

Higher Education to Face Overtime Challenges

Last month, the DOL unveiled its long-awaited overtime rule that has nationwide implications for employees and employers alike. Despite hopes for some relief, higher education institutions — whether operated for profit or not for profit — will face many of the same overtime pay requirements and compliance challenges as most other employers. Like other employers, colleges and universities should assess the potential impact of the final rule on their workforce, and begin shaping effective compliance strategies.

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Background

The Fair Labor Standards Act (FLSA) sets federal minimum pay and overtime standards requiring most covered employees to be paid at time and one-half of their regular rate of pay for all hours worked over 40 in any workweek. Regulations enforced by the DOL's Wage and Hour Division provide exemptions from those requirements for salaried "executive, administrative, and professional" (EAP) employees who generally satisfy three tests. First, they must be paid on a salary basis that is not subject to reduction based on the quality or quantity of their work ("salary basis test"). Second, they must be paid at or above a minimum salary level ("salary level test"). Third, the employee's primary job duty must satisfy criteria established by DOL regulation ("duties test"). The regulations also contain a special rule for "highly compensated" employees (HCEs) who satisfy higher earnings standards and regularly perform at least one of the exempt duties of an EAP employee.

On May 23, the DOL issued its long-awaited [final rule](#) on "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," effective December 1, 2016. As expected, the final rule dramatically narrows the exemptions by more than doubling the minimum salary level under which most white-collar workers are eligible to receive overtime pay. It raises the standard salary threshold from \$455 to \$913 per week (\$23,660 to \$47,476 annually), and hikes the annual compensation level for an HCE exemption from the



current \$100,000 to \$134,004. The salary and compensation levels will be subject to automatic updates every three years beginning January 1, 2020. (See our [May 18, 2016 FYI Alert](#).)



For the first time, employers will be allowed to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least quarterly to satisfy up to 10 percent of the standard salary threshold for an EAP exemption, but not for the HCE exemption. HCEs must receive a salary or fee of at least \$913 per week, but employers may continue to count nondiscretionary bonuses and incentive payments (including commissions) toward the \$134,004 annual compensation requirement. Left intact by the final rule, the current job duties requirements will continue to apply in tandem with the new minimum salary and compensation levels in determining exempt status. (See our [April 3, 2014 FYI In-Depth](#) for more information on the duties tests.)

Higher Education and Overtime Pay

Employees at higher education institutions are generally covered by the FLSA's minimum wage and overtime provisions, just as their counterparts in other sectors. The FLSA regulations do, however, allow some employees whose duties are unique to the education setting — such as teachers, athletic coaches, graduate and undergraduate students and academic administrators — to qualify for a white-collar exemption under special rules.

Despite speculation that the DOL's final overtime rule might provide broader relief for higher education institutions, it did not. While maintaining the *status quo* for "educational" positions, the new rule will impact groups of employees within the institution's workforce that occupy other positions. DOL [guidance](#) confirms that *bona fide* teachers and certain graduate students will continue to be exempt, but other employees — such as certain administrators and assistants — will be covered under the new rule.

Comment. In an era of runaway student debt, higher education institutions are already facing pressure to contain tuition costs. As a result of the new overtime rule, they now face potentially larger labor costs. If institutions cannot absorb the additional costs, they may have to rethink the tuition and fees they charge, and/or decrease student services to cover budget shortfalls. Programs, degree offerings and research activities may also be scaled back or altogether eliminated.

Bona Fide Teachers

Neither the salary level nor the salary basis requirements for a white-collar exemption apply to *bona fide* teachers in higher education institutions. Regardless of their pay, individuals who are employed by an educational establishment are exempt if their primary duty is teaching, tutoring, instructing or lecturing. Because faculty — including full-time college and university professors, adjunct or part-time instructors, and teachers of skilled and semi-skilled trades and occupations — do not have to satisfy the standard salary threshold, their status is unaffected by the DOL's new rule.

The DOL recognizes that extracurricular activities, such as coaching school athletic teams or serving as advisors for drama or debate teams, also contribute to students' educational development. Thus, faculty members who teach but are also engaged in these types of outside-the-classroom activities would still be considered to be engaged in the primary duty of teaching and overtime-ineligible.

Athletic Coaches and Trainers

Employees that have been — but may no longer be — exempt under the increased minimum salary threshold include head coaches, assistant coaches, and trainers unless they qualify for the teacher, learned professional or other white-collar exemption.

Coaches. Whether an athletic coach or assistant coach employed by a higher education institution will qualify for the teacher exemption depends on his or her job duties. If the primary or main duty is teaching — which may include instructing student-athletes on how to perform their sport — coaches may qualify for the exemption. If, however, their primary duties are recruiting, visiting high schools or athletic camps to interview students, or performing manual labor, they would not qualify as “teachers” and for the attendant exemption.



