

In Brief

Updates from the Office of Legal Affairs



Volume 1, Issue 1

October 2015

Technology and Work Hours: How to Navigate Overtime Issues



"While all these advances are exciting and welcome, supervisors need to be aware that under the law, some employees might need to be paid overtime for these off-campus activities."

There's no doubt that technological advances have made many aspects of our lives easier. We can check email on our smartphones, return phone calls from anywhere in the world, and access our work computers from home. While all these advances are exciting and welcome, supervisors need to be aware that under the law, some employees might need to be paid overtime for these off-campus activities. And, if federal guidelines are not followed, the law provides for significant penalties against the employer.

What Does FLSA Require?

As you likely are aware, under the Fair Labor Standards Act (FLSA), nonexempt/hourly employees qualify for overtime pay if they work more than 40 hours in a week. Most hourly employees are nonexempt, and the overtime rate would be 1½ times the normal pay rate for each hour worked over 40. Further, the FLSA applies if an employee works or is permitted to work. This means that the work does not necessarily have to be specifically authorized by a supervisor. The employer just has to have "reason to believe" that the employee is working overtime. As an example, the court found unpaid overtime was owed by checking the time stamps on emails to show that the work was performed after the employee's regular hours. Further, the emails were to the manager, so the employer should have known the work was performed. Additionally, in one recent court case, having a policy prohibiting unauthorized overtime is not enough to avoid paying overtime.

De Minimus

Not all work counts as overtime. If the amount of work performed is so small, it is considered "de minimus" time worked. While the courts have not specifically defined the de minimus exception, generally if the work is under a few minutes/day in total, it will not be considered overtime. So, nominal activities like reading one email or sending a single text message may not be considered overtime.

What Could Happen?

Claims for overtime pay can be filed with the U.S. Department of Labor or as a lawsuit in court. If it is determined that the employee was not paid for overtime, a court will calculate the overtime hours worked and multiply by 1½ of the base pay. Then, the employee also is awarded liquidated damages in the same amount. Moreover, FLSA is a "fee shifting statute," meaning that if the employee wins, the employer must pay the employee's attorney's fees. All this can add up to a hefty sum.

What Can Supervisors Do?

First, make sure your nonexempt/hourly employees know that they cannot work from home without prior authorization from the supervisor. Also, if they do work extra hours away from the office or at home without authorization, you still need to pay them overtime, but they should also be warned or corrective action taken for failure to follow the policies. Supervisors need to pay attention to work being performed. If a nonexempt/hourly employee is sending you emails at 9 p.m., it is the supervisor's responsibility to notice.

Contact Us:

Office of Legal Affairs
Rodman Hall, Suite 249

Colleen Trembl
General Counsel
ctrembl@jcu.edu
216.397.1595

Kenneth T. Danton
Assistant General Counsel
kdanton@jcu.edu
216.397.1994

Susan Miller
Legal Assistant
smiller@jcu.edu
216.397.1590

Independent Contractors vs. Employees: What is the Difference?

When you are looking for additional help to assist in your department's work, you may consider different ways to staff your needs, such as adding a staff member, using a temporary employee, or hiring an independent contractor. An independent contractor is a self-employed individual or an individual employed by another organization in an independent trade, business or profession in which they offer services to the general public. Independent contractors assist JCU in tapping

specialized expertise needed for project-specific work for a specific term, recognizing the contractor's desire for independence in the work performed, and helping save on benefit and administration costs.

If you are thinking of hiring an individual or a firm to perform work as an independent contractor, it is important to assure that the individual meets all the legal requirements of an independent con-

"We must decide on a case-by-case basis whether an individual meets the legal requirements for an independent contractor."

tractor. That is because the Internal Revenue Service (IRS) has strict guidelines for when a worker can be considered an independent contractor to assist employers in meeting the legal requirements for employment tax withholdings and employment taxes that are required for an employee but not for an independent contractor.

We must decide on a case-by-case basis whether an individual meets the legal requirements for an independent contractor by looking at the facts of each case. Generally, an independent contractor exists if JCU or the department has the right to control or direct only the result of the individual's work and not what will be done or how it will be

done. Three key factors that must be considered in deciding whether an individual can be classified as an independent contractor include: (1) the amount of control the University department or school has over **what the worker does** and how he or she does the work; (2) the amount of control the University has over the **business aspects** of the job, such as who provides the tools and supplies for the work, how the worker is paid, and whether expenses are reimbursed; and (3) the **relationship** between the worker and the University in terms of benefits, the nature of the work performed, and the length of the relationship. Generally, a department should not retain an individual as an independent contractor if the individual has recently been an employee of the University in the same or substantially similar position.

The Human Resources Department and the Office of Legal Affairs (OLA) can answer questions you may have about the use of independent contractors. For a template independent contractor agreement, contact HR or the OLA. If the worker cannot be classified as an independent contractor, HR or OLA can help you with other options for retaining the worker.



Privacy of Student Records: A Re-Cap of FERPA

Who Does FERPA Give Rights To?

All students who attend post-secondary institutions are afforded rights under the Family Educational Rights and Privacy Act (FERPA). FERPA protects the privacy of education records and provides guidelines for the proper use and release of student information. All students have the right to inspect and review their education records as well as to amend any incorrect statements in their records. If a student is a dependent for tax purposes, the student's education records may be disclosed to their parents without consent of the student. Otherwise, such disclosure is not permitted.

