Given the breadth and complexity of the wage and hour issues implicated by recent Department of Labor (DOL) and private plaintiff enforcement actions, plaintiffs’ bar campaigns and judicial decisions, the November 12, 2009 webinar hosted by Jones Day, the American Hospital Association and the American Society for Healthcare Human Resources Administration was unable to address all of the questions posed by participants. While the presenters cannot respond to specific requests for legal advice due to the absence of the requisite factual foundations, they have developed the following supplement to address the principal categories of questions raised by participants in the webinar evaluation materials. As with the initial paper, this supplement addresses rules and requirements under the Fair Labor Standards Act (FLSA); as many of the issues addressed are likewise regulated by state law, those additional rules should be consulted and complied with, if containing stricter requirements.

I. Exemption Questions – Duties and Salary Basis Tests

A. Classification Strategies

Question: What are the reasons for and disadvantages of classifying an employee as exempt from overtime pay? Must all employees within a job classification be classified as exempt or non-exempt? Does full-time/part-time affect the appropriate classification?

Response: A careful consideration of the advantages, disadvantages, and consequences of classification is a key component of any compliance analysis. However, these matters can only be assessed in the context of the employer’s own particular business needs and administrative structure. Indeed, the decision to classify an employee who meets the duties and salary basis tests for an exempt employee as exempt or non-exempt is, in part, a business decision, inasmuch as the fact that an employee qualifies for exempt status does not mean that that employee must automatically be treated as exempt from overtime. Both status categories entail important but distinct compliance obligations with attendant costs (e.g., different kinds of recordkeeping, tracking hours worked and calculating overtime pay vs. continual monitoring regarding the performance of “white collar” job duties); both also present different but equally significant penalties and other adverse consequences for non-compliance. It bears noting, moreover, that, because an employee’s status is based on his or her job duties and pay scheme, it does not matter for wage and hour purposes whether the employee is full- or part-time or even whether all employees in the same job title are classified similarly (although workweeks should be standardized for as many employees as possible to avoid potential discrimination and administrative issues).

Question: Certain full-time RNs who qualify for exempt status based on their independent judgment and formal education have requested to go to part-time status working 30
hours a week. Would they remain exempt even though they are now working fewer hours but performing the same job duties? At what point should the employer consider non-exempt status for that position?

Response: Again, the FLSA does not address part-time employment. Whether employees are considered full-time or part-time does not change the application of the FLSA; rather, they would remain exempt so long as they meet not only the duties test but also the salary basis test. The latter test requires that the employees be paid a guaranteed minimum amount that does not vary based on the quantity or quality of the work – a salary that reflects and is commensurate with the employees’ part-time status thus is completely permissible, again so long as both tests are met. As noted, the decision as to when to shift to non-exempt status can be an HR business decision, and could depend, for example, on whether the employees routinely fail to meet their hours expectation. If you find you are paying the employees for time they are not working, you may want to shift them to a non-exempt hourly status so that you can vary their pay based on the number of hours the employees actually work.

Question: May an exempt Nursing Executive Director pick up extra shifts as an RN but remain exempt?

Response: Pursuant to 29 C.F.R. § 541.708, work that is exempt under one section of Part 541 will not defeat the exemption under any other section. Thus, the regulation states that employees who perform a combination of exempt duties as set forth any of the exemption categories (e.g., an employee whose primary duty involves a combination of exempt administrative and exempt executive work) may qualify for exemption. Based on this provision, so long as the Nursing Director’s job responsibilities in each position meet the duties test for the pertinent exemption category, the exemption should not be lost.

Question: Where can I find good exemption tests for each of the categories-executive, administrative, and professional?

Response: The DOL website contains helpful basic information about FLSA requirements and is a good first start on this and other compliance issues. A link to the exemption tests may be found at http://www.dol.gov/compliance/topics/wages-overtime-pay.htm. The website also has links to the FLSA statute and regulations; the regulations at 29 C.F.R. 541.301 provide the definitions for the terms most relevant to the learned professional exemption (the typical basis for the RN exemption), including the terms “work requiring advanced knowledge” and “customarily acquired by a prolonged course of specialized intellectual instruction.” Because exemption determinations frequently require subtle distinctions of the law based on detailed factual analyses, however, consultation with employment counsel generally is a prudent course of action for these types of issues and decisions.

