



Annualized vs Hourly Pay: Record Keeping – What Should You Consider

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Objectives

- Discussion – Questions and Comments Welcome!
- Discuss how current Annualized Pay and Hourly Pay practices may create potential issues.
- Discuss how to better protect our districts from potential issues that arise from current practices.
- Discuss how good communication with employees reduces potential liability for Wage and Hour Violations.
- Discuss Annualized Pay vs Hourly Pay in the context of the Fair Labor Standards Act



Scope of the Problem

- Nationwide, in recent years, the U.S. Department of Labor (DOL) has conducted a few hundred audits of school districts.
- In just five southern states, these actions have yielded approximately \$11.2 million in back pay (usually covering only 2 years) for about 7,000 employees.
- In all cases, DOL made it quite clear they would be monitoring school districts closely for compliance with all aspects of the Fair Labor Standards Act (FLSA).
- The potential penalties for violating the overtime pay provisions of FLSA can be severe for employers.
- District and individual supervisors may be held civilly or criminally liable for violations, and they may be sued by DOL, or by employees, where the department does not bring suit. Civil liability can include liquidated damages, back pay, injunction from further violation, and if violations are found to be willful, punitive damages.

Which Federal Wage Laws Apply?

- The principle federal wage and hour legislation for school employers is the Fair Labor Standards Act (FLSA). FLSA is supplemented by other wage and hour laws, including the Equal Pay Act of 1963, which prohibits sex-based discrimination in pay, and the Portal-to-Portal Act of 1947. Mississippi Education Code and some Labor Code provisions may apply.
- The Wage and Hour Division of the DOL administers and enforces labor laws regarding wages, hours, and working conditions with entities governed by the FLSA. The Division has local offices in Mississippi.
- The statute of limitations on claims for wages or overtime violations is generally two (2) years from the date the illegal act occurred. If, however, the failure to pay wages or overtime was willful, (i.e. that the employer knew its conduct was prohibited by the FLSA or showed reckless disregard for whether it might be prohibited) the statute of limitations is extended to three (3) years.

What is the Fair Labor Standard Act?

- Federal law that governs minimum wage, overtime, recordkeeping, and child labor requirements/restrictions
- Passed by Congress in 1938 originally, has been amended in 1966, 1972, 1974 and 1985, and finally updated in August 2005
- Called the Overtime law, but focuses on other aspects of pay as well (e.g. equal pay, child labor restrictions, etc.)

Source: Department of Labor Regulation 553
<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.1.30&idno=29>

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Are We Answering the FLSA Pay Question?

- The FLSA seeks to articulate that there are differences between persons who are employed in exempt and non-exempt roles; and these differences must be acknowledged and handled appropriately within organizations.
- Employees in jobs that are exempt from the FLSA work when duty calls, until the job is done. These employees receive a salary, pay that doesn't change for doing their work (irrespective of quantity of hours).
- Employees in jobs that are non-exempt work during specific times. When those timeframes are exceeded those employees are eligible to receive overtime compensation. These employees are paid by the hour for their work.

What Can a Department of Labor Investigation Include?

- In general, DOL investigations are conducted pursuant to a report of a wage and hour violation. However, they are NOT restricted to the wage and hour issue(s) raised in the complaint or initial investigation.
- Such an investigation may be expanded to include an investigation into an employer's adherence to the following more common areas:
 - I-9 Compliance
 - FMLA Compliance
 - Child Labor Violations

Annualized Pay Versus Hourly Pay?

Annualized Pay

- Is it Salary?
- Does it provide exemption from FLSA?
- Is it a guaranteed amount?
- Is the amount adjustable?

Hourly Pay

- How is rate determined?
- What is the pay frequency?
- Is it a guaranteed amount?
- How are hours captured?

