

Personnel Management...

Employee Leave Laws, Independent Contractors, Employees and Wage and Hour issues

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Whit Colvin
Bishop, Colvin, Johnson & Kent, LLC
wcolvin@bishopcolvin.com

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EMPLOYEE LEAVE LAWS

- Sick leave
- Personal leave
- Sick leave banks
- Catastrophic sick leave
- On-the-job injury
- Leave-of-absence
- Vacation leave
- Military leave
- Military leave differential pay

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Sick Leave

- Full-time employees & adult bus drivers
- Earn one day per month of employment
- Unlimited accumulation of sick leave

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Sick Leave

- Transfer of sick leave balance between Alabama public education institutions:
 - County and city boards of education,
 - Two-year postsecondary institutions,
 - Four-year colleges and universities,
 - and,
- Various other agencies but limited to only a few specified state agencies.

Sick Leave Definition

- The employee's absence from duty for
 - Personal illness
 - Incapacitating personal injury
 - Attending to an ill member of the **family**
 - Death in the **family**
 - Death, injury, or illness of another person who has unusually strong personal ties

Family Members

- **Illness** of a parent, spouse, child, **foster child currently in the care and custody of the employee**, brother or sister, or an individual with a close personal tie.
- **Death** of a parent, spouse, child, brother or sister, in-laws (father, mother, son, brother, daughter, sister), nephew, niece, uncle, aunt, grandparent or grandchild.

Sick Leave Legal Opinions

- Employee earns sick leave while on sick leave or other leave-with-pay.
- Sick leave may only be used for legal purposes. (Illness, injury, or death).
- Cannot be paid for unused sick leave.
- Sick leave cannot be transferred employees (except for catastrophic leave).

Sick Leave Legal Opinions (continued)

- An employee that holds two different full-time jobs earns sick leave for each position.
- A doctor's excuse or other justification may only be required if there is probable cause to believe that sick leave is being abused or misused by the employee.

Personal Leave

- Any certificated employee.
- Support employees who work an average of at least 20 hours per week.
- At least 2 days with pay required.
- Up to 3 additional days:
 - Without pay
 - With pay
 - Partial pay (deduction for the cost of a substitute)

Personal Leave

- Unused days do not carry-over to the next year.
- An employee cannot be required to disclose their reasons for requesting personal leave.

Personal Leave

- Any employee has the option to convert unused personal leave days to sick leave at the end of the scholastic year if the unused days are funded (full pay or partial pay).
- A certificated employee has an additional option of being paid for unused personal leave days at the end of the scholastic year if the unused days are funded (full pay or partial pay).

Personal Leave Legal Opinions

- Personal leave days are considered funded even if the employee must pay for a substitute in order to receive the additional personal leave days.
- A certificated employee who chooses to be paid for unused personal leave days is to be reimbursed at the highest daily rate paid to substitute teachers.
- A board of education is not required to reimburse support employees for unused personal leave.

Personal Leave Legal Opinions (continued)

- Local boards of education do not have to grant the same number of personal leave days (beyond the 2 required) to support employees as they do to teachers.
- The cost of a substitute cannot be deducted from an employee converting unused personal leave to sick leave.

Sick Leave Bank

- A sick leave bank allows an employee to deposit (bank) some of their own sick leave for future use and borrow against some of their sick leave days to be earned in future employment with the school board.
- A participating sick leave bank member may borrow days from the sick leave bank when the member's non-banked sick leave days have been exhausted.
- The employee has to redeposit and restore the borrowed days to the sick leave bank.

Sick Leave Banks

- A local board of education will establish a sick leave bank plan upon request of 10% of the board's full-time employees.
- A secret ballot vote by employees will determine if the certificated employees and support employees have separate sick leave banks or one joint sick leave bank.

Sick Leave Banks

- Each sick leave bank will have a committee consisting of five employees.
- The sick leave bank committee will write the guidelines for the operation of the bank.
- The sick leave bank guidelines are to be approved by secret ballot vote of participating members.

