

May 16, 2017

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

SYLLABUS:

2017-013

1. A county auditor is required to issue a warrant on the county treasurer to pay the compensation of county employees in an amount that is set forth in a proper order or voucher and, with respect to employees in the classified service of the county, a certified estimate, payroll, or account from the pertinent appointing authorities. (1969 Op. Att’y Gen. No. 69-153, overruled, in part, due to statutory amendment.)
2. A county auditor may not implement a change in the number of days in which a county employee’s compensation is paid following the end of a pay period by paying certain county employees compensation for only one week of a biweekly pay period, unless the county appointing authority presents to a county auditor a voucher or order setting forth that amount.
3. A county appointing authority may present a voucher or order setting forth compensation for only one week of a biweekly pay period, so long as such a change does not conflict with a provision of an applicable collective bargaining agreement.
4. A county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, when doing so causes a county employee to be paid his annual compensation in fewer pay periods than is specified in an applicable statute, or to receive in the same number of pay periods less than his full annual compensation in one year.
5. A county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, unless the reduction in pay is supported by one of the reasons set forth in R.C. 124.34.
6. A county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, when doing so violates the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219 (West Group 1998).



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OPINION NO. 2017-013

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested an opinion about a county auditor's authority to change the number of days in which a county employee's compensation is paid following the end of a pay period when changing the number of days will cause the employee to receive compensation for one less week in the calendar year in which the change is implemented. You have explained that currently all Erie County employees are paid biweekly on the same day. Some of those county employees, however, are paid thirteen days after the last day of a pay period, while others are paid six days after the last day of a pay period. For example, on the March 24, 2017 pay date, the county employees who are paid thirteen days after the last day of a pay period receive compensation for work performed during the weeks of February 26, 2017 through March 11, 2017. On the same pay date, the county employees who are paid six days after the last day of a pay period receive compensation for work performed during the weeks of March 5, 2017 through March 18, 2017.

Both categories of county employees are paid biweekly for a pay period of two weeks. The difference between the categories is that the county employees who are paid six days after the last day of a pay period receive compensation for a two-week pay period that ends six days immediately preceding the pay date. The county employees who are paid thirteen days after the last day of a pay period receive compensation for a two-week pay period that ends thirteen days immediately preceding the pay date. For ease of discussion, we refer to the employees who are paid six days after the last day of a pay period as employees who receive compensation six days in arrears.¹ Similarly, we refer to

¹ In subsequent correspondence, an assistant prosecutor in your office informed us that employees of the following county appointing authorities are paid six days in arrears: the board of county commissioners, the county soil and water conservation district, the county public defender commission, the county law library resources board, the county auditor, the county recorder, the county treasurer, the county prosecuting attorney, the Erie County Court of Common Pleas, the Probate Division of the Erie County Court of Common Pleas, the Erie County Municipal Court, the Domestic Relations Division of the Erie County Court of Common Pleas, the Erie County Clerk of Court, the county sheriff, the county engineer, the board of alcohol, drug addiction, and mental health

the county employees who are paid thirteen days after the last day of a pay period as employees who receive compensation thirteen days in arrears.

In order to increase efficiency and accuracy in processing the county's payroll, the county auditor would like to implement a plan for the second half of calendar year 2017 that will transition the county employees who are paid six days in arrears to a schedule that is thirteen days in arrears. To accomplish that goal, the county auditor proposes that for the June 30, 2017, pay date, the county employees who are paid six days in arrears will receive compensation for work performed during the week of June 11 through June 17, 2017. Compensation for the June 18 through June 24, 2017 work week, which would have been paid on June 30, 2017, would instead be paid on July 14, 2017. On July 14, 2017, all county employees will receive compensation for the same two-week pay period that ends on July 1, 2017. From that point forward, all county employees will be paid thirteen days in arrears and will receive all of the compensation earned in 2017 by January 12, 2018. However, implementation of this transition plan means that the county employees who were paid six days in arrears prior to the change will, in calendar year 2017, receive compensation for one week less than they would have received had the schedule not been changed. The affected county employees will receive, in one biweekly paycheck of 2017, compensation for only one week of that biweekly pay period. Payment of the compensation for the second week of that pay period will be delayed until the next biweekly pay date.² In essence, your question asks whether payment of a county employee's

services, the county board of developmental disabilities, the veterans service commission, and the county board of elections. Those employees include employees who are in the classified service of the county, employees who are in the unclassified service of the county, and employees who are part of a collective bargaining unit.

² Our understanding of the implementation of the county auditor's proposal is gleaned from your letter requesting a formal Attorney General opinion. After we received your letter, your assistant contacted us to clarify that it is possible that under the county auditor's proposal, instead of delaying the payment of compensation for the June 18 through June 24, 2017 work week until the July 14, 2017 pay check, the county employees who are paid six days in arrears will not receive compensation for that work week until they separate from county employment. This alternative plan will not transition the county employees who are paid six days in arrears to a pay schedule that is thirteen days in arrears, which is the stated purpose of implementing the proposal. The following example will assist in illustrating that point.

