



Employment Issues

‘White Collar’ Exemption Rules

Special Report

CONTENTS

Executive Exemption.....	1
Administrative Exemption.....	2
Salary Basis Issues.....	2
Suggested Best Practices	3
Pay Deductions	6

On August 23, 2004, the most significant change to the Fair Labor Standards Act (FLSA) in more than 50 years went into effect. The new “white collar” exemption rules are designed to help employers determine whether employees are or are not eligible for overtime pay.

It all began in June of 1938, when the first version of the Fair Labor Standards Act (FLSA) became law and employers and employees tried to understand minimum wage laws and the difference between exempt employees, who are not entitled to overtime wages, and non-exempt employees, who are entitled to overtime wages. Despite revisions to simplify the rules in 1940 and 1949, the law has never been easily understood.

The FLSA requires that most employees be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a) (1) of the FLSA provides exemptions from both the

minimum wage and overtime pay for employees who are employed in a *bona fide*:

Executive;
Administrative;
Professional;
Computer Professional; or
Outside Sales Capacity.

These are often called “white collar” exemptions. Superintendents, principals, academic administrators and teachers are included in this group, but most other district employees would not be eligible for these exemptions. It is very important for district employees to be classified in accordance with the new regulations. The following guide is provided to help you accomplish that consistently and confidently.

Executive Exemption

To qualify for the executive exemption, an employee must meet *all* of the following tests:

- a. The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- b. The employee’s primary duty must be “managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise”;
- c. The employee must customarily and regularly direct the work of

- at least two or more other full-time employees or their equivalent; and
- d. The employee must have authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

To qualify for the administrative employee exemption, an employee must meet *all* of the following tests:

- a. The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- b. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- c. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Principals and academic administrators will continue to be exempt as administrative employees. The salary test for academic administrative employees will be met if such employees are paid at a rate which is at least equal to the entrance salary for teachers in the district.

Salary Basis Issues

Employees who are exempt under one of the white collar exemptions must be paid on a salary basis. This means that the employee must be paid a predetermined amount of money regardless of the quality or quantity of work performed. When deductions are

taken out of the wages of an exempt employee, the deductions may destroy that employee's exempt status. Under the new regulations, public sector employers may make a number of deductions that will not destroy an exemption. These deductions include:

- a. Salary payments during the employee's initial and terminal weeks of employment that are in an amount less than compensation for one full week.
- b. Deductions for absences for personal reasons: 1) provided the district has a written policy under which employees accrue personal leave and which requires the employee's pay to be reduced or requires the employee to be placed on leave without pay because accrued leave is exhausted, 2) leave has been sought and denied, or 3) the employee has chosen leave without pay.
- c. Deductions for absences, sickness or accident: 1) provided the district has a written policy under which employees accrue sick leave and which requires the employee's pay to be reduced or requires the employee to be placed on leave without pay because accrued leave is exhausted, 2) leave has been sought and denied, or 3) the employee has chosen leave without pay.
- d. Partial week payments for a reduced schedule or intermittent leave under the FMLA.
- e. Deductions for a week in which no work is performed.
- f. Penalties for the violation of an existing safety rule of major significance.
- g. Suspensions without pay for disciplinary infractions for one full day or more provided the suspension is based upon the

violation of a generally applicable written policy.

However, suspensions without pay for less than one full day for disciplinary infractions (*other than suspensions for the violation of a safety rule of major significance*) will destroy the exemption.

Many school district employees are non-exempt, and the FLSA rules on their right to overtime pay are strict. Working hours for all employees not exempted under the FLSA, including secretaries, bus drivers, cafeteria, janitorial and maintenance personnel, must conform to federal and state regulations.

Districts must use their own judgment in classification. The Administrative Exemption duties test, which has been the most problematic area of FLSA for years, is not made easier by the 2004 revisions. Typically, school districts have had the most difficulty classifying the “secretary” positions. Just because a secretary has a salary, she/he may not be exempt from overtime wage rights. However, school board secretaries and business managers who have been exempt are likely to continue to be exempt under the administrative exemption. Since the exemption for these positions is frequently contested, each district will need to independently evaluate this exemption issue.

