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HUMAN RESOURCES FOR THE SPECIAL EDUCATION ADMINISTRATOR

MASE Best Practices Conference

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I. HIRING OF EMPLOYEES – PITFALLS TO AVOID

A. Negligent Hiring

1. This theory of recovery imposes liability for an employee's intentional torts when the employer "knew or should have known that the employee was violent or aggressive and might engage in injurious conduct." *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993). The scope of the employer's duty of reasonable care in hiring is largely dependent on the "type of responsibilities associated with the particular job." *Id*. at 422.

2. Minnesota first recognized a cause of action based on negligent hiring in *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983). In *Ponticas*, a tenant who was raped by a manager of an apartment complex brought an action against the owner/operator of the apartment complex alleging negligent hiring of the manager despite his criminal record. The Minnesota Supreme Court affirmed a jury's verdict that the owner/operator of the apartment complex violated its duty to exercise reasonable care in the hiring of the apartment manager who, because of the nature of his employment, posed a threat of injury to members of the public.

3. A school district's duty to use reasonable care in hiring employees was addressed in Minnesota in *P.L. v. Aubert*, 527 N.W.2d 142 (1995). In *P.L.*, a high school student, who was sexually abused by a teacher, sued the teacher, school district, and school principal alleging battery, intentional infliction of emotional distress, negligence, sexual harassment, breach of fiduciary duty, and vicarious liability. Although fact issues remained as to the other causes of action, the negligent hiring claim was dismissed. The school district escaped liability for negligent hiring because it had exercised reasonable care in hiring the teacher. The court noted that the teacher had a valid Minnesota teaching license, good academic credentials and excellent references.

B. Discrimination Issues

1. **Affirmative Action Restrictions.** Employers cannot hire a protected class candidate e.g., a woman, or person of color, on the basis of gender or minority status, unless they can establish that the employer actually discriminated in the past and that the hiring preference is narrowly designed to correct the past discrimination. The United States Supreme Court has made it clear in recent years that employers cannot make hiring

decisions in favor of protected classes based upon statistical disparities unless: (1) the employer can show that it actually discriminated against a particular class of individuals in the past; and (2) that the proposed action was narrowly designed to correct that past discrimination.

2. **Americans with Disabilities Act ("ADA")/Minnesota Human Rights Act ("MHRA") Restrictions.** Employers cannot require or request an applicant to furnish information that pertains to race, color, religion, national origin, sex, marital status, sexual orientation, status with regard to public assistance, disability, or age. Minn. Stat. § 363A.08, subd. 4. Therefore, any questions relating to these categories should be avoided.

C. Veterans Preference Act ("VPA")

1. School districts must provide veterans, disabled veterans and spouses of deceased or disabled veterans certain preferences in the hiring process. *See* Minn. Stat. § 197.455.

2. The hiring provisions of the VPA only apply to "competitive open" job openings. Minn. Stat. § 197.455, subds. 4, 5, and 6. In this context, a "competitive open" job opening means that all interested persons are eligible to compete in an examination for the job. Thus, they do not apply to promotional positions or positions that are only posted internally pursuant to a union contract.

3. The hiring provisions of the VPA do not apply to certain positions including the following positions: private secretary, superintendent of schools, department head or one chief deputy of any elected official or head of a department, or any person holding a strictly confidential relation to the appointing officer. Minn. Stat. § 197.46; Minn. Stat. §197.455.

4. The hiring provisions of the VPA do not apply to "occasional or temporary" employment situations. *See Crnkovich v. Indep. Sch. Dist. No. 701, Hibbing*, 142 N.W.2d 284 (Minn. 1966) (holding that an extra carpenter who was hired during the summer months was only a temporary employee and not covered by the VPA); *see also* Minn. Op. Att'y Gen. No. 85A (Sept. 23, 1964).

5. The VPA requires school districts to give veterans a preference that increases their odds of receiving an interview for an open position. The Act does not give veterans an "absolute preference" or require public employers to hire veterans. *McAfee v. Dept. of Revenue*, 514 N.W.2d 301 (Minn. 1994).