Sick Leave Banks

- Sick leave bank committee
 - One member is appointed by the superintendent.
 - Four members are elected at the beginning of the school year to a one-year term by a secret ballot vote of the bank's members.
 - No member can serve on the committee for longer than 5 years.

Sick Leave Bank Guidelines

- Appropriate and beneficial guidelines in addition to those contained in the law, if they don't conflict with the law.
- Must contain a provision whether or not to allow employees, who have previously failed or refused to join the sick leave bank, with the option to join the sick leave bank upon the deposit of the required number of sick leave days.

Sick Leave Banks

- Forms and administrative procedures for the sick leave bank will be developed by the sick leave bank committee.
- Guidelines developed by committee must be approved by secret ballot vote of participating members.

Sick Leave Banks

- Sick leave bank guidelines must establish an equal number of sick leave days (not to exceed 5 days) for deposit by each participating member in order to become a member of the sick leave bank.
- Employee membership in the sick leave bank is voluntary.

Sick Leave Banks

- New employees are allowed to join the sick leave bank at the beginning of employment.
- If the new employee does not have the required number of sick leave days to join the bank, the appropriate number of sick leave days will be advanced to the new employee as the deposit to join the sick leave bank.

Sick Leave Banks

- The credit balance will be reduced by one day each month as the sick leave days are earned by the employee. After the credit balance is reduced to zero, sick leave days earned by the employee will be used to repay any outstanding loan to the sick leave bank.

Sick Leave Banks

- Sick leave days withdrawn from the sick leave bank can only be used for the reasons allowed for sick leave.
- Sick leave bank committee will investigate all alleged abuse of the sick leave bank.

Sick Leave Banks

- An employee cannot owe more than 15 days to the sick leave bank, unless over 50% of the sick leave bank members vote to extend the limit.
- Days are to be repaid to the sick leave bank monthly, as the sick leave day is earned is month by the employee.

Sick Leave Banks

- Sick leave bank balance on deposit:
 - Upon employee transfer to an eligible employer, the days are withdrawn and transferred with the employee.
 - Upon retirement, the days are withdrawn and made accessible for retirement credit.

Sick Leave Banks

- If an employee who owes days to the sick leave bank resigns or is terminated, the value of each of the owed days will be deducted from the final paycheck at the employee's current daily rate of pay.

Sick Leave Bank Legal Opinions

- A member of a sick leave bank can give only the number of days to the sick leave bank allowed by law (not to exceed 5 days).
- If the final paycheck does not cover the value of the days owed to the sick leave bank when the employee leaves, the board must exercise due diligence and appropriate procedures to collect the debt.

Catastrophic Sick Leave

- The sick leave bank committee will adopt guidelines for reverting unused donated days to the employees who donated the sick leave days.
- Each sick leave bank committee is responsible for writing guidelines and administrative procedures for catastrophic sick leave. [*Should define "extended period of time".*]

Catastrophic Sick Leave

- **Law covers sick leave bank members in:**
 - All local boards of education
 - Two-year postsecondary institutions (*for now*)
 - DYS School District
 - Alabama Institute of Deaf and Blind
 - Alabama School of Fine Arts
 - Alabama High School of Math & Science
 - Alabama A&M University (*but no other universities*)

Catastrophic Sick Leave

- **An employee must be a member of a sick leave bank to donate or receive catastrophic sick leave days.**
- **A donating employee does not have to be a member of the same sick leave bank as the recipient employee.**

Catastrophic Sick Leave Defined

- “Any illness, injury, or pregnancy or medical condition related to childbirth, **certified by a licensed physician which causes the employee to be absent from work for an extended period of time.**”

Catastrophic Sick Leave

- An employee may use catastrophic sick leave days for himself or herself or for the following covered persons:
 - Parent
 - Spouse
 - Child **including a foster child currently in the care and custody of the employee**
 - Brother or sister
 - Individual with a close personal tie

Catastrophic Sick Leave

- An employee must exhaust all sick and personal leave days before using catastrophic sick leave.
- An employee must borrow and utilize the maximum number of days from the sick leave bank before using catastrophic sick leave.