FLSA Required Employee Records

- Required Records for **Non-Exempt** Employees (29 C.F.R. § 516.2):
 - The employee's full name and social security number and, on the same record, any symbol that might be used in place of the employee's name on any time, work or payroll records.
 - The employee's home address, including zip code.
 - The employee's date of birth, if under age 19.
 - The employee's sex and occupation.
 - The time of day and day of week on which the employee's work week begins.
- The regular hourly rate of pay for any week when overtime is worked, the basis on which wages are paid and the amount and nature of each payment that is excluded from the regular rate.
- The hours worked by the employee each work day and the total hours each work week.
- The total daily or weekly straight-time earnings, excluding overtime pay.
- Total pay for overtime hours.
- Total additions or deductions from wages paid each pay period.
- Total Wages paid each pay period.
- The date of payment and the pay period covered by the payment.

FLSA Required Employee Records

- Required Records for **Exempt** Employees (29 C.F. R. § 516.3):
 - The employee's full name and social security number and, on the same record, any symbol that might be used in place of the employee's name on any time, work or payroll records.
 - The employee's home address, including zip code.
 - The employee's date of birth, if under age 19.
- Required Records for **Exempt** Employees:
 - The employee's sex and occupation.
 - The time of day and day of week on which the employee's work week begins.
 - Total wages paid each pay period.
 - The date of payment and the pay period covered by the payment.

Good Records – Training The Best Defense

- Accurately analyze the job duties
- Document position descriptions, have employees and supervisors review them for accuracy – keep them on file
- Provide written analysis to worker so they assess/agree with classification analysis
- Conduct management training so that managers understand that an exemption can easily be defeated by carelessness and understand the degree of independence required to maintain the exemption

Position Description

- For every employee classified as exempt there should be an accurate position description
- The position description should delineate the essential duties as well as skills and abilities
- The essential duties should be those duties listed as primary under the exemption
- The duties should describe the degree of cognitive, analytical, managerial, etc. responsibility within the tasks listed and the freedom under which they are exercised

Actual Duties Control

DOL Will Do an Audit

- Actual duties not title control
- Importance to the business and frequency of the exempt duties play a significant role
- Amount of independence and judgment regularly exercised also important
- Difference in salary in comparison to non-exempt employees
- How comingled are employees duties with those of non-exempt employees

Revise Handbook

- Safe Harbor Policy
- Notice to Employees that if they believe they are improperly classified, there is a reporting and correction process.
- Reimburse employees for improper deductions.

Understanding Litigation Process Matters

- The litigation process requires your classification decision to be clearly and unmistakably right, or your company loses – always.
- You don't want to find out that requirement for the first time when you are sued, and you won't see that requirement in the regulation or exemption tests.
- If you understand how your classification decision will be challenged in litigation, you will make better "up-front" decisions regarding classification. You will no longer make "close-calls" and you will change and strengthen your company's documentation process so that you will be able to minimize your damages in the event of a suit.

Top Ten List of FLSA Pitfalls

1. Not knowing the current wage and overtime obligations.

Districts must insure that **non-exempt** employees are paid proper overtime (e.g., under the FLSA work after 40 hours in a seven-day work week must be compensated at one and one-half times the regular rate of pay.)

2. Additional Duties

A huge problem for schools is the practice of full-time non-teaching employees covered by FLSA performing additional duties for the employer. For example, supplemental contracts for coaching sports or other activities where the non-teaching employee works 40 hours in a week could implicate FLSA issues.

Top Ten List of FLSA Pitfalls

3. Two-rate systems

The Act does NOT permit employers and employees to agree on a two-rate system. For example, employers may not avoid the requirement that time worked over 40 hours in a week is subject to overtime pay by establishing one rate of pay for the regular hours worked and a different, reduced rate for hours in excess of 40.

4. Joint Employment

Pursuant to Regulations 29 CFR §791.2, there will likely be a finding of joint employment if an employee works for a school district, but also has a job for another employer that is not “completely disassociated” from the first job.

Examples of joint employment:

An aide works for the district during the regular school day and also works as a bus driver for the bus contractor. ; another example is an employee who works for a school district and for a related custodial service at another site in the district. All hours in both jobs may be counted together for overtime purposes, and both employers may be liable for the overtime pay.

