

## U.S. Department of Labor Issues FLSA's New Overtime Rule

On May 23, the U.S. Department of Labor published its long-awaited “Final Rule” revising the “White Collar Exemptions” of its overtime pay regulations.<sup>1</sup> These changes will have significant budgetary, programmatic, and human resource impacts on colleges and universities as they seek to comply with the Fair Labor Standards Act (“FLSA”), which requires overtime pay at time-and-a-half for employees unless they are exempted by the statute and its regulations.<sup>2</sup> The Final Rule takes effect December 1, 2016. It has no special provisions or carve outs for colleges and universities.

This Issue Brief summarizes the new overtime rule and how it will impact campuses, offers perspective on how to comply with the new regulation, and answers some of the questions presidents and other senior campus leaders may immediately be asking. Overall, it is important to note, deep dives will be required across campuses to assess the Final Rule’s applicability to individual employees and institutional budgets. Equally important, careful attention, planning, and communication is necessary to minimize the Final Rule’s negative impact on campus culture and employee morale.

Of greatest interest and effect for campuses, as of December 1 most employees must be paid overtime when working more than 40 hours in a work week **unless**

- they meet a **salary basis test** by being paid above a new threshold of \$47,476 annually (i.e., \$913 per week) **and**
- they meet a **duties test** that requires that they primarily work in a delineated “*bona fide* executive, administrative, or professional capacity.”<sup>3</sup>

The Final Rule doubles the previous salary threshold of \$23,660, and, for the first time, directs that the threshold increase every three years based on the salary level for the 40th percentile for full-time salaried workers of the lowest-wage Census region in the country (currently the Southeast). The duties test is unchanged by the Final Rule.

The proposed changes apply to employers in all sectors, but will pose particular challenges for higher education. Employees in many corners of campuses—from residence halls to research labs—are likely to be affected. With no phase in period for the Final Rule, and its challenging re-alignment with the many locked in budgetary, tuition and programmatic aspects of the 2017 academic year, it is imperative that institutions take immediate steps to assess the Final Rule’s impact.

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These steps include

- identifying potentially affected employees (who may include postdocs and even some individuals holding faculty appointments);
- reviewing the primary job duties of potentially affected employees and reaffirming or modifying their classifications (as “exempt” or “non-exempt” from overtime payment obligations);
- raising some employees’ salaries above the new threshold, and considering whether to reduce other employees’ salaries to offset newly mandated overtime payments to those employees; and
- assuring that user-friendly time tracking mechanisms are available, understood, and utilized by all employees who are required to be paid overtime if they work more than forty hours in a work week, particularly any formerly exempt employees who are reclassified as non-exempt.

## **FLSA and Final Rule Details**

Like all other employers, the FLSA requires colleges and universities to pay their non-exempt employees overtime at a rate of time-and-one-half of the regular rate of pay for all hours worked in excess of 40 in a workweek, unless the employee is exempt from the overtime requirement under one of the specific categories articulated in the FLSA statute.<sup>4</sup>

In March 2014, President Obama directed the Department of Labor to update these standards and to look for ways to “modernize and simplify the regulations while ensuring that the FLSA’s intended overtime protections are fully implemented.”<sup>5</sup> The Final Rule is the culmination of the process, which included receipt of over 290,000 public comments.<sup>6</sup>

Faculty continue to be exempt from overtime *regardless of salary* via a “teacher” exemption, so long as “their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge.”<sup>7</sup> Computer professionals performing delineated primary duties remain exempt from overtime so long as they are paid above the Final Rule’s new salary threshold or compensated hourly at not less than \$27.63. The Final Rule also provides that highly compensated employees who satisfy some, but not all, of the duties test applicable to either the professional, computer professional, executive, or administrative classification will continue to be exempt, provided they are paid a minimum of \$134,004 per year.

The salary threshold under the Final Rule will automatically increase every three years based on data from the Bureau of Labor Statistics; employers will receive 150 days of prior notice before the scheduled increases.

