

## Child Care Providers and the Fair Labor Standards Act

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Child care centers are on the Federal Department of Labor's (the "DOL") radar screen. As a result, all child care centers would be wise to take a minute to evaluate their wage and hour policies and their job descriptions for compliance with the Federal Fair Labor Standards Act ("FLSA"). The FLSA is the Federal statute that regulates payment of overtime and minimum wage. A common misconception is that employees who are paid a "salary" rather than an "hourly" wage, are exempt from the overtime requirements of the FLSA. Unfortunately, that is not true. To qualify as an "exempt" employee under the FLSA, an employee must fall into one of several classifications, and be paid a statutory minimum of \$455 per week. If the employee does not meet all the requirements for classification as an "exempt" employee, the employee will be entitled to overtime.

An employee who is misclassified as "exempt" may recover back wages for a two or three-year period (depending on whether the violation is willful) and an amount equal to the back wages as liquidated damages, i.e. a penalty. Employees who prevail on a FLSA claim may be entitled to recover reasonable attorneys' fees and costs as well. Employers who misclassify employees as "exempt" may be subject to significant penalties in addition to back wages. For example, willful violators of the FLSA may be prosecuted criminally and fined up to \$10,000 per violation. A second willful conviction could result in six months imprisonment. DOL also may assess civil penalties up to \$1,000 per violation for repeated or willful violations of the FLSA.

Given the significant cost involved should an individual be misclassified, and the increase of audits by the DOL targeting child care centers, each center should conduct an audit. An audit of wage policies should include a review of position descriptions and of the following issues:

**Teachers.** The FLSA provides for the classification of "teachers" as "exempt" employees. That means that employees who meet the requirements for classification as a "teacher" under the FLSA need not be paid overtime, if they are paid a minimum of \$455 each week. Unfortunately, the title of "teacher" is narrowly defined by the FLSA and interpreting regulations and opinion letters.

Whether or not an individual meets the statutory definition of "teacher" seems to turn on which agency licenses the employee. If the center is licensed by a division of the Department of Health and Human Services, and not licensed by the Department of Education, then the DOL has taken the position that such individuals are not "teachers" for purposes of the FLSA. See Wage and Hour Division opinion letter FLSA2008-13NA, dated September 29, 2008. The September 2008 opinion letter states that "[u]nless

the daycare center provides grade school curriculums, introductory programs in kindergarten, or nursery school programs in elementary education of the sort described in § 541.204(b), as determined under state law, the instructors are not within the scope of the teacher exemption of the FLSA." Similarly, in an earlier opinion letter, dated September 20, 2000, the DOL concluded that "it is our opinion that while 'childhood education settings' (for ages 0-5) commonly referred to as preschools, may engage in some basic educational activities for the children attending, *preschool employees whose primary duty is to protect and care for the needs of the children would not ordinarily meet the requirements for exemption as teachers.*" See also, April 24, 1999 DOL opinion, Wage and Hour Division (emphasis added).

**Payment for Training.** Whether a child care center needs to pay its employees for time spent in required training is a hot issue, to say the least. Colorado Group Child Care Regulation 7.702.43 requires centers to have a staff development plan that includes a minimum of fifteen (15) clock hours of training each year for all staff. 29 CFR § 785.27 requires that employers include mandatory clock hours of training in the computation of total hours worked, for calculation of overtime and minimum wage.

This regulation begs the question: Who is requiring the 15 clock hours of training? Is this state-required training or training required by the child care center? The relevance of this distinction becomes clear when the Department of Labor opinion letters are reviewed.

The first opinion letter on this issue that we located is dated September 9, 1996. (It is important to remember that the opinion letters crafted by the Department of Labor could be related to any state's regulations and do not necessarily reflect the language in Colorado's regulations.) Colorado's regulations are particularly stringent, and also are subject to review in 2010. In the September 1996 opinion letter, the DOL addressed the application of 29 CFR § 785.27 to training required by State regulations. The DOL found that time spent in training programs need not be counted as hours of work if all of the four criteria are met:

- Attendance is outside of the employee's regular work hours;
- Attendance is voluntary;
- Training is not directly related to the employee's job; and
- The employee performs no productive work during attendance.

The DOL admitted that the first requirement was fact-based. The DOL opined that state-mandated training is voluntary if the employer does not include additional requirements. But, the DOL also said "[i]t is a different situation, however, where a State requires employers to provide training as a condition of the employer's license to remain open for business – e.g. a day care center operator's license is conditional on all employees receiving a fixed number of hours of child care training each year. As the operator would typically require employees to attend such training, it would not be voluntary and this criteria would not be met." What does this sentence mean? Does it mean that an employer must pay for 15 hours of training if a particular training is required on a particular day? What if an employer provides modules that an employee may choose at their leisure, and also allows for other training, at an employee's discretion?

A conservative reading of this text would suggest that the first 15 hours of training should be paid, if those 15 hours are counted by the employer to satisfy the regulatory requirement. This is also the interpretation given by DOL investigators involved in child care audits. That said, there remains an argument for those who would like to challenge the wording and characterize the 15 hours of training as state required and not employer required. The Colorado regulation requires employers to have a plan for provision of the 15 hours of clock training, but does not mirror the language of the DOL opinion letters that seem to suggest that the employer is actually providing the training. This distinction – between trainings offered by an employer and an independent provider – is echoed by a September 10, 1998, DOL opinion letter. This distinction begs yet another question: Does this distinction punish the helpful employer who offers training, by requiring that employees be paid for that time spent in training, while allowing another employer, who does not offer training and make the 15 hours of training convenient for staff, is not required to compensate employees for the hours spent in training?

A third opinion letter, dated January 7, 2009 (FLSA2009-1), clarifies that the location of the training is irrelevant to the requirement that training be paid. It states "...it is our opinion that the time spent by employees voluntarily attending in-service training or continuing education required by the State and provided at your client's day care center is not hours worked under the FLSA. This is true even if the State requires that individuals may only be employed by the employer if they meet the in-service or continuing education requirements, so long as the State does not require the employer to provide the training."

For further guidance, we recommend centers review the information provided in the DOL U.S. Wage and Hour Division Fact Sheet #46 (Daycare Centers and Preschools Under the Fair Labor Standards Act (FLSA)).

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