

Fair Labor Standards Act Handbook 2018



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This publication is not intended to provide legal advice. Please consult your school attorney or KASB Legal Assistance for guidance on specific questions.

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Foreword

Fair Labor Standards Act: A Guide for Public Schools provides answers to questions about overtime requirements, exempt employees, child labor laws, compensatory time, and other requirements of the Fair Labor Standards Act in the public school context. While it provides the factual and legal basis to

support the conclusions presented, the primary goal of this handbook is to provide school board members, school administrators and school attorneys with easy-to-understand answers to FLSA requirements.

Fair Labor Standards Act: A Guide for Public Schools also provides user-friendly checklists and forms to ensure procedures are handled correctly. This guide should make your task easier and help you avoid costly mistakes when dealing with FLSA issues.

This publication was written by the KASB Legal Department. Some of the material included in this handbook was adapted, with permission, from materials originally prepared by the North Carolina School Boards Association. Other sources include materials prepared by the National School Boards Association Council of School Attorneys, the U.S. Department of Labor and the Thompson Publishing Fair Labor Standards Act Handbook for States, Local Governments and Public Schools.

While this publication will be supplemented from time to time, users are cautioned to ensure recent changes in the law do not adversely affect a particular employment situation. Current statutory and case law will control the outcome. *Fair Labor Standards Act: A Guide for Public Schools* is intended to be a source of information only; it is not intended to be legal advice. Please consult with your local or KASB attorney for advice on specific legal matters affecting your school district.

Introduction

The Fair Labor Standards Act (FLSA), 29 U.S.C. §201, et seq., establishes minimum wage and overtime pay requirements, requires extensive recordkeeping, and sets standards for child labor for employers. Additionally, provisions of the Equal Pay Act, that prohibits pay differentials based on sex, are included in its provisions.

FLSA's requirements apply to "public agencies," including public school districts, as well as many private businesses. Although the school district or community college is the "employer" under FLSA, the definition of "employer" is broad and can allow for liability to be imposed on individual employees who are responsible for overtime violations. Not all supervisory employees are subject to individual liability; to be an "employer" for FLSA purposes, an individual must exercise control over the school's operations. Under FLSA, both individuals and employers are jointly and severally liable for overtime violations, which means an employee can sue either the individual or the school or both. Each is separately liable for the entire amount of the claim.

Not all workers are covered by the FLSA. FLSA does not apply to elected officials, bona fide volunteers, legal advisors, some trainees or independent contractors. Other employees are covered by the recordkeeping provisions but exempted from the minimum wage and overtime pay provisions. Exempt employees generally include executives, administrative and professional employees, such as teachers or licensed staff.

The FLSA provides minimum standards that may be exceeded but cannot be waived or reduced. Schools must comply with any federal, state or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, schools may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining

agreements cannot waive or reduce FLSA protections, nothing in the FLSA relieves employers from their contractual obligations under such bargaining agreements.

The purpose of this handbook is to provide schools with information on their obligations under the Fair Labor Standards Act, except for those portions of the law dealing with the Equal Pay Act. In addition to detailed explanations of requirements under the FLSA, this handbook contains forms and checklists designed to assist schools in determining if employees are exempt from FLSA's overtime requirements, qualify as bona fide volunteers, or present potential FLSA problems. It also contains examples of how to determine which hours count towards hours worked for overtime purposes and instructions for computing overtime or compensatory time in various circumstances.

Where to Obtain Additional Information

The U.S. Department of Labor (DOL), the agency that enforces the FLSA, provides information regarding the FLSA on its Wage and Hour Division's Web site at:

www.dol.gov/whd/flsa/

It also maintains a toll-free help line, available from 8 a.m. to 5 p.m., at 1-866-4US-WAGE (1-866-487-9243).

CHAPTER 1. Types of Employees

Non-Covered Workers

Some workers are simply not covered by the FLSA's requirements. For schools, volunteers and independent contractors are the types of individuals likely to fall in this category. Board members are not covered by FLSA, nor are legal advisors.

Volunteers

Under FLSA, "the term "employee" does not include any individual who volunteers to perform services for a public agency . . . if—

- (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- (ii) such services are not the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. §203(e)(4)(a).

A volunteer is one who performs hours of service for civic, charitable or humanitarian reasons without expectation of compensation for services rendered. A school employee may volunteer to assist the school district or community college so long as the person truly volunteers, without any expressed or implied coercion, and the volunteer work is not related to the employee's regular employment.

In the public sector, the volunteer work must be substantially different from an employee's paid work. In determining if the work is the same type of service the individual is employed to perform, DOL will consider the duties and factors contained in the "three-digit categories of occupations" definition of the

job (standardized definitions of particular jobs) and the facts and circumstances in each case. The key inquiry is whether the volunteer service is closely related to the employee's actual duties.

If the volunteer work directly relates to the regular employment, the employee cannot be treated as a volunteer. For example, if a person employed regularly in a clerical position volunteers to take tickets at a football game, the employee is performing clerical functions in each position and cannot qualify as a volunteer. In this case, even if the employee offers to perform clerical work of taking tickets "off the clock" or "on their own time," the school cannot allow it and must pay the individual for the hours of work. FLSA does not allow an employee to waive the requirements of the law. If the person in the same clerical position volunteered to assist with preparing the field for the football game, a function which is not clerical in nature, the individual could volunteer, perform the service and receive no compensation. While the FLSA would allow various nonexempt employees to volunteer to coach [See Appendix A], Kansas State High School Activities Association Rules prohibit the use of volunteer coaches in Kansas.

The Department of Labor has indicated it will not assert FLSA violations if a public school employee volunteers to help with activities in their own child's classroom or related activities, even if the employee is performing similar tasks in a volunteer capacity [See Wage & Hour Opinion Letter of 11/30/94]. However, this policy does not waive the employee's right to assert a claim for such hours [See Wage & Hour Opinion Letter of 8/3/95].

Restrictions on volunteers apply to work done for the school district employer, not just a particular school. Therefore, a bus driver who transports children only to the elementary school in the district cannot volunteer to drive bus for high school football games.

The regulations allow volunteers to be reimbursed for expenses, reasonable benefits and nominal fees or any combination of these three. However, a nominal fee cannot be a substitute for compensation and may not be tied to productivity. Factors to consider in determining if the fee is nominal include:

- Distance traveled;
- Time and effort expended by the volunteer;
- Whether the volunteer is available at any time or only at specified times;
- Whether the volunteer provides services on an as needed basis throughout the year.

A volunteer who provides services periodically on a year-round basis may receive an annual stipend or fee.

Allowing non-exempt employees to volunteer to perform services for the district creates a potential risk for the school district. Materials contained in appendices A, B, C and D should assist school districts in determining if individuals will qualify as bona fide volunteers in specific circumstances.

Independent Contractors

Those who contract with the school district as independent contractors to provide services are not covered by the FLSA. In determining if a worker qualifies as an independent contractor, the ultimate inquiry is whether the worker is truly in business for himself or is economically dependent on an employer who can allow or prevent the employee from working. The Department of Labor applies an

economic realities test, evaluating six factors to determine if a worker qualifies as an independent contractor for FLSA purposes. Because it uses the FLSA “suffer or permit” to work standard, the economic realities test looks at a broader scope of employment than the common law control test for an independent contractor. *Goldberg v. Whittaker House Co-op, Inc.*, 366 U.S. 28 (1961). The factors considered under this test go beyond employer control and include:

- The extent to which the work performed is an integral part of the school’s business. If the work is integral to the employer’s business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself.
- Whether the worker’s managerial skills affect his or her opportunity for profit and loss. Analysis of this factor should focus on whether the worker exercises managerial skills, such as the hiring and supervision of workers or investment in equipment and whether those skills affect that worker’s opportunity for both profit and loss.
- The relative investments in facilities and equipment by the worker and the employer. The worker must make some investment compared to the school district’s investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself.
- The worker’s skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker’s skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. When a worker takes the initiative to operate an independent business, as opposed to being economically dependent on the school for employment, independent contractor status is implicated.
- The permanency of the worker’s relationship with the school. Permanency or indefiniteness in the worker’s relationship with the school district suggests that the worker is an employee, as opposed to an independent contractor. However, mere lack of a permanent relationship with the school district does not necessarily suggest independent contractor status.
- The nature and degree of control by the employer. Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the school district. This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. A worker’s control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee’s work at the remote worksite.

Wage and Hour Division, Fact Sheet 13: Am I an Employee?: Employment Relationship under the Fair Labor Standards Act <https://www.dol.gov/whd/regs/compliance/whdfs13.htm> See, also *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984).

If the work is controlled or directed by the school in day-to-day operations, the person must be treated as an employee for FLSA purposes.

Trainees

Those in training for a position of employment, such as student teachers, are not considered employees under the FLSA. Trainees, not the school, are the primary beneficiaries of their own work. Generally, trainees should not displace regular employees and should work under close observations. The training period should be of a fixed duration, which is established prior to commencing work. Additionally, trainees should understand they are not entitled to a job at the end of the training period or to wages for the time spent in training.

Elected Officials

Elected officials such as school board members or members of a community college board of trustees are not covered by the FLSA. Also, board members' personal staff members or legal advisors are not covered by FLSA as long as they are not subject to a state's civil service laws.

Exempt Employees

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and be paid overtime—at one and one-half times the regular rate of pay—for all hours worked beyond 40 hours in a workweek. In addition to employees who are simply not covered by the FLSA, other employees are exempt from the FLSA's minimum wage and overtime provisions. FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Additionally, certain computer employees are exempt.

The legislative history of the FLSA indicates the exemptions for professional, administrative and executive employees were premised on the belief these workers typically earned salaries well above the minimum wage and enjoyed other compensatory privileges, such as better fringe benefits and opportunities for advancement. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily assigned to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium. See *Report of the Minimum Wage Study Commission*, Volume IV, pp. 236 and 240 (June 1981).

To qualify for a standard exemption, employees generally must meet a job duties test and be paid on a salary basis at not less than \$455 per week. Efforts by the Obama administration to move the salary requirement to a higher level (\$913 per week or \$47,476 per year) were thwarted, both by court action which stayed implementation and by the Trump administration which withdrew the proposed changes to the regulations. The proposed changes would have set the salary threshold at "the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) and required adjustment every three years.

So long as it meets the salary threshold, salary can be paid in increments longer than a week, but not shorter than a week. For instance, an employee could be paid not less than \$910 biweekly, \$985.83 semi-monthly; or \$1,971.67 monthly. A salary of \$455 per week yields an annual salary of no less than \$23,660.

To qualify for the “highly compensated employee” exemption, total compensation must be not less than \$100,000.00 per year.

Exempt employees cannot be paid on an hourly basis. The salary amount cannot be prorated for part-time workers. Salary must be “free and clear” of any claimed credit for non-cash items of value that the school provides for an employee. Costs incurred in providing board, lodging or other facilities do not count toward the minimum salary.

Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the Department’s regulations. Traditionally, courts have narrowly construed the exemptions and placed the burden is on the employer to show that each employee it deems to be exempt in fact meets all of the requirements for exemption. However, in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), the Supreme Court rejected the principle of narrow construction “as a useful guidepost for interpreting the FLSA,” The Court indicated, “Because the FLSA gives no ‘textual indication’ that its exemptions should be construed narrowly, ‘there is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.’” 138 S. Ct. at 1142.

Salary Basis Requirement

Only “salaried” employees qualify for these exemptions, but the fact a person is paid on a salary basis does not necessarily mean the employee is exempt. To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. In an educational institution, these salary requirements do not apply to teachers or lawyers. 29 C.F.R. 541.303(d) and 541.304(d). Exempt computer employees may be paid at least \$455 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour. Other exempt employees cannot be paid on an hourly basis. Academic administrative personnel, such as superintendents, principals, academic counselors and others with similar responsibilities are subject to the salary basis requirement, but a special provision allows the salary level to be met if it is at least equal to the entrance salary for teachers at the school. 29 C.F.R. 541.204(a).

To qualify for exemption, initially the employee must be paid on a salary basis. This means the employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis, and that this amount cannot be reduced because of variations in the quality or quantity of the employee’s work. Subject to limited exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

If the school makes deductions from an employee’s predetermined salary, except as allowed by the regulations, that employee is not paid on a “salary basis.” Any time the employee is ready, willing and able to work, deductions may not be made for time when work is not available. For instance, the school cannot deduct a day’s pay from the salary of an exempt worker because the school closes for inclement weather if the employee was willing to come to work on that day. Exempt employees do not need to be paid for any workweek in which they actually perform no work.

If the salary basis test is not met and no exception applies, the employee is entitled to overtime even if the salary level and duties tests are met.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible:

- For absences of one or more full days for personal reasons other than sickness or disability;

For most employers, these deductions must be for full days only. If an employee is gone for 1 ½ days on personal business, only one day can be deducted. However, special rules for public sector employers allow deductions for partial day absences when leave is not requested or has been exhausted. [See the section of this guide on Special Public Sector Rules.]

A school may require deductions from a personal leave account if the employee is entitled to personal leave under the school policies. [See the section of this guide on Questioned Employment Practices.]

- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;

This exception includes situations where an employee receives benefits pursuant to short-term disability insurance maintained by the school, state disability insurance under KPERS, or benefits under the workers' compensation laws. Schools may make full-day deductions from salary not only for days the employee receives compensation under these plans, but also for days when the employee is absent before qualifying for benefits and days absent after the benefits have been exhausted.

A school may require deductions from a sick leave account if the employee is entitled to sick leave under the school policies. [See the following section of this handbook on Questioned Employment Practices.]

- To offset amounts employees, receive as jury or witness fees, or for military pay;
- If the absence is for less than a full week, deductions can only offset the other pay amounts.
- If an employee is gone for jury duty or on military assignment for longer than one week, the school does not need to pay the employee for any full week in which no work is performed.

The exception for witness fees applies only if an employee is subpoenaed to testify, not if he or she voluntarily agrees to testify.

- For penalties imposed in good faith for infractions of safety rules of major significance;

This exception allows for deductions in any amount for violations of safety rules of major significance designed to prevent serious danger in the workplace.

- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

This exception allows for full day suspensions without pay for violation of workplace conduct rules. It does not cover amounts paid as fines or for settlement of claims.

