



Addressing the Latest Challenges Relative to Wage & Hour Law and Utilizing the FLSA as a Sword for Budget Management



WASBO
2022 Accounting
Conference



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Embracing Challenge. Delivering Opportunity

AGENDA |

FLSA - Generally

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Classification of Various Employees

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What is Your Task?

1. Create and implement additional services and supports for students
2. Attract and retain best and brightest
3. Be mindful of budgetary restraints

In other words, do more with less!



Overview of the Fair Labor Standards Act



The Fair Labor Standards Act

Two Basic Requirements of the FLSA

1. Pay non-exempt employees minimum wage (\$7.25/hour)
2. Pay non-exempt employees premium overtime pay at a rate of 1.5 times the employees' regular rate of pay for all hours worked over 40 in the workweek.

Two Categories of Employees

1. Nonexempt – Subject to minimum wage and overtime requirements
2. Exempt – Minimum wage and overtime requirements need not be met



Classification of Various Employees in a School District



Exemptions

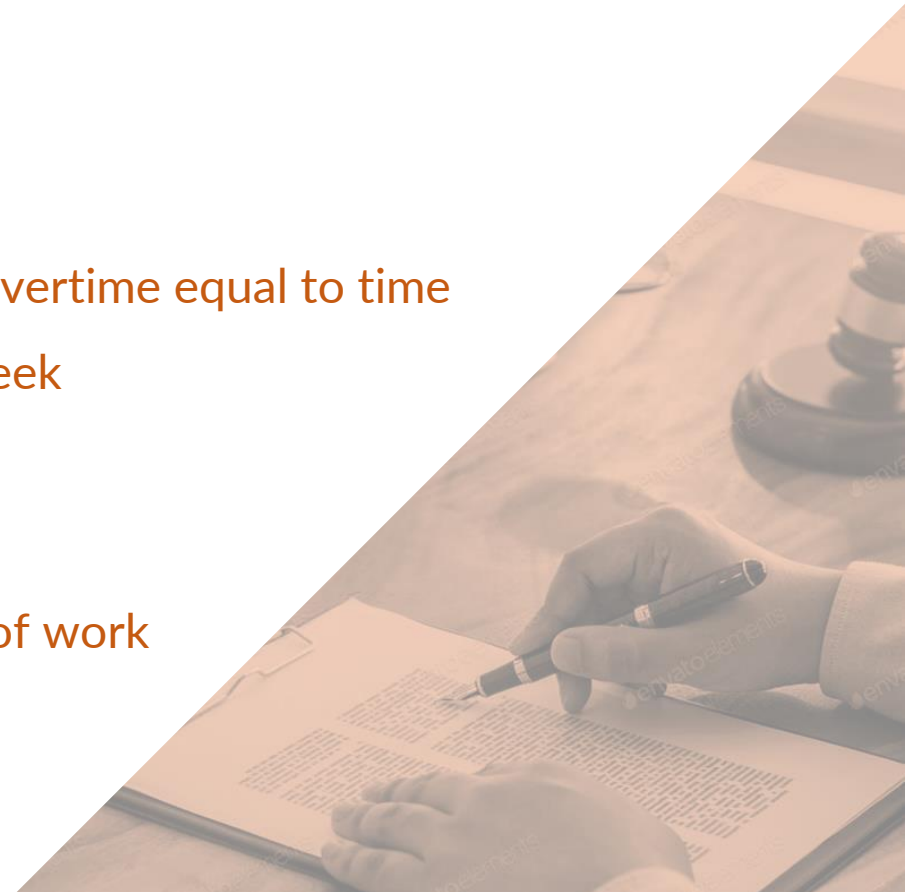


Nonexempt Employees

- Enjoy all the protections of the FLSA
- Generally paid on an hourly basis and are entitled to receive overtime equal to time and one-half for all “hours worked” over 40 hours in a workweek

Exempt Employees

- Requirements of minimum wage and overtime do not apply
- Paid a predetermined salary not based on quality or quantity of work
- Specific exemption categories (narrowly construed)



Exempt Employees

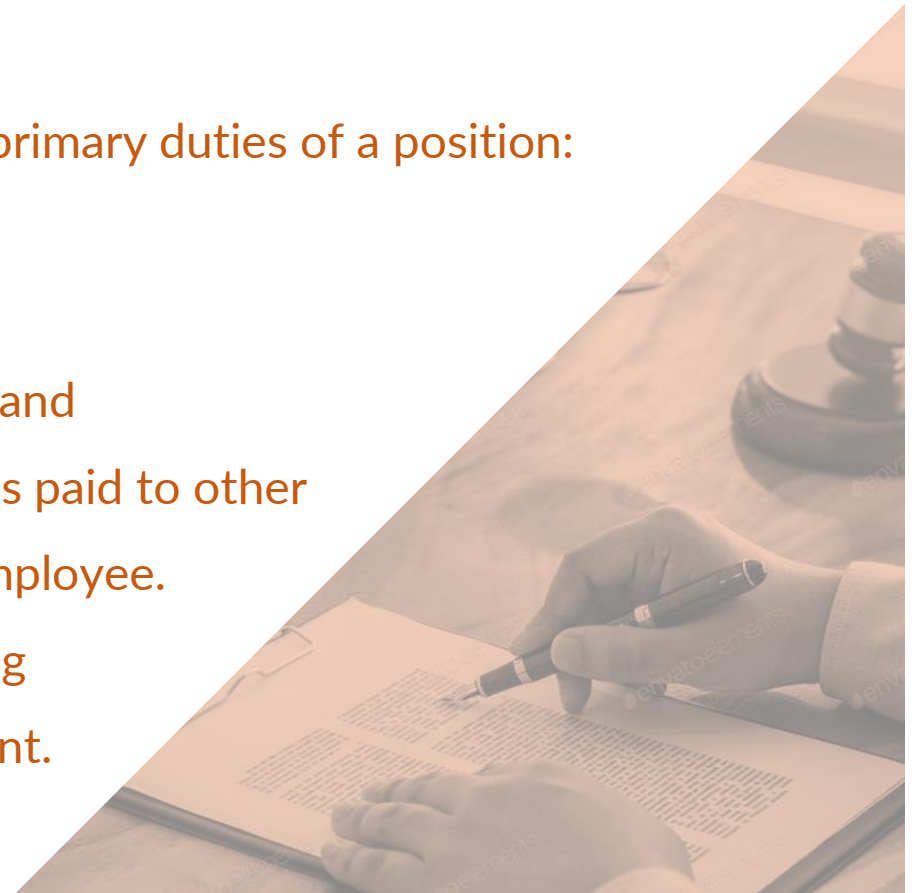


- Salary threshold of \$684 per week (\$35,568 annually)
- Nondiscretionary bonuses and incentive payments, can be used to satisfy up to 10% of the salary threshold.
- Discretionary bonuses cannot be used toward meeting the salary threshold.
- Employers can make catch-up payments to employees within one pay period of the end of the year.
- Must meet primary duties test for specific exemption category



Primary Duties Test

- There are a number of factors to consider when determining the primary duties of a position:
 - relative importance of the exempt 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 wages paid to other employees for any nonexempt work performed by the employee.
- Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement.



