

**EXECUTIVE SUMMARY:
Fair Labor Standards Act
Exemption Audit**



C O N S U L T A N T S T O M A N A G E M E N T

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EXECUTIVE SUMMARY

This executive summary is intended to summarize the results of the Fair Labor Standards Act Exemption Audit, and to aid the City of Columbus' statutory legal counsel in review of the Audit findings. If any questions arise regarding any of the determinations of this Audit, please contact Brian D. Butcher or CJ Fultz at 614-923-7700. You may also reach us at bbutcher@clemansnelson.com or cfultz@clemansnelson.com.

METHODOLOGY

This was the methodology utilized to conduct this Fair Labor Standards Act Exemption Audit.

STEP ONE:

The consultant will meet on-site with the client to collect all applicable personnel documents (e.g., classifications specifications, position descriptions, previous audits, tables of organization, labor contracts, etc.) and payroll information necessary to conduct the Audit. The consultant will encourage the client to identify any areas of concern. This step can be facilitated electronically to expedite the Audit.

STEP TWO:

The consultant will analyze the provided classifications to ascertain appropriate FLSA status (Exempt, Non-exempt, and Non-covered). This analysis will be dependent on the accuracy of the classification specification. If the client feels that a classification specification is not accurate or the classification's FLSA status may be "contested", a position analysis questionnaire may be distributed to the subject matter experts so the consultant can make an accurate determination as to whether or not the classification qualifies for an FLSA exemption. Occasionally, the consultant may also have to reach out to a client-assigned contact to confirm/obtain other relevant information. The audit will not include an on-site time-study.

STEP THREE:

Based on the information provided by client, the consultant will complete the audit identifying appropriate FLSA status and how each class met or fell short of an exemption. A short Executive Summary of the findings will be provided to the client and its statutory legal counsel. A full database (checklist) of the analysis will also be provided to the client.

STEP FOUR:

After completion of the Audit, the client and the consultant will meet to discuss the results and any recommendations for FLSA compliance.

SUMMARY OF RESULTS

The specific Fair Labor Standards Act Exemption Audit Results for each classification are included in the accompanying excel workbook. The jobs are grouped in excel sheets according to the Class Plan Index (accurate as of December 11, 2017) which was provided to the Consultant by Applicant and Employee Services Manager Tammy Rollins. Below is a summary of the results for certain broad groups of classes.

AFSCME

The City of Columbus and the American Federation of State, County, and Municipal Employees have two separate collective bargaining agreements covering a wide range of job classes. Neither AFSCME agreement separates out employees into overtime eligible and non-eligible categories or provides for certain positions being compensated on a salary basis. Under the terms of the agreements all employees in classes under the two AFSCME agreements are paid on an hourly basis. Because the Administrative, Computer, Executive, Highly Compensated, and Professional exemptions require employees be paid on a salary basis rather than an hourly basis, none of the classes currently listed in the AFSCME agreements would currently qualify for such Fair Labor Standards Act exemptions.

FOP/OLC

The City of Columbus has collective bargaining agreements with the Fraternal Order of Police Ohio Labor Council, Inc. The collective bargaining agreement with the FOP/OLC does not separate the employees governed by said agreement into overtime eligible and non-eligible or provide for compensating certain classes on a salary basis. Rather classes governed by the collective bargaining agreements are paid on an hourly basis, and receive overtime compensation per the terms of the agreement. Therefore, none of the classes currently covered by this FOP/OLC agreement would currently qualify for the Administrative, Computer, Executive, Highly Compensated, or Professional exemptions under the Fair Labor Standards Act.