Under the current pay schedule, county employees who are paid six days in arrears receive compensation for a two-week pay period six days after the last day of the two-week pay period. This means that on June 30, 2017, if the pay schedule is not changed, the county employees who are paid six days in arrears will receive a pay check compensating those employees for the work weeks of June 11 through June 17, 2017 (week 1) and June 18 through June 24, 2017 (week 2). On the same pay day of June 30, 2017, county employees who are paid thirteen days in arrears will receive a pay check compensating those employees for the work weeks of June 4 through June 10, 2017 (week 1) and June 11 through June 17, 2017 (week 2).

compensation for one week of a biweekly pay period may be delayed until the next biweekly pay date.³

I. County Auditor's Warrant for Payment of Compensation

To answer your question, it is helpful to first explain a county auditor's authority with respect to the payment of compensation to county employees. A county auditor, as a creature of statute, has only those powers conferred expressly by statute, or necessarily implied therein. 2012 Op. Att'y Gen. No. 2012-018, at 2-154. R.C. 319.16 sets forth a county auditor's duty to issue warrants to pay county obligations, including compensation to county employees, and provides, in pertinent part, as follows:

The county auditor *shall* issue warrants, including electronic warrants authorizing direct deposit for payment of county obligations in accordance with [R.C.

To transition the county employees who are paid six days in arrears to the same pay schedule of the county employees who are paid thirteen days in arrears, payment of compensation for the work week of June 18 through June 24 (week 2 of the pay period) has to be delayed and not paid until the following pay day of July 14, 2017 so that on July 14, 2017, those county employees who have been transitioned will receive compensation for the two-week pay period of June 18 through July 1, 2017, which is the same pay period for the other county employees who are paid thirteen days in arrears.

Withholding the payment of compensation for the work week of June 18 through June 24 until a county employee ends his employment with the county, instead of delaying the payment until the next pay day, presumably means that on June 30, 2017, the affected county employees will receive compensation for the work week of June 11 through June 17, 2017. And, on July 14, 2017, the affected employees will receive compensation for a two-week pay period beginning on June 25, 2017 and ending on July 8, 2017, which is still a pay schedule that is six days in arrears. Thus, withholding the payment of compensation for the work week of June 18 through June 24 until the county employee's employment ends, instead of delaying the payment until the next pay day, would not accomplish the goal of transitioning county employees to the same pay schedule of the other county employees that is thirteen days in arrears.

We, therefore, understand the clarification that was provided to us to mean that the county auditor's proposal will delay the payment of one week's worth of compensation for each of the pay periods that were in effect under the original pay schedule for those county employees who used to be paid six days in arrears. In that sense, the delay of one week's worth of pay for the affected county employees will not resolve itself until the county employees receive their final pay check after separation. It is with this understanding of the information provided to us that we have answered the question posed in your letter.

³ Your letter notes that only county employees, and not county elected officials, will be affected by the county auditor's proposal.

9.37(F)], on the county treasurer for all moneys payable from the county treasury, *upon presentation of the proper order or voucher and evidentiary matter* for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund. The auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal, including a county board of mental health or county board of developmental disabilities, so authorized by law. (Emphasis added.)

See also R.C. 321.15 (“[n]o money shall be paid from the county treasury, or transferred to any person for disbursement, except on the warrant of the county auditor”); R.C. 5705.46 (“[e]ach political subdivision may make expenditures for the payment of current payrolls upon the authority of a proper appropriation for such purpose”). An additional requirement is imposed upon the county auditor with respect to warrants issued for the payment of compensation for officers, clerks, and employees in the classified service of the county. R.C. 9.41 provides, in pertinent part:

[A]ny fiscal officer of any county ... shall not draw, sign, issue, or authorize the drawing, signing, or issuing of any warrant on ... the treasurer ... of any county ... to pay any salary or other compensation to any officer, clerk, employee, or other person in the classified service unless an estimate, payroll, or account for such salary or compensation containing the name of each person to be paid, bears ... in the case of the service of the county, the certificate of the appointing authority, that the persons named in the estimate, payroll, or account have been appointed, promoted, reduced, suspended, or laid off, or are being employed in pursuance of [R.C. Chapter 124] and the rules adopted thereunder.

A county auditor’s duties are generally ministerial. 2009 Op. Att’y Gen. No. 2009-033, at 2-218. While a county auditor may require evidentiary matter to demonstrate that a claim is proper in purpose and amount, 2009 Op. Att’y Gen. No. 2009-033, at 2-219, a county auditor has no authority to issue a warrant for an amount of compensation that differs from the amount specified in a valid or legal voucher or order, 2003 Op. Att’y Gen. No. 2003-027, at 2-225.

