



Memo 5

December 2018

## OVERTIME COMPENSATION

### *Caution/Warning*

At the time this memorandum was updated, the proposed regularity changes regarding the applicable income minimums for exempt employees contained in 81 Fed. Reg. 32, 391 have been permanently enjoined by a federal court's ruling in *State of Nevada v. U.S. Department of Labor*.<sup>1</sup> As such, the new regulations are not addressed in this memorandum, and the Trump administration has appealed this ruling to the Fifth Circuit Court of Appeals.<sup>2</sup> While this appeal is pending, the Department of Labor is simultaneously in the process of developing new regulations and has issued a request for information on its current regulations and engaged in hosting "public listening sessions" to gather views for potential regulatory revisions.<sup>3</sup> It is anticipated that the Department of Labor will have new proposed regulations developed by the spring of 2019. Given that this area of law is presently in flux, we recommend that you consult with our office regarding any potential rule changes.

### **A. Introduction - Applicability of Overtime to School Personnel**

Both the Education Code and federal law have long required that classified employees of schools and community college districts be compensated for overtime worked at one and one half times their regular rate of pay. Overtime is generally defined as any time worked in excess of eight hours per day or time in excess of 40 hours per week. However, there are some regulations discussed below that allow for employees to have a four day 40 hour workweek and/or compensatory time off in lieu of overtime.

Additionally, the Education Code and federal law also permit schools and community college districts to exempt certain "management" employees from overtime provisions. When

---

<sup>1</sup> *State of Nevada, et al. v. U.S. Department of Labor, et al.*, U.S. District Court Eastern District of Texas, Case No. 4:16-CV-731, order issued August 31, 2017

<sup>2</sup> *State of Nevada, et al. v. U.S. Department of Labor, et al.*, 5<sup>th</sup> Circuit Court of Appeals, filed on October 30, 2017

<sup>3</sup> RIN 1235-AA20 issued on July 26, 2017, at <https://federalregister.gov/d/2017-15666> & <https://www.dol.gov/whd/overtime/listening.htm>.

analyzing overtime issues, it is important to understand that both state and federal law impact when and how school and community college districts calculate overtime.

**B. Overtime Requirements Under the Education Code and Other State Laws**

The specific California regulations pertaining to overtime that have been developed pursuant to the Labor Code do not apply to state and local government employers, including school and community college districts.<sup>4</sup> Instead, at the state level, the Education Code has specific provisions regarding the applicability of overtime to employees of school and community college districts.

**C. School Districts**

Under the Education Code, non-exempt classified employees must receive overtime compensation for any work performed in excess of the regular work week. Education Code section 45126(a) provides that the default regular work day for a non-exempt classified employee be set at eight hours and no more than 40 hours a week. Any work performed in excess of eight hours a day or 40 hours a week must be compensated on an overtime basis.<sup>5</sup>

Additionally, Education Code section 45131 sets the regular work week to no more than five consecutive days per week. Under Section 45131, any non-exempt classified employee who works four or more hours a day shall be paid at the overtime rate on the sixth day of consecutive work even if the employee has worked a total of less than 40 hours over the previous five days.

For employees who work less than four hours a day, Education Code section 45131 also provides that the overtime rate of pay be paid on the seventh consecutive day of work in a week regardless of total hours worked by the employee on the sixth day.

Irrespective of the above provisions, the Education Code specifically allows for the governing board of a school district to establish alternative work week schedules which would govern when overtime compensation would apply. The board may set the regular workweek at four consecutive days of 10 hours each or a nine hour per day 80 hour per two week schedule<sup>6</sup>, but the association, if any, must agree to the establishment of the extended workday schedule.<sup>7</sup> Additionally, the board may approve a 12 hour per day 80 hour per two week work schedule for school police departments by a collective bargaining agreement.<sup>8</sup>

---

<sup>4</sup> Title 8 C.C.R. § 11040.(1)(B)

<sup>5</sup> Educ. Code § 45128

<sup>6</sup> Educ. Code §§ 45132 & 45133

<sup>7</sup> Educ. Code §§ 45132 & 45133

<sup>8</sup> Educ. Code § 45134

A governing board may also set the work week at less than eight hours a day and 40 hours a week for classes of employees.<sup>9</sup> If the governing board has established a workday of seven hours and a work week of 35 hours for classified employees or for current classes of classified positions, then those employees who work in excess of seven hours a day or 35 hours a week must be compensated on an overtime basis.<sup>10</sup>

The default for overtime compensation is pay at one and one half times the regular rate of pay.<sup>11</sup> The Education Code is silent on how to calculate the regular rate of pay as the Fair Labor Standards Act (“FLSA”) is applicable.