FOP

The City of Columbus has a collective bargaining agreement with the Fraternal Order of Police, Capital City Lodge No. 9. The collective bargaining agreement does not separate the employees governed by said agreement into overtime eligible and non-eligible or provide for compensating certain classes on a salary basis. Rather classes governed by this collective bargaining agreement are paid on an hourly basis, and receive overtime compensation per the terms of the agreement. Specifically Article 22.3 establishes the overtime standards for all classes under the agreement. Therefore, the classes of Police Officers, Sergeants and Lieutenants would currently not qualify for the Administrative, Computer, Executive, Highly Compensated, or Professional exemptions under the Fair Labor Standards Act. However, the class of Commander only receives overtime compensation “at the discretion of the Chief of Police,” and therefore could currently qualify for FLSA exemption.

IAFF

The City of Columbus has a collective bargaining agreement with the International Association of Fire Fighters. The collective bargaining agreement with the IAFF does not separate the employees governed by said agreement into overtime eligible and non-eligible or provide for compensating certain classes on a salary basis. Rather classes governed by this collective bargaining agreement are paid on an hourly basis, and receive overtime compensation per the terms of the agreement. However, Article 13.2(A) notes that the Deputy Chief position is ineligible to receive compensatory time off or payment for overtime worked. Therefore, the Deputy Chief classification is the only classification currently covered by the IAFF agreement that could currently qualify for the Administrative, Computer, Executive, Highly Compensated, or Professional exemptions under the Fair Labor Standards Act.

CWA

The City of Columbus and the Communication Workers of America are parties to a collective bargaining agreement that covers numerous classes of employees. The collective bargaining agreement specifically separates the classes covered under the agreement into overtime eligible and non-eligible categories, and further provides that employees in the overtime non-eligible or exempt category be compensated on a salary basis. Because there is the potential through collective bargaining process for the City and the Union to agree to move certain classes into either grouping, the Consultant evaluated all classes under the CWA for possible Fair Labor Standards Act exemptions. The results are articulated in the accompanying spreadsheets.

While this Audit may show a class, that is currently designated as overtime eligible or non-exempt by the collective bargaining agreement, does qualify for a Fair Labor Standards Act exemption, any change to this status would likely have to be bargained for through the collective bargaining process. For further information on this matter the City should consult its statutory legal counsel or labor representative.

HACP

The City of Columbus maintains a Health Administrative Compensation Plan. This plan covers classes of employees and identifies both overtime eligible and non-eligible groups. The compensation plan further provides for the payment of these overtime non-eligible or exempt classes to be compensated on a salary basis. Because it is possible for these classes to satisfy the

salary basis test under the Fair Labor Standards Act, all classes falling under the HACP were evaluated to determine if each class qualified for a Fair Labor Standards Act exemption. The results are articulated in the accompanying spreadsheets.

MCP

The City of Columbus also maintains a Management Compensation Plan which covers employees that are classified as both exempt and non-exempt for purposes of the Fair Labor Standards Act. The MCP provides for exempt employees to be compensated on a salary basis. Because it is possible for these classes to satisfy the salary basis test under the Fair Labor Standards Act, all classes falling under the MCP were evaluated to determine if each class qualified for a Fair Labor Standards Act exemption. The results are articulated in the accompanying spreadsheets.

RECOMMENDED CHANGES

The accompanying check list spread sheet shows the evaluation of all class specifications. Here the Consultant will reference those classes in which a change is recommended, and give a brief explanation explaining the reason for the change. In total the Consultant is recommending changes to the FLSA status of eight (8) class specifications.

