

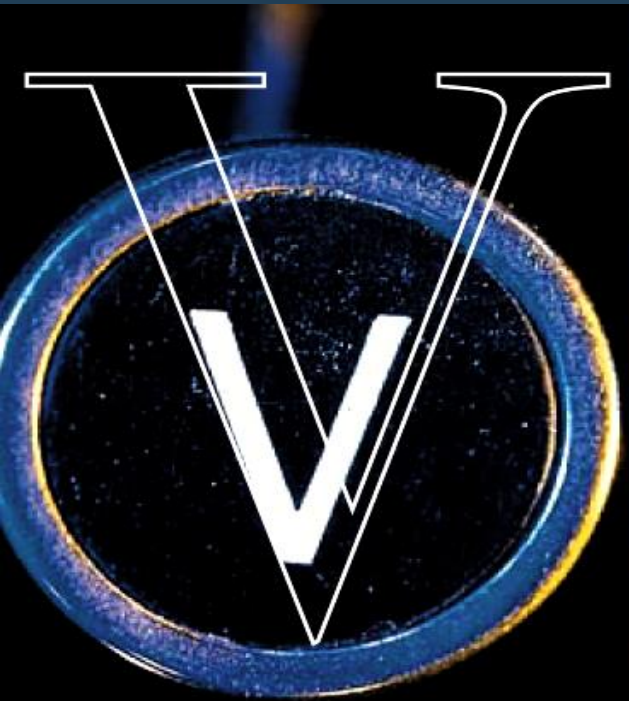


## Coaches, Tutors, and Yoga Instructors: Classification Issues in Schools

NBOA 2018 ANNUAL MEETING

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## Session Outline

- Governing Law and Enforcement
- Exemption Classifications
- Independent Contractors
- Positions to Consider
- Methods for Changing Status
- Updating School Policies

## Governing Law

- Fair Labor Standards Act (FLSA)
  - Federal law
  - State law may be similar, more restrictive, less restrictive, or non-existent
  - Enforced by the Department of Labor
  - Types of enforcement:
    - audits
    - litigation

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# Audits

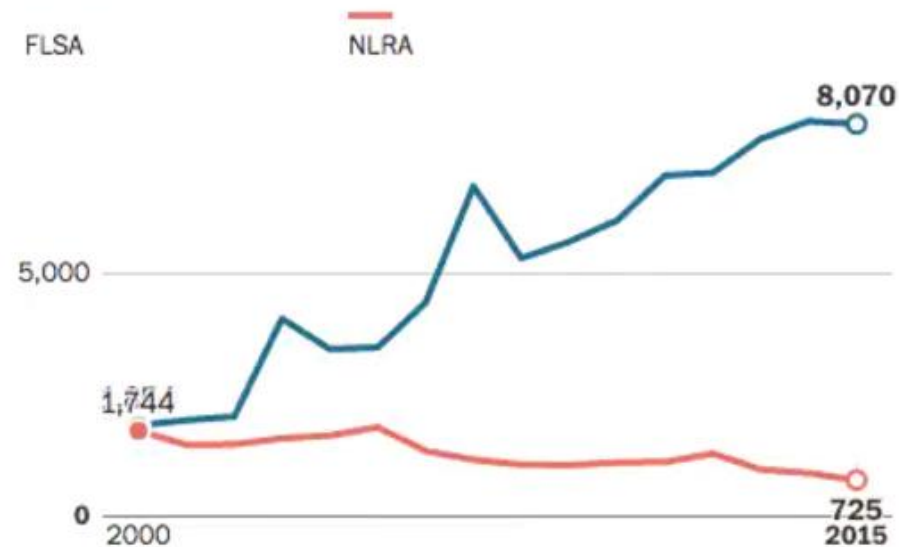
- Both **federal and state** department of labor can conduct audit
- Generated by:
  - **Complaint**
    - By one employee
    - Usually look at more than just complainant
  - Industry focus
  - Random selection
- Can look at FMLA compliance, I-9 documents, exemption classification, calculation of pay, tracking of hours, etc.
- May notify other agencies if concerns: OSHA, IRS etc.
- Appear at door asking for records: Suggest you need time to compile and set another meeting
- Appear cooperative but do not over share
  - Attempt to determine why they are visiting
  - May or may not tell you



# Litigation

## Wage and hour litigation has skyrocketed

The number of cases filed in federal district court under the Fair Labor Standards Act is growing faster than almost any other category, while cases filed under the National Labor Relations Act have sunk.



Numbers are for the 12-month period ending March 31 of each year.