## **The Final Rule in the Higher Education Context<sup>8</sup>**

The teaching exemption has rather broad application, so long as the individual’s primary duty is teaching, tutoring, instructing (including in a research context), or lecturing. These bona fide teachers include professors, adjunct professors, and teachers of skilled and semi-skilled trades and occupations. Certain academic administrative personnel who interact with students outside the classroom, such as academic counselors, will qualify as exempt, as long as they are paid at least as much as the entrance salary for faculty at their institutions.

The Final Rule's impact on postdoctoral fellows has been much discussed. Those who primarily conduct research, as opposed to teach, will continue to fall outside the teaching exemption. Their annual salaries will need to be above the new minimum threshold; otherwise they must be paid overtime. For postdocs whose teaching responsibilities legitimately bring them within the teaching exemption, the Final Rule does not mandate that they be paid overtime, no matter their salaries.

Colleges have long assumed that athletic coaches, many of whom earn less than \$47,476, were exempt under the teaching exemption. While this classification continues to be appropriate if a coach's primary duties are teaching or instructing athletes how to improve their sports, coaches who primarily recruit, break down film, etc. are unlikely to qualify as bona fide teachers; they must be paid overtime unless they are paid at least \$47,476 and can meet the "white collar" exemption duties test.

The list of other potentially affected employees is long. Student admissions counselors average under \$38,000. Entry-level alumni relations officers do not make much more, and residence hall managers average less. Others who may earn less than the new minimum salary threshold include those in student affairs (admissions counselors, financial aid counselors, student activities officers), administrative support (human resources professionals, contract managers), auxiliary services (parking managers, ticket managers), athletics (trainers, facilities managers, publicity and communications), food service (shift managers and special events), and community outreach/educational extension functions (agricultural extension agents, industry extension consultants).<sup>9</sup>

With the Final Rule now in place, institutions will be assessing and pricing out the most obvious FLSA compliance strategies for employees who will need to be treated differently on December 1 than they are now:

- increasing salaries of exempt employees who are paid less than \$47,476 (including the rare part time employees who occasionally work more than 40 hours in a week and whose full time equivalent salary is above that threshold but, in fact, receive a salary below it); or
- reclassifying formerly exempt employees as non-exempt and either (i) avoiding overtime work by them, (ii) paying them overtime at their current compensation levels, or (iii) managing the combination of their base pay and overtime to roughly maintain current per employee compensation.

No solution is cheap or easy. Increasing salaries, in some cases to nearly double the previous level, is expensive and may cause other categories of employees to complain that they too are entitled to raises. On the other hand, reclassification to non-exempt status can lead to increased costs in either overtime pay or implementing overtime controls, such as hiring additional part-time employees so that the same amount of work can be accomplished without overtime.

Moreover, reclassification has intangible costs. Employees may face diminished job autonomy, decreased opportunity for career development and advancement, less flexibility with work arrangements, changes in the levels and types of benefits, no guarantee of periodic wage increases, and a perceived loss of prestige and credibility. All of these could adversely affect employee morale.

Further complicating compliance is that many of the affected positions do not lend themselves to fixed work schedules, as contemplated by the rule. Campuses and college students never have had a nine-to-five cadence; neither have the lives of the folks who routinely, and often informally, work extended nights and weekends making campuses hum. Rather, campuses are full of people who do what needs to be done, when it needs to be done, until it is done, and in their own ways. While these schedules might frustrate the workforce management and analytics mindsets increasingly populating boards, presidencies, and senior administrative positions – and perhaps the DOL—they are equally (at least) celebrated as a testament to the uniqueness of a campus community, the dedication of its employees, and the value delivered to the students who are part of it. Colleges must find ways to comply and still preserve this culture.

Given the number of employees who will be impacted by this rule, an obvious and understandable focus has been on how institutions, and ultimately their students, will pay for it. The White House predicted that these changes in the exemptions would result in an estimated \$12 billion in increased wages for workers nationwide over the next 10 years—and costs for employers.<sup>10</sup> These costs are likely to trickle down to students in the form of higher tuition and fees, or in reduced services. As noted in *The Wall Street Journal* this spring: “The new requirements are creating a clash between two White House priorities: strengthening the middle class by raising pay for many workers and relieving tuition burdens on college students.”

