



College and University Professional Association for Human Resources

THE IMPACT OF THE DEPARTMENT OF LABOR'S EXEMPT SALARY INCREASE ON PUBLIC AND LAND-GRANT HIGHER EDUCATION EMPLOYERS

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On December 1, 2016, the U.S. Department of Labor's (DOL) Final Rule revising the "white-collar" exemptions from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements will go into effect. The Final Rule's key revision is a significant increase to the minimum salary level generally required for exemption, raising it from \$455 per week (i.e., \$23,660 annually) to \$913 per week (i.e., \$47,476 annually).¹

Notably, DOL did not make any revisions to the duties required to take advantage of the white-collar exemptions. The substantial increase to the salary level, however, brings significantly more importance to the duties required for the exemption. Most of the exemptions require payment of the minimum salary; a few do not. For example, the exemption for employees who can be classified as "teachers" does not carry any salary requirement. Although the Final Rule does not impact the teacher exemption directly, the distinction between an employee who meets the teacher exemption (which does not have the salary requirement) and one who meets only the executive exemption (which does) takes on added significance.

This white paper provides guidance on the issues resulting from the Final Rule that are particular to public and land-grant colleges and universities.² Additional white papers have been prepared

¹ The Final Rule also increases the minimum salary level required for the "highly compensated" employee provision (from \$100,000 to \$134,004), introduces an automatic update of the salary levels every three years, and permits employers to use incentive compensation to satisfy part of their salary obligation. These revisions are not discussed in detail in this white paper.

² This white paper is intended only to provide a general overview for compliance and is not a substitute for consulting your own counsel. Members classifying — or contemplating classifying — particular employees as exempt should not rely on these general guidelines but should conduct their own evaluation and consult counsel to assess the applicability of the FLSA's exemptions.

addressing the impact of the Final Rule on the classification of coaches and certified athletic trainers and the Final Rule-related issues facing higher education employers generally.³

OVERVIEW

The FLSA and its implementing regulations generally require employers to pay employees at least the minimum wage of \$7.25 for all hours worked, and an overtime premium of one-and-one-half the regular rate of pay for all hours worked in excess of 40 hours in a workweek. The FLSA and its regulations, however, exempt some employees from these requirements. The most prominent of these exemptions are known as the “white-collar” exemptions, which can be found in Part 541 of Title 29 of the Code of Federal Regulations. Part 541 includes exemptions for administrative employees (including certain academic administrators), professionals (including certain teachers), executives, outside salesmen, and computer employees.⁴ In connection with the coming salary increase, DOL issued guidance on the application of these exemptions to higher education, which can be found here: <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>.

Generally, there are three requirements for an employee to qualify for these exemptions:

- The employee must earn a salary of at least \$455 per week (i.e., \$23,660 annually). As of December 1, 2016, that level will increase to \$913 per week (i.e., \$47,476 annually). Notably, however, the salary level does not apply to teachers and outside sales employees, and can be limited for employees classified as “academic administrators.” Exempt computer employees can be paid either the minimum salary or at least \$27.63 per hour.
- The employee must receive that pay on a “salary basis,” a term that is defined in the regulations and limits the types of deductions that can be made from an employee’s salary; and
- The employee’s “primary” (i.e., most important) duty must be a recognized exempt duty under the pertinent exemption(s).

For each exemption, the duties requirements are the most complex and difficult requirements to analyze. The salary requirements are just as important, however, especially given that the salary level is set to substantially increase on December 1, 2016. We detail the duties and salary requirements below.

³ For the white paper addressing issues related to coaches and certified athletic trainers, please see http://www.cupahr.org/knowledgecenter/kc_template.aspx?id=13600. For the white paper addressing higher education issues generally, see http://www.cupahr.org/knowledgecenter/kc_template.aspx?id=13711.

⁴ DOL’s general fact sheet on the requirements for the white-collar exemptions can be found here: https://www.dol.gov/whd/overtime/fs17a_overview.pdf

DETERMINING THE EXEMPT STATUS OF HIGHER ED EMPLOYEES

An employee's job title alone is insufficient to establish exempt status. Rather, whether an employee qualifies for one or more of the FLSA's white-collar exemptions generally turns on the "primary duty" of the employee performing the job and, depending on the exemption, the employee's salary.