Catastrophic Sick Leave

- Donated catastrophic sick leave may be used to repay days owed to the sick leave bank by the recipient employee.
- Sick and personal leave days earned while the employee is utilizing catastrophic sick leave days must be exhausted before continuing to use catastrophic sick leave days.

Catastrophic Sick Leave

- A member of a sick leave bank may donate a specific number of days (not to exceed 30 sick leave days) to a sick leave bank for a specific employee to use for a catastrophic illness.
- The donating employee cannot be required to donate a minimum number of days.

Catastrophic Sick Leave

- State laws do **not** contain a limitation on the number of catastrophic sick leave days that an employee can receive by donations from other sick leave bank members.

On-the-Job Injury

- Full-time employees & adult bus drivers.
- Each board of education will establish procedures and forms for notification of on-the-job injury.
- Sick leave days will not be deducted for the days the employee is paid for an absence approved for on-the-job injury pay.

On-the-Job Injury Defined

- **“Any accident or injury to the employee occurring during the performance of duties or when directed or requested by the employer to be on the property of the employer, which prevents the employee from working or returning to his or her job.” *Section 16-1-18.1(a)(5)***

On-the-Job Injury

- Within 24 hours after occurrence of the injury, the employee must make proper notification of the injury to the local superintendent of education (or school principal, if applicable) in accordance with the notification procedures of the local board of education.

On-the-Job Injury

- In the event the employee is clinically unable to report the injury, the notification procedures shall permit the reporting of the injury by another person who is reasonably knowledgeable to make the notification of the injury.

On-the-Job Injury

- Within 30 calendar days of notification of the injury, the local superintendent (or designee) will inform the injured employee about the board's approved procedures for on-the-job injuries and the employee's rights to request reimbursement from the State Board of Adjustment.

On-the-Job Injury

- The board policies may require medical certification from the employee's physician that the employee was injured and cannot return to work as a result of the injury.
- May also require the physician's statement that there is a reasonable expectation that the injured employee will be able to return to work.
- The superintendent may require a second opinion at the expense of the board.

On-the-Job Injury

- Once the superintendent determines that the employee has been injured on the job and cannot return to work as a result of the injury, the employee's salary and benefits will continue up to **90 working** days consistent with the employee's injury.
- The board may adopt a policy to extend the 90-day period.

On-the-Job Injury

- The employee may file for reimbursement with the State Board of Adjustment for unreimbursed medical expenses and costs incurred as a result of an on-the-job injury.
- Reimbursement to the employee shall be determined by the Board of Adjustment.

On-the-Job Injury

- Alabama State Board of Adjustment
www.bdadj.Alabama.gov
- Claims must be filed within one year from date of injury (two years for death).
- Claims for out-of-pocket medical expenses not paid by private insurance.
- Claims for lost wages and/or compensation for leave used.

On-the-Job Injury

- The school board may request state funds for reimbursement for the cost of substitutes for the employee injured on the job.
- The reimbursement is limited to 90 days for each approved on-the-job injury at the state-funded daily substitute rate.
- Reimbursement is contingent on annual legislative appropriations.

Leaves of Absences

- Full-time employees and adult bus drivers may be **paid** for *leaves of absences*.
 - For training.
 - When approved by the State Board of Education as beneficial to the state's educational objectives.
 - Employee absence for an unavoidable cause (other than sickness) while school is in session. (Limited to one week)

Leaves of Absences

- The board may grant a teacher an unpaid leave of absence for good cause for 1 year.
- The board may extend the unpaid leave of absence for a valid reason for 1 year.
- The unpaid leave of absence will not impair the continuing service status of the teacher.

Vacations

- The local board of education may adopt policies and procedures to provide **paid** vacations for full-time employees and adult bus drivers.

