LBAEE
February 2024 News

MOU CHANGES HIGHLIGHTS (cont.)

A new MOU 2023-2026 was approved by City Council on 12/5/23 and is currently routed for final signatures. We started highlighting the most important changes in the previous newsletter and will continue here:
As part of compensation permanent full-time bargaining members should have received a $2800 bonus and non-career employees a $1400 bonus in the paycheck dated 2/2/24.

ARTICLE IV – Benefits

- Reference to outdated health amount removed
- Part time employees available to enroll in health coverage
- Benefits eligibility date explained
- Long and Short Term Disability insurance explained
- Upon retirement 75% of Vacation Leave can be converted to Sick Leave

ARTICLE V – Retirement and Workers Compensation

- No significant changes

ARTICLE VI – Other Benefits and Employment Conditions

- Work and Meal period defined
- Defines/ explains the 5/40 Standard Work Schedule and Alternative Schedules
- Employees eligible for $800 Education Assistance per fiscal year subject to funding
- $350 Allowance for required Safety Footwear

ARTICLE VII – Grievance Procedure

- References to Water Dept. updated to show Long Beach Utilities instead.

ARTICLE VIII – General Provisions

- Term : October 1, 2023 – September 30, 2026
- Successor MOU request start period : March 15, 2026 – April 15, 2026
- Updated signing parties

After-Hours Work

Technology continues to transform the workplace. With cell phones, laptop computers, e-mail, and virtual meetings, employees can work from anywhere, any time. This has blurred the distinction between when an employee can reasonably be expected to work and when not. Most public employees in California have experienced this firsthand. But to what extent should an employee feel obligated to respond to an employer's request to work after-hours? How must an employee be compensated for working after-hours? This month, we explore after-hours work to provide clarity more generally. If you have a specific question, contact your employee organization or professional staff.

After-Hours Work Should Be Limited. A study recently conducted by Slack's Workforce Lab upended the traditional notion that burning the midnight oil is beneficial. The study found that employees who feel obligated to work after-hours are less productive. Slack, owned by Salesforce, is a cloud-based team communication platform. Slack has a Workforce Lab that studies how to make work better to improve productivity and employee well-being. The study, published in December 2023, surveyed more than 10,000 desk workers around the world. It found that employees who log off at the end of the workday are 20% more productive than those who feel obligated to work after-hours. Employees who feel obligated to work after-hours report twice as much work-related stress and burnout, and lower job satisfaction. The study recommends calling it quits at the end of the regularly scheduled workday. There is a role for after-hours work, but it should be infrequent. Absent an emergency or a critical deadline, rest from work ultimately leads to higher productivity and a happier workforce.

For local government employees in California, after-hours work is common. It may be necessary to respond to after-hours emergencies, handle special projects, or meet minimum staffing requirements. However, understaffing should not be an excuse for permanent endless work. If you are expected to work after-hours, consider asking your supervisor if the work is something that can wait until the next workday. If you think you have been assigned more work than can be accomplished within a normal workday, consider asking your supervisor about prioritizing your work to avoid the need to work after-hours. The employer may recognize that the work is not urgent enough to require work after-hours especially if your supervisor is subject to similar demands. Ultimately, the employer does have the right to assign after-hours work, subject to complying with certain legal requirements below.

FLSA. The Federal Fair Labor Standards Act (FLSA) guarantees basic workplace protections for California government workers, such as overtime pay for hourly employees. Hourly employees must receive overtime pay for hours worked over forty per workweek at a rate not less than one and one-half times the regular rate of pay. Under the FLSA, employees can earn compensatory time off in lieu of overtime pay pursuant to a collective bargaining agreement. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days off unless it results in the employee working more than forty hours that workweek. The FLSA only requires the employer to count actual hours worked, meaning all time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace. The FLSA does not require the employer to count paid leave (vacation, sick, holidays, annual leave, compensatory time) as hours worked for the purpose of calculating overtime, although this is a benefit that can be negotiated in the MOU.