6. The hiring provisions of the VPA currently apply to teachers. School districts must either use a 100-point system to evaluate applicants for teaching positions or they must grant an interview to any veteran who applies for a teaching position and has the proper licensure for that position. Minn. Stat. § 197.455, subd. 5a.

D. Contract Issues

1. **Collective Bargaining Agreements ("CBA").** To the extent a position is covered by a CBA, the CBA may have language addressing a school district's authority to hire for union positions without first giving union employees the opportunity to be placed in the position. Additionally, a CBA may contain agreed upon posting and bidding procedures for lateral transfers before the vacancy is announced to the public. Failure to follow these procedures may result in a grievance and obligation to provide the position to an existing employee which may conflict with the obligations owed to an employee who has just been hired to fill the position.

2. **Detrimental Reliance on a Promised Job.** The determination as to who in the school district may exercise the appointment power is important so that the school district may avoid creating contractual rights, disputes over statutory powers, and potential damage claims. Clear delineation of authority to offer jobs will avoid potential contract claims that an applicant detrimentally relied on the promise of the job and possible damage claims against the school district. Each job description should identify the appointing authority for the position and should state that the position will not be filled until final approval by that authority.

E. Screening Candidates in the Age of Social Media

Employers can search the internet, including social media, for information regarding potential job applicants. Information about an applicant may be available online that is not otherwise available to a school district. A school district may obtain such information by asking applicants for access to social media webpages, or even conducting an internet search of the applicant's name.

1. **Potential Concerns of Using the Internet During the Screening Process.**

   a. Using the internet, particularly social media webpages, to obtain information about applicants increases the risk that the employer will learn that an applicant is a member of a protected class. This,

in turn, increases the risk that the employer may be held liable or must defend against a discrimination claim by a rejected candidate.

b. Internet and social media sources may be inaccurate or include information that has no bearing on an applicant's ability to perform his or her pending job.

2. **Reducing Potential Liability.**

a. Limit the use of internet resources.

b. Develop and implement a consistent internet screening policy.

c. Use an information screening process.

II. OFFERS OF EMPLOYMENT

A. Only the School Board Has the Authority to Hire and Fire

B. Making a Good Conditional Offer

1. Whenever possible, do not offer anyone a job or state that you will be recommending them for hiring until you have checked their references, college background, applicable licensure and criminal background check results.

2. If an offer must be made before all the requested information has been received back, make it in writing and refer to it as a recommendation by the Administration.

3. Make terms of conditional employment clear (i.e. clean criminal background check, receipt of college transcripts, acceptable reference checks, etc.)

4. Include a statement that employment is subject to approval or disapproval by the school board at its sole discretion.

5. Do not allow the person to start work before the school board acts.

6. Address emergency situations by:

a. obtaining annual approval from the school board for a specific list of substitutes which may be hired on a temporary basis to serve until the next school board meeting;

b. providing clear written notices to substitute identifying the limited duration of employment and when the school board will act on the employment decision;

c. obtaining an acknowledgement from substitutes that they understand and agree to these terms of temporary employment;

d. allowing substitutes to work only when absolutely necessary; and

e. conducting background checks on substitutes before placing them on the substitute list.

C. When Conditional Job Offers Are Appropriate

1. The applicant has been selected but physical tests or examinations still need to be conducted.

2. There is a concern the applicant will take another job.

3. School board approval is anticipated.

D. Dangers of Allowing a Conditional Hire to Start Work Before All Conditions are Satisfied

1. Veterans Preference Act.

2. Negligent Hiring.

2. Reasonable/Detrimental Reliance Claims.

III. WORKPLACE INVESTIGATIONS

A. Before the Investigation – Best Practices

While workplace investigations will typically be handled by human resources personnel, it is important for all school district administrators to be cognizant of practices and procedures that will contribute to an efficient and effective investigation.

1. **Document the Discovery.** Whoever brought the complaint to your attention and/or discovers the alleged misconduct should create a written statement that describes everything the person knows about that conduct, including the names of potential witnesses, the identity of the alleged wrongdoer (if known), the date that the misconduct occurred or was discovered, and any other potentially relevant information.