It does not cover infractions of rules related to attendance or performance, but applies to violations involving sexual harassment or other forms of prohibited harassment, violence, drug or alcohol violations or violations of law.

Suspensions without pay must be imposed pursuant to a written policy applicable to all employees. The policy need not include an exhaustive list of specific violations, but it must put employees on notice that suspension without pay is a possibility if the rule is violated. The rule can apply to off-campus conduct as well as on-campus conduct if the employee has sufficient notice.

In addition to deductions from pay, the school may reduce the amount of leave an employee has accumulated for disciplinary infractions. (See Wage & Hour Letter Opinion 3/30/94).

- For weeks partially worked in the initial or terminal week of employment; or

This exemption does not allow for deductions of amounts an employee may owe the school when terminating employment.

- For hours in which an exempt employee takes intermittent or reduced unpaid leave under the Family and Medical Leave Act.

When an employee takes unpaid FMLA leave, the school can pay a proportionate part of the full salary for the time actually worked. The department has indicated employers cannot force workers to take more leave than required by the circumstances of the leave. (See Wage & Hour Letter Opinion 3/30/94). It is unclear how the department would rule in cases where FMLA specifically authorizes a school to extend leave for academic continuity in certain circumstances.

Questioned Employment Practices

In the comments accompanying regulations issued in August 2004, the Department of Labor made clear the following employment practices are permissible and do not violate the salary basis test:

- Voluntarily paying overtime to exempt employees;
- Making deductions from employee leave banks, even on an hourly basis, for absences or disciplinary reasons;
- Employers can require deductions from leave accounts even if it leaves a negative balance in the leave account. However, employers cannot require repayment if employment is terminated.
- There are conflicting court opinions on whether employers may take deductions from accumulated compensatory time.
- Requiring employees to work specific schedules; and
- Recording and tracking employee work hours.

Additionally, Wage & Hour opinion letters suggest that an employer can make deductions from salary to recover salary advances or to recoup overpayment of wages without affecting the exempt status of the

employee. See Wage & Hour Opinion Letter (3/20/98). School districts may also require employees to use leave when school is closed for inclement weather. See Wage & Hour Opinion Letter FLSA 2005-41.

Special Public Sector Rules

Because of the principles of public accountability, there are some special exceptions that apply to public entities. Public accountability principles suggest elected officials and public entities are held to a higher level of responsibility that demands effective and efficient use of public funds in order to serve the public interest and maintain the public trust. If a public employer were required to pay employees for time not worked and not covered by leave, these principles might be violated. Therefore, public schools are allowed to make deductions from salary for partial day absences when leave is not requested or has been exhausted. Public schools can also furlough exempt employees for budgetary reasons without jeopardizing the exempt status of the employee. 29 CFR 241.710. These exceptions apply only if the pay system of the school is established by statute, regulation, policy or practice, as opposed to an ad hoc decision. The exceptions do not apply to deductions for disciplinary reasons.

Effect of Improper Deductions from Salary

When a school makes improper deductions from salary, it risks losing the exemption for not only that employee, but other employees in the same classification who are supervised by the same manager. The school will lose the exemption if it has an “actual practice” of making improper deductions from salary that demonstrates it did not intend to pay employees on a salary basis. The key inquiry is the intent of the school employer.

Factors to consider when determining whether a school has an “actual practice” of making improper deductions include, but are not limited to:

- The number of improper deductions, particularly as compared to the number of employee infractions warranting deductions;
- The time period during which the school made improper deductions;
- The number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and
- Whether the school has a clearly communicated policy permitting or prohibiting improper deductions. [See Appendix E].

If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent, improper deductions will not result in loss of the exemption if the school reimburses the employee for the improper deductions. The regulations do not indicate when the employer must reimburse the employee for the improper deductions. It is recommended that the reimbursement occur within a reasonable time after the inadvertent improper deductions are discovered.

Safe Harbor

Even if a school makes improper deductions from salary, it may avoid loss of the exemption if it falls within the “safe harbor” established by the regulations. The safe harbor applies regardless of the reason for the improper deductions. To come within the safe harbor, a school must:

- Have a clearly communicated policy prohibiting improper deductions and including a complaint mechanism [See Appendix E];
- Reimburse employees for any improper deductions; and
- Make a good faith commitment to comply in the future.

A school will not lose the exemption for any employees unless the school willfully violates the policy by continuing the improper deductions after receiving employee complaints. Again, the regulations do not indicate when the school must reimburse the employee for the improper deductions. It is recommended that the reimbursement occur within a reasonable time after the investigation of the complaint verifies there were improper deductions.

Fee Basis

Administrative, professional and computer employees may be paid on a “fee basis” rather than on a salary basis. If an employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee is being paid on a “fee basis” for FLSA purposes. A fee is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the school must consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than \$455 per week;
- The employee’s primary duty must be management of the school or of a customarily recognized department or subdivision of the school;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

Factors to consider when determining the primary duty of an employee include, but are not limited to:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee’s relative freedom from direct supervision; and
- The relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

The amount of time spent performing exempt work is not dispositive, but can be a useful guide in determining whether exempt work is the primary duty of an employee. Employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and the regulations do not require that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may meet the primary duty requirement if the other factors support such a conclusion.

In *Paganas v. Total Maintenance Solution LLC*, 220 F.Supp.3d 247 (E.D.N.Y. 2016), vacated and remanded, 2018 WL 1251789 (2d Cir. 2018). Paganas was employed as a building manager at St. John's University and paid an annual salary of \$80,000. His duties included overseeing the cleanliness of buildings, supervising six to 15 cleaners, directing cleaners in their work, reallocating workers when short-staffed, setting up rooms for meetings or events, and attending daily management meetings. He testified, however, that he spent 90 percent of his time doing nonsupervisory, physical cleaning tasks. He also testified he never recommended disciplinary action; did not have authority to hire or fire employees; and did not make recommendations to hire, promote and fire employees. Because questions of fact needed to establish eligibility for the executive exemption were disputed, the Second Circuit vacated the grant of summary judgment to the employer remanded the case to the lower court. This case serves as a reminder that authority to supervise does not mean an employee is automatically exempt, especially if the employee spends most of their time doing the same work as those he or she supervises.

Exempt work is work that meets any of the white collar tests and “activities that are directly and closely related to such work,” including tasks that contribute to or facilitate performance of the exempt work. It may include physical tasks, menial tasks or routine work. Some examples include:

- Recordkeeping;
- Monitoring and adjusting machinery;
- Taking notes;
- Using the computer to create documents or presentations;

- Opening the mail for the purpose of reading it and making decisions; or
- Using a photocopier or a fax machine.

Management

Generally, “management” includes, but is not limited to, activities such as:

- Interviewing, selecting, and training of employees;
- Setting and adjusting their rates of pay and hours of work;
- Directing the work of employees;
- Maintaining production or sales records for use in supervision or control;
- Appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status;
- Handling employee complaints and grievances;
- Disciplining employees;
- Planning the work;
- Determining the techniques to be used;
- Apportioning the work among the employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- Providing for the safety and security of the employees or the property;
- Planning and controlling the budget;
- Monitoring or implementing legal compliance measures;
- Team building;
- Training;
- Attending management meetings; and
- Planning meetings and developing meeting materials.

Department or Subdivision

The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Customarily and Regularly

The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

Two or More

The phrase “two or more other employees” means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Particular Weight

Factors to be considered in determining if an employee’s recommendations about hiring or changes in employment status are given “particular weight” include, but are not limited to:

- Whether it is part of the employee’s job duties to make such recommendations; and
- The frequency with which such recommendations are made, requested, and relied upon.

Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee’s recommendations may be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

Trainees

The executive exemption does not apply to trainees for executive positions.

Performance of Nonexempt Work

So long as the employee’s primary duty is an exempt duty, the executive employee can also perform nonexempt tasks. Generally, the executive employee chooses to perform nonexempt tasks as opposed to being required to perform the tasks.

The exemption is also not lost if an exempt executive performs nonexempt tasks because of an emergency.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations the school or the school’s customers; and
- The employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Primary Duty

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

Factors to consider when determining the primary duty of an employee include, but are not limited to:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee’s relative freedom from direct supervision; and
- The relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

The amount of time spent performing exempt work is not dispositive, but can be a useful guide in determining whether exempt work is the primary duty of an employee. Employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and the regulations do not require that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may meet the primary duty requirement if the other factors support such a conclusion.

To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the school. This includes actions such as advising management, planning, negotiating, purchasing, or representing the school. Work “directly related to management or general business operations” includes, but is not limited to work in functional areas such as:

- Tax;
- Finance;
- Accounting;
- Budgeting;

- Auditing;
- Insurance;
- Quality control;
- Purchasing;
- Procurement;
- Advertising;
- Marketing;
- Research;
- Safety and health;
- Personnel management;
- Human resources;
- Employee benefits;
- Labor relations;
- Public relations;
- Government relations;
- Computer network, Internet and database administration;
- Legal and regulatory compliance; and
- Similar activities.

The exemption includes not only those who participate in formulation of management policies or business operations as a whole, but persons who carry out major assignments in conducting the operations of the school or whose work affects business operations to a substantial degree, even though tasks are related to a particular segment.

Employer's Customers

An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

Discretion and Independent Judgment

In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. The exercise of discretion does not have to be customary or regular in nature, but at some time it must be a part of the duties.

Factors to consider when determining if an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to:

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- Whether the employee carries out major assignments in conducting the operations of the school;
- Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- Whether the employee has authority to commit the school in matters that have significant financial impact;
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- Whether the employee has authority to negotiate and bind the school on significant matters;
- Whether the employee provides consultation or expert advice to management;
- Whether the employee is involved in planning long- or short-term business objectives;
- Whether the employee investigates, and resolves matters of significance on behalf of management; and
- Whether the employee represents the school in handling complaints, arbitrating disputes or resolving grievances.

If an employee exercises discretion and independent judgment with regard to one of these factors on a matter of significance, it may be sufficient to establish the exemption. Each employee's exemption, however, requires a case specific analysis.

The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. However, the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

The requirement is not met by the performance of clerical or secretarial work, recording or tabulating data, or performing repetitive, recurrent or routine work. The use of a manual does not necessarily

defeat the exemption. If the manual is used to address novel or difficult circumstances and requires specialized knowledge or skill to interpret its provisions, the exemption is not lost. However, the exemption is not available for those who merely apply well established techniques or procedures described in manuals.

Matters of Significance

The term “matters of significance” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

The regulations do not define the term. A Wage and Hour Opinion Letter of (2/14/03) indicates the term applies “to kinds of decisions normally made by persons who formulate or participate in formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects, financial or otherwise.”

Educational Establishments and Administrative Functions

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week (or on a salary basis at least equal to the entrance salary for teachers in the school if it is lower) and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field.

Employees engaged in academic administrative functions include:

- The superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program;
- The principal and any vice-principals responsible for the operation of an elementary or secondary school;
- Department heads in institutions of higher education responsible for the various subject matter departments;
- Academic counselors; and
- Other employees with similar responsibilities.

Jobs relating to building management and maintenance or the health of students are not classified as academic administrative functions. These jobs may or may not be exempt under the regular executive or administrative tests.

Trainees

The exemption does not apply to persons in training to become an administrative employee.

Examples of Exempt Administrative Employees and Nonexempt Counterparts

Again, it is important to remember that job titles alone are insufficient to establish an exemption. Each employee's exempt or nonexempt status must be evaluated on a case-by-case basis. In a school context, the following employees may fit within the administrative exception depending on their actual duties and salary:

- Team leaders who lead a team of other employees assigned to complete major projects for the school.
- Executive or administrative assistants, if the employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance. If the employee has the authority to route mail, answer correspondence and make decisions on behalf of the executive, an exemption may apply. If the person performs traditional secretarial activities like opening mail and presenting it to the boss, answering phones, making travel arrangements, or preparing expense reports no exemption applies. The person remains clerical support, not exempt, even though he or she may have the title of executive assistant.
- Human resource managers, who interpret laws, gather and evaluate facts to resolve employee concerns, implement management policies, and make hiring and firing recommendations are generally exempt. However, personnel clerks who screen applications are not exempt.
- Purchasing directors who have authority to bind the school on significant purchases may be exempt even if they must consult with the board or superintendent and have board approval before entering into the contract.
- Business managers are generally exempt, but bookkeepers are not.

Professional Exemption

The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees: learned professionals and creative professionals. As with other exemptions, the exemption does not apply to trainees.

Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;

- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- 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.

Primary Duty

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee’s relative freedom from direct supervision; and
- The relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

The amount of time spent performing exempt work is not dispositive but can be a useful guide in determining whether exempt work is the primary duty of an employee. Employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and the regulations do not require that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may meet the primary duty requirement if the other factors support such a conclusion.

Work Requiring Advanced Knowledge

“Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

The fact an employee has a college degree does not make the employee exempt. An employee is not exempt unless his or her work requires advanced knowledge. An employee who has an advanced degree, but whose work does not require that level of education, will not qualify for an exemption.

Field of Science or Learning

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences,

pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirement for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor

This includes such fields as, for example, music, writing, acting and the graphic arts.

Examples of Exempt Professionals

Teachers

Teachers are exempt professionals if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic

teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; driver's education teachers; home economics teachers; and vocal or instrumental music teachers.

Teachers who also spend a considerable amount of time in extracurricular activities such as coaching athletics or advising in drama, speech, debate or journalism are deemed to be engaged in teaching because these activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

Nursery school teachers who do not have a college degree and whose primary duty is caring for the physical needs of children are not exempt.

The salary and salary basis requirements do not apply to bona fide teachers.

Nurses

Registered nurses who are registered by the appropriate state examining board generally meet the duty requirements for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt. However, registered nurses who are paid on an hourly basis do not meet the salary basis test and should receive overtime pay.

Licensed practical nurses and other similar health care employees, however, do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations. Therefore, LPNs are entitled to overtime pay.

Athletic Trainers

Athletic trainers who successfully complete four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the National Athletic Trainers Association Board of Certification may be exempt. Without these credentials, however, athletic trainers are not exempt.