In lieu of an overtime payment, there are circumstances in which the district may offer the employees regular salary and comp time for excess hours worked.<sup>12</sup> Under the FLSA, the provision for compensatory time can only be provided pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees.<sup>13</sup> Employees may accrue not more than 240 hours of compensatory time for hours worked.<sup>14</sup> The compensatory time off must be used within 12 calendar months following the month in which the overtime was worked.<sup>15</sup> Any unused compensatory time shall be paid out to the employee at termination of employment.<sup>16</sup>

As discussed under exemptions below, pursuant to Education Code section 45130, the governing board of a district may pass a resolution to exempt supervisory, administrative, or executive positions from overtime provisions.

#### **D. Community College Districts**

For community college districts, the work week is limited to eight hours a day, 40 hours a week. The board may establish a shorter work week, but similar to school districts, if the governing board has established a workday of seven hours, and a work week of 35 hours, for classified employees or for current classes of classified positions, then those employees who work in excess of seven hours a day, or 35 hours a week, must be compensated on an overtime basis.<sup>17</sup> Full-time employees (considered at least seven hours a day, 35 hours a week) who work five consecutive days must be given overtime compensation for all work performed on the sixth

---

<sup>9</sup> Educ. Code § 45128

<sup>10</sup> *Ibid*

<sup>11</sup> Educ. Code § 45128

<sup>12</sup> Title 29 U.S.C. § 207(o)(1) and Educ. Code §§ 45128 & 45129

<sup>13</sup> Title 29 U.S.C. § 207(o)(2)(A)

<sup>14</sup> Title 29 U.S.C. § 207(o)(3) (Note, however, under § 207(o)(3) public safety employees, including school district police, can accrue up to 480 hours in compensatory time)

<sup>15</sup> Educ. Code § 45129

<sup>16</sup> Title 20 U.S.C. § 207(o)(4)

<sup>17</sup> Educ. Code § 88026

consecutive day.<sup>18</sup> Additionally, part-time employees who work less than four hours a day must be provided overtime compensation for any work done on the seventh consecutive day of work.

The default for overtime compensation is pay at one and one half times the regular rate of pay.<sup>19</sup> The Education Code is silent on how to calculate the regular rate of pay. As such, the FLSA calculation is applicable. In lieu of an overtime payment, a community college board may offer the employees' regular salary and comp time for excess hours worked.<sup>20</sup>

Under the FLSA, the provision for compensatory time can only be provided pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees.<sup>21</sup> Employees may accrue not more than 240 hours of compensatory time for hours worked.<sup>22</sup> The compensatory time off must be used within 12 calendar months following the month in which the overtime was worked.<sup>23</sup> Any unused compensatory time shall be paid out to the employee at termination of employment.

As discussed under exemptions below, under Education Code section 88029, the governing board of a community college district may exempt supervisory, administrative, or executive positions from overtime provisions.

#### **E. Overtime Requirements in the Fair Labor Standards Act**

The Fair Labor Standards Act<sup>24</sup> applies to all state and local government employers, including public schools and community college districts.<sup>25</sup> From the prospective of school and community college districts, even after the board may have exempted employees from overtime under the Education Code, the provisions of the FLSA still govern which employees are exempt from overtime, what employee activities are included as "work," and how the regular rate of pay is calculated.

#### **F. Employees Exempt from Overtime**

1. Teachers, Instructors and Other Certificated Employees. All teachers and other certificated employees (defined as an employee in an academic or administrative capacity) of a school or community college district are exempt from overtime under FLSA.<sup>26</sup> This exemption of teachers/instructors from the FLSA overtime exemptions applies even if the teacher engages in

---

<sup>18</sup> Educ. Code §§ 88027 & 88030

<sup>19</sup> Educ. Code § 88027

<sup>20</sup> Educ. Code § 88027

<sup>21</sup> Title 29 U.S.C. § 207(o)(2)(A)

<sup>22</sup> Title 29 U.S.C. § 207(o)(3)

<sup>23</sup> Educ. Code § 88030

<sup>24</sup> Title 29 U.S.C. § 201, et seq.