- 1) Executive Assistant I
 - This class is currently listed as exempt in the MCP; it is the Consultant's recommendation that the FLSA status be changed to non-exempt. Please see the Specific Class Specifications Analyzed section of this summary.
- 2) Legal investigator/Paralegal (U)
 - This class is currently listed as exempt in the CWA agreement; it is the Consultant's recommendation that the FLSA status be changed to non-exempt. Please see the Specific Class Specifications Analyzed section of this summary.
- 3) Web Content Coordinator
 - This class is currently listed as non-exempt under the CWA collective bargaining agreement. The job duties listed in the class specification indicate that the position has considerable input with management and other department personnel in development and implementation of information for inclusion on City websites. This class also has input on policies, procedures, and guidelines related to the content management system. These types of duties are related to public relations, government relations, etc. which are directly related to general business operations of the City. These duties indicate that the position likely qualifies for an Administrative exemption.
- 4) GIS Analyst
 - This class is currently listed as exempt under the CWA collective bargaining agreement; however, the Consultant's evaluation concluded that the class specification's listed duties were likely insufficient to qualify positions under this classification for an FLSA exemption. The class specification provided no support for the Executive exemption, Highly Compensated Employee exemption, or Computer Employee exemption, and while the education and experience required was beyond just a high school diploma it likely does not rise to the level necessary to meet the requirements for the Professional exemption. Similarly, the class specification is unlikely to support an Administrative exemption because the duties listed do not have sufficient nexus to the management or business operations of the City and the duties do not indicate that employees in that position would have the necessary discretion or independent judgment required for the exemption.

5) Programmer Analyst

- This class is currently listed as non-exempt under the CWA collective bargaining agreement; however, the Consultant's evaluation concluded that the duties in the class specification were such that positions under this class could likely qualify for FLSA exemption under the Computer Employee exemption. The Computer Employee exemption requires that employee's duties consist of: application of systems analysis; design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; design, documentation, testing, creation or modification of computer programs related to machine operating systems; or a combination of the aforementioned duties. The class specification lists writing, compiling, reviewing and modifying of new and existing programs; analyzing new and or current software for compatibility with program requirements; and implementing new applications or programs, and upgrading of existing applications or programs. These duties likely satisfy the requirements of the Computer Employee exemption.

6) EMS Instructor II

- This class is currently listed as exempt under the CWA collective bargaining agreement; however, based on the duties listed in the class specification combined with the supervision of the class by the EMS Education Manager, the Consultant's evaluation concluded that positions under this class specification would likely not be considered exempt under the FLSA. The class specification provided no support for the Executive exemption, Highly Compensated Employee exemption, or Computer Employee exemption, and while a high-level understanding of EMS instruction is required, it likely does not rise to the level necessary to meet the requirements for the Professional exemption. Similarly, the class specification is unlikely to support an Administrative exemption because while the duties listed could be argued to have a connection to the management or business operations of the City; the duties do not indicate that employees in that position would have the necessary discretion or independent judgment required for the exemption.

7) Latent Print Examiner II

- This class is currently listed as exempt in the CWA agreement; it is the Consultant's recommendation that the FLSA status be changed to non-exempt. Please see the Specific Class Specifications Analyzed section of this summary.

8) Polygraphist

- This class is currently listed as exempt under the CWA collective bargaining agreement; however, the Consultant's evaluation concluded that positions under this class specification likely do not qualify for the Administrative, Executive, or Professional exemptions under the FLSA.

SPECIFIC CLASS SPECIFICATIONS ANALYZED

The City requested the Consultant look into certain classes specifically, the outcome of the Audit with regard to those class specifications and a brief explanation of the reasoning behind each determination is included below.

Cable Worker Supervisor II (3558)

This class currently is listed as overtime exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to the class specification it receives compensation in excess of \$455 per week. According to the class specification the class is “responsible for supervising crews involved in the installation, repair, and replacement of components of the underground power distribution system; performs related tasks as required.” This indicates that the primary duty of the class is the management of these work crews. The class specification of this class and those of Cable Worker I, Cable Worker II, and Cable Worker Supervisor I indicate that the cable workers are an established subdivision rather than a specific task to which employees may be generally assigned from time to time. The class specification indicates that the class supervises at least two (2) full-time employees or an equivalent amount of part-time employees. The class specification further indicates that this class has the power to make work and training schedules, approve/disapprove leave, initiates and recommends disciplinary action, and conduct performance evaluations. As a result this class specification likely qualifies for the Executive exemption under the Fair Labor Standards Act.

