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## *NFFE Forest Service Council*

### Important Information

### Update on FLSA Lawsuit

October 19, 2011



#### **Bargaining Unit Employees,**

Your Fair Labor Standards Act (FLSA) status determines your eligibility for overtime. An agency review has affected the FLSA status of hundreds of employees. The union invoked negotiations on this issue and they are now complete. In addition, a lawsuit addressing employees' FLSA status is ongoing. This message explains what's going on, how it affects you, and what your options for further action are.

**Background:** If you work overtime, your FLSA status is important to your overall earnings. Depending on your job, you are either covered (or "non-exempt," as it is coded on official documents) or exempt from the requirements of the FLSA. Your FLSA status ("exempt" or "non-exempt") determines the pay rate to which you are entitled for overtime and whether you can earn overtime for certain work activities:

- Exempt employees' overtime pay rate is capped at the GS-10-1 level. Non-exempt employees are entitled to cash payment of 1.5 times their base rate for overtime work.
- Exempt employees are less likely to be entitled to overtime for training and travel.
- Non-exempt employees are entitled to cash payment at 1.5 times their base rate for overtime work and may not be coerced into receiving comp time instead. Exempt employees whose pay rate exceeds the GS-10-10 rate may be directed to earn comp time in lieu of cash payment.

Many of you may be aware of a lawsuit that employees may join to challenge their FLSA status. Because FLSA status cannot be challenged in the grievance process, NFFE National hired Woodley & McGillivray, a law firm that specializes in representing employees and unions, to assist union members who may wish to challenge their FLSA status. This union initiative began in 2010. Back pay received by employees under the lawsuit would not come out of the agency budget, so this was a win-win for employees and the agency. Subsequently, the agency began reviewing and correcting the employees' FLSA status codes. The union invoked negotiations on the impact and implementation of this review. This letter explains how employees may be affected by the agency review, union negotiations, and lawsuit.

**Effect of union negotiations:** Early in 2011, Forest Service management notified the NFFE Forest Service Council (NFFE-FSC) that they were doing a major review to correct the FLSA coding for a large number of employees. This review was independent of the lawsuit. Some employees stood to be adversely affected in a major way by the review. Any whose status was changed from "exempt" to "non-exempt" could be required to repay any overpayments for overtime that occurred while they were erroneously coded as "exempt." In some cases, employees were facing repayments for 10 or more years of overtime. In fact, some employees have already received notice of overpayment, which stated "expect a bill for FLSA payments previously paid to you in error." Some employees may have even received bills. Some faced a potential liability of thousands of dollars.

NFFE-FSC requested negotiations. Labor law requires completion of negotiations prior to implementation of changes. Thus, after we invoked negotiations, the notices stopped and the bills were put on hold. No further bills were sent. We have now completed negotiations. The agreement is posted at [http://www.nffe-fsc.org/flsa/110930\\_FLSA\\_MOU.pdf](http://www.nffe-fsc.org/flsa/110930_FLSA_MOU.pdf). Briefly,

- For employees whose status the agency changed from "non-exempt" to "exempt," repayments for past overpayments for overtime will be waived. Employees will not need to request a waiver; the agency will automatically generate the waiver request on their behalf. Employees will still receive one or two bills (Notice of Intent to Offset Salary) from NFC, but they will not have to pay them.

- Employees whose status the agency changed from “exempt” to “non-exempt” will receive back pay for underpayments for overtime that occurred within the past two years. Payment will be limited to overtime coded on timesheets as having been worked and for which they were underpaid. If an employee worked but was not compensated because of the coding error (this could happen, for example, for travel, training, or free time), s/he will need to prove that s/he worked the time and open a case with HRM to be reimbursed.

**Effect of negotiations on the FLSA lawsuit:** The Agency review and related negotiations were separate from the lawsuit and do not affect it. Only those employees who sign up for the lawsuit will receive damages or otherwise benefit from the outcome of the case. Union negotiations only addressed how FLSA status as determined by the agency would be processed. Under our Master Agreement, we could not address the accuracy of the review itself. If you wish to challenge the status decision itself, we recommend you join the lawsuit. Again, agency determinations of FLSA status cannot be challenged with a grievance. Thus, the lawsuit may benefit you if:

- Your status was changed from “non-exempt” to “exempt” and you believe that the new coding is incorrect. Go to [http://www.nffe-fsc.org/flsa/Changes\\_N\\_To\\_E.xlsx](http://www.nffe-fsc.org/flsa/Changes_N_To_E.xlsx) to see if you are in this group. Column H, labeled “FLSA,” shows the coding prior to agency review. Column I, labeled “Correct FLSA,” shows the coding as changed by the agency’s review. A change from “N” to “E” will decrease your entitlement to overtime payments in future years. You may challenge this status change in the lawsuit.
- Your status was changed from “exempt” to “non-exempt” (you can see if you are in this group at [http://www.nffe-fsc.org/flsa/Changes\\_E\\_To\\_N.xlsx](http://www.nffe-fsc.org/flsa/Changes_E_To_N.xlsx).) and
  - If your status had been miscoded for more than 2 years prior to the date the error was identified, the lawsuit may permit you to receive up to 3 years of back pay and interest.
  - If you had worked time for which you were not paid (e.g. travel time, training time, free time), the firm’s attorneys will assist you in receiving you back pay for this time (Alternatively, you may open a CRM case to receive pay for this time if you choose not to join the lawsuit).
- Your status was not changed, but you are coded as “exempt” and believe you should be “non-exempt.” You may find out what your FLSA status is by logging into Paycheck 8 and choosing “Enter Time.” Your FLSA status is listed to the right of the calendar at the top of the screen.

The criteria for determining FLSA status are complex. As a general rule, a nonprofessional, non-managerial, non-supervisory employee will more than likely be non-exempt if coded properly. For more information, go to <http://www.opm.gov/flsa/>. You may also go to Woodley & McGillivray’s site at [www.unionrights.com](http://www.unionrights.com) and check the information section.

Again, if you do not sign up for the lawsuit, you will not benefit from it. The lawsuit is open to dues-paying NFFE members only. NFFE National has paid an expert Washington, DC law firm up front to assist members in obtaining fair overtime payments as required by the law of the land. Union members have chipped in by paying their dues to make this possible. To join the lawsuit, you must pay your fair share by joining the union and remaining as a member for at least one year. Any payments coming out of the lawsuit will not affect the agency’s budget. Payments come out of a government-wide judgment fund. For more information, click on the trailing links.

**Lawsuit forms:** Go to <http://www.nffe-fsc.org/flsa/>, click on *Retainer Agreement and Consent to Sue forms.pdf* (more general information on the lawsuit is available there as well)

**To join NFFE:** Go to <http://www.nffe-fsc.org/join.php> (or contact a Local union official)

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"All that is necessary for the triumph of evil is for good [people] to do nothing." - Edmund Burke