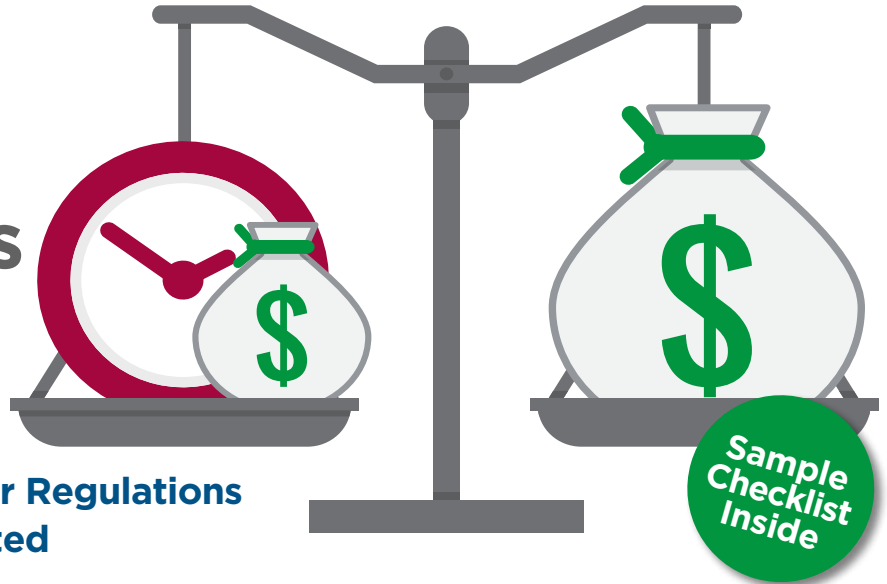


Under FLSA, **Fair Play** is **Fair Pay**



Don't Let the New Fair Labor Regulations Catch Your District Flat-footed

The U.S. Department of Labor (DOL) has been busy over the last year putting the finishing touches on new regulations under the Fair Labor Standards Act (FLSA). With much anticipation, the DOL unveiled its final product in May 2016. To help school districts comply with FLSA, we are pleased to present the 2016 FLSA Self-Audit Checklist for School District Employees.

The FLSA has a broad impact on employers, as this law governs how employees are compensated through various rules that delineate minimum wage and overtime. Unless specifically exempted, employees covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half times their regular rates of pay – also known as overtime pay. The FLSA has teeth: not only can the DOL order payment of back wages, it can also impose penalties for wage and hour violations. For example, in 2015, the Wage & Hour Division (WHD) of the DOL found overtime violations in 10,496 cases, and nearly 80% of the FLSA back wages that were recovered were for overtime violations.¹ Back wages ordered by the WHD for all FLSA violations totaled \$63.8 million in 2015, and civil monetary penalties for all FLSA violations in 2015 came to \$2.1 million.²

¹ U.S. Department of Labor, Wage and Hour Division Fiscal Year Statistics, <https://www.dol.gov/whd/statistics/statstables.htm#flsa>

² U.S. Department of Labor, Wage and Hour Division Fiscal Year Statistics, <https://www.dol.gov/whd/statistics/statstables.htm#flsa>

If the threat of a DOL investigation wasn't scary enough, the specter of collective actions against employers for FLSA wage violations looms large. As noted in the prominent annual workplace class action compendium by law firm Seyfarth Shaw, FLSA wage and hour collective action suits significantly outpaced the filings of other types of employment-related class actions – so much so that in the firm's opinion, FLSA collective action litigation represents “the most significant exposure to employers in terms of any workplace laws.”³ Indeed, in recent years, FLSA suits were successfully pursued against many large organizations throughout the country.⁴

The significance of these revamped regulations cannot be exaggerated. Before this year, the last update to the rules was in 2004. In March of 2014, President Obama directed the DOL to modernize the regulations, and modernize it

³ Seyfarth Shaw 12th Annual Workplace Class Action Litigation Report, pp. 14-15. http://www.seyfarth.com/dir_docs/publications/2016WCARfinal.pdf

⁴ A few of the well-known companies who have had FLSA violation suits brought against them recently include TJMaxx/Marshall's (<http://www.law360.com/articles/688050/marshalls-tj-maxx-workers-ask-for-final-nod-on-4-8m-deal>); Tyson (http://www.nytimes.com/2016/03/23/business/supreme-court-upholds-worker-class-action-suit-against-tyson.html?_r=0); Zillow (<http://www.inman.com/2016/02/29/zillow-faces-class-action-lawsuit-over-alleged-unpaid-employee-compensation/>); Burger King (<https://www.law360.com/articles/815092>); and Morgan Stanley (<http://www.wsj.com/articles/morgan-stanley-reaches-settlement-on-overtime-pay-lawsuit-1408049111>)

Checklist Excerpt

Avoiding FLSA Pay Violations Self-Audit Checklist for School District Employers

Are your Teachers Truly Exempt?

