Wage and Hour Law: A Guide for Independent Schools

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Table of Contents

I. A Re-Introduction to the Wage and Hour Law As Applied to Independent Schools ................................................................. 1

II. FLSA's Basic Obligations and Structure of this Article ......................................................... 1

III. What Workers are Covered by the FLSA? ........................................................................... 2

A. Volunteers .......................................................................................................................... 2

B. Trainees/Interns .................................................................................................................... 3

C. Independent Contractors ...................................................................................................... 4

IV. When is an Employee “Exempt” and What Does it Mean? .................................................... 5

A. Executive Exemption – FLSA Section 13(a)(1) .................................................................. 5

B. Administrative Exemption – FLSA Section 13(a)(1) ............................................................ 7

C. Professional Exemption – FLSA Section 13(a)(1) ................................................................. 9

D. Highly Compensated Exemption – FLSA Section 13(a) ...................................................... 11

E. Other Special Exemptions .................................................................................................... 12

F. Combination Jobs ................................................................................................................. 17

1. Teaching Duties Combined with Other Jobs ................................................................. 18

2. Other Examples .................................................................................................................... 18

G. You Should Assess Your Employees’ Exempt Status Now (Before the Claim Comes) .......... 19

V. What Is the Significance of Paying an Employee on a “Salary Basis”? ............................... 20

VI. What Are An Employer’s Obligations Regarding Nonexempt Employees? .................. 22

A. Minimum Wage – FLSA Section 6 ...................................................................................... 23

B. Overtime and Related Issues – FLSA Section 7(a) ............................................................ 23

1. Compensatory Time ........................................................................................................... 25

2. Fluctuating Rate Pay Plan .................................................................................................. 25

3. Weighted Average and the “Rate that Applies” Method of Paying Overtime ................. 27

4. Wage Deductions And Out-Of-Pocket Payments ......................................................... 28

C. Hours Worked .................................................................................................................... 29

1. “Hours Worked” Generally ............................................................................................ 29

2. Time Records ................................................................................................................... 30

3. Waiting Time .................................................................................................................... 30

4. On Call ............................................................................................................................. 30

5. Commuting and Travel Time .......................................................................................... 31

6. Training or Other Meetings ............................................................................................. 32

7. Civic or Charitable Work .................................................................................................. 32

D. Record Keeping – FLSA Section 11(c); Regulations Part 516 ........................................... 32

VII. How is the Wage and Hour Law Enforced? ........................................................................ 33

A. Enforcement by the DOL ................................................................................................. 33

B. Private Actions ................................................................................................................... 33

C. Settlements ........................................................................................................................ 34

VIII. Conclusion ......................................................................................................................... 34

About the Authors ................................................................................................................... 34
I. A Re-Introduction to the Wage and Hour Law As Applied to Independent Schools

NAIS continues to receive many questions each year regarding schools’ obligations under the Fair Labor Standards Act (FLSA), also known as the federal Wage and Hour Law. These questions address issues relating to such things as the exempt status of various employees; the propriety of making certain deductions from an employee’s pay; methods of calculating pay; amounts to be included in an employee's pay to determine overtime; and assessing the exempt status of employees who hold “combination” jobs.

Given that there is still much confusion in this area and substantial litigation for all types of employers, including independent schools, we have decided to provide updated guidance on these important compliance requirements.

This article should not be relied upon as legal advice, as such advice requires proper attention to the specific facts of the particular situation. Schools are encouraged to consult with an attorney competent in the area of Wage and Hour Law when faced with a particular scenario.

The Wage and Hour Law was initially written in 1938 and, although revised in 2004, its major substantive provisions have remained virtually unchanged for 60 years. As many schools have likely learned, the current Wage and Hour Law is one of the most convoluted of all federal laws, making it one of the most difficult to comply with, particularly the requirements for the FLSA’s so-called “white collar” exemptions for executive, administrative, and professional employees. The FLSA is strictly enforced by the Department of Labor (DOL) and violations of the law typically require payment of back pay, liquidated damages (a doubling of the back pay), and attorneys’ fees. Claims under the Wage and Hour Law have become a favorite of plaintiffs’ attorneys because they can often obtain substantial fees for bringing even minor overtime or minimum wage claims. Wage and Hour class actions are one of the largest growing areas of employment litigation. Unfortunately, because many employers are woefully out of compliance with this law, they often find that their best option is to settle quickly.

Significant changes to the salary component of the exemption test were scheduled to go into effect on December 1, 2016. However, they are currently on hold nationwide due to a preliminary injunction issued by a federal judge in Texas. While the legal process and any potential future legislative or regulatory changes play out, it is important to remember that all prior rules regarding wage and hour law, exempt vs. nonexempt employees, and the corresponding duties tests are still in effect, and schools should ensure they remain in compliance.

II. FLSA’s Basic Obligations and Structure of this Article

The FLSA’s basic obligations sound simple enough. Unless an employee meets the requirements of one of the “exemptions” under the law, employers are required to
pay employees at least the minimum wage for all of their “hours worked,” pay overtime for all hours worked over 40 in a workweek, and keep detailed records of an employee’s daily and weekly hours worked. With this law, however, these obligations are much easier said than done. This article will focus on defining the general requirements under the current regulations and will point out the common Wage and Hour problems found in independent schools.

*Common Question:* Does this law apply to all of my employees?

*Answer:* Yes. Every single employee falls under the Wage and Hour regulations. This means that every employee’s job description and obligations must be considered in light of these regulations. Unless an individual is not an employee, as considered in the next couple of pages, that employee’s position becomes part of the school’s FLSA analysis.

*Common Question:* Once an employee has been properly classified, do I need to reassess the workforce periodically?

*Answer:* Yes. An employer should periodically reassess the exempt / nonexempt status of employees, reaffirm that their pay is calculated properly, and verify that timekeeping is managed accurately. This is because positions, reporting obligations, duties, and responsibilities change fairly regularly, particularly in independent schools.

This article does not address additional requirements that may be imposed by states having their own wage and hour and wage payment laws. Schools should work with their wage-hour attorneys to ensure that the school is in compliance with both federal and state requirements. In many states, the state law mirrors the federal law, but not always. States have been known to implement higher minimum wage rates and vary specific portions of the law, such as how to compensate for travel time.

### III. What Workers are Covered by the FLSA?

A basic concept underlying the FLSA is that it applies only to employment relationships. Some of the most common areas of both confusion and litigation in determining the definition of “employee” involve volunteers, trainees, and independent contractors.

#### A. Volunteers

Generally, people who volunteer their time for charitable or religious purposes for a non-profit organization may not be considered FLSA employees, but the relationship must be truly voluntary and with no expectation of compensation. For example, room mothers, helpers on development drives, and fathers coaching sports can fall within the definition of “volunteer” at a school. However, if the volunteer is performing a function that a paid employee usually performs for the employer (e.g.,
office work, lawn maintenance, teaching), the DOL may find that the individual is not a true volunteer. In addition, many schools inadvertently violate the FLSA by allowing regular employees to “volunteer” after working hours, doing the same or substantially similar job for which they are paid during working hours. These additional hours, rather than being volunteer time, likely will be counted as hours worked and may put the employee into an overtime status.

**Common Question:** What if an employee wants to volunteer time unrelated to their usual job?

**Answer:** There are some situations in which employees may volunteer time, but schools are strongly cautioned to work with legal counsel in this area. Volunteer duties must be substantially different from the normal obligations of the job the employee usually does. Where employees routinely do almost any kind of job for the school (as in the case of the head's assistant), it can be difficult to find a volunteer opportunity that is truly outside the scope of the position.

**B. Trainees/Interns**

Trainees at a school are individuals who are usually engaged in work-study programs under limited and specific criteria. According to the United States Supreme Court, individuals who work on the premises of another, without any expectation of compensation, to learn a skill or trade are not necessarily considered employees under the FLSA. Thus, students or interns can fall outside the scope of the FLSA. However, one should never assume this without investigation and legal advice. Courts evaluate certain criteria to determine if the evidence establishes student or intern status, including whether:

1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2) The training is for the benefit of the trainees.
3) The trainees do not displace regular employees, but work under close observation.
4) The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion his operations may actually be impeded.
5) The trainees are not necessarily entitled to a job at the completion of the training period.
6) The employer and the trainees understand that the trainees are not entitled to wages (or stipends) for the time spent in training.

Factors three, five and six are fairly straightforward. Whether the remaining three criteria apply, however, is often harder to determine and requires a careful analysis. As to factor three, the school should try to ensure that there is documentation to
evidence that the training is required in connection with a degree that the student is seeking. One caveat with respect to number six: an intern may receive a nominal stipend or tuition assistance from the employer or educational institution to cover costs such as meals and lodging. Tuition assistance or nominal stipends will not destroy trainee status and are not considered wages.