Military Leave

- State law provides for 2 types of paid military leave (in addition to *military leave differential pay*) — **federal military leave** and **state military leave**.
- The most common military leave taken by LEA employees is for training in the Alabama National Guard and the Reserves of the Armed Forces. (Federal military leave)

Military Leave

- For **federal military leave**, employees of local boards of education are provided time away from work, at full pay, for no more than 168 hours (usually equivalent to 21 days) per calendar year.
- State law prohibits the board from paying the employee full pay for days exceeding 21 days of **federal military leave** per year.

Military Leave

- For **state military leave**, employees of local boards of education are provided time away from work, at full pay, for no more than 168 hours (usually equivalent to 21 days) at any one time.
- **State military leave** is occasionally used by the Governor to call up the National Guard for natural disasters.

Military Leave

- An employee may receive full pay for state and federal military leave in the same year.
- Employees on paid or unpaid military leave continue to accumulate service credit for any seniority, status, and rate of pay the employee would have obtained had the employee not taken military leave.

Military Leave

- The U. S. Congress provided clear protection for all members of the uniformed services, including National Guard and Reserve members, with the October 1994 passage of the Uniformed Services Employment and Reemployment Rights Act (**USERRA**).

Military Leave

- No law, policy, practice, etc. that would diminish the rights established in **USERRA** takes precedence over the provisions of **USERRA**.
- **USERRA** does not supersede, nullify, or diminish any law, policy, practice, agreement, or contract that provides greater rights or benefits to service members.

Military Leave Legal Opinions

- A local board of education may not:
 - Require the employee to schedule military leave so that it does not interfere with the school year or employee duties.
 - Restrict the taking of military leave for non-required duty or training.
 - Condition continued employment on the employee's foregoing military leave.

Military Leave Legal Opinions

- A local board of education cannot interfere with any employee's rights to join the reserves or guard, or interfere with the employee's membership in the reserves or guard.
- A local board of education may not deduct an amount equivalent to the compensation earned in the military during the time the employee is on military leave.

Military Leave Legal Opinions

- Military leave, paid or unpaid, counts as time spent on the job for any calculation, determination, promotion, or other decision that is based upon length of employment.

Military Leave Differential Pay

- State law provides for *military leave differential pay* for employees of local boards of education called into active service in the war on terrorism.
- The Alabama Adjutant General will determine if the active military service qualifies for *military leave differential pay*.

Military Leave Differential Pay

- An employee called into active service of the U. S. armed forces during the war on terrorism (which began September 11, 2001) is entitled to compensation from the local board of education if the basic pay for active military service is less than the salary the employee would receive if still working for the board.

Military Leave Differential Pay

- For purposes of calculating the *military leave differential pay*, the board salary includes supplements, pay raises, and salary schedule step increases the employee would receive if still working for the board.
- The employee is not due the *military leave differential pay* for any days that the employee receives full pay from the school board for accrued vacation leave or the 21-day annual military leave pay.

Military Leave Differential Pay

- *Military leave differential pay* is subject to state and federal tax withholdings but not employer or employee FICA or TRS matching.

Military Leave Differential Pay

- The employee does not earn sick leave or vacation leave for the days the employee receives the *military leave differential pay*.
- However, if the school board uses length of service to determine personal leave or vacation days, the time spent on active duty military service counts as service credit as if the employee is still on-the-job.

Military Leave Differential Pay

- The U. S. Congress provided clear protection for all members of the uniformed services, including National Guard and Reserve members, with the October 1994 passage of the Uniformed Services Employment and Reemployment Rights Act (**USERRA**).

Military Leave Differential Pay

- No law, policy, practice, etc. that would diminish the rights established in **USERRA** takes precedence over the provisions of **USERRA**.
- **USERRA** does not supersede, nullify, or diminish any law, policy, practice, agreement, or contract that provides greater rights or benefits to service members.

Military Leave Differential Pay

- Military pay in Act No. 2002-430 means basic pay and does not include special and incentive pays, allowances, or other fringe benefits.