A county employee’s wages or salary is set by the employee’s appointing authority, subject to any statutory limitations. 2008 Op. Att’y Gen. No. 2008-012, at 2-137; 1984 Op. Att’y Gen. No. 84-092, at 2-315 to 2-316; *see, e.g.*, R.C. 305.17 (“[t]he board of county commissioners shall fix the compensation of all persons appointed or employed under [R.C. 305.13-.16]”); R.C. 325.17 (“[t]he officers mentioned in [R.C. 325.27] may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices [and] shall fix the compensation of those employees”). For each pay check, a county employee’s appointing authority shall generate a voucher or order that sets forth the amount of compensation to be paid to that employee for that pay period. *See* 2013 Op. Att’y Gen. No. 2013-039, at 2-392 to 2-393 n.15 (the amount of compensation to be paid to a classified county employee in a paycheck shall be set forth in the estimate, payroll, or account that is certified to the county auditor); 2003 Op. Att’y Gen. No. 2003-027, at 2-225 (a voucher

or order sets forth the amount of compensation to be paid biweekly or monthly). Accordingly, a county auditor is required to issue a warrant on the county treasurer to pay the compensation of county employees in an amount that is set forth in a proper order or voucher and, with respect to employees in the classified service of the county, a certified estimate, payroll, or account from the pertinent appointing authorities. 2003 Op. Att’y Gen. No. 2003-027, at 2-225 (“it is clear that a county auditor is statutorily required to issue a warrant for the specific amount of compensation that is set forth in an order or voucher that is presented to him”). If an appointing authority’s order or voucher includes compensation for two weeks of work, a county auditor has no authority to issue a warrant for an amount that corresponds to only one week of work or that is less than the amount specified in the voucher or order. *See id.* (“[a] county auditor has no authority to change the amount of compensation set forth in an order or voucher”).

Thus, a county auditor is required to issue a warrant on the county treasurer to pay the compensation of county employees in an amount that is set forth in a proper order or voucher and, with respect to employees in the classified service of the county, a certified estimate, payroll, or account from the pertinent appointing authorities. A county auditor may not implement a change in the number of days in which a county employee’s compensation is paid following the end of a pay period by paying certain county employees compensation for only one week of a biweekly pay period, unless the county appointing authority presents to a county auditor a voucher or order setting forth that amount. Your question, therefore, necessitates a determination of whether a county appointing authority may present to a county auditor a voucher or order and, when appropriate, a certified estimate, payroll, or account, that sets forth compensation for only one week of a biweekly pay period. This requires an examination of a county appointing authority’s power to temporarily alter the number of days for which compensation is paid to a county employee on a regularly scheduled biweekly pay date.

II. Frequency and Timing of Compensation

As mentioned above, county appointing authorities generally have the authority to fix the compensation of their employees, subject to any statutory limitations. 2008 Op. Att’y Gen. No. 2008-012, at 2-137; 1984 Op. Att’y Gen. No. 84-092, at 2-315 to 2-316. In the absence of a statute determining the frequency or interval in which an employee shall be paid, the appointing authority may make that determination. *See* 1982 Op. Att’y Gen. No. 82-055, at 2-157 (“the authority to adopt [a salary] schedule would quite naturally imply the power to specify not only the amount but also the frequency of salary payments”); 1969 Op. Att’y Gen. No. 69-153 (syllabus) (when there is no statute specifying when employees shall be paid, it is the appointing authority’s “sole responsibility to voucher their salaries or wages for payment at reasonable intervals”);⁴ *see also Local 330, Akron Fire*

⁴ 1969 Op. Att’y Gen. No. 69-153, at 2-331, addressed whether the employees of a board of county commissioners, a county prosecuting attorney, or a court of common pleas may be paid on a semimonthly basis. At the time of the issuance of that opinion, there was no statute that specified the intervals in which the employees of those offices shall be paid. *Id.* at 2-332. Accordingly, the

Fighters Ass'n v. Ray, 9th Dist. No. 10597, 1982 WL 2682 (Aug. 4, 1982), at *2 (“[t]here is no question but that the parties [(a fire fighters association and a city)] could collectively bargain with respect to the payment period . . . and with respect to the length of delay, if any, between the end of the pay period and when the employees would be paid”). The frequency or interval of payment sets the length of a pay period and the number of days for which compensation is paid on a pay check. Therefore, to determine whether a county appointing authority may temporarily alter the number of days for which compensation is paid to a county employee on a regularly scheduled biweekly pay date, we shall examine the statutes that may restrict a county appointing authority’s power to determine or alter the frequency of or number of days in a pay period.

A. Collective Bargaining Agreements -- R.C. Chapter 4117

The first potential limitation on a county appointing authority’s power to determine or alter the frequency of or number of days in a pay period is R.C. Chapter 4117, which addresses collective bargaining by public employees. Certain county employees have the right to bargain collectively on matters related to wages, hours, and other terms and conditions of employment. R.C. 4117.03(A)(4); R.C. 4117.03(D) (“[a] public employer shall not engage in collective bargaining or other forms of collective negotiations with the employees of county boards of elections referred to in [R.C. 4117.01(C)(12)]”); R.C. 4117.08(A) (“[a]ll matters pertaining to wages, hours, or terms and other conditions of employment . . . are subject to collective bargaining”); *see generally* R.C. 4117.01(B) (a county is a “public employer” for purposes of R.C. Chapter 4117); R.C. 4117.01(C) (subject to exceptions, a “public employee,” for the purpose of R.C. Chapter 4117, is “any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer”); R.C. 4117.01(M) (for the purpose of R.C. Chapter 4117, “wages”

Attorney General advised that in the absence of a statute specifying an interval, the county officer who appointed the employee shall issue vouchers “at reasonable intervals.” *Id.*