<sup>25</sup> *Garcia v San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)

<sup>26</sup> Title 29 U.S.C. § 213(a)(1)

work beyond “normal” teaching duties, such as professional development and training, attending conferences, attending IEP team meetings, coaching athletic teams, or sponsoring an academic or extracurricular club.<sup>27</sup> Teachers may negotiate for additional wages or stipends for ancillary responsibilities associated with co-curricular duties, however, this will not trigger the FLSA overtime provisions.<sup>28</sup> Additionally, the overtime provisions do not apply to part-time teachers so long as they are paid a compensation amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employees of the same grade or assignment.<sup>29</sup>

2. Classified Employees. In order for classified employees to be exempt from overtime, the exemption requirements in both the Education Code and FLSA must be satisfied.

a. Overtime Exemption Under the Education Code. For classified employees to be exempt from overtime, the governing board or personnel commission must, by resolution pursuant to Education Code section 45130 or 88029, exclude supervisory, administrative, or executive positions from the state overtime provisions. The resolution must certify in writing that the duties’ flexibility of hours, salary, benefit structure and authority of such positions or classes are of such a nature that they should be set apart from the Education Code’s overtime provisions and that the employees in those positions and classes will not be unreasonably discriminated against by such exclusion.<sup>30</sup> A model resolution follows as Attachment A.

b. Overtime Exemption Under the FLSA. Once the governing board has adopted the resolution exempting classified positions from overtime, the test for exemption under the FLSA must still be satisfied. In order to be exempt from the minimum wage and overtime provisions of the FLSA, executive, administrative, or professional employees must be paid on a salary basis and must meet the applicable standard or highly compensated employee duties test to be exempt.<sup>31</sup> It is effectively a two-step process to determine if an employee is exempt from overtime - first, the employee must meet the “salary test,” and second, the “duties test” must be satisfied.<sup>32</sup>

There are two potential ways to meet the “salary test”: (1) by being compensated the minimum salary level **and** being compensated on a salary basis, or (2) being classified as a highly compensated employee.

The minimum salary level to be considered as potentially overtime exempt is presently set by the permanent injunction issued in *Nevada, v. U.S. Department of Labor* at amounts from the 2004 regulations, which require the employee to be compensated above

---

<sup>27</sup> See. *Ind. Educ. Empl. Rel. Bd. v Nettle Creek Classroom Teachers Ass’n*, 26 N.E. 3d 47. (2015)

<sup>28</sup> *Ibid*

<sup>29</sup> *Kettenring v L.A.U.S.D.*, 167 Cal. App. 4th 507 (2008)

<sup>30</sup> Educ. Code §§ 45130 & 88029

<sup>31</sup> 29 C.F.R. §§ 541.601 & 541.602

<sup>32</sup> *Hancock v. Woodson Incorporation*, 2012 U.S. Dist. LEXIS 32297. (2012 So. Dist. Of Mississippi)

the rate of \$455 per week (or \$23,600 per year).<sup>33</sup> The employee must then be compensated on a salary, not hourly basis.<sup>34</sup>

Alternatively, under the FLSA, an employee may be classified as a “highly compensated employee” if they are paid at least \$134,004 in salary or salary plus commission/non-discretionary bonuses, and thereby be overtime exempt.<sup>35</sup>

If the salary requirements under the FLSA are not met (or if the board pays the employee on an hourly not salary basis), a classified employee will be required to be paid overtime even if the board has passed a resolution under Education Code section 45130 or 88029.