An employer may "exempt" an employee from overtime pay based on one of the FLSA's exemptions. Most exempt employees in the public sector fall into one of three categories – Executive, Administrative, or Professional. Each exemption has a specific duties test that must be met for an employer to exempt an employee from overtime pay. Generally speaking, (1) the *executive* exemption is for those who manage an agency or a department, and who have the authority to hire or fire employees; (2) the *administrative* exemption is for those who perform office or other non-manual work that is directly related to the management or general business operations, and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance; and (3) the *professional* exemption is for those whose work requires advanced knowledge and specialized instruction and which requires consistent exercise of discretion and judgment.

The employee must also be paid enough to be exempt from overtime pay. Under current law, an employee must earn at least $684 per week, or $35,568 per year. The Department of Labor proposed a rule in August 2023 that would increase the salary threshold to $1,059 per week, or $55,068 per year. If it becomes law, an employer cannot exempt an employee earning less than this threshold.

California law requires employees to earn at least two times the state minimum wage to be exempt from overtime. Effective January 1, 2024, this means employers must pay a salary of at least $1,280 per week ($66,560 per year) to qualify for the exemption. State

law also requires time and one-half pay for working more than 8 hours in a workday and double-time for working more than 12 hours in a workday. Unfortunately, these state laws do not apply to local government employees.

Keep in mind that when an employee is called at home or emailed after hours about a work problem and must perform work after-hours, the time is compensable regardless of whether an employee is "on-call." The employer must compensate the employee for all time worked, and after-hours, it will often be at the overtime rate. The FLSA does not require a minimum amount for the disruption caused to the employee's non-work time, but all time worked is compensable.

Employees should not fear reporting time worked when directed to work after-hours, even if the time spent is as little as 10 minutes, and even if your department has a "no-overtime" policy or doesn't "authorize" overtime pay. The mere fact that the money is not budgeted, or is subject to budget controls, does not mean it is not owed legally. If the directive is not clear, ask if you are merely being contacted after hours, or if you are being directed to work after-hours. You should not be contacted by your supervisor outside of working hours absent a specific need.

MOU Protections. Additional protections regarding after-hours work may be found in your negotiated MOU or Personnel Rules. Here are some common ones.

Standby Pay: Time for a worker who is required to remain available for calls at home after-hours is frequently not compensable under the FLSA. However, the more restrictions an employer places on a worker's off-time, the more likely the time is compensable. Factors include geographical restrictions on the worker's freedom of movement, required response time (*e.g.*, within 30 minutes), and the effect on the worker's ability to engage in personal pursuits (*e.g.*, using alcohol, attending kid's soccer games, *etc.*).

Typically, where there is an operational need for workers to respond quickly to an emergency, there is a negotiated standby or on-call policy. The policy should lay out when an employee is considered "on-call," what are the restrictions on off-duty time, how quickly an employee is expected to report for duty, and how employees are compensated. Often, the payment is a flat daily or weekly amount rather than an employee's regular rate. The pay may be earned under the MOU or policy, even if it is not required under the FLSA. If the employee is called into work, at that point, any time worked is

compensable under the FLSA. In fact, the opportunity to earn pay at the overtime rate is what makes standby assignments attractive to workers. Most workers do not think the pay for standing by, alone, is worth the inconvenience.

Callback Pay: Some after-hours work might not take much time to complete. In those cases, check to see if the MOU or personnel rules have a minimum callback pay. A typical provision might say an employee gets time worked or a minimum of two hours' pay, whichever is greater. Minimum callback pay is designed to compensate an employee for the inconvenience and disruption of having to complete work after-hours, even though the actual compensable time worked under the FLSA may not be significant. It is particularly important in situations where an employee physically reports back to work. Ordinary commute time is not compensable under the FLSA, but it can be negotiated into the callback pay policy.

Fatigue Time: Fatigue time, or a "golden hours" policy, allows workers who are called back in after-hours to extend the start of their next shift by a set number of hours to ensure an adequate rest time between the after-hours work and the next shift. This is often paid time off, and the policy may treat the paid time off as hours worked so it does not impact the overtime pay from the night before. Fatigue time typically applies to workers who drive a commercial or company vehicle or who operate heavy equipment.