Computer Employee Exemption

Section 13(a)(1) and Section 13(a)(17) of the FLSA provide an exemption from both minimum wage and overtime pay for computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field who meet certain tests regarding their job duties and who are paid at least \$455 per week on a salary basis or paid on an hourly basis, at a rate not less than \$27.63 an hour. Computer employees are not eligible for exemption under the highly compensated employee test.

Employees in computer-related jobs may also be exempt from FLSA's overtime requirements. In 1992, the U.S. Department of Labor issued regulations to clarify its position. In order for these employees to qualify for the professional exemption, they must be highly skilled in computer systems analysis, programming or related work in software functions. For the professional exemption to apply, the employee's primary duty must include the application of systems analysis techniques and procedures and/or the design, development, analysis, creation, testing or modification of computer systems or programs related to user or system design specifications or machine operating systems. This exemption

does not include employees whose work relies on the use of computer software, but are not engaged in systems analysis or programming work. Employees who meet these criteria may qualify for the exemption even if they are not paid on a salary basis, but their hourly rate of pay must be \$27.63 or higher. This hourly rate did not go up with the 2016 changes to the regulations.

Computer-related personnel may qualify for other exemptions. For instance, a person who directs the activities of a group of two or more programmers and also performs complex programming activities may qualify for the executive exemption. Systems analysts and computer programmers perform “work directly related to management policies or general business operations,” as required for the administrative exemption, whenever they deal with the planning, scheduling and coordination of activities required to develop systems for processing data to obtain solutions to business problems of the school or its students. In addition, the employee must exercise discretion and independent judgment in analyzing the problem and developing a solution. In a 1999 letter opinion, the agency concluded a network administrator was not an exempt administrative employee because he did not exercise discretion and independent judgment. [See Wage & Hour Opinion Letter 11/5/99].

- To qualify for the computer employee exemption, the following tests must be met:
- The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee’s primary duty must consist of:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 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;
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

Highly Compensated Employees

The regulations contain a special rule for “highly-compensated” workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt if:

- The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
- The employee’s primary duty includes performing office or non-manual work; and
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

For example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

Total Annual Compensation

The required total annual compensation of \$100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

Make-up Payments and Prorating

There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump-sum, make-up amount to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

Customarily and Regularly

“Customarily and regularly” means greater than occasional but may be less than constant, and includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks.

More than One Exemption

Employers may “tack” exempt work and combine exemptions to qualify for exemption. *Winkle v. Hutchinson Community College*, 28 Kan. App. 2d 344 (2000) (community college’s head athletic trainer was exempt from the overtime provisions of the FLSA as both an administrative and a professional employee).

Reviewing Exempt Status of Employees

To ensure your employees remain eligible for exempt status, school districts should review the salary level and duties of all exempt employees on a periodic basis. If such review reveals an employee is misclassified as exempt, the school should take steps to make the change as soon as possible. The employee should be paid for any overtime worked while misclassified. While taking voluntary action

does not preclude award of liquidated damages should court action be brought, it should limit additional liability in most cases. See *Simmons v. Boys & Girls Club of the Pikes Peak Region*, 2017 WL 4572320, (D. Colo, 2017) (when an original exempt classification lacks a good-faith basis, a school may still be liable for liquidated damages, even if it attempts to fix the misclassification on its own).

If the salary threshold is raised above the current \$23,660, schools will need to determine what adjustments will be made to ensure compliance with FLSA. The following information should help schools evaluate their options.

Options for Implementing Changes

While the 2016 regulatory changes which would have raised the salary threshold for exempt employees were thwarted, it is likely the threshold will change at some point in the future. When the salary threshold is raised, schools will have the following options:

- Increase the employee's salary to the new threshold, the minimum level required to maintain the employee in exempt status.
- Leave the employee's salary at its current level and pay overtime or give compensatory time for any hours worked over 40 hours in a workweek.
- Leave the employee's salary at its current level, forbid the working of overtime and hire additional help as needed.
- Decrease the employee's base salary to adjust for the anticipated overtime which will be paid at one and one-half times the regular rate.
- Restructure your workforce or particular jobs, transferring duties from newly nonexempt employees to those who remain exempt.

Each of these options has advantages and disadvantages.

Increasing Salary to the Minimum Level

Increasing an employee's salary to the minimum level of will allow an employer to keep the employee's exempt status. For employees whose salaries are relatively close to this level, this may be the best option. Getting a raise and retaining exempt status should generally be good for employee morale. Additionally, the school will not have to track or record hours worked for the employee who retains exempt status.

On the downside, if increasing this employee's salary brings the salary relatively close to his or her supervisor's salary, salary adjustments may need to be made with more than one employee, further increasing the cost to the school district.

Keep Salary; Pay Overtime

If the school chooses to reclassify the employee as nonexempt, leave the employee's salary at its current level and pay overtime if the employee works more than 40 hours in a workweek, costs may will likely increase. The school will need to decide if it will convert the employee's salary to an hourly rate

and pay the employee on an hourly basis or continue to pay the employee a salary, but pay additional overtime amounts when the employee's hours worked exceed 40 in a workweek. Using the fluctuating workweek model [see the chapter on "Overtime" in this manual] will help reduce amounts paid as overtime hours increase, but additional costs will still be incurred. Additionally, recordkeeping and computing payroll are more burdensome using this model.

The employee who now receives overtime pay for hours worked in excess of 40 will likely appreciate the additional pay, but the morale of those who continue as exempt employees may be affected as formerly exempt employees now get additional pay for overtime.

A school district can also choose to allow employees to accrue compensatory time in lieu of paying overtime, if the employee agrees to this arrangement. [See the chapter entitled "Compensatory Time" in this manual.] For each hour of overtime worked, the employee accrues 1 ½ hours of compensatory time, which can be used like paid vacation time. For employees with fluctuating workloads, this may be a good option. Although employees cannot accrue more than 240 hours of compensatory time, and the school must pay for accrued compensatory time if the employee quits the job, the school can require an employee to use the compensatory time, and could require that accumulated time be used during times of the year when the workload diminishes.

Keep Salary; Forbid Overtime

In response to the new regulations, some school districts may choose to continue to pay employees who become nonexempt their salary rate, or convert it to an hourly rate, but enact strict rules prohibiting these employees from working more than 40 hours in a workweek. This may require hiring additional workers to complete the work that needs to be done, but they, too, will be paid at a regular hourly rate, probably far less than an experienced employee would get for overtime.

If this method of compliance is adopted, the school must diligently require employees to cease working when the 40 hour threshold is reached. You cannot tell an employee not to work overtime, but then allow it to occur without paying for it. If an employee who has been directed not to work overtime actually works 42 hours in a workweek, you must pay for the two hours of overtime at the time and a half rate, but the employee can be disciplined for disobeying the directive.

This method should have a positive effect on the morale of the newly nonexempt employees who work fewer hours with no drop in salary. It may, however, have an opposite effect on those who remain exempt, particularly if in the same department, who may have increased workloads or no reduction in hours without salary adjustments.

Adjust Hourly Rate for Overtime

Adjusting an employee's hourly rate to account for overtime may work effectively for employees who consistently work overtime hours. For purposes of this example, assume the new salary threshold is \$47,000. Further assume a head custodian is paid a salary of \$40,000 and works nine hours a day, five days a week. This results in five hours of overtime each week. If this individual was being paid a \$40,000 salary, the weekly rate of pay would be \$769.23, and the hourly rate for the expected 45 hours per week would be \$17.09. However, if the new salary is set at \$42,214, and the employee continues to work five hours of overtime each week, she would need to be paid an additional \$42.75 ($(\$17.09/2) \times 5$ hours) per week for the overtime. Over a year, this would result in the equivalent of a salary of \$42,214, not \$40,000.

To keep annual compensation at the \$40,000 level, the hourly rate would need to be adjusted downward to approximately \$16.20 per hour.

$$(40 \times \$16.20) + (5 \times (16.20 + (16.20/2))) =$$

$$\$648.00 + (5 \times (\$16.20 + \$ 8.10)) =$$

$$\$648.00 + (5 \times \$24.30) =$$

$$\$648.00 + \$121.50 = \$769.50$$

If this salaried employee works overtime at different rates in different weeks, however, the transition might not be so smooth. If the employee works only 40 hours some weeks, the employee's pay for that week would be only \$648.00 for the week, far below the \$769.23 per week the employee was accustomed to making as a salaried employee. While this might be made up later in weeks with more than five hours of overtime, for employees who count on a steady amount of income on a regular basis, the adjustment might be difficult and take a toll on employee morale.

Alternatively, not making the downward adjustment in either the hourly rate or the expected workload will result in additional costs to the school.

Restructure Jobs

Instead of making adjustments to pay, some schools may reassign tasks most likely to precipitate the need for overtime to employees whose position remains exempt. While this approach may hold down costs for overtime, it may also result in employee resentment if those who remain exempt are expected to accomplish more and more without adjustments to their salaries as well.

General Considerations

No matter which option is chosen, schools should take the following steps to ensure a smooth transition for any employees who will be moved from exempt to nonexempt status.

- Talk with employees moving from exempt to nonexempt status, prior to making any changes. Consider all of the following:
 - Will payroll dates change? Some school districts pay hourly and salaried employees at different times of the month. If so, employees switching from one payroll to another may need to adjust dates when automatic payments are withdrawn from their checks, dates when child support payments are made, or adjust other financial obligations. Ensure employees have advance notice of the change.
- Will any employee benefits change because of the change from exempt to nonexempt status? If so, these changes should be fully explained. Will job duties change? If so, employees must fully understand their new responsibilities and/or tasks for which they are no longer responsible.

- Provide employees with training on recording and reporting hours worked. Ensure employees understand:
 - Their expected work hours in a workweek;
 - How to keep track of and accurately record hours worked on whatever recordkeeping system (time clock; time sheet, etc.) the school chooses to use;
 - If and how overtime work will be authorized, including any board policies on this issue;
 - “Off the clock” work is not allowed and potential disciplinary consequences for working unrecorded hours.
- Provide supervisors with training on overtime and other potential issues that might arise when the change is implemented. Supervisors must understand:
 - What counts as hours worked for any employee they supervise;
 - How employees should accurately record hours worked on the school’s timekeeping system;
 - How to monitor and verify employee timekeeping;
 - If and how, they may authorize overtime hours for nonexempt employees; and
 - Even if authorization is technically required, if they knowingly “suffer or permit” nonexempt employees to work overtime, the school must pay for the overtime worked.
- If the school uses compensatory time in lieu of paying for overtime, ensure newly nonexempt employees sign an appropriate agreement allowing for the use of compensatory time. (See Appendix I).

Communication about how overtime will be handled must be clear and concise. Too often in these situations, employers give the impression that they will no longer pay for overtime hours, but it is acceptable if an employee continues to work additional hours. This is not true. If a school district allows employees to work overtime hours, the district must pay for these hours. The district can forbid working overtime without prior authorization, but then it must enforce the rule.

Nonexempt Employees

Clerical Workers

In the school context, it is unlikely that clerical workers will qualify for an exemption. The requirement that an employee exercise “discretion and independent judgment” requires the making of real decisions about significant matters and does not apply to the kinds of decisions normally made by clerical employees. Work that is generally clerical in nature, involving well-established techniques, procedures and standards is not exempt. [Wage and Hour Opinion Letters, 10/23/95 and 1/18/96].

Blue Collar Workers

The exemptions provided by FLSA apply only to “white collar” employees who meet the salary and duties tests set forth in the regulations. The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the regulations no matter how highly paid they might be.

Police, Fire Fighters, Paramedics & Other First Responders

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

Given this broad protection for police officer overtime in the regulations, it is unlikely a school resource officer would qualify for exemption.

Noncertified Employees

With respect to noncertified employees, minimum wage and overtime must be paid for extra duties required by the school district or community college, such as ticket taking, timekeeping, scorekeeping, security, etc. Minimum wage and overtime will also most likely need to be paid to the following positions:

- Library aides;
- Coaching assistants;
- Teacher aides;
- Secretarial/clerical workers;
- Special education paraprofessionals;
- Key punch operators for school records;
- Cooks and cafeteria workers;
- Dieticians;
- Custodians;
- Bus drivers;

- Hall or lunchroom monitors;
- Maintenance workers; and
- Groundskeepers.

In many cases it is necessary to pay noncertified employees that are in a supervisory positions minimum wage and overtime. Unless employees clearly fall under the definition of executive, administrative, or professional personnel, they should not be treated as exempt.

School employers are often faced with difficult questions regarding the applicability of FLSA to certain types of employees. Directors of transportation, maintenance, food service, etc., may or may not be exempt from FLSA. If a director of transportation, maintenance, food service, etc., meets the tests for the executive, administrative, or professional exemption, such person would be exempt from the FLSA overtime requirements. However, if there is any doubt as to whether the test is met, the employee should be classified as nonexempt and paid overtime.

Probable Classification of School Employees

The following list of occupations separated according to classifications is set forth in the 2004 comments to the regulations. Remember, however, that each employee's exemption should be determined on an individual basis, looking at the specific duties the employee performs.

Blue Collar Occupations

- Cooks
- Food counter, fountain & related occupations
- Food preparation, kitchen workers
- Janitors and Cleaners
- Public transportation attendants
- Bus drivers
- Early childhood teacher's assistants
- Child care workers
- Groundskeepers and gardeners
- Automobile mechanics
- Electronic repairers
- Data processing equipment repairers
- Heating, air conditioning and refrigeration mechanics

- Office machine repairers
- Carpenters
- Electricians
- Plumbers & pipefitters
- Roofers
- Woodworking Occupations

White Collar Occupations

- Administrators in education related fields
- Financial managers
- Personnel managers
- Purchasing managers
- Managers, food serving establishments
- Registered Nurses
- Occupational Therapists
- Physical Therapists
- Speech Therapists
- Teachers
- Academic Counselors
- Librarians
- School Psychologists
- Social Workers
- Public Relations Specialists

For additional information on positions at the college or university level see Fact Sheet # 17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act, [dol.gov/whd/overtime/whdfs17s.pdf](https://www.dol.gov/whd/overtime/whdfs17s.pdf)

Chapter 2. Computing Hours Worked

With the exception of the child labor provisions, FLSA does not limit the number of hours an employee can be required to work; however, any hours worked in excess of forty (40) in a workweek must be paid at the overtime rate. With limited exception, employees are not entitled to breaks nor are they entitled to paid vacations or holidays under FLSA.