Military Leave Differential Pay Legal Opinions

- Sick leave taken for authorized sick leave purposes before the employee's departure for active duty could be eligible for restoration pursuant to Act No. 2002-430.
- However, accrued sick leave cannot be used while the employee is on military leave.

Military Leave Differential Pay Legal Opinions

- Under federal law, it is illegal for an employer to require an employee to take vacation, annual, or similar paid leave for the performance of military duty.
- Annual (or vacation) leave taken voluntarily by the employee shall be restored. The restored leave can then be taken again but can not be restored again.

Jury Duty

- A full-time employee is entitled to the usual compensation for time spent –
 - Responding to summons for jury duty.
 - Participating in the jury selection process.
 - Actually serving on a jury.
- But not jury duty that occurs during time the employee is not scheduled to work.

Subpoenaed as Witness

- Employee is entitled to the usual pay when subpoenaed as a witness related to the employee's job.

CONTRACTS

The Basics

- Education is a State function executed through local boards
- Superintendent, Board, and CSFO all have statutory role in handling funds, BUT Principals, Bookkeepers, and Directors do not

The Basics

- For local administrators, authority (and responsibility) related to finance is by delegation from Superintendent, CSFO, and Board
- How?
 - Board policies
 - Local school finance manual
 - Directives
 - Day-to-day interaction

A Few Things to Remember . . .

- A school is not a legal entity
- You are bound by rules set up for you
- Failure to follow rules can lead to personal liability and a loss of immunity

SPENDING IT WISELY Contracts

- By law, the Board has the authority to contract
- Principals – no inherent right to execute a contract
 - Can be delegated right by Board or Superintendent (if that authority has been delegated to them)
 - “Going rogue” and executing a contract anyway has risks
 - Personal liability for expenditure
 - Charge back
 - Loss of immunity
- Typical contracts – Prom, transportation, athletic equipment, maintenance, grass cutting, beauty pageant judging, cheerleader tryouts, etc.
- Remember, you may need contracts to establish that person contracted with is not an employee

Independent Contractor

- Sometimes need to contract with individuals or small groups of individuals to provide services on periodic or sporadic basis
- Do this through the use of a contract – we call them independent contractors.
- Contracts are critical – establish the relationship

Independent Contractor

- Often use a clause like the following:
 - Contractor agrees to provide all services as an independent contractor and both the Board and Contractor disclaim any and all employment relationship between the parties. As Contractor is not an employee, she is not entitled to the benefits provided by the Board to its employees, including, but not limited to, group health insurance and pension plan. Accordingly, fees, taxes, administrative costs and any other costs incurred by Contractor in the performance of any of the services mentioned herein shall be the sole responsibility of Contractor. For the purposes of this Agreement, Contractor, her employees, officers, agents, assigns or representatives shall not be considered as employees, officers, agents, assigns or representatives of Board.

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Potential Consequences of Ambiguity

- Attainment of tenure or continuing service status
- Right to benefits
- Due process
- Employment Laws
- FLSA
- Taxes
- Penalties

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The Rules

- Internal Revenue Service drives the analytical train
- If an Independent Contractor from a tax perspective, presumed to be from other perspectives as well.
- Do not pay FICA taxes or other employment taxes for independent contractors

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Independent Contractor Tests

- Common Law Test
- 20 Factor Test
- New “Relationship of the Parties” Test

Common Law Test

- Employee if the Board has the right to control the result of the services, the means and the methods of providing it
- Employee if the person providing the services is “subject to the will and control of the employer not only as to what shall be done but how it shall be done.” (Tres.Reg)
- The factor is whether the Board has the right to control, not whether it actually did.
- Independent contractor decides the means and methods (how to get the result)-the Board will define the result or outcome expected

The 20 Factor Test

- Before 1987, had to look at cases to see how the common law test was applied
- In 1987, IRS developed the 20 factor test
- How the factors are applied (the weight and importance of each) is contextual

What are the factors?

