



***PAY ME RIGHT \$ OR
PAY ME MORE \$\$\$***

***Presented by:
Bruce Anderson and Larry Lee,
Partners at Fisher & Phillips, LLP***

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TODAY'S AGENDA

- ❑ In this election year and beyond, payment by employers to employees are under attack by the government and aggressive employee lawyers.
- ❑ This presentation focuses on the practical wage and hour issues your charter school faces on a regular basis.

CONVENTIONAL WISDOM

Convention wisdom is a major problem under the FLSA:

- *“Everyone pays this way.”*
- *Salaried staff do not have to be paid overtime.”*
- *This is what the employees want us to do.”*
- *The employee agreed to do this or the employee never complained.”*
- *We’re not big enough of an employer for anyone to sue us.”*

TOPICS OF DISCUSSION

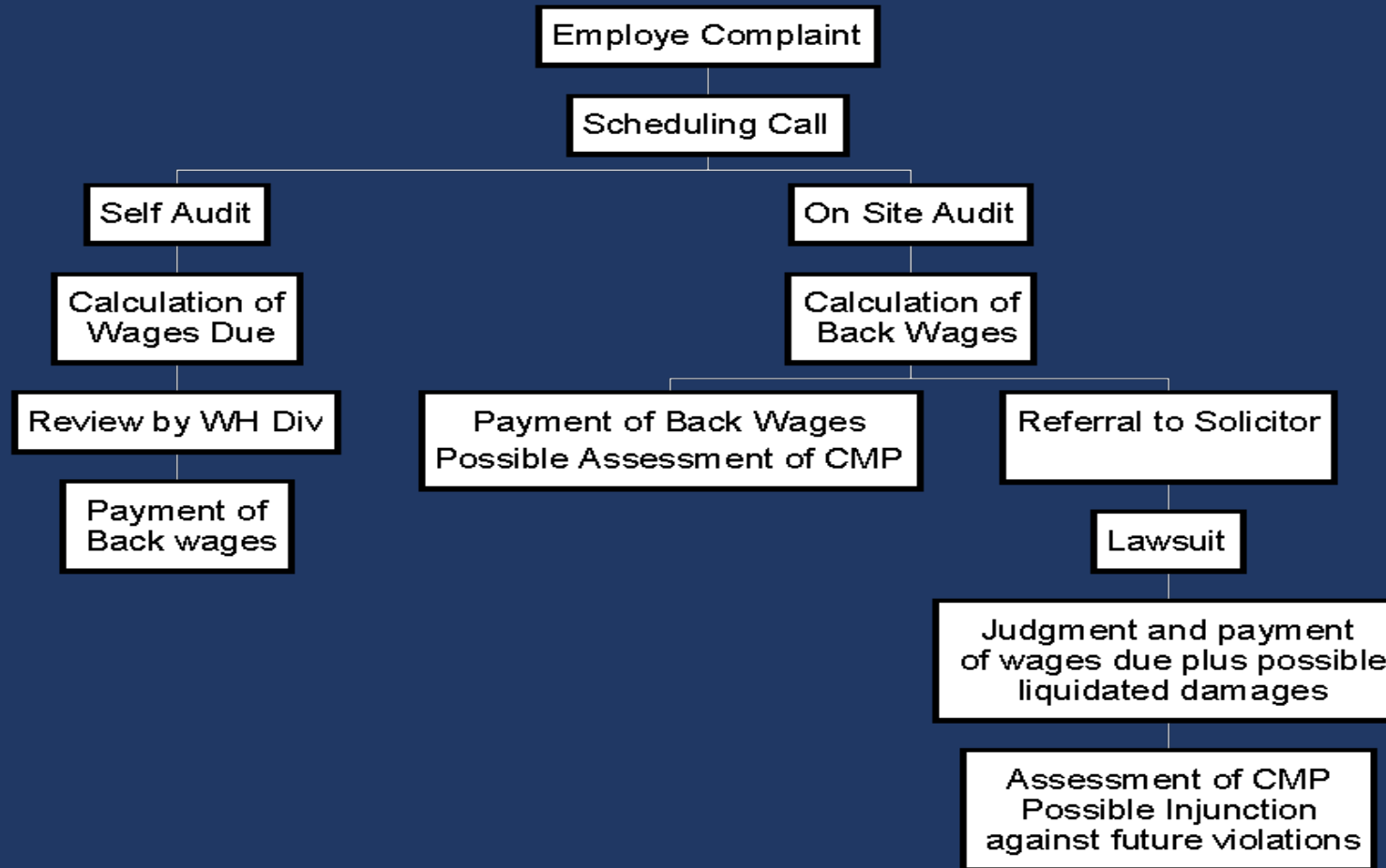
- ❖ How to classify an employee as “exempt” or “non-exempt”
- ❖ The worker with other duties (eg. coach or works in an after work program): Pay overtime or not?
- ❖ Or the worker who is on-call to answer homework questions: Pay or not pay?
- ❖ Is this worker really an independent contractor?
- ❖ Other related topics?