Planned Overtime: If the need for after-hours work is foreseeable, the employer should give advance notice to anyone who will be required to work. The amount of advance notice depends on the operational need, but it should be at least 48 hours and as much as two weeks. There may be a policy or practice in place within the workgroup as to how this overtime is assigned – for example, by a bidding or seniority system. It may be written into the policy or the MOU. This is more common in instances where overtime is needed to meet minimum staffing requirements.

If you are not given adequate notice, and you have planned after-hours responsibilities (*e.g.,* picking kids up from school or daycare), or you have approved vacation or leave during the time in question, you should not be threatened with discipline for refusing to work the after-hours assignment (unless of course you are on standby). However, if you are directed to work overtime and refuse, you may be subject to discipline for insubordination. To avoid this, you may want to follow the "obey now, grieve later" principle (doing the overtime and contacting your employee organization about grieving

the lack of advanced notice). A planned overtime roster can also address this concern, and help employees plan their schedules accordingly.

Changes to Work Schedules: The employer can set the FLSA workweek as any fixed and regularly recurring period of 168 hours over seven consecutive 24-hour periods. It does not have to coincide with the calendar week. It can begin on any day of the week and any hour of the day. The employer cannot change this designated period to avoid paying overtime, but it can establish different workweeks for different employees or groups of employees.

The employer can also change work schedules to avoid the need for overtime assignments, but the employer must comply with any MOU provisions or personnel rules governing changes to work schedules. It is common to find language about changes to work schedules in the MOU or work schedule policy. A common clause is one that allows management the right to change schedules subject to a certain amount of advance notice before making any changes (*e.g.,* two weeks). Management does not have to bargain with the employee organization if it is following the documented policy and what has been agreed to, but management must bargain with the employee organization if it wants to change the policy, change any agreed-upon terms, or implement a new policy. (*See, e.g., San Jacinto Unified School District* (1994) PERB Decision No. 1078) (school district violated state bargaining law by unilaterally changing its established policy regarding work schedules of maintenance employees assigned to work home football games).

Benefits for Exempt Employees: The employer can require exempt employees to work after-hours and it does not have to pay more than the employee's regular salary under the FLSA. Check the MOU and personnel rules, though. Exempt employees often earn additional paid time off (*e.g.,* administrative leave) that is meant to offset the additional hours exempt employees work beyond forty in a workweek.

Some exempt employees work way more than the amount of administrative leave they earn annually. It is often not hour-for-hour, but the amount of leave is negotiable. Employers may also say that exempt employees earn a higher salary in part because after-hours work may occasionally be necessary. If you are an exempt employee, and you are routinely asked to work after-hours, consider asking your employee organization to bargain for more administrative leave or higher pay in the next MOU negotiation.

Exempt employees should also look for flex time language. Flex time is where an employee adjusts the start or end of a regularly scheduled workday by a set number of hours for having recently worked after-hours. For example, if an employee has a regular work shift during the day, but must attend a city council meeting, board meeting, or community event that evening, flex time might allow the exempt employee to leave their shift early or come in late the next morning without having to use their own leave time.

Conclusion. After-hours work should not be abused by management. If there is an operational need, local government employees can expect to work additional hours, but this should be the exception, not the rule. Chronic after-hours work is bad for productivity and employee wellness. It is also expensive under the FLSA and any MOU or personnel rules governing after-hours work.

If after-hours work is a big problem at your workplace, consider ways to proactively engage your supervisor on this issue, and talk to your employee organization about bargaining over this subject in the next round of MOU negotiations. If your rights have been violated or you have been denied pay under the MOU or FLSA, contact your professional staff to discuss your next steps.

News Release - CPI Data!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

3.4% - CPI for All Urban Consumers (CPI-U) Nationally

3.6% - CPI-U for the West Region

3.5% - CPI-U for the Los Angeles Area

2.6% - CPI-U for San Francisco Bay Area

4.3% - CPI-U for the Riverside Area (from November)

5.2% - CPI-U for San Diego Area (from November)

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I work a 9/80 schedule. I'm currently working my 5-day week (9 hours Monday-Thursday, 8 hours Friday). My supervisor is requiring me to work on Saturday as well. I asked to take this Thursday off and work Saturday, swapping my off days rather than getting overtime. My supervisor said I can swap, but it needs to be a day next week instead. She said this is due to the workweek starting this Friday at noon. Why does that matter, and why can't I swap for this Thursday?