Top Ten List of FLSA Pitfalls

5. Estimating hours worked

Employers should be aware that estimates of the number of hours worked, or the average number of hours required to accomplish tasks, may not be substituted for actual hours worked. Employers **MUST** keep accurate records of the time employees work; a failure to do so creates the presumption in favor of an employee and is an independent violation of the FLSA.

6. Salaried versus hourly

Salaried employees may be entitled to overtime pay; there is a misconception that only hourly employees are eligible to receive overtime pay.

Top Ten List of FLSA Pitfalls

7. Compensatory Time

Instead of overtime compensation, public employers may permit employees to accumulate and use compensatory time. Compensatory time may be provided only pursuant to a collective bargaining agreement or an agreement between employer and employee prior to the work being performed.

8. "Suffering or permitting" work

Perhaps the biggest problem area falls in this category. Many employers fail to realize and appreciate the concept of "suffering or permitting" employees to work more than 40 hours per week. Even if an employer has a policy stating that employees may not work overtime, if the employee does work more than 40 hours a week, the employer may not deny its FLSA obligations by referring to this policy.

Top Ten List of FLSA Pitfalls

This is especially true if the overtime hours are incurred with the employer's knowledge and tacit acquiescence.

"Suffered or Permitted" to work is defined as any time an employer knows or has reason to believe that an employee is working.

- Note: The Portal to Portal Act of 1947 generally relieves employers from overtime liability under FLSA for hours spent walking, riding, or traveling to and from the actual place of performance of the principal activities the employee is employed to perform.

The employer must affirmatively take action to ensure employees comply with policies controlling overtime, even by disciplining the employee, when necessary. The concept of "suffering or permitting" work may even be applied in certain circumstances to work an employee takes home, if the employer knows the employee regularly takes work home, and/or knows the work assigned cannot be completed in a 40-hour work week.

Top Ten List of FLSA Pitfalls

9. Volunteer Service

Non-teaching employees performing volunteer services in the school district may also be a cause for concern. DOL takes a dim view of this practice under FLSA and accompanying regulations. The general rule is that compensable time includes work or services done at the employer's request, at the employer's direction or control, or while the employee is required to be at work.

One factor used to determine whether FLSA may apply to services volunteered by non-teaching covered employees is whether the time spent is substantially for the employer's benefit. It is possible some volunteers would meet this definition, while other volunteer service, which may truly be voluntary, and not a condition of employment, would not.

Top Ten List of FLSA Pitfalls

10. Waiting or “on call” time

Time spent waiting may be compensable when the employee is required to report at a certain time and be ready to work, but must then wait for work to actually begin. To help answer this question, consider whether waiting time is within the employer’s control, or if the employee may use the time for his/her own purposes and/or whether the employee is able to leave the premises or work site.

- An example of normally non-compensable waiting time would be when the employee shows up earlier than his/her expected start time and waits for work to begin. However, DOL also instructs employers to NOT let this practice continue by disciplining employees in violation. Otherwise, an employer opens itself up to a claim under the “suffer and permit” doctrine.

Common Problem Areas for Schools

- Bus drivers who are paid for only scheduled hours or the route time. (If he/she breaks down or traffic causes a delay in the completion of the route, the additional time spent must be counted as work time. In addition, most school districts require drivers to do safety checks at the beginning of routes and secure the bus upon completion of the route. Many also allow drivers to remain on premises during off-duty time and perform administrative tasks.”)
- Employees who work multiple jobs/dual employment, such as classroom aides or cafeteria workers who also serve as bus aides. (Even though the employee is paid separately for each job, the hours must be combined to determine if the employee worked more than 40 hours during the work week. In addition, if the employee actually performs work between the two scheduled positions, he/she must be paid for this work.

Common Problem Areas for Schools

- Aides who must eat with the students but whose meal period is deducted from the calculation of work time.
- Employees who work through lunch and/or eat at a desk. (Employees must be completely removed from duty if the time is not to be counted as work time.)
- Cafeteria managers, maintenance supervisors, transportation supervisors, janitorial supervisors who mostly perform the same work as the people they supervise.
 - (These employees are often misclassified as exempt employees; however, they should be considered non-exempt if they primarily do non-exempt work.)