## Strategies for Optimizing Compliance with the Final Rule

Colleges and other institutions of higher education should start taking steps now to craft a strategy to comply with the Final Rule by the December 1, 2016 deadline, and to make the transition as smooth as possible for students and employees. Prudent steps may include:

- **Audit Existing Exemptions.** Institutions should plan and undertake a comprehensive audit of positions and employees potentially impacted by the changes, focusing on currently exempt employees who earn salaries in the \$23,660 to \$47,476 range, while keeping in mind anticipated automatic increases in the future.
- **Review Individual Job Duties and Descriptions.** It is a good time to identify any employees potentially misclassified as exempt; reclassifications made this year may be less likely to raise flags about past errors. Institutions should review job descriptions to ensure that the primary duties of all exempt employees satisfy one of the statutory exemptions, and compare the description to the employee’s actual duties. Institutions should be particularly mindful of those employees who perform some teaching duties, but who may not perform enough to qualify as their primary duties.
- **Develop a Compliance Strategy.** For each employee or classification affected by the Final Rule or identified as misclassified, institutions should determine how to achieve compliance, taking into consideration the nature of the position and the best interests of the institution. Possible solutions include: raising salaries to the new minimum; adjusting duties; realigning and shifting workload to other exempt employees; reclassifying to non-exempt status and paying overtime; or adjusting base pay and overtime so that total annual compensation remains the same. There are a number of factors relevant to this consideration, including the number of hours worked by the employee, the practicality of imposing overtime controls, budgets, the nature of the position, the broader effects any reclassification will have on the department or institution, career advancement, and staffing levels.

- **Plan Communications.** An important part of a compliance strategy is determining how changes will be communicated to employees and crafting a careful message, keeping in mind that some employees will likely react negatively to these changes, particularly if they perceive a loss in compensation, autonomy, or status.
- **Review Policies, Practices and Tools.** Institutions should review their timekeeping and overtime policies, practices and tools to determine where adjustments will be needed to comply with the Final Rule and to make sure adequate safeguards are in place to control overtime costs.
- **Additional Training.** Employees reclassified as nonexempt, as well as managers and administrators, may need additional training regarding recording time and limitations on working overtime.

## Q&As

### Q: What needs to be done first?

A: Identify and quantify the magnitude of the issue. Assemble a task force to review all salaried (exempt) personnel currently making less than \$47,476 annually. Then pursue a structured analysis on a departmental basis. As part of this initial process, it is also crucial to determine whether any employees currently treated as exempt from overtime payments have been misclassified.

### Q: What are my options?

A: (i) Increase the salaries of current exempt staff to the new \$47,476 minimum. (ii) Reduce workloads to eliminate or minimize overtime pay obligations. (iii) Convert to hourly or salaried nonexempt, and pay time-and-one-half for all overtime hours over 40 at the employee's regular rate of pay. (iv) Adjust employee base pay and pay overtime; this involves reallocating earnings between regular wages and overtime pay in order to maintain current total compensation levels for an employee, based upon anticipated overtime needs. **DO NOT** implicitly or explicitly suggest that employees may work off-the-clock.

### Q: What are the hidden traps?

A: (i) Rollup costs. If employees are increased to the new statutory minimum, is there compression at the next higher levels of supervision that needs to be addressed? (ii) If employees are reclassified as non-exempt, control of after hours' work (research, late night emails, etc.) must be addressed. **DO NOT** implicitly or explicitly suggest that employees may work off-the-clock.

### Q: What are the key non-compensation considerations and action steps?

A: A communication plan must be developed to manage any changes ultimately implemented as a result of the new regulations. Employee morale must be a focus of individual and collective attention, as some institutionally dedicated, hard-working staff may be upset at the loss of status, flexibility in their work hours, etc.