A workweek is any seven-consecutive day period and the employer is free to determine the beginning of the workweek. While a pay period may be longer than a week, hours cannot be averaged over more than one workweek in calculating overtime. If an employee works 32 hours one workweek and 48 hours the next workweek in a two-week pay period, the employee is entitled to overtime pay for the eight hours worked over 40 in the second week, even though the employee worked eight hours less than 40 in the first week. Overtime is also not computed on a daily basis. If an employee normally works an eight-hour day, but on occasion works a 12-hour day, the employee is not entitled to overtime for the hours in excess of eight, unless the employee actually works more than 40 hours in the workweek.

School employees may be hired to work less than 40 hours per week. In these cases, the contract with the employee or board policies should make it clear the employee can be required to work up to 40 hours in the workweek at the regular rate of pay, and that overtime will not apply until the employee reaches over 40 hours in the work week. In the absence of such a policy, some employees have successfully argued they are entitled to overtime when working hours in excess of the contracted amount, even if it is less than 40 hours.

Timekeeping

School administrators should ensure they have accurate records of the hours an employee works. Whether a school uses time clocks, a computerized timekeeping system, or handwritten time sheets, accuracy and veracity are the keys. The following practices have been identified as problem areas on timesheets in FLSA litigation:

- Timesheets that show the exact in and out time and total hours worked every day of the week;
- Timesheets that are not filled out by the employee or that contain no verification by the employee that the hours recorded reflect the actual hours worked;
- Timesheets that are not signed by the employee;
- Timesheets that do not record actual hours worked, but just whether the employee is present or absent;
- Timesheets that record contracted hours not actual hours worked; and
- Timesheets with multiple employees, filled out by the supervisor, without employee signatures to indicate the timekeeping was reviewed and/or is accurate.

School districts have a statutory duty to keep proper records of nonexempt employees' wages and hours. In FLSA litigation, if the employee has kept personal records of the time he or she has worked, the burden is on the school to show that the records are not an accurate reflection of the time the employee actually worked. To combat employee claims for back overtime, schools must have complete and accurate records. Without precise records, it may be difficult to defend against an FLSA lawsuit. Whatever timekeeping system the school uses, it should contain the following components:

- An accurate listing of the time work begins and ends;
- A signed acknowledgement by the employee that the timesheet accurately represents all of the hours the employee has worked for the school in the work week;
- A signed certification by the supervisor that the timesheet accurately reflects the hours the employee worked during the work week.

It is best to have the employee fill in the times on the timesheet, punch in or out on the time clock or log in or out on a computerized system by themselves. If a supervisor performs these functions for the employee, it is imperative that the employee review the timesheet and acknowledge, with a signature in writing, that it is an accurate reflection of all the hours worked in a workweek.

Any time an employee spends doing work for the school, unless it is performed in a legally acceptable volunteer capacity, must be counted as hours worked. Anytime the school "suffers or permits" an employee to work, the time spent working counts toward the hours worked in the time period. Even if work has not been requested by the school, the work will count as hours worked if the school allows the employee to do the work and the school benefits from the work. If the school knows or has reason to know that an employee is continuing to work, it is considered work time.

Maintaining policies that require accurate time submissions by employees, training employees and supervisors on how to track time, and providing employees with a mechanism to complain about and cure alleged underpayment can help protect the school district from FLSA liability. However, school administrators must carefully monitor employees to ensure work is not performed if the school does not want to pay for it. A rule prohibiting the work serves as a beginning, but will provide a weak defense if it is not monitored and enforced. If the school knows or has reason to believe the work is being done and makes no effort to stop the employee, it generally will have to pay for the hours the employee spends doing the work.

For instance, if the school secretary routinely takes copy for the school newsletter home, types it on her home computer and brings it to school the next day ready to be printed, she must be paid for the hours spent working at home if the school knows she is doing the work at home and allows her to continue completing the newsletter in this manner. In this case, although the school has not asked the secretary to do work at home, after school hours, it has knowingly allowed her to do this work that benefits the school and must pay for her time.

The secretary in this situation cannot volunteer to do the newsletter "off the clock." An employee cannot volunteer to do the same type of work they are paid to do. While the secretary might volunteer to sponsor a school club, she cannot volunteer to perform her normal duties without compensation. [NOTE: While FLSA would allow a secretary to volunteer to coach, Kansas State High School Activities Rules prohibit the use of volunteer coaches.] Nor can an employee waive his or her rights under FLSA. Because the FLSA is remedial in purpose, designed to establish minimum labor standards, waiver of

rights under the law is not permitted. *Brooklyn Savings Bank v. O'Neil*, 328 U.S. 697 (1945); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).

School administrators must resist pressures to allow or encourage off-the-clock work. These pressures may be economic or practical in nature, but any variance from the school's written timekeeping policies can have serious legal consequences.

If employees work hours beyond the number of hours they are contracted to work, if that number is less than 40, or work overtime hours without authorization, and the school knows or has reason to believe the work is being performed, generally the school should compensate the employee for the hours worked. In this situation, the school can discipline the employee for violation of board policy or insubordination. However, if the school has a policy requiring pre-approval of overtime and does not know or have reason to believe the work is being done, the school may be able to avoid liability for overtime pay, but only if it consistently enforces the policy. [See *Harvill v. Westward Communications, LLC*, 311 F.Supp.2d 573 (E.D. Tex. 2004)].

Any time worked, including time worked on a paid holiday, count toward the 40-hour work week. A paid holiday or vacation day, for which the employee is paid but does not perform any work, is not included when calculating the hours worked in a 40-hour work week. The same is true of other types of paid leave. While an employee is paid for hours spent on paid leave, those hours do not count as hours worked in the computation of overtime pay.

Hours Worked

Holiday or Weekend Work

The FLSA does not require extra pay for working on weekends or holidays. For example, if an employee works on Saturday or on Thanksgiving Day, but works 40 or fewer total hours including the weekend day or holiday, no extra pay is required. By policy or agreement, the school may pay extra for weekend or holiday work, but it is not required to do so. If a school adopts a holiday pay policy allowing for additional pay for working on holidays, the school must adhere to its policy. In *Holmes v. U.S.D. 259*, 46 P.3d 1148 (Kan. 2002), the Kansas Supreme Court held the school district could not give employees a paid holiday in lieu of paying the holiday rate as required by board policy.

Rest Breaks and Meal Periods

Aside from provisions requiring breaks for nursing mothers for breast feeding, nothing in the FLSA requires a school to provide its employees with breaks for smoking, using the restroom, making personal phone calls, visiting with other employees, getting coffee or soft drinks, or even eating lunch, but in practice most schools allow their employees to take breaks during the school day. Breaks of short duration (20 minutes or less) must be counted as hours worked.

In *Sec'y United States Dep't of Labor v. American Future Systems, Inc.*, 873 F.3d 420 (3d Cir 2017), DOL brought an hour and wage action, claiming the employer's policy of not providing paid breaks of more than 90 seconds, but instead allowing employees to take breaks from work at any time, for any reason and for any duration, violated the Fair Labor Standards Act. The Second Circuit held the employer's flexible time policy was subject to the FLSA, which required compensation for rest periods of less than 20 minutes. The Third Circuit also found the District Court did not abuse its discretion in awarding liquidated damages.

If employees abuse break policies, they must be paid but employers have the right to discipline the employees, terminate the employees, discontinue the break policy, or make changes to the break policy. In *American Future Systems*, the court noted, "Where the employee is taking multiple, unscheduled 19-minute breaks over and above his or her scheduled breaks, for example, the employer's recourse is to discipline or terminate the employee—not to withhold compensation."

If the break time allowed is more than 20 minutes and the employee is completely relieved of duty for a period long enough to enable the employee to use the time effectively for his or her own purposes, then hours are not hours worked under the FLSA. An employee is not completely relieved of duty to use the time effectively for his or her own purposes unless the employee is definitely told in advance that he or she may leave the job and that the employee will not have to recommence work until a specified time. Whether the time is long enough to enable the employee to use the time effectively for his or her own purposes depends upon all the facts and circumstances of the case.

A recent Department of Labor opinion letter, DOL Opinion Letter FLSA 2018-19, adds an exception to the general rule. If an employee needs frequent breaks due to a serious health condition, some of these breaks may be considered FMLA leave, which can be unpaid leave. However, the employee must be given the same amount of paid leave as other employees. For instance, assume an employee requires a 15-minute break each hour of an eight-hour shift. This would result in 2 hours of break time. If the employer allows all employees a 15-minute compensated break in the morning and another in the afternoon, the employee would be entitled to 30 minutes of paid break and one hour and 30 minutes could be unpaid FMLA leave.

Bona fide meal breaks need not be counted as hours worked, but the regulations suggest the meal period generally should be 30 minutes or more, and the employee should be relieved of duty during the meal period. The school may require the employee to stay on school premises during the lunch break, but the employee should not be required to eat at his or her desk, answer the telephone, respond to requests from students or staff or otherwise perform work during the lunch break.

Although the FLSA regulations indicate the employee must be "completely" relieved of duty during the meal period, the Kansas courts have concluded the test for determining if meal break periods are compensable is generally whether the employee's time is spent predominantly for the benefit of the employer or the employee. *Powell v. Simon Mgt. Group, L.P.*, 265 Kan. 197 (1998); *Laman v. City of Shawnee*, 972 F.2d 1145 (10th Cir. 1992); *Armitage v. City of Emporia*, 982 F.2d 430 (10th Cir. 1992). Applying this test in *Powell*, the court concluded meal periods of security guards who monitored their radios during the lunch period were not generally compensable. Only if an officer was required to respond to a call did the meal period become compensable.

Unauthorized extensions of authorized work breaks need not be counted as hours worked if the school district has expressly and unambiguously communicated to the employee that:

- The authorized break may only last for a specified period of time;
- Any extension of the break is contrary to the school district's rules; and
- Any extension of the break will be punished.

An amendment to FLSA, contained in the Affordable Care Act, requires employers to provide reasonable break time for an employee to express breast milk for one year after the child's birth. These breaks must

be provided “each time the employee has need to express the milk.” The school must provide a place, other than a bathroom, that is shielded from view and free from intrusion by for this purpose. This requirement became effective March 23, 2010. The Department of Labor FAQ on this requirement is included in Appendix J.

Physical Exams, Fingerprinting and Drug Testing

Whenever employees, after being hired by the school, are required to have physical examinations, submit to drug testing, or report to an office for fingerprinting, the following time counts as hours worked:

- The time spent traveling to and from the designated location;
- The time spent waiting to be examined, tested or fingerprinted; and
- The time spent being examined, tested or fingerprinted.

Even if these activities are scheduled on weekends or after working hours, the time spent meeting the school’s requirement must be counted in determining the hours worked.

The time an employee spends seeking medical attention, at the school’s direction, during his or her working hours for work-related illness or injuries may also count as hours worked. Time required in travel to and from the place where medical attention is provided is included, if the travel occurs during working hours on a day when the employee is working. A school must count time spent in follow-up medical treatments as hours worked only if the school instructs the employee to get the treatments. Unless the school instructs the employee to get the treatments, they will not count as hours worked, even if you allow the employee to take time off from work, paid or unpaid, to get the treatments.

Lectures, Meetings and Training Programs

Schools often provide employees with opportunities to broaden their knowledge or hone their skills through lectures, meetings or training programs. The time employees spend at these programs sometimes must be included in the calculation of hours worked. Time spent on these activities is not considered working time if the following criteria are met:

- Attendance is outside of the employee’s regular working hours;
- Attendance is voluntary;
- The course, lecture or meeting is not directly related to the employee’s job; and
- The employee does not perform any productive work while attending the meeting or program.

Voluntary attendance means the activity is not required by the employer. If an employee perceives his or her present working conditions will be adversely affected by not attending the program, however, attendance may be viewed as involuntary, even though not required by the school. Further, training is directly related to the employee’s job if it is designed to make the employee handle his job more effectively. It does not encompass training to acquire new skills or training the employee for another job, even if this training incidentally improves the employee’s skill in doing his or her regular work.

Hours spent attending lectures or training sessions are also not regarded as hours worked in the following circumstances:

- The school may establish a program of instruction, similar to courses offered by a college, for the benefit of its employees. Voluntary attendance in these programs, outside of working hours, does not count as hours worked, even if the courses relate to the employees' jobs or are paid for by the school.
- If an employee voluntarily or independently decides to attend a college or training program after work hours, the time is not hours worked, even if the courses are related to the job or if the school agrees to pay for the training.
- Time spent after working hours in specialized or follow-up training required for certification does not count as hours worked.

On-Call Time

Whether one is free to use on-call time for one's own purposes is the key to determining if this time must be counted as hours worked. Hours spent on-call are generally hours worked if an employee must stay on school premises while on-call. However, if the employee is merely required to leave work where he or she may be reached, on-call time is generally not working time if the employee can effectively engage in personal activities during this time. The frequency of calls may be an important factor in determining if an employee enjoys this freedom. Any time an employee spends responding to a call is clearly included in hours worked.

Preliminary and Postliminary Activities

Time an employee spends at school in activities before and after performing the principal work duties of the day may or may not count as hours worked. Each case depends on the specific circumstances. If employees are required to perform other tasks prior to beginning their primary tasks, time spent on these activities will generally count as hours worked unless the amount of time spent on the activity is insignificant. For instance, the time a bus driver spends doing a safety check of the bus before driving the route or securing the bus after driving the route probably count as hours worked.