- Instructions – If employer has right to require compliance with instructions, indicates employee status
- Training – Required worker training shows that the work has to be done in a certain manner which indicates employee status.
- Integration – Integration of the worker's services into the business operations of the person for whom services are performed indicates employee status.
- Personal Service Required – If services are required personally, this indicates the intent to control the means and methods of the work (implies employee status).

What are the factors?

- Hiring, Supervision and Paying Assistants – If employer hires, supervises or pays assistants, implies employee status. If worker hires and supervises others on own, implies independent contractor status.
- Continuing Relationship – Continuing relationship between worker and employer indicates employee status.
- Hours of Work – If employer sets hours of work, indicates employee status.

What are the factors?

- Alienation (right to work for others) – Exclusive work or requirement that person work substantially full time indicates employee status. If worker is free to work for others when are for whom she chooses, indicates IC.
- Working on Premises – If work is performed on employers' premises (especially if the work could be done anywhere), indicates employee status.
- Order or Sequence of Work – If order or sequence is set by employer, this shows worker is not free to set own means and methods and indicates employee status.

What are the factors?

- Reporting – Required regular reporting indicates employee status.
- Method of Payment – Payment by the hour, week or month implies employee status while payment by the job or commission indicates IC.
- Expenses - Payment of business or travelling expenses by employer implies employee status.
- Tools and Materials – Provision of tool and materials by employer generally implies employee status.

What are the factors?

- Significant Investment – Investment in facilities used by worker (own office or workplace), implies IC.
- Profit or Loss – A worker who can realize a profit or a loss (who bears the risk) different from the profit or loss ordinarily borne by employee indicates IC.
- Multiple Clients – If worker performs work for more than one employer at a time, generally indicates IC.
- Availability – If worker makes service available to the public (other employers) regularly and consistently, indicates IC.

What are the factors?

- Right to discharge – The right to discharge or discipline a worker indicates employee relationship.
- Right to terminate – If the worker has the right to terminate the relationship at any time without incurring liability (employee at will principle), indicates employee status.

Independent Contractor Test

- IRS previously used 20 factor test
- New test in 2006 – focuses on relationship of parties
 1. Behavioral control
 2. Financial control
 3. Type of relationship between the parties

Independent Contractor or Not Behavioral Control

- Evaluate the extent to which the "employer" has a right to control and direct performance – whether employer has retained the right to control the details of performance or has given up that right...
 - **Instructions to worker.** If can tell when, where and how to work=employee
 - Examples:
 - When and where to do the work
 - Tools and equipment to use
 - Hiring assistants
 - Where to purchase supplies
 - Election of who performs work
 - Order or sequence to follow
 - **Does business train worker?** Employers generally train their workers, ICs use their own methods.

Independent Contractor or Not Financial Control

- Unreimbursed business expenses
 - Will look at fixed ongoing costs
 - IC will have some unreimbursed expenses.
- Extent of independent contractor's investment
 - Significant investment is not determinative though.
- Free agency – whether services available to others
- Payment /compensation
- Who gets profit or bears loss?

Independent Contractor or Not Type of Relationship

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- Written contracts – intent of parties
 - Not determinative but will be given weight
 - If don't have a written contract at all, will work against IC status.
 - Chance to make the case on the front end and define terms.
- Whether benefits provided
- Permanency of relationship
 - Fixed time = IC, Permanent or Open Ended = Employee
- Services key part of regular business or not?

Applying Tests

- DOL, IRS will use the factors and the tests that suit purposes – not bound exclusively by them
- IRS provides some examples in Publication 15-A
- Remember that no one single factor is determinative – they are subject to a balancing analysis

Not Just the IRS...

- US is not just looking for unpaid employment taxes
- Also looking at failure to pay overtime, minimum wage or other benefits due employees but not independent contractors (such as Family Medical Leave, insurance under ACA, etc.)
- Misclassification can result in a number of headaches
- US expects that employers will use more ICs to avoid overtime, ACA and other federal mandates and have stepped up enforcement and audits

Audit Red Flags

- 1099 and W-2 for the same worker from the same business
- 1099 from only one business or employer
- Unemployment request from a worker who got a 1099
- Rehiring worker as IC after retirement (there are revolving door and ethics law complications here as well)

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On the Wage and Hour Front If the knock comes...