**Q: For employees who must receive overtime, may we offer comp time instead?**

A: If you are a public institution, yes... though with conditions. State colleges and universities will continue to be able to offer comp time in lieu of overtime pay for non-exempt personnel, consistent with existing regulations. Employees of state colleges and universities may accrue up to 240 hours of comp time and are permitted to use it on the date requested unless doing so would “unduly disrupt” the operations of the institution. However, private institutions cannot satisfy their overtime obligations by providing comp time and must pay overtime-eligible employees an overtime premium for hours over 40 in a workweek.

**Q: How do we address RAs (student resident advisors)?**

A: Student resident advisors who receive reduced room and board or tuition credits are students, and not employees covered by the Fair Labor Standards Act.

**Q: What about staff who are provided campus housing and board, and paid below the salary threshold? May we factor in the value of the housing and board when determining whether they are above or below the FLSA salary threshold?**

A: No. To qualify for exemption, an employee must earn the minimum salary specified under the rule “exclusive of board, lodging or other facilities.” The phrase “exclusive of board, lodging or other facilities” means “free and clear” of any claimed credit for “non-cash items of value that an employer may provide to an employee.” Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption.

**Q: We have many part time exempt employees who make a good salary, but because they are only work 50-75 percent time, their actual pay will fall below the Final Rule’s salary threshold. May we use their full time equivalent salary when determining whether they may continue to be classified as exempt.**

A: No. So long as part-time employees do not exceed 40 hours of work in a week, there is no issue. But if they do, they must be paid at least \$913 per week or receive overtime compensation.

**Q: How do we address postdoctoral researchers?**

A: Postdoctoral researchers in both the sciences and the humanities who do not primarily teach or instruct fall into the professional employee classification of the white collar exemptions. As a result, they will be subject to the new salary requirements.

**Q: How do we address academic administrative staff whose current salary is below the new salary threshold of \$47,476?**

A: Academic administrative personnel that help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists, and others with similar responsibilities, may be subject to a special alternative salary level that does not apply to white collar employees outside of higher education. These academic administrative personnel are exempt from the FLSA’s minimum wage and overtime requirements if they are paid at least the entrance salary for teachers at their institution.

**Q: How do we address non-academic administrators whose current salary is below the new salary threshold of \$47,476?**

A: (i) Raise salaries to the new regulatory minimum. (ii) Reduce workloads to eliminate or minimize overtime obligations. (iii) Pay overtime, based on the employee's regular hourly rate. (iv) Adjust employee based pay and pay overtime by reallocating earnings between regular wages and overtime pay in order to maintain current total compensation levels based upon anticipated overtime needs.

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<sup>1</sup> 81 FR 32546.

<sup>2</sup> 29 U.S.C. § 213.

<sup>3</sup> 81 FR 32546.

<sup>4</sup> See 29 U.S.C. § 213. Additionally, some states have overtime laws. In cases where an employee is subject to both the state and federal overtime laws, the employee is entitled to overtime according to the higher standard.

<sup>5</sup> Notice of Proposed Rulemaking: Overtime, available at: <https://www.dol.gov/whd/overtime/nprm2015/>.

<sup>6</sup> Proposed Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, July 6, 2015, available at <https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-0001>.

<sup>7</sup> U.S. Department of Labor Wage and Hour Division Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA) [https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf).

<sup>8</sup> The Department of Labor has released a few resources, purporting to lend guidance to higher education institutions on dealing with the new rule. See U.S. Department of Labor Wage and Hour Division, *Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act*, May 18, 2016, <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>; U.S. Department of Labor Wage and Hour Division, *Overtime Final Rule and Higher Education*, <https://www.dol.gov/sites/default/files/overtime-highereducation.pdf>.

<sup>9</sup> Letter from Joshua A. Ulman, Chief Government Relations Officer, College and University Professional Association for Human Resources, to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, U.S. Department of Labor Wage and Hour Division (Sept. 4, 2015).

<sup>10</sup> Press Release, The White House Office of the Press Secretary, FACT SHEET: Growing Middle Class Paychecks and Helping Working Families Get Ahead By Expanding Overtime Pay (May 17, 2016), available at: <https://www.whitehouse.gov/the-press-office/2016/05/17/fact-sheet-growing-middle-class-paychecks-and-helping-working-families-o>; see also 81 FR 32546.