Courts have concluded time spent in these activities is compensable in several situations. See *Brown v. Permanente Med. Grp., Inc.*, 2017 WL 1536493 (N.D. Cal. 2017)(\$6.2 million dollar settlement in a case involving time spent on computer log on and log off procedures which took 10 to 30 minutes per day); *Tompkins v. Farmers Insurance Exch.*, 2017 WL 4284114 (E.D. Pa. 2017) (\$775,000 settlement in a class-action lawsuit for alleged failure to compensate employees for preshift work, including starting up computers and accessing Farmers' software applications, obtaining daily assignments, determining the locations the workers would need to visit and the order in which the visits would occur, mapping routes, contacting customers and auto repair facilities, downloading required forms and gathering paperwork, and traveling to the workers' first appointments of the day); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), on remand, *Bouaphakeo v. Tyson Foods, Inc.*, 214 F. Supp. 3d 748 (N.D. Iowa 2016)(\$5.2 million award for time spent donning and doffing protective gear before and after the shift); *Harris v. Chipotle Mexican Grill, Inc.*, 49 F. Supp. 3d 564 (D. Minn. 2014)(employees demonstrated colorable basis for claim that employer had common policy of requiring employees to work off the clock during closing shifts).

Schools must ensure that nonexempt employees are paid for all hours worked while under their direction or control. When reviewing preliminary or postliminary activities, schools should consider the tasks performed, the amount of time spent on those tasks, and the level of control the school has over the employee at the time the work occurs.

Insignificant Periods of Time

In recording time under FLSA, infrequent and insignificant periods of time beyond the scheduled working hours, which cannot be precisely recorded for payroll purposes may be disregarded. Factors to consider in determining if the amount of time spent on an activity is insignificant or *de minimus* include:

- The amount of daily time spent on the additional work;
- The practical administrative difficulty of recording the additional time;
- The size of the claim in the aggregate; and
- Whether the work was performed on a regular basis. *Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998).

Civic and Charitable Work

Time spent in work for civic or charitable purposes on school premises and at the direction of the school is working time. Time spent voluntarily in these activities outside of the employee's normal working hours does not count as hours worked. However, time spent for these purposes may count as hours worked if:

- The school requests the employee to do the charitable or civic work;
- The work being done is under the school's direction or control; or
- The work is being done during the time the employee is required to be on school premises, or any other location assigned by the school district as the employee's place of work.

Commuting

Home-to-work travel and its reverse are not considered working time under the FLSA regulations unless an employee is required to perform work-related duties on the way to or from work. If an employee picks up supplies for the school on his or her way to work, the time spent getting the supplies and the travel time from the point where the supplies were purchased to the school figure into the hours worked calculation. Home-to-work travel may also count as hours worked if an employee is called back to work, after his or her normal working hours, to deal with an emergency situation. Travel from one job site to another job site during the work day is considered working time. School employees must generally be paid for travel between school buildings.

Overnight Trips

If a nonexempt employee is required to take an overnight trip, the employee is paid for all hours on duty. If the employee is completely free from duty for a period of time to enable the employee to

effectively use the time for his or her own purposes, such hours are not considered “worked” under FLSA.

If a bus driver makes an overnight trip, the number of hours counted as hours worked can be affected. For example, a school district may take a bus load of students to a state play-off activity and the driver may be required to wait several hours for the return trip home. In some cases, the driver may not return until the following day. Any time that the driver is required to be on duty, he is covered under the FLSA. If he is unable to use the time effectively for his own purposes, and remains under the control of the school, the time counts as hours worked. On the other hand, if the driver is completely relieved of duty and has sufficient time to use the time for his own purposes, the time may not count as working time. However, in order to be considered completely relieved from duty, the employee must be definitely told in advance that he may leave the job and that he will not have to commence work until a specified time. Whether the time is long enough to enable him to use the time effectively for his own purposes depends on the circumstances in each case.

Waiting Time

Whether an employee must be compensated for time spent waiting to do work depends on whether the employee has been engaged to wait or is waiting to be engaged. For instance, a receptionist who reads a book between phone calls or a custodian who talks to his fellow employees while waiting for machinery to be used on the job to be repaired are considered to be working during their relatively short and generally unpredictable periods of inactivity. On the other hand, a custodian who works a split shift and is completely relieved of duty for four hours each afternoon is not considered working during the idle time.

Inclement Weather Closures

Pay obligations differ during inclement weather closures depend on the employee’s exempt or nonexempt status under the FLSA. In Kansas, employers are not required to pay hourly, nonexempt employees for either full-day closures or early closures, but only for hours actually worked. However, because exempt employees must be paid for an entire workweek if they work any part of the workweek, schools are required to pay exempt employees for the entire day. If the school remains open during inclement weather, there is no obligation to pay an exempt who chooses to take the entire day off for personal reasons.

Chapter 3. Overtime

The FLSA places no limits on the number of hours an employee may work but does require overtime pay at a rate of not less than one and one-half times the employee's regular rate of pay for each hour worked in a workweek in excess of 40 per week. Overtime must be calculated on a workweek basis but need not be paid on a weekly basis.

Computing Overtime

The employee's regular rate of pay must be calculated before deductions such as contributions to a benefit plan, insurance premiums, withholding taxes, or garnishments are made.

General Rule

For employees who are paid an hourly rate computation of overtime is relatively simple. For the first 40 hours of work, the employee is paid at his or her regular hourly rate. For any hours over 40, the employee is paid for each hour at one and one-half times the regular rate.

Fluctuating Workweek

A school district or community college may employ a noncertified person (e.g., custodian) on a yearly basis and pay such employee a fixed salary with fluctuating hours. The regular rate for an employee whose hours of work fluctuate from week to week will vary. The employee working in this arrangement must be paid a stipulated salary with a clear understanding that it constitutes straight-time pay for all hours worked, regardless of the number of hours actually worked. The employee's regular rate is determined each week by dividing the salary by the number of hours he or she worked in that week. The regular rate cannot, of course, be less than the applicable minimum wage. Since the employee has been paid his or her straight-time compensation, he or she must receive additional overtime pay for each overtime hour worked in the week at not less than one-half the regular rate.

The fluctuating workweek method of paying salaried employees is allowed under the FLSA regulations, but this method of calculating overtime compensation can be used only if:

- The employee fully understands the salary is meant to cover all hours worked;
- The school and the employee have a clear understanding the salary (not including the additional overtime payments) will not fluctuate even though the job demands the employee work more or less than 40 hours in a given workweek;
- The salary is large enough to assure the average hourly wage will never fall below minimum wage.

To ensure the employee understands the fluctuating workweek method and its effect on overtime compensation, a written policy or document that sets forth an explanation should be provided to and preferably signed by the employee. [See Appendix H].

Calculating Overtime: Salaried Employee; Fluctuating Workweek

Assume an employee works no more than 60 hours and is compensated on a fluctuating work week basis at a weekly salary of \$800. Assume further that over a four-week period, the employee works 40, 45, 50 and 60 hours. The employee's compensation would be computed as follows:

First week hours worked: 40 hrs.

First week regular rate: \$20.00 (\$800 divided by 40)

Half time Premium: $\$20.00 \times \frac{1}{2} = 10.00$

Overtime Pay: 0

Total Compensation: \$800

Second week hours worked: 45 hrs.

Second week regular rate: \$17.78 (\$800 divided by 44)

Half-time premium: $\$17.78 \times \frac{1}{2} = \8.89

Overtime: \$44.44 (\$8.89 x 5 hours)

Total compensation: \$844.44

Third week hours worked: 50 hrs.

Third week regular rate: \$16.00 (\$800 divided by 50)

Half-time Premium: $\$16.00 \times \frac{1}{2} = 8.00$

Overtime: \$80.00 (\$8.00 x 10 hours)

Total compensation: \$880

Fourth week hours worked: 60 hrs.

Fourth week regular rate: \$13.33 (\$800 divided by 60)

Half-time premium: $\$13.33 \times \frac{1}{2} = \6.67

Overtime: \$133.33 (\$6.67 x 20)

Total compensation: \$933.33

Dual or Joint Employment

Sometimes school employees work in two different jobs in the district. This is referred to as dual employment for FLSA purposes. Even if the jobs are in different buildings or different departments, since

the jobs are both with the same employer—the school district—the weekly hours worked in each position must be combined for purposes of determining if overtime applies.

If the employee works in jobs with different rates of pay, the overtime is generally calculated based on the weighted average. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs.

Calculating Overtime: Employment at Different Rates of Pay

Assume a person works as both a custodian and a bus driver and is receiving \$16.00 per hour as a custodian for 30 hours per week and \$20.00 per hour as a bus driver for 20 hours per week. The employee's pay would be computed as follows:

\$16.00 per hour for 30 hours =	\$480.00	
\$20.00 per hour for <u>20 hours</u> =	<u>\$400.00</u>	
50 hours		\$880.00
Average hourly wage (\$880 divided by 50)	\$	17.60
Overtime factor	x	<u>.50</u>
Additional amount per hour for overtime pay	\$	8.80
Number of hours of overtime	x	<u>10</u>
Overtime pay		\$ 88.00
Total wages for week (880.00 + 88.00)		\$ 968.00

Alternatively, if the school and employee agree in advance, the employee can be paid time and a half on the basis of the work performed during the overtime hours. Using this method, the school runs the risk of paying overtime at the higher rate if the overtime hours are worked in the higher paying job. While the employee can agree that the overtime rate will be based on the rate paid for the job that creates the need for overtime, the employee cannot agree to be compensated for overtime only at the lower of the two rates.

Joint employment situations may also cause overtime problems. When an employee is employed by two separate employers, normally each employment is considered separately and the need to pay overtime arises only if the employee works more than 40 hours for one of the employers. However, if a joint employment relationship is created for FLSA purposes, the two employers are treated as one entity, and the hours worked for each entity must be combined to determine if overtime must be paid. Joint employment situations arise when:

- There is an agreement between two employers, such as a school district and a special education cooperative, to share the employee's services;

- One employer is acting directly or indirectly in the interest of another employer, such as when a school hires a temporary secretary through an employment agency; or
- The employers are deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other.

In other states, the DOL has concluded when the school contracts with an entity to provide services that would normally be provided by a school (such as transportation services or food services), and the school also employs individuals who drive buses or work in the cafeteria for the contractor, the employees are joint employees and the hours they work for the school must be combined with the hours they work for the bus or food service company on a weekly basis to determine if they are entitled to overtime pay.

In joint employment situations, the school district and contractor should determine how hours worked will be reported and how overtime will be calculated and paid as part of their contractual agreement. Under FLSA, both employers are jointly and severally liable for the entire amount of overtime owed to the employee if liability is established under FLSA. Either employer can be sued for the entire amount of the claim.

Different Types of Payment

There are some instances in which an employee may be paid an hourly rate for some work and a flat rate for other work. The following chart, based on Wage and Hour Opinion Letter 7/28/87 with pay adjusted for inflation, illustrates how to determine the amount of overtime to be paid in these circumstances. In the example, the bus driver is paid \$11 per hour for driving a regular route, \$80 for activity trips that occur on weekends or prevent him from completing all of his regular hours, and \$54 for activity trips that do not infringe on his ability to complete his regular route.

Calculating Overtime: Different Types of Payment

Assume a bus driver is paid an hourly rate for driving a regular bus route on a daily basis, and is paid a flat rate for activity trips. Further assume the driver is paid a higher flat rate if the activity trip is on a weekend or if the trip is at a time that requires the driver to miss all or part of the regular route.

Total Hours Worked							48 hours
Total Pay							\$770.00
Hourly rate (\$770/48)							\$16.04
Additional amount per hour for overtime pay							\$8.02
Number of hours of overtime							<u>x 8</u>
Overtime pay							\$64.16
	S	M	T	W	T	F	S
Regular hours	0	4	4	2	4	4	0

Regular Pay	0	\$60	\$60	\$30	\$60	\$60	0
Extra Hours	7	0	0	8	5	4	6
Triple Pay	\$120	0	0	\$120	\$70	\$70	\$120

Occasional and Sporadic Work

The FLSA does not require the combining of two salaries for the calculation of overtime in situations if an employee works occasionally and sporadically, on a part-time basis, for the school in a different capacity from his or her regular employment. In these cases, it is essential that the work be intermittent and irregular. If the second job is continuous or regular, it constitutes a second employment relationship, and hours worked in the two positions must be combined to calculate overtime.

The Wage and Hour Division of the U.S. Department of Labor has issued several opinion letters on the issue of occasional and sporadic work in the school setting. The department has concluded:

- Where a school custodian worked additional hours as a substitute teacher every week or every other week, the work was not intermittent or irregular and did not fall within the “occasional and sporadic” provision of FLSA. (9/10/97).
- A bus driver’s activity trips, which involved the same type of work the bus driver normally performed, did not fall within the “occasional and sporadic” provision of FLSA. (4/15/88).
- Where support personnel work additional hours coaching or supervising extracurricular activities, such work must be intermittent and irregular to fall within the “occasional and sporadic” provision of FLSA. A custodian’s coaching duties did not meet this requirement (12/3/86).

Qualifying under the occasional and sporadic provisions requires an analysis of the amount of time worked each day and the number of days worked each week, month or semester. If a regular pattern of work is established, it is unlikely the provision applies.

Chapter 4. Compensatory Time

In lieu of paying actual overtime wages, state and local governmental entities can allow compensatory time off. The time off must be not less than one and one-half hours for each hour of overtime worked. An employee can accrue only 240 hours of compensatory time; therefore, if overtime is worked beyond this amount, compensation must be in cash. If an understanding or agreement to permit the use of compensatory time exists, an employee must be permitted to use accrued compensatory time within a reasonable period after it is requested unless to do so would unduly disrupt the operations of the school.

If an employee is terminated or resigns with accrued, unused compensatory time, payment is required and calculated at the average regular rate of pay for the final three years of employment, or the final regular rate received by the employee, whichever is higher. FLSA does not require an employer to give any particular notice in advance of termination. However, depending upon the employment relationship, board policies, verbal representations, or handbooks, a notice requirement may exist. Any policy or contractual provisions should be followed to avoid substantive and procedural legal difficulties.

Agreement Required

Compensatory time may be used only if an agreement is negotiated with an individual employee or with a representative of the employees to use compensatory time in lieu of payment for overtime. The agreement must be reached prior to the commencement of work. If the school used compensatory time prior to April 15, 1986, the practice suffices as an “understanding” permitting the continued use of compensatory time. However, employees should be given notice of the practice.

FLSA falls short of requiring a written agreement with your employees, but, if challenged, the school should be able to show the employee knowingly agreed to compensatory time in lieu of overtime as a condition of employment. Using a written agreement will meet this requirement. [See Appendix I]. The school should also be able to show the employee was informed how compensatory time would be earned, preserved, used or cashed out.

