



Policy Alert: FLSA

Model Salary Basis Policy

The U.S. Department of Labor has issued a "Model Salary Basis Policy" outlining permissible pay deductions for exempt employees. The policy identifies when deductions are allowed, including but not limited to a change now allowing deductions for disciplinary suspensions of one or more full days for workplace conduct rule violations (such as misconduct involving harassment, drugs/alcohol, or weapons) but not simply performance or attendance issues.

... enforcing such a policy
can afford a "safe harbor"
for employers ...

Adopting, communicating, and enforcing such a policy can afford a "safe harbor" for employers who inadvertently make improper deductions from exempt employee

pay. We recommend that all school boards adopt and disseminate such a policy. The model policy can be found at http://www.dol.gov/esa/regs/compliance/whd/fairpay/model_policy_PF.htm.

HELPFUL REFERENCE

<http://www.dol.gov/elaws/flsa.htm>

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Status of New "FairPay" Overtime Regulations After House Vote

On August 23, 2004, new Department of Labor (DOL) regulations significantly changing white collar exemptions from overtime pay under the Fair Labor Standards Act (FLSA) went into effect. However, on September 9, 2004, the House of Representatives voted to partially block the new overtime regulations. The House voted in favor of a budget amendment that denies funding for DOL to administer the new regulations, except for the provisions raising the salary threshold for exempt status to \$23,660 annually. The Senate had previously passed similar restrictions on the enforcement of the new regulations.

At present, the new regulations *remain in effect*, and school boards should continue to review their job descriptions and position classifications to be sure they are in compliance with the requirements of the new regulations for exempt classifications. Even if DOL is ultimately restricted from enforcing its new regulations, they will still be on the books and could be enforced through private litigation. However, it is more likely that this provision will be removed from the final budget in conference, or that even if a final budget bill passes the Congress, including such a restriction on DOL's enforcement of the new overtime regulations, the President will veto such a bill.

Employment Harassment/Discrimination

Claims: Trends and Reminders

First, the Good News. Statistics on charges of harassment and other discrimination filed with the Equal Employment Opportunity Commission (EEOC) for 2003 reveal an overall decline in the number of charges filed from 84,442 in 2002 to 81,293.

Now, the Not So Good News. The percentage of charges including retaliation claims increased during the last year. Indeed, retaliation claims have generally been on the rise in the past five years, and this trend counsels a review of school board harassment/discrimination policies for non-retaliation provisions, as well as thoughtful, objective documentation of personnel actions.

The Law and the Elements of Proving Retaliation. Under Title VII of the Civil Rights Act of 1964, as amended, it is unlawful for an employer to discriminate against any individual because he or she has opposed harassment or other discrimination, or because he or she has brought a complaint, testified, or otherwise participated in a harassment or other discrimination investigation or hearing. To prevail on a claim of retaliation, an employee must prove he or she engaged in opposition to harassment/discrimination or participation in an investigation, that the school board took some type of adverse employment action against the individual, and that there was a causal connection between the protected activity and the adverse employment action.

What Should Your Board Do To Minimize the Risk of a Retaliation Claim Under Its Harassment/Discrimination Policies? *First, review your harassment/discrimination policies.* They should contain a provision prohibiting retaliation against anyone making a *good faith* complaint or participating in an investigation. The *good faith* qualifying language affords the discretion to discipline bad faith or malicious charges of harassment or other discriminatory conduct.

Second, remind and train supervisors and administrators conducting harassment or other discrimination investigations to counsel complainants and participants that retaliation will not be tolerated and that any questionable conduct should be reported so that it can be addressed.

Third, remind and train supervisors and administrators to properly and objectively document personnel actions such as evaluations, disciplinary measures, and terminations.

Courts will be unlikely to allow retaliation claims to proceed if an employee's personnel file objectively documents a legitimate basis for any adverse employment action taken.

While Reviewing Our Harassment/Discrimination Policies for Retaliation Provisions, Is There Anything Else We Should Look For? Be sure that your policies do not limit prohibited harassment/discrimination to sexual harassment. Recently, in working on specific personnel matters, we have come across harassment policies addressing only sexual harassment. The Supreme Court has made clear that the "hostile environment" rubric developed for sexual harassment claims will apply in cases of workplace harassment involving any protected category, including sex, religion, race, national origin, disability, or age. Your policies should spell out that harassment on the basis of any of these categories is prohibited and will be investigated and disciplined.

> Guynn Co-presenting at VSBA Conference

"A Hard Look at Financial Agreements"

Douglas L. Guynn and Leigh Burden, Director of Financial Services, Manassas City Public Schools, will be co-presenting at the 2004 VSBA's Annual Conference in Williamsburg, November 16-19. In a pre-convention workshop, "A Hard Look at Financial Agreements," Guynn and Burden will examine the positives and negatives of fixed percentage budget/appropriations agreements that some school divisions have entered into with their appropriating bodies (city council/board of supervisors). There have been consequences for school boards that have entered into these agreements. If your board or staff is contemplating such agreements, come and learn the finer details. For conference information, see <http://www.vsba.org>.

FOIA

WATCH THOSE "MEETINGS"

Virginia's Freedom of Information Act requires that certain things must be done before there is a "legal" meeting of a school board and other public bodies. Specific notice must be given of the meeting, and the public must be allowed access to it, unless it's a properly convened "closed meeting."