C. Independent Contractors

True independent contractors are not considered employees under the FLSA. The problem is that many employers incorrectly classify certain workers as independent contractors. Merely agreeing to have an independent contractor relationship will not suffice. Rather, the DOL and courts look at the “economic reality” test, which involves an analysis of whether the possible employer controls or has the right to control the work to be done by the possible employee, to the extent of prescribing how the work shall be performed; the method of payment; how free the possible employer is to replace the possible employee with another; the extent to which the possible employee’s services are an integral part of the employer’s business; the amount of the alleged contractor’s investment in facilities and equipment; and the alleged contractor’s opportunities for profit and loss; among other things.

An easy way to conceptualize an independent contractor is to think about the relationship the school has with its lawn maintenance company. The company periodically cuts the school’s lawn (and many other lawns in town) pursuant to an agreed upon schedule; it uses its own tools, equipment, and employees; it sends a bill for the services; and the school retains the right to terminate the relationship at will but with notice. If your independent contractor relationships do not have similar characteristics, you should seek the advice of an attorney regarding their status.

**Common Question:** Are my seasonal coaches, to whom we pay a stipend of $1500, independent contractors or employees?

**Answer:** The answer to this question is really based on the facts of the relationship. Do the seasonal coaches provide the same services for other schools or community centers? Do they own their own equipment? Is this a long term, on-going relationship that the school is not able to terminate freely? The more that the coaches look like employees (i.e., working only for the school; under the school’s supervision and direction; using the school’s equipment; and regularity of the services being provided – yearly, all year long, etc.), the more likely that they are employees. This does not mean, however, that they are nonexempt employees. As discussed under the professional exemption, coaches may well qualify as exempt “teachers” within the organization. For more information on this topic, please see the NAIS advisory Wage Hour Conundrum: Nominal Fees for Volunteer Coaches, available at: [http://www.nais.org/government/article.cfm?ItemNumber=149578](http://www.nais.org/government/article.cfm?ItemNumber=149578).
Common Question: What if we have an employee who teaches and then also takes on the role of coaching a sport or dance?

Answer: As discussed below under the section dealing with Combination Jobs, many schools will find that they have historically paid some individuals on staff a stipend to take on coaching or other responsibilities. When an employee’s primary job causes them to be classified as exempt from the requirements of the Wage and Hour Law, this stipend is usually fine. However, when an employee’s primary job is considered an hourly or nonexempt job, this stipend may need to be reconsidered unless the school can establish that the individual is serving in an independent contractor role.

IV. When is an Employee “Exempt” and What Does it Mean?

Once the school knows who its “employees” are, it must determine whether the employees are “exempt” or “nonexempt.” Generally, exempt employees are salaried employees. However, the converse is not true; not all salaried employees are exempt, which is a common misperception in independent schools. Moreover, if the exempt status of an employee is contested, the employer bears the burden to show all requirements for the exemption are met for the employee in question. Exemptions are narrowly construed. The most common exemptions in independent schools are the executive, administrative, and professional exemptions. This section will summarize the various exemptions applicable to educational institutions.

A. Executive Exemption – FLSA Section 13(a)(1)

Under section 541.100 of the regulations, in order to qualify for the executive exemption an employee must meet the following four elements:

1. The employee must be compensated on a salary basis at a rate of not less than $455.00 per week, exclusive of board, lodging, or other facilities (This amount was scheduled to increase to $917 per week or $47,476 per year as of December 1, 2016, but this change is currently on hold as part of the injunction mentioned at the top of this document.);
2. The employee’s primary duty must be in managing the organization or a department, subdivision, or other customarily-recognized unit of the organization;
3. The employee customarily and regularly directs the work of two or more other full-time employees or the equivalent; and,
4. The employee has the authority to hire or fire, or his/her recommendations as to hiring, firing, or other status changes are given particular weight.
In practice, in order to qualify for the executive exemption, a good rule of thumb is that the employee must spend more than 50 percent of his/her time managing the business (or a department or other unit of the business), which will include active supervision of two or more full-time employees. Whether the fourth requirement is met will depend in part upon whether making recommendations is part of the employee’s work, how frequently he or she makes or is asked to make such recommendations, and how often higher management relies upon them.

*Common Question:* Our office manager and advancement manager share the supervision of three full time employees. Does that mean that each meets the third requirement?

*Answer:* Not necessarily. To meet the third requirement, each manager must customarily direct the work of two or more full-time employees, meaning that they must each direct/supervise the equivalent of 80 hours of other employees’ work. This can be one full-time employee (40 hours) plus two part-time employees (20 hours each), or some other combination. In your question, if the three employees each work 40 hours, and the two managers equally share the supervision, then neither manager will meet the third requirement. You may consider adjusting the supervision so one manager supervises two of the full-time employees.

*Common Question:* In our school, the head of school is the only person who is authorized to terminate employees. Does this mean that other managers cannot meet the fourth requirement?

*Answer:* It depends on the circumstances. It is not uncommon for the head to reserve termination decisions for him or her self. However, if another manager actively supervises the employee, has dealt with the performance concerns, has investigated the reasons that may lead to termination, and has made a recommendation to the head regarding the termination, and the head relies upon that manager’s recommendation without independently doing an investigation, then the manager’s recommendation would qualify as being given “particular weight.”

In schools, the head of the school, business office manager, department managers, and bona fide supervisors often fall within this “executive exemption.” Schools often misclassify many other persons, however, under this exemption. Common errors include treating as exempt (1) an employee who does not supervise two or more full-time employees or the equivalent, or (2) an employee (such as an office manager) who does manage two or more employees but who spends the vast majority of his/her time in nonexempt work.

*Common Question:* My business officer is a key person on my administrative management team and meets all of these elements, except he directly
supervises only 1.5 employees. Does this mean I should be paying him overtime?

*Answer:* Although you might think of your business officer as an executive, he does not fall under that exemption in the regulations. Therefore, you must pay him overtime even if he is being paid a salary unless he falls under another exemption. Remember that the titles of the exemptions are somewhat nebulous and you should look at all of the potential exemptions before determining that someone is not exempt from the overtime requirements of the FLSA.

**B. Administrative Exemption – FLSA Section 13(a)(1)**

There are two administrative exemptions that may apply to positions in independent schools. The first exemption is the traditional administrative exemption, the second relates only to individuals working in schools in certain capacities. Section 541.200 of the regulations exempts school employees:

1. Who are compensated on a salary basis at a rate of not less than $455.00 per week, exclusive of board, lodging, or other facilities (This amount was scheduled to increase to $917 per week or $47,476 per year as of December 1, 2016, but this change is currently on hold as part of the injunction mentioned at the top of this document.);
2. Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the school; and
3. Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Positions that typically qualify for the traditional administrative exemption include the school’s publications director, chief financial officer, and human resources director. You should note, however, that these individuals must be making important decisions that involve choices among alternatives, researching, investigating, managing a budget, etc. within their area of responsibility to qualify for this exemption. Persons who have important positions, such as controllers, who apply a set of standard principles to their work (such as accounting principles for P&L statements, accounting entries, etc.) often do not qualify for this exemption.

*Common Question:* We have five administrative assistants in our school. Does this mean they are all exempt from overtime?

*Answer:* The administrative exemption is often misunderstood and over-applied. Schools mistakenly believe that anyone who works in an “administrative” capacity in a colloquial sense and is paid on a salary basis automatically qualifies for this exemption. Thus, common problems involve treating office personnel, development office personnel, the registrar,
admissions assistants, library assistants, and administrative assistants to the various department heads as exempt administrative employees. These classification errors can be costly for the school in the event of an individual claim for overtime or an audit by the DOL. The school would be well served to ensure that legal counsel analyzes each person’s position, duties, responsibilities, and authority to determine whether he/she truly meets the stringent requirements for the administrative exemption.

Section 541.204 of the regulations, relating to educational establishments, exempt school employees:

1. compensated on a salary basis at a rate of not less than $455.00 per week (this amount was scheduled to increase to $917 per week or $47,476 per year as of December 1, 2016, but this change is currently on hold as part of the injunction mentioned at the top of this document), exclusive of board, lodging, or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and
2. whose primary duty is the performance of administrative functions directly related to academic instruction or training in an educational establishment or one of its departments or subdivisions.

The term “educational establishment” means an elementary or secondary school system, an institution of higher education, or other educational institution, and does not draw a distinction between public and private schools, or between those operated for profit and those that are not for profit. “Other educational institution” includes special schools for mentally or physically disabled or gifted children, regardless of whether the schools are classified as elementary, secondary, or higher, and also may include post-secondary career programs depending on licensure or accreditation.

The regulations specify certain employees who would be considered engaged in academic administration and therefore exempt:

- Superintendent or other head of a school system responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program (assistants responsible for administration of such matters also would qualify for exemption);
- Principal and any vice-principals responsible for the operation of the school;
- Department heads in institutions of higher education responsible for the administration of the department;
- Academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and
• Other employees with similar responsibilities.

To the contrary, jobs relating to building management and maintenance and to the health of students, as well as staff such as social workers, psychologists, lunch room managers, or dieticians, would not be considered engaged in academic administrative functions. However, such employees might nonetheless qualify for exemption under the general rule for administrative employees or under the executive or professional exemptions, if they meet those exemptions’ requirements.