Take Away No. 1: Pay your employers right now, otherwise the school will be exposed to either a Dept. of Labor audit or a very expensive/time consuming lawsuit.

Why the litigation explosion?

- Employers do not understand the law or compliance therein
- There is a large number of potential plaintiffs in the educational workplace
- Plaintiff gets double back wages plus attorney's fees
- Basic wage and hour law is actually easy to learn
- But it is difficult to successfully defend a w & h lawsuit

Federal Wage and Hour Investigation



Employee Lawsuit

**Employee finds
Attorney**

**Attorney sues you
in Federal Court for
3 yrs of back wages, liquidated
damages and attorney's fees**

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1.

Treating non-exempt
employees as exempt.

1. Executive Exemption

- Is in charge of a department or sub-department, and
- Supervises the work of two or more full time employees, and
- Receives a salary or guarantee of at least \$455/wk, and
- Has the authority to hire and fire

2. Administrative Exemption

- Primary duty is performing office or non-manual work related to management policies or general business operations, and
- Exercises discretion and independent judgment with little or no supervision, (holds a position of responsibility), and
- Receives a salary or guarantee of at least \$455/wk

3. Professional Exemption

- Performs duties requiring advanced knowledge in a field of science or learning requiring specialized instruction, and
- Consistently exercises discretion and independent judgment , and
- Receives a salary or guarantee of at least \$455/wk
- Eg. Teachers

4. Highly-Compensated Employees

- Performs office or non-manual work, and
- Receives a salary or guarantee of at least \$455/wk, and
- Is guaranteed total annual compensation of at least \$100,000 per year, and
- Performs any one of the exempt duties of white collar employee

“Salary Basis” Safe Harbor

- Must clearly communicate policy prohibiting improper deductions, and
- Establish and communicate the complaint mechanism for improper deductions, and
- Reimburses employees for any improper deductions, and
- Make a good faith commitment to comply in the future

“Is he or she exempt from overtime?”

- What does he or she spend the majority of his time doing?
- How is his or her pay plan structured?
- Does he or she fit exactly into one of the nine exemptions?

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2.

Failing to pay all the overtime that is due.

If an employee is not exempt from overtime...

The employer must pay overtime premium on all compensation the employee receives.

Example:

Office Administrator is paid salary of \$600/wk. plus monthly bonus of about \$700/mo. She works 50 hours a week.

But she's NOT EXEMPT!!!

DOL's calculation:

2 years overtime on salary: \$6,240

2 years overtime on commission: \$1,680

TOTAL DUE: \$7,920

Private lawsuit calculation for damages and fees:

3 years overtime on salary:	\$9,360
3 years overtime on commission:	\$2,520
Liquidated damages:	\$11,880
Attorneys fees:	\$25,000
TOTAL DUE:	\$48,760

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6.
Treating
employees as
“independent
contractors.”

Who is an “independent contractor”?

- No clear line
- Depends on the forum you are in
- Different tests:
 - “Economic realities” test
 - “Right of control” test
 - IRS 20-point test

Example:

You agree with a retired employee to use him as a security guard to patrol your school grounds from 9:00 p.m. to 6:00 a.m., six nights a week. He usually sits (or sleeps) in his car. You pay him a flat \$350 per week. When you catch him sleeping for the third time and fire him, his son (an attorney) sues you for back wages, claiming that his father was your employee.