B. Pay and Deductions from Pay for Exempt Employees

Question: If a part-time exempt Nurse Practitioner who works 32 hours a week (four 8-hour days) is asked to work one additional shift of 8 hours on a weekend once a month, how should the employer pay her for the additional hours?
Response: The rules regarding the provision of premium pay to exempt employees are found at 29 C.F.R. § 541.604(a). This regulation provides that an employer may pay an exempt employee additional compensation without losing the exemption or violating the salary basis test if the arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. It thus states that the exemption will not be lost if the exempt employee is guaranteed at least $455 each week paid on a salary basis and then receives additional compensation based on the hours worked beyond her normal workweek. Such additional compensation may be paid on any basis – flat sum, bonus payment, straight-time hourly amount, time and a half, or any other amount, and may even include paid time off. Based on this regulation, you could reach an agreement with the employee as to how to compensate her for the extra shift based on any of these payment arrangements and still treat her as an exempt employee so long as the other requirements are met.

Question: Can a hospital permit an exempt RN to be on-call on an hourly basis?

Response: The question raises a red flag about compliance with the salary basis test. The FLSA regulations provide, at 29 C.F.R. § 541.2, that a job title alone is insufficient to establish the exempt status of an employee; the exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part. As noted on pages 2-3 of the 11/12/09 webinar paper, an exempt learned professional like an RN must be compensated on a salary or fee basis at a rate of not less than $455 per week. Pursuant to 29 C.F.R. § 541.602, an employee will be considered to be paid on a “salary basis” within the meaning of the regulation only if the employee regularly receives each pay period a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Moreover, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

Based on these rules, if the RN is only paid for the hours worked when he is called in, he would not meet the requirements of the salary basis test. If, however, the on-call work is simply additional work that is scheduled beyond and on top of his normal workweek for which he receives a guaranteed minimum salary each pay period, he could receive additional compensation for the on-call work. Again, such additional compensation may be paid on any basis, including on an hourly basis. See August 19, 2005 DOL Opinion Letter (FLSA 2005-20); 29 C.F.R. § 541.604.

Question: Can and how should an exempt employee be furloughed?

Response: Because exempt employees must be paid their full weekly salaries for any week in which they perform work of any quantity or quality, placing such employees on furlough can be a risky action. However, an exempt employee may be furloughed without jeopardizing his or her exempt status in certain circumstances. First, if the furlough is not announced in advance and is not meant to be a permanent change in the exempt employees’ work schedule, it must be for an entire (or more than one full) workweek; in other words, the employees must...
perform absolutely no work at all during that week, including even the most mundane tasks. If
the exempt employees perform any work during this type of furlough period (such as checking or
sending voicemail/email messages), they must be paid their full weekly salaries, which, again,
cannot fall below $455/week. As confirmed in a January 16, 2009 DOL Opinion Letter (FLSA
2009-18), an employer may also implement a shortened workweek due to economic conditions
with an attendant fixed reduction in salary so long as such change is intended to be a “bona fide
reduction not designed circumvent the salary basis payment.” In this regard, the DOL noted as
an example of a bona fide reduction a situation in which the reduction constituted a permanent
change in the work schedule (from 52 five-day workweeks to 47 five-day workweeks and 5 four-
day workweeks) for all exempt employees due to the economic conditions.

Question: Is it true that all ‘as needed’ or per diem positions necessarily would be
non-exempt since there is no guarantee of a weekly wage?

Response: Generally, yes. As stated on page 2 of the 11/12/09 webinar paper, an
employee who meets the duties tests for the executive exemption must be paid on a salary basis
of at least $455 per week. An employee who meets the duties tests for the administrative or
professional exemption must be paid on a salary or fee basis of at least $455 per week, and an
employee in certain computer-related occupations who meets the duties tests may be paid either
on a salary or fee basis of at least $455 per week or on an hourly basis of at least $27.63 for each
hour worked. As noted above, for purposes of these definitions, a “salary” is a predetermined,
fixed amount of pay that (a) constitutes all or part of the employee’s compensation for the pay
period and (b) may not be reduced based on the quality or quantity of the work performed.
Consistent with this definition, an “as needed” employee would not meet the salary basis test.