What Are Education Records?

Education records include anything that contains information directly related to the student that is maintained by an educational institution or someone acting for such institution. Some things that are not education records include: records in the "sole possession" of the maker, law enforcement records created by a law enforcement agency for law enforcement purposes, employment records, unless the employment is based on student status, medical and psychological treatment records and alumni records created after the student has graduated.

What Can and Cannot Be Disclosed?

A school generally may not disclose personally identifiable education records to a third party without prior written consent. However, there are several exceptions to nondisclosure of education records. Disclosure is permitted to JCU employees performing their official, education-related duties, to another institution where a student wishes to enroll or is enrolled, to federal, state, and local educational authorities as well as other exceptions. Directory information such as name, address, telephone number, program of study, date of birth, and degrees received may be disclosed unless the student has formally opted out.

What Do I Do?

Contact the Registrar's Office to receive a form for a student to sign to authorize disclosure of education records to a third party. Every educational institution is required to annually post a notice of the rights afforded students under FERPA. JCU's notice can be found here: <http://sites.jcu.edu/registrar/pages/students/ferpa/>. If you have any other questions, please contact the Registrar's Office or the Office of Legal Affairs.

Upcoming Supervisory Training Sessions

Presented by
Human Resources and
Office of Legal Affairs

**October 8, 2015
9-10:30 a.m.**

"A Supervisor's Guide to Understanding FMLA and ADA"

LSC Conference Room

**October 22, 2015
9:00 a.m.-11:00 a.m.**

"Wage & Hour Issues in the Workplace: Understanding the FLSA"

Jardine Room

Protecting Student Privacy and Autonomy During the Disability Accommodation Process

Under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, the University has a duty to provide reasonable accommodations to students with disabilities in order to allow them to participate fully in the academic and extra-curricular life here at John Carroll University. The ADA and Section 504 also obligate the University to refrain from treating a student differently based upon knowledge of a student's disability or the perception that a student has a disability. These laws, and related JCU rules and processes, are focused on empowering individuals with disabilities to seek the accommodations they need in order to succeed without unreasonably giving up their privacy or autonomy. This important interest in privacy and autonomy, and the right of all students to be treated the same regardless of a perception of disability, requires the University to sometimes take a less active approach in accommodating disabilities than some might expect.

Often, one's first reaction to being confronted with a student who is struggling is a desire to understand the cause of the student's struggles and take proactive steps in order to help the student, even if they aren't yet ready to ask for such help. This reaction is natural and can be motivated by the best of intentions, including the University's caring culture and mission. However, when an instructor suspects that a student may be struggling due to a disability, it is important that help and outreach not be shaped or impacted by the suspicion or perception of a

disability. Absent self-identification or an accommodation request, JCU is *required* to respond to these students the same way it would respond to any other student. This does not mean that individuals should not reach out as they would for any student; it simply means that the outreach should not be based on assumptions about disabilities. The best way to preserve the rights of disabled students is to work through the appropriate JCU office for obtaining classroom accommodations, the Services for Students with Disabilities (SSD). <http://sites.jcu.edu/disabilities/pages/accommodations/>. Although these procedures involve additional steps, they are constructed to help maintain student autonomy concerning when the student wants to be identified as differently abled or given differential treatment.

Lastly, on a similar note, when a student shows up with a letter of accommodation, it is important to let the student determine whether or not they want to discuss details of their disability. Unless the student wishes to discuss it, it is not appropriate to ask about the underlying disability that warrants the accommodations. This does not mean that it is inappropriate to talk with a student about their challenges if they start such a conversation; it simply puts a student in charge of taking that first step. When warranted, questions about the accommodations a student is receiving or should receive should be directed to the SSD office.

"Absent self-identification or an accommodation request, JCU is required to respond to these students the same way it would respond to any other student."



What to Do When a Subpoena, Summons or Legal Notice Arrives

Imagine this: You are sitting at your desk, opening mail. In a strange-looking envelope, you find a document entitled Summons & Complaint. What do you do next?

If you receive a subpoena, summons or other legal notice by mail or in person, we request that you contact the Office of Legal Affairs (OLA) so we can review the issue with you. If the document relates to the University or to work on behalf of JCU, OLA will handle or assist you in handling the document. A few reminders about legal documents you may receive:

- A subpoena requires the University to produce documents in a court proceeding. A summons notifies the University that a lawsuit has been filed against it. Other legal documents include notices, charges or requests from administrative agencies (such as the Equal Employment Opportunity Commission or the Ohio Dept. of Job & Family Services) or regarding bankruptcy or consumer class action suits. All these documents, if related to the University, should be forwarded to the OLA.
- Do not accept a summons or subpoena that is addressed to another individual or department unless you are specifically authorized to do so. Direct the process server to the OLA (Rodman 249). We will determine whether it can be accepted by the University.
- If a lawyer or process server contacts you to ask how to serve your office with a legal document, advise the individual that all legal documents should be delivered to the OLA.
- If you do receive a summons or subpoena involving University business, please contact the OLA as soon as possible, preferably the same day. Keep a record of the date, time and method you received the notice.
- If you are unsure whether the legal document relates to University business or to a personal matter, please feel free to contact the OLA to discuss.