Currently, several statutes specify intervals for the payment of compensation to, at least some of, the employees of a county prosecuting attorney and a court of common pleas. R.C. 309.06(A); R.C. 309.07; R.C. 2101.11(B)(1)(a); R.C. 2151.13; R.C. 2153.09; R.C. 2153.11; R.C. 2301.12; R.C. 2301.16; R.C. 2301.22; R.C. 2301.27(A)(3); R.C. 2335.03; R.C. 2335.04; R.C. 2701.08. It is, therefore, necessary to overrule, in part, the conclusion of 1969 Op. Att’y Gen. No. 69-153 that a county prosecuting attorney or a court of common pleas shall issue vouchers for compensation at reasonable intervals. Although the specific conclusion as it applies to certain employees of a county prosecuting attorney and a court of common pleas is no longer an accurate statement of the law, the underlying rationale for the opinion’s conclusion remains accurate. Thus, we cite 1969 Op. Att’y Gen. No. 69-153 with approval for the principle that, in the absence of a statutory directive, the determination of the intervals in which an employee may be paid is a matter to be decided by the county appointing authority in accordance with law.

are “hourly rates of pay, salaries, or other forms of compensation for services rendered”); 2006 Op. Att’y Gen. No. 2006-052, at 2-517 n.1.

“Where no [collective bargaining] agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.” R.C. 4117.10(A). Subject to certain exceptions, when a provision of a collective bargaining agreement conflicts with a statute or local law, the collective bargaining agreement prevails. 2006 Op. Att’y Gen. No. 2006-052, at 2-517 n.1. R.C. 4117.10(A) sets forth the laws that prevail over a conflicting collective bargaining agreement. “A determination as to whether there is a conflict between a particular statute or rule and a collective bargaining agreement must be made on a case-by-case basis.” 2006 Op. Att’y Gen. No. 2006-052, at 2-518 n.1.

The interval and frequency in which pay checks are issued to employees are matters related to wages, and, therefore, may be addressed in a collective bargaining agreement. *Local 330, Akron Fire Fighters Ass’n v. Ray*, 9th Dist. No. 10597, 1982 WL 2682 (Aug. 4, 1982), at *2 (“[t]here is no question but that the parties [(a fire fighters association and a city)] could collectively bargain with respect to the payment period . . . and with respect to the length of delay, if any, between the end of the pay period and when the employees would be paid”). Even if a state statute or local law exists that provides for the interval and frequency in which pay checks are issued to a specific county employee, insofar as those are not one of the laws identified in R.C. 4117.10(A), the terms of a collective bargaining agreement will prevail. Therefore, a county appointing authority may present a voucher or order setting forth compensation for only one week of a biweekly pay period, so long as such a change does not conflict with a provision of an applicable collective bargaining agreement.

B. Statutes Specifying Frequency of Payment of Compensation

The next potential limitation on a county appointing authority’s power to determine or alter the frequency of or number of days in a pay period are statutes requiring county employees to be paid compensation at particular intervals.⁵ Several statutes require certain county employees to be paid biweekly or semimonthly. *See, e.g.*, R.C. 309.06(A) (assistants, clerks, and stenographers in the office of the county prosecuting attorney); R.C. 321.43 (night watchman employed by the county treasurer to protect money in the county treasury); R.C. 325.17 (deputies, assistants, clerks, bookkeepers, or other employees of officers mentioned in R.C. 325.27⁶); R.C. 341.20 (cook employed by a county sheriff); R.C. 1901.311 (special deputy clerk for the branch offices of a municipal court); R.C. 1901.32 (bailiffs and deputy bailiffs appointed by a municipal court); R.C. 1901.33 (interpreters, mental health

⁵ For the purpose of this part of the opinion, we assume that there is no conflicting provision of an applicable collective bargaining agreement.

⁶ The officers mentioned in R.C. 325.27 are the county auditor, county treasurer, probate judge, county sheriff, clerk of the court of common pleas, county engineer, and county recorder.

professionals, probation officers, assignment commissioner, deputy assignment commissioners, and other court aides appointed by a municipal court); R.C. 1907.20 (clerks, deputy clerks, and special deputy clerks of a county court); R.C. 1907.53(A)(1) (bailiff appointed by a judge of a county court); R.C. 2101.11(B)(1)(a) (deputy clerks, court reporters, bailiffs, other necessary employees, probate court investigators, and assessors appointed by the probate court); R.C. 2151.13 (bailiffs, probation officers, and other necessary employees appointed by a juvenile judge); R.C. 2153.09 (employees of a juvenile court).