Question: Can we make deductions from an exempt employee’s salary if her or she
is working a reduced schedule due to intermittent FMLA leave (e.g., 4-hour days for one week
per month while undergoing chemotherapy) that is mutually agreed upon by the employee and
the employer?

Response: FMLA regulations provide that, if an employee is otherwise exempt from
minimum wage and overtime requirements of the FLSA as a salaried executive, administrative,
professional, or computer employee, providing unpaid FMLA-qualifying leave to such an
employee will not cause the employee to lose the FLSA exemption. See 29 C.F.R. §§
825.206(a); 541.602(b)(7). The fact that an employer provides FMLA leave, whether paid or
unpaid, and maintains records required by this part regarding FMLA leave, should not be
relevant to the determination whether an employee is exempt within the meaning of 29 C.F.R.
Part 541.

Question: Is it lawful to pay an exempt employee who is absent for half of the
regular work day on personal business or illness a full day’s pay that consists of a partial
deduction from the employee’s accrued paid time off (PTO) leave bank?

Response: A January 14, 2009 DOL Opinion Letter (FLSA 2009-2) confirms that,
under the FLSA, employers may deduct less than a full day from a salaried exempt employee’s
accrued leave bank for absences due to personal reasons, accident, or illness, without causing the
loss of the exempt status of the employee. An employer may reduce an exempt employee’s accrued leave hours for either partial or full day absences so long as the employer has an established benefit plan (vacation, sick leave, or PTO plan). In addition, the reduction in the accrued leave bank must not result in a reduction of the employee’s guaranteed salary for the week in which the partial-day leave is taken; payment of the employee’s salary must be made for a partial-day absence if taken for personal reasons, sickness or accident even if the employee has no remaining vacation or sick leave or PTO hours. On these and other deduction issues, it is particularly important to review all applicable state laws, as some states (notably, California) have specific rules on these issues as well.

C. Remedying Misclassification Issues

Question: What is the best way to correct the status of an employee who is misclassified as exempt? Should you automatically try to calculate back overtime for the past two years?

Response: Given the explosion of litigation and DOL investigative and enforcement action (and the potentially huge costs of liability findings), it is prudent for employers to consider prompt and appropriate remedial action if their internal audits reveal that employees have been incorrectly classified and/or paid. However, the decision whether to implement solely prospective remedial measures or to remedy the violation for the full statute of limitations period implicates important legal, human relations, and strategic issues. To ensure that such measures comply fully with all state and federal laws, as well as to protect any discussions assessing risks and liability from disclosure through the attorney-client privilege, employers should consult with counsel throughout the decision-making process.

II. Compensable Hours

A. “Off the Clock” Hours – Working from Home

Question: Is time spent working at home before a shift (e.g., checking and responding to email, enrolling in benefits) compensable?

Response: The rules governing the compensability of time spent “off the clock” are addressed on page 11 of the 11/12/09 webinar paper. As noted, non-exempt employees must be paid for all hours worked, which generally includes all time an employee must be on duty, on the employer premises, or at any other prescribed place of work. Additionally, non-exempt employees must be paid for work “suffered or permitted” by the employer even if the employer does not specifically authorize the work; if the employer knows or has reason to believe that the employee is continuing to work (even if the employer does not have “actual knowledge” of the practice), the time is considered hours worked and must be compensated. 29 C.F.R. § 785.11. This is true even if the employer has a rule against off-the-clock work, as employer acquiescence in “off the clock” work demonstrates that the policy is not being enforced. Bottom line: Establish a policy prohibiting unauthorized hours worked outside employees’ regularly scheduled shifts, enforce violations of the policy through disciplinary action, but always compensate employees for hours they actually work – before, during, and after their workday.
B. Compensation for *De Minimis* Time Worked

**Question:** What is your interpretation of the *de minimis* component to the FLSA? Especially with non-exempt employees logging in to check emails from home, calling to voicemail to check for messages when out, etc. is the concept of *de minimis* work appropriate in the healthcare environment?