Legal Investigator/Paralegal (U) (1998)

This class currently is listed as overtime exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to the class specification it receives compensation in excess of \$455 per week. The class specification indicates that the primary duties of this class are researching legal questions for attorney review, maintaining legal case files, and drafting legal documents for attorney approval.

The class specification makes no mention of any duties regarding the management of any subordinates to qualify for the Executive exemption, and does not indicate that this position engages in the administrative functions or has the necessary discretion or independent judgment to qualify for the Administrative exemption. The class specification indicates that it is not compensated highly enough to qualify for the Highly Compensated Employee exemption, and nothing in the class specification supports an exemption under the Computer Employees exemption.

While the class specification included no minimum qualifications, the class would likely not qualify for the Professional exemption. The Department of Labor has routinely concluded that Paralegals often do not qualify for the Professional exemption. The DOL has indicated that a paralegal position may be exempt if the position required professional knowledge such as a paralegal being required to have and use their knowledge of engineering or chemistry because they will be primarily assisting on patent cases. This class specification does not indicate that the duties required the advanced knowledge necessary to qualify for a Professional exemption.

Street Maintenance Manager (3990)

This class is currently listed as overtime exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to

the class specification it receives compensation in excess of \$455 per week. The class specification indicates that it is responsible for “planning, implementing, directing, and evaluating the activities of street maintenance programs.” The class specification further indicates that the class supervises street maintenance crews, planning and directing the work of these crews, and evaluating the work performed by these crews. The class is also responsible for assisting in preparation of budgets, establishing policies and procedures, and monitoring program objectives. These job duties indicate that the class likely qualifies for the Administrative exemption.

Street Maintenance Assistant Manager (3991)

This class is currently listed as overtime exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to the class specification it receives compensation in excess of \$455 per week. The class specification for this class indicates that the class is responsible for job duties such as: supervising employees, conducting performance evaluations, approving/disapproving leave, initiating disciplinary action, recommending corrective action, conducting/participating in disciplinary conferences, and ensuring that subordinates comply with safety precautions. These job duties and the class’ position in the hierarchy indicate that the class likely supervises more than two (2) full-time employees or an equivalent amount of part-time employees. Therefore, the class specification likely qualifies for an Executive exemption.

Network Administrator (0522)

This class is currently listed as overtime exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to the class specification it receives compensation in excess of \$455 per week. The class specification indicates the class is responsible for “the reliable operation, maintenance, installation, design, and development of network infrastructure.” The class specification further indicates that the class is responsible for work involving the configuration, operation, and administration of network hardware and components. The duties of this class pertain to the business operations of the City, but the class appears to only advise or make recommendations regarding what hardware or other devices should be purchased or utilized. Therefore, the class likely does not have the independent judgment or discretion to qualify for the Administrative exemption. The duties indicated in the class specification do state that the class requires the employee to analyze respective systems and ensure that the correct hardware is configured and operating appropriately. The functions listed in the class specification support classifying the class as FLSA exempt under the Computer Employee exemption.

Network Engineer (0523)

This class is currently listed as overtime exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to the class specification it receives compensation in excess of \$455 per week. The class specification indicates the class is responsible for the “design, development, implementation, and maintenance of the city’s network infrastructure and for the supervision of network support staff.” The class specification indicates that the class is responsible for supervising likely more than two (2) full-time employees, or equivalent numbers of part-time employees.

The class specification details the class’ job duties which require the design and development of LAN/WAN architecture and the modification of network infrastructure to optimally perform,

management of voice over internet protocol systems, and is responsible for utilizing network management systems to resolve network issues and designs, implements, and monitors intra-site, inter-site, and external data connectivity solutions. These duties illustrate that the class specification is responsible for using systems analysis to establish and maintain LAN/WAN networks and the network infrastructure. Based on this and the satisfaction of the salary basis test, the class likely qualifies for the Computer Employee exemption.