- Is the employee's primary duty teaching, tutoring, lecturing, or instructing students in pre-Kindergarten through 12th grade on a full-time, part-time, substitute, or hourly basis? (Note: Teachers are exempt even if they do not meet the salary requirements applicable to other exempt employees.) Yes No
- Does the employee possess a teaching certificate or, if the school district does not require certification, is the employee employed as a teacher? Yes No

* * *

Are Your Academic Administrators Truly Exempt?

- Is the employee's primary duty performing administrative functions directly related to academic instruction, rather than general business operations? (Note: superintendents, assistant superintendents, principals, vice-principals, and academic counselors who administer academic tests or advise on degree requirements may fall into this category.) Yes No
- Does the employee earn a salary or fee of at least \$913 per week (or \$47,476 per year) or a salary at least equal to the entrance salary for entry level teachers in the school district? Yes No

* * *

Are Your Other Administrators Truly Exempt?

- Does the employee earn a salary or fee of at least \$913 per week or \$47,476 per year? Yes No
- Is the employee's primary duty the performance of office or non-manual work directly related to the management or general business operations of the school district or the school district's customers? (Note: Administrative jobs related to matters such as building management and maintenance, student health, and food service, for example, may fall into this category.) Yes No
- Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance? (Please consider what the employee actually does, not merely what may be stated in a job description.) Yes No

* * *

This is a portion of the 2016 FLSA Self-Audit Checklist for School District Employees.

Download the complete checklist at SLRMA.org

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did. In July of 2015, the DOL published the proposed amendments and requested comments. The DOL reported that it received over 270,000 written comments in response to the new regulations.⁵ The volume of written comments is not surprising, considering one of the most significant regulatory changes will potentially result in employers paying workers either a higher salary or writing large checks for overtime pay.

Let's take a look at the rule with the most potential impact on many employers: the standard salary level. The old regulation states that an employee is exempt from overtime pay if the employee is salaried, primarily performs executive, administrative, or professional duties, and earns \$455 weekly/\$23,660 annually. Under the new regulation, generally an employee will be exempt from overtime pay if the employee is salaried, primarily performs executive, administrative, or professional duties, and **earns \$913 weekly/\$47,476 annually**. While seemingly benefitting workers with more earnings, legal and HR pundits prognosticate that the new regulations might have some unexpected consequences, such as driving down base salaries, decreasing employer contributions to employee benefits such as medical and dental, and reducing paid time away from work. Others believe the changes could result in fewer wage and hour suits, but might create record-

⁵ U.S. Department of Labor Wage and Hour Division, Final Rule: Overtime: <https://www.dol.gov/whd/overtime/final2016/>

Recent Dispatches in the Newsroom



K.R. v. Huber Heights City Schools Board of Education

June 2016

School may not be in session yet, but school sports are already in full swing. Team sports are a great way for students to build muscle and character. But are you ready for when team dedication goes wrong? Log on to SLRMA.org to find out what happened when one school board was confronted with student-on-student sports team hazing.

New EEOC Guidance on Transgender Bathroom Access

May 2016

Given recent media attention surrounding the Federal Government's policy on transgender students' use of school bathrooms and locker rooms, many employers are wondering about their legal obligations regarding bathroom access for transgender employees. Earlier this month the Equal Employment Opportunity Commission (EEOC) released a "Fact Sheet" stating the Commission's position on the matter.

continued from previous page

keeping problems for employers.⁶ Without question, the FLSA changes should not be ignored.

How will the new FLSA rules impact school districts? For starters, employees who were previously exempt from the overtime requirements, particularly those in nonacademic roles, may need to be reclassified as non-exempt if they earn less than \$47,476 per year. In other words, employees who have not been paid overtime in the past might now qualify for overtime, thus potentially creating budgetary shortfalls.

We encourage SLRMA members to take an immediate and proactive approach to complying with FLSA. The 2016 Self-Audit Checklist provides you with an overview of the FLSA changes, then guides you through the key questions to ask in determining exempt vs. nonexempt status for each category of employees. Your District can use this list as a jumping off point for establishing a comprehensive strategy for compliance with labor laws. As always, consultation with local counsel familiar with both FLSA and your state's labor laws is highly recommended.

⁶ For interesting discussions and opinions about changes to the FLSA regulations, read Law360's "Attorneys React to DOL's Final Overtime Exemption Rule", <http://www.law360.com/articles/797663/attorneys-react-to-dol-s-final-overtime-exemption-rule>, and Society for Human Resource Management's "Overtime Pay Changes Will Affect Employee Benefits, Too" by Steven Miller, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/overtime-benefits.aspx>

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Hogan Lovells Client Advisory

Beyond Bathrooms: New Guidance Regarding Transgender Students Addresses FERPA Requirements

The U.S. Department of Education and Department of Justice recently weighed in on the obligations of school districts, colleges and universities to provide civil rights protections for transgender students. On May 13, the departments issued a Dear Colleague Letter (“DCL”) that summarizes the responsibilities of school districts, colleges and universities that receive federal financial assistance under the departments’ interpretation of federal law, including Title IX of the Education Amendments of 1972 and the Family Education Rights and Privacy Act (“FERPA”). Here, we focus on the DCL’s guidance pertinent to compliance with FERPA.

Download it Today!