**Response:** While it is true that truly insignificant periods of time spent working outside normal work hours need not be counted as compensable, relying on a *de minimis* defense is extremely risky in the FLSA context for any employer. Thus, for example (as stated on page 16 of the 11/12/09 webinar paper), although the FLSA allows an employer to round employee time to the nearest quarter hour, rounding is only acceptable where the practices average out so that the employees are fully compensated for all the time actually worked. 29 C.F.R. § 785.48(b). Moreover, what seems to be “*de minimis*” time can add up quite quickly (e.g., regularly checking blackberry emails from home), as demonstrated by the $907,247 settlement that Mt. Clemens General Hospital was forced to pay in 2004 to 2,083 employees following an investigation that revealed that the hospital was not paying employees when they worked early or beyond their shift unless they worked a full 15 minutes extra.

C. Meal and Break Periods

**Question:** How can we weigh the disadvantages of automatic deductions for meals with the disadvantages of requiring staff (for the first time) to clock out and back in for meal breaks? Is it enough that a hospital that has a 30-minute automatic deduction for lunch has implemented a policy that encourages employees to write on their timesheet if they performed work during the meal break so that the 30 minutes would then be added back to their time?

**Response:** As discussed on page 15 of the 11/12/09 webinar paper, automatic meal period deduction practices, while lawful on their face, pose potentially significant risks (and potentially significant liability) because of the challenges presented by enforcing the portion of such policies requiring cancellation of the deduction when the employee works during the meal period. Just as it is difficult to ensure that time spent on email and voicemail away from the office by nonexempt employees is recorded and paid, so too is it difficult to ensure that supervisors are monitoring employees closely enough to make sure that the deduction is not applied when the full 30-minute meal break is not taken. In the event that an employer concludes that it is not confident in its enforcement of the policy, it may want to eliminate the automatic deduction practice. Alternatively, measures can be adopted that do not pose undue burdens on employees, such as the requirement to certify in writing on the time sheet that the hours reflected on the sheet are a complete and accurate statement of the hours actually worked by the employee.

**Question:** When a non-exempt employee is paged during their unpaid break in the cafeteria, is the entire period then compensable? What if they resume their unpaid break, resulting in a total of 30 or more minutes that are “completely relieved from duty”?

**Response:** For a meal period to be bona fide, the employee cannot be required to perform any duties – active or inactive – during the period. If neither part of the lunch break that
the employee is able to take allows him to be “completely relieved from duty” for a period exceeding 30 minutes, given the increased scrutiny on meal break deductions, the prudent course would be to avoid making a deduction.

Question: On a smoke-free campus, employees are required to leave campus to smoke and are also required to clock out for personal business. Would this time be compensable if the hospital maintains a policy that provides employees with two paid breaks per shift as long as the employees, in addition to their smoke breaks, are given the opportunity to take the paid break period time?

Response: Determinations of compensability hinge upon the length of time that an employee is “completely relieved from duty.” If employees are so relieved for more than 30 minutes to smoke or conduct personal business, the time need not be compensated; if the break is for 20 minutes or less and the hospital’s policy is explicit enough, it is compensable. In the event that the smoke breaks exceed 30 minutes and the hospital’s policy advises employees that unauthorized breaks of more than 20 minutes, which are taken in addition to the two paid breaks, are against its rules and punishable by disciplinary action, the hospital’s best course is to manage the extra break time through such disciplinary action.

Question: A group of non-exempt hospital employees notify their supervisor they will be leaving campus for less than 20 minutes. However, the group does not clock back in until 25-30 minutes later. May a deduction from pay be made?

Response: Probably not. While the group has exceeded the length of the rest break that customarily is considered and paid for as working time (assuming the employer has expressly and unambiguously communicated to employees that the authorized break may only last a specific period of time and that any extension is unauthorized and is subject to disciplinary action), a 25-30 minute break likely would not be seen as a bona fide meal period. The DOL’s rule of thumb is that such rest or meal periods must extend to 30 minutes or more to be bona fide and thus non-compensable. See DOL Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act, available at http://www.dol.gov/whd/regs/compliance/whdfs22.pdf. Thus, as noted above, disciplinary action would be the appropriate course rather than a deduction from pay.

