

# No Coverage For Suit Brought Under the Fair Labor Standards Act To Enforce Pre-Existing Wage Obligation

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Applying Virginia law, a federal district court has held that a school district and educators legal liability policy does not afford coverage for a suit alleging violations of the Fair Labor Standards Act (the FLSA) because the purported failure to pay wages due is not a "wrongful act" and the remedies claimed do not constitute "loss." *Republic Franklin Ins. Co. v. Albemarle County Sch. Bd.*, 2010 WL 2950499 (W.D. Va. July 23, 2010).

The policy at issue afforded specified coverage for loss resulting from a claim for a wrongful act. The policy defined "wrongful act" as any breach of duty, neglect, error or omission in the discharge of educational institution duties. "Loss" was defined to mean any amount that an insured is legally obligated to pay, including judgments and settlements. The term also included punitive damages where insurable by law, but not fines or penalties imposed by law or "[o]perating costs . . . such as would be included in [the insured school district's] budget . . . ."

The school district was sued by a group of plaintiffs purporting to represent a class of current and former bus drivers and transportation assistants. They alleged that the school district, in violation of the FLSA, failed to pay the bus drivers and transportation assistants for all hours worked, including overtime pay. Among other relief, plaintiffs sought "compensatory damages [unpaid wages and overtime] and an equal amount of liquidated damages as provided by the FLSA," as well as attorneys' fees allowed under the statute.

The insurer refused to defend the action. In the coverage litigation that followed, the court found that the school district's obligation to pay wages in accordance with the FLSA and the parties' contracts arose from plaintiffs' performance of their employment duties and not from a "wrongful act." According to the court, "an insured cannot convert a non-covered, pre-existing wage obligation into a covered 'wrongful act' through the simple failure or refusal to pay overtime." The court noted that to conclude otherwise could create a "moral hazard," as employers could violate wage laws with impunity and transfer any resulting liability to their insurers.

Additionally, the court held that the amounts plaintiffs sought from the school district did not constitute covered "loss." In this regard, the court equated back wages to "operating costs," which expressly were not included within the meaning of the term. The court also found that the liquidated damages and attorneys' fees provided for under the FLSA constituted "penalties," which were carved out from the definition of "loss" as well. The court further noted that these statutory remedies could not exist independently of, and necessarily were tied to, a back pay award and, as such, could not result from a covered "wrongful act."