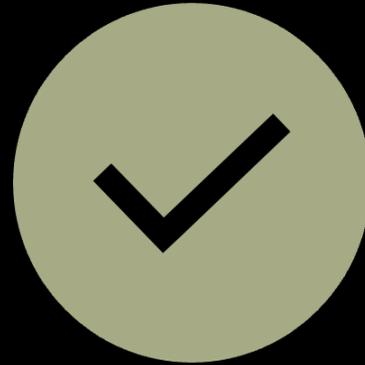
Failure to Pay for ALL Hours

Limiting Recording of Hours

BONUSES and OT



NON-DISCRETIONARY



DISCRETIONARY

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
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

Calculating as follows is incorrect:

<i>40 hours x \$8.00/hr.</i>	=	<i>\$320.00</i>
<i>4 hours x \$12.00/hr.</i>	=	<i>\$ 48.00</i>
<i>Total for hours worked</i>	=	<i>\$368.00</i>
<i>ADD On Call Bonus (\$100.00) for Total</i>	=	<i>\$468.00</i>

REGULAR RATE *Examples*

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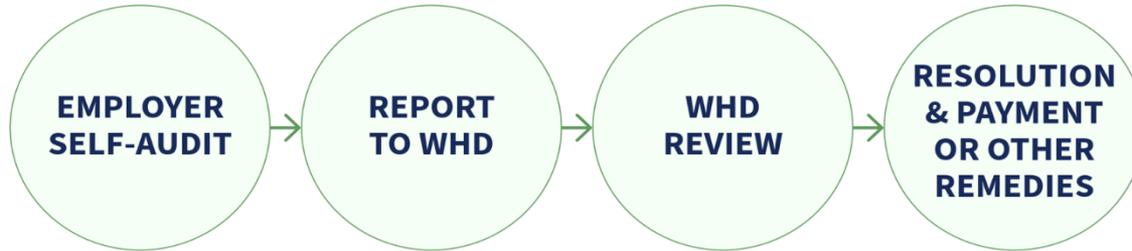
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CORRECT Calculation: \$472.44

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.

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

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: Definition of
disability,
reasonable
accommodation,
undue hardship

Eligibility

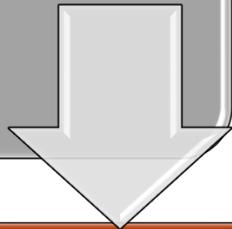
ADA – an employee (or applicant) who is disabled as defined by the ADA, is qualified for the position and can perform the essential functions of the position with or without a reasonable accommodation.

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')*

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

ADA - Disability

A physical or mental impairment that **substantially limits** one or more major life activities of the individual, a record of such an impairment, or being regarded as having such an impairment.

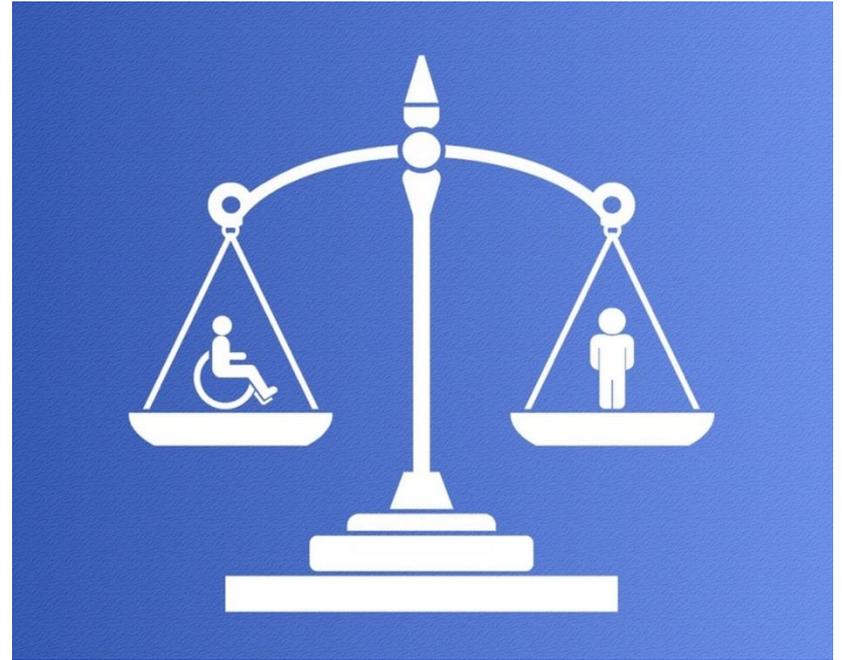
Substantially limits must be made on an individual basis, case by case, ...and an impairment that is episodic or in remission may also meet the definition of ADA if it would substantially limit one or more major life activity when active.

Regarded as

An individual only has to establish that an employer discriminated against them due to a medical condition, whether he or she has one or the employer just thought he did.



He does not have to meet the substantially limited in a major life activity standard.



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