It doesn't take much to have a FOIA meeting – and a FOIA violation can draw you into controversy or even the expense of litigation. By law, school board members are responsible for reading and becoming familiar with the FOIA. Saying on the witness stand that you just haven't gotten around to reading the FOIA won't cut it with a judge – and shouldn't.

In general, you're in a FOIA "meeting" virtually anytime *three or more* board members gather. It doesn't matter where members assemble – the school board office, the local restaurant, or at an out-of-town convention hundreds or thousands of miles away. Even a committee get-together will be considered a meeting because the committee is treated as a FOIA "public body." If the board names as few as two – or even one – of its members as a committee, you can wind up in a "meeting" when a *quorum* is fewer than three members.

What about e-mail? The Supreme Court recently decided in the *Beck* case that e-mail among board members won't usually be considered a "meeting." The usual e-mail is similar to letters sent back and forth. Yet, they might be considered a "meeting" if the e-mail exchange is simultaneous, such as in a "chat room" or instant e-mail setup. The reminder: stay out of chat rooms, avoid anything that looks like "instant messaging" about school board business, and don't hurry in replying to e-mail from a board colleague!

Beyond the e-mail questions, the FOIA Advisory Council continues to field questions about the "meeting" issue for school boards. Sure, the Advisory Council sometimes doesn't get it right, as the *Beck* case eventually illustrated, but all school board members should give due consideration to the opinions of the Council's staff. The Advisory Council recently issued a couple of advisory opinions worth noting. Our mention of them doesn't necessarily mean we agree with the conclusions reached. They do help inform and remind

of some FOIA pitfalls that can haunt the most earnest board members.

➤ Everyone knows that once in a while a couple of members of the locality's governing body of the locality get together with a couple of school board members. Be careful! If these school board members were appointed, designated or otherwise voted on to be a committee of the board, you have a FOIA "meeting," according to a letter opinion of the Advisory Council's Executive Director. The chair and vice-chair of the Chesterfield County School Board escaped this result, however, because their gathering with counterparts from the Chesterfield County Board of Supervisors was something "initiated casually" by the chairman of the School Board to talk about bond referendum options. We wonder whether in litigation other facts might have been discovered about how "casually" things really developed. But, in the end, the FOIA Advisory staff seemed to take a very strict approach to how a committee is created and concluded that things were legally okay under the FOIA, although the representatives may have seemed to be functioning as a committee in reality. So, for board members, here's your lesson: know the role in which you're serving – and in close calls, it is prudent to get legal advice. If you're serving on a so-called "liaison committee," you and your committee members almost surely must comply with the FOIA meeting mandates. Don't let anyone lead you to go along with a "wink and nod" at these kinds of things.

➤ In a different school board situation, the Advisory Council's Executive Director found that three school board members actually had engaged in a "meeting" for FOIA purposes while attending a community forum. Here's the account recited in the opinion letter: Three school board members got together with about 20 local residents at a private home. The residents were concerned about the impact of a proposed new school. A newspaper reporter was present, and a newspaper article gave an account of the event. At the conclusion of the meeting, the chairman of the school board supposedly promised that in light of the concerns expressed, the board would not break ground

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SPED DISCIPLINE "STAY PUT"

Fourth Circuit Upholds Student Transfer

The Individuals with Disabilities Education Act (IDEA) generally mandates that school officials cannot unilaterally change a student's "then-current educational placement" while discipline proceedings are pending. After they've exhausted their 10-day suspension safe harbor, this "stay put" rule can vex principals and others seeking to assure an orderly learning environment for all students.

In a recent case from Virginia, the Fourth Circuit undertook to define what "educational placement" means. Is it the location of where the SPED services are provided? Or is it more about the overall programmatic attributes and routine of what's being provided to the student?

The case of *A.W. v. Fairfax Co. Sch. Bd.* involved an IDEA student assigned to the "gifted and talented" program at his elementary school. A.W. had persuaded another student to place a threatening note in the computer file of a student that A.W. disliked. The note read "DEATH AWAITS YOU." An administrator decided to transfer A.W. to a gifted and talented program at another elementary school. A.W.'s parents invoked their right to an administrative due process review to attack the IEP-MDR findings and tried unsuccessfully to enroll A.W. eventually at the junior high school he would have attended but for his transfer. The matter ended up in federal court.

The Fourth Circuit rejected A.W.'s contention that school officials violated the IDEA's educational placement stay-put rule when transferring him despite the ongoing due process challenge to the school officials' actions. According to the Court, educational placement is not about a particular school location. Instead, the term refers to "the environment in which educational services are provided" or the "overall instructional setting." If a change in location doesn't result in a "dilution of the quality of a student's education" or a "departure from the student's LRE-compliant setting," a change in "educational placement" hasn't occurred. A.W.'s transfer involved a "materially identical setting"

and, therefore, the IDEA's stay-put rule wasn't even implicated.

Score this win as a common sense outcome. Thank goodness for the Fourth Circuit.

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on construction as early as indicated. According to the Advisory Council's Executive Director, there (clearly) were three members of the school board who assembled to talk about public business and, therefore, it was a FOIA "meeting" – and notice was required for the meeting. We do not know whether the three board members had a different account of how and what things transpired. The lesson, though, is always to be mindful about any occasion when *more than two board members* are in the same place at the same time. By the way, the request for the opinion in this instance came from a board colleague who seemingly did not know about the occasion.

The FOIA is serious business. Compliance is an essential part of the legal duties of school board members.

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