Categories of Nonexempt Employees



1. Custodial/maintenance
2. Administrative assistants
3. Educational assistants/paraprofessionals/aides
4. IT support staff
5. Bus drivers
6. Food service employees



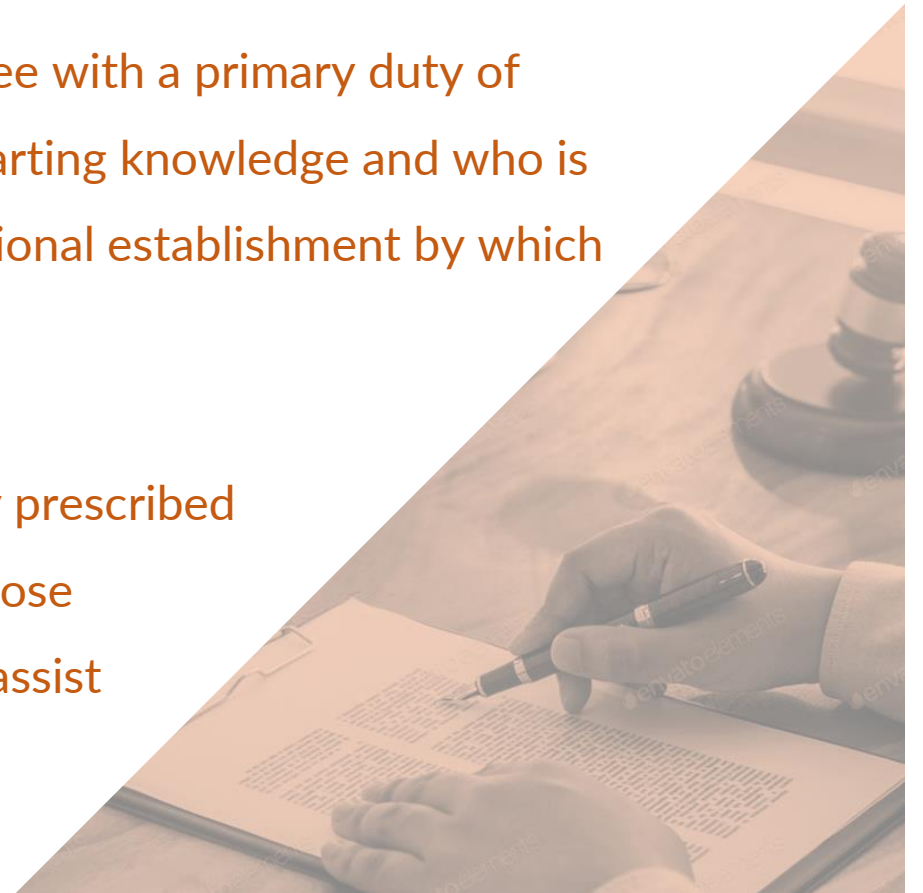
Categories of Exempt Employees

- Executive Exemption
 - Superintendent/District Administrator
 - Directors
- Administrative Exemption
 - Principals, Assistant Principals
 - Curriculum Specialist
 - Supervisors of maintenance, transportation, food services, etc.
- Professional Exemption
 - Teachers*
 - Librarian
 - Counselor, psychologists, social workers
 - School nurse
 - Physical/Occupational Therapist



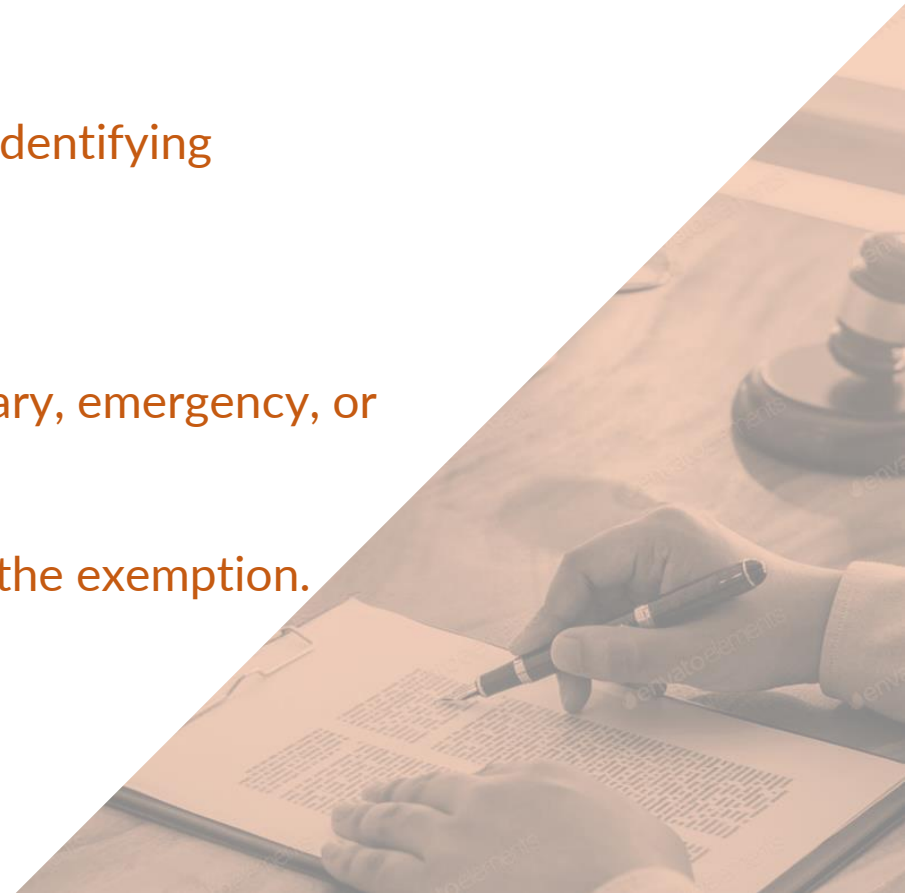
Special “Teachers” Exemption

- The “Professional” exemption specifically includes “any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. ” 29 C.F.R. § 541.303(b)
- The salary requirements of the FLSA do not apply to teachers.
 - Schools may compensate teachers less than the statutorily prescribed salary and need not provide additional compensation to those teachers who also coach athletic teams and/or otherwise assist with extracurricular offerings



Teacher's License/ Certificate

- Possession of a teacher's certificate provides a clear means of identifying individuals within the scope of the exemption.
- This is true regardless of the terminology
 - *e.g.*, permanent, conditional, standard, provisional, temporary, emergency, or unlimited
- However, possession of licensure is not required to qualify for the exemption.