An employee's primary duty is "the **principal, main, major or most important duty** that the employee performs." Thus, the primary-duty inquiry is qualitative, not quantitative, and accounts for factors such as "the relative importance of the [employee's] exempt duties as compared with other types of duties; the amount of time spent performing exempt work; ... relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." Although an employee spending 50% of her time on exempt work will typically satisfy the primary duty requirement, it is important to note that "[t]ime alone ... is not the sole test, and nothing ... requires that exempt employees spend more than 50% of their time performing exempt work."

An employee can be classified as exempt if his or her primary duty fits one of the categories described below. She may also satisfy the duty requirement if her primary duty is a combination of the responsibilities below. This "combination exemption" can be important to preserving an employee's exempt status, but, as is discussed below, the combination exemption requires the employee to meet all of the remaining elements of the combined exemptions, including those related to salary levels.

It is important to remember that the primary duty must be applied to the entirety of an employee's work for an employer. Thus, as just noted, different exempt duties can be combined, creating an exempt primary duty, and allowing an employee to satisfy the overtime exemption. On the other hand, if an employee performs work for the same employer in both exempt and non-exempt roles, it is necessary to determine the employee's primary duty. If the employee has an exempt primary duty, then the exemption will apply (assuming the salary basis test is met as appropriate); if the employee has a non-exempt primary duty, then all hours worked by that employee must be counted — including those worked in the exempt role — for the purpose of determining whether overtime compensation is due⁵.

Below, we discuss the white-collar exemptions. Due to the DOL's increase of the salary level, we separate the discussion of those exemptions by their reliance upon that salary level.

⁵ It is also important to determine who the FLSA "employer" is. If the employee performs exempt work for one employer and non-exempt work for another employer, then there is no need to combine the hours. When the employee performs work for a single employer -- or joint employers -- hours and duties need to be combined. For DOL's most recent statements regarding employment and joint employment, see the following: https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf (employment and independent contractors); https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf (joint employment).

A. Exemptions Without a Minimum Salary Requirement

Several of the exemptions do not require the payment of any minimum salary. These exemptions are the teacher exemption (which is part of the professional exemption), the doctor/lawyer exemption (which also is part of the professional exemption), and the outside sales employee exemption.

1. *The Teacher Exemption [29 C.F.R. § 541.303⁶]*

The teacher exemption applies to employees whose primary duty is “teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.” Having a primary duty of teaching generally involves exercising discretion and judgment. Although possession of a teaching certificate provides a fairly clear means of identifying employees who qualify for the exemption, the exemption does not require possession of a certificate or even a bachelor’s degree.

The FLSA’s salary test does not apply to those employees who qualify for the teacher exemption. As a result, full-time faculty members, part-time instructors, and adjuncts are not subject to any FLSA salary level or the requirement that they be paid on a salary basis, provided they have a primary duty of teaching.⁷

2. *Doctors and Lawyers [29 C.F.R. § 541.304]*

Doctors and lawyers similarly are exempt without regard to salary. This exclusion from the salary requirement applies to any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in practice. It also applies to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession.

3. *Outside Sales Employees [29 C.F.R. § 541.500]*

“Outside sales” work is also exempt, and outside sales employees are not subject to a salary requirement under the FLSA. Some admissions counselors at for-profit universities may fall under the outside sales exemption. We are not aware of any guidance by DOL or any federal court decision regarding the possible application of the outside sales exemption to other positions in the higher ed setting. Accordingly, members considering

⁶ The referenced regulations (29 C.F.R. §§ 541.0 -- 541.710) can be found here: http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title29/29cfr541_main_02.tpl.

The Wage and Hour Division’s (WHD) Field Operations Handbook, which provides additional details on DOL’s interpretation of the regulations, can be found here: https://www.dol.gov/whd/FOH/FOH_ch22.pdf.

⁷ As noted above, you can review the NCAA and CUPA-HR white paper on coaches here: http://www.cupahr.org/knowledgecenter/kc_template.aspx?id=13600.

the outside sales exemption should consult counsel prior to relying upon this fairly unique interpretation.