Answer: The Federal Fair Labor Standards Act (FLSA) guarantees overtime pay for California government workers, unless you are in a position that is exempt from overtime pay under the FLSA. If you are an hourly overtime-eligible employee (as opposed to a salaried, overtime-exempt employee), you are entitled to overtime pay for hours worked over 40 in the workweek at a rate not less than one and one-half times your regular rate of pay.

When your supervisor says that the workweek starts on the Friday of your 5-day week at noon, she is referring to the FLSA-designated workweek. The employer can set the FLSA workweek as any fixed and regularly recurring period of 168 hours over seven consecutive 24-hour periods. It does not have to coincide with the calendar week. It can begin on any day of the week and any hour of the day. For employees on a 9/80 work schedule, employers set the FLSA workweek beginning halfway through the 8-hour day and ending the next week at the same time (*e.g.,* 12 noon on Friday through 11:59 am the following Friday).

Because of how your FLSA workweek is defined, if you took this Thursday off, the employer would have to pay you overtime for next week that could have been avoided if you swapped for a day next week instead. Your supervisor does not have to allow you to swap and can ask that any swap minimizes overtime. A solution may be to take the days you want using your own paid leave and get overtime pay for working Saturday.

Question: If a certification is not in a job description, do you have to obtain it as a condition of employment during your probation? What if the City had you sign a letter saying that your employment is contingent upon getting a certain certification? Can they "grandfather in" certain employees and only apply this requirement to new employees in the same classification? Is a certification part of the job requirement and go through our employee organization?

Answer: If the certification is a minimum requirement for the position, it should be listed as such in the job description. If it is not listed, then it is reasonable to conclude that it is not required, absent some other City rule or policy that says otherwise. For example, if you signed an offer of employment that required this certification as a condition of employment, the City can hold you to what you agreed to in your offer letter.

If the City wants to add a new certification to your job description, the City must provide your employee organization with notice and an opportunity to "meet and confer" prior to implementing the new requirement. One common way of addressing this in the meet and confer process is to grandfather in any current employees. This means to agree to apply the new requirement only to employees who hire or promote into the position after an agreed-upon date, prospectively.

If you signed a letter stating that the hire is contingent upon getting a certain certification, let your employee organization know. They can let you know if this is something your employee organization was notified of or agreed to. If this certification was added as a requirement (either in the job offer or in the job description) without your employee organization having been made aware of it, the employee organization can file an unfair practice charge with the state Public Employment Relations Board, or request that the City remove the requirement until completing any bargaining.

Question: I recently retired, and I am receiving my CalPERS pension. I worked in the private sector for eighteen years at very modest earnings prior to working with the city for over thirty years. I plan on waiting until age 70 to begin drawing my Social Security, so my only current income is my CalPERS benefits. If I begin work in the private sector, and have some modest earnings, does my working reduce my CalPERS pension benefit? If so, what would be the limit on my outside earnings?

Answer: If you are a service retiree, you can work for a private industry employer not associated with any CalPERS employer without restrictions and continue to receive your CalPERS retirement allowance. If you are a disability retiree, there are restrictions on the work you can do for a private industry employer. CalPERS has a guide to employment after retirement (PUB 33). It discusses those restrictions, as

well as any restrictions there may be if you decide to return to work for another CalPERS covered employer, whether full-time, part-time, or as a retired annuitant and what steps you may need to take to comply with any restrictions. The guide also discusses employment in other public retirement systems, where as a service retiree, you can work without restrictions.

You might also check with Social Security or consult with a fiduciary fee-only financial planner. There are two provisions that may reduce your Social Security benefits, known as the Government Pension Offset (GPO) and the Windfall Elimination Provisions (WEP). Under the GPO, your dependent benefits (*e.g.,* spouse, widow, or widower) may be reduced if they are filing based on your Social Security record and not their own. Under the WEP, your own Social Security benefits can be reduced if you earn a pension from an employer who didn't withhold Social Security taxes. See SSA Publication No. 05-10007 and No. 05-10045. Either way, you can work for a private employer, and not be subject to any limit on your outside earnings.