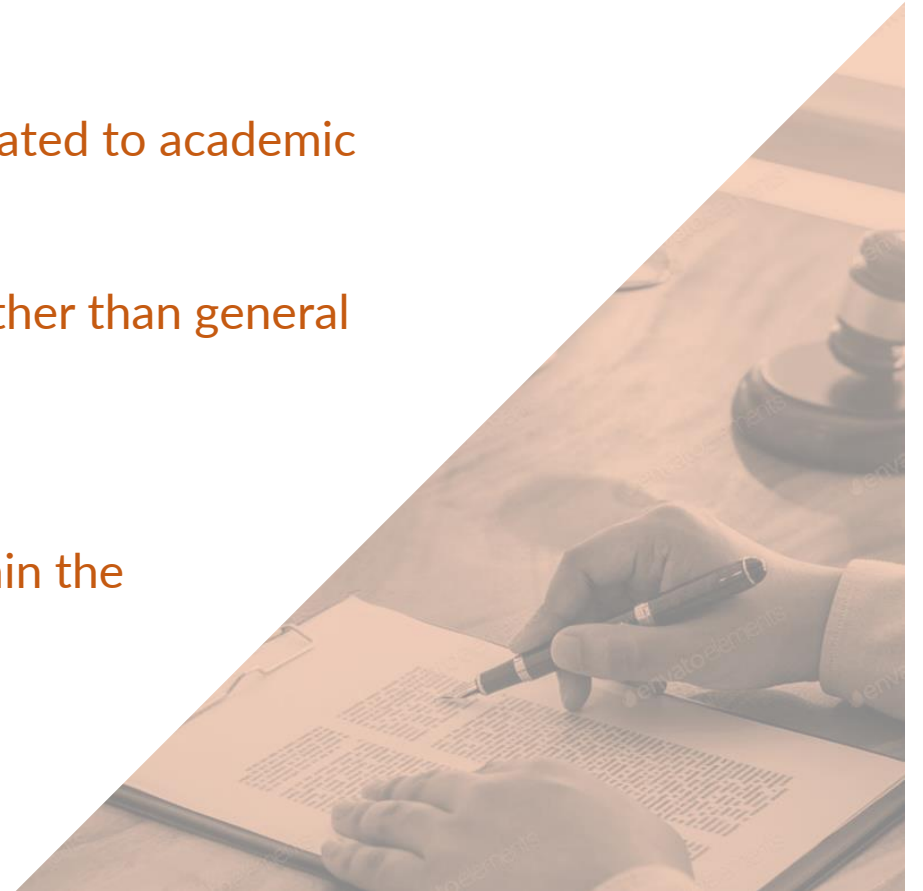
Exempt Teachers

- Regular academic teachers
- Teachers of kindergarten or nursery school pupils
- Teachers of gifted or disabled children
- Teachers of skilled and semi-skilled trades and occupations
- Teachers engaged in automobile driving instruction
- Home economics teachers
- Vocal or instrumental music instructors
- Includes part-time teachers, substitute teachers, and teachers paid on an hourly basis.
- But, this does not include aides, assistants or student teachers.



Academic Administrative Exemption

- Primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment.
 - Work related to the academic operations and functions rather than general business operations.
 - Include operations directly in the field of education.
- Jobs relating to areas outside the educational field are not within the definition of academic administration.



Academic Administrative Exemption

- Superintendent, principals, and APs
- Staff 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
- Academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements



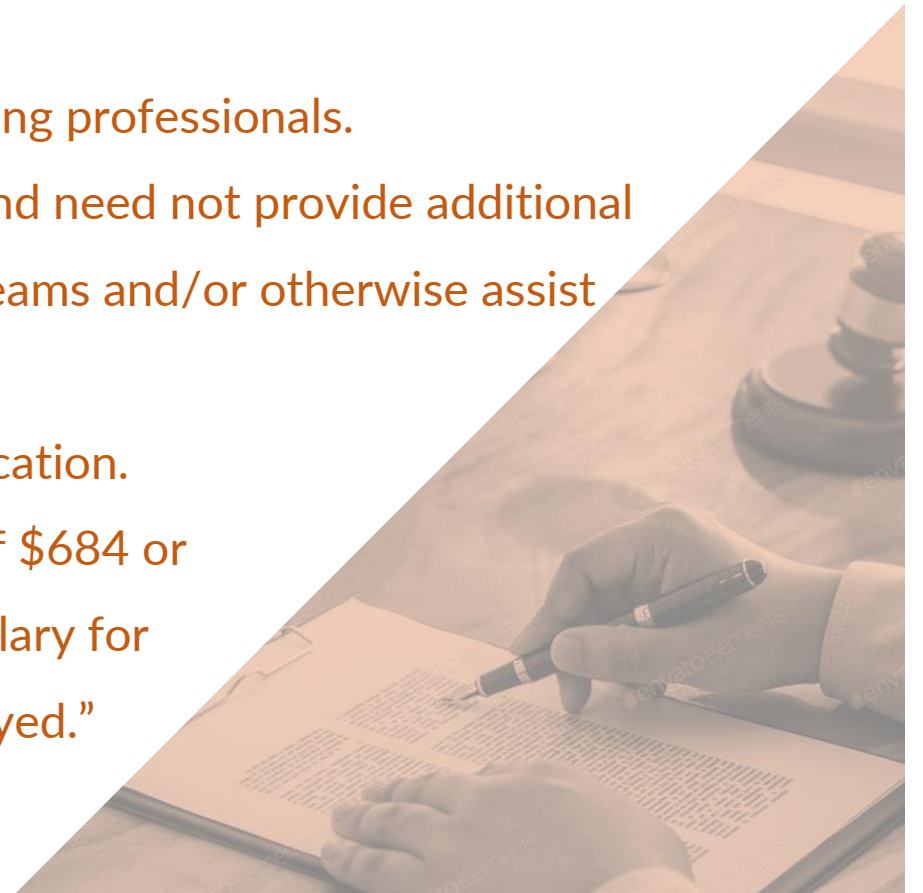
Academic Administrative Exemption

- Jobs which do NOT qualify for the Academic Administrative Exemption:
 - Facilities/maintenance
 - Nurse, social workers, psychologists
 - Food service employees
- Such work is not considered academic administration—related to the field of education, but such employees may qualify for exemption under the regular administrative exemption or under other sections of the FLSA.