D. Travel Time

Question: If an employer sends a non-exempt employee to an out of town conference that lasts several days, is the employee paid for airplane travel?

Response: The principles that govern pay for travel time depend upon the kind of travel involved. Travel that keeps an employee away from home overnight is “travel away from home.” According to DOL Fact Sheet #22, time spent engaged in this type of travel is compensable if it cuts across the employee’s normal workday. “The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days.” (Remember, too, to count this time, if warranted, for overtime purposes.) The Fact Sheet further notes, however, that, as an enforcement policy, the DOL “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.”

Question: An employee is assigned to work at two locations daily, in the morning at location 1 and in the afternoon at location 2. Is the travel time between the two locations compensable?

Response: Yes. This would be considered “travel that is all in a day’s work.” According to the DOL Fact Sheet, time spent by an employee as travel that is part of their principal activity, such as “travel from job site to job site during the workday,” is work time and must be counted as hours worked.

Question: If an employee is on call, is travel time to the facility compensable if they are called in?

Response: If this time is normal “home to work” travel, such that it occurs in the context of the employee traveling to work before his or her regular workday or returning home at the end of the workday, it is not considered compensable work time.

E. Training Time

Question: Can an employer force an employee to use PTO for time spent while attending trainings?

Response: As stated on page 12 of the 11/12/09 webinar paper, time spent attending lectures, meetings, and other training programs is not counted as working time only if four criteria are met: the time must be outside normal hours, it must be voluntary, it cannot be job related, and the employee cannot concurrently be performing other work. If the training in question does not meet all four criteria, then the time is compensable and the employer should not reduce an employee’s PTO bank to account for it.

Question: If an employee must attend training for their job on a Friday and Saturday and Saturday is not their normal work day, is the employer required to pay for the training on Saturday?

Response: Because the training appears not to be voluntary and is job-related, it would not meet all four criteria. As a result, it is time worked and compensable.

Question: Is study and testing time compensable if the employer requires the employees to obtain the certification in order to keep their job?

Response: Yes, for the reasons stated above.

Question: If a non-exempt employee completes required web-based training on his own time on a personal computer is this compensable if the hospital is aware he is doing this training? Would the outcome be different if the hospital provided and instructed the employee to use on-site equipment to complete the training on work time?
Response: A January 15, 2009 DOL Opinion Letter (FLSA 2009-13) addresses a similar issue and concludes that such hours are compensable because the employer has “suffered or permitted” the employee to perform the work and the fact pattern does not meet all four criteria establishing the non-compensability of training time. In the second part of the question, the conclusion regarding compensability would not change; however, if the employee was working off-shift against the hospital’s instructions, he could be subject to disciplinary action even though the hours would still have to be considered work time.

III. Definition of the “Workweek”

Question: How narrowly can the “workweek” be defined if it is set and not adjusted? Could it be for a department or each specific shift? What about per individual?

Response: Under the FLSA, a workweek is seven consecutive 24-hour periods; it is up to the employer to determine the day, or even hour, on which that period begins. As long as the period remains fixed, this determination may be made for any group of employees – department or shift – or even for individual employees. However, as noted above, the workweek should be standardized to the extent possible so as to avoid potential EEO, administrative and other challenges.

IV. Calculating Overtime Payments

A. Inclusions in the Regular Rate of Pay

Question: A hospital provides weekend differentials and holiday pay to its LPNs. Would these pay arrangements need to be included in regular rate and overtime calculations?

Response: Under section 7(e)(6) and 7(h) of the FLSA, extra compensation provided by a premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest or on the sixth or seventh day of the workweek (referred to in the statute and regulations as “special days”) may be treated as an overtime premium for the purposes of the Act and need not be included in calculating the regular rate of pay. See 29 U.S.C. §§ 207(e)(6), 207(h); 29 C.F.R. § 778.203.

Question: What is the difference between a discretionary and a non-discretionary bonus?