3. The FLSA Job Duties Test. If the salary test is met, the second step is to review the job duties of the position. Exempt employees generally fall into the following major categories:

a. Executive. To qualify for the executive exemption under the regulations, an “employee employed in a bona fide executive capacity” is any employee who meets the salary test and (i) whose primary duty is management of the enterprise in which the employee is employed, or of a customarily recognized department or subdivision thereof; (ii) who customarily and regularly directs the work of two or more other employees; and (iii) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.<sup>36</sup> The “hire or fire” element is satisfied even if the employee does not have full authority to hire or fire. The requirement is satisfied if the employee gives suggestions and recommendations that are given “particular weight” by the employer.<sup>37</sup>

---

<sup>33</sup> 29 C.F.R. § 541.600 (Apr. 23, 2004 revisions). Almost all employees earning less than a minimum salary of \$455 per week will qualify for overtime, regardless of their job duties. The level proposed in the 2016 revision of 29 C.F.R. § 541.600 is \$913 per week or \$47,476 per year. However, there is a notable exception under both sets of regulations for teachers who are exempt regardless of their salary under 29 C.F.R. § 541.600(e).

<sup>34</sup> 29 C.F.R. § 541.602. Although not applicable to the school setting, the salary test is also satisfied by alternate means in the context of commission sales persons.

<sup>35</sup> Title 29 C.F.R. § 541.601(a) & (b)

<sup>36</sup> 29 C.F.R. § 541.100

<sup>37</sup> 29 C.F.R. § 541.105. The regulations list a number of factors to be considered in determining whether an employee’s suggestions and recommendations are given “particular weight,” including “whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. However, “particular weight” does not include an occasional suggestion with regard to a co-worker.

b. Administrative. To qualify for the administrative exemption, the employee must meet the salary test and be “employed in a bona fide administrative capacity,” which means the employee (i) whose primary duty is 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 (ii) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.<sup>38</sup> The administrative exemption can apply to employees who work in human resources, budgeting, or as an executive/administrative assistant to senior management, so long as the position provides the employee with significant decision-making authority and the employee is not just following specific instructions or prescribed procedures.<sup>39</sup>

c. Professional. The professional exemption extends to “learned” professionals and “creative” professionals. The employee must perform work requiring advanced knowledge. The advanced knowledge must be in a field of science or learning and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.<sup>40</sup> This exemption would include all credentialed employees of a school district, a majority of whom would be teachers that are exempt from overtime regardless of compensation.<sup>41</sup>

d. Computer Employees. The 2004 regulations consolidated existing rules establishing an exemption for computer employees, including “computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field. The requirements for the exemption are as follows: “The ... exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than \$455 per week..., exclusive of board, lodging or other facilities, and the ... exemption applies to any computer employee compensated on an hourly basis at a rate of not less than \$27.63 per hour. In addition, ... the exemptions apply only to computer employees whose primary duty consists of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.”<sup>42</sup>

4. Highly Compensated Employees. “Highly compensated employees” are employees with a total annual compensation of at least \$134,004 who “customarily and regularly” perform any one or more of the exempt duties or responsibilities of an executive, administrative or

---

<sup>38</sup> 29 C.F.R. § 541.200

<sup>39</sup> 29 C.F.R. § 541.203(b), (d) & (e)

<sup>40</sup> 29 C.F.R. §§ 541.300 & 541.301

<sup>41</sup> 29 C.F.R. § 541.303

<sup>42</sup> 29 C.F.R. § 541.400(b)



professional employee.<sup>43</sup> The job duties test is less restrictive for a highly compensated employee than in any of the other major categories because the employee's primary duty does not need to fit within any of the defined exemptions as long as the employee "customarily and regularly" performs exempt duties.

As discussed before, if a classified position meets both the income and job duties test, then that position is exempt from overtime under the FLSA. Non-exempt school employees would generally include the following classifications:

- Bus Drivers
- Cafeteria Workers
- Dieticians
- Custodial Workers
- Day Care Teachers and Workers
- Hall or Lunch Room Monitors
- Secretarial Support
- Security Personnel
- Building Management