Suggested Best Practices

Do not permit unauthorized overtime!

- a. Have overtime practices clearly spelled out in employee handbooks.
- b. Inform employees that advance written approval is required before overtime will be authorized, and stick to it. While this will not shield the district from payment if overtime is worked without authorization, it may serve as grounds for disciplinary action that

will help avoid recurring problems of unauthorized overtime.

Keep accurate time records, signed by non-exempt employees.

- a. Don't simply record the scheduled hours (*i.e.* 8:00 – 4:30) but rather the actual time worked (*i.e.* 8:11 – 4:22).
- b. Insist employees sign-off on any changes to timekeeping records.
- c. Routinely remind employees that actual time worked must be reflected on their timesheets.

Place the required FLSA posters in conspicuous places where non-exempt employees can readily see them.

Do not permit employees to work through lunch/meal periods.

Breaks of any kind must be 20 minutes or more in order for the time not to be compensable. If a break is 15 minutes, it is compensable. Employees who work during their meal period must be paid for their meal period. Employees who eat in an area where they may be required to work (such as an office) may be entitled to compensation if they perform work during their meal period.

Minimize employment in more than one job (e.g. custodian and bus driver) where the combined number of hours will exceed 40 per workweek.

These situations cause problems in correct calculation of overtime wages. Adopt a policy regarding dual employment.

Adopt a written policy regarding deductions for personal reasons and for sickness or accidents.

Deductions in pay for absences of less than one day will not destroy the exemption for employees who are otherwise exempt employees, provided the district has adopted a written policy that requires an employee's pay to be reduced or the employee to be placed on leave without pay whenever: (1) permission for leave has not been sought, (2) permission for leave has been sought and denied, (3) accrued leave is exhausted, or (4)

the employee has chosen to use leave without pay.

Be sure to follow the rules with regard to volunteers.

Any individual who volunteers to perform services for a public agency, which is a state, a political subdivision of a state, or an interstate governmental agency, is not an employee and is not covered by the act if (1) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (2) such services are not the same type of services that the individual is employed to perform for such public agency.

Do not permit a non-exempt employee to “volunteer” for activities within the school, unless his or her child is involved.

Even then, there may be an issue with the Wage and Hour Division if the activity being volunteered for is the same as the employee’s job (*i.e. a bus driver “volunteering” to drive for a school-sponsored trip for his/her child’s class.*)

Recognize that a district may use an employee occasionally to substitute in a job other than the employee’s regular job without paying overtime.

If an employee works: (1) “on an occasional or sporadic basis,” (2) “solely at the employee’s option,” (3) on a part-time basis, and in (4) “a different capacity from any capacity in which the employee is regularly employed with the public agency,” then the hours worked will be excluded from the hours for which the employee is entitled to overtime compensation. For example, a custodian who voluntarily agrees to work as a substitute bus driver and substitutes on an occasional basis need not be paid overtime for the bus driving work.

Classify employees who perform only coaching or extracurricular duties for a district as non exempt.

Employees who are not teachers or administrators but perform coaching or other

extracurricular duties for a school district are non-exempt employees and are entitled to overtime compensation. All of the recordkeeping requirements of the act apply to these employees, including the requirement that all hours of work be recorded.

Independent contractors are not covered by the act and are not required to be paid overtime.

However, the school district cannot make all of its bus driver’s independent contractors simply because it would be less expensive to operate in this fashion. The Department of Labor will examine the following factors in determining whether an individual is an independent contractor: (1) the extent to which the services rendered are an integral part of the district’s business, (2) the permanency of the relationship, (3) the amount of individual investment in facilities and equipment, (4) the opportunities for profit and loss, (5) the degree of independent business organization and operation, (6) the nature and degree of control by the district, and (7) the degree of independent initiative, judgment, or foresight exercised by the one who performs the services.

Examine the structure of after-school programs that are co-sponsored (or authorized by the district and on school property) and be careful with hours worked by non-exempt personnel.