Common Problem Areas for Schools

- Maintenance employees who are paid on a per-call basis (i.e., receive a flat fee per call) when they have to work in the event of an emergency.
 - (Hours spent working should be calculated and added to the regular hours to determine if the employee has worked overtime.)
- Non-exempt employees who serve as volunteer coaches.
 - (The question here is whether an employee is considered a bona fide volunteer, or if the duty is an extra assignment. A bona fide volunteer must offer their services freely, without coercion or pressure, direct or implied, and cannot perform the same type of services which they are employed to do.)

Common Problem Areas for Schools

- Any fee paid to a volunteer must be nominal
- A question to ask when considering whether an employee is a volunteer is whether the employee could choose not to show up to do the volunteer duties or could quit performing the duties he/she is volunteering to perform if he/she wanted to at any time, without negative impact on his/her employment.
- Office staff who stay after scheduled hours to perform school-related work, such as to take tickets at an athletic event, attend parent-teacher conferences, work at open house, go to staff meetings, set up or close functions, etc. Employees would have to be compensated for such activities.

Common Problem Areas for Schools

- However, if the activities are “occasional and sporadic,” the hours spent doing them do not have to be added to the employee’s regular work hours for overtime purposes. An activity is considered “occasional and sporadic” if it is:
 - Not a regular assignment
 - Is solely at the employee’s option (no coercion, implied or explicit); and
 - If it is in a different capacity than the employee’s regular work
- Non-exempt staff who attend training sessions or staff meetings during the summer and on weekends for which they are not paid.
- Employees who come to work early or stay late.
- School employees who “volunteer” for school programs and functions.

Common Problem Areas for Schools

- Computer technicians who do not perform the highly-skilled duties required to be an exempt employee. To be exempt, computer personnel must:
 - Perform work requiring highly-specialized knowledge in systems analysis, programming or software engineering;
 - Work as a systems analyst, computer programmer, software engineer, or similarly skilled worker; and
 - Consistently exercise discretion and judgment.
- Employees who work in after-school programs at school for students. (Even though a program may be run by another group, like the YMCA, the DOL may consider this to be joint employment unless the school and other group are entirely independent of each other and are completely disassociated with respect to the employment of the employee.)

A person's title does NOT automatically make them an exempt computer professional.

Common Problem Areas for Schools

- School employees working special functions at school, but sponsored by others such as PTA, performance groups, etc. (The best practice is to require such groups to include in their rental fee an amount equal to the employee's overtime rate for the expected hours.)
- Secretary calling substitutes from home or other employees who work at home. (Hours for such work must be recorded and compensable.)
- The superintendent/board secretary who stays late for the school board meeting. (All of the hours must be compensated.)
- Assuming that salaried means the employee is exempt. (Even though an employee receives a salary, he/she can still be non-exempt.)

Record Keeping

Employer Has Duty to Keep Records

- Can not delegate to employee.
- Employees can keep their time, but if not kept accurately by employee, employer is responsible.
- Even if employees certify that time records are correct, the employer is still liable if they are not accurate.
- Failure to keep records is a violation on its own.

Record All Overtime Hours

- All hours worked must be recorded
- If employee works overtime and employer knows it, the hours must be recorded
- Can require employees not to work overtime unless “approved” but if directive is disobeyed, hours worked must be recorded.
- It is unlawful to refuse to pay for “unauthorized overtime.”

The Failure to Keep Records Has Consequences

- Employee only has to provide a “reasonable inference” that the employee worked a certain number of hours.
- Without records to rebut, employee wins.
- Willful failure to keep the required records or falsification of records is a **criminal offense**.



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Top Ten List of Ways to Lessen Liability Through Communication and Documentation

- 1. Properly classify employees as exempt or non-exempt.**

Have records in each employee's file designating whether he/she is exempt or non-exempt.