#### **G. Activities Subject to Overtime**

Under both the Education Code and FLSA, districts are required to pay overtime compensation for all "hours worked" in excess of the applicable work week.<sup>44</sup> "Hours worked" is a legal term of art that is subject to dispute. The regulations under the FLSA define "all hours" as including all hours that an employee is "suffered or permitted to work" for the employer.<sup>45</sup> Hours worked also include time during which an employee is required to be on the employer's premises, on duty, or at a prescribed work place.<sup>46</sup> The definition of hours worked can require that an employee be compensated for time, such as travel time, waiting time, and certain meal, rest and sleep periods. Under the rules, the courts and the United States Department of Labor developed a "de minimis" rule whereby short periods of time may be disregarded in calculating work time and the FLSA authorizes the rounding of an employee's start and stop times.<sup>47</sup> However, any preparation activities that are integral and indispensable to the principal activity of the employee are considered compensable for overtime purposes.<sup>48</sup> Some cited examples of compensable work time that may be applicable in the school setting included, but may not be limited to, the following:

---

<sup>43</sup> 29 C.F.R. § 541.601(a)

<sup>44</sup> Educ. Code §§ 45128 & 88026 and Federal Law

<sup>45</sup> Title 29 U.S.C. § 203(g)

<sup>46</sup> 29 C.F.R. § 785.7

<sup>47</sup> *Anderson v. Mt. Clemens*, (1946) 328 U.S. 680.

<sup>48</sup> *Integrity Staffing Solutions, Inc. v. Busk*, (2014) 135 S. Ct. 513.



- Time by budget or fiscal employees who are required to remain waiting or on call until an official audit is finished;<sup>49</sup>
- Charitable work requested or controlled by the employer;<sup>50</sup>
- Emergency work travel time;<sup>51</sup>
- Grievance assistance unless a collective bargaining agreement provides otherwise;<sup>52</sup>
- Labor management committee meetings regarding working conditions or CBA interpretation, unless the CBA provides otherwise;<sup>53</sup>
- Lunch or other periods if employees are not free to leave their post or the time is too short to be considered useful;<sup>54</sup>
- Employer directed medical attention during working hours, including mandatory drug tests;<sup>55</sup>
- Time spent “on-call” where the employee must stay on or close to the work premises;<sup>56</sup>
- Rest periods or breaks from five to 20 minutes;<sup>57</sup>
- Employer required training;<sup>58</sup>
- Traveling from job site to job site, or traveling for work out of town during work hours;<sup>59</sup>
- Waiting for work while on duty.<sup>60</sup>

#### H. Activities Not Subject to Overtime

The regulations also provide many examples of work-related matters that are not subject to potential overtime calculation and for which an employee need not be compensated:

- Absences and leaves or time spent before, after, or between regular working hours;<sup>61</sup>
- Routine changes of clothes or washing up at the beginning or end of each workday, if for the employee’s convenience, unless there is collective bargaining to the contrary;<sup>62</sup>

---

<sup>49</sup> 29 C.F.R. § 785.15

<sup>50</sup> 29 C.F.R. § 785.44

<sup>51</sup> 29 C.F.R. § 785.36

<sup>52</sup> 29 C.F.R. § 785.42

<sup>53</sup> 29 C.F.R. § 785.42

<sup>54</sup> 29 C.F.R. § 785.19

<sup>55</sup> 29 C.F.R. § 785.43

<sup>56</sup> 29 C.F.R. § 785.17 and *Armour & Co. v. Wantock*, (1944) 323 U.S. 126

<sup>57</sup> 29 C.F.R. § 785.18

<sup>58</sup> 29 C.F.R. §§ 785.27 & 785.29

<sup>59</sup> 29 C.F.R. §§ 785.38 & 785.39

<sup>60</sup> 29 C.F.R. § 785.15

<sup>61</sup> 29 C.F.R. §§ 778.218 & 790.7

<sup>62</sup> Title 29 U.S.C. § 203(o)

- Charitable work done voluntarily outside of working hours;<sup>63</sup>
- Grievance procedures classified as non-paid under the CBA;<sup>64</sup>
- Lunch or other meal periods involving no duties and lasting at least one half hour;<sup>65</sup>
- Medical attention outside of working hours, or not at the direction of the employer;<sup>66</sup>
- On-call time where the employee merely leaves a telephone number and is not restricted;<sup>67</sup>
- Personal time for a worker who lives on his or her employer's premises;<sup>68</sup>
- Trade school attendance or other training programs, which are voluntary or are unrelated to present working conditions;<sup>69</sup>
- Traveling to and from home and work;<sup>70</sup>
- Traveling on overnight trips, during non-working hours, unless also performing duties or other work;<sup>71</sup>

