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FLSA Amendments Being Enforced for All Municipal Employees

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TENNESSEE CITIES should be aware that the Wage and Hour Division, Department of Labor, is including all city employees except fire and police personnel in audits of hours worked and wages paid. The U.S. Supreme Court stay against enforcement of the 1974 amendment to the Fair Labor Standards Act is still in effect, but, through an error in the wording of the printed order, confusion has arisen.

The Wage and Hour Division reports that it has been advised by the Department of Labor to enforce the FLSA in regard to all employees except police and fire personnel, the only category the Department considers is still subject to litigation. (An "informed source" advises that the Division is undertaking enforcement action only when a complaint is received.)

When Chief Justice Warren Burger wrote his decision to stay the effect of the FLSA, it was a very complex opinion but did apply the stay to all governmental employees, the National League of Cities reports. However, the decision was turned over to a clerk for preparation of the necessary order. In this order it was stated that the stay applied only to police and fire personnel. This order, although in conflict with Justice Burger's opinion, is the one being followed by the Wage and Hour Division, NLC explains.

NLC is recommending that audited cities take one of two actions. The municipality can notify the Wage and Hour Division that it will not comply with the audit finding and if necessary will go into court and request a show cause order. Such an order would require the Division to show cause why it should not be enjoined from enforcing the 1974 amendment.

A second approach is for the city to put in escrow sufficient funds to cover the amount of the audit finding and so advise the Wage and Hour Division. These funds would remain in escrow until the U.S. Supreme Court renders a decision in the case brought by NLC. In instances where this has been done, NLC reports, the Division has taken no further action.

MTAS Municipal Law Consultant Gene Puett notes that the Supreme Court has re-scheduled hearings on the NLC case for sometime during the 1975-1976 term. There is no way to tell when the ruling will come. When the case is heard and if the ruling upholds the constitutionality of the 1974 amendments, cities could be liable retroactively for all overtime not paid in conformity with the requirements of the amendments.