DOL considers an exemption from the overtime pay/compensatory time requirements of FLSA to be the exception, rather than the rule. Any "gray areas" should be resolved in favor of finding the employee to be non-exempt and the overtime compensable, as the burden is on the district to prove the exemptions are applicable.
- 2. Have a board policy or At-Will Agreement language about the work week, overtime and compensatory time, and make sure all employees (including management) have access to and understand the language.**

 - In addition, make sure that all employees:
 - Are provided a copy of the policy;
 - Acknowledge that they have received and understand the policy;
 - Agree to follow the policy and procedures or be subject to discipline (and enforce the policy regularly.)

Top Ten List of Ways to Lessen Liability Through Communication and Documentation

3. Have an accurate time sheet or other method of time keeping.

Make sure there is a compliant time keeping method of keeping track of working hours for non-exempt employees, e.g. time sheet, time clock, or computerized check-in system.

- Employees with the exact in/out time and total hours worked every day of the week. This is a red flag to the DOL, since it is rare that a person would begin and end work at the same time every day.
- Time sheet not filled out by the employee. If someone else fills out the time sheet, the employee should review the time sheet to acknowledge that it is correct.

Top Ten List of Ways to Lessen Liability Through Communication and Documentation

- Time sheet not signed by the employee. Without a signature, employees can later claim that they never saw the time sheets.
- Time sheets with multiple employees filled out by supervisor. If this is used, each employee should review his/her time and sign the timesheet to acknowledge that it is correct.
- Time sheet does not record actual hours worked, just present/absent.
- Time sheet that does not record actual time/hours worked, but only contracted hours.

Top Ten List of Ways to Lessen Liability Through Communication and Documentation

- 4. Annually train supervisory staff on FLSA compliance issues.**
- Train supervisors regularly, especially when first assigned supervisory duties, on the following topics:
- what counts as compensable work time;
 - how time accounting must be completed for non-exempt employees; and
 - their duty to monitor time accounting and verify time worked.
- 5. Train all non-exempt staff on time accounting procedures and overtime requirements.**
- Train all non-exempt staff when hired and regularly thereafter on the following topics:
- Board policy/contract requirements;
 - What counts as compensable time; and
 - How to complete time keeping correctly, and the ramifications for false reporting of time.

Top Ten List of Ways to Lessen Liability Through Communication and Documentation

- 6. Decide whether non-exempt employees will be permitted to volunteer.**
- Non-exempt employees may not volunteer to perform services on behalf of the district if the volunteer duties involve the same types of duties they regularly perform. In order to be a bona fide volunteer, an employee must freely and voluntarily (without any direct or implied coercion or requirement) agree to perform the volunteer duties for no compensation.
- If you are using non-exempt school employees as volunteers for any activities, have them sign a form verifying they are volunteering to perform these duties. Such forms are not guaranteed to protect the district from liability, but they may assist in demonstrating that the employee volunteered.

Top Ten List of Ways to Lessen Liability Through Communication and Documentation

- 7. Have supervisory, payroll and finance staffs monitor weekly time records.**

Make sure that supervisory staff continuously monitors weekly time records for accuracy and completeness, and that they report all overtime worked by non-exempt employees. If there are any concerns about information being recorded properly or staff being paid properly, determine whether you need to do an audit of employee records.

- 8. Post all federal and state-required employment posters.**

Make sure that all employment posters are posted in areas that are accessible to all employees, especially non-certificated employees. You may want to post copies in the following places: staff lounge, school office, cafeteria kitchen, bus garage, break rooms, janitor's closet and other places where employees gather.

Top Ten List of Ways to Lessen Liability Through Communication and Documentation

- 9. Consult with your district's legal counsel about FLSA compliance issues and make sure you work together to address any outstanding questions.**

You may want to strongly consider conducting periodic compliance reviews with legal counsel involved, to potentially protect any adverse findings under the attorney-client work-product doctrines.

- 10. If you become subject to any form of wage-law challenge or investigation, consult legal counsel immediately.**

Do not:

- sign any waivers of timelines;
- trust the investigator;
- volunteer information; or
- allow an audit to occur without authority from counsel.