Schools should note that in the case of either aspect of the administrative exemption, the employee’s position must involve the exercise of discretion and independent judgment. This term is best looked at in terms of true discretion and consequences. Where the employee does not have much true decision making power or latitude without consulting a supervisor, there is little discretion or independent judgment. The extent of that discretion can be most readily ascertained by determining how costly it would be to the school for the individual to misjudge a decision that his job requires on a routine basis.

C. Professional Exemption – FLSA Section 13(a)(1)

1. Teachers: There are three main aspects of the professional exemption that apply in independent schools. By far the largest exemption category for most schools is the teaching professional exemption. This aspect of the professional exemption, set forth in Section 541.303 of the regulations, applies to school employees:

   1. Whose primary duty (i.e., more than 50% of the employee’s time) is in tutoring, instructing or lecturing; and
   2. Who are employed and engaged in this activity as a teacher in an “educational establishment” by which the teacher is employed.

There is no specific pay requirement for teaching professionals (you can pay them hourly, a salary, or a commission). They are not required to meet the salary exemption dollar amount. The regulation provides the following examples of exempt teachers:

• regular academic teachers;
• teachers of kindergarten or nursery school pupils;
• teachers of gifted or disabled children;
• teachers of skilled and semiskilled trades and occupations;
• teachers engaged in automobile driving instruction;
• home economics teachers; and
• vocal or instrumental music instructors.

The exemption also covers faculty who, in addition to their teaching activities, spend time in extracurricular activities such as coaching athletic teams or moderating or advising in such areas as drama, speech, debate, or journalism. While the rule states
that the possession of a teaching certificate provides a clear means of identifying individuals within the scope of the exemption, it further explains that such a certificate is not required. Thus, a teacher who is not certified may be considered for exemption, provided that the individual is employed as a teacher by the employing school or school system.

*Common Question:* We have many employees (part- and full-time) who only coach. Are they considered exempt under the professional exemption?

*Answer:* Although the DOL has not issued an opinion on this issue, we believe there is a strong argument that head coaches qualify for the teaching professional exemption. Such individuals teach not only the mechanics of the particular sport, but teach children many other important life lessons including sportsmanship, teamwork, cooperation, responsibility to be somewhere on time prepared to act, and abiding by the sport's regulations. The strongest case for the exemption would be a coach who has a certification from a recognized body in the particular sport, but other life experience (i.e., a former professional player teaching football) would also qualify.

2. **Other Professionals:** Section 541.300 of the regulations sets forth another aspect of the professional exemption often applicable in independent schools that applies to employees, other than teachers:

1. Who are compensated on a salary basis at a rate of not less than $455.00 per week, exclusive of board, lodging, or other facilities (This amount was scheduled to increase to $917 per week or $47,476 per year as of December 1, 2016, but this change is currently on hold as part of the injunction mentioned at the top of this document); and

2. Whose primary duty is the performance of work:
   a. requiring advanced knowledge in a field of science or learning customarily requiring a prolonged course of specialized intellectual instruction; or
   b. requiring invention, imagination, originality, or talent in a recognized artistic field or creative endeavor.

This aspect of the regulation often applies to licensed guidance counselors, licensed social workers, licensed registered nurses (but not licensed practical nurses), speech therapists, certified athletic trainers, and head librarians with library science degrees, as long as their principal, main, major or most important duty is work within their area of specialty.

3. **Computer Professionals:** Finally, section 541.400 of the regulations sets out the computer professional exemption. To qualify for this aspect of the professional exemption, the employee must have “highly specialized skills in the
theoretical and practical application of computer systems analysis, programming, or software engineering.” He/she must regularly design/create/modify computer programs and perform systems analysis work on the school’s computers. Tasks such as computer set-up, repair and trouble-shooting, and working with the school’s phone system are generally not considered exempt work. To be an exempt computer employee, a person must meet all of the relevant computer professional requirements and may be compensated either on a salary basis of $455 per workweek or on an hourly basis if the rate is at least $27.63 per hour. Schools should note that the computer professional exemption cannot be applied under the special “highly compensated employee” exemption discussed below.

Common Question: We have a webmaster who designed and set up our website. He completed the project last year and his work since then has been in maintaining it. Is he considered exempt under the computer professional exemption?

Answer: Probably not now. He was likely exempt when he was designing and setting up the website (depending on the actual work he did and his responsibilities), but now that he is primarily maintaining the website, it is unlikely that he is engaging in work involving design, creation, and modification of computer programs or systems analysis work.

D. Highly Compensated Exemption – FLSA Section 13(a)

The 2004 regulations created a new "highly compensated employee" exemption. Under this exemption, employees who are paid at least $455.00 per week on a salary or fee basis and who have a total annual compensation of at least $100,000 per year will be exempt if they are (i) engaged in office or non-manual work, and (ii) perform as few as one of the exempt duties or responsibilities for the executive, administrative, or professional exemptions. For example, this exemption might apply in a situation where the school has a highly paid comptroller who would not otherwise qualify for the administrative exemption because his/her primary duty does not include the exercise of discretion and independent judgment with respect to matters of significance. This dollar amount was scheduled to increase on December 1, 2016, to $134,004, but this change is currently on hold as part of the injunction mentioned at the top of this document.

Similarly, it might apply to a highly paid manager who supervises two or more employees in managing a department but who would not otherwise qualify for the executive exemption because he/she does not have authority to hire or fire or make such recommendations.

Under this exemption the annual compensation amount would not be limited to the person’s base salary; it could instead also be made up of commissions and/or other nondiscretionary bonuses and nondiscretionary compensation. Also, the employer may use any 52-week period as the relevant year, such as a fiscal year, provided that it designates such period in advance. If it does not, the calendar year will be the
operative period. As stated above, this exemption does not apply to computer professionals.

E. Other Special Exemptions

1. Dorm Parents: Dorm Parents

We have been receiving a number of questions lately regarding house or dorm parents. As a result, we believe that this topic is worthy of some additional discussion and guidance. Schools that allow students to board with them during the school year generally employ house parents or dorm parents to supervise the students during the evenings and on weekends.

We typically see three different scenarios involving house or dorm parents: (1) employees hired exclusively as house or dorm parents; (2) employees whose primary duty is the performance of work qualifying them for a white-collar exemption who also serve as house or dorm parents; and (3) employees whose primary duty is the performance of nonexempt work who also serve as house or dorm parents. We will discuss each of these categories and their status under the Fair Labor Standards Act (“FLSA”).

Exclusive House/Dorm Parents

Employees hired exclusively as house or dorm parents are not exempt from the overtime requirements of the Wage and Hour law unless they qualify for the exemption appearing at Section 13(b)(24) of the FLSA. Section 13(b)(24) sets forth an overtime exemption for an employee who is employed with his or her spouse by a non-profit educational institution to serve as the parents of children (1) who are orphans or one of which natural parents is deceased, or (2) who are enrolled in the institution and reside in residential facilities of the institution. This exemption will apply if the employee and spouse reside in the facility, receive (without cost) board and lodging from the institution, and are together compensated on a cash basis, at an annual rate of not less than $10,000.

Schools relying on this exemption should note that the Department of Labor (“DOL”) has consistently held that the Congressional intent when the 13(b)(24) exemption was enacted was that both requirements under subsections (1) and (2) above must be met for the exemption to apply. In other words, the DOL has taken the position that the statute’s use of the word “or,” rather than the word “and,” is a scrivener’s error and has interpreted these requirements as conjunctive. As a result, the DOL will not recognize the dorm or house parent exemption unless the spouses are serving as parents of orphans or partial orphans. Under this interpretation, most schools would not be permitted to rely on this exemption. However, so far, the courts addressing this issue have reached a different conclusion. Three federal courts, including a federal appellate court, have concluded that Congress intended the use of the word “or,” and refused to interpret the clear language of the statute in
a contradictory manner, especially since Congress has had plenty of time to correct the problem. Under the courts’ interpretation, a school can rely on the exemption so long as the employee and spouse are serving as parents of children who are enrolled in the institution and reside in residential facilities of the institution.

*Common Question:* Does the exemption apply to a single house/dorm parent or an unmarried couple serving as house/dorm parents?

*Answer:* No. The DOL takes the position that Congress only intended to exempt married couples who serve as house/dorm parents and that the exemption does not apply to unmarried individuals. This same conclusion would likely be reached by a court given the rule of law that FLSA exemptions are to be narrowly construed and are construed against the employer asserting an exemption.

*Common Question:* Does the $10,000 have to be in cash or can the value of the room and board take the place of the $10,000?

*Answer:* The payment of not less than $10,000 must be on a cash basis, in addition to the provision of room and board without cost to the employees. Also, the $10,000 is not a stipend, it is a minimum threshold for how much the house parents must earn. Also remember that they must earn enough to cover the minimum wage for all hours worked.

*Common Question:* Does the exemption apply if the spouse is not providing any services to the school as a house/dorm parent?

*Answer:* No. The exemption requires that the spouses serve as parents. Therefore, both spouses must be providing parental services to the children. As a practical matter, the school and/or the married couple can determine how to split the workload, but both must be employed and both must provide some service.