A school may reduce the number of hours an employee can work or cash out an employee’s accrued compensatory time at any time. The school can also require an employee to use his or her compensatory time. *Christensen v. Harris County*, 529 U.S. 526 (2000).

Compensatory time, like vacation time, is paid time off. An employee accumulates compensatory time at a rate of 1½ hours for each hour of overtime worked. When employees use compensatory time, they are paid for each hour used at their regular hourly rate of pay.

Recordkeeping for Compensatory Time

If the school allows for compensatory time in lieu of cash payment for overtime, the following records must be kept:

- The number of compensatory hours earned each workweek by each employee, calculated at a rate of one and one-half hour for each hour of overtime worked, 29 CFR §553.50 (a);

- The number of hours of compensatory time used in each work week by the employee, 29 CFR §553.50 (b);
- The number of hours of compensatory time paid in cash, including the amount paid and date of payment, 29 CFR §553.50 (c); and
- Any written understanding or agreement with respect to earning and using compensatory time off, including a written record of any oral agreements, 29 CFR §553.50 (d).

Chapter 5. Recordkeeping & Enforcement

Recordkeeping Requirements

The FLSA requires employers to keep detailed records for covered employees, as well as records for employees who are exempt from the minimum wage and overtime requirements. The law defines the time period for which certain types of records must be preserved, but does not require that the records be maintained in any particular format. Whatever format is used, the records must be accessible and viewable.

For employees who are subject to FLSA's minimum wage and overtime pay provisions, the following records must be kept:

- Name in full, 29 CFR §516.2 (a)(1);
- Home address, 29 CFR §516.2 (a)(2);
- Date of birth, if under 19, 29 CFR §516.2 (a)(3);
- Sex and occupation, 29 CFR §516.2 (a)(4);
- Time of day and day of the week on which the employee's workweek begins, 29 CFR §516.2 (a)(5);
- Regular hourly rate of pay, including an explanation of the basis for determining the regular rate, for any workweek in which overtime compensation is due, 29 CFR §516.2 (a)(6);
- Hours worked each workday and total hours worked each workweek, 29 CFR §516.2 (a)(7);
- Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, 29 CFR §516.2 (a)(8);
- Total premium pay for overtime hours, 29 CFR §516.2 (a)(9);
- Total additions to or deductions from wages paid each pay period, 29 CFR §516.2 (a)(10);
- Total wages paid each pay period, 29 CFR §516.2 (a)(11);
- Date of payment and the pay period covered by the payment, 29 CFR §516.2 (a)(12).

For exempt employees, an employer must keep the same information except for those records which pertain to payment and hours worked (29 CFR §516.2 (a)(6) through 29 CFR §516.2 (a)(10)). In addition, the school must keep records delineating the basis on which the employee's wages are paid in sufficient detail to permit calculation of the employee's total compensation for employment, including fringe benefits, for each pay period. All records must be made available to the Department of Labor upon request. Willful falsification of records may subject an employer to criminal action.

Length of Time for Retaining Certain Records

At Least Two Years

- Basic Employment and Earnings Records
- Wage Rate Tables
- Order, Shipping, and Billing Records
- Records of Additions to or Deductions from Wages Paid

At Least Three Years

- Payroll Records
- Certificates
- Collective Bargaining Agreements
- Individual Contracts
- Sales and Purchase Records

Enforcement

The Wage and Hour Division of the Department of Labor is responsible for enforcement of the FLSA. Most frequently, WHD becomes involved because of a complaint it receives from an employee, although it also has general monitoring and auditing authority. If the department determines a violation of FLSA has occurred, and is unable to resolve the complaint through informal conciliation procedures, it may conduct a full investigation and attempt to resolve the matter through a supervised settlement agreement. If resolution is not attained in this manner, DOL can bring action against the school for back wages, an equal amount in liquidated damages and injunctive relief. Alternatively, DOL can assess civil penalties of up to \$1000 per violation for repeated, willful violations of the FLSA. Criminal charges, including fines and imprisonment for up to six months are also options.

Employees themselves can bring actions in state or federal court to recover back wages. In these cases, courts can also award liquidated damages in an amount equal to the amount of wages owing. Employees may also be entitled to recover attorney fees and court costs.

Generally, actions to recover overtime wages must be brought within two years after the wages should have been paid. However, if the violation is willful, the time period is extended to three years.

Further, an employee's FLSA claims may be subject to arbitration. *Rodriguez-Depena v. Parts Auth., Inc.*, 877 F.3d 122 (2d Cir. 2017).

Retaliation

The remedy provision for retaliation claims was added to the FLSA in 1977. Retaliation against an employee for filing a complaint or cooperating in the investigation of a complaint under FLSA are prohibited.

Retaliation laws generally protect third parties who complain on behalf of an individual, including co-workers and relatives of a mistreated employee, from any adverse actions by an employer. This means that the fact that the person being fired is not the one with the underlying claim is usually not a defense to a retaliation claim. *Starnes v. Wallace*, 849 F.3d 627 (5th Cir. 2017).

Filing of an FLSA complaint does not prohibit taking action against an employee for performance based reasons. In *Williams v. Flexfrac Transport, LLC*, 2018 WL 1887440 (Tex. App. Apr. 20, 2018), a truck driver was terminated two days after he filed a complaint with the Department of Labor about his pay brought action alleging retaliation. Testimony that Williams was a poor employee, had a bad attitude, was constantly late, incessantly complained, and would not return phone calls supported the jury's finding in the company's favor. Further, the record included email documentation of internal communications regarding performance issues beginning a month before Williams complained about his pay.

Plaintiffs can recover damages for emotional injuries in retaliation actions under the FLSA. See *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016); *Moore v. Freeman*, 355 F.3d 558, 563 (6th Cir. 2004); *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 112 (7th Cir. 1990). Other circuits have upheld jury awards for emotional damages in FLSA retaliation cases though the legal question was not challenged on appeal. *Travers v. Flight Servs. & Sys., Inc.*, 808 F.3d 525, 530, 539–42 (1st Cir. 2015); *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 992 (8th Cir. 2001) (per curiam); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999).

Training on the FLSA provisions prohibiting retaliation is well-advised. As part of anti-retaliation training, the employer should:

- Consider whether managers need to be informed of an internal complaint, assuming the employee has not already volunteered this information.
- Instruct managers informed of the complaint of the company's no-retaliation policy.
- Inform everyone involved that there is to be no retaliation and encourage the complaining employee to come forward with any problems or issues at the conclusion of an investigation into a wage complaint. Ensure every action taken against an employee who has filed a charge or lawsuit goes through the HR and legal departments.
- Have someone who is not the subject of the claim perform an independent investigation of any proposed adverse action against anyone who has filed a claim or complaint.
- Document the investigation and take no action unless it can clearly be supported by company policy.
- Continue to document any prior pattern of poor behavior or performance.

When disciplining supervisors who have shown retaliatory behavior, align the punishment to the nature of the retaliation and the history of prior bad acts by the managers, if any. Appropriate responses might include written counseling, mandatory one-on-one retaliation training, a warning that any additional retaliatory action will result in termination or termination.

Information on training for retaliation was excerpted from Smith, Allan, "Plaintiffs Can Now Receive Emotional Distress Damages in Wage and Hour Retaliation Claims, Society for Human Resource Management, August 8, 2017, shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/emotional-distress-damages.aspx

Chapter 6. Compliance Checklist

The purpose of this list is to provide school districts with assistance in complying with the requirements of FLSA. It is a guide for evaluating your employment practices under FLSA; it does not constitute legal advice. Schools should seek legal assistance from their board attorney when making FLSA-related decisions.

1. Classify all employees as exempt or nonexempt.

Identify which employees are exempt from the overtime requirements of the Fair Labor Standards Act because they qualify as executive, administrative, professional, computer professional, or highly compensated employees. If you have employees who meet the highly compensated test, reclassify their positions. Maintain a record in each employee's file indicating why the position has been classified as exempt.

Remember, exemption is the exception rather than the rule, and any employee classified as exempt must meet the salary level and basis tests and the job duties test in order to qualify for an exemption. Exemption cannot be based on job title or the fact a person is paid on a salary basis rather than an hourly basis. Any employee who does not meet the tests for exemption must be classified as nonexempt.

2. Review job descriptions and include language to reflect performance of exempt duties.

For instance, if an employee is classified as an executive employee, include language in the job description indicating that one of the employee's duties is to make recommendations about hiring, firing or other employment actions with regard to the employees the individual supervises.

3. Review board policies to ensure compliance with the salary basis test.

Adopt a safe harbor policy and complaint procedure.

4. Adopt a board policy on the workweek, overtime and compensatory time (if you choose to allow for compensatory time) and make sure all employees have access to and understand the policy.

The policy should identify:

- The seven-day workweek for the school district—when it begins and ends;
- The number of hours expected to be worked each week by employees;
- Whether employees need authorization (oral or written) to work overtime; and
- Whether you will use compensatory time instead of overtime pay for employees working more than 40 hours per week. [NOTE: Employees must agree to use compensatory time.]

Employees should:

- Be given a copy of the board policy;

- Acknowledge that they have received and understand the policy; and
- Agree to follow the policy and procedures or be subject to discipline.

5. Notify nonexempt employees of their expected work hours in a workweek.

Be clear in policy, administrative regulations, and employee handbooks that the salary of non-exempt employees is paid for a 40-hour workweek. As a local option, you may regularly schedule paraprofessionals to work 37.5 hours per week and leave the remainder as possible flex time. To avoid the possibility of “straight time” claims for hours worked between 37.5 and 40, you need to clearly communicate to your employees that the school district pays them a salary for up to 40 hours of work and that the school system retains the right to request that any employee perform additional duties up to 40 hours without additional pay. As long as compensation for the week constitutes at least minimum wage and it is clear that you are paying the employee for a 40-hour workweek, you should not find yourself facing “straight time” claims. If it is not clear the employee is paid for a 40-hour workweek, the school may have “straight time” claims for hours worked between 37.5 and 40.

6. Have a good timesheet or other method of timekeeping.

Make sure the school has an acceptable timekeeping method for keeping track of working hours for nonexempt employees. Acceptable methods include timesheets, time clocks or computerized check-in systems, so long as they include the required elements.

7. Annually train your supervisory staff on FLSA compliance issues.

Supervisors should have training on the following topics:

- What counts as hours worked or compensable time;
- How timesheets must be completed for nonexempt employees;
- Their duty to monitor timesheets and verify time worked;
- The requirements of the salary basis test; and
- The retaliation provisions of FLSA.

8. Train your nonexempt staff on timesheets and overtime requirements.

Train all nonexempt staff when hired and regularly thereafter on the following topics:

- Board policy requirements;
- What counts as compensable time; and
- How to correctly complete timesheets.

9. Decide whether nonexempt employees will be permitted to volunteer in the district.

Nonexempt employees cannot volunteer to perform the same type of services they regularly perform as an employee, even if they will perform those services outside their normal workday. To be a bona fide volunteer, an individual must freely and voluntarily (without any direct or implied coercion) agree to perform the volunteer duties for no compensation or a nominal fee. Additionally, some regional offices of the Department of Labor have added a requirement that employees volunteer only on an occasional or sporadic basis.

If nonexempt employees volunteer to perform duties for the district, the school should have them sign a form verifying they are volunteering.

10. Have all nonexempt employees sign the following documents annually:

- A statement they have been provided a copy of the board's policy on work time, have reviewed it and agree to follow the policy or be subject to discipline; and
- An agreement that any overtime worked over 40 hours per week will be compensated with time and a half compensatory time rather than overtime pay. [NOTE: The second document is necessary if and only if the board has determined it will use compensatory time in lieu of overtime pay.]

11. Have supervisory, payroll and finance staffs monitor weekly time records.

Supervisory staff must continuously monitor weekly time records for accuracy and completeness. They should also report all overtime worked by nonexempt staff to the business office to ensure the employees are paid overtime or credited with compensatory time. If the school has concerns about information being recorded properly or staff being paid properly, determine if an audit of employee records is needed.

12. Keep FLSA-required records for nonexempt and exempt employees for the requisite amount of time.

At Least Two Years

- Basic Employment and Earnings Records
- Wage Rate Tables
- Order, Shipping, and Billing Records
- Records of Additions to or Deductions from Wages Paid

At Least Three Years

- Payroll Records
- Certificates
- Collective Bargaining Agreements
- Individual Contracts

- Sales and Purchase Records

13. Post all federal and state required employment posters.

Employment posters should be posted in areas accessible to all employees, especially non-certified employees. Consider posting copies of the posters in the following places: the teachers' lounge, the school office, the cafeteria or kitchen, the bus garage, the janitor's closet or other places where employees gather.

14. Consult with your school board attorney about FLSA compliance issues to address any outstanding issues.

Chapter 7. Child Labor Laws

The FLSA sets 14 as the minimum age at which most children can perform non-agricultural work. However, at any age, youths may deliver newspapers; perform in radio, television, movie, or theatrical productions; work in businesses owned by their parents; perform babysitting or perform minor chores around a private home.

State law exempts these services as well, but provides that these exempt services cannot be performed by a child attending school during hours in which the public school is in session in the district in which such child resides. K.S.A. 38-614. State law also provides additional protections for minor child entertainers in K.S.A. 38-615 through 38-622 and requires a work permit for children under the age of 16 if they are not enrolled in and attending secondary school. K.S.A. 38-604.

Hours of Work

FLSA places restrictions on the number of hours certain children can work and the type of work they can perform until workers reach age 18. FLSA limits the hours worked by 14- and 15-year-olds to non-school hours. These youths cannot work more than three hours in a school day, including Fridays, 18 hours in a school week, eight hours in a non-school day or 40 hours in a week when school is not in session. Work must occur between 7 a.m. and 7 p.m. except from June 1 through Labor Day, when evening hours are extended to 9 p.m. State law contains similar provisions. K.S.A. 38-603.

Type of Work

The FLSA also limits the type of work youths can perform in accordance with their age. Permissible jobs, by age, are as follows:

- Young workers 18 and older may perform any job, hazardous or not;
- Young workers 16 and 17 years old may perform any non-hazardous jobs; and
- Young workers 14 and 15 years old may work outside school hours in various non-mining, non-manufacturing and non-hazardous jobs.