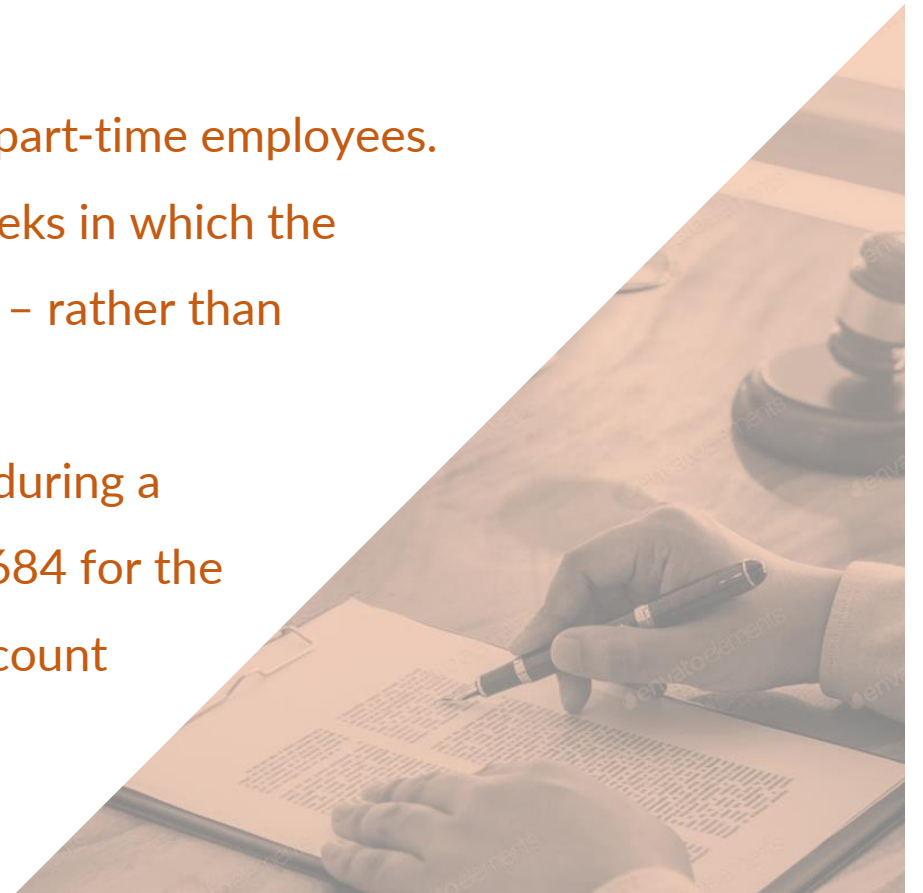
Teacher and Administrators

- The salary requirements of the FLSA do not apply to the teaching professionals.
 - Schools may compensate teachers less than \$684/week and need not provide additional compensation to those teachers who also coach athletic teams and/or otherwise assist with extracurricular offerings
- The weekly salary of \$684 does apply to administrators in education.
 - Administrators must be paid the minimum weekly salary of \$684 or “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed.”



Part-Time Employees

- No proration of the \$35,568 salary requirement is allowed for part-time employees.
- But, a 10-month employee may be paid \$684/week for the weeks in which the employee actually performs work during that 10-month period – rather than determining salary solely on an annual basis.
 - Caveat – If an employee performs even one hour of work during a workweek, the employee must be compensated at least \$684 for the work performed, unless lawfully authorized deductions account for the decreased salary.

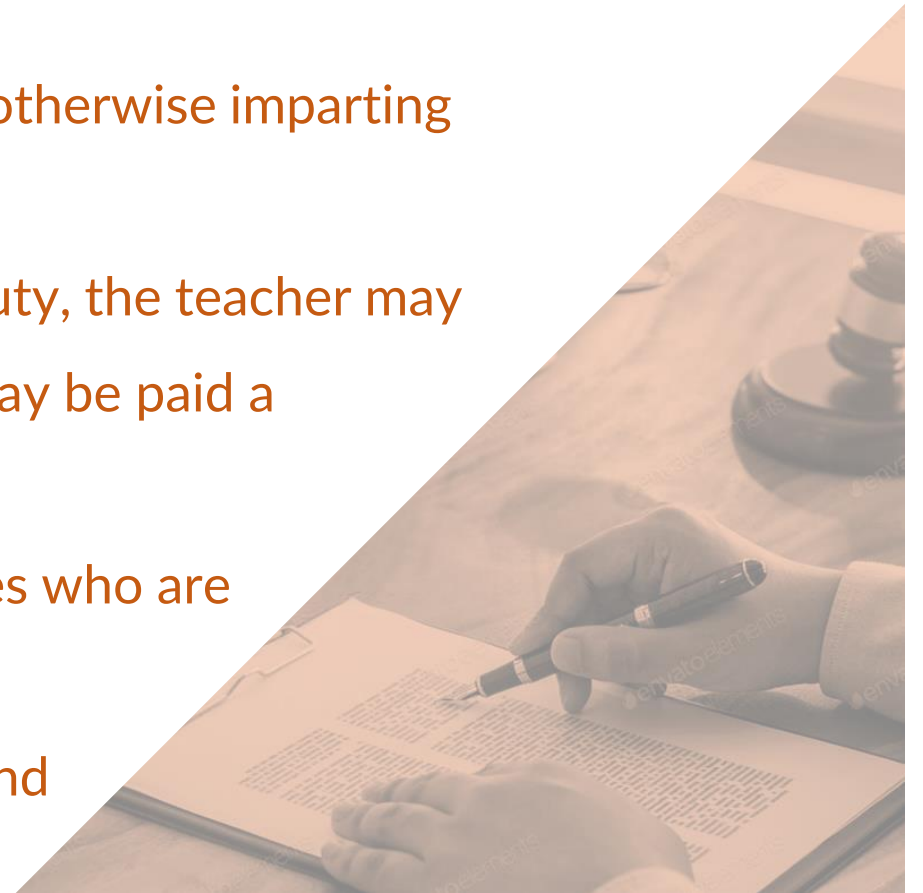


Coaches |



Teacher as Coach

- Teachers have a primary duty of teaching, lecturing, or otherwise imparting knowledge. 29 C.F.R. §541.303(b)
- Because coaching is secondary to a teacher's primary duty, the teacher may continue to be exempt for purposes of the FLSA, and may be paid a nominal fee (stipend) for coaching activities.
- DOL acknowledges in a 2018 opinion letter that coaches who are full-time teachers in a school satisfy the "primary duty" requirement and are exempt from the minimum wage and overtime requirements.