3. **Make a Report If Appropriate.**

   a. **Report any suspected crimes to law enforcement.**

   b. **Maltreatment of Minors Reporting.** Remember your obligation as a mandated reporter when you know or have reason to believe a child is being neglected or physically or sexually abused or has been neglected or physically or sexually abused within the preceding three years. *See* Minn. Stat. § 626.556.

   c. **Report to law enforcement and the State Auditor, under certain circumstances.** Minnesota law requires public employees and officers to "promptly" report to law enforcement and the State Auditor whenever the employee "discovers evidence of theft, embezzlement, unlawful use of public funds or property, or misuse of public funds" by anyone who is "authorized to expend public funds." Minn. Stat. § 609.456, subd. 1.

   Note: The reporting requirement is triggered by the discovery of "evidence." Rumor is not enough. However, because these reports must be made "promptly," a school district may wish to make them before conducting its own internal investigation. The State Auditor may make adverse findings against a school district if the report is not prompt.

4. **Determine Whether the Alleged Employee Wrongdoer Should be Placed on Administrative/Investigatory Leave Pending the Outcome of the Investigation.**

5. **Act Promptly.** If a school district decides to conduct an investigation (or is mandated to conduct one pursuant to school district policy), even minimal delays may result in lost evidence or provide the alleged wrongdoer with an opportunity to conceal the truth or come up with a "story."

6. **Choosing an Investigator.** School districts should decide to investigate alleged misconduct internally or hire a third-party investigator. In making this determination, school districts should consider the following:

   a. The potential ramifications of the problem, both practical and legal;

   b. Whether an internal investigator will be viewed as biased because of his/her position with the employer;

   c. The long-term impact of using an internal investigator, including the future work relationship, if any, between the investigator and the subject of the investigation;

   d. The ability of an internal investigator to efficiently conduct the investigation in a thorough, objective, and timely manner; and

   e. The likelihood of the investigator having to testify at a grievance arbitration, litigation, or other matter related to the investigation and subsequent discipline.

6. **Determine the Scope and Strategy of the Investigation.**

7. **Determine Who Will be Present at Each Interview.**

B. Data Practices Considerations

1. **Tennessen Warnings.**

   a. **Legal Requirements.** The Minnesota Government Data Practices Act ("MGDPA") states that an individual who is asked to provide any private or confidential data concerning the individual shall be informed of the following:

      - The purpose and intended use of the requested data;
      - Whether the individual may refuse or is legally required to supply the requested data;
      - Any known consequences arising out of supplying or refusing to provide the private or confidential data; and
      - The identity of other persons or entities authorized by state or federal law to receive the data.

(Minn. Stat. § 13.04, subd. 2).

b. **Student Interviews.** When interviewing students, the specific language of a Tennessen Warning can be tailored to the age/understanding of the student being interviewed, as long as all required elements are present.

c. **Tennessen Warnings should be in Writing.** The MGDPA does not require written Tennessen Warnings. However, in order to avoid issues of proof, the best practice is to give written Tennessen Warnings, signed by the individual being interviewed. Above the space for the individual's signature, the warning should contain language to the following effect: "By signing below you acknowledge that you have read this notice prior to being interviewed. A copy will be provided to you upon request."

d. **Broadly Drafted.** The Tennessen Warning should broadly address the legal components discussed above. School District's should not limit themselves to overly specific uses of the data or omit any person or entity that may have a right to access the collected data.