Hazardous jobs in a school context might include driving a motor vehicle, being an outside helper on a motor vehicle, or jobs requiring the use of any of the following power-driven machines: woodworking machines, hoisting apparatus, metal-forming, punching or shearing machines, power-driven bakery machines, balers, compactors, paper-products machines, power-driven circular saws, band saws, guillotine shears, chain saws, reciprocating saws, wood chippers and abrasive cutting discs. Working in wrecking, demolition, roofing or excavation operations is also prohibited. Regulations governing child labor define roofing operations to include all operations on or about a roof and includes all work performed in connection with the installation of a roof. In some of these occupations, there may be limited student-learner exceptions.

Seventeen-year-olds may drive motor vehicles on a limited basis, so long as the driving is occasional and incidental to the employment and the following criteria are met:

- The automobile or truck does not exceed 6,000 pounds gross vehicle weight, and it is equipped with a seat belt or similar restraining device for the driver and for any passengers and the school has instructed the employee that such belts or other devices must be used;
- The driving is restricted to daylight hours;
- The minor holds a State license valid for the type of driving involved in the job performed and has no records of any moving violations at the time of hire;
- The minor has successfully completed a State-approved driver education course;
- The driving does not involve: the towing of vehicles; route deliveries or route sales; the transportation for hire of property, goods, or passengers; urgent, time-sensitive deliveries; or the transporting at any one time of more than three passengers, including employees of the school;
- The driving performed by the minor does not involve more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the minor's employer to a customer (except urgent, time-sensitive deliveries which are completely banned in paragraph (b)(5) of this section);
- The driving performed by the minor does not involve more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than the employees of the school); and
- The driving takes place within a thirty (30) mile radius of the minor's place of employment;

Under the regulations governing child labor, 14- or 15-year-old may not work in the following occupations:

- Construction or repair jobs;
- Driving a motor vehicle or helping a driver;
- Operating power-driven machinery or hoisting apparatus other than typical office machines;
- Youth peddling, sign waving or door-to-door sales;
- Processing occupations;
- Public messenger jobs;
- Transporting of persons or property;
- Workrooms where products are manufactured, mined or processed; and
- Warehousing and storage.

A 14- or 15-year-old may work in retail stores, food service establishments and gasoline service stations. However, a 14- or 15-year-old may not perform the following jobs in the retail and service industries:

- Baking;
- Boiler or engine room work, whether in or about;
- Cooking, except cooking is permitted with electric or gas grills that do not involve cooking over an open flame or with deep fryers that utilize a device that automatically lowers and raises the baskets into and out of the grease;
- Freezers or meat coolers work;
- Loading or unloading goods on or off trucks, railcars or conveyors;
- Meat processing or working in areas where meat is processed;
- Maintenance or repair of a building or its equipment;
- Operating, setting up, adjusting, cleaning, oiling or repairing power-driven food slicers, grinders, choppers or cutters and bakery mixers;
- Outside window washing or work standing on a window sill, ladder, scaffold or similar equipment; and
- Warehouse work, except office and clerical work.

The jobs a 14- or 15-year-old may do in the retail and service industries include:

- Bagging and carry-out of customer's orders;
- Pricing and tagging goods;
- Cashiering, selling, modeling, art work, advertising, window trimming or comparative shopping;
- Cleaning fruits and vegetables;
- Clean-up work and grounds maintenance (the young worker may use vacuums and floor waxers, but he or she cannot use power-driven mowers, cutters and trimmers);
- Delivery work by foot, bicycle or public transportation;
- Kitchen and other work in preparing and serving food and drinks, but not cooking—except in limited circumstances—or baking;
- Work as a lifeguard at a traditional swimming pool, if 15 years of age and properly certified;
- Work of an intellectual or artistically creative nature;
- Office and clerical work; and
- Pumping gas, cleaning and polishing cars and trucks (but the young worker cannot repair cars, use garage lifting rack or work in pits).

In addition to ensuring you do not violate the rights of child workers, Kansas law also requires the school, if it hires children under the age of 16, to post a notice that contains the following information: the maximum number of hours such child may be required or permitted to work each day of the week, the hours of commencing and stopping work, and the hours allowed for dinner or other meals. K.S.A. 38-605.

Work Experience and Career Exploration Programs

Federal law provides some variations from the child labor provisions for employment of youths between 14 and 16 years of age who are enrolled in and employed under a school-supervised, school-administered work experience or career exploration program. 29 CFR 570.35a. Generally these programs must meet state standards, be approved by the Wage and Hour Division, provide students with credit for both in-school related instruction and on-the-job experience, and be under the supervision of a teacher. From an employer's perspective, the employment of a minor in the program cannot displace a worker already employed by the employer.

Students participating in the program must enter into a written training agreement signed by the teacher, the employer and the student. Parents must either sign the agreement or otherwise consent to the agreement. State law indicates the agreement must provide: the work of the student-learner is incidental to his or her training under the supervision of a teacher-coordinator employed by the school, and a schedule of organized and progressive work processes to be performed on the job has been prepared.

Work experience and career preparation programs allow some exemptions, but generally do not allow minors to work in hazardous professions. The number of hours spent working are also limited to not more than 23 hours in any one week when school is in session and not more than 3 hours in any day when school is in session, any portion of which may be during school hours.

Chapter 8. Appendices

Appendix A: DOL Letter on Volunteers

https://www.dol.gov/whd/opinion/FLSA/2004/2004_07_14_6_FLSA_Coaching.pdf

Appendix B: Volunteer Information Sheet

The Fair Labor Standards Act allows people to volunteer to perform services, without promise, expectation or receipt of compensation for those services, for public schools for civic, charitable or humanitarian reasons. School district employees cannot volunteer to perform services for the school district unless they are bona fide volunteers. That means:

- The employee’s services are offered freely and without pressure or coercion, direct or implied from the school or its officials.
- The employee does not perform the same type of services as a volunteer that he or she performs in his or her regular job.

As a public employee, a school employee cannot volunteer to perform his or her regular work duties off the clock and without compensation. Even if an employee offers to do the work “on their own time” or on a volunteer basis, the school must either not allow the employee to do the work, or pay the employee for the work. Employees cannot waive their right to be paid under the FLSA.

Allowing non-exempt employees to volunteer for any activity is a risk, and schools do not need to accept the volunteer services. If it is determined a nonexempt employee was not a *bona fide* volunteer, the school may be liable for back wages and/or overtime for the time the employee spent performing the “volunteer” services.

The restrictions on volunteer services apply to work done for the employer—that is the school district—not a particular school. A secretary working at an elementary school building cannot volunteer to perform secretarial services at the high school.

Appendix C. Sample Volunteer Agreement

Volunteer Agreement

20__-20__ School Year

NOTE: An employee of the school district MAY NOT volunteer to perform a job that is the same or similar job to the job for which he/she is employed.

I, _____, of my own free will and without any coercion from my employer, hereby volunteer to perform the following service(s) for the school district:

My time and service in this capacity are given without promise, expectation or receipt of any form of compensation, benefits or other remuneration for this service.

I understand and agree that my volunteer services are not being performed in the course and scope of my regular employment at _____ School. I further understand that my performance of these services in a volunteer capacity is not in any way required by the school district or its board of education.

I acknowledge and agree that my volunteer services do not involve the same or similar types of services as the services I perform as an employee of the school district. I further acknowledge and agree that my volunteer services are not closely related to my duties and responsibilities as an employee.

I understand that my participation as a volunteer may be terminated at any time, without cause, and that I may withdraw from participation at any time, for any reason, and that my withdrawal from volunteer service will not affect my continued employment with the school district.

This agreement will continue in force until terminated by either party.

Volunteer Signature & Date

Authorized School Official & Date

Appendix D: Volunteer Checklist

1. Is this individual employed by the school district? Yes No

2. Is this individual employed by an entity closely related to or that provides services for the school such as a bus driving company or a food service provider? Yes No

If the answer to questions one or two is yes, proceed to question 3. If the answer to both questions is no, proceed to question 6.

3. What services does the employee perform for the school district or the closely related employer?

4. What services does the employee want to volunteer to perform?

5. Are the volunteer services the same or similar to the services the employee provides as an employee of the district or a closely related employer? Yes No

If the answer to question five is yes, the employee cannot volunteer to provide the services. If the answer is no, proceed to question 6.

6. Will the individual receive:

a. Any compensation for the services? Yes No

b. Any benefits such as health insurance, length of service awards, etc.? Yes No

c. Any reimbursement of expenses such as meals or travel expenditures? Yes No

d. Any nominal fee? Yes No

7. If the answer to any of the questions in number six is yes, describe the type of compensation and how it is paid.**

8. How many hours a week will the individual volunteer?

9. Is there a set schedule under which the individual volunteers to perform the services? Yes No

10. Has the individual volunteered his or her time of his or her own free will, without promise, expectation or receipt of any form of remuneration for this service? Yes No

If the answer to question 10 is no, the employee is not a volunteer and must be paid for the services.

11. Is the individual required to perform any of the services? Yes No

If the answer to question 11 is yes, the employee is not a volunteer and must be paid for the services.

12. Can the employee choose not to show up to perform the volunteer duties or quit performing the duties he/she is volunteering to perform without a negative impact on his or her employment?
Yes No

**** Section 3(e)(4)(a)(i) and the implementing regulations at 29 CFR § 553.106 provide that a volunteer may only be paid expenses, reasonable benefits, or a nominal fee, or any combination thereof, without losing volunteer status.**

The statute and implementing regulations do not define what constitutes a “nominal fee,” but the regulations do provide guidance for determining whether a fee is nominal and permissible. In particular, § 553.106(e) states that a fee is not nominal if it is a substitute for compensation or tied to productivity.

The factors to examine in making this determination include, but are not limited to: (1) the distance traveled and the time or effort required of a volunteer; (2) the availability—limited or unlimited—of a volunteer to provide services; and (3) the basis—as needed or throughout the year—on which a volunteer agrees to perform services. These factors focus upon whether the fee is actually more analogous to a payment for services or recompense for something performed and therefore not nominal. To the extent a fee is based upon the factor delineated, there is a greater likelihood that such fee is not nominal. For example, to the extent that payments are tied to productivity (e.g., payment of hourly wages for service rendered), are similar to “piece rates” or are comparable to “production bonuses,” there is a greater likelihood that such fees are not nominal.

Finally, § 553.106(f) provides that the determination of whether the expenses, benefits or fees would preclude an individual from qualifying as a volunteer under the FLSA must be made by examining the total amount of payments in the context of the economic realities of a particular situation.

Appendix E. Sample Policies

GCA--Compensation and Work Assignments

Classified employees shall be paid according to pay rates established by the board. Payment shall be made at the established pay date following the end of each pay period.

Work Assignments

Subject to board approval, the superintendent shall develop time- schedules for all classified employees. Work assignments for classified employees shall be made by the superintendent.

Attendance Required

Regular attendance is required of all employees subject to leave provisions in district policy, employee handbooks or other documents approved by the board. Excessive absences or tardiness, unauthorized leave or unexcused absences may result in disciplinary action including termination of employment.

Workweek

For the purposes of FLSA compliance, the workweek will be 12:00 a.m. Sunday until 11:59 p.m. Saturday. [NOTE: A workweek consisting of seven full days must be established. The week does not have to start on Sunday.]

Classification of Employees

For purposes of compliance with the Fair Labor Standards Act, the superintendent shall ensure that all job positions are classified as exempt or non-exempt and that employees are made aware of such classifications.

Overtime

No non-exempt employee shall work more than 40 hours per week without the prior written permission of the appropriate supervisor. Principals and supervisors shall monitor employees' work to ensure that the overtime provisions of this policy and the Fair Labor Standards Act are followed. All employees shall be compensated for overtime worked at a rate of one and one-half times their normal rate of pay for any hours worked over 40.

Non-exempt employees whose workweek is less than 40 hours will be paid at the regular rate of pay for time worked up to 40 hours. Overtime pay or compensatory time off will be provided only if an employee works more than 40 hours in a workweek.

Compensation for Out-of-Town/Overnight Trips (See GAN)

When classified personnel are required to be out of town on district business, they shall be compensated in the following manner: Regular or overtime pay (or compensatory time) as appropriate for time away from (name of town) MINUS:

1. Eight hours for sleep when overnight;
2. Reasonable time for meals (normally one hour per meal); and
3. Time used exclusively for pleasure or personal business.

GCA--Compensation and Work Assignments

Compensatory Time [This paragraph is optional and should be included only if the school chooses to use compensatory time.]

In lieu of overtime compensation, non-exempt employees may receive compensatory time off at a rate of not less than one and one-half (1.5) hours for each one hour of overtime worked, if such compensatory time is agreed to by the employee before the overtime work is performed and is authorized by the employee's immediate supervisor.

GBR--Work Schedule (See JGFB)

Certified personnel must be at their assigned area during each duty day. Any teacher who finds it necessary to leave while supervising students shall first secure approval from the principal. Building and playground assignments shall be made by the principal.

Work Schedules

The minimum length of the school day for licensed and professional shall be defined in the negotiated agreement. Work schedules for other employees shall be defined by the superintendent consistent with the Fair Labor Standards Act (FLSA) and the provisions of this policy.

Attendance Required

Regular attendance is required of all employees subject to leave provisions in district policy or the negotiated agreement, as appropriate. Excessive absences or tardiness, unauthorized leave or unexcused absences may result in disciplinary action including termination of employment.

GAOF--Salary Deductions (Also see GAL)

Salary deductions shall be made if permitted by board policy, the negotiated agreement, or required by law. The district shall comply with the salary basis requirements of the Fair Labor Standards Act (FLSA).

The superintendent shall develop forms to provide information needed to make approved salary deductions. All requests for salary deductions shall be submitted to the superintendent during enrollment periods established by the board.

SAMPLE SALARY BASIS POLICY (KASB)

GAL--Salary Deductions (FLSA)

The district shall comply with the salary basis requirement of the Fair Labor Standards Act (FLSA). The board prohibits all managers from making any improper deductions from the salaries of exempt employees. Employees shall be made aware of this policy.