Fire Deputy Chief (3085)

This class is currently listed under the IAFF collective bargaining agreement. According to the wage rates established by the collective bargaining agreement the position would satisfy the \$455 threshold. It is important to note that positions which are first responders cannot be exempt under the FLSA. Positions within first responder departments may qualify for exemption under the FLSA, but only if the duties of the position are primarily administrative in nature.

The wage rate indicated in the collective bargaining agreement would result in an annual salary well in excess of the \$100,000 per year threshold for the Highly Compensated Employee exemption. The class specification indicates that the class is responsible for administering Fire Division policy, developing policy as needed, ensuring that equipment and personnel are properly distributed, administering the Fire Safety Inspection Program, and ensuring that personnel are properly trained. The class specification further states that the position is “responsible for directing the City’s emergency response system on an assigned unit day or is responsible for assigned Bureau activities.” This classification is subordinate to both the Fire Assistant Chief and the Fire Chief.

While this class is subordinate to two other classes, the rank structure of the Division of Fire and the class specification for this class indicates that a Deputy Chief’s primary duty is the management and administration of an established subdivision (bureau) of the Division of Fire. The class specification indicates that the primary duties of this position are non-manual or office work which includes the management of the personnel within a designated bureau. Combining these factors with the high level of compensation, this class likely qualifies for FLSA Exempt Status under the Administrative, Executive, and Highly Compensated Employee exemptions.

Police Commander (3060)

This class is currently listed under the FOP collective bargaining agreement. According to the wage rates established by the collective bargaining agreement the position would satisfy the \$455 threshold. It is important to note that positions which are first responders cannot be exempt under the FLSA. Positions within first responder departments may qualify for exemption under the FLSA, but only if the duties of the position are entirely administrative in nature.

The wage rate indicated in the collective bargaining agreement would result in an annual salary well in excess of the \$100,000 per year threshold for the Highly Compensated Employee exemption. The class specification indicates that the class is responsible for administering and directing the activities of a particular bureau within the Division of Police. The class specification further explains that the position prepares budget for bureau, determines most efficient scheduling and use of bureau personnel, administers collective bargaining agreements, manages assigned staff, and oversees sensitive investigations including internal complaints and officer involved shootings. This classification is subordinate to both the Police Deputy Chief and Police Chief.

While this class is subordinate to two other classes, the rank structure of the Division of Police and the class specification for this class indicate that Commander's primary duty is the management and administration of an established subdivision (bureau) of the Division of Police. The class specification indicates that the primary duties of this position are non-manual or office work which includes the management of the personnel within a designated bureau. Combining these factors with the high level of compensation, this class likely qualifies for FLSA Exempt Status under the Administrative, Executive, and Highly Compensated Employee exemptions.

Latent Print Examiner II (3010)

This class is currently listed as exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to the wage rate tables the position is compensated in excess of the \$455 per week threshold required by the FLSA.

The class specification does not indicate any functions or education requirements or a sufficient wage rate that would support exemption under either the Computer Employee, Highly Compensated Employee, or Professional Employee exemptions. This class specification was revised, and additional information was added, notably, to the education and experience requirements. These changes were considered as part of this analysis. However, after reviewing these changes and the relevant federal regulations, the type of education required likely does not meet the threshold for the Professional Employee exemption. This leaves only the Administrative and Executive exemptions as possible reasons why this class was characterized as exempt under the CWA collective bargaining agreement.

According to the class specification this class is responsible for examining and evaluating latent print evidence in connection with criminal investigations. Other functions listed in the class specification include preparing reports; testifying in court; logging/recording and storing files, reports, and evidence; and may respond to crime scenes or other areas to identify and evaluate print evidence. None of these functions would fall under the category of non-manual or office work directly related to the management or general business operations, and similarly none of these functions indicate any management responsibility.

Based on the review of the essential functions listed in the class specification, it is likely that this class does not qualify for exemption under the FLSA and is therefore non-exempt.

