

# Failure to Pay Overtime Does Not Constitute a Wrongful Act Under Errors & Omissions Policy

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The United States District Court for the Northern District of Mississippi, applying Mississippi law, has held that a school district's professional liability policy does not cover the district's failure to pay overtime wages. *Cleveland School Dist. v. Nat'l Union Fire Ins. Co.*, 2005 WL 2406087 (N.D. Miss. Sept. 27, 2005). The court determined that, since the payment of overtime wages was a statutory duty, the failure to pay overtime did not constitute a "wrongful act" under the policy. Further, the court held that, even if the claim came within the definition of a "wrongful act," the insurer could deny coverage under the policy's profit exclusion.

An insurer issued a "school leaders errors and omissions policy" to a Mississippi school district. The policy defined a "wrongful act" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission by an Insured solely in the performance of duties for the School Entity." In addition, the policy contained an exclusion for any claim "arising out of the gaining of any profit or advantage to which the Insured is not legally entitled to or to any award of salary."

The court rejected the school district's contention that the failure to pay its employees their proper overtime wages in accordance with the Fair Labor Standards Act (FLSA) was a "wrongful act" as defined by the policy. Relying on precedent, the court reasoned that the school district "had a duty to pay overtime compensation because of the statutory requirements of the FLSA, not because of any act or omission of the school district." The court further reasoned that the amounts owed to the employees were in the nature of pre-existing debts. "The school district cannot rely on an insurance policy to relieve it of its duty to honor pre-existing obligations." Based on these observations, the court held that the failure to pay overtime was not a "wrongful act" as defined by the policy.

Alternatively, the court held the insurer could deny coverage for the school district's failure to pay overtime wages under the policy's profit exclusion. The court reasoned that, by paying its employees less than what was required by law, the school district obtained an advantage. "The school district gained profit, remuneration, or advantage by having its employees perform overtime work for the district and not paying them [properly]." Based on this reasoning, the court found that the profit exclusion was applicable.

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