

# Legal Issues in Employment

## Salary Schedules, Overtime, and Students

### First Act

(Plus a Whole Lot More)

Alabama Association of School Business Officials  
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Whit Colvin  
Bishop, Colvin, Johnson & Kent, LLC  
[wcolvin@bishopcolvin.com](mailto:wcolvin@bishopcolvin.com)  
[www.bishopcolvin.com](http://www.bishopcolvin.com)

# Let's Get Focused...

- Focus and Purpose – To teach kids
- Takes people to teach
- Takes other people to create an environment conducive to learning
- All employees are there to support learning in one way or another (including you)
- The employment process should support learning as well and should not be a distraction

# Salary Schedules

We have some things to think about . . .

- The salary schedule itself
- Overtime
- Policy/handbook conflicts
- Other fundamental or structural issues

# Salary Schedules

- Typically contain job titles and chart of salaries
- Most often salaries reflected as annual rate
- Schedules must meet (or exceed) state matrix for some employees
- Schedules must have “steps”
- Typically “x axis” is degree, qualification, or responsibility related
- Typically “y axis” is experience-based
- Some are quite detailed – some are quite simple

# Salary Schedules

- In addition to charts of numbers, most schedules have some terms and conditions which impact salary, such as:
  - Number of days salary covers (e.g., 187)
  - Number of hours each day that salary covers (e.g., 7.5, 8)
  - Holidays, vacations, sick days
  - Formulas for overtime, salary reduction
  - Supplement information
  - “Conversion” data
  - How to apply data
  - Expectations for earning salary

# Salary Schedules

- Much litigation over salary schedules
  - Placement, conversion, form
  - Equal protection
- Establishes “expectations” related to pay
- Changing salary schedules always needs to be carefully considered – changes have a “ripple” effect
- “Contractual” language
- If changed in any way to raise compensation, very difficult to lower it back down
- Also, make sure and review State law – if there is a required schedule, can’t pay below it...

# Policy/Handbook Conflicts

- Board materials matter – employees, students, parents, and community rely on them
- If the work day or work period changes, there is much to modify – work schedules, class schedules, bus schedules, etc.
- Provisions are in memos, letters, handbooks
- Policies and handbooks sometimes include specific definitions of work week, school day, work day, hours of work, etc. – have to resolve conflicts

# Schedules

- Typically left to local administrators
- Should always have a document showing what schedules are
- Communicate the schedule to employees!!
- How do you deal with extracurricular activities?
- How much flexibility do you want to allow?
- Needs to be consistent and clear

# Managing Resources

- Overtime
- Strategies for dealing with overtime, and the people who are eligible for it
- Evaluating and managing work force needs
- Students First

# Overtime

- FLSA compliance still an issue in some schools
- Overtime has to be managed
- How you manage is extremely important
- Mistakes can have exponential costs
- Overtime will continue to be part of the dialogue in schools from a fiscal responsibility standpoint

# Overtime Basics

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

# Calculating the Regular Rate

## Practical Tips

- Get a good formula in place and stick with it
- Use technology
- Remember the fundamentals

$$\frac{\text{All Compensation Earned}}{\text{All Time Worked}} = \text{Regular Rate}$$

- Don't assume anything when it comes to time worked
- The variables that go into the formula are based on “contractual principles” and understandings
- A salary can be based on more than 40 hours in a week—in that case, only pay overtime premium of 1/2 time

# Is Overtime Due ?

## Calculating Hours Worked

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

# Exemptions

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

# New Rule

- This year, we have a major update to FLSA regulations
- Changes concern exemptions
- Exemptions commonly referred to as “EAP” exemption
  - E = Executive
  - A = Administrative
  - P = Professional

## Result of Rule

- Expand overtime protections to certain “white collar” employees
- Salary threshold goes up

Effective Date

December 1, 2016

BUT

Implementation of changes  
were halted by a legal  
challenge – currently on appeal

# Application of Exemption Tests

- Job titles alone are insufficient to establish exemption
- Job descriptions alone are also insufficient to establish exemption
- Have to look at salary and duties performed

# Exemption Categories Commonly Seen in Education

- Executive
- Administrative – regular and academic
- Professional
  - Learned Professional – doctors, lawyers, teachers
  - Creative Professional – artists, musicians, creative writers
  - Computer Employee

“EAP”

# Executive Exemption

## The Old Rule

1. Salary of at least \$455.00 per week (\$23,660.00 per year);  
AND
2. Primary duty must be management; AND
3. Customarily and regularly direct the work of at least two or more other full time employees or the equivalent; AND
4. Authority to hire or fire, or the suggestions and recommendations as to hiring, firing, advancement, promotion or other change in status must be given particular weight

# Executive Exemption

## The New Rule

1. Salary of at least **\$684.00** per week (**\$35,568.00 per year**);  
AND
2. Primary duty must be management; AND
3. Customarily and regularly direct the work of at least two or more other full time employees or the equivalent; AND
4. Authority to hire or fire, or the suggestions and recommendations as to hiring, firing, advancement, promotion or other change in status must be given particular weight

# Administrative Exemption

## The Old Rule

1. Salary of at least \$455.00 per week (\$23,660.00 per year);  
AND
2. Primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer; AND
3. Primary duty includes the exercise of discretion and independent judgment about matters of significance