Latent Print Examiner III (3011)

This class is currently listed as exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on a salary basis, and according to the wage rate tables the position is compensated in excess of the \$455 per week threshold required by the FLSA.

The class specification does not indicate any functions, education requirements, or a sufficient wage rate that would support exemption under the Computer Employee, Highly Compensated Employee, or Professional Employee exemptions. This class specification was revised, and additional information was added, notably, to the education and experience requirements. These changes were considered as part of this analysis. However, after reviewing these changes and the relevant federal regulations, the type of education required likely does not meet the threshold for the Professional Employee exemption. This leaves only the Administrative and Executive exemptions as possible reasons why this class was characterized as exempt under the CWA collective bargaining agreement.

According to the class specification this class is responsible for examining and evaluating latent print evidence in connection with criminal investigations and supervising latent print examiners. Other functions listed in the class specification include supervising employees within the Latent Print Unit including conducting performance evaluations, approving/disapproving leave requests, and initiating disciplinary action; performing budgetary functions for the unit; preparing reports; testifying in court; logging/recording and storing files, reports, and evidence; serves as liaison to public as well as other laboratories or law enforcement agencies; prepares, coordinates, and/or conducts training programs for staff; and performing periodic review of procedures, plans and directives for appropriate changes or additions. Several these functions would fall under the category of non-manual or office work directly related to the management or general business operations. Additionally, when this class specification was updated, guidance was added that the primary reason for this classification's existence was the supervision of employees in the latent print specialization, and that the class may not exceed more than two (2) positions. These duties and the guidance given in the class specification indicate that the class' primary duty is the management of the Latent Print Unit.

Based on the review of the essential functions listed in the class specification, it is likely that this class does qualify for exemption under the FLSA Executive exemption.

Executive Assistant I (0106)

This class is currently listed as exempt under the MCP. Its classification as exempt under the MCP indicates that the positions are paid on a salary basis and at a rate greater than the \$455 per week threshold required by the FLSA.

The class specification does not indicate any functions, education requirements, or a sufficient wage rate that would support exemption under the Computer Employee, Highly Compensated Employee, or Professional Employee exemptions. This leaves only the Administrative and Executive exemptions as well as the Personal Staff exemption as possible reasons why this class was characterized as exempt.

According to the class specification, positions under this classification provide office support to the Mayor's Office. This support is characterized by duties such as: typing correspondence; making travel arrangements for Mayor; maintains confidential files; planning and prioritizing items for the Mayor's schedule; taking dictation or verbatim minutes of meetings and conferences attended by the Mayor; etc. These duties are likely insufficient to satisfy the requirements of the Administrative or Executive exemptions. Therefore, this class was likely exempted under the Personal Staff exemption. According to C.F.R. §553.11 the FLSA provides for the exemption of an elected officials personal staff if the employee is under the direct supervision of the elected official, has regular contact with such official, is not directly supervised by someone other than the elected official, is not subject to civil service laws, and is appointed and serves solely at the pleasure or discretion of the elected official.

Through discussion with the client, it was explained that this class specification does in fact include the Mayor's personal secretaries, but also includes positions that would serve elsewhere and would likely not be qualified for the Personal Staff exemption. To summarize, those secretaries actually working as the Mayor's personal staff would likely be exempt; however, other employees in the Executive Assistant I class would likely not qualify for such exemption, and the duties listed are insufficient to support exemption under another FLSA exemption.

Management Analyst I (0779)

This class is currently listed as non-exempt under the CWA collective bargaining agreement. Per the terms of the agreement, the position is paid on an hourly basis, and according to the wage rate tables the position is compensated in excess of the \$455 per week threshold required by the FLSA.

The class specification does not indicate any functions, education requirements, or a sufficient wage rate that would support exemption under the Computer Employee, Highly Compensated Employee, or Professional Employee exemptions. This leaves only the Administrative and Executive exemptions as potentially valid exemptions.