Source: Federal Judiciary

THE WASHINGTON POST

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## Exemption Overview

- Employees covered by FLSA unless qualify under “exemption” category
  - **Non-Exempt** = *Not* exempt from overtime & other requirements
  - **Exempt** = Exempt from overtime & other requirements
- Non-Exempt (covered by the FLSA rules)
  - Compensated at minimum wage for all hours *worked*
  - Overtime for all hours *worked* over 40 in a workweek
  - Overtime calculated at regular rate of pay (not necessarily hourly rate)
- Exempt (not covered by the FLSA rules on overtime)
  - Qualifies under exemption category
    - Executive, Administrative, Administrative in Educational Establishments or Professional
  - Paid on salary basis
- Independent contractor not covered by FLSA

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## Three-Part Test For Exemption

- **Salary Level**
  - Paid at the minimum rate of \$455/week
- **Salary Basis**
  - Paid the same amount each week regardless of the # of hours worked
    - Limited ability to dock in hour increments
- **Job Duties**
  - Meet the qualifications of an exempt category
    - Executive, Administrative, Administrative in Educational Establishments or Professional
  - Actual duties performed by the employee
    - Not just as described in the job description

## Salary Level & Salary Basis

- Salary Level
  - Paid at the minimum rate of \$455/week
- Salary Basis
  - Pre-determined amount of compensation each pay period
  - Cannot be reduced based on quality/quantity of work
  - Must receive full salary if any work performed
    - regardless of the number of days or hours worked
    - FMLA exemption: Based on hours if intermittent leave
    - can use paid vacation or sick leave (whole days vs hours)
- Docking allowed in whole days if:
  - Voluntarily absent for personal reasons (trip with husband)
  - Used up sick and vacation leave
  - Disciplinary suspension
  - **Major** safety violations
- Teachers Not Subject to Salary Basis Pay
  - Allowed to dock in hour increments





## Job Duties Considered in Exemption Qualification

- Review of job duties when determining qualification for exemption category
- Actual job duties and responsibilities performed by employee
- Factors also considered
  - Job title
    - Can hurt but not necessarily help
  - Job description
    - Make sure the person actually performs this work
- Review regularly since responsibilities change
- Performance of employee may allow one employee but not another to qualify as exempt
  - Two employees holding the same job title may assume different amounts of responsibility

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## Non-Exempt Employees

- Employer must track hours worked by non-exempt employee
  - Risk assessment – how much risk for how much benefit
  - Clock, employee recording on paper, employee recording on computer, sign in & out at front desk, assume base work hours and notify employer when work more or less than base work hours
- Non-exempt paid on hourly rate
  - # of hours worked times hourly rate
  - Can set “fixed” rate per week based on established work week and add overtime payment for hours over 40
  - Salary overtime eligible employee vs. hourly employee
- Overtime paid at 1 ½ times **regular rate** of pay
  - “work” doesn’t include paid leave
  - Regular rate = total remuneration for employment earned in the workweek (number of hours worked times hourly rate + any nondiscretionary payment) divided by the total number of hours worked by the employee in the workweek



## Executive Exemption

- Paid on Salary Basis
- Primary duty
  - managing the school, or a customarily recognized department or subdivision
- Direct
  - two or more other full-time employees or the equivalent
    - four half times
- Authority to
  - hire, fire, advance, promote & change status given *particular weight*
  - “*Particular weight*”
    - part of the employee’s job duties to make such recommendations?
    - recommendations are made, requested, and relied upon?

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## Administrative Exemption

- Paid on Salary Basis
- Primary duty
  - performance of office or non-manual work directly related to the management or general business operations of the School
    - work directly related to running or servicing of the School
- Must
  - exercise discretion and independent judgment on matters of significance
    - authority to compare, evaluate and make decision on matters of significance
    - more than applying well-established techniques, procedures or specific standards described in manuals or other sources

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## Administrative In Educational Establishments

- Paid on a salary basis or fee basis of \$455/week or not less than entry level teacher
- Primary duty
  - performing administrative functions directly related to academic instruction or training in the educational establishment
  - performing work related to the academic operations and functions of the school

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## Professional Exemption

- Paid on a salary basis or fee basis of not less than \$455/week
- Primary duty
  - 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
- Advanced knowledge
  - in field of science or learning
  - customarily acquired by a prolonged course of specialized intellectual instruction
    - lawyers, doctors, engineers

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## Professional Exemption: Teachers

- Salary Basis Not Required
  - can dock in hour increments
  - can dock for leaving day before spring break begins
  - can dock if fails to appear on first day of orientation
- Primary duty
  - teaching, tutoring, instructing or lecturing in the activity of imparting knowledge in an educational establishment
    - caution if considering teacher's aids