Similarly, several statutes require that the salary or wages for certain county employees be paid monthly. *See, e.g.*, R.C. 309.07 (secret service officer appointed by a county prosecuting attorney); R.C. 2153.11 (bailiffs appointed by the administrative judge of a juvenile court); R.C. 2301.12 (court interpreter, criminal bailiff, chief court constable, psychiatrists, psychologists, or other examiners or investigators, and an administrative assistant appointed by a court of common pleas); R.C. 2301.16 (criminal bailiff in a court of common pleas); R.C. 2301.22 (court reporters appointed by a court of common pleas if paid annually); R.C. 2301.27(A)(3) (probation officers appointed by a court of common pleas); R.C. 2335.03 (assignment commissioners appointed by a court of common pleas with two or more judges who hold court at the same time); R.C. 2335.04 (assignment commissioner appointed by a court of common pleas with only one judge); R.C. 2701.08 (court constables appointed by a court of common pleas, court of appeals, or probate court); R.C. 3501.12(A) (members of a board of elections).⁷

In *Ohio Council 8 v. Weber*, 27 Ohio App. 3d 133, 499 N.E.2d 1276 (Marion County 1985), the court considered whether a county auditor may implement a pay schedule for certain county employees that would result in fewer than twenty-six pay periods for one year. In that case, the county auditor believed it was necessary to delay the payment of wages for a full pay period in order to comply with a requirement to obtain certification for payrolls from the Department of Administrative Services. *Id.* at 134. The court examined the language of R.C. 325.17, which required certain county employees to “be paid biweekly[.]”⁸ The court held that R.C. 325.17’s requirement to

⁷ The statutes identified in this section of the opinion are not intended to be an exhaustive list of every statute that may specify the frequency in which a county employee shall be paid. Care shall be taken by appointing authorities to examine the statutes with respect to each particular county employee to determine whether a statute specifying the frequency of compensation exists with respect to that particular employee.

⁸ The current version of R.C. 325.17 provides, in pertinent part:

The officers mentioned in [R.C. 325.27] may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, shall fix the compensation of those employees and discharge them, and shall file certificates of that action with the county auditor. The employees’ compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for that office. When so fixed, the compensation of

pay the deputies, assistants, clerks, bookkeepers, or other employees of the officers mentioned in R.C. 325.27 on a biweekly basis means that those employees shall receive their full annual compensation over twenty-six pay periods of fourteen days per pay period. *Ohio Council 8 v. Weber*, 27 Ohio App. 3d 133 (syllabus). Insofar as the county auditor's proposed schedule resulted in paying those county employees in twenty-five pay periods of varying lengths, the court concluded that the county auditor's proposal violated R.C. 325.17. *Ohio Council 8 v. Weber*, 27 Ohio App. 3d at 135.

Even though the court in *Ohio Council 8 v. Weber* considered only the language of R.C. 325.17 and the meaning of "biweekly," the rationale applied by the court of appeals may be applied to other statutes requiring that county employees be paid biweekly, semimonthly, or monthly. In specifying particular intervals for the payment of wages or salaries, the General Assembly intends that county employees receive their entire annual compensation in equal installments over pay periods that correspond to the intervals specified. Even as "biweekly" signifies an intent that an employee's full annual compensation be paid in twenty-six equal segments per year, "semimonthly"⁹ and "monthly" signify an intent that an employee's full annual compensation be paid in twenty-four equal segments per year and twelve equal segments per year, respectively.¹⁰ See R.C. 2301.12(E) (an administrative assistant in certain courts of common pleas shall "receive compensation to be fixed by the judges appointing him sitting in joint session, payable in *equal monthly installments* from the county treasury,

each such deputy, assistant, bookkeeper, clerk, and other employee shall be paid biweekly from the county treasury, upon the warrant of the county auditor. The amount of the biweekly payment shall be adjusted so that the total amount paid out to an employee over a period of one year is equal to the amount the employee would receive if the employee were paid semimonthly.

This version of R.C. 325.17 is substantially similar to the version that was considered by the court of appeals in *Ohio Council 8 v. Weber*, 27 Ohio App. 3d 133, 133-34, 499 N.E.2d 1276 (Marion County 1985).

⁹ "Semimonthly" means "done, happening, published, etc. every half month or twice a month[.]" *Webster's New World College Dictionary* 1321 (5th ed. 2014).

¹⁰ When a statute mandates that a county employee's annual compensation be paid biweekly, semimonthly, or monthly, a county appointing authority and county auditor may not cause that compensation to be paid in fewer pay periods, and may not cause the county employee over the same number of pay periods to receive less than the employee's entire annual compensation. However, the requirement to pay county employees biweekly, semimonthly, or monthly does not prohibit an appointing authority from paying a county employee's compensation over a greater number of pay periods than required by the interval established by a controlling statute. See 1981 Op. Att'y Gen. No. 81-021 (syllabus) ("[t]he language of R.C. 325.17 does not prohibit a county auditor from issuing twenty-seven biweekly paychecks when the calendar year includes twenty-seven payperiods as long as the total amount so paid does not exceed the authorized annual compensation").

upon the warrant of the county auditor” (emphasis added)); R.C. 2301.22 (if a court reporter is paid compensation annually, “[t]he county auditor shall issue warrants on the county treasurer for the payment of the compensation under [R.C. 2301.22] in *equal monthly installments*” (emphasis added)).

The county auditor proposes that county employees who are currently paid six days in arrears receive compensation in 2017 in twenty-six pay checks, one of which includes compensation for only one week of a biweekly pay period. This will result in those employees receiving compensation in 2017 for fifty-one weeks, instead of fifty-two. To the extent that this proposal will result in a county employee receiving a paycheck that does not fully compensate the employee for a pay period in accordance with the interval that is statutorily required, the county auditor’s proposal violates that statutory requirement. Therefore, a county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, when doing so causes a county employee to be paid his annual compensation in fewer pay periods than is specified in an applicable statute, or to receive in the same number of pay periods less than his full annual compensation in one year.