According to the class specification, this class is responsible for performing research, analysis, and making recommendations to management on routine issues and matters having a fiscal or operational impact. Examples included under the class specification include researching and analyzing operational or administrative issues and making recommendations for resolution or improvement; conducting cost/benefit analysis and feasibility studies; writing grants; drafting legislation, encumbrances, requisitions, and contract and bid proposals. Positions in this class specification clearly perform non-manual office work that is relevant to business operations—which is required for the Administrative exemption—however the listed work does not quite indicate the level of discretion or ability to use independent judgment with respect to matters of significance that is also required for exemption. This deficiency is highlighted further in comparing the class specification for Management Analyst I and Management Analyst II. Because of this lack of discretion or authority, employees in the Management Analyst I class would not likely qualify for the Administrative exemption. Finally, the class specification makes no mention of exercising supervision over other positions; therefore the employees in this class would also not likely qualify for the Executive exemption.

Based on the review of the functions listed in the class specification, the Management Analyst I class designation as non-exempt under the CWA collective bargaining agreement is likely correct.

ADDITIONAL INFORMATION

A) Public Accountability and Salary Basis

Under the FLSA, in order for employees to qualify for exemption, they must be compensated on a salary basis. This can be tricky in public sector employment where the majority of employee benefits (vacation, sick leave, personal leave, etc.) may be tied to how many hours the employee actually works. Additionally, while a salaried employee in the private sector can usually come and go from work on a varied schedule, the public accountability requirement inherent to public sector employment, where a city has an obligation to show that tax dollars are being used responsibly, necessitates public employers have the ability to make certain deductions such as deductions for absences without paid leave or in the case of budget related furloughs. This public accountability factor combined with the need of public sector payroll systems to record an employee's pay on an hourly basis, to assist with accounting of vacation and sick leave accrual and usage, would seem to prohibit public employees from qualifying as exempt for FLSA purposes.

However, the DOL has created a special definition for salary basis as it applies to public sector employment. This rule is codified under 29 C.F.R. § 541.710:

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

- (1) Permission for its use has not been sought or has been sought and denied;
- (2) Accrued leave has been exhausted; or
- (3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

DOL investigators have reiterated the application of this public sector salary basis test indicating that payment of employees on an hourly basis or coding them as hourly in payroll software does not prohibit such employee from qualifying for an exemption under the FLSA.

B) Class Specifications

While the Consultant's recommendations regarding a class' status under the Fair Labor Standards Act are contained in the accompanying spreadsheets, there were a few related issues that should be reviewed by the City to help ensure the accuracy of the exempt or non-exempt status of each class specification.

This audit was conducted on the basis of job class specifications rather than each individual position description within that class. To that end, the status of exempt or non-exempt for each

class is a starting point rather than a final conclusion. Each class specification contains language indicating that the duties listed may not be performed by all positions in that particular class, and that the duties that are listed may not encompass all duties that may be performed. While it is not necessary to list every duty performed by employees in positions within a class, it is important for the City to stress the duties or other information that would satisfy the Fair Labor Standards Act exemption duties tests.

As a result of this Audit focusing on the class specifications rather than individual position descriptions, care should be taken when designating the individual positions as exempt or non-exempt. For instance, if a class specification has been identified as exempt under the Executive exemption, but an individual in a position under that classification does not supervise at least two (2) full-time employees or an equivalent amount of part-time employees then the position would likely not be exempt. Additionally depending on where a position falls within a pay range, an employee that only partially satisfies the Administrative, Executive, or Professional exemption may qualify as exempt under the Highly Compensated Employee exemption while an employee in the same position at the beginning of a pay grade may not yet qualify for such exemption.

Finally, because a number of the class specifications analyzed are covered under various collective bargaining agreements the Consultant recommends that the City should consult its statutory legal counsel and/or labor representative(s) regarding how best to proceed with making any changes to such classifications.