*Common Question:* How must the cash payment be allocated between the spouses?

*Answer:* The statute does not specify how to allocate the minimum amount between the spouses. However, schools must remember that the Section 13(b)(24) exemption is only an exemption from the overtime requirements of the FLSA and that house/dorm parents must be paid at least the minimum wage for each hour worked. Therefore, each spouse must maintain a record of their “hours worked” and be paid at least the minimum wage for each hour worked. In such situations, an employee’s regular hourly rate includes the reasonable cost of the board and lodging provided by the school. Also, the DOL recognizes that an employee residing on his or her employer’s premises on a permanent basis or for extended periods of time is not considered to be
working all the time on the premises. This is because, ordinarily, the employee can engage in normal private pursuits while on the premises, including sleeping. Because of the difficulty in determining the exact number of hours being worked in such circumstances, the DOL permits the parties to enter into a written reasonable agreement as to the hours to be considered hours worked that takes into consideration all of the pertinent facts.

Otherwise Exempt House/Dorm Parents

Often schools provide room and board to teachers and administrators and have them serve as house or dorm parents during nights and weekends. Where such teachers or administrators qualify for a white-collar exemption from the requirements of the FLSA, the Section 13(b)(24) exemption is inapplicable and no additional compensation need be provided to compensate for the time spent as a house or dorm parent. For example, an employee whose primary duty is teaching, tutoring, instructing or lecturing will qualify for the professional exemption, regardless of how (or how much) they are paid. The professional exemption is an exemption from the minimum wage, overtime, and record keeping requirements of the FLSA. Similarly, employees qualifying for the executive or administrative exemptions (typically Admissions Directors, Human Resources Directors, department managers, directors, etc.) because their primary duties meet the duties requirements for the exemptions and because they are paid on a salary basis of at least $455 per week (or its equivalent), do not need to be paid additional compensation for serving as house or dorm parents at night or on weekends. You can certainly choose to compensate them with an extra stipend, but the FLSA does not require it.

Otherwise Nonexempt House/Dorm Parents

Sometimes schools have nonexempt staff who also work as house or dorm parents during nights and weekends. This situation is the most difficult of the three scenarios in which to provide any clear guidance. There are no cases and no DOL opinion letters interpreting the application of the 13(b)(24) exemption to a situation involving a nonexempt employee holding more than one position.

We believe a reasonable interpretation of the statute is that where such employees are spending the majority of their working time (more than 50% of their total hours worked) performing their nonexempt job functions during normal school hours, they will not qualify for the Section 13(b)(24) overtime exemption. The reason is that they are not being employed “to serve as the parents of children,” as required by the statute. As a result, such employees would be entitled to overtime compensation based on all of their hours worked during both normal school hours and night and weekend hours. As discussed above, because of the difficulty in determining the exact number of hours that a house or dorm parent is working, the DOL permits the parties to enter into a written reasonable agreement as to the
hours to be considered hours worked that takes into consideration all of the pertinent facts.

*Common Question:* What needs to be included in a “written reasonable agreement” regarding the hours to be considered worked for the dorm parent duties?

*Answer:* The parties need to agree upon an estimate of hours that the employee will work each 24-hour period. The agreement should outline that the employee resides on the employer’s property seven (7) days per week while acting as a dorm parent for the employer. The agreement should describe the usual hours during each day that the employee will be engaged in performing duties as a dorm parent (i.e., from 5:00 pm to 10:00 pm Monday through Friday, and 9:00 am to 4:00 pm every third Saturday and Sunday) and describe work that takes place all day. (Example: employee will be waking the students up in the morning, getting them ready for school, preparing breakfast, providing transportation to/from school, supervising the child(ren) after school, supervising homework and entertainment activities, shopping for meals, cleaning the house, and other related activities). The agreement should also outline that there are other periods during the day that employee will be engaged in normal private pursuits, such as eating, sleeping, entertaining friends and relatives, watching television, listening to the radio, reading, resting, visiting, and other activities involving periods of complete freedom from work; employee may also at times arrange for coverage and/or have the freedom to leave the premises for personal purposes. Then the agreement should conclude with a statement that based on all the facts, the employee and employer agree that a reasonable estimate of the hours worked each 24-hour period, is 5 on Monday through Friday and 7 on every third Saturday and Sunday. Both parties should also agree that if the employee’s hours of work differ substantially from the above agreed number of daily hours, the employee will report this fact to the immediate supervisor; and if a pattern develops showing that there is a significant difference from the above-agreed hours per 24-hour period, a new agreement will be reached reflecting the changed facts.

*Common Question:* If I have to pay overtime on all the hours worked over 40 in both jobs combined, how do I determine the overtime rate? I pay the employee a stipend of $10,000 per year for the dorm parent duties.

*Answer:* You will have to convert the $10,000 stipend to its weekly equivalent to begin the analysis. If the employee performs dorm parent duties over 40 weeks, divide the $10,000 by 40 ($250). If the employee performs the dorm parent duties over 52 weeks, divide the $10,000 by 50 ($192.31). Then, the employer should determine the overtime pay due by using the weighted average overtime calculation. To do this, the employer adds all straight time pay for all hours worked first. Assume that the employee is paid a salary of $800 for her administrative office duties. Also assume that the employee is performing dorm parent duties for 40 weeks.
(thus, $250 per week). Add the two amounts for all straight time compensation ($800 plus $250 = $1050). Then divide the total compensation by the total hours (both jobs combined). Assume 45 hours for the office duties and 20 hours for the dorm parent duties, for a total of 65 hours. $1050 divided by 65 = $16.15 per hour (this is the weighted average hourly rate). This compensates the employee for “time” for all straight time hours. You now owe “and a half” for the 25 hours over 40. Take the weighted average rate of $16.15 x \frac{1}{2} x 25$ OT hours for an overtime calculation of $201.88. This, plus the $1050 is the employee’s total compensation for this 65 hour week. You should note you might want to consider paying the employee a lesser rate (simply minimum wage) for the dorm parent duties. This could provide some savings. The problem you might encounter is a potential discrimination claim if you are inconsistent in how you pay employees for performing the same essential job.

Where an employee is primarily employed as a house or dorm parent and employed in another nonexempt capacity, it is unclear whether they would qualify for the Section 13(b)(24) exemption, even if their spouse is also employed primarily as a house or dorm parent. Unfortunately, there is little guidance as to whether the DOL or the courts would apply a primary duty test to the dorm parent requirement or whether they would hold that the employee’s job must be exclusively that of a dorm parent. (You should note that there are other exemptions under the law in which the courts and DOL have held that the exemption only applies if the employee performs that job exclusively. The 13(b)(24) exemption does not provide guidance in this area and there are no cases or opinion letters that address this issue either). If the courts or DOL apply an exclusivity test, then an employee could not qualify for the 13(b)(24) exemption if any time is spent performing other duties and overtime would need to be paid based on all hours being worked in all positions. If they apply a primary duty test, then an employee whose primary duty is being a dorm parent would qualify for the overtime exemption if they meet the other requirements of the exemption.

**Common Question:** Assuming the dorm parent exemption applies because the employee’s primary duty is being a dorm parent and they are employed with their spouse, does the school have to track hours separately and do employees get overtime if they work more than 40 hours in their non-dorm parent work?

**Answer:** Although there is no guidance in this area, the reasonable interpretation from other aspects of the Wage Hour law is that if the 13(b)(24) exemption applies, then the employee would be exempt from overtime regardless of what duties were being performed during what hours. Thus, there is no reason for tracking hours separately. However, if an employee is working more than 40 hours performing non-dorm parent duties, it is highly unlikely that the employee’s primary duty is being a dorm parent, in which case the exemption would not apply and the employee
would need to be paid overtime compensation on all hours worked during the week.

2. **Summer Camp Exemption:** Many schools operate a camp or camps on their campuses during the summer months. The Wage and Hour Law includes an exemption for a seasonal “establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center.” In addressing this exemption, one court has expressed that the major purpose of this exemption is “to allow recreational facilities to employ young people on a seasonal basis and not to have to pay relatively high minimum wages” otherwise required under the law. In interpreting this exemption, the federal Department of Labor has clarified that a summer camp that is operated by a school, academically accredited during the fall through spring semesters, can have a summer camp (recreational) program that qualifies as an “organized camp” as long as the camp is not a part, continuation, or extension of the accredited academic program of the school.

Although the DOL’s test sounds relatively easy to apply, the analysis is actually fairly complicated. The DOL looks at numerous factors to determine whether the academic portion of the school’s program is truly separate from the summer camp (exempt) portion of the school. Some of the factors that the DOL assesses include where the school obtains its employees for the summer camp; where it obtains its students; whether the documents, applications, brochures, enrollment agreements, employment agreements, etc. are separate and reflect different operating entities. It also assesses whether the property is being simultaneously used in the summer for academic summer school and recreational summer camp, and whether student camp counselors receive any type of credit for volunteering in the summer toward their academic program (i.e., community service credit).