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# Learned Professional Test

## The Old Rule

1. Salary of at least \$455.00 per week (\$23,660.00 per year);  
AND
2. Primary duty is performance of work requiring advanced knowledge; AND
3. The advanced knowledge must be in a field of science or learning; AND
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

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# Administrative Exemption School Board Employees The Old Rule

Section 541.204 specifically addresses application of administrative exemption to educational establishments and prescribes a special test:

1. Salary of at least \$455.00 per week or starting salary for teacher;  
AND
2. Primary duty is performing administrative functions directly related to academic instruction or training

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# Administrative Exemption School Board Employees

- New rule raises the salary threshold  
BUT
- Alternative salary threshold – starting salary for teachers (for FY2019, this is \$39,301.00 for 187 day contract)
  - Question – Do we have to convert this salary to account for a longer contract (i.e. 12 months)?
  - Answer – Most likely. The tests use a weekly salary amount to meet the threshold and DOL guidance indicates that the “comparator” is the weekly salary.

# Administrative Exemption School Board Employees

- Remember, the salary test is only the first part
- 2<sup>nd</sup> part of test → Have to be *Academic* Administrative Personnel
  - According to DOL, includes:
    - Superintendent
    - Principals and vice-principals
    - Department heads in higher *learning*
    - Academic counselors and advisors
    - Other employees with similar responsibilities
  - Does NOT include:
    - General business operations
    - Building management or maintenance
    - Health of students and staff
    - Lunchroom managers

# Salary for 9, 10 and 11 Month Employees

- What about the salary threshold for employees who work less than 12 months?
- Have employees who are paid over 12 months but work less.
  - Is it \$684.00 per week over 12 months or less?
- DOL guidance explains that an annual salary covering a duty period of less than a year, when paid over 12 months can be lower than the threshold and the exemption would still apply
- The measure is whether the salary over the duty period worked meets the required minimum amounts

# What about teachers?

- Teachers are “Professional” employees = Professional Exemption
- Special Rule for “bona fide teachers” – do not have to meet the salary threshold
- New rule does not affect “bona fide teachers”

# Bona Fide Teachers

- Primary duty – teaching, tutoring, instructing, lecturing in activity of imparting knowledge
- Employed and engaged as a teacher in an educational establishment
- Includes classroom teachers, career tech teachers (“skilled and semi-skilled trades and occupations), preschool teachers, kindergarten teachers, coaches

## So, Who is Exempt?

- Certificated personnel
  - Teachers
  - Principals
  - Directors
- Executive Level Employees
  - Superintendent
  - CSFO
  - Other Directors
- Administrative Employees
- Nurses (R.N.'s)
- Accountants

## And Who is Not?

- Administrative Aides
- Bookkeepers
- Custodians
- Maintenance Crews
- Bus Drivers
- LPN's and other nurses with two year degree or less
- CNP Personnel

# Exempt Positions

## A few things to remember . . .

- NOT eligible for overtime compensation
- Can still be required to complete time records
- Board can still schedule work hours
- Exempt employee pay NOT subject to hourly pay deductions, except for:
  - Major workplace rule violation
  - Unapproved leave of absence
  - Exhaustion of accrued leave or FMLA
  - Mandatory furlough for budgetary reasons
- Exempt employees may be required to use accrued leave to cover work absences
- Improper pay reductions can render employee non-exempt

# About Job Descriptions and Exemption

- Helpful to have “exempt status” in job description
- Exemption depends on what employees do - not what the job description says
- Review job descriptions BUT ALSO review what employees actually do
- An audit is a good idea, even if informal (has ancillary benefits too)

# Dual Employees

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

# Volunteers

- Use caution!
- General rule: A classified employee cannot work for free as a volunteer
- Cannot waive overtime
- Cannot volunteer for same type of services which employee is employed to perform
- This is tricky and has to be carefully analyzed

# Substitutes

- Avoid using employees as substitutes
- Think of it as two jobs
- Can cause recordkeeping problems

## Lump Sum Payments

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

# Examples

- Paying CNP workers \$25.00 to cook pregame meal
- Paying custodian \$50.00 to cut the grass or \$100.00 to wax floors on weekend
- Paying secretary \$30.00 to take up tickets at ballgame
- Paying bus driver \$50.00 per field trip

# Strategies

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

# Supplements for Non-Exempt Employees

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

# So What is the Problem With Supplements?

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

## An Additional Complication

- Third parties paying the supplement
- Make sure there is a clear (in writing) arrangement
- Assume that an employee always works for you

# Keep Good Records

- Can use timesheets or electronic means
- Either way, must have ability to record all time worked
  - Bus drivers
  - Weekend Work
  - Special projects
  - Start time and end times for work
- Sign in and out for lunch/breaks

# Compensable Work Hours

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

# Calculating Time - Substitutes

- Need a time sheet for substitutes
- Conventional method is to have sub sign in on employee's time sheet
- Cannot track time (no place to put it), much less number of days worked
- Complication – when employee (bus driver, etc.) substitutes, no centralized way to track hours worked until it is too late

# Meeting and Training Time

- Mandatory meeting/training time is work time
- Voluntary training during work hours is work time, IF:
  - Approved by appointing authority
  - Directly related to employee's job
  - Designed to enhance employee's performance
- Voluntary training after hours to gain additional skill or knowledge is NOT work time, even if job related

## Travel Time

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

## Time Clock or Time Sheets?

- Think about electronic or even old fashioned time clocks
  - Put it in the office
- Why?
  - Records actual time
- Time sheets – up to employee to put down correct time