Community Member as Coach

DOL Opinion Letter – FLSA 2018-6

- The DOL concluded that non-district employees who coach, *i.e.*, community members who, for instance, work at another job and serve as a stipended coach simply because they desire to be involved in a school’s athletic program – also qualify as teachers under the FLSA and are exempt from the minimum wage and overtime requirements because their “primary duty” while working with student-athletes is instructional in nature.



Community Member as Coach

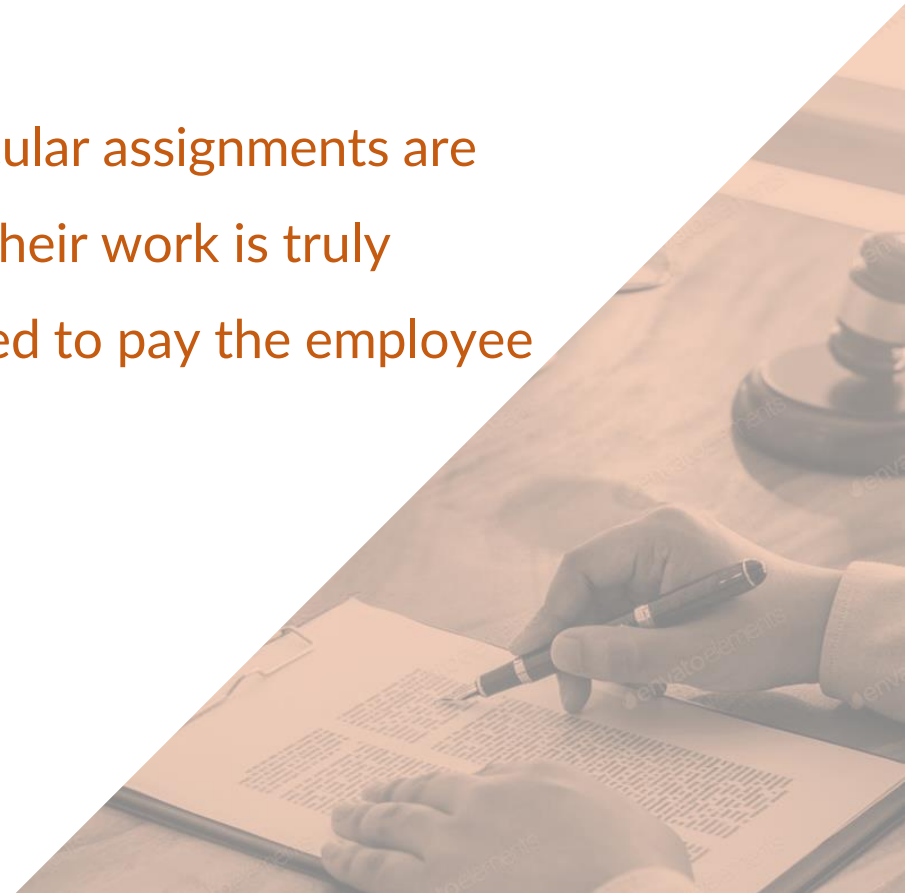
DOL Opinion Letter – FLSA 2018-6

- Coaches spend most of their time instructing student athletes in rules and fundamentals.
- Head coaches and assistant coaches share those teaching duties, although head coaches are responsible for determining the fundamental philosophy, skills, and techniques.
- When not instructing players, coaches devote the balance of their time to activities such as recruiting students to play sports, supervising team members during trips to and from games, disciplining team members when necessary, and accounting for all equipment in their care.



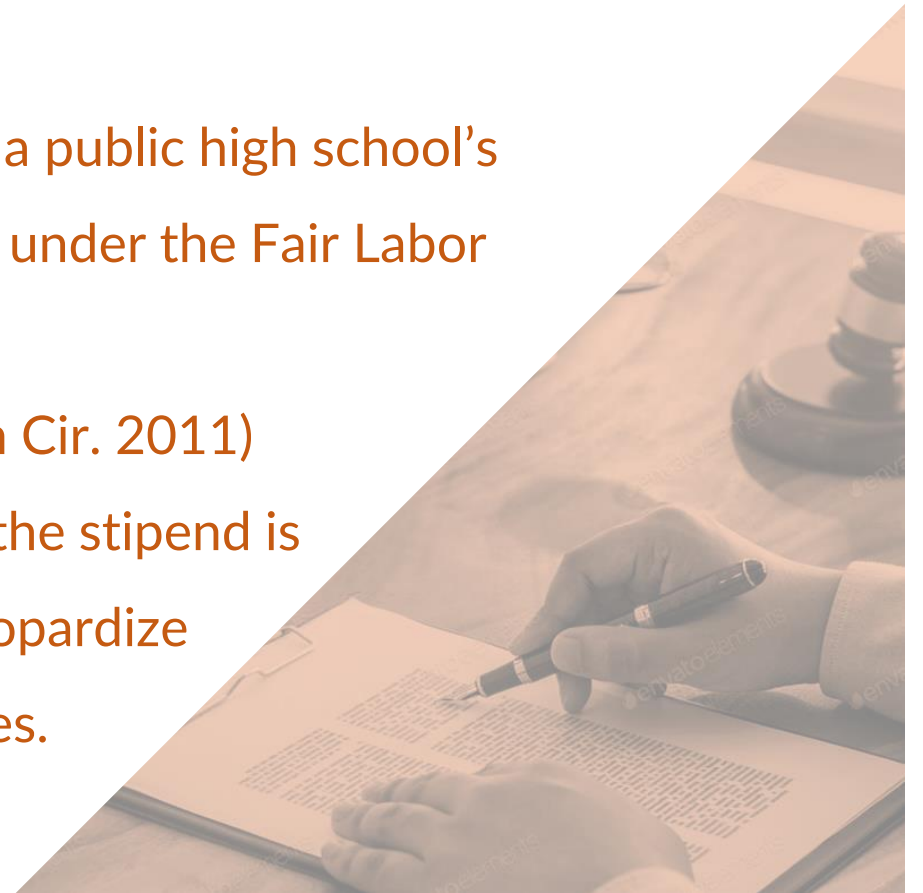
Nonexempt Employee as Coach

- Non-exempt employees who “volunteer” for extracurricular assignments are subject to the FLSA guidelines in determining whether their work is truly “voluntary” or whether the school district will be required to pay the employee for all “hours worked” as a coach.



Nonexempt Employee as Coach

- School safety officer who also served as a golf coach for a public high school's golf team is a volunteer and not entitled to overtime pay under the Fair Labor Standards Act.
 - *Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011)
- Reimbursing expenses or providing a stipend (as long as the stipend is not connected with productivity) does not necessarily jeopardize an individual's status as a volunteer for overtime purposes.