C. Tenure of Employees in the Classified Civil Service -- R.C. 124.34

Some of the county employees who may be affected by the county auditor’s proposal include employees who are in the classified service of the county. R.C. 124.34(A) prohibits an employee in the classified service of the county from incurring a reduction in pay except as provided in R.C. 124.34. *See also* 2A Ohio Admin. Code 123:1-31-07 (2016-2017 Supplement) (“[a] ... reduction in pay ... shall be made for one or more of the statutory reasons enumerated in [R.C. 124.34]”); 2A Ohio Admin. Code 123:1-31-04 (“[r]eduction or demotion shall be made only for one or more of the reasons given in [R.C. 124.34]”). Any decrease in an employee’s compensation constitutes a reduction. 2A Ohio Admin. Code 123:1-47-01(A)(69) (2016-2017 Supplement); *see also* 2B Ohio Admin. Code 124-1-02(Y) (2016-2017 Supplement) (a “reduction in pay” is “an action which diminishes an employee’s pay”). “Pay” is defined as “the *annual*, non-overtime compensation due an employee including, when applicable, the cost of the appointing authority’s insurance or other contributions, longevity pay, supplemental pay and hazard pay.” 2B Ohio Admin. Code 124-1-02(Q) (2016-2017 Supplement) (emphasis added).

Under the county auditor’s proposal, certain county employees will receive one fewer week’s worth of compensation in 2017. Even if those county employees receive compensation for that week in the first paycheck of 2018, the compensation for those county employees will be reduced in calendar year 2017. Instead of being paid for fifty-two weeks of work over twenty-six pay periods, they will be paid for only fifty-one weeks over twenty-six pay periods. When a county appointing authority or the county auditor causes a county employee in the classified service to receive only one week’s worth of compensation in one biweekly paycheck, resulting in that county employee receiving compensation in one year for only fifty-one weeks of work, the county employee incurs a reduction in pay. This is true even if the reduction is only temporary. *See State ex rel. Vukovich v. Youngstown Civil Serv. Comm’n*, 69 Ohio St. 2d 16, 19, 430 N.E.2d 452 (1982) (“temporarily reducing the work week from 40 hours to 32 hours constituted a reduction in pay within the meaning of R.C. 124.34”).

If a reduction in pay is not imposed on the basis of one of the grounds authorized in R.C. 124.34, a county appointing authority may not present a county auditor with a voucher or order and a certified estimate, payroll, or account, for a classified employee that sets forth compensation for only one week of a biweekly pay period. Increasing the efficiency of a county auditor's office or improving the accuracy of payroll processing is not one of the reasons for which a reduction in pay may be imposed under R.C. 124.34.¹¹ Therefore, a county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, unless the reduction in pay is supported by one of the reasons set forth in R.C. 124.34.

D. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA), 29 U.S.C.A. §§ 201-219 (West Group 1998), requires employers to pay covered employees¹² a minimum wage and overtime. 29 U.S.C.A. § 206(a); 29 U.S.C.A. § 207(a)(1). "Although the FLSA does not specify a time that employees must be paid, 'courts have consistently interpreted the statute to include a prompt payment requirement.'" 2012 Op. Att'y Gen. No. 2012-018, at 2-159 (quoting *Mathis v. About Your Smile, P.C.*, No. 02-CV-597, 2002 WL 1878894, *2 (E.D. Pa. Aug. 14, 2002)). "[T]he governing principle of law is that an employer must pay its employees at least minimum wage on payday." *Mathis v. About Your Smile, P.C.*, No. 02-CV-597, 2002 WL 1878894, *2 (E.D. Pa. Aug. 14, 2002); see also *U.S. Dept. of Labor v. Micro-Chart, Inc.*, 98-FLS-12, Admin. Review Bd. Final Decision and Order (Dep't of Labor Nov. 4, 1998) (the failure to pay wages on a regular payday is a violation of the FLSA); U.S. Dep't of Labor, Wage

¹¹ R.C. 124.34(A) provides, in pertinent part:

No officer or employee [in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts of the state] shall be reduced in pay ..., except as provided in [R.C. 124.32], and for incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of [R.C. Chapter 124] or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony while employed in the civil service.

Conviction of a felony may also be grounds for a reduction in pay. R.C. 124.34(A).