# If you simply *must* use Time Sheets

- Instruct employees how to complete, and provide something in writing
  - Record actual time
  - Record all time
  - If forget to record contemporaneously, have entry “approved” by supervisor
- Have employee sign the “instructions” or memo
- Have employee certify time sheets
- Have supervisors certify time sheets

# Calculating Time – Lunch Breaks

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

# Compensatory Time

- Boards may offer compensatory time in lieu of cash payments
- Comp time is NOT leave, but a form of compensation:
  - Entitled to use time as if using cash compensation
  - Must be able to use for personal use
  - Appointing authority may require use of comp time

# Compensatory Time

- “Paid” at 1.5 times
  - Get 1.5 hours comp time for every hour of overtime
- Employee is to use for personal use
- Cannot say no to use, unless the absence would unduly disrupt business

# Comp Time and School Boards

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

# If You Want to Use Comp Time

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

CAN BE A GREAT TOOL IF MANAGED CORRECTLY

# Comp Time - Practical Tips

- Establish a policy/procedure or rule for comp time plan
  - Use standard form
  - Standard tracking system
  - Make clear expectations concerning working overtime, use of comp time, pay downs or pay offs, required use of comp time, recordkeeping, etc.
- Educate, educate, educate – managers and administrators tend to think of this as a freebie – overtime for no pay
  - Merely a deferral of an obligation (with “interest” – pay raises)
- Plan as if you were paying the overtime – need to have the money on hand
- Communicate – make sure employees understand the plan

# Managing Overtime Starts with Monitoring Overtime

# Self Audit

- Coordinate a self audit practice with Central Office
- Set up a practice at local schools for principals – once a week, review time sheets for
  - Anomalies
  - Too much consistency
- Do during the week – if you catch it at payroll time, can be too late

# Monitor Time Entry

- Every so often, monitor time entry
  - Either as time is entered or just afterward
- Don't delegate this
  - Have principal do it from time to time
- Will deter fraudulent entry and provide basis for testimony, if needed

# Substitutes

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

# Communication

- Communicate expectations to employees
- Document those expectations
- Be vigilant in following up when expectations are not met

# Electronic Timekeeping System

- Automated reporting function
- Interface with payroll
- Allows centralized monitoring

# Personnel 102

## Tips, Tricks, and Guidance for School Business Officials

# Impediments to Proper Management (Overtime, Leave and other Issues)

- Local management
- Casual school environment
- “Professional” culture
- Lack of training
- Lack of resources
- Lack of communication
- Incompatibility & lack of coordination
- Differences in Departmental Culture

# Departmental Cultures

## Human Resources v. Finance

- In Finance
  - Things are more black and white, rules based
  - Question everything
  - Job to take care of money
  - Regimented
- In Human Resources
  - Worry more about employees
  - Avoid issues
  - Deference to local management
  - “Don’t rock the boat” mentality

# Overtime has been left up to Finance Departments to deal with

- Finance
  - Good at detecting it
  - By then, it is too late
- Not so good at managing it
- Why? . . . Not been trusted to do so.

# Key Concepts in Managing Overtime (as well as Personnel Cost)

- Planning
- Communicating
- Training
- Managing
- Discipline
- Problem solving

# Planning - Keys

- Need to catalog resources
  - How many custodians? CNP? Aides? Bus Drivers? Office Workers?
- Identify needs
  - Someone to cut grass, buff floors, take money to bank, answer burglar alarms, open or close school
- Match resources with needs?

CAN YOU MEET NEEDS WITH CURRENT RESOURCES IF NO EMPLOYEE WORKS OVER 40 HOURS IN WEEK?

# Planning Keys

- How do you structure work force? Contract out services?
- Stagger schedules?
- What are expected work hours
  - 40 per week? 37.5 per week? How many days?

TIP: MOST OF THE TIME, THE TAIL WAGS THE DOG . . .  
WE GO WITH WHAT WE KNOW OR ARE USED TO,  
NOT WHAT WE NEED . . .

WE DEFINE JOBS BY THE PEOPLE WHO HOLD THEM . . .  
DON'T

# Planning Keys

- Define responsibilities for jobs
- Duties for jobs
- What type of duties should be handled by classified employees?
  - Handle money?
  - Make own schedule?
  - Direct other employees?
  - Bus duty?
  - Coaching?
  - After hours work?
  - Timekeeping duties? Manage overtime?

# Planning Keys

- Split jobs, multiple locations, dual jobs
  - Remember obligation to pay overtime for classified employees
  - Overtime=Bad? Not necessarily – sometimes when factor in benefits/training/administration it makes more sense to pay overtime than hire another person!
- Rules of substitute employment, filling in for others, working over

# Planning Keys - Payments

- Decide how to pay for extra work when you need it?
  - Supplement?
  - Lump Sum?
  - Basic Hourly Rate?
  - Blended Rate?
- How will you handle third party payments?
  - PTA
  - Booster Club
  - Community Education Program
  - Support Organizations

# Planning Keys - Schedules

- Work hours (both number and specific hours to be worked) should be clear and documented
- Schedule (what employee does during day) should be established
- Lunch needs to be at a set time and staggered for employees doing like duties
  - (Please don't schedule all custodians to eat at the same time)