Thus, as with most exemptions under the Wage and Hour Law, application of this exemption requires a fact specific inquiry. The less of an overlap of operations and administration between the academic program and the summer camp, the more likely the exemption will apply.

F. **Combination Jobs**

Schools have tight budgets and that means that all hands are used in many ways. Schools, probably more than any other employer, have employees that perform a number of different responsibilities as a part of their job. Section 541.708 of the DOL regulations permits an employer to classify an employee as exempt where the employee’s primary duty involves a combination of exempt “white collar” work. Outlined below are some examples of combination positions with an analysis of the exempt or nonexempt status of such positions.
1. Teaching Duties Combined with Other Jobs

*Question:* We have an employee who teaches 22 hours per week; handles lunchroom orders 3 hours per week; handles calls to alumni for donations 15 hours per week; takes the board minutes on average 1 hour per week; and coaches soccer on average 5 hours per week. Does she qualify for any exemption?

*Answer:* The employee works on average 46 hours per week. Of those hours, 27 are in teaching related responsibilities (teaching and coaching). Given that her “primary” duty includes work in an exempt capacity, she will meet the requirements for the teaching professional exemption.

Using the same example as above, if rather than coaching for 5 hours per week, the employee handled secretarial duties for 5 hours per week, more than 50% of her total hours would be in a nonexempt capacity. In that case, it would be difficult to prove that her “primary” duty is teaching and the employee would likely be considered nonexempt for all hours worked. She must maintain an accurate record of her daily and weekly hours and receive overtime for all hours over 40 in a workweek.

We frequently encounter combination exemptions involving employees who teach approximately 50% of their time and engage in other responsibilities for the remainder of their hours, including guidance counseling, after-care director duties, head of a portion of the school, head librarians duties, etc. Again, as long as the employee’s “primary” duty is spent in some combination of exempt duties (with more than 50% of the time being a good rule of thumb), the employee should be considered exempt. In these cases, because the employee is not teaching more than 50% of his/her time, you should ensure that the salary test ($455 workweek) required for other exemptions is met.

2. Other Examples

*Question:* We have several employees throughout the school that work in nonexempt positions such as maintenance, security, and business official assistant positions that receive stipends for engaging in other duties, such as after-care assistants, coaches, bus drivers, and chess coaches. What options do we have in paying these individuals?

*Answer:* These are classic examples of the problem areas in Wage and Hour compliance for schools. When you have a nonexempt employee handling more than one job for extra pay, you must ensure that the employee maintains an accurate daily and weekly record of all hours worked for all jobs. If you keep the employee’s total hours under 40 in a workweek, you do not have an overtime concern. You must ensure, however, that the
employee’s total compensation for the week exceeds the minimum wage for all hours worked in all jobs. If the employee exceeds 40 hours in a workweek, you must pay the employee overtime. Overtime is based on the employee’s “regular rate” which, in turn is based on how the employee is paid. These situations can be very costly, which is why many schools choose to allow only otherwise exempt employees to perform the extra duties for extra pay.

**Question:** We have an assistant in the Advancement Office that works 35 hours per week and is paid a salary of $700 per week. She is also one of our dorm parents. In that regard, she has dorm responsibilities to supervise the students living in her dorm from 6:00 a.m. until school starts at 8:15 a.m., again at night from 6:00 p.m. until lights out at 10:00 p.m., and she is responsible for the activities on one day every fourth weekend. She receives $15,000 per year for these dorm responsibilities.

**Answer:** This employee is not exempt from the requirements of the Wage and Hour Laws. Therefore, she must maintain accurate time records and be paid overtime. During the weeks without weekend work, this employee is working 35 hours in the office plus 31.25 hours in the dorm, for a total of 66.25 hours. During weeks with weekend work, her total hours would be higher. Her compensation is $700 for her office work plus $346.15 for her dorm duties ($15,000 ÷10 months then converted to its weekly equivalent). Her overtime compensation must take into account all of her hours worked and all of her compensation in both positions.

G. **You Should Assess Your Employees’ Exempt Status Now (Before the Claim Comes).**

If you have not already done so, develop and evaluate current, detailed information about employees’ job duties and responsibilities to judge what their exemption status is likely to be under the current provisions. Identify employees who are eligible for one of the exemptions, but are not currently being treated as exempt, and consider whether you want to treat them as exempt; what psychological impact would this have, for example?

By the same token, identify employees now treated as exempt whose standing is or might be in doubt, and consider what options you have. For instance, can the content of an employee’s job be changed to strengthen an exemption claim, should the person be converted to an hourly-rate-plus-overtime basis, or would it be better to pay the individual under a salaried-with-overtime system? Also, consider how you will go about announcing and explaining any changes you might decide to make.

In thinking through these issues, don’t forget about the wage-hour laws of other jurisdictions. For one thing, a state might not recognize all of the FLSA’s “white
collar” exemptions or might define them in different and/or more-limited ways. Illinois has already acted to distinguish the FLSA “white collar” exemptions from similar exemptions under its own law.

V. What Is the Significance of Paying an Employee on a “Salary Basis”?

The executive, administrative, and professional exemptions (except for teachers) generally require payment on a salary basis. The Wage and Hour Division’s interpretations consider an employee to be paid on a salary basis only if the employee is paid each pay period a predetermined amount that is not subject to reduction because of variations in the quality or quantity of work performed. This means that the employee must be paid his/her salary for every workweek in which the employee performs any work, regardless of the number of hours the employee actually works.\(^1\)

Under the current regulations, the DOL allows the following deductions to be made from an exempt employee’s salary:\(^2\)

1. **Proportional deductions may be made for whole-day absences due to personal reasons other than sickness or disability.** For example, if the employee is absent for two whole workdays to handle personal matters, the salary may be reduced for the two whole-day absences.

2. **Proportional deductions may be made for whole-day absences due to sickness or disability (including work-related accidents) if this is done in accordance with a bona fide plan, policy, or practice providing compensation for salary loss due to such sickness or disability.** These deductions may be made before the employee qualifies for compensation under the plan, policy, or practice and after the employee exhausts the allowance under the plan, policy, or practice.

3. **An employer may offset against the salary any amounts received by the employee as jury fees, witness fees, or military pay for the particular workweek.** The salary may not be reduced for absences within a workweek caused by jury duty, attendance as a witness, or temporary military leave. From a practical standpoint, most employers simply pay the employee the full salary and ask the employee to tender the jury fee or witness fee to the employer.

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1 Special rules apply to salaried employees taking intermittent leave under the Family and Medical Leave Act. See 29 CFR § 825.206 and 29 CFR § 541.602(b)(7).

2 These rules apply only under the “white collar” exemptions. For example, different considerations apply to salaried employees subject only to an FLSA overtime exemption and to nonexempt employees paid on a salary-plus-overtime basis. Also, deductions from the salaries of nonexempt employees paid under a “fluctuating-workweek” plan are more limited even than those allowed by the above rules.
Salary deductions may be made for penalties imposed in good faith for infractions of safety rules of major significance. This exception is very narrowly construed, and employers should give careful, advance consideration to whether particular facts will support such a deduction.

Salary deductions may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. This encompasses suspensions imposed under written policies applicable to all employees regarding serious work-related misconduct, such as sexual harassment, violence, drug or alcohol violations, or violations of the law.

An employer may pay a proportionate part of the employee's full salary for the time actually worked in the first workweek of employment or in the last workweek of employment. This does not mean that an employer can meet the salary test by paying a proportionate part of the salary to someone who is employed occasionally for a few days.

An employer may pay a proportionate part of the employee's full salary for the time actually worked in the workweek when the employee takes unpaid leave under the federal Family and Medical Leave Act. This exception is an outgrowth of a special provision in the FMLA itself.

Otherwise permissible salary deductions for time missed may be computed in terms of the hourly or daily equivalent of the employee's weekly salary, or in any other amount that is proportional to the time the employee actually misses. For instance, a whole-day deduction for an exempt employee who is hired to work a five-day, 40-hour week could be calculated at 1/5th, 8/40ths, or 20% of the individual's salary.

Common Question: May absences not falling within these categories be offset solely against vacation allowances or other leave allotments?

Answer: In the past, some courts said they could not be. However, many other courts have more recently taken a contrary view, as has the DOL in numerous opinion letters. Thus, this practice probably would not be construed to violate the salary-basis test in most situations.

Also, section 541.604 of the DOL regulations specifies that an employer may provide an exempt employee with additional compensation, even on an hourly basis, without violating the “salary basis,” so long as the employee is guaranteed at least the minimum required amount paid on a salary basis.

Common Question: What happens if an employer makes improper deductions from the salaries of exempt employees?
Answer: The answer depends upon a variety of considerations, starting with what the facts show about whether the employer did or did not intend to pay the employees on a salary basis.

The DOL says that an "actual practice" of making impermissible deductions demonstrates that the employer did not intend to pay the employee on a salary basis, such that the exemption is lost. Among the factors relevant to this question are: the number of improper deductions, particularly as compared to the number of similar instances in which a deduction might have been made; the time period over which the deductions were made; the number and location of the affected employees; the number and location of managers responsible for the deductions; and whether there is a clearly-communicated policy permitting or prohibiting improper deductions.