B. Exemption with Potentially Reduced Salary Level: Exempt Academic Administrators [29 C.F.R. § 541.204]

The regulations provide a special exemption for academic administrators. If the employee has a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment, he can qualify for exemption if he is paid a salary of not less than \$913 per week (as of December 1, 2016), or if it is less than \$913 per week, a salary at least equal to the entrance salary for teachers in the same educational establishment. DOL has not provided specific guidance on the term “minimum salary for teachers,” but the best course of action would be to use as the baseline the salary paid to those full-time, entry-level individuals who qualify for the teacher exemption. This should be the minimum salary of a teaching position that is regularly hired for a continuing appointment.⁸

The reduced salary is only applicable to academic administrators. Employees who work in higher education, but whose work does not relate to the educational field are not performing academic administrative work, and do not qualify for the reduced salary provision.

C. Exemptions that Require Payment of the Minimum Salary

The bulk of exempt employees are subject to the new salary level. These include employees classified as exempt under the executive, administrative, and professional exemptions, as well as those computer employees who are paid on a salary basis.

1. Exempt Administrators Over Non-Academic Areas [29 C.F.R. § 541.200]

To satisfy the administrative exemption, an employee must satisfy the salary requirements (i.e., a salary of at least \$913 per week as of December 1, 2016), and her primary duty must be office or non-manual work that requires discretion or independent judgment with respect to significant matters. The regulations state that administrative work includes work in the functional areas of tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and other similar activities.

2. Exempt Executives [29 C.F.R. § 541.100]

To satisfy the executive exemption, an employee must satisfy the salary requirements (i.e., a salary of at least \$913 per week as of December 1, 2016), and it must be the case that (1) her primary duty is management of a recognized part of the university; (2) she customarily and regularly directs the work of two or more full-time equivalent

⁸ This would be the actual lowest salary paid to full-time teachers, not an average. Moreover, although we are unaware of DOL providing specific guidance on the issue, we believe the comparison amount should be based upon the teacher’s actual weekly salary based on the weeks worked, not a reduced amount based on the administrative convenience of extending 9 months of pay over a 12-month period. Of course, regardless of the manner in which the minimum is computed, it would be prudent to work with your institution’s general counsel to determine the best course of action.

employees; and (3) she has meaningful input into hiring, firing, or other changes in status of subordinate employees.

3. *Exempt Professionals [29 C.F.R. § 541.300]*

Except for teachers, doctors, and lawyers, as discussed above, to qualify as an exempt professional, an employee must satisfy the salary requirements (i.e., payment of at least \$913 per week on a salary or fee basis as of December 1, 2016). In addition, an employee must have a primary duty of performing work that requires either (1) advanced knowledge in a field of science or learning or (2) invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. In higher education, examples of learned professionals that generally may meet the duties requirements for professional exemption include many researchers, certified public accountants, certified athletic trainers, and librarians.

D. The Combination Exemption [29 C.F.R. § 541.708]

An employee who performs a combination of exempt duties described above for executive, administrative, professional, and outside sales employees may still qualify for exemption. Thus, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption.

In using the combination exemption, however, it is important to remember that only the primary duty is “combined.” The remaining elements of the exemption — e.g., the requisite salary level — continue to apply. For example, if it is necessary to “tack” together the teacher exemption and the executive exemption in order to establish an exempt primary duty, the salary requirement would apply. If, on the other hand, the primary duty was clearly teaching and no additional duties were necessary to establish an exempt primary duty, the salary requirement would not apply.

E. Specific Positions

Below are descriptions of the exemption issues that may be implicated for several positions common to public and land-grant universities. It is important to remember, however, that addressing exempt status requires an analysis of the specific job duties performed by the particular job being considered. Job titles alone do not support a finding of exemption.

1. *Extension Agents/Extension Educators*

Extension agents/extension educators typically are responsible for developing a curriculum of educational programs, then teaching the planned educational programs and activities in assigned program areas. The extension agent uses a variety of teaching methods, strategies, techniques, activities, and materials in conducting educational programs.

In addition to the extension agent’s own activities, he or she may assist in the implementation of educational programs and activities in program areas for which other staff members have assigned leadership responsibilities. The agent serves as an information resource to clientele, partners and extension staff, and otherwise supports implementation of educational programs which address critical issues and/or emerging needs.

An extension agent will identify, recruit, and train local volunteer leaders to enable them to effectively perform their duties while serving on committees, clubs, and/or organizations. And the agent works with and supports extension-sponsored groups, such as 4-H clubs, toward the achievement of increased participation and strengthened programs.

An extension agent typically has at least a master's degree in the field in which he or she is educating. Given that degree requirement, it likely is the case that an extension agent qualifies for the learned professional exemption. In some cases, an extension agent's work supporting others in the extension program may support the administrative exemption. Both of these exemptions (or some combination of the two) would require payment of the minimum salary of \$47,476 (as of December 1, 2016).