¹² Subject to certain limited exceptions, county employees are subject to the requirements of the Fair Labor Standards Act (FLSA). See 29 U.S.C.A. § 203(e)(2)(C) (for the purpose of the Fair Labor Standards Act, subject to certain limited exceptions, "employee" means "any individual employed by a State, political subdivision of a State, or an interstate governmental agency"); 2012 Op. Att'y Gen. No. 2012-018, at 2-159 n.5 ("[t]he Fair Labor Standards Act (FLSA) applies to public employees").

and Hour Div., Open Letter Fair Labor Standards Act (FLSA), 1998 WL 1147716 (July 20, 1998) (“an employer is required to pay employees the full minimum wages and overtime due on the regular payday for the workweek in question”). An employer may delay the payment of wages to an employee for a period that is “reasonably necessary for the employer to compute and arrange for payment of the amount due and then may not be delayed beyond the next [payday] after such computation can be made.” U.S. Dep’t of Labor, Wage and Hour Div., Open Letter Fair Labor Standards Act (FLSA), 1987 WL 1369151 (June 29, 1987). With respect to the payment of overtime, 29 C.F.R. § 778.106 provides, in pertinent part:

There is no requirement in the [FLSA] that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

No court in Ohio has considered the issue of whether an employer may delay for two weeks the payment of one week of compensation in order to transition employees to a pay schedule that includes a longer delay between the end of the pay period and when a paycheck is issued. However, courts in other jurisdictions have considered similar issues. In *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993), the United States Court of Appeals considered the question of whether the FLSA was violated when wages for employees were paid fourteen or fifteen days after a regularly scheduled payday. The California legislature was unable to agree on a budget, which resulted in a failure to appropriate funds for the payment of salaries to state employees. *Id.* During the time in which a state budget was not in effect, employees of the California Department of Transportation did not receive any compensation on their regularly scheduled payday. *Id.* Once the state budget was approved by the Governor, the employees were paid their compensation, but it was fourteen to fifteen days after their regularly scheduled payday. *Id.* The court held that the state violated the FLSA because “under the FLSA wages are ‘unpaid’ unless they are paid on the employees’ regular payday.” *Id.* The court reasoned that the FLSA authorizes recovery of unpaid wages and overtime and an award of liquidated damages. *Id.* at 1539. In order to calculate the amount of unpaid wages and overtime and the amount of liquidated damages, there must be a point in time when the wages are unpaid and the statute is violated. *Id.* at 1539-40. The court concluded that “[t]he only logical point that wages become ‘unpaid’ is when they are not paid at the time work has been done, the minimum wage is due, and wages are ordinarily paid – on payday.” *Id.* at 1540. The court rejected the state’s argument that a distinction should be made between late payment and nonpayment. *Id.* The court also rejected the trial court’s conclusion that the FLSA requires prompt payment under the totality of the circumstances. *Id.* The court stated:

Any kind of sliding scale we can think of, however, would be contrary to the statute's direction that employers shall "pay" the minimum wage and that employees are entitled to recover "unpaid" minimum wages. It also would force employees, employers, and courts alike to guess when "late payment" becomes "nonpayment" in order to determine whether the statute of limitations has begun to run, the amount of unpaid wages and liquidated damages to be awarded, and how much prejudgment interest has been accrued. The due date, and with it when the employee actually gets paid, would become a moving target.

Id.

The United States Court of Federal Claims was presented with a similar question in *Martin v. U.S.*, 117 Fed. Cl. 611 (2014). Several federal employees were required to work in the fall of 2013 during a budget impasse that resulted in a partial shutdown of the federal government. *Id.* at 613. Because moneys were not appropriated, certain federal employees who were required to work during the shutdown did not receive, on their regularly scheduled payday, pay for five days of a two-week pay period. *Id.* at 613-14. They were paid the missed compensation two weeks after the regularly scheduled payday. *Id.* at 614. The court concluded that "the government's payment to employees two weeks later than the Scheduled Paydays for work performed during the October 2013 budget impasse constituted an FLSA violation." *Id.* at 621. Adopting the rationale of the court in *Biggs v. Wilson*, the court noted "if an FLSA claim accrues when an employee is not paid on a regularly scheduled payday, the FLSA violation also must occur on that day." *Id.* at 620. Because the employees in *Martin* were paid for some, but not all, of the days in the pay period on their regularly scheduled payday, the court had to determine whether the employees were paid a minimum wage on time under the FLSA. *Id.* at 622. The court applied a workweek measurement to determine whether the employees were paid minimum wage. *Id.* at 624. The court reasoned that the FLSA and corresponding regulations contemplate the payment of minimum wage on a weekly basis, rather than an hourly basis. *Id.* at 623. The court stated, "the language of the [FLSA] focuses on the aggregate pay for all work performed within a workweek." *Id.* at 624. Accordingly, employees who received pay that exceeded the equivalent of the payment of minimum wage for forty hours in that week were paid the minimum wage on time. *Id.* ("any potential plaintiff who was paid more than \$290 (\$7.25 multiplied by 40 hours) for the Week must be dismissed from the case").

In *Rogers v. Troy*, 148 F.3d 52 (2d Cir. 1998), the United States Court of Appeals was presented with a situation that was factually similar to the situation described in your letter. Over a three month period, the City of Troy gradually changed the pay schedule of its employees from a weekly payroll to a lagged biweekly payroll. *Id.* at 54 ("[t]o implement the lag, the plaintiffs' pay was delayed by one day each week for five weeks"). By the end of the year in which the change was implemented, the city employees received only 51 out of 52 weeks of pay. *Id.* at 59. Pay for that week was not permanently denied; receipt of it was simply delayed until the first paycheck of the following year. *Id.*

The court decided that an employer may “without violating the FLSA, pay its employees later than the contractually agreed upon payday, if that late payment is due to the employer’s good faith effort to make a permanent change in its pay schedule.” *Id.* at 54. The court held

although the FLSA does include a prompt payment requirement, that requirement is not violated when an employer changes its pay schedule so long as this change: (a) is made for a legitimate business purpose; (b) does not result in an unreasonably long delay in payment; (c) is intended to be permanent; and (d) does not result in violation of the substantive minimum wage or overtime provisions of the FLSA.