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## Computer Professionals

- Employed as computer systems analyst, computer programmer, software engineer or other similarly skilled worker in computer field and
- Primary duty consists of:
  - Application of systems analysis techniques and procedures
  - Design, development, testing and modification of computer systems or programs or machine operating systems
  - Combination of above
- Does NOT include:
  - Manufacture or repair of hardware and equipment
  - Work highly dependent upon or facilitated by use of computers and programs



## Independent Contractors Factors Considered

- IRS looks at degree of control and independence based on three categories:
  - Behavioral: Does the school control or have the right to control what the worker does and how the worker does his or her job?
    - How is IC evaluated?
  - Financial: Are business aspects of IC's job controlled by the school?
    - How is IC paid, what expenses are reimbursed, who provides tools/supplies, who provides insurance?
    - Opportunity for profit and loss
  - Type of relationship: Are there written contracts or employee type benefits?
    - Pension plan, insurance, vacation pay, etc.?
    - Will the relationship continue and is the work performed a key aspect of the business?
    - Can worker perform this work for other schools?
- Weigh all factors – no magic “number” of factors
- Documents: agreement, job description, other documentation of factors used in coming up with the determination

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## Consequences of Treating Employee as Independent Contractor

- Payment of wages, benefits, overtime compensation
- Tax liability
- Failure to allow participation in deferred compensation plan
- Insurance treatment (workers comp., unemployment)
- Liability Coverage
- Legal Exposure for Failure to properly classify
  - Increase in cases filed

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## Positions to Consider

- Development/advancement associates – duties?
- Substitutes – day rates? substitute for other schools?
- Counselors – have own practice?
- Psychometrics (testers) – have own practice?
- Dorm parents – employed with spouse?
- Nurses – degree? shift?
- Digital media coordinator – creative enterprise?
- Other specialists (coordinator of play, after school programs)

## Case Study: Coaches

- **Basketball coach**
- Example 1:
  - Coach C, a former NBA star, coaches varsity basketball. Is a member of the school community but is not employed by the school in any other capacity.
  - As the head coach, Coach C commits almost all of his time to **instruction, skill-building, and physical training** for his players.
  - No teaching certificates, no academic degree in the teaching field
  - Paid a stipend of \$5,000.00 for the basketball season.
- Example 2:
  - Coach B does instruction, skill-building, physical training, general clerical, recruitment of students to play sports, performing manual labor, accounting for equipment, travels with team and sometimes disciplines students.
- **Q: how do you classify Coach C and Coach B?**
  - Exempt? Non-Exempt? Stipend? OT?

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## Case Study: Yoga Instructors

- **Parent/yoga instructor:**
  - A parent at your school has offered to teach an afterschool yoga class next year. The school will charge families directly for the service and the instructor will receive a percentage of the enrollment fees collected. The yoga instructor will develop her own schedule, which is posted on the school's website. The school will not require her to attend any trainings or staff meetings, but will require that she has requisite yoga credentials and passes all of the school's background requirements. The instructor will continue to teach classes at other schools and venues nearby.
- **Q: how do you classify the instructor?**
  - employee or independent contractor
  - Exempt, non exempt



## Case Study: Tutors

- **Language tutor:**
  - Your school has hired a private language tutor to assist students after school. This part-time position is paid by the hour, under normal payroll practices. The school sets the tutor's schedule, assigns students, and provides the space for tutoring.
  - The school has asked the tutor to attend faculty training and all-staff meetings, so that instruction remains consistent.
  - In addition, the school has assigned a veteran full-time teacher (who also tutors) to oversee and assist the tutor with his work.
  - The tutor signed the handbook acknowledgment and a standard offer letter, which establishes that he is an “independent contractor.”
- **Q: how do you classify the instructor?**
  - independent contractor? employee?



## Changing From Exempt to Non-Exempt

- Employees often “offended”
  - perceived as “unprofessional”
  - tracking time is often the issue
- Cost Benefit Analysis
  - law requires overtime payment to non-exempt employees
  - employees upset if status changed
  - financial liability for failing to compensate overtime
  - liability for cost of non-payment vs. employee morale
- Challenges
  - Retroactive or only going forward
  - Employees question why not retroactive
  - Considerable unhappiness
- Strategies for Change
  - Identify other changes planned (benefits, handbooks)
  - Roll out as one package
  - Sell as a positive
  - Consider using “overtime eligible” and “overtime ineligible”

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## Updating School Documents & Policies

- **Examples** of documents to review:
  - Employee Handbook
    - work hours/schedules, definitions section, discipline, payment/compensation, benefits section, etc.
  - Employment Agreements/Offer Letters
    - identify status
    - eligibility for overtime
    - quote salary vs hourly rate
  - Job Descriptions
- **Recipients:** who receives these policies?
- **Record-keeping:** how long to maintain records?

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# Questions???

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