



FLSA LITIGATION: COMING SOON TO A SCHOOL DISTRICT NEAR YOU

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By: Lisa E. Soronen, NSBA Staff Attorney

Violating the Fair Labor Standards Act (FLSA) is easier and more common than you may think and the consequences can be severe. In fact, according to David S. Fortney, the former acting Solicitor of Labor General for the U.S. Department of Labor, FLSA class actions are now the most common employment law class actions nationwide. In a typical case, a school secretary comes to work 10 or 15 minutes early and occasionally works through lunch. While this employee is paid for working 40 hours a week and his or her timesheets state that he or she comes in at exactly 8:00 am and leaves at exactly 4:30 pm every day, everyone, especially a federal judge, knows that this is not true.

To make matters worse, Mike Espy, former congressman and U.S. Secretary of Agriculture, has teamed up with a number of other plaintiffs' lawyers, called the School Litigation Group, to vindicate the FLSA overtime rights of certain school employees. The FLSA requires that "covered" or "non-exempt" employees (generally non-administrator, support staff employees) receive overtime or compensatory time when working over 40 hours a week. The overtime provisions of the FLSA do not apply to teachers or other academic administrative employees.

The School Litigation Group's strategy has been to set up shop in various cities and then advertise for potential plaintiffs by holding press conferences, putting up bulletin boards, advertising on the radio with a toll-free number, and even chartering planes carrying slogans about the litigation. The School Litigation Group reports on their web site at <http://www.slgcentral.com/states.html> that they are representing plaintiffs in Alabama, Arkansas, Georgia, Mississippi, Tennessee and South Carolina. Mike Espy told the NATIONAL LAW JOURNAL that if school districts in these states have the same poor practices under the FLSA as Mississippi does, the group may go national.¹ The map on the website indicates that Illinois, Missouri and Louisiana may be the School Litigation Group's next targets.

¹ Gary Young, *School Suits 101*, NATIONAL LAW JOURNAL, Mar. 17, 2003, available at <http://www.law.com/jsp/article.jsp?id=1046833573507>.

Mississippi has dealt with thousands of FLSA claims in the last few years. The box below summarizes the volume and cost of Mississippi's cases. This article discusses some of the FLSA issues Mississippi faced and some of the steps districts can take to avoid FLSA problems.

Since the summer of 2000, employees in approximately 105 of Mississippi's 152 school districts have brought Fair Labor Standards Act lawsuits. About 6,000 plaintiffs filed complaints. Most cases have settled in the range of between \$4,000 and \$5,000 per plaintiff. The Harrison County school district, when faced with lawsuits, determined that it owed approximately \$500,000 to about 250 of its 2,000 employees. Over 100 employees thought the district owed them more, and a federal judge agreed, to the tune of an additional \$160,000.¹ The total cost to Mississippi school districts has been between \$15 and \$20 million.

WHAT IS THE NATURE OF THE CLAIMS?

Employees in Mississippi claimed that they had been denied lawfully earned overtime because of one or more of the district's improper practices, which are described below. Districts in Mississippi were largely compelled to succumb to claims, because the burden is on the employer to prove that it did not violate the FLSA. Districts often kept poor records regarding employee work hours. So, even if employees had non-meritorious cases, the districts could not prove it.

- "Suffering or permitting" employees to work over 40 hours a week

If covered employees work more than 40 hours a week in a 7-day period, they are entitled to time and one-half of their basic hourly rate for the hours worked over 40. The most common problem in Mississippi was that employees were not being paid overtime. For example, in some instances, the superintendent's secretary was taking notes once a week at evening board meetings, a teacher assistant who was married to a teacher was coming to work early with his or her spouse, or a particularly conscientious employee skipped lunch when things were hectic. In each of these instances, if the employee worked over 40 hours a week he or she should have accrued overtime.

- Dual employment

If employees work two non-exempt positions for the district and their total hours exceed 40 per week, they must be paid a blended overtime rate. A common example of dual employment is when a bus driver also works as a custodian. Districts run into FLSA problems when they fail to notice that a dual employee is working over 40 hours a week in total and fail to pay the dual employee overtime. The following example illustrates how the blended overtime rate is computed. If an employee normally works 60 percent of his or her time at a \$20 per hour position and 40 percent of his or her time at a \$10 per hour position, the blended rate is \$16 ((60% x \$20) +(40% x \$10)). So, the blended overtime rate is \$24 per hour (\$16 x 1.5).

