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WHY WAGE AND HOURS MATTERS MORE THAN EVER

Wage and hour issues probably are not at the top of school districts' agendas. However, failure to pay attention to overtime requirements can lead to serious problems. In Pennsylvania, two state statutes govern wage and hour claims. In addition, the federal Fair Labor Standards Act (FLSA) generally requires that employees working over 40 hours in a work week receive payment for overtime at a rate 1.5 times that of their regular hourly rate. School districts may not be aware that these requirements could apply to their support personnel and other employees.

School districts that have failed to satisfy these requirements have faced costly consequences. For example, litigation regarding overtime requirements in Mississippi has cost school districts there \$30 million to \$50 million in overtime liability. Fortunately, the laws governing wage and hour regulations are not hard to follow as long as the applicability of overtime exemptions to school personnel is understood.

Among private employers, the Pennsylvania Wage Payment and Collection Law, 43 P.S. §§ 260.1, et seq., is frequently utilized by disgruntled employees. It allows for liquidated damages and the payment of attorney's fees. School districts have not had to contend with such claims since the Pennsylvania Commonwealth Court's decision in *Philipsburg-Osceola Educ. Ass'n by Porter v. Philipsburg-Osceola Area Sch. Dist.*, 633 A.2d 220, 223 (1993). However, increasingly, school districts are subcontracting significant portions of their school functions. These private subcontractors will be subject to WPCL claims, so districts must be mindful that any contracts with these subcontractors will not leave the districts exposed to any indemnification claims.

Pennsylvania also has the Pennsylvania Minimum Wage Act, 43 P.S. §§ 333.101, et seq. This statute also provides for attorney's fees and sets the minimum wage in Pennsylvania at the federal level if the federal minimum wage is higher than Pennsylvania's minimum wage (which it currently is). While it used to include an exemption for "public employees", this exemption was removed in 1974. At least three federal district judges have indicated that the statute will apply to public employees, notwithstanding a long-standing opinion letter from the Pennsylvania Attorney General to the contrary. More importantly, the Pennsylvania Minimum Wage Act could be amended to raise the minimum wage above the federal level, and, indeed such a bill has been introduced.

The federal FLSA, 29 U.S.C.A. §§ 201, et seq., most definitely does apply to school districts. In addition to the overtime rules, it sets the federal minimum wage. The FLSA does create exemptions from overtime requirements generally based on the type of work the employee performs. Teachers are exempted from the FLSA, and the position of "teacher" is broadly defined in the Act. The Act further exempts "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel" School administrators and professionals such as superintendents, department heads, assistant superintendents, principals, counselors, psychologists, professional therapists and other supervisors are exempt and are not typically entitled to overtime pay, but this inquiry will be specific to the job duties of the employee, requiring the district to determine whether the employee's duties include "administrative functions directly related to academic instruction or training"

Employees such as cafeteria workers, bus drivers, secretaries, custodians, mechanics, aides and other support workers are not exempt and generally are entitled to overtime, if they work more than 40 hours in a given work week. This is true regardless of whether they are normally paid on an hourly basis or on a weekly

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or monthly salaried basis. Most wage and hour issues arise from employee dual employment. When non-exempt employees have two or more jobs with the school district and, as a result, work more than 40 hours in a work week, the school district may be obliged to pay overtime. It does not matter that the employee's work time did not exceed 40 hours in either of the jobs, separately.

However, school districts do not have to pay employees overtime for intermittent secondary employment in positions such as ticket takers, food vendors, etc. Intermittent secondary employment is not included for the purposes of determining overtime if it meets the following exception from FLSA overtime requirements: (1) the work is "solely" at the employee's option; (2) the work is occasional or sporadic, and, (3) the work is in a different capacity from the employee's regular work. Accordingly, if an employee, e.g., a janitor, decides to take tickets or sell food at an occasional or sporadic event, the hours worked at the event will not be combined with other hours worked. It is important to note that regular part-time jobs will not fall under this exception. Hence, they have to be counted in overtime calculations. For school districts (and other public employers), work done on a "volunteer" basis will also be exempt under the FLSA. In *Purdham v. Fairfax County School Bd.*, 637 F.3d 421 (4th Cir. 2011), the appeals court held that a school security officer who also "worked" as the golf coach for the school was volunteering as a coach since his coaching was unrelated to his employment and whether he coached would have no impact on his work for the district. The court came to this conclusion despite the fact that the employee received a small stipend for coaching.

Many districts assume that employees governed by a collective bargaining unit are not covered by the FLSA. This is not quite true. First, the CBA itself must conform to the rules set forth in the FLSA for such agreements. Second, and more importantly, courts will consider claims under the FLSA for bargaining unit members when the court concludes that the basis of the claim is not addressed in the CBA. Thus, for example, if a maintenance job performed by bargaining unit member includes "set up" time for the job, but the calculation and management of the "set up" time is not addressed in the CBA, the employee may be entitled to bring an action under the FLSA.

Finally, it should be noted the FLSA also includes a provision prohibiting discrimination in pay based on gender. This provision governs all employees, including teachers, professionals and all others who would otherwise be exempt from the overtime regulations.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.