Question: I have a question about new laws regarding cannabis use outside of work. In previous job positions I was required to have a Class A license. After switching positions now, I still have the Class A license, but it is not required in my job description. The City does not pay me extra for having this license, and the City does not test for drugs. Can I use cannabis outside of work and not be held responsible? If an accident were to happen while I am driving a City vehicle, but not under the influence, and I tested dirty at a clinic following the accident, can the City hold me accountable?

Answer: In 2022, Governor Newsom signed Assembly Bill 2188 which went into effect January 1, 2024. AB 2188 makes it unlawful for an employer to discriminate against a person for the use of cannabis off the job and away from the workplace. It also prohibits discrimination based on an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their system. It exempts employees in the building and construction trades, and those requiring a federal background investigation or clearance. It also does not preempt state or federal laws that require employees to be tested for controlled substances as a condition of employment, receiving federal funding

or federal licensing-related benefits, or entering into a federal contract.

In 2023, Governor Newsom signed Senate Bill 700, which also went into effect on January 1, 2024. SB 700 makes it unlawful for an employer to request information relating to an applicant's prior use of cannabis. Information obtained from the person's criminal history is exempt, and employers are permitted to consider or inquire about it consistent with state and federal law.

Although AB 2188 and SB 700 apply to public agencies, those agencies must also follow the Federal Drug Free Workplace Act of 1988 (41 U.S.C. Ch. 81), which requires employers who maintain certain federal contracts or who receive a federal grant to follow federal drug free workplace regulations. They also must follow state law, Gov't Code § 8350 et seq., which requires employers who contract with or receive grants from the State of California to certify that they provide a drug-free workplace.

To comply, agencies have adopted and enforced drug free workplace policies that typically prohibit cannabis use, which is still a controlled substance under federal law. It's too early to tell how those laws will be interpreted to work together. Until the courts answer those questions, there is a small chance your City could hold you responsible for cannabis use off-the-job.

Similarly, Federal Department of Transportation (DOT) regulations requires pre-hire, random, reasonable suspicion, post-accident, and return-to-duty drug testing, including for cannabis. DOT requires all Commercial Driver's License (CDL) drivers who operate commercial motor vehicles to be subject to DOT testing. Even if your current job might not require a Class A license, there is a small chance you could be flagged for DOT testing because you have a Class A and are in their database. You can also lose your CDL if you fail or refuse to take a DOT test, even if the CDL is not required in your current role.

The Federal Motor Carrier Safety Administration established the CDL Clearinghouse database, which enables employers to identify drivers who commit a drug violation while working for one employer but who fail to subsequently inform another employer, as required by current regulations. Records of drug violations remain in the Clearinghouse for five years or until the driver completes the return-to-duty process, whichever is later.

DOT drug testing currently tests for non-psychoactive cannabis metabolites that can be in your system but does not establish impairment while on-duty. AB 2188 prohibits discipline based upon that type of testing because it doesn't prove actual impairment at the time of the test. Although DOT regulations do not require termination of employment due to a positive cannabis test, agencies routinely terminate for positive DOT cannabis test results. Until the courts decide how to reconcile these two requirements, off-the-job cannabis use remains risky for workers subject to DOT testing.

Regardless, the City can hold you accountable for coming to work under the influence of cannabis or possessing cannabis at work. Even if the City does not conduct random or pre-employment drug testing, they will likely still test based on reasonable suspicion or post-accident, particularly when driving a City vehicle. If the City tests you, and it comes back positive for psychoactive cannabis metabolites (actual impairment), or they can establish you were impaired on-the-job, you will be subject to discipline.

You must determine how important it is to use cannabis, and to what extent you want to put your job at risk for doing so. The law grants more protections than ever before, but there is still a risk to your employment. If you do receive discipline for off-the-job cannabis use, contact your employee organization for help.