In many cases, it may be possible for an extension agent's work to satisfy the requirements of the teacher exemption. As discussed above, the teacher exemption does not require the payment of a minimum salary. In order to qualify for the teacher exemption, the agent would need to have a primary duty (i.e., a most important duty) of "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge." The extension agent also must be employed by an educational establishment (such as an institute of higher learning).⁹

Although it is not possible to list all of the functions that may or may not be "teaching" under the FLSA, some general principles govern when an individual may qualify for the teacher exemption. Where an extension educator imparts his knowledge and experience upon his students, using his own methods of organizing, communicating and delivering the course materials, he meets the standard for "teaching." For example, where an extension agent teaches a high school class as a visiting instructor or provides instruction as part of a certificate program for beginning farmers, those activities support the teacher exemption. This is likely true whether or not the course is for credit.

The teacher exemption applies when the extension educator spends a majority of her time on these teaching activities and/or assessing students' performance, with the balance of her time spent on closely-related activities such as class preparation; preparing and maintaining training aids, tools and equipment used in class; and serving as a mentor to students. Assistance with extracurricular activities also counts towards satisfaction of the "primary duty of teaching" test.¹⁰

The regulations include tutoring (along with teaching, instructing and lecturing) as one of the duties of a teacher. It is unclear, however, how far tutoring would apply in the context of one-on-one instruction (*e.g.*, helping a farmer better understand the operations on her

⁹ See 29 C.F.R. § 541.303. The regulations may also require that the employee be engaged in teaching "in" an educational establishment, but it does not appear that this language has been interpreted by DOL or the courts.

¹⁰ As noted above, "primary duty" means the most important duty. Although an employee who spends a majority of her time on exempt work will satisfy the primary duty test, an employee who spends less of his time on exempt work may nevertheless qualify for exemption.

own farm), particularly when that instruction is unrelated to classroom-style training. Where such instruction is in connection with classroom-style teaching, it is more likely to assist in supporting the exemption. If, however, an employee spends all (or nearly all) of his time providing one-on-one coaching or counseling, it may be more difficult to establish that the employee is a “teacher,” as there is a current lack of guidance in the regulations and case law as to extent to which one-on-one instruction falls within the exemptions.¹¹

Finally, in some cases, agents may have supervisory responsibility. Where they do, it is necessary to determine their primary duty. If they have a primary duty of teaching, with only occasional supervisory activity, they likely continue to qualify for the teacher exemption. Where supervision has become their primary responsibility, however, it is likely that the executive exemption — and the minimum salary level — apply.

2. *Resident Directors*

Resident directors often are responsible for the supervision of graduate coordinators and several resident assistants. They also are responsible for the creation and execution of programming and connecting the “student life work” to the academic work of the institution. Many of these resident directors also supervise clerical staff and maintenance staff. Thus, in many cases, resident directors may meet the executive and/or administrative exemptions, or some combinations thereof. Whether a particular resident director qualifies, however, is dependent on the particular facts and circumstances of your institution. Generally, resident directors do not qualify for the academic administrator exemption, because their primary duty is not directly related to the academic operations and functions of the university.¹² Also, room and board is not counted as salary for the purposes of meeting the minimum salary threshold.

3. *Postdoctoral Fellows*

Postdoctoral fellows often meet the duties test for the “learned professional” exemption. They must, however, also satisfy the salary basis and salary level tests to qualify for exemption. Under the 2016 National Institutes of Health (NIH) salary guidelines for postdoctoral research fellows, most fellows earn less than the revised salary level. This does not excuse non-compliance with the salary level. Beginning December 1, 2016, higher education institutions will need to supplement any gap between current salaries and the new salary level in order to maintain the exemption for those employees, or will

¹¹ Of course, even where the employee does not qualify as a “teacher,” he may nevertheless qualify as exempt under one or more other exemptions. Those exemptions, however, likely require payment of at least the minimum salary level.

¹² Of course, should a resident director have a primary duty related to the academic well-being of the students and/or curriculum development, it may be possible to take advantage of the academic administrator exemption.

need to treat these fellows as non-exempt.¹³ The minimum salary exemption may be met by salary payments from multiple sources in a joint employment relationship.