Coaching Pay



- A district may pay a teacher-coach as a district deems appropriate
 - Exempt teachers are not subject to the minimum wage and over time requirements of the FLSA.
- A district may pay a nonexempt coach a stipend as a bona fide volunteer, if applicable, or must comply with the FLSA as to minimum wage and over time pay
- A district may pay a community member-coach as a district deems appropriate under the teacher exemption of the FLSA.



Volunteers |



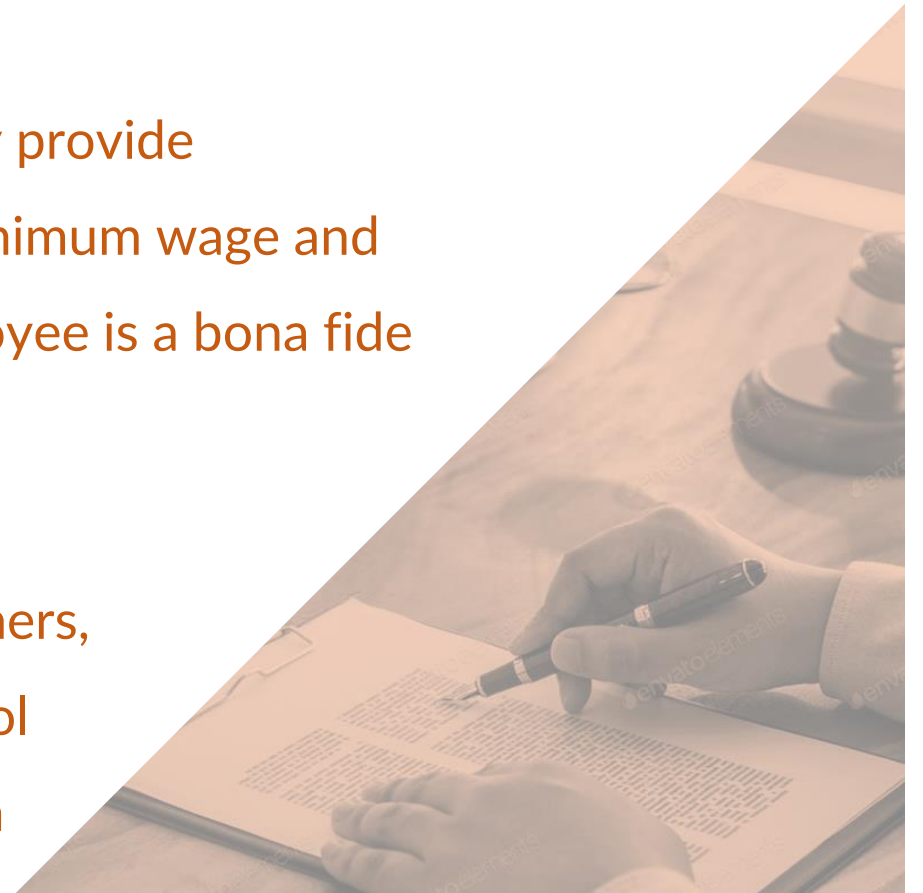
Classifying Employees as Volunteers

- Non-district employees may volunteer.
- Must be a bona fide volunteer under the FLSA
 - Performs service without promise, expectation or receipt of compensation for services rendered;
 - Offers services freely and without pressure or coercion, direct or implied; and
 - Is not otherwise employed by the district to perform the same type of services as those for which the individual proposes to volunteer.



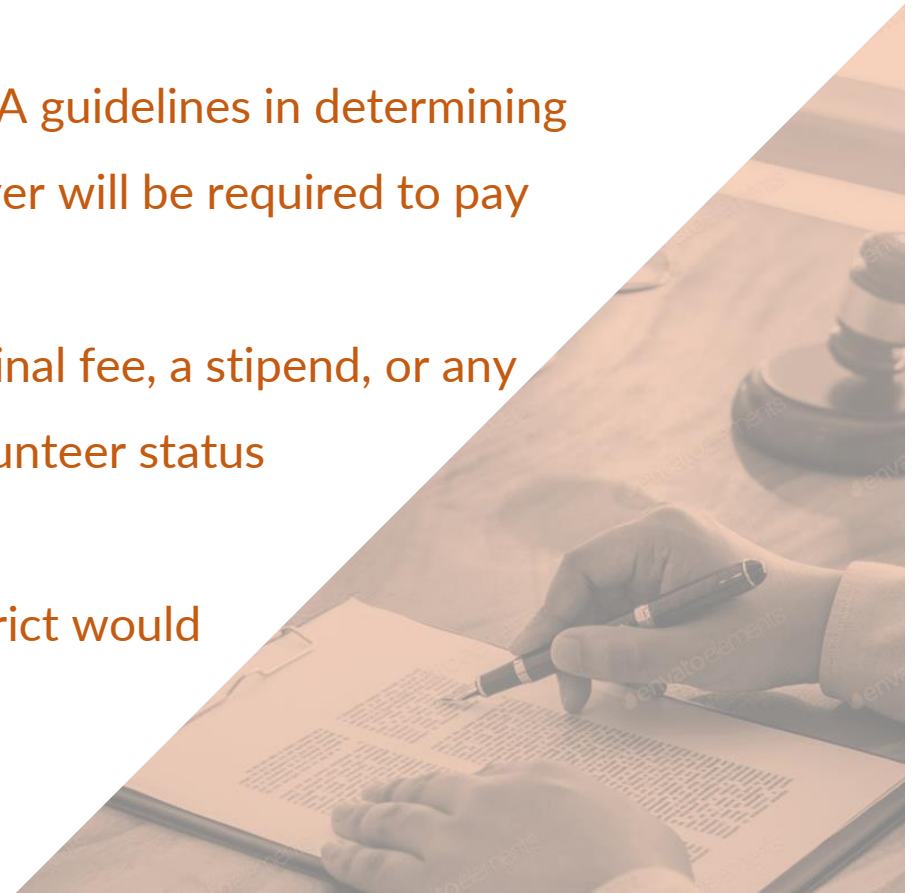
Nonexempt Employee as Volunteer

- Nonexempt employees and non-district employees may provide “volunteer” services and be exempt from the FLSA’s minimum wage and overtime requirements so long as the nonexempt employee is a bona fide volunteer.
- DOL Opinion Letter – FLSA 2006-40
 - DOL considered various scenarios—ticket taker, ushers, security guards, chaperones, proctors, crowd-control monitors, scorekeepers, etc., may all qualify as bona fide volunteers under the FLSA.