3. **Garrity Warnings.**

a. **When Administered.** Public employers must administer a Garrity Warning when requiring employees to provide information as a condition of maintaining employment. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

b. **Consequences of Garrity Warning.** If a public employer directs an employee to answer interview questions upon penalty of discipline, the information obtained by that employer and any subsequent information obtained as a result of the compelled statement cannot be used in subsequent criminal proceedings against the employee.

c. **Language.** Like a Tennessen Warning, a Garrity Warning should explain the interview subject's rights under the MGDPA. Unlike a Tennessen, however, the Garrity Warning should: (1) direct the subject to answer the interviewer's questions accurately and truthfully under penalty of discipline for insubordination; and (2) inform the interview subject that the information he/she provides and any information resulting from the interview may not be used

against them in criminal proceedings. The Garrity Warning should also stress that any information obtained independently by law enforcement or prosecuting authorities may be used in any criminal proceeding.

d. **Coordination with Law Enforcement.** If law enforcement officials are also investigating the conduct in question, it may be a good idea to contact the investigating officer before administering a Garrity Warning.

C. Preserving Electronic Evidence. School districts should take steps to preserve any evidence of wrongdoing that may exist on school district computers, video surveillance, and/or social media accounts

Note: School Officials Should Not Retain Copies of Actual or Suspected Child Pornography. In March 2008, a high school assistant principal in Loudoun County, Virginia, was charged with possession of child pornography and failure to report child abuse because he mishandled a sexting investigation. State v. Ting-Yi Oei, Loudon County, Virginia (2008).

D. Coordinating Investigation with Law Enforcement

1. **Spoliation of Evidence.** When a complaint involves accusations of criminal activity, a school district should be careful to conduct its investigation in a manner that does not spoil or disturb the evidence that law enforcement will need to gather.

   a. As stated above, school districts should report any suspected crime to law enforcement. School districts should then attempt to work cooperatively with law enforcement so that a district's investigation does not inadvertently impair the criminal investigation.

   b. School districts should preserve any evidence collected.

2. **Relying on a Police Investigation.** A school district generally may not rely on the results of a police investigation in lieu of conducting its own investigation. There are several reasons for this.

   a. The degree of sophistication and quality of police work can vary from one town to the next. Some school districts conduct more thorough investigations than law enforcement.

b. A school district has no control over the police investigation, and no ability to assess the credibility of witnesses in a police investigation.

c. A school district is not always able to access all the information the police gather. This impacts the school district's ability to assess the reliability of the information and to obtain the full picture of what occurred.

d. Police operate under a different standard than public employers. The police may find insufficient evidence to proceed, which could mean that there is not enough evidence to convince a jury beyond a reasonable doubt that a crime has been committed. At the same time, there could be more than sufficient evidence to take action in the employment/school setting, which generally operates under a much lower standard. Similarly, even where police do not wish to proceed with charges, there may be enough evidence for a school district to proceed with discipline.

E. Sharing Information with the Complainant Following the Completion of an Investigation.

1. The MGDPA prohibits school districts from releasing private educational data and private personnel data to the complainant.

2. The reality is, the MGDPA prohibits the release of private educational data and private personnel data such that school districts are left with very little they can tell a complainant after conclusion of an investigation into his/her complaint.

a. Cannot release whether allegations were substantiated or not.

b. Cannot release whether discipline will be or was imposed. Remember, a subject employee has the right to grieve such discipline (a process which can take a very long time), and non-final disciplinary action is not public. In addition, information regarding whether a student subject was disciplined is never public.

c. Can tell complainant what you are doing for him or her (or his or her child), as long as you do not name any other students/employees involved or release any private data about others.

d. Can tell complainant that an investigation was conducted and has now been completed. Can also tell the complainant that the school district "has taken all appropriate action."

IV. DISCIPLINE & TERMINATION

A. Progressive Discipline of Teachers

1. **Confirm that the Employee is a "Teacher."** Review the definition of a "teacher." Remember that for most school districts, a "teacher" is defined as a "principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department." Minn. Stat. § 122A.40, subd. 1 (emphasis added).

2. **Clearly Identify the Teacher's Deficiencies or Misconduct.** To the extent possible, objective criteria should be used to identify deficiencies and objective facts should be used to describe misconduct. Before identifying a teacher's deficiencies, a school district must be able to identify the expected level of performance and the basis for that expectation.

3. **Determine Whether the Teacher is Probationary and, If So, Whether the Deficiencies Warrant Non-renewal.** Depending on the nature and extent of a probationary teacher's performance deficiencies, a school district may best serve its interests by non-renewing the teacher rather than utilizing district resources to try to train or rehabilitate the teacher.

