

**CSEA  
Community College Committee  
Issue Paper**



**Adjunct Faculty Assignments  
Classified Staff Rights &  
Opportunities**

# CSEA Community College Committee - Issue Paper

## Adjunct Faculty Assignments

### Classified Staff Rights & Opportunities

What are the rights of classified staff who accept adjunct faculty assignments with their community college employer? And, what opportunities are there for classified staff to accept adjunct faculty assignments with their community college employer?

Further, what is the impact of the Fair Labor Standards Act (FLSA), the California Education Code and a specific Collective Bargaining Agreement on community college employers when classified staff members accept adjunct faculty assignments in addition to the classified staff members' regular, fulltime (forty hours per week) work schedule?

#### **The Fair Labor Standards Act (FLSA)**

In 1985 the Supreme Court ruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) that the Fair Labor Standards Act (FLSA) applies to public employees, including community college (and public school) employees.

According to the United States Department of Labor website ([www.dol.gov/elaws](http://www.dol.gov/elaws)) overview, the FLSA “prescribes standards for the basic minimum wage and overtime pay, (affecting) most private and public employment. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. For nonagricultural operations, it restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous. The Act is administered by the Employment Standards Administration's Wage and Hour Division within the U.S. Department of Labor.”

The FLSA mandates that those employees who are non exempt [all community college and public school classified staff are non exempt employees] must be compensated for **all work** “suffered or permitted.” To “suffer or permit” means the employer either requires an employee to work or allows employees to work. This includes work performed before an employee's assigned work schedule; work performed after an employee's assigned work schedule; work performed during breaks or lunch periods; or, work performed away from the work site before and/or after an employee's assigned work schedule.

There are a number of specific FLSA provisions that apply to classified staff, including overtime calculation rates, compensatory time requirements, prohibitions for volunteering to perform work, etc.

#### **Overtime Provisions:**

FLSA overtime provisions require non exempt employees to be compensated at a rate at least 1½ times the employee's regular rate of pay for each hour worked beyond a 40-hour workweek. And, while the FLSA mandates non exempt employees be paid overtime for **all** hours worked beyond a 40-hour workweek, the FLSA overtime provisions only applies to time actually worked! That means, FLSA overtime provisions do **not** apply to leaves of absence, including sick leave, vacations leave and holidays!

### **Overtime Provisions (continued):**

FLSA overtime provisions also do **not** apply to time worked beyond an 8-hour shift; only to hours actually worked beyond 40-hours in a one week period.

Overtime calculation methods are established by the FLSA. Overtime rates are generally determined by including all forms of compensation (i.e. stipends; differential pay; longevity pay; etc.) and calculating an hourly rate that is multiplied by 1½ times to determine the overtime rate of pay. For monthly salaried employees, the monthly salary is divided by 173.33 (52 weeks times 40 hours a week; divided by 12) to establish the hourly overtime rate.

The FLSA also requires employers to calculate an overtime rate of pay for employees who regularly work in two different classifications with two different rates of pay. In these instances, the overtime rate is determined by using a weighted average of the regular rate of pay of both positions; if both jobs are performed within the 40 hour workweek.

According to FLSA regulations, the overtime requirement may **not** be waived by “agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.”

Again, non exempt employees **must** be compensated for all work that is “suffered or permitted” and all overtime must be compensated at no less than time and one-half (1½) times the employees regular rate of pay.

### **Exempt Employees:**

The FLSA provides an “exemption” from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. To qualify as an “exempt” employee, an employee must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of FLSA regulations.

Faculty members and adjunct faculty are “exempt” employees. As such, faculty members and adjunct faculty are **not** entitled to FLSA overtime provisions.

### **Adjunct Faculty Overtime Calculation for Classified Staff:**

When a fulltime classified employee accepts an adjunct faculty assignment for the same employer, the employer is obligated to compensate the classified employee at an overtime rate for all hours worked as a classified employee and as an adjunct faculty member (for all hours worked beyond 40 hours a week).

### **Adjunct Faculty Overtime Calculation (continued):**

The employer is required to calculate the appropriate overtime rate for a classified employee by using a defined calculation method, as illustrated in the following example.

#### **Weekly compensation calculation:**

Monthly salary conversion: ( $\$3500 \times 12$ ) / 52	=	\$807.69
Weekly faculty assignment $\$40.00 \times 3$ hours	=	<u>\$120.00</u>
Total weekly “base” compensation:		\$927.69
Hourly “base” compensation: $\$927.69 / 43$	=	\$ 21.57
One-half (1/2) “overtime” increment: $\$21.57 / 2$	=	\$ 10.79
Additional amount owed for the week: $\$10.79 \times 3$	=	\$ 32.37

The result is that the college employer must compensate the classified employee who accepts an adjunct faculty position at a higher rate than the college is required to compensate other adjunct faculty members.