In addition to the exemptions contained in the regulations, the courts have held that for classified school employees who voluntarily engage in coaching or other out of class volunteering (such as advising a club), they shall not have those hours considered hours worked for overtime in any calculation, even if the classified employee is receiving a stipend.<sup>72</sup>

#### **I. Calculation of the Regular Rate of Pay**

Under the Education Code and FLSA, a classified employee who works overtime shall be compensated at a rate of at least equal to time and one half of the “regular rate” of pay.<sup>73</sup> “Regular rate” is defined by the FLSA as including all remuneration for employment paid to, or on behalf of, the employee subject to certain statutory exclusions.<sup>74</sup> Under Section 207(e) and the relevant case law and interpretative regulations, the regular rate cannot be stipulated by the parties; instead, the rate must be discerned from what actually happens under the governing employment contract.<sup>75</sup> Where a classified employee in a single work week works at two or more different types of work, the employee’s regular rate of pay for any overtime for that week is calculated as the

---

<sup>63</sup> 29 C.F.R. § 785.44

<sup>64</sup> 29 C.F.R. § 785.42

<sup>65</sup> 29 C.F.R. § 785.19

<sup>66</sup> 29 C.F.R. § 785.43

<sup>67</sup> 29 C.F.R. § 785.17 & *Cochrun v. County of San Bernardino*, (1964) 229 Cal. App. 2d 362

<sup>68</sup> 29 C.F.R. § 785.23 *Thompson v. Loring Oil Co.*, 50 F. Supp. 213 (W.D. La. 1943.)

<sup>69</sup> 29 C.F.R. §§ 785.27 & 785.30

<sup>70</sup> 29 C.F.R. § 785.35

<sup>71</sup> 29 C.F.R. § 785.39

<sup>72</sup> *Purdham v. Fairfax County Sch. Bd.* (4th Cir 2011) 637 F.3d 421

<sup>73</sup> Educ. Code §§ 45128 & 88030 and Title 29 U.S.C. § 207(a)

<sup>74</sup> 29 U.S.C. § 207(e)

<sup>75</sup> *Local 246 Util. Workers Union v. So. Cal. Edison Co.* (9<sup>th</sup> Cir. 1996) 83 F.3d 292

weighted average of such rates.<sup>76</sup> The concept of a broadly defined regular rate is intended to prevent employers from circumventing the FLSA's overtime pay requirements by paying artificially low hourly pay rates and paying the balance of compensation due by other means, such as bonuses and stipends.<sup>77</sup> The courts have even found that the prorated value of any free tuition (or student fees) for college classes can be included as part of an employee's base rate of pay.<sup>78</sup> As such, the calculation of the regular rate of pay includes the hourly prorating of all non-discretionary stipends (including longevity stipends<sup>79</sup>) and all other forms of bonuses except the following:

- (1) Sums paid, such as gifts made at Christmas time or on other special occasions, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;<sup>80</sup>
- (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, and reimbursement for employment related travel expenses;<sup>81</sup>
- (3) Additional sums paid that when the timing of payment and the amount paid were at the sole discretion of the employer and not pursuant to any prior contract or were made to an approved bona fide profit-sharing or stock option plan or talent fees paid to performers;<sup>82</sup>
- (4) Contributions irrevocably made to a third party retirement or health insurance plan (including payments to PERS) or similar benefits for employees; however, any cash payments made to the employee in lieu of benefits is included in the calculation of the employee's regular rate;<sup>83</sup>
- (5) Extra compensation provided by a premium rate paid for certain hours worked (a shift differential) if a premium payment for the shift differential is addressed by an applicable collective bargaining agreement;<sup>84</sup>
- (6) An employer's buy back for unused sick leave;<sup>85</sup>
- (7) An employer's buy back of unused vacation time;<sup>86</sup> and
- (8) Coaching stipends are not calculated for the regular rate of pay of classified employees.<sup>87</sup>

---

<sup>76</sup> 29 C.F.R. § 778.115

<sup>77</sup> 29 C.F.R. § 778.500

<sup>78</sup> *Adoma v. Univ. of Phoenix Inc.* (2011 E.D. Cal.) 779 F. Supp.2d 1126.