An actual practice of making improper deductions causes the exemption to be lost (a) during the timeframe in which they were made (b) for employees in the same job classification (c) working for the same managers responsible for the actual deductions.

On the other hand, it is possible to avoid this outcome in some circumstances. For one thing, improper deductions which are only isolated or inadvertent will not cause the exemptions to be lost if the employer reimburses the employees affected. Additionally, the exemptions can also be salvaged under a "safe harbor" provision in the DOL regulations. 29 CFR § 541.603(d). This protection is available if: (1) the employer has in place a clearly-communicated policy prohibiting the improper pay deductions specified in the general salary-basis rule, (2) the policy includes a complaint mechanism through which employees can bring to the employer's attention deductions which they believe to have been impermissible, and (3) the employer investigates such complaints and, upon concluding that improper deductions were made, both reimburses the employees and makes a good-faith commitment to comply with the salary-basis rules in the future.

The employer loses the safe harbor protection by failing to reimburse employees for improper deductions, or if it willfully violates its policy by continuing to make impermissible deductions after receiving employee complaints about them. In such situations, the exemptions will be lost during the timeframe over which they were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.

Although the DOL regulations do not explicitly require the safe harbor policy to be in writing, we recommend that you place such a policy in your employee handbook.

VI. What Are An Employer's Obligations Regarding Nonexempt Employees?

If an employee does not fit within one of the exemptions discussed above, he or she must receive at least “minimum wage” for all hours worked, must be paid “overtime” for all hours over 40 in a workweek, and must meet the “record keeping requirements,” by maintaining an accurate record of all “hours worked” each day
and each week. Moreover, certain deductions cannot cut into a nonexempt employee’s minimum wage or overtime payments. Each of these requirements is discussed below.

A. Minimum Wage – FLSA Section 6

The FLSA mandates that a covered employer provide all nonexempt employees with sufficient compensation for every workweek. This obligation is known as “minimum wage.” The result reached by dividing the employee’s total compensation (from salary, commission, bonus, or stipend) by the total number of hours worked must be equal to or greater than the federal minimum wage. The federal minimum wage increased to $7.25 per hour on July 24, 2009.  

There are sources of income that may be credited toward the minimum wage. The reasonable cost to the employer for meals, transportation, housing, tuition benefits, and other customary services that are for the employee’s benefit, and customarily furnished to employees by employers in the industry, might be creditable. Costs of tools provided to the employee for use in the business, uniform purchasing, renting, or laundering costs, and the cost for transportation for the employer’s benefit may not be counted by employers toward the minimum wage. There are some complex issues to be considered in this area, so employers should not attempt to take such credits without being completely sure that this is permitted under the particular circumstances at hand.

B. Overtime and Related Issues – FLSA Section 7(a)

Employers must pay nonexempt employees overtime if they work more than 40 hours in a workweek. Overtime pay must be figured at 1.5 times the employee’s “regular rate” of pay for all time worked over 40 hours in a workweek (“overtime hours”). This seemingly simple concept can, in practice, become quite complex.

In most cases, the basis for determining overtime is an employee’s workweek. A “workweek” is a fixed and regularly-recurring interval of seven, consecutive, 24-hour periods. The workweek does not have to coincide with a calendar week and can begin on any day and at any time of day. Different workweeks can be established for each employee or group of employees.

The regular rate used to calculate overtime must be an hourly rate regardless of how the employee’s pay is otherwise computed. It is generally determined by dividing an employee’s total compensation for any workweek by the total number of hours he or she worked in that workweek which the compensation was intended to cover.

A common error in independent schools is the failure to include an employee’s “extra compensation” in the calculation to determine the employee’s “regular rate”

3 Keep in mind that your state’s minimum wage may be higher than the federal minimum wage.
for the workweek. In that regard, the employer must include bonuses, incentives, commissions, stipends, and other kinds of “extra” amounts paid in addition to the “base” or primary compensation, unless the FLSA expressly permits the pay to be excluded. For instance, most bonuses must be figured into an employee’s regular rate, including, among many others:

- additional sums paid for meeting goals or targets;
- a “shift differential” paid to induce employees to work an undesirable shift;
- cost-of-living bonuses; or
- good-attendance payments.

If the bonus covers a single weekly period, it is simply added to the employee’s other weekly earnings for purposes of calculating the regular rate.

Things are more complex if the bonus was earned for work over a period longer than one workweek. In that situation, once the amount of the bonus is known, the payment must first be apportioned back over the period during which it was earned. If the employer can identify particular bonus earnings to particular workweeks, then the allocation should be done that way.

On the other hand, if it is reasonable to assume that the employee earned an equal amount of the bonus each workweek ending in the period covered by the bonus, an equal amount is allocated to each such workweek. Alternatively, if it is more reasonable to assume that an equal amount was earned in each hour worked in the bonus period, then an equal amount is allocated to each such hour.

For example, if the school’s bus driver who worked over 40 hours also received an attendance bonus of $50.00, this additional bonus must be added to the employee’s total compensation to determine the “regular rate” for the week. Thus, the overtime rate will necessarily be slightly higher. Similarly, where one employee works two or more separate jobs for the same employer, all hours from all jobs must be counted to determine the total hours for the workweek, with special rules applying to determine the employee’s overtime rate each workweek. On the other hand, the school may exclude things such as gifts; “discretionary” bonuses; and pay for certain time not worked (vacation, holiday, and sick pay).

**Common Question:** My development assistant has been salaried, but we need to make her hourly. However, in setting her salary we took into account that there are approximately eight weeks a year when she works 50 hours during those weeks. Do we take this built-in overtime into account when setting her hourly pay?

**Answer:** Development Assistants typically are nonexempt and should be paid either on an hourly basis (plus overtime) or under the fluctuating rate pay plan (discussed below). The problem with converting an employee from salary to hourly is that the employee often feels demoted or less important to
the organization. In addition, if you reduce the employee’s compensation to account for the built-in overtime, the employee will feel demoted and paid less. This often leads to claims. One way to avoid the “demotion” problem is to pay the employee under the fluctuating rate pay plan. In that case, you are still faced with the question of whether to reduce the employee’s salary slightly to account for the fact that he/she will now be receiving an additional overtime premium. If you choose to reduce the salary, we recommend that you do so with advice of counsel and be prepared to show the employee several examples of his/her weekly compensation with overtime to evidence that his/her compensation will essentially be the same. Also, it is important to remember that an employer is extremely limited in making deductions from the salary of an employee on the fluctuating rate pay plan.

1. **Compensatory Time**

A common problem found in schools, especially in areas such as the Development Office, is the use of so-called “compensatory time” or “comp time” whereby the school allows an employee to work over 40 hours in one workweek in exchange for taking extra time off in another workweek. This kind of compensatory time is not permitted in the private sector. Each seven-day workweek must stand alone. Thus, the better practice is to organize an employee’s workweek hours to avoid overtime (e.g., sending the employee home early on Friday of the same workweek). The other options are to pay traditional overtime (as stated above), or to convert the employee to the fluctuating rate pay plan so that the school can take advantage of savings in the calculation of overtime.

2. **Fluctuating Rate Pay Plan**

Many employers use the so-called “fluctuating rate pay plan” or a variation of it to pay overtime premiums under federal Wage and Hour Laws to employees compensated on a salary basis whose hours of work vary from week to week. The plan simplifies overtime calculations, results in smaller earnings variations than purely hourly-rate plans, and can even discourage unnecessary overtime work. A key element of this plan is defining an employee’s compensation in a way that produces an advantageous “regular rate” — that is, the hourly rate upon which overtime pay must be based. Generally, the regular rate is determined by dividing the total wages paid for a week by the total hours worked in the week that those wages are intended to compensate. Once an employee’s wages are deemed to provide straight-time compensation for all hours worked, including any hours worked over 40 in a workweek (“overtime” hours), the employee is due only an additional 50 percent (rather than 150 percent) of the regular rate for overtime hours. This is because he or she has already been salary-compensated for the straight-time portion of his or her overtime hours. Under this system, an employee’s regular rate of pay will decrease as his or her hours worked increase. Of course, an employee’s regular rate cannot be less than the federal minimum wage (e.g., currently $6.55 per hour; increasing on July 24, 2009 to $7.25 per hour).
It is essential for salaried employees to agree or at least acknowledge an understanding that their salaries constitute straight-time pay for all hours worked in a week. The salary must not be said to cover only some predetermined or fixed number of hours. Once this understanding is reached, overtime is computed at one-half of the regular rate each week. We recommend that employees sign a statement reflecting their understanding of this pay plan.

As an example of how the pay plan works, assume that an employee who is paid a weekly salary of $400.00 works 45 ¼ hours in a week. The employee is due overtime premiums of ($400.00 ÷ 45 ¼) x (½) x (5 ¼ OT hours) = $23.20. The total pay is ($400.00 + $23.20) = $423.20. If the employee’s salary was intended to cover only 40 hours, the employee would be due $78.75 in overtime [($400.00 ÷ 40 = $10.00 hourly rate) x 1.5 x (5 ¼ OT hours) = $78.75]. Thus, the fluctuating rate pay plan saves the employer $55.55 in this example.