# Planning Keys - Schedules

- Ideally, don't schedule at times when there is no supervision (early morning, night)
- The "honor system" doesn't work
- Break times and lunch have to be 30/20 minutes or they count as paid time
- Break time and lunch should be scheduled
  - (That does not mean take it when you can)

# Communicating Expectations

- How we communicate with employees is essential to FLSA compliance
  - Poster – Law requires we post
  - Reaching “understanding” with employees
- Communications can also make (or ruin) your attorney’s day

# Essential Communication Areas

- What work hours are
- How to complete time records
- That time records have to show actual times worked
- Time has to be accurate
- What signing a time sheet means
- How to address inaccuracies
- Leave issues
- Medical Issues

# Essential Communication Areas

- When overtime may be worked
- Overtime approval process
- Lunch and breaks – sign in and out
- If lunch missed, how to handle
- Time records – contemporaneous
- Process for reporting request to violate policy on overtime
- Compensatory time

# Some Practical Tips

- Don't be "bossy"
  - Just lay it out there
- Avoid a long list of "thou shalt not's"
  - Instead be positive in tone
- Don't slip into educator ease
  - If it starts with "It is the intent of..." delete it and start over
- Be clear and concise on the work rules
- Be nice
- Be nice
- Be nice

# Communication Methods

Good		Oral
Better		Written
Best		Both

## Examples of Communications

# Training

- Ties in closely with communication
  - Use your communication methods in training

# Training

## Some Recommendations

- Establish the purpose for the training
  - Is it designed to teach or orient?
  - Is it a follow up or refresher?
  - Is it to demonstrate compliance?
- Once you know your purpose, the rest should fall into place

# Training

## A Simple Plan

- Who? Conduct training for the following categories:
  - a. Employees subject to overtime
  - b. Employees who supervise employees subject to overtime
  - c. Employees who assist employees who supervise employees subject to overtime
  - d. Policy makers – those who design or implement the rules and procedures
  - e. Record keepers – those who deal with the records
  - f. Processors – payroll mostly

# Training

## A Simple Plan

- What do we train on?
  - a. Depends on the “Who” being trained
  - b. Overtime principles, system procedures, expectations
  - c. Specific processes
  - d. What to do if something goes wrong
  - e. Do’s and Don’ts (be careful with this)
  - f. Areas of concern – red flags to look for
  - g. System philosophy – the “party line”

# Training

## A Simple Plan

- When do we train?
  - a. Hiring
  - b. Before school starts/beginning of year
  - c. At intervals during year
  - d. When problems arise
  - e. No perfect answer
    - Depends on how many employees you have and what your system's needs are

# Training

- How? How you train is every bit as important as
- what you train on . . .
  - Speech
  - Power Point
  - Always have handouts
  - In a classroom? Auditorium?
- Focus should be on effective communication of message to target audience – will be different to different groups
- If you have no record of when it occurred, what was discussed, and who was there, it won't help if you are sued.

# Training

## Some Tips

- Don't use a “train the trainer” method
  - Please don't train your administrators and leave training employees up to them
- Use visuals, handouts
- Document attendance and make it mandatory
- Partner with employee organizations
- Other ideas?

# Managing Overtime

- Perhaps the most difficult role – how do you help manage “overtime problems”?
  - Establish effective channels of communication
  - Develop a checklist of items that the Central office should be involved in (use others’ talents):

## Examples:

1. Failure to document
2. Time sheet problems
3. Sign in and out not lining up with schedule
4. Any report of overtime worked and not paid for
5. “Informal” comp time plan
6. Schedule variation

# Best Practices

- Time clock or electronic time-keeping system
  - Employee controls input and corrections
  - Should require deliberate action/conscious choices
    - Punch in
    - Swipe a card
    - Scan a fingerprint
    - Sign a sheet
  - “Time clock” in an area where can be supervised
  - A timekeeping system where other Board employees (secretaries and payroll clerks) or supervisors complete time records for employees will lead to problems
  - Develop a system where employees tell the Board when they actually worked NOT the other way around
  - Has to reflect actual time worked NOT scheduled time
  - Be cautious about assumptions . . . Including whether or not lunch or breaks taken

# Best Practices

- Review and Monitoring
  - Time sheets/records should be reviewed (and maybe even certified) weekly, regardless of payroll period
    - Shorter time period promotes accuracy
    - Better chance of remembering
    - Identify problems sooner
    - Eliminate the “hurry up to get paid factor”
    - Can manage time more effectively
  - Timesheets should be reviewed by someone other than the payroll clerk regularly-look for...
    - Erratic work habits
      - Too much consistency
      - Missed entries
      - Leave issues
      - Lots of overtime
  - Look at service reports
    - Staff write all sorts of things on service reports

# Best Practices

- Review and Monitoring
  - Visit schools during week
    - Use schedule. Are people where they are supposed to be?
    - Lunch being taken?
    - Everyone signed/clocked in?
    - Talk to employees – not just principal
    - Focus on lunchroom workers and custodians
    - Are posters up? Notices?

# Best Practices

## Handling Complaints and Problems

- Develop a process for reporting issues
  - Should be comfortable for employees
  - Should be outside the “chain of command”
  - Administration – up to speed on overtime
- If you don’t know there is a problem, you can’t fix it!
- If the Principal doesn’t recognize the problem, she can’t fix it!
- Even if the Principal knows about the problem, safe bet it won’t be fixed right.