- Joint employment

Joint employment issues arise under the FLSA when it appears that an employee is working for two employers, but for FLSA purposes is deemed to be working for one employer. The joint employer must pay overtime if a covered employee works over 40 hours a week in both positions. Joint employment exists unless the multiple employers are “entirely independent of each other and are completely disassociated with respect to the employment of a particular employee.” Districts have joint employment problems when they have outsourced part of their operations and an employee of the district works for both. For example, say an employee worked as both a bus driver and a custodian. Then, the district outsources bus driving and the employee continues to drive a bus for the outsourced company and work for the district as a custodian. In the combined jobs, the employee works over 40 hours a week. In Mississippi, the courts viewed outsourced employees who also worked for the district as joint employees, and concluded that they should be paid overtime if they worked a total of over 40 hours in both positions.

- Out-of-town travel

In general, employers are not required to compensate employees for non-working hours related to out-of-town travel. However, out-of-town time is only considered non-working if the employee is not required to perform any duties or other work. An employee who performs two jobs for the district, one of which involves out-of-town travel, can easily work over 40 hours a week. For example, take a bus driver who drives regular routes and extra trip routes for extracurricular events. One extracurricular trip route alone can take a number of hours to drive. Moreover, if the driver is required to perform any duties during the extracurricular event, such as supervising students, he or she must be paid for that time.

- Breaks

Employees need not be compensated for meal periods that last 30 minutes or more or rest periods that last 20 minutes or more. While these rules seem straightforward and easy to apply, some school districts have, for example, 22 or 23 minute lunch periods. If this is the amount of a lunch break given to a non-exempt employee, such employee must be paid for this lunch period.

- Compensatory Time

School district employees may receive one and one-half hours of compensatory time for each hour worked over 40. However, an agreement to give comp time must be memorialized *before* the work is performed in a collective bargaining agreement or a memorandum of understanding for unionized employees or through an “agreement or understanding” for non-unionized employees. To create adequate proof of a comp time agreement, it may be advisable to require non-union employees to sign and date a written agreement before performing overtime. Employees may only accrue up to 160 overtime hours (240 comp time hours); additional time above 160 hours must be paid. Employees

must be permitted to use comp time within a “reasonable period” after the request is made as long as using it does not “unduly disrupt” the operations of the school. Finally, if an employee quits and has unused comp time, the employee must be paid in cash for this time at a rate no less than the higher of the average regular rate of pay for the last three years or the employee’s final regular rate of pay.

- Employees who are exempt from overtime - Executive and Administrative Employees

Executive and administrative employees, as defined by the FLSA, are two of the “white collar” exceptions who do not have to be paid overtime under the FLSA. For an employee to be classified as executive, his or her primary duty must be the management of the enterprise, and he or she must direct the work of two or more employees. An administrative employee’s primary duty must be office or non-manual work that directly relates to policies or the general business operations and requires the exercise of discretion and independent judgment. Determining whether an employee meets the primary duty requirements can be difficult when an employee performs multiple duties some of which are “exempt” and some of which are “non-exempt.”

According to the Department of Labor (DOL), in the “ordinary case” an employee must spend over 50 percent of his or her time on primary duties to be classified as executive or administrative. However, in some cases, an employee can spend less than 50 percent of his or her time on primary duties and still be considered an executive or administrative employee under the FLSA. Often in rural school districts, the head cook or the lead food service worker may have management duties and may supervise the kitchen staff, but may also have to perform non-management duties like preparing and serving food. If such employee’s management duties do not exceed 50 percent of his or her work time, in most cases the employee will not qualify as an executive employee.

The DOL has proposed changes to the duties tests for “white collar” employees that may affect the exempt or non-exempt status of some school district employees. The Department published the proposed regulations on March 31, 2003, and is accepting comments on them until June 30, 2003. The proposed regulations are published in the Federal Register at 29 CFR 541 and are available on the Department of Labor’s website at <http://www.dol.gov/esa/whd/>.

- Occasional and sporadic

The FLSA allows employees at their option to perform “occasional and sporadic work” that will not be used to compute overtime hours. However, this exception is narrow. For it to apply, the work performed must truly be occasional and sporadic; it must not be similar to work regularly performed; it cannot be a condition of employment; and it does not apply to regular part-time jobs. For example, a food service employee staying late to help prepare food for a banquet or a secretary collecting tickets at all track meets is not occasional and sporadic work.

WHAT ARE THE PENALTIES FOR VIOLATING THE FLSA?