One disadvantage of the fluctuating rate pay plan is that employees normally must be paid their entire salaries for every workweek in which they perform any work. Occasional disciplinary deductions may be made as a penalty for what are called “willful” absences or tardiness, although these deductions may be made only after the employee’s pay has been properly computed under the law, and the deductions may not cut into any of the required minimum wage or time-and-one-half overtime pay the employee is due. In any case, if deductions occur frequently, the Wage and Hour Division can be expected to scrutinize compensation to determine whether a fluctuating rate plan has been validly maintained. Thus, the plan might not be desirable for personnel with a high absenteeism rate. Additionally, an employee on a fluctuating rate pay plan may be paid a pro rata share of his or her salary in the first and last week of employment, when the employee is not in payroll status for the entire week.

Employees on a fluctuating rate pay plan can be converted to hourly employees during the period in which they are taking intermittent or reduced schedule FMLA leave. This change would have to include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate must be determined by dividing the employee’s weekly salary by the employee’s normal or average weekly schedule of hours worked during weeks in which FMLA leave is not being taken. During the period in which such an employee is compensated on an hourly basis, the employee is eligible for overtime if he or she works more than 40 hours in a workweek.

*Common Question:* I think that this approach may work for our school. We have several administrative assistants who are salaried, but probably should be hourly. We have never paid them overtime before as the hours balance out with their reduced summer hours. Switching from salaried to hourly will be a political nightmare, but cutting their routine salary pay per week will
also be hard on their budgeting abilities. Are you saying that I can pay them a consistent salary every week and have a reduced overtime calculation?

*Answer:* Yes. This pay system allows for a consistent weekly pay system and provides an overtime structure that will likely meet your needs. You should note that nonexempt employees placed on this pay plan must still maintain a record of their daily and weekly hours worked. You should work with legal counsel when implementing such a program.

3. **Weighted Average and the "Rate that Applies" Method of Paying Overtime**

Many schools have nonexempt employees who work a full-time primary job who also work a second job for the same school. Common examples include maintenance workers who also drive buses for special events; or who provide security for special events. Sometimes development office assistants (or other employees) teach dance, music, or other after school classes. Rather than pay employees the same hourly rate for this different, additional work, an employer can pay different rates for different work. An employer also has the option of paying the employee overtime under the fluctuating rate pay plan, as long as the employee is quoted a salary for all jobs worked during the workweek. If the employer chooses to pay the employee different rates for different jobs, however, the employer has two other options for calculating overtime: the weighted average method and the “rate in effect” method.

   a. **Weighted Average.** Under the weighted average method, the employer must add up all forms of compensation for the workweek for all jobs and divide this amount by the total of all hours for the workweek for all jobs. This gives the "weighted average" hourly rate for all hours. The employee has then been compensated for all straight time hours for the workweek (through the different methods of compensation) and is still entitled to a half-time rate for the hours over 40. This method is the general rule for figuring regular rates when an employee performs work at two or more rates.

   As an example: A maintenance worker is paid $12.00 per hour for maintenance work. He also drives a bus for special events and is paid $18.00 per hour for these hours. If the maintenance worker spends 40 hours performing maintenance work and 15 hours driving for special events, his total compensation for the week is $750.00 ($12.00 x 40 plus $18.00 x 15). The total hours were 55 (40 + 15). The weighted average hourly rate is $16.64 ($750.00 ÷ 55 hours = $16.64). The employee has been paid “time” for all hours and is now owed “and a half” for the 15 hours over 40, or $124.80 ($16.64 x (½) x 15 OT hours). The employee’s total compensation for this workweek would be $874.80.

   b. **Rate-In-Effect.** Under the rate-in-effect method, overtime pay is based on the rate applicable to the work being performed in the overtime hours. Thus, if
the employee is performing work at the lower rate when he or she is working beyond 40 hours in a workweek, overtime is paid at time-and-one half this lower rate. If work at the higher rate is being performed, overtime is paid at time-and-one half the higher rate.

In the example above, assume that the maintenance worker spends 30 of his first 40 hours performing maintenance work and 10 hours driving, leaving 10 hours of maintenance work and 5 hours of driving performed in overtime hours. This employee would earn $540.00 ($12.00 x 30 plus $18.00 x 10) for his first forty hours and $315.00 ($12.00 x 1.2 x 10 plus $18.00 x 1.5 x 5) for his overtime hours. The employee’s total compensation for this workweek would be $855.00. Because more of the overtime hours were at the lower rate, the total compensation is less than when calculated under the weighted average method. Had the reverse been the case, the total compensation would have been higher.

It is extremely important to note that the rate-in-effect method of calculating overtime is an exception to the general rule and cannot apply unless several conditions are satisfied. The conditions are as follows:

1. the employee must agree that the rate-in-effect during the overtime hours will be the basis for computing overtime pay;
2. the agreement between employer and employee must be entered into before the work is performed;
3. the employer must show in its records the date of the agreement and the period of time it covers;
4. the rate used for the overtime computation must be a rate fixed in good faith;
5. the overtime hours must be hours worked on special days (such as Saturdays, Sundays, or holidays), hours worked in excess of normal working periods, or hours worked outside of contractually designated daily periods not exceeding 8 hours or weekly periods not exceeding 40 hours;
6. the number of overtime hours for which the overtime rate is paid must equal or exceed the number of hours worked in excess of 40;
7. the compensation for the overtime hours must be at least time and one half the minimum wage;
8. the employee’s straight-time earnings must average at least the hourly minimum wage; and
9. extra overtime compensation must be paid on other additional pay, such as inceptive bonuses, which is required to be included in the regular rate.

4. Wage Deductions And Out-Of-Pocket Payments

The cost for equipment, uniforms, and other materials that are required for a job may be deducted from a nonexempt employee’s wages, provided that the deductions do not decrease the employee’s wage amount below the required minimum wage or cut into any overtime compensation. For example, if the school
requires maintenance department employees to wear uniforms and sends them to a company for laundering, the cost of the uniforms and laundering may be charged back to the employee, but these charges cannot cut into either minimum wage or overtime compensation. This is true even if the employee agrees to the deduction or purports to waive his/her Wage and Hour rights. On the other hand, personal purchases and loan advances to an employee may cut into minimum wage and overtime, as long as the deduction does not include a profit to the employer. This frequently occurs with tuition repayment provisions, bookstore purchases, or other similar employee items. We recommend that the employer have a signed agreement with the employee acknowledging the debt and agreeing to payroll deductions to repay it, in both overtime and non-overtime workweeks.

C. Hours Worked

The next simple-sounding but difficult concept to apply is the term “hours worked.” Nonexempt employees are required to be paid for all hours worked (and the school must maintain accurate daily and weekly records of such hours).

1. “Hours Worked” Generally

Hours worked includes work that the employer has “suffered” or “permitted,” as well as rest periods of short duration. Thus, if the school knows that an office assistant begins working a half-hour early each day just to “get organized,” this time is compensable even though the school did not require the employee to come in early. Moreover, although meal periods of at least 30 minutes generally are not compensable, if the school knows that the receptionist who eats lunch at her desk does so to be available to answer the phone or handle a parent’s request during her lunch break, some or all of the break may be compensable. Similarly, if a teaching assistant is required to eat lunch with the students to keep an eye on them, the time is compensable.

Common Question: We pay for most federal holidays for our employees, including those paid hourly. If Monday is a holiday and the employee works forty hours Tuesday through Friday, do we have to pay them overtime since they did not technically work on Monday?

Answer: No. Overtime is computed only on “hours worked.” Because the employee did not actually work on that Monday, that time does not count as “hours worked” for overtime purposes.

Additional rules apply to travel situations where the employee’s primary duty involves driving (e.g., bus drivers). You should consult an attorney competent in the area of Wage and Hour Law for questions in this area.
**Common Question:** What if we have set a nonexempt employee’s hours and have repeatedly told her not to go beyond those hours unless given specific permission and she keeps doing it? Do we have to pay her?

**Answer:** If the school knows that the employee is working beyond her scheduled hours, the employee must be paid for those hours. The school may be best served by ensuring that the school’s overtime permission policy is spelled out in the school handbook and takes steps to react to the employee’s repeated infractions of the rule, but the school must still pay the employee.

2. **Time Records**

While a time clock or computerized time system is recommended for accuracy, the law does not require employees to punch time cards. It simply requires that the employer maintain an accurate record of hours worked by each nonexempt employee each day and each workweek. The computerized time system is the optimal type of system because it generally results in the most accurate recording of hours. However, in some cases, a hand-written time sheet is the most practical method of tracking time. Where employees do record their time by hand, it is important that they record actual starting and stopping times, and not their scheduled hours.