## IDEAS

- Appoint someone (Maybe you!) to handle – be the “overtime guru”
- Develop a reporting form, an e-mail box, a hotline, or other way to report
- Make reporting easy and non-confrontational
- Tell employees about it
- Posters, e-mails, memos, newsletters
- Tell Uniserve directors

# Discipline

- If an employer suffers or permits overtime to be worked, must pay for it
- Suffer or permit – If the employer knew or should have known the work is being performed, must either exercise authority to *prohibit* the work or pay for it
- Can't suffer or permit the work and then just not pay for it
- In other words, the discipline cannot be not to pay for the overtime

THE BURDEN IS ON YOU!

# Discipline

- What do I do if an employee does not follow the rules or works unauthorized overtime?
  1. Pay the employee
  2. Talk to the employee – be specific and find out what the problem is – there is usually more to the story
  3. Follow up on conversation with written communication
    - a. Describe reason for conversation
    - b. Nature of discussion
    - c. Understanding reached
    - d. Plan moving forward, including ramifications
- Monitor situation – Flag it.
  - If there is a problem, it will surface again

# Discipline

- The action to be taken relates directly to planning, training, and communication
- Mistakes v. Misdirection v. Dishonesty
  - May call for different approaches
- Your department needs to have “skin in the overtime game,” and be confident in acting
- If monitoring, training, etc., has been delegated, need to make sure proper foundation for disciplinary action is there
- Be clear about expectations and consequences if something happens (applies not only to principals but supervisors)

# Problem Solving

- This is why you should take an active role in overtime administration
- We are dealing with people – problems are going to come up
  - Time sheets will come in unsigned
  - Will miss some overtime
  - Employees will stop following schedule
  - Principals will come up with own rules
- Problem solving rarely involves simple resolution of the issue at hand. May have to mediate between departments. May have to revise policies, guidelines, training.

# Problem Solving

- May weigh risk and determine the best approach is to leave things as they are
- Be proactive – solve your problems before they become problems

# Why all this matters . . .

- FLSA liability =
  - Back pay for 2 years
  - or
  - Back pay for 3 years if willfulness is shown
  - +
  - Liquidated damages in amount equal to back pay
  - +
  - Costs
  - +
  - Attorneys fees

# Back Pay

- Two years of back pay is standard
- Employee can get three years of back pay if willful violation is shown
- Willfulness is not presumed – and employee must prove it. How?
  - Overt willful behavior – “we don’t pay overtime”
  - Repeat violations and failure to correct
  - Systemic problems, pervasive
  - Disregard for law

# Willfulness

- If you have planned, trained, reviewed, been proactive, and reasonably consistent and can demonstrate efforts to comply with Act, you should be safe

BUT

- “Judge, I put up that poster in the office – I can’t help it if employees didn’t see it,” won’t cut it

# Liquidated Damages

- Statutory penalty – fail to pay overtime, it is presumed that you double the damages
- There is a defense – good faith – to the imposition of liquidated damages
  - Good Faith = reliance on cases, attorney's advice, an expert, Department of Labor ruling, attempting to find the answer and finding it's not clear.
- Diligent attempt to comply with Act can be good faith
- Clear, however, that mistakes or not knowing the rules, misapplication of the rules is not good faith

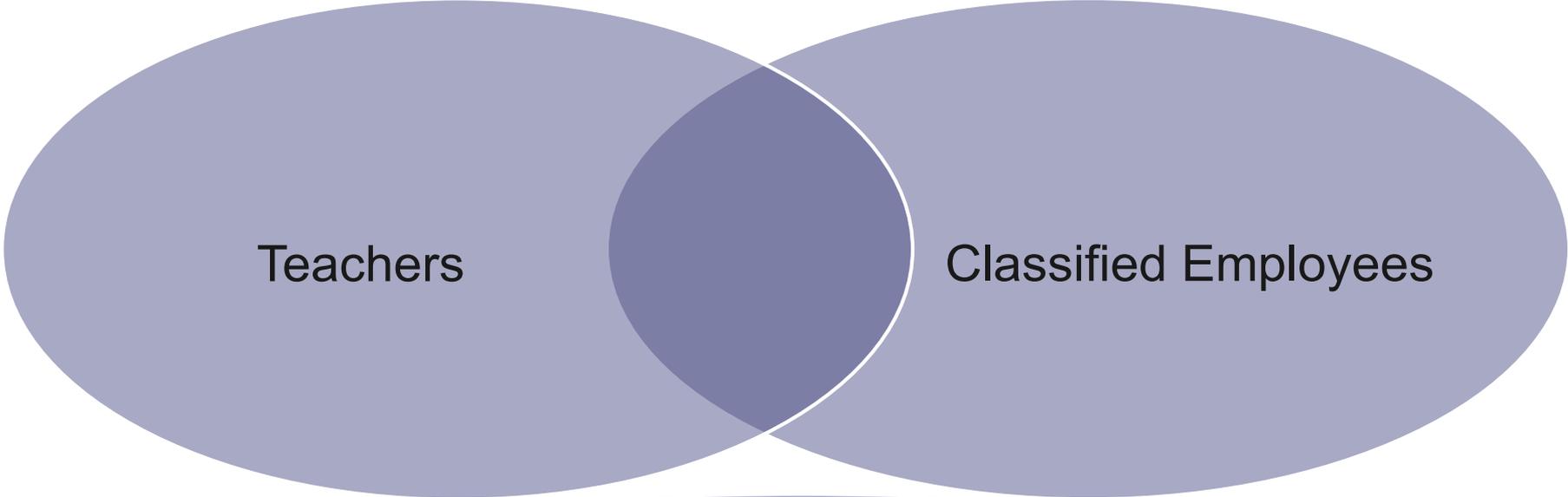
# Costs and Attorneys' Fees

- The problem with FLSA litigation
- Attorneys' fees always eclipse damages
- Attorneys have little incentive to settle