F. Student Workers¹⁴

There are a number of student-worker-specific issues that should be identified, but which likely are not impacted by the salary increase.

1. Graduate Teaching Assistants

Graduate teaching assistants who have teaching as their primary duty are not subject to the salary tests.

2. Research Assistants

DOL typically views graduate and undergraduate students who are engaged in research under a faculty member's supervision in the course of obtaining a degree as being in an educational relationship with the school.¹⁵ According to DOL, it would not assert an employment relationship with either the school or any grantor funding the research. Also according to DOL, this is true even though the student may receive a stipend for performing the research.¹⁶ If a worker is not an "employee" under the FLSA, the law's minimum wage, overtime, and recordkeeping provisions would not apply.

REVIEWING POSITIONS AND OPTIONS FOR COMPLIANT PAY

In all likelihood, the focus of any review will be on those positions currently earning between \$455 per week (\$23,660/year) and \$913 per week (\$47,476/year). For employees who meet the duties tests, employers have two general options: (1) raise the salary to meet the new test¹⁷; and (2) treat the employee as non-exempt. Although there certainly are different options within each broad category, employers are ultimately faced with the choice between raising salaries and tracking time, paying overtime for hours over 40, etc. Ultimately, there are no "right" or "wrong" decisions; employers will reach a variety of conclusions on how best to proceed based on their own circumstances, budgets, and employee populations.

Different higher education employers will handle each of these concerns differently. Some may increase pay to maintain exemptions. Some may restructure jobs to strengthen the exempt status

¹³ NIH recently announced its projected stipend levels for FY2017: <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-16-134.html>. These amounts exceed the minimum salary level and are projected to be effective December 1, 2016.

¹⁴ These student-worker issues also are discussed in DOL's recent guidance to higher ed employers: <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

¹⁵ DOL's position with respect to research assistants can be found in Chapter 10 of WHD's FOH at 10b18. Chapter 10 of the FOH can be found here: https://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

¹⁶ See WHD Opinion Letter 1994 WL 1004845 (June 28, 1994).

¹⁷ Assuming that the employee qualifies in an exemption that requires a salary.

of one position and “weaken” the exempt status of another position that the employer will convert to non-exempt. Still others may take this as an opportunity to classify some “borderline” positions as non-exempt. There are dozens of permutations.

For those who decide to convert any exempt employees to non-exempt status, however, they will need to determine how those employees will be paid on a going-forward basis.¹⁸ There are several different options, including: hourly, salary plus overtime, and fluctuating workweek.¹⁹

1. Hourly

Colleges and universities can simply convert a previously exempt employee to hourly status. In doing so, the employer can determine the hourly rate in whatever way it deems appropriate. For example, the employer can divide the existing weekly salary by 40 to arrive at the rate, then pay 1.5 times that rate for overtime hours (assuming no additional payments that must be included). Alternatively, an employer can adjust the amount of an employee’s earnings to reallocate it between regular wages and overtime so that the total amount paid to the employee remains largely the same.

2. Salary for 40 Hours Plus Overtime

To provide additional certainty and security for employees who are being reclassified, employers also can continue to pay employees a salary and pay overtime for hours in excess of 40 per week.

3. Salary for More Than 40 Hours Plus Overtime

Employers can pay a straight time salary for more than 40 hours in a week for employees who regularly work more than 40 hours, then pay overtime in addition to the salary. Using this method, the employer would pay an additional half-time overtime premium for overtime hours already included within the salary, and time-and-a-half for hours beyond those included in the salary.

When paying in this manner, it is important to remember that the salary cannot be a guarantee for straight-time and overtime hours. Thus, if an employee works more than 40 hours, but less than the number of hours the salary is intended to cover, the total compensation must reflect the number of hours actually worked. Of course, if the employee works less than 40 hours, the salary is paid.

4. Fluctuating Workweek

This method of pay may include some additional risks and should be discussed with counsel prior to implementation.

Where employees have hours of work which fluctuate from week to week, employers can pay a fixed salary that covers a fluctuating number of hours at straight time if certain

¹⁸ If an employer converts an employee to non-exempt status, the employer must treat the employee as non-exempt for all purposes. This means accurately tracking time, ensuring compliance with the minimum wage and overtime provisions, and properly computing the regular rate of pay for overtime.

¹⁹ Not every method is permissible in every state. Employers should discuss permissible options with qualified counsel prior to implementing any method other than hourly.

conditions are met, including a clear mutual understanding between the employer and employee.