Regardless of the time keeping method, you should monitor the time records to ensure that employees log in and out each day. Occasionally, handwritten entries will need to be made to an automated time record because a punch was missed. When such entries are made, both the employee and the employee’s supervisor should initial it at the end of the pay period. This will help ensure that the supervisor is aware of the employee’s actual start and stop times and will also help to avoid any disputes concerning the accuracy of the handwritten entry. Also, it is a good idea to have employees sign their time report at the end of the workweek certifying that the “hours reported are true and complete.”

3. **Waiting Time**

An employee’s time spent waiting for something to happen or for something to do can be compensable work time. One must look at all the facts to decide whether an employee is “engaged to wait” (which is compensable) or is “waiting to be engaged” (which is not).

For example, unpredictable periods of inactivity while an employee is “on duty,” such as standing by for another assignment during a shift, are usually regarded as being “engaged to wait.” On the other hand, a worker who is at home or with a beeper waiting to hear if he/she will be needed to go on duty are usually “waiting to be engaged” and need not be paid for this time. See *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

4. **On Call**
Questions sometimes arise as to how to categorize time an employee spends in on-call status. Naturally, all work an employee does while on-call must be treated as compensable.

Whether an employer has to record and pay for time the employee spends waiting but not working while on-call depends upon how restricted the employee is in using the time for his or her own purposes. An employee who is not required to remain on your premises and who can use the “idle” on-call time predominantly for his or her own benefit (even if required to carry a cellular telephone or beeper) generally need not be compensated for that time. 29 CFR §553.221(d); and 29 CFR §785.17. On-call time issues are often difficult ones not lending themselves to broad statements, but instead requiring specific analysis.

5. Commuting and Travel Time

Commuting and travel issues are some of the most complex issues in “hours worked” cases because specific facts and circumstances come into play. Normal commuting to and from work each day is considered non-compensable. However, travel between a “normal” workplace, such as an office, and another place of assignment, usually is counted as hours worked, as is travel between one assignment and another during a workday.

Overnight out-of-town travel by public transportation must be counted as hours worked to the extent that it occurs during normal working hours, even if the traveling is done on weekends and holidays. Overnight out-of-town travel as a passenger outside normal working hours does not have to be counted as hours worked, if the employee is not otherwise working while traveling. For example, if an employee’s usual schedule is Monday through Friday, 9:00 a.m. to 5:00 p.m., travel time between 9:00 a.m. and 5:00 p.m. any day of the week is compensable. Of course, the employee’s actual working time once arriving at the destination must be compensated as usual. 29 CFR §785.39. For example, the employee’s normal hours are 9:00 a.m. to 5:00 p.m. The employee leaves home to go to the airport for a 6:00 a.m. flight, arriving at the destination city at 7:30 a.m. The employee then drives to the worksite from the airport, arriving at 9:00 a.m. The employee works two days in the destination city (8 hours each day). The employee leaves the worksite at 5:00 p.m. on day two, drives to the airport, takes a 7:00 p.m. flight, arrives back at the home airport at 8:30 p.m., and arrives at home at 9:00 p.m. All travel from home to the airport and airport to home is considered non-working hours as long as the employee did no work on the airplane. The driving travel from/to the airport in the destination city and the working hours in the destination city are compensable. 29 CFR §785.37. If the employee is required to drive a vehicle in connection with this travel, all of the travel time must be considered hours worked (except for bona fide meal periods).

If an employee is sent on a special one-day assignment in another city, all the time that the employee spends either working or traveling is compensable. For example,
the employee’s regular working hours are 9:00 a.m. to 5:00 p.m. The employee is given an assignment that requires him/her to leave at 8:00 a.m. The employee drives to the destination and arrives at noon, works until 3:00 p.m. and returns to the home city at 7:00 p.m. All this time (except for meal times) is compensable. If the employee leaves from the normal place of work rather than from home, the travel between home and the normal place of work need not be counted as hours worked. If the travel is by public transportation, the time spent traveling between home and the departure point, such as an airport, may be deducted.

6. Training or Other Meetings

Generally speaking, attendance at the training or other meetings is compensable unless attendance is voluntary, is outside the employee’s regular working hours, entails no productive work during the training or meeting, and is not directly related to the employee’s job. Attendance is not considered voluntary if the employer requires it either expressly or by implication. Attendance is directly related to an employee’s job if it is intended to make the employee better at his or her regular job, as distinguished, for example, from training that a person undertakes in order to be eligible to be considered for a promotion. There are certain exceptions to these general training-time principles, and they must be considered on a case-by-case basis.

In practice, there are very limited situations in which the time spent by an employee in any such sessions will not be counted as hours worked. For example, if employees are required to take continuing education courses, two of the four requirements for excluding the time are likely not being met (voluntary attendance and not being related to current job). If the course is during regular working hours, another requirement is not being met.

7. Civic or Charitable Work

If an employee is directed or requested by his or her employer to do work for a civic or charitable purpose on the employer’s premise, the time spent must be counted as hours worked. For example, an employee who is directed by the employer to participate in or attend a charitable function must be paid for the time. However, when the employee voluntarily spends time at such activities outside his or her regular working hours, the time need not be counted.

D. Record Keeping – FLSA Section 11(c); Regulations Part 516

The FLSA has numerous rules and procedures with respect to record keeping. An employer must be aware of and comply with these regulations in order to avoid liability. The type of information an employer must maintain regarding its employees includes: (1) name; (2) sex; (3) home address; (4) date of birth (if under 19); (5) occupation in which employed; (6) time and day on which workweek commences; (7) total hours worked each workday and each workweek; (8) the total daily or weekly straight-time earnings; (9) the regular hourly pay rate for any workweek or work period when overtime is worked; (10) the total overtime pay for the workweek or work
period; (11) any deductions from or additions to wages; (12) total wages paid each pay period; and (13) the date of payment and pay period covered.

In addition, there are many other record-keeping rules that an employer must follow with respect to exempt or nonexempt salaried employees, employees that work in certain types of occupations, and those who may receive housing or a monetary allowance for food, and many others. Pursuant to the FLSA, certain records must be kept for either two or three years. Records, such as collective bargaining agreements, employment contracts, and records reflecting employee sales and employee wages and hours all must be kept for a period of at least three years. Entries made with respect to deductions from employee wages, billing and shipping records, and basic employment earning records generally must be kept for a period of at least two years.

VII. How is the Wage and Hour Law Enforced?

A. Enforcement by the DOL

The DOL’s Wage and Hour Division administratively enforces the FLSA. An employee complaint generally triggers an investigation by field agents. The Division is allowed to decline to reveal the identity of the employee that filed a complaint based on the recognized informant privilege. Typically, the investigator will review the employer’s entire pay practices, thus broadening the scope of the investigation well beyond the individual’s complaint. If the investigator discovers a violation of the Act, the employer will be notified and will be requested to comply with the Act by paying back pay and correcting improper practices. If settlement negotiations fail, then the Solicitor of Labor may seek an injunction or damages in an action commenced in federal court. In addition to enjoining an employer from violating the FLSA, an employer may be required to reinstate any employees (with back pay) who may have been terminated for complaining about FLSA violations. If the DOL is successful, it will be entitled to liquidated damages in an amount equal to any unpaid wages unless the employer can show that it acted in good faith with reasonable grounds for believing that its pay practices complied with the FLSA.

B. Private Actions

An employee may bring a private action for a violation of the FLSA in either state or federal court. The statute of limitations for such a claim is two years, unless the employee can show a willful violation by the employer, which increases the limitation period to three years. The employee plaintiff has the burden to show that the employer violated the FLSA and to show the amount of back pay due. If the employee prevails, he/she can recover the back pay, an equal amount in liquidated damages (unless the employer shows good faith as discussed above), and attorney’s fees and costs. An employee may also bring an action on behalf of himself and other employees that are “similarly situated.” However, those employees that do decide to become party-plaintiffs and “opt in” must file a written consent to sue with the
court. In this situation, the statute of limitations for that employee will only be tolled by the filing of the consent to sue with the court. Class actions under this law are mushrooming; in 2001, there were more wage-hour class actions than class actions alleging discrimination and harassment under the civil rights laws. Since then, the numbers have continued to grow.

C. Settlements

Schools should understand that employees cannot legally waive or settle their FLSA claims without oversight by the Supervisor of the Department of Labor or a court of record. In addition, most federal courts (where these claims are brought or end up) require very specific information to be placed in the record evidencing that the employee through a settlement has received all compensation due for all hours worked. Sometimes, the court requires that the parties have a hearing on the issues to assess the appropriateness of the settlement.

VIII. Conclusion

As many employers have found out the hard way, the Wage and Hour Law is extremely difficult to comply with. Even the guidelines set forth above are only that – guidelines. The larger the workforce, the more creative schools become in crafting unique or combination positions. Additionally, publicity about the FLSA exemptions and lawsuits is likely to cause many employees (including nonexempt ones) to question whether they are being paid correctly under the FLSA and other wage-hour requirements. For these reasons, every school should consider having an attorney experienced in Wage and Hour Law audit their workforce, pay procedures, and record keeping to ensure that employees are properly classified and violations are promptly corrected. In addition, schools should implement and distribute handbook provisions to take advantage of the disciplinary deduction and safe harbor provisions of the 2004 regulations.

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