# Students First

- The “tenure” law is always part of the conversation when it comes to managing resources
- Establishing work hours
- Changing work hours
- Changing days worked
- Salary Modifications

# Students First Act Who is Covered?

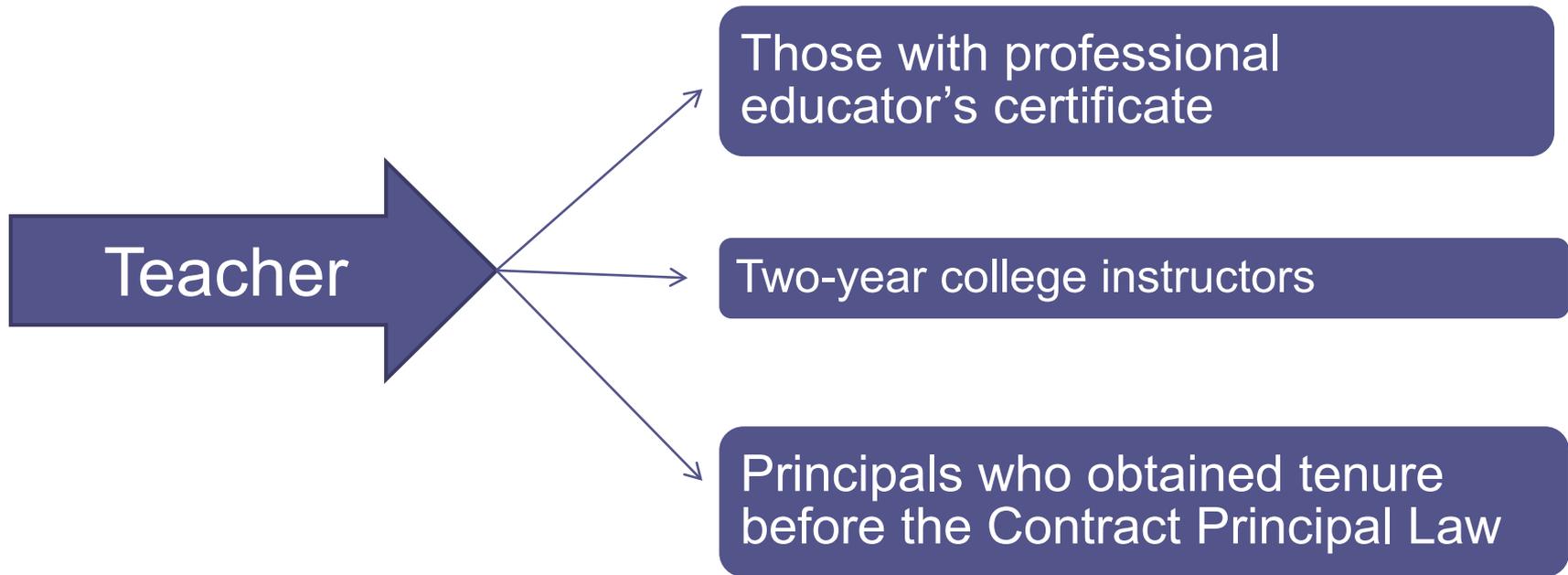


Teachers

Classified Employees

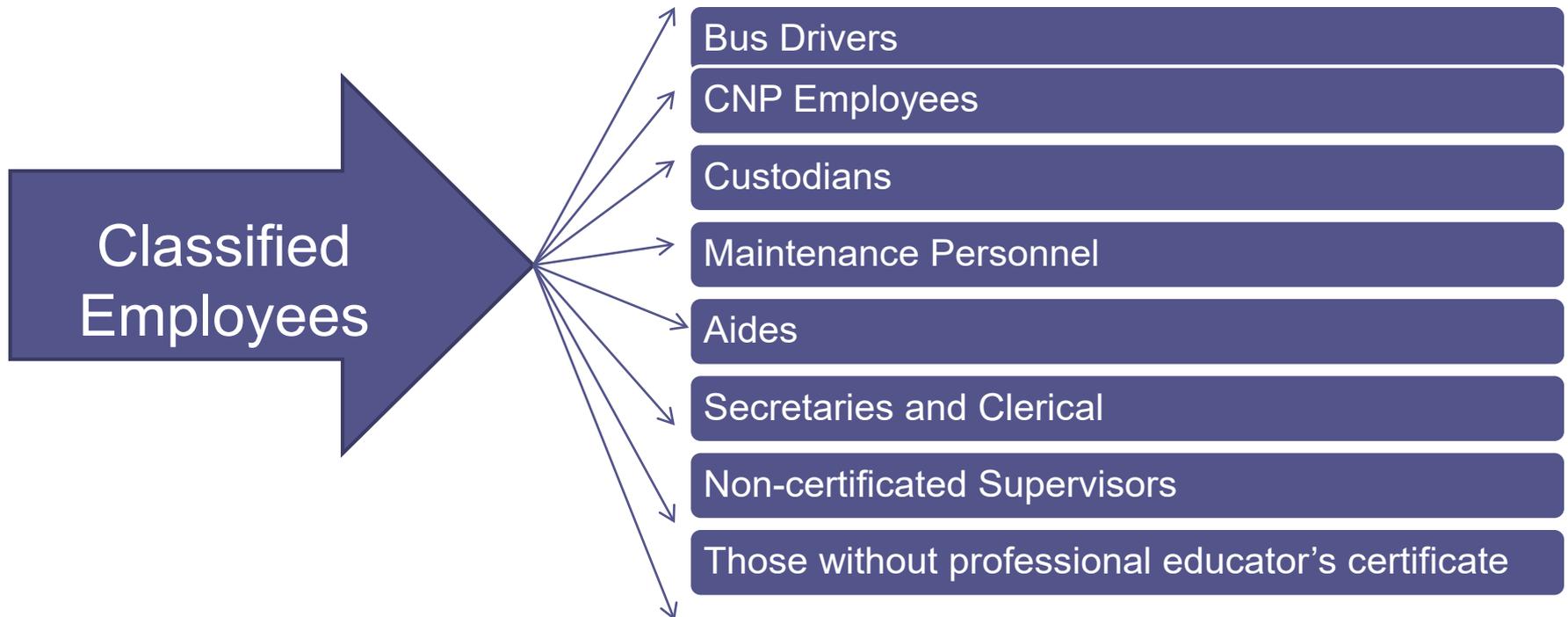
An employee has to meet either the definition of “teacher” or “classified employee” or he or she is not covered by the Act.