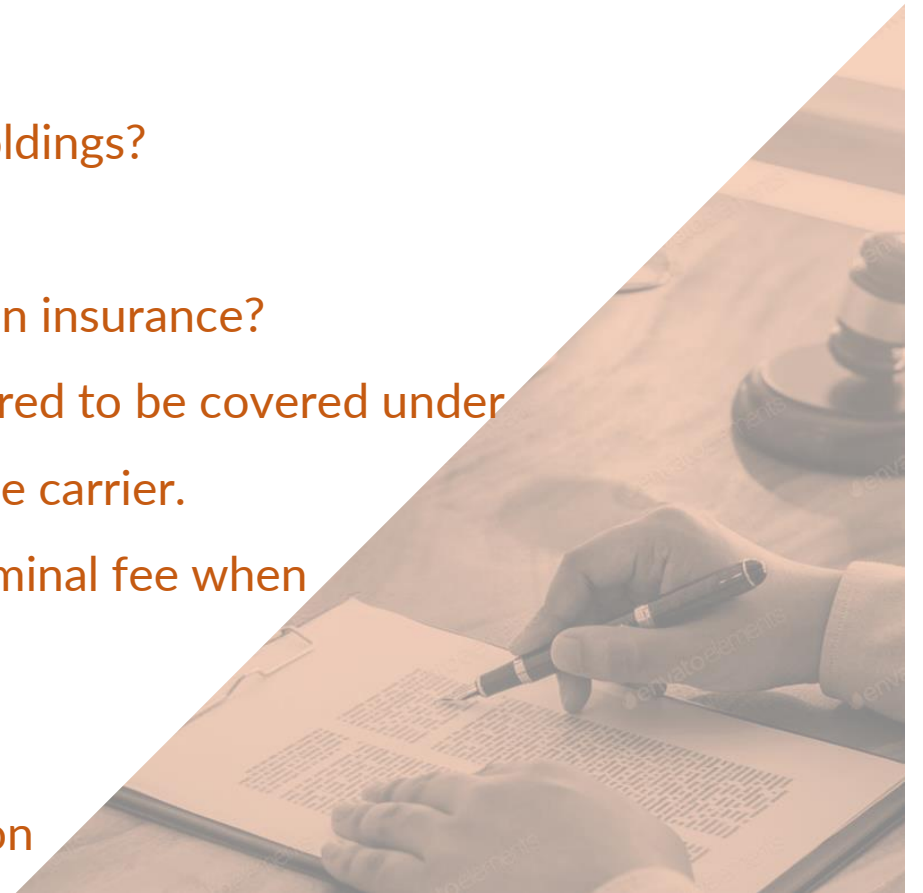
“Paying” Volunteers

- Non-exempt employees who volunteer are subject to the FLSA guidelines in determining whether their work is truly “voluntary” or whether the employer will be required to pay the employee for all “hours worked”.
- Volunteers may be paid expenses, reasonable benefits, a nominal fee, a stipend, or any combination thereof, for services rendered without losing volunteer status
 - Pay cannot be based on productivity or performance
 - Fee is nominal if it does not exceed 20% of what the district would pay for a full-time person in that position.



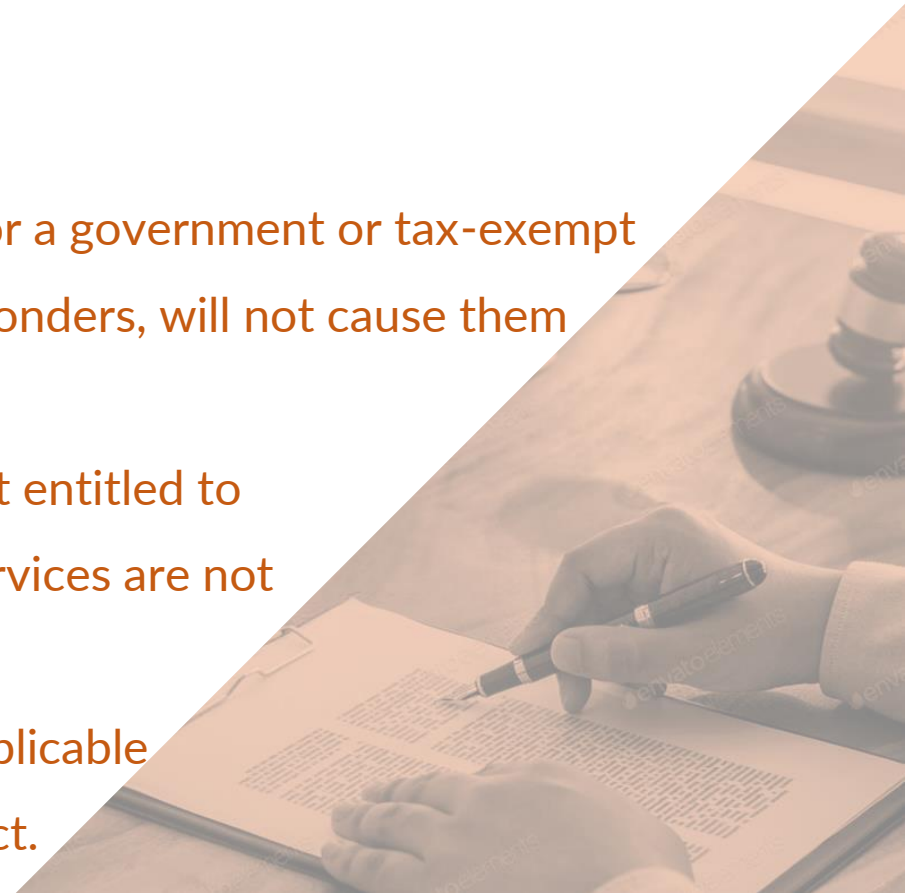
Additional Considerations for Volunteers

- If paid a stipend, must I deduct payroll taxes and other withholdings?
 - Generally, yes!
- Are volunteers covered by the district's worker's compensation insurance?
 - Maybe. Check with your carrier. Volunteers are not required to be covered under Wisconsin law but may be through an endorsement by the carrier.
- May an individual "volunteer" for a position and waive the nominal fee when a district would ordinarily provide such a fee?
 - Yes
 - Issues may arise if the individual "volunteers" for a position which is ordinarily held by a bona fide employee



What about PPACA and Volunteers?

- The final regulations provide clarification:
 - Volunteers: Hours contributed by bona fide volunteers for a government or tax-exempt entity, such as volunteer firefighters and emergency responders, will not cause them to be considered full-time employees.
- Hours worked by a volunteer who does not receive (and is not entitled to receive) compensation in exchange for the performance of services are not treated as hours of service for purposes of the PPACA.
- Thus, the 30 hour per week threshold of the PPACA is not applicable to those who volunteer for various positions in a school district.