Avoid situations where a school employee is working more than 40 hours a week in all jobs because the after-school program may be considered school employment (*even if another group such as the YMCA runs the program*), leading to potential overtime claims.

Carefully calculate overtime wages for employees with two jobs.

For an employee who holds two jobs within the district that have different rates of pay, the *normal* calculation is one-and-one-half times the weighted average of the two rates. By agreement of the district and the

employee reached in advance of the work being performed, the district may pay the employee at the rate that is established for the type of work being performed during the overtime hours.

Check your calculation of the regular rate of pay.

The following are examples of payments that must be included in a calculation of the regular rate: attendance bonuses, on-call pay, shift differentials, longevity pay, and special pay for licenses (*stationary engineer's license*) or certificates (*certification for asbestos removal*). The following are examples of payments excluded from the regular rate: pay for time not worked because of holiday, sickness or vacation, pension plan payments, and discretionary bonuses.

Follow the one-day rule when suspending exempt employees.

Only suspend exempt employees in increments of one full day or more. Limit suspensions of exempt employees to violations of written work rules, which are applicable to all employees.

Periodically audit wage and hour practices.

Establish a grievance procedure for wage-related complaints.

Have an internal employee grievance procedure which includes a provision that

allows an employee to complain about improper wage deductions and also reimburses employees for improper deductions. If your district has a collective bargaining agreement for some non-exempt employees, be sure to advise these employees that the grievance procedure may be used for this purpose.

Update job descriptions

A job description should state the employee's FLSA classification (*exempt or non-exempt*). A job description that accurately reflects the work being performed can validate that job's FLSA classification.

Adopt a new policy to cover pay deductions.
See Exhibit A.

References: 29 U.S.C. Sec. 213(a)
29 CFR Part 541

Department of Labor fact sheet:

<http://www.dol.gov/fairpay>

<http://www.dol.gov/esa>

Exhibit A
Code No. 706.3

PAY DEDUCTIONS

The district provides leaves of absences to allow employees to be absent from work to attend to important matters outside of the workplace. As public employers, school districts are expected to record and monitor the work that employees perform and to conform to principles of public accountability in their compensation practices.

Consistent with principles of public accountability, it is the policy of the district that, when an employee is absent from work for less than one work day and the employee does not use accrued leave for such absence, the employee’s pay will be reduced or the employee will be placed on leave without pay if:

- the employee has not sought permission to use paid leave for this partial-day absence,
- the employee has sought permission to use paid leave for this partial-day absence and permission has been denied,
- the employee’s accrued paid leave has been exhausted, or
- the employee chooses to use leave without pay.

In each case in which an employee is absent from work for part of a work day, a deduction from compensation will be made or the employee will be placed on leave without pay for a period of time which is equal to the employee’s absence from the employee’s regularly scheduled hours of work on that day.

Legal Reference: 29 U.S.C. Sec. 213(a)
 29 CFR Part 541

Cross References: 409.8 Licensed Employee Unpaid Leave
 414.8 Classified Employee Unpaid Leave

Approved _____ Received _____ Revised _____

Code No. 706.3 R1

PAY DEDUCTION REGULATION

The district complies with all applicable laws with respect to payment of wages and benefits to employees including laws such as the federal Fair Labor Standards Act and the Iowa Wage Payment Collection Act. The district will not make pay deductions that violate either the federal or state laws.

Any employee who believes that the district has made an inappropriate deduction or has failed to make proper payment regarding wages or benefits is encouraged to immediately consult with the appropriate supervisor. Alternatively, any employee may file a formal written complaint with the _____ (choose one) [*Superintendent, Business Manager, Board Secretary*]. Within 15 business days of receiving the complaint, the _____ (choose one) [*Superintendent, Business Manager, Board Secretary*] will make a determination as to whether the pay deductions were appropriate and provide the employee with a written response that may include reimbursement for any pay deductions that were not appropriately made.

This complaint procedure is available in addition to any other complaint process which also may be available to employees.