

PEF Contract Administration Department

Guidance for COVID-19 Related Overtime Assignments Including Department of Labor UI and DOH Hotline Assignments

Class Action Grievance Filed

Updated May 7, 2020

Many PEF members have been asked or mandated to help out with Department of Labor (DOL) Unemployment Insurance Calls, the DOH COVID-19 hotline, and other COVID 19 related overtime assignments. Despite PEF's repeated requests for the State to provide clarity about the compensation for these assignments, the State failed to do so. Our members want to help out during this crisis and worked these assignments only to be advised after the fact that they would not be paid at their regular overtime rate of pay, but rather at an overtime rate of a Salary Grade 9 or at an overtime rate based on the average of the employee's salary grade and a Salary Grade 9.

PEF strongly disagrees with the State's failure to provide advance information regarding compensation in order for our members to make educated and voluntary decisions about signing up for such assignments. PEF also disagrees with the State's determination to pay overtime at a lower rate of pay when the terms of these assignments were not disclosed in a timely manner. As such, we have filed a class action grievance seeking to ensure that employees who worked overtime or extra service work related to the COVID-19 crisis are properly compensated.

While PEF has and will continue to monitor and take appropriate action to remedy the situation, we cannot guarantee any particular outcome. In the meantime, PEF is providing the following guidance to our members who have or wish to volunteer for or are mandated to perform any COVID-19 related overtime assignments outside of their regular job duties:

1. **Your information is needed for the class action Covid-19 overtime grievance. Please contact your PEF Field Representative immediately if you are SG 27 or below and have worked overtime and have not been compensated or are not expecting to be compensated at your regular overtime rate of pay and it was not clear in advance that the overtime would be paid at a lower rate of pay.**
2. **Overtime assignments in a higher or lower salary grade must be *voluntary*.** (9 NYCRR Section 135.4(f)) PEF-represented employees in the PS&T unit in salary grades 22 and below are eligible for overtime for hours worked over 40 in a week. In addition, employees in salary grades 23 to 27 are eligible for COVID-19 related overtime for hours worked over 47.5 in a week in accordance with DOB Bulletin 501. As mentioned in paragraph 7 below, if an employee is mandated to work in a higher or lower salary grade, the employee must nonetheless comply with the directive and grieve it later.

3. **Voluntary overtime in a lower salary grade is to be paid at the lower overtime rate with the advance agreement of the employee.** Division of Budget Bulletin 1024 and DOB regulations (9 NYCRR Section 135.4(f)) provide that where there is an advance agreement with the employee, compensation for overtime worked in a lower salary grade will be at the maximum overtime salary rate for the lower position plus longevity increments that the employee would be entitled to if the employee were in that lower salary grade position. In the case of the DOL work, this would be the maximum overtime salary rate (plus applicable longevities) for a SG 9.
4. **Voluntary overtime in a lower salary grade may be paid at a rate using the average of the employee's regular overtime rate and the rate for the lower salary grade when there is no advance agreement with the employee to be paid at the lower salary grade.** After numerous conversations with the State about overtime rates, GOER advised that where there was/is no such advance agreement with the employee to be paid at a lower overtime rate, the employee will be paid at an overtime rate based on the *average* of the overtime rate for their regular position and the lower level position. Again, in the case of the DOL work, this would be an average between the employee's regular overtime rate and the overtime rate of the SG 9.
5. **PEF's position is that employees should be paid at their regular overtime rate in situations where they were not provided advance notice of a lower rate of pay.** We believe that an employee cannot be considered to have "volunteered" for a lower salary grade overtime assignment if the employee was not advised of the terms of the assignment; that is, that the work would be compensated at a lower rate of pay. The State disagrees. As mentioned above, while the PEF class action grievance will attempt to remedy this concern, we cannot guarantee the outcome.
6. Any required training during off hours should also be subject to overtime or compensatory time for overtime eligible employees.
7. **It is PEF's position that mandated overtime for lower grade work must be paid at the employee's regular overtime rate of pay, or at a higher rate of pay if the mandated overtime is for higher grade work.** While applicable regulations provide that overtime in lower and higher salary grades must be voluntary, if you are nonetheless *mandated* to perform such overtime work, please contact your Filed Representative immediately. In such a situation, the employee must comply with the directive and grieve it later. However, PEF will vigorously advocate that that any such *mandated* work in a lower level title, if not stopped, is at least paid at the employee's regular overtime rate of pay. We are aware that DOL is now mandating UI work and the class action grievance that we filed, which is noted above, challenges the overtime rates of pay that are less than the employee's regular overtime rate. If the mandated overtime is in a higher salary grade, then we will want to assure that the OT payment is at the higher rate of pay.

8. **Employees can be mandated to perform DOL UI and other COVID-19 related work during their regularly scheduled workweek.** Those volunteering or mandated to perform such work during their regularly scheduled workweek should be paid at their regular rate of pay as such assignments will simply be considered “time worked.”
9. **On-call Pay.** Anyone who is overtime eligible and who is required to standby and be available for assignments outside of regular work hours should be paid on-call pay at a rate of 25% of the employee’s daily rate of pay for each 8 hours, or part thereof, that the employee is on-call. If you have questions about your entitlement to on-call pay, please contact your PEF Field Representative.
10. If you sign-up for or are mandated to work any overtime shifts outside of your regular work hours, please make sure to confirm the compensation for the assignment before you agree to the assignment, and let your PEF Field Representative know if you have any concerns.
11. **Salary Recoupments.** We are also monitoring situations where the State has been attempting to recoup alleged overpayments of overtime to members. This includes situations where members worked overtime for DOL or DOH and were paid overtime compensation at their normal hourly rate, and the State is claiming they should have been paid at the overtime rate of a Salary Grade 9 or at an overtime rate based on the average of the employee’s salary grade and a Salary Grade 9. It is PEF’s position that the State may not recover an overpayment under circumstances where the employee did not know, or a reasonable employee would not have known that the salary paid to him or her was in excess of that to which he or she was entitled. In addition, due process – that is, notice of the alleged overpayment and an opportunity to contest the facts of the alleged overpayment - must be provided to the employee. Based on the general utter lack of clarity by the State as to how such overtime would be compensated, we can try to establish that the employee did not know, or have a reason to know, that his or her compensation was incorrect, and can try to stop the recoupment before it is implemented.

Any employee who is advised that the State is attempting to recover an overpayment for COVID-19 related overtime should immediately contact their Field Representative and provide the following: (1) the letter or memo advising of the alleged overpayment; (2) any correspondence between the employee and the agency regarding the COVID-19 related overtime, including but not limited to, information as to whether the assignment was mandatory or voluntary, any information concerning the compensation that employee would receive for such overtime, and (3) any other facts that would be relevant to the compensation received or the recovery, including the fact, if applicable, that the employee had no reason to know they were allegedly overpaid.