4. **Determine Whether the Teacher's Deficiency or Misconduct Meets One or More of the Statutory Grounds for Termination or Discharge.**

5. **Common Areas of Deficiency for Special Education Teachers.** Some of the more common areas of deficiency for special education teachers are as follows:

   a. Failure to meet due process timelines (e.g. failure to timely complete evaluations and evaluation reports);

   b. Failure to develop a new IEP within 12 calendar months;

   c. Backdating evaluation reports and IEPs;

   d. Failure to attend IEP meetings;

e. Failure to modify goals and objectives in a child's IEP for several years;

f. Failure to modify the present level of performance statements in IEPs;

g. Failure to report the student's progress to parents;

h. Failure to provide notice and obtain parental consent before implementing a new IEP;

i. Failure to maintain appropriate special education documentation in student files (e.g. missing IEP pages, evaluation reports, notices);

j. Failure to keep files in a secure location (e.g. leaving IEPs in plain view in the teacher's room during the school year or over the summer);

k. Failure to provide the quantity of direct service specified in student IEPs.

6. **Determine Whether Further Investigation is Warranted.** In determining whether an employee engaged in misconduct an investigation is often necessary and/or advisable. If an investigation is conducted, it must be done in a fair and objective manner. Otherwise, an arbitrator may refuse to terminate the subject of the investigation on the ground that he or she was treated unequally or unfairly.

7. **Determine Whether a Mandatory Obligation to Report the Teacher to the State Licensing Board Exists.**

8. **Closely Track the Teacher's Performance After Receipt of a Letter of Deficiency, and Notify the Teacher of Insubordination.** School districts must closely monitor a teacher's job performance once a letter of deficiency has been given. School districts should assess any changes in the teacher's performance and whether the teacher is complying with the directives in the letter of deficiency.

   a. **Tracking Performance.** Directives to correct poor performance should be written in a manner that allows a school district to later identify the teacher's level of performance when the letter of deficiency was issued, and compare it to the teacher's level of

performance a reasonable amount of time after he or she receives the letter of deficiency.

b. **Notice of Insubordination.** As soon as a school district discovers that a teacher is not complying with a directive in a letter of deficiency, the district should notify the teacher in writing that she has not complied with the directive. The teacher should also be notified that failure to comply with the directive constitutes insubordination, which is a ground for immediate discharge. In addition, the letter should notify the teacher that all prior directives remain in effect, and that if he or she fails to follow any directives in the future, the school district may take disciplinary action up to an including immediate discharge or termination of employment effective at the end of the school year

9. **Respond to the Teacher's Statements About a Letter of Deficiency.** Teachers respond to letters of deficiency in a variety of ways. Some teachers ask a few clarifying questions and then begin working diligently to correct their deficiencies. Unfortunately, others will spend much of their time writing extensive letters arguing about their job performance and alleging that the school district has treated them unfairly. The school district's response to such post-LOD communications from the teacher can be critical.

a. **No Response.** If the teacher does not make any response to the letter of deficiency, the school district should presume that the teacher understands the information in the letter and is competent to comply with the directives in the letter.

b. **I Need an Extension.** Most well-crafted directives will have a date by which the teacher must comply. Absent unusual circumstances, such as a death in the teacher's family, extensions should be granted sparingly. The date specified in a directive should be carefully considered before the directive is issued. The date should represent a reasonable period of time for the teacher to complete the work necessary to cure the deficiency. Granting an extension without a solid rationale could suggest to an arbitrator that the original directive was not reasonable. On the other hand, a teacher's request for an extension can be used to the advantage of the school district.

- **Implied Admission.** When a special education teacher has been directed to remedy a deficiency in special education

paperwork by a certain date, the mere request for an extension can be viewed as an acknowledgement by the teacher of the extent to which her files are out of compliance.