Response: As stated on pages 5-6 of the FLSA webinar paper, section 7(e) of the FLSA requires the inclusion in the regular rate of all remuneration for employment except certain specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift, and savings plans. Bonuses that do not qualify for exclusion from the regular rate as one of these payment arrangements must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. The difference between the two types of bonuses is discussed in the regulations at 29 C.F.R. § 778.211(b), which provides that, in order
for a bonus to qualify for exclusion as a discretionary bonus, the employer “must retain
discretion both as to the act of payment and as to the amount until a time quite close to the end of
the period for which the bonus is paid.” In other words, the sum, if any, to be paid as a bonus
must be “determined by the employer without prior promise or agreement” and the employee can
have “no contract right, express or implied, to any amount.” If, however, the employer
“promises in advance to pay a bonus, he has abandoned his discretion with regard to it.” Id.

Question: If someone finishes a shift, then clocks back in at time and 1/2 for call
pay, can we take a credit against overtime at the end of the week?

Response: Yes. The regulations at 29 C.F.R. § 778.204(a) provide that, “[w]here a
collective bargaining agreement or other applicable employment contract in good faith
establishes certain hours of the day as the basic, normal, or regular workday (not exceeding 8
hours) or workweek (not exceeding the maximum hours standard applicable under [the FLSA])
and provides for the payment of a premium rate for work outside such hours, the extra
compensation provided by such premium rate will be treated as an overtime premium if the
premium rate is not less than one and one-half times the rate established in good faith by the
contract or agreement for like work performed during the basic, normal or regular workday or
workweek.” The regulation further provides that, to qualify as an overtime premium under this
rule, the premium must be paid because the work was performed during hours “‘outside of the
hours established . . . as the basic . . . workday or workweek’ and not for some other reason”
(such as the fact that it is an undesirable shift). 29 C.F.R. § 778.204(b).

B. Aggregation of Hours – Joint Employment Considerations

Question: A hospital has been bought by another hospital. Both maintain separate
tax ID numbers, as well as separate and independent Board members and management officials.
Human resources functions are also independent; each hospital is responsible for all hiring and
firing decisions and there is no interchange of staff. If an LPN works at both facilities, 20 hours
at one facility and 25 at another, is she owed overtime?

Response: The rules governing aggregation of hours in the joint employment context
are addressed at pages 17-19 of the 11/12/09 webinar paper. Because any analysis of this issue is
extremely fact-intensive and the question presented includes only a few of the relevant facts, a
more detailed response is not possible.

C. The 8 and 80 Rule

Question: Please define a “day” in the context of the 8 and 80 overtime system. Is a
day from midnight to midnight or a 24-hour period from the beginning of the shift?

Response: Pursuant to the regulation at 29 C.F.R. § 778.601(c), for purposes of the 8
and 80 system, the 14-day period may begin at any hour of any day of the week; it need not
commence at the beginning of a calendar day. It consists of 14 consecutive 24-hour periods, at
the end of which a new 14-day period begins. The first workday in the period begin as at the
same time as the 14 day period and ends 24 hours later.
Question: If an employee works less than 80 hours in a 14 day period but did work over 8 hours a couple of those days do they get overtime?

Response: Yes, for the hours in excess of 8 hours in any workday. 29 C.F.R. § 778.601(b) states that, as a condition for use of the 14-day period in lieu of the standard 40-hour workweek in computing overtime, section 7(j) of the FLSA requires, first, an agreement or understanding between the employer and the employee before performance of the work that such period is to be used, and second, the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate for all hours worked in excess of eight in any workday within such period and in excess of 80 during the period as a whole. Subsection (d) further clarifies that such compensation is required for all hours in such period in excess of 8 in any workday or workdays which are worked by the employee, whether or not more than 80 hours are worked in the period.

Question: A hospital has decided to change from the 8-and-80 workweek system to a regular 40-hour workweek. When can the change be applied?

Response: According to DOL Fact Sheet #54: The Healthcare Industry and Calculating Overtime Pay, available at http://www.dol.gov/whd/regs/compliance/whdfs54.pdf, an employer’s work period under the 8 and 80 overtime system “may be changed if the change is designated to be permanent and not to evade the overtime requirements.” This change should be made prospectively, but the Fact Sheet further counsels that, “[i]f an employer changes the pay period permanently, it must calculate wages on both the old pay period and the new pay period and pay the amount that is more advantageous to each employee in the pay period when the change was made.”