Both the district and *individual supervisors* may be liable for FLSA violations. Moreover, districts insurance will not likely cover these claims.

- Civil penalties

First, if the DOL files a civil suit, an employer can be liable for unpaid overtime for the last two years for non-willful violations and up to three years for willful violations as well as future injunctive obligations. Proving a willful violation is fairly easy — the standard is “knowing” or “reckless disregard” for whether conduct violates the overtime obligations. Second, employers may also be liable for liquidated damages equal to the amount of back pay owed — effectively doubling back pay liability. Third, employers that lose these cases may have to pay the plaintiffs’ reasonable attorneys’ fees, litigation costs and prejudgment interest. Fourth, districts may owe the employees’ retirement fund a contribution plus interest based on the back pay. Fifth, the DOL may assess a \$1,000 civil money penalty per employee, per each repeated or willful violation.

If the DOL attempts to settle a case with a school district, rather than file a lawsuit, it will likely request two years of back pay and no liquidated damages or fines, except in egregious cases. If the DOL does not bring a civil lawsuit against an employer, individuals may do so and recover the damages listed in the above paragraph.

- Criminal penalties

The DOL may also pursue criminal penalties for willful violations. The violator may be fined up to \$10,000 for the first offense. A second conviction may result in up to six months in jail.

PREVENTIVE LAW TIPS: HOW DOES A DISTRICT AVOID VIOLATING THE ACT?

Know the law!

- Makes sure that employees have been properly classified as exempt or non-exempt. Most non-teaching, non-administrator employees (custodians, bus drivers, secretaries, food service employees, teacher assistants) are covered by the FLSA, which means that such employees must receive overtime pay for all time worked over 40 hours a week.
- The test for determining whether an employee is covered or exempt is **NOT** whether the employee receives a salary. A covered employee may be paid a salary. However, if he or she works more than 40 hours a week, he or she must be paid overtime based on time and one-half of the regular hourly rate of the salary. The employer and the employee *may not* agree to waive the employee’s rights to overtime under the FLSA.

- Employers **must** keep accurate records regarding the time covered employees have worked. For nonexempt employees who are entitled to overtime, the FLSA requires that employers keep records showing, among other things: employee's name, time and day on which the workweek begins, regular hourly rate, hours worked each day, total hours for each workweek, and total weekly straight time and overtime earnings. A time sheet recording over and over again that an employee worked from 8:00 am to 4:30 pm will not work because it does not reflect the time the employee is actually working. For example, if an employee who is scheduled to work at 8:00 am begins working at 7:52 am the employee's time record must reflect that the employee began work at 7:52 am NOT 8:00 am.
- While time clocks are not required by the FLSA, they may eliminate many record keeping problems.
- If an employer "suffers or permits" an employee to work overtime, even after telling the employee that he or she cannot work overtime, the employer must pay the overtime. This is true even if the employer has promulgated a rule stating that overtime is not allowed and regardless of whether the overtime is performed at home or at work. So if a school district does not want overtime performed, it should adopt a policy prohibiting unauthorized overtime and inform the employees regarding the policy's terms and that the district will enforce the policy through discipline if necessary. If employees refuse to follow this directive, the district must still pay the overtime but should discipline the employees in order to achieve compliance.
- Make sure that FLSA notices are posted where **all** employees are likely to see them. As evidence of the fact that the School Litigation Group is "school-friendly," Mike Espy told the NATIONAL LAW JOURNAL that he has not yet invoked the provision of the FLSA that would make districts liable for 20 years of overtime if federally mandated overtime notices are not posted.² According to Espy, many districts post the notices in the teachers' lounge, but not in locations where covered employees will likely see them. The FLSA requires that notices be located in "conspicuous places in every establishment where such employees are employed so as to permit them to observe readily." School attorneys should not count on Mr. Espy's continued tolerance of misplaced posters.
- Some states, like California, have state wage and hour laws that are more generous to employees than the FLSA. In these instances, you must comply with both state and federal law.

Have a clear, lawful FLSA policy, communicate it and enforce it.

² *Id.*

- The district should review all policies regarding overtime, particularly relating to record keeping, dual employment, out-of-town travel, breaks, compensatory time and joint employment. Districts need to consider the following for covered employees: Do the policies make clear that employees will be paid for all time worked? Do the policies make clear if and under what circumstances overtime is permitted? Have these policies been distributed and explained to the administration and covered employees? Are the policies being followed?
- Provide adequate training on the requirements of the FLSA to managerial and supervisory employees such as superintendents and principals. Also, provide training to human resource personnel, business managers and bookkeepers who administer this law on a day-to-day basis. Provide this training *frequently*. Laws change often, and so do school district personnel.
- Make sure that covered employees receive copies of FLSA policies and that these policies are explained and enforced.