- DOL may investigate or audit as well.
- May come from a complaint, the IRS collaboration or otherwise being informed of a problem
- Because of the collaboration and the common overlap between IC classification and overtime, an audit can result in a double whammy

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Reminders and Practical Tips Wage and Hour

- Make sure the DOL Poster is at every school site and the central office
 - Easiest compliance task
 - First thing DOL will look for
- Keep Good Records
 - DOL requires that you maintain records with required information and that they be maintained for three years (payroll records)

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Reminders and Practical Tips Wage and Hour

- Records must contain:
 - Employee's full name and social security number.
 - Address, including zip code.
 - Birth date, if younger than 19.
 - Sex and occupation.
 - Time and day of week when employee's workweek begins.
 - Hours worked each day.

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Reminders and Practical Tips Wage and Hour

- Records must also contain:
 - Total hours worked each workweek.
 - Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
 - Regular hourly pay rate.
 - Total daily or weekly straight-time earnings.
 - Total overtime earnings for the workweek.
 - All additions to or deductions from the employee's wages.
 - Total wages paid each pay period.
 - Date of payment and the pay period covered by the payment

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Reminders and Practical Tips Wage and Hour

- Remember your Exemption Principles
 - Can be a major problem if in an IC audit, a non-exempt person was treated as exempt
 - Exemption decisions should be made at Central Office – don't make those decisions at local school level
 - They are very technical and complicated
- Dual Jobs and Lump Sum payments
 - Eliminate to the extent practicable
 - Calculation difficulties as well as a tendency to underpay taxes (IRS problem!)

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Remember Your Overtime Basics

- 1 ½ times regular rate of pay
- Only for more than 40 hours in week
- Paid as cash or time off
- Regular rate includes all pay

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Overtime Basics Hours Worked

- Overtime must only be paid if more than 40 hours are worked in a work week
 - Work Week – typically Sunday - Saturday
- Only count compensable hours, NOT including holidays, vacation or sick leave
- Work hours can NOT be averaged across two or more weeks to avoid overtime:
 - It is NOT acceptable to average work hours at the end of the month
 - It is NOT acceptable to work over 40 hours in one week and take the time off, hour for hour, the next week
- Overtime does NOT accrue simply because an employee works beyond his/her regular schedule on a given day

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Overtime Basics - Exemptions

- Certain positions meet exemption criteria from FLSA regulations based on the nature of work performed and the amount and type of pay received
- Positions "exempt" under the FLSA are not entitled to overtime compensation regardless of the number of hours worked
- There are detailed tests for exemption
- Exemption tests are complicated – decisions should not be made by local administrators

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Dual Job Employees

- Two jobs – can result in more than 40 hours
- Don't calculate based on the job which "caused the overtime"
- Use a blended rate, have to custom calculate
- Salary schedule/agreements become important
- Instead, establish hourly rate and pay overtime

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Volunteers

- Use caution!
- Cannot waive overtime
- Cannot volunteer for same type of services which employee is employed to perform

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Substitutes


- Avoid using employees as substitutes.
- Think of it as two jobs
- Especially substitute bus drivers.
- Can cause recordkeeping problems.

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Lump Sum Payments


- Lump sum payment counts as additional base compensation
- If results in overtime, have to pay overtime on the lump sum
- Lump sum cannot serve as the overtime compensation
- Can substantially raise the hourly rate

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Strategies

- Pay for the hours worked at hourly rate – do not use lump sum payments
- Keep accurate records of work even if lump sum is used
- Watch minimum wage

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Supplements for Non-Exempt Employees

- Not typical- Supplements are usually for exempt employees
- Examples:
 - Coaching supplements
 - Band instructors
 - Club or activity sponsors

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So What is the Problem With Supplements?