# Students First Act Who is Covered?



# Students First Act

## Who is Covered?



# Students First Act Who is not Covered?

Superintendents

CSFOs

Temporary, part-time, substitute

Summer school

Occasional, seasonal, supplemental, or irregularly employed

Pilot programs or programs with short-term or finite funding

# Students First Act

\*Practical Tip \*

## Documenting Status

- Memorialize it if you know a position is not covered
- Think about an employee acknowledgment
- If it is temporary, put end date on Personnel Action AND put that position is not covered
- If funding is limited, identify that criteria
- Less may not be more – make sure the situation is clear

# Students First Act

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## Earning “Tenure” & “Nonprobationary Status”

- Three consecutive complete school years
- Complete school year is anytime before October 1<sup>st</sup> through end of year
  - If hired after October 1<sup>st</sup>, that year doesn't count
- Earn it unless written notice is given :
  - For teachers, on or before last day of third consecutive school year
  - For classified employees, on or before June 15<sup>th</sup> following that third year (except for 1<sup>st</sup> year of legislative quadrennium, then June 30<sup>th</sup>).

# Students First Act

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## Earning “Tenure” and “Nonprobationary Status”

- Only complete school years count
- Includes creditable leave time
- Tenure/nonprobationary status as teacher or classified employee separate and not transferrable or interchangeable between categories
- Not transferrable between boards, except for annexation, school district formation, consolidation, or a similar reorganization

# Students First Act

## Service Credit & Already Attained Tenure

Employees who have attained tenured status or nonprobationary status shall be deemed tenured teachers under this Act. Current time in service shall be credited toward the attainment of tenure or nonprobationary status

# Students First Act

## Earning “Tenure” and “Nonprobationary Status”

Tenure is not earned in:

Position

Rank

Title

Work Site

Location

Assignment

or Rate of Compensation

# Students First Act Termination

## Probationary Classified Employees

- May be terminated any time upon written notice (recommendation by Superintendent, vote of Board) before nonprobationary status is earned
- If terminated, get 15 days pay and benefits from issuance of notice
- Decision not appealable

# Students First Act Termination Non-tenured Teachers

- May be terminated any time upon written notice (after recommendation of Superintendent and vote of the Board) on or before June 15<sup>th</sup> unless it is the third year and then the deadline is the last day of the school year
- During school year, requires 30 days notice
  - Teacher can submit written statement to Board
- Decision not appealable

# Students First Act Termination

## Tenured and Nonprobationary Employees

- Reasons for Termination
  - Justifiable decrease in number of positions
  - Incompetency
  - Insubordination
  - Neglect of duty
  - Immorality
  - Failure to perform duties in a satisfactory manner
  - Other good and just cause
- Cannot be for political or personal reasons

# Students First Act

## \* Practical Tip \*

### Political or Personal

- Employment decisions cannot be made for political or personal reasons
- Have to make sure there are sound reasons for decisions and they are appropriately documented
- “I’m not required to have a reason” will eventually be problematic
- Need to know why every personnel action is being taken – just because a reason does not have to be specified does not mean that there does not have to be one.