If districts do not want to pay overtime, consider doing the following:

- Minimize dual employment to the extent that covered employees work no more than 40 hours a week. If operations are going to be outsourced, separate the outsourced operations.
- Assign paid extracurricular duties to exempt employees. Covered employees must be paid overtime for performing these duties if their total workweek exceeds 40 hours.
- Use caution in allowing non-exempt employees to volunteer to lead extracurricular activities without pay. This practice may create FLSA problems if such employees later claim they did not volunteer for the work, but rather were required to take it. Proof that the assignment was voluntary can be particularly difficult if paid “volunteers” perform similar functions. While the DOL may handle this issue differently in each state, in general an employee may only “volunteer” without pay under the FLSA if: (1) it is made clear to the employee that he or she is a volunteer; (2) the work is occasional and sporadic; and (3) the volunteer work is unrelated to the employee’s regular job.

WHAT SHOULD A DISTRICT DO WHEN FACED WITH A FLSA CLAIM?

- Call the district’s legal counsel immediately to get advice on how to investigate and settle the claim as quickly as possible.
- Strategize to defeat plaintiffs’ attorneys’ attempts to establish “collective actions.” Under the FLSA, employees may file a “collective action” and recover on behalf of other “similarly situated” employees. If a collective action is permitted, plaintiffs’ attorneys may send letters to all non-exempt employees in the district

asking them to join the lawsuit. These letters may cause more employees to join the lawsuits than would join if no letter was sent, including employees who have no valid claim. While the courts' interpretations of "similarly situated" vary from state to state, school attorneys in Alabama have successfully argued in many cases that district employees are not "similarly situated" and have avoided collective actions.

- Remember that it is a violation of the FLSA to fire or retaliate in any other manner against an employee who has filed a complaint under the FLSA or cooperates with a DOL investigation.
- Stay on good terms with union representatives. In states that are unionized, union representatives rather than plaintiffs' attorneys may assist employees in resolving FLSA claims. Working with union representatives rather than plaintiffs' attorneys may be to the district's advantage as the district may be able to reach out-of-court settlements and avoid paying attorneys' fees or liquidated damages.

Finally, if a district believes it may be violating the FLSA but has not yet been sued, it may want a law firm that specializes in this area of the law to perform a FLSA audit. The audit should be subject to the attorney-client privilege so that it does not have to be disclosed if claims subsequently are filed. A good audit will evaluate the district's current FLSA practices and procedures, inform the district if and how it may be violating the FLSA and provide assistance in making necessary changes to comply with the law.

The DOL also performs self-audits as long as no lawsuits have been brought against the district. In a self-audit, the DOL will determine if the FLSA has been violated and will assess how much the district owes in back pay for the last two years. The advantage of the self-audit is that in most cases the district can avoid paying liquidated damages, attorneys' fees and the third year of back pay. Moreover, taking this proactive step shows good faith on the part of the district, which will have a continuing relationship with many employees, and may discourage employees from bringing individual lawsuits. The disadvantage of a self-audit is, unlike in a court settlement or in a DOL investigation (which is initiated by the DOL without the request of the employer), the district cannot obtain a release of claims, so individuals can still sue under the FLSA. Also, the DOL may uncover and pursue back pay claims for people who would not have found or pursued claims on their own. Requesting a self-audit may be a more attractive option if the district is certain it has violated the law, lawsuits are imminent, and the DOL office in the state is fair and cooperative. However, this course of action only should be followed after consulting with experienced counsel in these matters.

This article was prepared with the assistance of David Watkins of Adams and Reese in Jackson, Mississippi; Sally Brewer Howell of the Alabama Association of School Boards in Montgomery, Alabama; Spud Seale and Elizabeth Carter of Hill, Hill, Carter, Franco, Cole and Black in Montgomery, Alabama; and David S. Fortney of Fortney and Scott in Washington D.C. David Watkins and James A. Keith have represented most of the school districts in Mississippi in the FLSA cases. Spud Seale and Elizabeth Carter have

represented the majority of school districts in Alabama with FLSA cases and have successfully prevented plaintiffs' attorneys from bringing collective actions in many school districts. David S. Fortney has counseled a wide range of public and private sector clients on FLSA compliance matters, and he has served as an expert for parties in these matters.