If an employee believes that an improper deduction has been made to his or her salary, the employee should immediately report this information to his or her direct supervisor or to [_____].

Reports of improper deductions shall be promptly investigated. If it is determined that an improper deduction has occurred, the employee shall be promptly reimbursed for any improper deduction made.

SAMPLE SALARY BASIS POLICY (Department of Labor)

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What to Do If an Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [insert alternative complaint mechanism(s)].

Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.

Appendix F. Exempt Employee Checklists

Executive Employee Exemption

You must answer yes to all of the questions in order for an employee to qualify for the executive exemption.

Is the employee paid not less than \$455 per week? Yes No

Is the employee paid on a salary basis? Yes No

The employee experiences no reduction in salary for variances in the quality and quantity of work;

The employee is paid his or her full salary for any workweek in which any work is performed.

(Deductions from leave banks are permissible. For public employers, deductions of less than a full day for absences are also permissible.)

NOTE: The salary basis requirements do not apply to teachers.

Is the employee's primary duty managing the school district or a customarily recognized department or subdivision of the school district? Yes No

Primary duty is the principal, main, major or most important duty the employee performs.

A customarily recognized department or subdivision does not include a mere collection of employees assigned to a specific job or series of jobs from time to time.

Does the employee regularly and customarily supervise two or more employees in the department the executive is managing? Yes No

This requires two or more full-time employees or their equivalent (e.g. four- half-time employees or one full-time employee and two half-time employees).

Shared responsibility for supervision of the same two employees in the same department does not fulfill the requirement unless the ratio in the department is at least two full-time employees per manager.

Are the employee's suggestions and recommendations about hiring, firing, advancement, promotion or any other tangible employment action with regard to other employees given particular weight?

Is it part of the employee's job duties to make such suggestions and recommendations?

With what frequency are suggestions or recommendations made or requested?

With what frequency are the suggestions or recommendations relied upon?

Administrative Employee Exemption

You must answer yes to all of the questions in order for an employee to qualify for the administrative exemption.

Is the employee paid not less than \$455 per week Yes No

Is the employee paid on a salary basis? Yes No

The employee experiences no reduction in salary for variances in the quality and quantity of work;

The employee is paid his or her full salary for any workweek in which any work is performed. (Deductions from leave banks are permissible. For public employers, deductions of less than a full day for absences are also permissible.)

NOTE: The salary basis requirements do not apply to teachers.

Does the employee's primary duty consist of the performance of office or non-manual work directly related to the management or general business operations of the school district? Yes No

Primary duty is the principal, main, major or most important duty the employee performs.

The employee should not be a clerical or "blue collar" worker.

Does the employee have a primary duty that requires the exercise of discretion and independent judgment with regard to matters of significance? Yes No

Generally, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.

Learned Professional Employee Exemption

You must answer yes to all of the questions in order for an employee to qualify for the learned professional exemption.

Is the employee paid not less than \$455 per week or exempt from the salary level requirement? Yes No

NOTE: The salary level requirement does not apply to teachers.

Is the employee paid on a salary basis or exempt from the salary basis test? Yes No

The employee experiences no reduction in salary for variances in the quality and quantity of work;

The employee is paid his or her full salary for any workweek in which any work is performed.

(Deductions from leave banks are permissible. For public employers, deductions of less than a full day for absences are also permissible.)

NOTE: The salary basis requirements do not apply to teachers.

Does the employee's primary duty consist of the performance of work that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction? Yes No

Primary duty is the principal, main, major or most important duty the employee performs.

"Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment.

A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.

Advanced knowledge cannot be attained at the high school level.

The fact an employee has a college degree does not make the employee exempt. An employee who has an advanced degree, but whose work does not require that level of education, will not qualify for an exemption.

Computer Employee Exemption

You must answer yes to all of the questions except as indicated below, in order for an employee to qualify for the computer employee exemption.

Is the employee paid at least \$455 per week on a salary basis or paid on an hourly basis, at a rate not less than \$27.63 an hour. Yes No

Unless paid at the \$27.63/hour, is the employee paid on a salary basis? Yes No

The employee experiences no reduction in salary for variances in the quality and quantity of work;

The employee is paid his or her full salary for any workweek in which any work is performed.

(Deductions from leave banks are permissible. For public employers, deductions of less than a full day for absences are also permissible.)

Is the employee employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing one or more of the duties described below? Yes No

You must answer yes to at least one of these four primary duties.

Does the employee's primary duty consist of:

The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; Yes No

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; Yes No

The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or Yes No

A combination of the aforementioned duties, the performance of which requires the same level of skills. Yes No

Primary duty is the principal, main, major or most important duty the employee performs.

Appendix G: Sample Timesheet

Unified School District No. _____									
Department:									
Employee Name:									
Date	Begin Time	Lunch Begin	Lunch End	Add'l Stop Time	Add'l Start Time	End Time	Hours Worked	Leave Used	Type of Leave
	Hour:Min	Hour:Min	Hour:Min	Hour:Min	Hour:Min	Hour:Min	Hour: Min	Hour:Min	
Sun.									
Mon.									
Tue.									
Wed.									
Thu.									
Fri.									
Sat.									
Total Hours for Week:			Regular	Overtime	Leave	Total Hrs.			
I hereby certify that this is a true and accurate representation of all hours that I have worked on behalf of Unified School District No. _____ in the designated workweek.									
Employee Signature: _____ Date: _____									
I hereby certify that to my knowledge this is a true and accurate representation of all hours that this employee has worked in the designated workweek.									

Supervisor Signature: _____ Date: _____

NOTE: ANY CHANGES MUST BE INITIALED BY BOTH THE EMPLOYEE AND THE SUPERVISOR.

Please indicate amounts of leave used Hour: Minute

Example: 2 ½ hours used = 2:30

Types of Leave:	V – Vacation	H – Holiday	CI – Child Involvement
	S -- Sick	M -- Military	C – Compensatory
			J – Jury Duty

Appendix H. Fluctuating Workweek Consent Form

I, _____, have been offered a position as a _____ in Unified School District No. ____.

I understand that overtime compensation in this position will be paid on the fluctuating workweek method set forth in the Fair Labor Standards Act regulations at 29 CFR 778.114. I understand the salary I receive is meant to cover all hours worked, and that part of my overtime is included in my basic salary. Additional overtime compensation paid will vary with the number of overtime hours worked.

Using the half-time method, I understand that for each workweek that I work in excess of 40 hours, the school will divide my weekly salary by the number of hours I actually work in the workweek to determine my regular rate. The regular rate will be multiplied by one-half to establish the half-time premium. The half-time premium will then be multiplied by the number of hours I work over 40 in any given week to determine my overtime pay. My overtime pay will be added to my salary in any given work week to determine my total pay. The amount of overtime paid will vary weekly depending on how many hours I work.

I have reviewed the sample overtime calculations for half-time and the attached formula. I understand this method of calculating overtime and agree that this method shall be used to compute my pay until I am notified that this method will no longer be used. I understand and agree that this method of calculation will remain effective even if my salary is adjusted for any reason.

Employee Signature

Date

Sample Half-time Overtime Calculations (Based on Salary of \$400/week)				
Hours Worked	40	45	50	60
Salary	\$800.00	\$800.00	\$800.00	\$800.00
Regular Rate	\$20.00	\$17.78	\$16.00	\$13.33
Half-time Premium	\$10.00	\$8.89	\$8.00	\$6.67
Overtime Pay	0	\$44.44	\$80.00	\$133.33
Total Pay	\$800.00	\$844.44	\$880.00	\$933.33
Formula				
Total Pay = Salary + ((Salary ÷ Hours Worked) x ½) x (Hours Worked – 40)				

	Regular Rate = $\text{Salary} \div \text{Hours Worked}$
	Half-time Premium = $\text{Regular Rate} \times \frac{1}{2}$
	Overtime Pay = $\text{Half-time Premium} \times (\text{Hours Worked} - 40)$

Appendix I. Sample Agreement: Compensatory Time

USD _____ (Name of Town), KS

Agreement to Receive Compensatory Time Off

Pursuant to the Fair Labor Standards Act (FLSA), the USD _____ Board of Education has a policy of granting compensatory time off to non-exempt employees in lieu of overtime pay for time worked in excess of 40 hours in any workweek. A copy of the policy dated _____ has been provided to me.

I understand that I must obtain my supervisor's express written authorization to work overtime prior to working in excess of 40 hours in any workweek. I understand that I will earn compensatory time at a rate of not less than one and one-half (1.5) hours for each one hour of overtime worked. I further understand that I will be allowed to use compensatory time within a reasonable period after requesting such use. However, I also understand that pursuant to the board policy and applicable FLSA regulations, the board may require me to use the compensatory time within a certain time period, may prohibit the use of compensatory time on certain days, may require that compensatory time be cashed out after a particular time period or may otherwise limit the use of compensatory time.

I hereby knowingly agree and consent to the use of compensatory time in lieu of overtime pay for time worked in excess of 40 hours in any workweek, and I accept this as a condition of my employment with the USD _____ Board of Education.

Employee Signature and Date

Supervisor* Signature and Date

* (or designee)

Appendix J. FAQ:Break Time for Nursing Mothers

US Department of Labor; Wage & Hour Division

dol.gov/whd/nursingmothers/faqBTNM.htm

Appendix K. Potential Problem Areas for Schools

Potential Problems

Paying bus drivers for only scheduled hours or the route time.

- If a bus breaks down or traffic causes a delay in the completion of the route, the additional time spent must be counted as hours worked.
- If a bus driver is required to do safety checks on the bus before driving begins or to take steps to secure the bus after the driving is completed, the time spent doing these tasks must be included in the hours worked.

Deducting meal period from the calculation of work time for teacher aids or paraprofessionals.

- If paraprofessionals or aides are required to eat with the students they work with, the meal period cannot be deducted.
- If they are not required to eat with the students and are relieved of all duties for a period of 30 minutes or more, the lunch period can be deducted.

Employees who work through lunch and/or eat at their desk.

- Employees should be completely relieved of duty if the time is not to be counted as work time.
- An employee eating at his or her desk should not be answering telephones, responding to work-related inquiries or doing any work-related tasks during the lunch period.

Employees who work multiple jobs for one school district.

- Even though an employee may be paid separately for each job, the total hours worked must be combined to determine if the employee worked overtime in any given work week.
- Generally, overtime pay must be calculated using a blended rate.

Cafeteria managers, maintenance supervisors, transportation supervisors and janitorial supervisors who spend much of their time doing the same type of work as the people they supervise.

- These employees are often misclassified as exempt employees.
- To be exempt, the employee must meet the salary basis, salary level and executive (primary duty management) or administrative (primary duty office or non-manual work) duties tests.

Maintenance employees who are paid on a per-call basis and receive a flat fee when they have to work in the event of an emergency.

- Schools can pay workers at a different rate than the regular rate when they have to work on an emergency basis.
- Hours spent working on an emergency basis should be calculated and added to the regular hours to determine if the employee has worked overtime.

Non-exempt employees who serve as volunteers, or who “volunteer” to assist with school programs or functions.

- An employee cannot volunteer to do the same type of work he or she is paid to do.
- A bona fide volunteer must offer his or her services freely, without coercion or pressure, direct or implied.
- If an employee’s child is participating in the program, the Department of Labor will not assert a violation of FLSA. However, it does not preclude the employee from later asserting a claim of an FLSA violation.

Office staff who stay after scheduled hours to perform school related work such as taking tickets at athletic events, working at an open house, going to staff meetings, or setting up for functions, etc.

- Unless such activities are truly occasional and sporadic, the hours spent doing these tasks must be compensated and the hours must be added to the employee’s regular work hours for overtime purposes.
- If the activity is occasional and sporadic, the hours do not need to be added to the employee’s regular work hours for overtime purposes. An activity is occasional and sporadic if it is: (1) not a regular assignment; (2) solely at the employee’s option (no coercion, implied or explicit); and (3) in a different capacity than the employee’s regular work.

Non-exempt staff who attend training sessions or staff meetings during the summer or on weekends for which they are not paid.

- If attendance at the training session or staff meeting is required as part of the job, the employee must be paid for the hours spent at the training or the meeting.

Substitute teachers who are not certified and who work in other non-exempt positions where the combined hours will exceed 40 during a workweek.

- Emergency substitute teachers who do not have full certification may not be exempt employees under FLSA, particularly if they have not completed a college degree.

Employees who come to work early or stay late.

- If employees are being allowed to work during these times, they must be compensated for the time.
- Insignificant amounts of time do not need to be compensated.

- Do not allow employees to perform any work before they have clocked in or after they have clocked out.

Employees who work in after school programs at school for students.

- Even though programs may be run by other groups, like the YMCA, the Department of Labor considers this to be joint employment unless the school and the other group are entirely independent of each other and are completely disassociated with respect to the employment of the employee.

School employees working special functions to be held at the school, but sponsored by others (PTA, Booster Club, etc.)

- Assume the school will be required to count this time as hours worked.
- If a rental fee for use of the facility is collected, include an amount equal to the employee's overtime rate for the expected hours in the rental fee.

Outsourcing of bus drivers or cafeteria workers.

- The Department of Labor does not consider it to be separate employment when school employees work for a company that is performing a school district function. This raises a joint employment issue.
- For joint employment, the Department of Labor requires that all hours worked for either employer be included in determining if the employee has worked hours in excess of 40 and is entitled to overtime.

Secretary calling substitutes from home or other employees doing work at home.

- Hours for such work must be recorded and compensated.
- If an employee performs work at home in violation of school policy, the employee generally must be paid for the hours worked, but can be disciplined for violations of policy.

The secretary/board clerk who stays late for school board meetings.

- All of the hours worked in both capacities must be compensated.

Assuming that salaried means an employee is exempt.

- The fact an employee is paid on a salary basis does not make the employee exempt. The employee must also meet the duties test and qualify as either an executive, professional, administrative or computer employee.

Treating an employee as an independent contractor.

- A school district cannot deem employees to be independent contractors to avoid paying overtime.

- The Department of Labor will examine a number of factors to determine if an individual is an independent contractor or an employee.
- If the work is controlled or directed by the school in day-to-day operations, the person must be treated as an employee for FLSA purposes.