
FOR YOUR INFORMATION

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News For School and Municipal Clients

The FLSA and Employees Working in Two Different Positions

The Fair Labor Standards Act (FLSA) sets forth various standards related to minimum wage, overtime, equal pay, recordkeeping, and child labor for employees who are covered by the FLSA and who are not exempt from specific provisions. The United States Department of Labor (DOL) is the federal agency that administers and enforces the requirements under the FLSA. In this respect, the DOL has been increasingly active in recent years, making changes to regulations in various areas and taking steps to increase enforcement. Significantly, last year, the DOL made important changes to the federal regulations related to exemptions from the minimum wage and overtime requirements of the FLSA for “white collar” employees.

In the spirit of being more active in this area, the DOL has also been providing additional guidance to employers on various wage and hour issues through opinion letters. In these opinion letters, the DOL responds to a specific question from employers related to a particular wage and hour issue affecting the employer. Typically, the employer seeks guidance because the answer to the question is not clearly set forth under the law.

One particular recent opinion letter is noteworthy. On August 26, 2005, the DOL considered whether certain employees at a community college were exempt from the minimum wage and overtime standards under the FLSA. The employees at issue worked

both as full-time employees and as part-time teachers. For example, the community college hired a full-time master welder who also taught a welding course at night. The community college considered the employees nonexempt (i.e., subject to all FLSA requirements) in their full-time capacities and paid them by the hour for all hours worked. However, the college was unsure as to whether the employees were exempt from the minimum wage and overtime provisions while they were teaching, particularly in light of the employees’ other full-time work at the college. The college asked the DOL how to classify such employees.

In answering this question, the DOL reviewed the federal regulations, which included a specific exemption from the minimum wage and overtime standards for teachers who meet certain qualifications. In particular, to qualify for the teacher exemption, an employee’s “primary duty” must be the performance of “teaching, tutoring, instructing, or lecturing.” “Primary duty” means “the principal, main, major or most important duty that the employee performs,” and any determination of an employee’s primary duty must be based on all the facts in a particular case, with major emphasis on the character of the employee’s job as a whole. Factors that an employer considers when determining the primary duty of an employee include: (1) the relative importance of the exempt duties as compared

to other types of duties and (2) the amount of time spent performing exempt work.

Applying the regulations, the DOL concluded that, because the primary duty of the employees was working in their full-time nonexempt positions, rather than their part-time teaching jobs, the exemption for teachers did not apply. According to the DOL, the employees spend the majority of their time performing nonexempt duties in their full-time jobs and the time spent as a part-time teacher is a small portion of the time spent as a full-time employee engaged in nonexempt duties. The DOL stated that, when it considered the character of the particular employees' jobs as a whole, their regular, full-time nonexempt positions provide more relative importance to the college than their part-time teaching duties. Thus, the exemption for teachers from the minimum wage and overtime requirements did not apply; therefore, the employees were entitled to the minimum wage and overtime protections in both their full-time positions and in their part-time teaching positions.

The community college also noted that it paid its teachers for only that time spent lecturing, although the college assumed that the teachers spent time outside of class in preparation for their classes. The college also asked the DOL whether it was permissible for such employees, if they were nonexempt while teaching, to be paid only for the hours that they lecture, rather than also for the hours

they spend preparing for lecture and tutoring. The DOL concluded that, because the employees did not qualify for the teacher exemption, any time spent preparing for class or tutoring in addition to actual classroom instruction time are hours worked and must be compensated. This rule applies to work performed away from the premises or the job site, or performed at home. All hours worked must be recorded and the employee is entitled to overtime for all hours worked over forty in a week.

This opinion letter emphasizes that an employer should identify any employees working in two or more capacities for the employer and should consider the status of such employees in light of both positions. School districts should be particularly aware of employees who work both as coaches, which is a nonexempt position, and in another capacity for the district. In such cases, if the employee performs exempt work as his or her primary duty (e.g., a teacher), the employee will be considered exempt in his or her coaching capacity as well. However, if the employee performs nonexempt work as his or her primary duty (e.g., a custodian), the employee will be considered nonexempt in his or her coaching capacity and may be entitled to overtime when considering all hours worked in both positions.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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