Employee Absences|



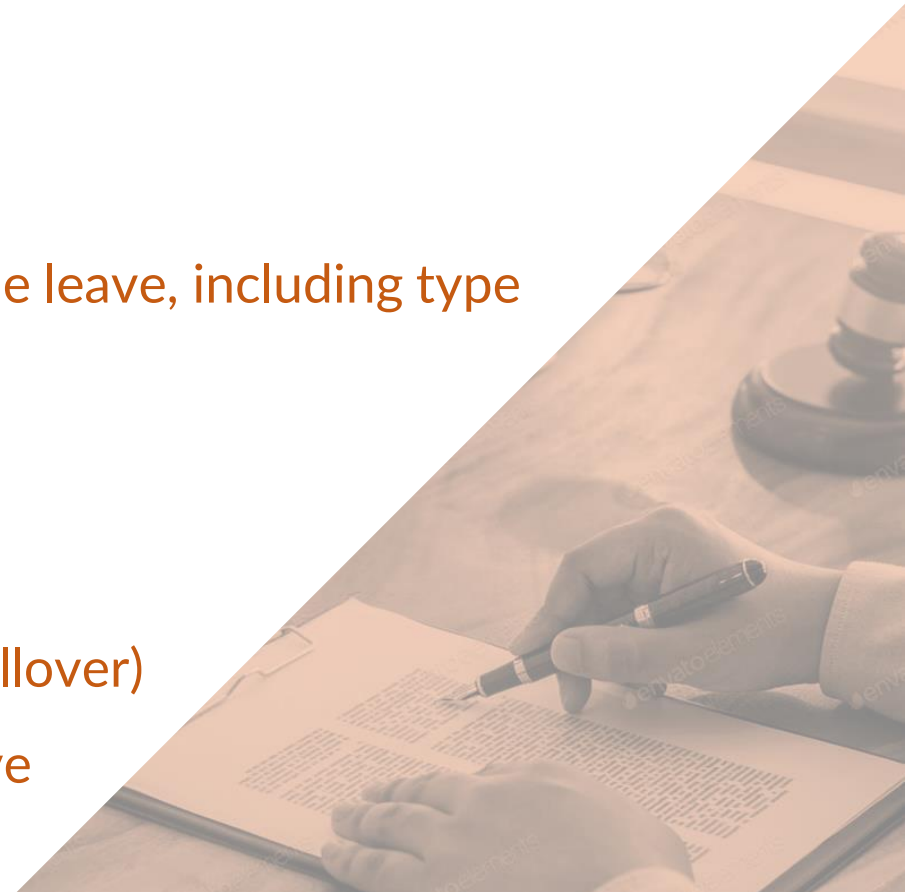
Employee Leave Management

- Implement a clear leave management process:
 - Increases employee satisfaction and retention
 - Creates policy consistency across the district
 - Ensures compliance with wage and hour laws
 - Increases productivity and efficiency
- Became clear over course of past couple of years how important leave policies are in the workplace
- Communication is key!



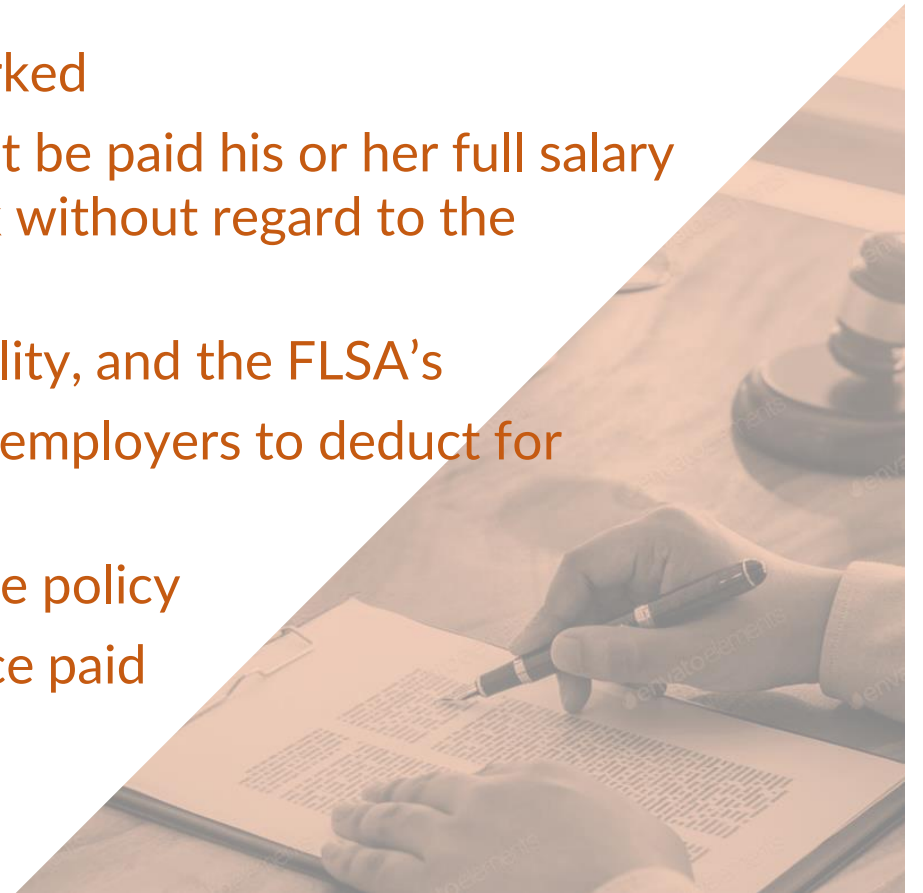
Employee Leave Management

- Policy development
- Principles to incorporate
 - Need to determine how and when employees accrue leave, including type and amount
 - Track leave allotments and track use of leave
 - Process for requesting and utilizing leave
 - What happens to unused time (use it or lose it or rollover)
 - Banking of time/payout of accrued and unused leave
- Consider the workplace culture you wish to foster



No-Docking Rule

- Nonexempt employees need only be paid for hours worked
- Subject to certain exceptions, an exempt employee must be paid his or her full salary for any week in which the employee performs any work without regard to the number of days or hours the exempt employee works
 - One exception is absences due to sickness or disability, and the FLSA's public accountability policy allows for public sector employers to deduct for partial day absences
 - To do so, school district must have appropriate leave policy
 - Include in policy the protocol for handling leave once paid leave allotments are exhausted





Action Items



- Use the tools of the FLSA to manage budgetary constraints
- Ensure job descriptions reflect duties tests
- Conduct a thorough review of the actual duties being performed by those employees in exempt positions and correct situations that may not meet the duties tests.
 - *e.g.*, Clerical staff is still clerical staff – they should not be paid on a salary basis.
- Carefully review the manner in which coaches and co-curricular positions are staffed and paid
- Manage leave through comprehensive policy



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Questions |