# Students First Act Termination

## Tenured and Nonprobationary Employees

1. Recommendation by Superintendent – written notice of proposed termination
  - Reason
  - Short and plain statement of facts
  - Statutory grounds for termination
  - Opportunity to request hearing within 15 days of notice
2. No hearing request, Board can go ahead and vote
3. If hearing requested, Board sets hearing between 30 and 60 days of issuance of notice of hearing (can be rescheduled by agreement or good cause)

# Students First Act

## Tenured and Nonprobationary Employees Termination Hearings

- Superintendent has burden of proof
- Employee can present testimony, evidence, and argument, and can cross examine witnesses
- Can have an attorney
- Court reporter paid by State
- Hearing can be private or public (employee choice)
- Subpoenas may be issued
- Board acts as a deliberative body

# Students First Act Pay

- Employment decisions are effective immediately
- For tenured and non-probationary classified personnel, pay continues until the sooner of:
  - (1) 75 days
  - (2) When the hearing officer rules
- Termination based on moral turpitude, immorality, abandonment of job, incarceration, or neglect of duty – pay may cease immediately
- If employee wins appeal, can receive back pay

# Students First Act

## Tenured and Nonprobationary Employees

### Appeal of Board Decision

- Appeal is to State Superintendent
- Goes to hearing officer (retired judges trained in ADR)
- Notice of appeal contains grounds and served on Superintendent
- Superintendent will prepare record and send it
- Hearing officer holds hearing with deference to Board's decision and renders decision
- Can appeal that decision to Court of Civil Appeals

# Students First Act

## Tenured and Nonprobationary Employees Suspensions

These provisions are a bit different and much simpler to follow:

- Can suspend for 20 work days without pay
- Notice has to be given and an opportunity to present evidence and argument to the Board
- If over 20 days, notice, hearing, and review process for terminations apply

# Students First Act

## Reassignments and Transfers

Reassignments

Within same  
school or  
campus

Transfers

Between  
schools

# Students First Act Teachers Reassignments

*Superintendent can reassign*

- Within same school, campus, or facility
- By 20<sup>th</sup> calendar day after school begins
- Teacher must have certification
- Only once per year
- Without loss of compensation

No challenge or appeal

Remember this when looking at resources

# Students First Act

## \* Practical Tip \*

### Reassignments

- Set up a reassignment process
- Don't need Board approval
- Superintendents reassign, not principals, not personnel departments not finance
- Make sure Superintendent is aware of the reasons for reassignment

# Students First Act Transfer – Tenured Teacher

## Conditions for transfers to another school

- Employee must hold appropriate certification
- No reduction in compensation
- First 20 calendar days of school
- Only once per school year
- Must be Board approved
- If within high school feeder pattern, meeting before vote
- If outside high school feeder pattern, hearing before vote
- If only one feeder pattern = only a meeting required

# Students First Act

## Transfer – Non-probationary Classified

- Can be transferred if no reduction in compensation, written notice is issued not less than 15 days before decision, and transfer is effective not less than 15 calendar days from decision
- If to a work site outside of high school feeder pattern, have opportunity to appeal in same manner as termination
- Only one transfer per year

# Students First Act

## Transfer – Reduction-in-Pay

- Probationary and non-tenured employees
  - Can be transferred to position that pays less or shorter term if:
    1. Appropriate certificate
    2. Written notice is given with explanation of effect on compensation of employee
    3. Opportunity to object in writing before the vote
  - Transfer effective not less than 15 calendar days from vote
- Non-probationary and tenured employees
  - Transfers to positions with lower rate or shorter term may be challenged like a termination
  - Transfers in conjunction with RIFs or made in order to comply with state or federal law are not subject to challenge or review

# Students First Act

## System Level Decisions

- The following are not considered terminations or transfers
  - Reduction or modification of compensation or benefits
  - Reduction or modification of work or school year

### IF

- Prospective
  - Recommended by Superintendent and approved by Board
  - Applied uniformly to similarly situated employees within system, division, department, or employment classification
- Layoffs or RIFs due to decreased enrollment or shortage of revenues cannot be challenged as well

# Students First Act

## Paid Administrative Leave

Acknowledges and authorizes paid administrative leave

Paid administrative leave – Superintendent decides

# Notice Provisions

Notice by certified mail, next business day delivery (FedEx, UPS, DHL), or by physical delivery to the employee or the employee's last known address

Notice deemed received two business days after sent for mail and private delivery

The *employer* has the burden of proving service was effected, but the *employee* has the burden of proving that such service was not properly made.

# Students First Act

## \* Practical Tip \*

### Policy Review

- Many policy manuals address tenure and non-probationary status, hearing rights, suspensions, and other matters
- Remember policy can be binding
- Review policies and make sure they don't conflict with the new act

# Independent Contractors

## The New World of Outsourcing

- Expansion of outsourcing opportunities for school boards
  - Substitute employees
  - Bus Services
  - Nurses
  - Custodial/Support
- Contracts are critical
- How you handle the outsourced employees may be more critical

# Independent Contractors

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

# Independent Contractor

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

# Potential Consequences of Ambiguity

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

# The Rules

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

# Independent Contractor Tests

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

# Common Law Test

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

# The 20 Factor Test

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

# What are the factors?

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

# What are the factors?

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

# What are the factors?

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

# What are the factors?

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

# What are the factors?

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

# What are the factors?

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

# Independent Contractor Test

IRS previously used 20 factor test

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

# Independent Contractor or Not

## Behavioral Control

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

# Independent Contractor or Not

## Financial Control

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

# Independent Contractor or Not

## Type of Relationship

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

# Applying Tests

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

# Not Just the IRS...

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

# Audits

- Some audits may come randomly
- DOL and IRS will collaborate in efforts and will share info
- So, a misclassification issue may result in overtime and back pay liability as well.

# Audit Red Flags

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

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

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

QUESTIONS . . . ?

Whit Colvin

205.251.2881

205.254.3987 fax

wcolvin@bishopcolvin.com



1910 First Avenue North  
Birmingham, Alabama 35203  
[www.bishopcolvin.com](http://www.bishopcolvin.com)