Id. at 55. In reaching that conclusion, the court distinguished the situation at issue from the circumstances involved in *Biggs* and other prior cases. Specifically, the court explained, “[t]he earlier cases all involved substantial delays in payment, and – more important – the practices disapproved of resulted in evasions of the minimum wage and overtime provisions of the FLSA.” *Rogers v. Troy*, 148 F.3d at 56 (footnote omitted).¹³ The court in *Rogers* found significant that the change to the payday schedule was intended to be a permanent change for a valid business purpose, and that the wages paid during and after the period of transition conformed to the provisions of the minimum wage and overtime provisions of the FLSA. *Id.* at 57. The court noted “since the plaintiffs’ wages for every work week were greater than the statutory minimum *even when the wages were discounted for the delay in payment*, each employee would be paid at least the minimum wage for every hour he or she worked.” *Id.* at 59.

Although *Rogers v. Troy* is not binding authority in Ohio, it is persuasive authority interpreting the same provisions of a federal law that are applicable in Ohio. In addition, the factual circumstances of the situation described in your letter most closely resemble the factual situation involved in *Rogers*. Accordingly, it is reasonable to apply the holding of that case to our analysis in this opinion. Based upon the information you provided to us, the county auditor’s proposal appears to have been suggested as a good faith effort to make a permanent change to the payday schedule for county employees. You have explained that the purpose of implementing the change is to increase efficiency and accuracy in processing the county’s payroll, which is a legitimate business purpose. The proposal, as we understand it, delays the receipt of a week of compensation for only one additional pay period, which is not an unreasonably long delay in payment. The final consideration under *Rogers* is that implementation of the county auditor’s proposal does not result in a violation of the minimum wage and overtime provisions of the FLSA. This means that in the June 30, 2017 paycheck, the county employees who are paid six days in arrears shall be paid an amount that is at least equal to the minimum wage and overtime that would have been earned for each week in that biweekly pay period.

¹³ The court recognized that *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), did not involve an attempt to evade the provisions of the FLSA, but that “the late payment in that case was not part of a permanent change in the pay schedule [and] was not made for a good faith business purpose.” *Rogers v. Troy*, 148 F.3d 52, 57 n.3 (2d Cir. 1998).

Therefore, a county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, when doing so violates the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219 (West Group 1998).

Summary of Analysis

In order for the county auditor to implement his proposal to transition county employees who are paid six days in arrears to a schedule that is thirteen days in arrears, each county appointing authority for those employees shall present a county auditor with a voucher or order and, when appropriate, a certified estimate, payroll, or account, that sets forth compensation for only one week of a biweekly pay period. In addition, the county auditor's proposal may be implemented with respect to only certain county employees. For those employees who are covered by a collective bargaining agreement that specifies that employees shall receive twenty-six biweekly paychecks per year, the county auditor's proposal will violate that agreement. For those county employees in the classified service of the county, the county auditor's proposal will result in an improper reduction in pay if it is not imposed for a basis specified in R.C. 124.34. Finally, for those county employees who will receive less than the minimum wage for the July 30, 2017 paycheck, the county auditor's proposal will run afoul of the FLSA.

Our analysis and conclusions do not mean that a county employee may never be paid thirteen days in arrears. Rather, we mean to say that when employees have been paid six days in arrears and a change in the number of days in arrears is implemented while those employees are employed, the change must occur in accordance with applicable collective bargaining agreements, R.C. 124.34, and the FLSA. A county appointing authority may work toward eliminating a pay schedule that is six days in arrears by paying new employees in accordance with a pay schedule that is thirteen days in arrears when they begin employment with the county.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A county auditor is required to issue a warrant on the county treasurer to pay the compensation of county employees in an amount that is set forth in a proper order or voucher and, with respect to employees in the classified service of the county, a certified estimate, payroll, or account from the pertinent appointing authorities. (1969 Op. Att'y Gen. No. 69-153, overruled, in part, due to statutory amendment.)
2. A county auditor may not implement a change in the number of days in which a county employee's compensation is paid following the end of a pay period by paying certain county employees compensation for only one week of a biweekly pay period, unless the county appointing authority presents to a county auditor a voucher or order setting forth that amount.

3. A county appointing authority may present a voucher or order setting forth compensation for only one week of a biweekly pay period, so long as such a change does not conflict with a provision of an applicable collective bargaining agreement.
4. A county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, when doing so causes a county employee to be paid his annual compensation in fewer pay periods than is specified in an applicable statute, or to receive in the same number of pay periods less than his full annual compensation in one year.
5. A county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, unless the reduction in pay is supported by one of the reasons set forth in R.C. 124.34.
6. A county appointing authority may not present a voucher or order setting forth compensation for only one week of a biweekly pay period, when doing so violates the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219 (West Group 1998).

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General