- **Written Admission.** If a teacher has numerous deficiencies in her special education paperwork, and the school district has any question about whether the deadline embedded in a directive is reasonable, an alternative way of responding to a request for an extension is to write a letter to the teacher stating: "Before considering your request for an extension, you must specifically identify, in writing, the errors in your files. You must also provide an estimate of how much time it will take to correct each error, and an explanation of why you believe an extension is necessary." The benefit of this type of response is that it forces the teacher to admit her errors in writing. Such an admission can be powerful evidence in a termination hearing.

c. **I Need Help.** A school district should carefully consider any request for *specific* assistance. Because an arbitrator may be reviewing the matter at some point in the future, school districts must act in a manner that is fair and reasonable under the circumstances. However, by virtue of being licensed, teachers are presumed to be competent to do their job. School districts are not required to essentially assign another person to do a special education teacher's job for him or her. If a teacher responds to a letter of deficiency by simply saying, "I need help," the school district should instruct the teacher to specify the help she needs. For example: "If you believe you need additional training to correct your deficiencies, you are directed to develop a plan outlining the training you need and to submit the plan to me within two weeks from the date of this letter."

d. **I Do Not Understand the Directives.** Always attempt to clarify any provision that a teacher finds unclear, but in doing so be careful not to modify or back down from the directives in the letter of deficiency.

e. **Other Teachers Are Not Required to Do This.** Teachers who receive directives often respond by claiming that the directives add more work to their day, and that they are being treated unfairly because other teachers do not have similar directives to follow.

One way to respond to such a claim is as follows: "The directives you received are not designed to increase your workload. Rather, they were carefully designed to help you cure your continuing deficiencies. You have been given these directives because you have demonstrated that you are unable to meet the requirements of your job without such directives."

10. **Identify the Appropriate Level of Discipline.** The decision to suspend a teacher without pay for a few days or propose a teacher for immediate discharge will depend on the gravity of the teacher's deficiencies or misconduct.

B. Terminating a Continuing Contract Teacher.

1. **Consult with legal counsel.** If a school district decides to pursue termination, it must follow all statutory procedures for termination. There are several statutory provisions that apply to the termination of a continuing contract teacher. Therefore, upon making the decision to pursue termination, it is advisable for school districts to contact legal counsel to discuss the particular facts and statutory provisions that are applicable to the case.

IV. WORKFORCE INNOVATION AND OPPORTUNITY ACT (WIOA)

A. What is WIOA?

1. The Workforce Innovation and Opportunity Act ("WIOA") and its implementing regulations are designed to strengthen and improve the nation's public workforce development system and help Americans with significant barriers to employment, including individuals with disabilities, into high quality jobs and careers and help employers hire and retain skilled workers.

2. Title IV of *WIOA* amended title I of the Rehabilitation Act of 1973 ("Rehabilitation Act"). The Rehabilitation Act, as amended by WIOA requires that local school districts coordinate with other vocational rehabilitation agencies to provide to students and youth with disabilities with services in order to ensure they have opportunities to receive the training and other services necessary to achieve competitive integrated employment.

V. FAIR LABOR STANDARDS ACT (FLSA)

A. General Legal Framework. The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., is the federal law of most general application concerning wages and hours of work. The FLSA sets minimum wage, overtime, equal pay, child labor, and record-keeping requirements for covered employees. It is enforced by the United States Department of Labor or by individual plaintiffs filing suit in federal court.

B. Employee Defined. For purposes of the FLSA, an employee is defined as:

1. Any individual employed by a State, political subdivision of a State including school districts, or an interstate governmental agency, excluding such individuals who are:

   a. elective office holders; 29 U.S.C. § 203(e)(2)(C)(ii)(I);

   b. elected officials' personal staff; 29 U.S.C. § 203(e)(2)(C)(ii)(II);

   c. volunteers to perform services for a public agency, if –

      1) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

      2) such services are not the same type of services which the individual is employed to perform for such public agency. 29 U.S.C. § 203(e)(4).

2. Independent contractors who pass the economic reality test. *Doty v. Elias d/b/a Eddy's Steakhouse*, 733 F.2d 720 (10th Cir. 1984).