Under this method, an employee is employed on a salary basis and has hours of work which fluctuate from week to week. The salary is paid to him pursuant to an understanding with his employer that he will receive the fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.

There must be a clear, mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period. The amount of the salary must be sufficient to provide compensation to the employee at not less than the applicable minimum wage rate for every hour worked.

Because the salary is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

5. *Compensatory Time Off*

Public sector employers have at their disposal an additional method of handling overtime worked. Pursuant to an agreement with employees or their representatives, state or local government agencies may arrange for their employees to earn comp time instead of cash payment for overtime hours.

A comp time arrangement must be established pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding, another agreement between the public agency and representatives of overtime-protected employees, or an agreement or understanding arrived at between the employer and employee before the performance of the work. This agreement may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay (for example, providing the employee a copy of the personnel regulations).

The comp time must be provided at a rate of one-and-one-half hours for each overtime hour worked. For example, for most state government employees, if they work 44 hours in a single workweek (4 hours of overtime), they would be entitled to 6 hours (1.5 times 4 hours) of compensatory time off. When used, the comp time is paid at the regular rate of pay. Most state and local government employees may accrue up to 240 hours of comp time. Law enforcement, fire protection, and emergency response personnel, as well as employees engaged in seasonal activities (such as employees processing state tax returns) may accrue up to 480 hours of comp time. An employee must be permitted to use comp time on the date requested unless doing so would “unduly disrupt” the operations of the agency.

COMMUNICATING COMPENSATION AND RECLASSIFICATION DECISIONS

Communications to employees are a critical component of the reclassification process. It is important to reassure employees who will be reclassified that they remain important and integral members of the team. The change should be explained as one that is related exclusively to the manner and method of pay--not the employee's value to the organization.

Employers will need to explain the new method of pay. For those employer who have elected to reduce base pay to accommodate expected overtime hours worked, it likely will be necessary to provide employees with examples that demonstrate how that will work. In addition, unless there is a guarantee that a certain number of hours will be provided, employers should be cautious in how they describe the expected amount of pay; for example, "if you work 45 hours, your pay would be \$500," not "you will be paid \$500 for 45 hours."

Employers also will also need to address the practical issues related to implementing the reclassification. For example, where job duties have been eliminated for non-exempt workers and/or added to exempt workers, the applicable job descriptions for the position will need to be revised and reissued. Newly non-exempt workers will need to be properly coded in payroll systems (for both their new pay and the inclusion of any bonuses in the overtime rate). In addition, employers should train newly non-exempt workers and their managers on the employer's timekeeping policies--especially any policies prohibiting off-the-clock work. And, as employers consider some of the issues described below with respect to hours of work, they may consider preparing new policies that address some of the complicated timekeeping issues that will arise as a result of reclassification.

BEST PRACTICES FOR ENSURING MINIMUM WAGE AND OVERTIME COMPLIANCE FOR NON-EXEMPT EMPLOYEES

In the wake of the significant salary threshold increase, members may find that budgetary constraints require that certain positions be classified as non-exempt (i.e., overtime eligible). If the position previously had been exempt, it is critical to develop a plan to communicate the change to the affected employee(s), including the new method of pay, the change to benefits (if any), and the need to record time. In addition, it is advisable to provide training to the newly-reclassified employee(s) regarding their timekeeping obligations.

Regardless of whether the employee is newly-reclassified or has been non-exempt previously, there are a few areas in which members should take special care to ensure minimum wage and overtime compliance.

1. Best Practices for Timekeeping

Whether using paper timesheets, computer-based log-ins, time clocks, or some other method of timekeeping, a favored practice is a daily or weekly review and certification of time records by the employee. Such a certification would address both that the hours identified were actually worked and that the employee did not perform any work not recorded on the time record. Following the employee's review and certification, time records should be reviewed by the employee's manager for potential inaccuracies. If

adjustments are made to an employee's time, both the manager and the employee should sign-off on the adjustment.

2. *Travel Time*

One difficulty members will face with many non-exempt employees is handling travel time. The FLSA addresses travel time in a variety of contexts. For example, commuting time is expressly excluded from the hours worked by an employee. On the other hand, time spent traveling from place-to-place during the course of a day is included in the hours worked. Thus, if a non-exempt employee arrives at the office to begin paperwork, then travels to a different building for a meeting later in the day, then the time spent traveling to the meeting must be included in the employee's hours worked.