The requirement for a community college employer to pay overtime to a classified employee who accepts an adjunct faculty assignment only applies if the classified employee accepts an adjunct faculty with their own employer. FLSA overtime provisions do not apply to classified employees who accept an adjunct faculty assignment from a community college employer who does not employ the classified employee as a part of their classified staff.

### **Compensatory Time Off:**

After the *Garcia* decision, Congress passed legislation that amended the FLSA to permit public sector employees to accumulate compensatory time off (CTO – also known as “Compensatory Time” or “Comp. Time”) in lieu of overtime compensation; with specific limits (for all intents and purposes, private sector employees are prohibited from accruing CTO). CTO is the equivalent of 1½ hours of time off for each hour of work performed over 40 hours a week, in lieu of overtime pay.

Public sector employees are allowed to accrue up to 240 hours of CTO; any CTO beyond the 240 hour limit must be paid off at the appropriate overtime rate of pay. Public safety and emergency response workers are permitted to accumulate up to 480 hours of CTO.

### **Waiting Time:**

According to FLSA provisions, “whether waiting time is hours worked under the (FLSA) depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been ‘engaged to wait.’”

### **On-Call Time:**

The FLSA provides that an “employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.”

### **Lectures, Meetings and Training Programs:**

Attendance at training programs or workshops must be considered work time unless four criteria are met: 1) the training is outside normal hours; 2) attendance for the training is voluntary; 3) the training is not job related; and, 4) no other work is concurrently performed.

### **Travel Time:**

Regular and/or routine commuting time from home to work or vice versa is not considered work time. However, if an employee who regularly works at a fixed location in one city is directed to work at a different location, the time spent in traveling to and returning from the “new” location is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Time spent by an employee traveling from job site to job site during the workday is work time and must be counted as hours worked.

According to FLSA regulations, travel that keeps an employee away from home overnight is clearly work time, when it cuts across the employee's workday. “The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the (Department of Labor) will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.”

### **Rest and Lunch Periods:**

The FLSA does not require rest periods (work breaks) or lunch periods. However, an authorized rest period is counted as hours worked for overtime purposes. Lunch periods are not generally counted as hours worked, unless the employee is not relieved of duties or the employee is required to perform any duties, whether active or inactive, while eating.

Working through a break or working during a lunch period could result in overtime compensation, if the time worked exceeds 40 hours in a workweek.

### **Volunteering:**

Under FLSA provisions, employees are **not** allowed to “volunteer” to perform work for their employer!

This means that **any** work performed by an employee for their employer **must** be compensated – all hours “suffered or permitted.” In fact, it is **not** legal for an employer and employee to reach an agreement that provides the employee will “volunteer” to perform work without compensation!

### **California Education Code Provisions:**

California Education Code (Ed Code) Section 88026 (45127 for K-12 school employers) provides that any time worked beyond eight (8) hours a day, as a part of a 40 hour workweek, must be paid at an overtime rate. Ed Code Section 88027 (45128 for K-12 school employers) mandates that community college employers “provide for such compensation or compensatory time off at a rate at least equal to time and one-half the regular rate of pay of the employee designated and authorized to perform the overtime.”

Additionally, Ed Code Section 88030 (45131 for K-12 school employers) provides that employees assigned to work more than four hours per day be compensated for “any work required to be performed on the sixth or seventh day following the commencement of the workweek at a rate equal to 1½ times the regular rate of pay of the employee designated and authorized to perform the work.” For employees assigned less than four hours a day, this Ed Code overtime provision only applies to the seventh day of work.

Ed Code Section 88028 (45129 for K-12 school employers) provides that when “compensatory time off is authorized in lieu of cash compensation, such compensatory time off shall be granted within 12 calendar months following the month in which the overtime was worked without impairing the services rendered by the employing district.”

### **Collective Bargaining Agreements:**

Section 3543.2 of the Government Code (EERA) provides that the scope of bargaining “shall be limited to wages, hours of employment, and other terms and conditions of employment.” This means that unions are empowered to negotiate overtime provisions into the collective bargaining agreement (CBA).

These CBA provisions can improve upon the rights and benefits provided by the FLSA or the Ed Code, but the employer and the union are prohibited from reaching agreements that reduces, diminishes or eliminates rights and benefits established by the FLSA or the Ed Code.

For instance, a CBA could contain language that provides for a 35-hour workweek, with all hours worked beyond 7 hours a day or 35 hours a week to be paid at an overtime rate. But, the CBA could **not** eliminate the right to overtime compensation for a non exempt employee who works more than 40 hours in a workweek or provide that employees are permitted to “volunteer” to work for their employer.