Liability:

- Unpaid wages: \$4,732
- Pension contributions
- Insurance benefits
- Liquidated damages for non-payment of wages
- Attorney's fees

Your potential liability

- Wage and Hour: failure to pay wages due
- IRS: penalties for failure to withhold taxes
- Unemployment: failure to make proper contributions
- Negligent hiring / retention
- Unemployment compensation
- Workers compensation
- Negligence toward third party

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7.

Failing to keep
accurate time
records.

Time Records

- The employer shall maintain an accurate record of the hours worked by each non-exempt employee each day and each week.
- The employer can delegate this duty to employees, but it remains responsible for compliance.

- No required format: Punched time cards, handwritten time sheets, computer log, etc., so long as they are accurate.
- Most accurate: Punched time card

- There is no fine for failing to require employees to keep accurate records.
- However, without good time records, you are at your employees' mercy.

Meals and Breaks for Administrative Staff

- Federal law does not require lunch or coffee breaks.
- Short breaks (usually lasting about 5 to 20 minutes) are compensable work hours that generally would be included hours worked.



Self Audit

1. Make sure that you know who is exempt and who isn't.
2. Pay overtime when overtime is due.
3. Ask whether your workers are classified correctly? (e.g. independent contractors)
4. Make sure you consult with a management wage and hour attorney who can advise on compliance and best practices.



Worker that performs other Duties: Don Bruiser

- Don is a full-time maintenance and grounds worker that is scheduled to work 40 hours per week.
- He is also the football coach of the eight grade middle schoolers working approximately an additional 25 hours per week.
- Don is a non-exempt employee as a maintenance worker and paid \$12 per hour.
- As the football coach, he is paid a lump sum of \$1000 per month.

Questions

Is Don entitled to be paid any overtime under these circumstances?

- As a non-exempt employee, Don must be paid overtime beyond the 40 hours that he works.
- This means that Don is entitled to overtime for the 25 hours that he works as the school's football coach.

Calculation for OT

How do we calculate the amount of overtime to be paid?

- The U.S. DOL states: “In this situation, the public employer may not calculate overtime for each position separately, but must aggregate the total hours spent on both jobs in a workweek to determine the number of overtime hours worked.

Two Choices to Calculate OT owed: Take the combined total of hours worked in a workweek, and either: 1) pay time and $\frac{1}{2}$ for the hours worked at the rate of pay for the type of work being performed during the OT hours as a football coach (\$250 per week divided by 25 hours per week = a regular rate of \$10 per hour for an overtime rate of \$15 per hour), ; OR 2) calculate the total amount paid ($40 \times \$12 = \$480 + \$250$) divided by the total number of hours worked ($40+25 = 65$). This second approach is known as weighted average. Thus, the regular rate to be paid would be $\$730$ divided by $65 = \$11.23$, for an overtime rate of \$16.85 per hour.

Which method do you prefer?

Teacher that performs other Duties: Annie Apple

- Annie is a full-time teacher and is classified as “exempt.” She is paid \$30,000 per year.
- She also works in the after school program for K – 5 for approximately an additional 15 hours per week.
- For her work in the after school program, Annie is paid \$10 per hour.

Questions

Is Annie entitled to be paid any overtime under these circumstances?

- Her exempt status is not relevant to answer this question under the U.S. DOL regulations (29 CFR 553.20(c)(5)).
- Rather, is her work in the after care school program an activity traditionally associated with teaching?
- If “yes,” then she is not entitled to be paid overtime.
- If the answer is “no,” then she is entitled to overtime. Then one of the two methods of calculating overtime applies.

Teacher Assigned to a “Homework Hotline”

Are such teachers entitled to be paid overtime in this situation?

- According to the U.S. DOL, teachers can be required to perform extra duties (e.g. ticket taking, score or time keeping, or security at events) *as long as* the teachers time in those activities does not exceed 20% of their total hours worked for that specific work week.
- How do you calculate the 20%? Simple and short answer: It depends on a case-by-case basis.

Thank You

Bruce Anderson: banderson@laborlawyers.com
(303) 218-3678

And

Larry Lee: lle@laborlawyers.com
(303) 218-3663

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