- Accustomed to exempt personnel obtaining supplements
- Do not keep good records
- Can cause minimum wage issues
- Often not factored into hourly rate
- Cannot count as overtime compensation

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An Additional Complication

- Third parties paying the supplement.
- Make sure there is a clear (in writing) arrangement.
- Assume that an employee always works for you.
- Remember: Supplements are handled at the Board level, have to be Board approved.

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Keeping Time

- Time sheets, clocks, or computers
- System must reflect all time worked
 - Bus drivers
 - Weekend Work
 - Special projects
 - Start time and end times for work
- Sign in and out for lunch/breaks

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Compensable Work Hours

- All hours an employee is required to work, including idle and certain on-call times
- Waiting time is work time if period of waiting is :
 - Unpredictable
 - Short duration
 - Employee unable to use time effectively for own purposes

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Travel Time

- Ordinary travel to and from work is NOT work time
- Travel from work site to work site is work time
- When required to travel substantial distance to perform a job away from regular work site, travel is work time

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Lunch Breaks

- Lunch breaks – bona fide lunch breaks of more than 30 minutes
 - If on duty, have to pay
 - If interrupted, have to pay
 - Good idea to have employee sign out for lunch
- Other breaks
 - If less than 20 minutes, compensable
- Cannot count two 15-minute breaks as “lunch break”
- Breaks are not required by FLSA
- Remember, overtime is by week, not by day
 - Don't automatically get overtime for missing lunch

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Compensatory Time

- Boards may offer compensatory time in lieu of cash payments
- Comp time is NOT leave, but a form of compensation:
 - Entitled to use time as if using cash compensation
 - Must be able to use for personal use
 - Appointing authority may require use of comp time but cannot cause employee to forfeit annual leave at end of fiscal year
 - "Paid" at 1.5 times
 - Get 1.5 hours comp time for every hour of overtime

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Comp Time and School Boards

- Common practice to have informal "comp time" plan
- Usually not comp time as referred to in FLSA
- Usually consists of trading days or hours – one for one
- Time records are informal and cannot cash out
- Informal comp time plans are fine *IF* employee does not work overtime
- Should not refer to as comp time and should not mix (maybe call flex time or just discretionary scheduling)
- Remember, cannot set off time across work weeks without paying overtime – perfectly fine to do it within work week

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If You Want to Use Comp Time

- Agreement with employee *in advance* (before the overtime is worked)
- Can be policy
- Keep solid records
- Make sure calculated correctly – 1.5 hours for every overtime hour worked

CAN BE A GREAT TOOL IF MANAGED CORRECTLY

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"On Call"

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- Employees do not always have to be paid for "on call" time.
- Case-by-case analysis focusing on the character of the "on call" duty.
- Turns on how much freedom employee has while "on call."

Self Audit

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- Coordinate a self audit practice with Central Office
- Set up a practice at local schools once a week, review time sheets for
 - Anomalies
 - Too much consistency
- Do during the week – if you catch it at payroll time, can be too late
- Every so often, monitor time entry
 - Either as time is entered or just afterward

Substitutes

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- Get a good substitute tracking system in place
- Watch for employees substituting – especially bus drivers
- Watch for substituting at different schools

Reminders and Practical Tips Wage and Hour

- Supplements
 - Should never have an independent contractor with a board approved salary schedule-connected supplement
 - Example – “Independent contractor” coach being paid a lump sum such as tennis coach, soccer coach, specialty coach, band instructor, etc.
 - These arrangements can be common – work with counsel if this comes up – there may be ways to arrange it but if things aren’t done just right, it can lead to problems – want to make sure Board approvals are worded correctly and PA’s are not generated (implies employee relationship)

QUESTIONS... ?

Whit Colvin
205.251.2881
205.254.3987 fax
wcolvin@bishopcolvin.com

BishopColvin
BISHOP, COLVIN, JOHNSON & KENT, LLC

1910 First Avenue North
Birmingham, Alabama 35203
www.bishopcolvin.com