A CBA could also establish that an employee has the right to decline overtime or the right of the employee to choose to receive either overtime or compensatory time off.

However, once a contract provides an established rate of pay, it is that established rate of pay that determines the employee’s minimal overtime rate for all hours worked beyond 8 hours a day (per Ed Code – provided a 40 hour workweek is established) or 40 hours a week (per the FLSA and the Ed Code).

It should be noted that CSEA is prohibited from bargaining for positions that are not part of the CSEA bargaining unit. For instance, CSEA is barred from bargaining the salary rates for a certificated unit and/or adjunct faculty positions that are not a part of the CSEA bargaining unit.

### **Adjunct Faculty Assignment Analysis:**

The following questions and responses are intended to address the rights of classified staff who accept adjunct faculty assignments and/or the opportunity of classified to accept adjunct faculty assignments with their community college employer. The question response appears immediately following the question – bolded.

1. Is it legal for a classified employee to accept an adjunct faculty assignment with the community college that employs them?

**Yes. There is no prohibition for a community college employer to allow a classified employee to accept an adjunct faculty assignment with their community college employer.**

2. Why do some community college employers prohibit their classified employees from accepting adjunct faculty assignments?

**Some employers are not willing to accept the obligation to compensate their classified employees at an overtime rate of pay for hours worked beyond the classified employees 40 hour workweek. The overtime rate of pay in these circumstances applies to the additional hours of employment as an adjunct faculty member as well as any additional hours of employment of the classified employee's regular work assignment.**

3. Is it legal for CSEA to bargain a different overtime rate of pay for classified staff who accepts an adjunct faculty assignment?

**The FLSA provides the method by which non exempt workers (classified staff) are compensated for overtime work. CSEA could bargain a higher overtime rate of pay for all hours worked beyond 8 hours a day or 40 hours a week, but CSEA and the community college employer are not permitted to bargain for overtime rates that would be less than the overtime rates established under the FLSA.**

4. Do all community college employers prohibit classified staff from accepting adjunct faculty assignments?

**No. A number of community college employers allow their classified staff to accept adjunct faculty assignments.**

5. Under what conditions do some community college employers allow classified staff to accept an adjunct faculty assignment?

**First, community college employers who allow classified staff to accept adjunct faculty assignments are required to calculate the appropriate overtime rate using a calculation method established by the FLSA. And, all hours worked by the classified staff member beyond their 40 hour work week must be compensated at the appropriate overtime rate.**

**Some community college employers are willing to pay the higher overtime rate in order for their classified staff to accept adjunct faculty assignments.**

6. Are there other conditions in which some community college employers allow classified staff to accept an adjunct faculty assignment?

**Yes. Some community college employers have worked out arrangements with CSEA provide that a classified staff member may temporarily, on a voluntarily basis, reduce their hours of assignment below their regular 40-hour workweek in order to avoid overtime (time worked beyond 40 hours a week) for the duration of their adjunct faculty assignment.**

**Under this arrangement the classified staff member would reduce their regularly assigned workweek to offset the number of hours required to perform the adjunct faculty assignment. For instance, a classified staff member would work a 37-hour work week with a 3-hour adjunct faculty assignment.**

**In some instances, the classified staff may choose to use vacation time or accumulated CTO (i.e. 3 hours per week or whatever hours required to perform their adjunct faculty assignment) to subsidize the temporary reduction in their regular hours of assignment to equalize any loss in pay for the duration of their adjunct faculty assignment.**

**Even under this arrangement, the community college employer is required to calculate the appropriate overtime rate using a calculation method established by the FLSA. And, all hours worked by the classified staff member beyond a 40 hour work week during the duration of their adjunct faculty assignment must be compensated at the appropriate overtime rate.**

7. Is the community college employer obligated to provide an overtime rate of pay to a classified employee who accepts an adjunct faculty assignment if the classified employee is employed by a different community college or public school employer?

**No. The FLSA provisions only apply to classified staff member who work beyond their 40-hour workweek for their own employer. A classified staff member who works for two different community college employer and/or public school employers is not entitled to FLSA overtime benefits. The FLSA requires an employee to work for beyond 40 hours a week for the same employer before the FLSA provisions apply.**

**There are many instances where a classified employee for one community college employer and/or a public school employer accepts an adjunct faculty assignment for another community college employer. In these instances, the community college employer who offers a classified employee of another employer an adjunct faculty assignment bears no FLSA liability.**

8. Do the FLSA overtime provisions apply to part-time classified staff members who accept an adjunct faculty assignment with their community college employer?

**The FLSA overtime provisions apply to all classified staff for a community college employer. However, there is no FLSA overtime liability incurred unless a part-time classified employee who accepts an adjunct faculty assignment works beyond a 40-hour workweek.**