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FAIR LABOR STANDARDS ACT:

Are School Districts Under Attack?

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Wage and Hour:

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I. Introduction

The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) is responsible for enforcing a variety of federal employment laws, most notably, the Fair Labor Standards Act (FLSA). In the recent years, the WHD has become more aggressive in its handling of investigations.

Why- do you ask? In the last few years the Obama Administration has directed the DOL to implement measures to help "give America a raise." So in these last few years, the Administration and the DOL have tackled equal pay for women and men, worker misclassification and have increased the minimum wage for federal contractors to $10.10 per hour.

Before we launch into the proposed changes to proposed guidelines, let's look at recent litigation regarding school districts within the last few years in the Fifth circuit.

II. FLSA Suits Against School Districts in the Fifth Circuit in 2014-2015

There were three cases (see 1-3 below) filed against the Houston Independent School District ("HISD") by the same plaintiff's counsel, on behalf of three separate plaintiffs. These cases in the Southern District of Texas involve the "occasional and sporadic" overtime exception for ancillary work performed by school district employees. In sum, the occasional and sporadic exception provides that overtime provisions are not applicable to ancillary work, or extra work, performed if: 1) the employee is an employee of a public agency; 2) the ancillary employment was occasional and sporadic; 3) the ancillary work was performed voluntarily; and 4) the ancillary employment was in a different capacity than the employee's regular employment. *See* 29 U.S.C. § 207(p)(2) and 29 U.S.C. § 553.30.

The two remaining cases (4 and 5 below), hailing from the Western District of Texas and the Eastern District of Louisiana, concern traditional FLSA matters, *i.e.*, whether a school district employee can demonstrate that he or she worked the overtime hours alleged and whether the school district had actual or constructive knowledge of the employee's overtime.

1. Blair v. Houston Independent School Dist., No. CIV.A. H-13-2628, 2014 WL 5429383, at *1 (S.D. Tex. Oct. 24, 2014) reconsideration denied, No. CIV.A. H-13-2628, 2015 WL 1470394 (S.D. Tex. Mar. 31, 2015)

In 1995, HISD hired Plaintiff Wiley Blair III as a grounds man for the district's Delmar Sports Complex. His regular work, which was performed traditionally from 7:00 a.m. to 3:30 p.m., Monday through Friday, included primarily cleaning the facilities and parking lots and preparing the fields and locker rooms for game days. Occasionally, Blair would be offered what is considered ancillary work at the sports complex. This work included ticket collecting, running the game clock, and providing security, each of which would be performed outside of Blair's normal working

hours. HISD paid Blair a different hourly rate while performing this ancillary work, and he was not paid overtime for the extra work performed.

Blair brought suit against HISD alleging that when the hours from his ancillary work were combined with his regular work hours, he was due overtime compensation under the FLSA. HISD moved for summary judgment on the grounds that the work Blair performed in an ancillary capacity was both irregular and scattered and fulfilled the "different capacity" requirement. The Court disagreed, holding that the ancillary work performed by Blair was similar enough to be considered within the purview of his regular job. Finding a clear factual dispute existed as to the similarity of Blair's regular work and ancillary work, the Court denied HISD's motion for summary judgment.

HISD moved for reconsideration on the grounds that the Court mistakenly reviewed the occasional and sporadic provision as an FLSA exemption rather than an FLSA exception, which carries a lesser burden of proof for employers. HISD distinguished the two by explaining that under the FLSA regulations, exemptions are to be narrowly construed against the employer because exemptions seek to entirely remove a covered employee from the protections of the FLSA, whereas an exclusion is simply to exclude certain hours worked from overtime pay, not the employee entirely. The Court was unpersuaded and denied HISD's motion for reconsideration.[1]

2. <u>Franklin v. Houston Independent School Dist., 92 F. Supp. 3d 582 (S.D. Tex. 2015)</u>

Plaintiff Cynthia Franklin filed suit against HISD alleging that HISD violated the FLSA's overtime provisions by failing to pay her overtime from August 1984 through September 2012. Franklin started with HISD as an equipment manager for the athletic department at the Butler Sports Complex, where she picked-up equipment for other sports complexes, issued newly ordered equipment to coaches, completed paperwork for equipment, folded uniforms, cleaned the dressing rooms and locker rooms, and emptied trash. In addition to her regular work, Franklin alleged she also performed ancillary work during HISD sporting events, including ticket taking, guarding doors, keeping score and time in various events, working the concession stand, and making duplicates of game video footage. This additional work was performed outside of Franklin's usual 7:00 a.m. to 3:30 p.m. work schedule, mostly on the evenings and weekends, and she was compensated at a different hourly rate than for her regular services. Franklin's claims centered around the allegation she was not paid overtime when she performed ancillary work in excess of her regular 40 hour workweek. Franklin alleged these extra jobs occurred frequently and regularly throughout various sports seasons and virtually in every month of the year.

HISD moved for summary judgment arguing the occasional and sporadic exception applied to Franklin's extra work and she was not entitled to overtime pay. In supporting this contention, HISD asserted Franklin's ancillary work was sporadic and occasional because the work was only

[1] It should be noted that in the last of the Southern District of Texas cases, *Ford v. Houston Independent School Dist.* discussed below, the judge expressly disagreed with the *Blair* judge's finding that the occasional and sporadic provision was an FLSA exemption. In *Ford*, the judge held the occasional and sporadic provision is an FLSA *exception* with the burden of proof on the employee rather than HISD.

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