Out-of-town travel can cause particular problems. If an employee's trip takes place in a single day—for example, a visit to a meeting in a town 60 miles from campus—then all of the time spent traveling will be included in the hours worked by the employee. If the trip is out-of-town and overnight, then only those hours spent traveling during the employee's normal working hours are included in the hours worked—unless the employee is performing work during the travel.

For example, assume a non-exempt employee normally works from 8:00 a.m. to 5:00 p.m., Monday to Friday. The employee leaves on a plane at 5:00 p.m. on Friday to meet with potential out-of-state students. The employee prepares his notes on the plane. He arrives and continues reviewing the file in the hotel. He departs for the meeting at 7:30 a.m. on Saturday, taking a taxi and arriving at 8:00 a.m. He leaves the meeting location at 1:30 p.m. and departs on a 3:00 p.m. flight home. In this case, the time spent as a passenger on the plane to the meeting is not compensable, with the exception of the time spent preparing notes or otherwise performing work. Similarly, the employee must be compensated for the additional time preparing for the meeting in his hotel room. On Saturday, the taxi drive would not be compensable (unless the employee was preparing in the taxi), but the time spent in the meetings and the trip home (until 5:00 p.m.) would be counted in hours worked.²⁰

3. *Remote Access/Cellphone/Smartphone*

Another significant problem area for non-exempt employees is their ability to work outside of normal hours, such as accessing networks remotely and using cellphones and smartphones to communicate with others. These actions are all likely "work" under the FLSA and thus would need to be included in the hours worked by that employee. In addition, due to the application of some legal principles developed for a 1960s workforce, time spent waiting for a call or in between an e-mail and response may also become time that must be included in the employee's work hours.

²⁰ The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days. See 29 C.F.R. § 785.39. Part 785 of the regulations, governing hours worked, can be found here: http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title29/29cfr785_main_02.tpl.

Unfortunately, there are limited solutions for the remote access/cellphone issue. The employee cannot agree that he will not be paid for the hours spent on these tasks outside of his normal workday. The law requires that the employee be paid for those working hours—particularly if those hours would cause the employee to work more than 40 hours in the workweek. If an institution does not want to pay for the time, the work must not be performed. This could involve prohibiting remote access or smartphone usage, limiting the use to normal working hours, and/or crafting working hours to accommodate these tasks as part of the employee’s “normal” schedule.

4. Meetings/Training

As a general rule, meetings and training sessions must be included in working hours. Only when the meeting meets the following four criteria can it be excluded from work hours: (1) attendance is outside of the employee's regular working hours; (2) attendance is in fact voluntary; (3) the course, lecture, or meeting is not directly related to the employee's job; and (4) the employee does not perform any productive work during such attendance.

Given the standards, most conferences attended by non-exempt employees must be included in work hours. “Working” lunches or similar lunch meetings typically do not meet these criteria and must be included in work hours. It’s also important to remember that providing the food that is eaten during the lunch does not change the meeting from working hours to non-working hours. Only when all four of the above criteria are met can a meeting be excluded from working hours.

5. Managing Working Hours

As the employer, it is the institution’s obligation to manage non-exempt employees to ensure that only the work desired is performed. Off-the-clock work—whether voluntary or involuntary—cannot be permitted. Ensuring that all work is properly compensated requires vigilance by the employer. As the regulations state: “it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. ...The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.”²¹ In some cases, this may mean that an employer must pay for unauthorized overtime and discipline an employee for failing to comply with the policy.

The precise contours of how an employer manages working hours for newly-reclassified workers is dependent on the specific facts and circumstances of the situation. In some cases, it may be possible to prevent remote network access or cellphone use by the employee; in others, it may be necessary to schedule specific blocks of time for the employee to work remotely or use her cellphone, and to make those blocks part of the expected work hours; in still others, the member may decide to allow continued cellphone usage and remote access without restrictions, and to deal with the ramifications of the “extra” hours through overtime pay.

²¹ See 29 C.F.R. § 785.13.

Ultimately, an employer can decide to pay for the hours worked or the employer can decide not to allow the hours to be worked or it can land somewhere in the middle with limitations on the hours worked. There is no one-size-fits-all solution and members should consult with counsel to ensure they are addressing these issues as best they can.

For other higher education FLSA resources, please visit the CUPA-HR website at www.cupahr.org.

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