<sup>79</sup> *Pingatore v. Town of Johnston*, 2011 U.S. Dist. LEXIS 140473; and *Mitchell v. County of Monterey*, 2008 U.S. Dist. LEXIS 102253 (N.D. Cal., Dec. 17, 2008).

<sup>80</sup> 29 U.S.C. § 207(e)(1)

<sup>81</sup> 29 U.S.C. § 207(e)(2) & (8) and *Brennan v. Padre Drilling Co.* (1973 S.D. Tex) 359 F. Supp. 462

<sup>82</sup> 29 U.S.C. § 207(e)(3)

<sup>83</sup> 29 U.S.C. § 207(e)(4) and *Flores v. City of San Gabriel* (2013 C.D. Cal.) 969 F. Supp.2d 1158

<sup>84</sup> 29 U.S.C. § 207(e)(5) (6) & (7)

<sup>85</sup> *Lemieux v. City of Holyoke* (2010 D.C. Mass.) 740 F. Supp.3d 246.

<sup>86</sup> *Adoma v. Univ. of Phoenix, Inc.* (2011 E.D. Cal.) 779 F. Supp.2d 1126

<sup>87</sup> *Purdham v. Fairfax County Sch. Bd.* (4th Cir. 2011) 637 F.3d 421

## J. Compensatory Time Off in Lieu of Overtime

Both the Education Code and FLSA allow flexibility for state and local government employees regarding compensation for statutory overtime hours. Education Code sections 45129 and 88028, along with Title 29 U.S.C. section 207(o), authorize public agencies, including schools to provide compensatory time off in lieu of monetary overtime compensation, at a rate not less than one and one half hours of compensatory time for each hour of overtime worked.

Compensatory time may be used if it is provided for in a collective bargaining agreement, employment agreement or memorandum of understanding. The agreement may be established through negotiation with individual employees or through the collective bargaining process.<sup>88</sup> Any agreement for compensatory time off must be in place before the performance of the work and the agreement may allow for compensatory time off in lieu of overtime payments in cash or for any combination of compensatory time off and overtime payment in cash, as long as the principle of time and one half is maintained.<sup>89</sup>

An employee who has accrued compensatory time and requests use of the time must be permitted to use the time off within a reasonable period after making a request so long as it does not unduly disrupt the operations of the employer.<sup>90</sup>

## K. Preventing Excess Overtime

Overtime compensation must be paid any time an employer “suffers or permits an employee to work in excess of their established work hours; even if the employee engages in excess work voluntarily.”<sup>91</sup> In essence, once an employer allows the employee to work or knows that the employee is working, the employee must be compensated whether the work is performed at the place of business or at home.<sup>92</sup>

Therefore, the employer is required to ensure that overtime work it does not want performed is not performed. The mere drafting of a rule prohibiting unauthorized overtime is not in and of itself sufficient to avoid compensation for actual additional hours worked.<sup>93</sup>

Districts should protect themselves from unwanted overtime and potential lawsuits by employees who are seeking back pay for unauthorized work by:

- Adopting a clear time and attendance policy;
- Requiring all managers of non-exempt classified staff to review time records weekly;

---

<sup>88</sup> 29 C.F.R. § 553.23

<sup>89</sup> 29 C.F.R. § 553.23(a)(2)

<sup>90</sup> 29 U.S.C. § 207(o)(5)

<sup>91</sup> 29 C.F.R. § 785.11

<sup>92</sup> 29 C.F.R. § 758.12

<sup>93</sup> 29 C.F.R. § 785.13

- Training all staff regarding overtime and timekeeping policies; and
- Uniformly and promptly addressing any policy violations involving unauthorized overtime by employees or supervisors.

## CONCLUSION

School administrators should keep in mind that the overtime standards and exemptions set forth by the California Department of Industrial Relations do not apply to public school or community college districts. As discussed above, overtime for school and community college district employees is governed only by the state Education Code and the Fair Labor Standards Act. Therefore, before a position can be classified as overtime exempt, requirements of the Education Code and Fair Labor Standards Act must be satisfied. Given the complexity and fact-specific nature of this area of law, district administration should consult with legal counsel before attempting to change a position to overtime exempt.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

*–Darren J. Bogié*

---

*Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.*