C. FLSA Rights Cannot be Waived. Neither employees nor employers in a written agreement can waive rights under the FLSA, nor can the union bargain away FLSA rights for some other benefit. *Barrentine v. Arkansas Best-Freight System*, 450 U.S. 728 (1981).

D. Common FLSA Issues

1. **Multiple Jobs/Same School District.**

   a. Even if the jobs held are different occupations, or at different sites,

if the work is non-exempt, the two jobs' hours count as if they were one job for overtime purposes. 29 C.F.R. § 778.103; 29 C.F.R. § 778.115.

b. The school district must ensure that all hours are properly documented.

c. The overtime rate must be based on either

- The weighted hourly rate; 29 C.F.R. § 778.115; or

- The employee and employer can agree which rate will be used for calculating overtime. The employee and employer must agree in advance what rate the overtime will be used, or the weighted rate will be used. 29 C.F.R. §778.419.

d. A "weighted hourly rate" is mathematical calculation that blends the two rates. As an example, if an employee works 60% of his time at a rate of $20 per hour, and 40% of his time at a rate of $10 per hour, the "blended" rate if $16 per hour. ((60% x 20) + (40% x 10)). If the employee then works five hours of overtime, he or she must be paid $24 ($16 x 1.5) an hour for those five hours absent an agreement. *See* 29 C.F.R. § 778.115.

2. **Dual Employment: Athletics and other Extracurricular Activities.** A non-exempt district employee who also works as coach or otherwise with extracurricular activities is likely not entitled to overtime pay for his or her time as a coach, even if that coach receives a small fee for that coaching. This matter was before the Fourth Circuit Court of Appeals, where a school security guard also worked as a golf coach. The employee claimed he was entitled to overtime pay for 300-450 hours per year of coaching in *Purdham v. Fairfax County School Board*, 637 F.3d 421 (4th Cir. 2011). The court held that he was a "volunteer" for purposes of the FLSA, and thus not entitled to any overtime for his time coaching. This decision was consistent with opinion letters from the Department of Labor.

3. **Unpaid Breaks.**

a. Meal breaks of 30 minutes or more may be unpaid. However, if the meal break is cut short, or is only scheduled for less than 30 minutes, the employee must be paid. 29 C.F.R. § 785.19.

b. Rest breaks of 20 minutes or more may be unpaid. *See* 29 C.F.R. § 785.18 (requiring rest breaks of 5 to about 20 minutes to be paid).

4. **Inaccurate Time Records.** It is important to ensure that your time records are accurate. Employers may not direct their employees to record designated start and stop times on their timecards regardless of when the employees actually work.

5. **Long/Holiday/Weekend Hours.** The FLSA does not require overtime payments until an employee works more than 40 hours in a week. 29 C.F.R. §§ 778.101-102. The FLSA also does not require overtime for weekend or holiday work. 29 C.F.R. § 778.102. This means an employee could work four ten-hour days, including over a holiday, and still not be entitled to overtime. An employer should still be mindful of any collective bargaining agreements to the contrary.

6. **Non-requested Work.** A non-exempt employee doing work at his or her own choosing is entitled to overtime, even if the employer does not request it. *See* 29 C.F.R. § 785.13. If the employee is working through lunch breaks, or putting in extra time before or after his or her normal shift when things are busy, the employer must pay for that extra time. It may seem counterintuitive to tell an employee to not work as hard or help out, but that must be done if the employer wants to avoid paying overtime. This also includes an employee working more than 40 hours to rectify a mistake he or she previously made.

7. **Volunteers.** As explained above, employees volunteering are generally not entitled to payment of overtime. However, the person must actually be volunteering and cannot be coerced by the employer to work. Also, the employee must not be doing the same type of work as he or she normally would do. For instance, a school security guard who provides security services at a weekend school carnival is entitled to overtime pay for that carnival, even if it is on the weekend and he or she chooses to be there. Volunteers may be paid a "nominal" stipend for their time and still be considered "volunteers." *See* 29 C.F.R. § 553.100-106.