As the DOL makes clear, the amount of time a coach spends instructing student-athletes will not determine the employee’s exempt or nonexempt status, but it is relevant in making that determination. While assistant athletic instructors who spend more than half their time instructing athletes are likely to qualify as exempt teachers, assistant coaches who spend less than a quarter of their time doing so are unlikely to be considered exempt. Coaches who cannot satisfy requirements for the teacher exemption may still qualify as exempt if their primary duties involve exempt administrative and executive work and they satisfy minimum salary criteria.

Trainers. DOL guidance confirms that certified athletic trainers may satisfy the duties requirements for a non-teacher professional exemption. Generally, trainers will be able to meet the duties requirement for the learned professional exemption if they have successfully completed four academic years of preprofessional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and have been certified by the Board of Certification.

Students

Because FLSA coverage flows from an employer-employee relationship, students are only entitled to the federal minimum wage and overtime pay protections if they are employees of the education institution. Both graduate and undergraduate students who receive compensation from their colleges or universities for performing duties that are not part of the educational program are generally considered employees for FLSA purposes. They may, for example, wait tables in the dining halls, usher at athletic events, work in the campus book store, or shelve books in the library. Most of these students are hourly workers who perform nonexempt work and are not affected by the new rule.

Importantly, the DOL has confirmed that graduate and undergraduate students who occupy positions that are common to education institutions generally are not subject to the FLSA as non-employees. While those occupying other common positions are employees, they may qualify for various white-collar exemptions or special rules that apply in a higher education setting.

Research Assistants. The DOL does not generally view graduate or undergraduate students who are engaged in research under faculty supervision as part of a degree program to be employed by the educational institution or a grantor. Thus, they are not subject to the FLSA or its overtime pay requirement.

Resident Advisors. Similarly, the DOL does not consider students in a *bona fide* educational program who serve as resident advisors in exchange for reduced room and board or tuition credit to be employees of the institution. As non-employees, they are not subject to the FLSA or its overtime pay requirements.

Graduate Teaching Assistants. Graduate students whose primary duty is teaching or serving as a teaching assistant may be viewed as employees but would qualify for the teaching exemption.

Postdoctoral Fellows. By definition, postdoctoral fellows conduct research at higher education institutions following completion of their doctoral studies. Because they are not working toward a degree, the DOL considers them employees — rather than students — of those institutions. Whether a postdoctoral fellow is overtime-eligible will depend on whether he or she can satisfy the duties test for a particular exemption.

Generally, postdoctoral fellows may qualify for either the “learned professional” or the “teacher” exemption discussed above if they satisfy the requisite criteria. Fellows may qualify for the learned professional exemption — one of the two main categories of the professional exemption — if they satisfy the applicable duties test and are compensated on a salary or fee basis at a rate not less than the new threshold of \$913 per week. If a postdoctoral fellow’s primary duty is teaching, he or she may be exempt regardless of pay. While a fellow who spends more than 50 percent of his or her time teaching will generally qualify for the exemption, a fellow who spends less time may still meet the primary duty requirement if other factors support that conclusion.

Non-Academic Professionals

Higher education institutions routinely employ non-teacher learned professional in various capacities. Depending on their job duties and education, employees such as certified public accountants, certified athletic trainers, librarians and psychologists may satisfy the duties test for the exemption. However, unless the individual qualifies for the teacher exemption, the professional employee will still have to satisfy both the salary basis and standard salary level test for a white-collar exemption.

Academic Administrators

Unlike teachers, academic administrative personnel — such as department heads, academic counselors and advisors, intervention specialists and those with similar responsibilities — must meet either the standard minimum salary level or a special salary level applicable only in the higher education setting to qualify for a white-collar exemption. Employees in these administrative jobs are not subject to the FLSA’s minimum wage or overtime requirements if they are paid at least as much as the starting salary for teachers at the institutions where they are employed — even if it is less than the new salary threshold — and their primary duty is performing administrative functions directly related to academic instruction or training.

While the special academic administrative employee test would apply to counselors who administer testing programs, assist students with academic problems and advise them on degree requirements, it would not apply to other jobs such as building managers, student health advisors, psychologists or food service managers. However, those jobs may be exempt under other white-collar exemptions.

State/Local Laws Also Apply

While educational institutions enjoy certain exceptions under the FLSA, state laws also apply to their employees. Before concluding that an employee is not overtime-eligible, institutions will want to check applicable state and local laws to confirm they do not require payment of overtime.

Public Universities and Colleges

While there is no blanket exemption for state and local governments, the FLSA contains a unique provision that allows “public agencies” to compensate overtime-eligible employees with compensatory (comp) time in lieu of overtime pay. Public universities and colleges that are considered “political subdivisions” may also take advantage of this provision. In making that determination, the DOL considers whether the state directly created the school, or the school administrators are responsible to public officials or the general electorate.

Where permitted, accrual of comp time is generally limited to 240 hours. However, employees who are engaged to work in a public safety, emergency response or seasonal activity may accrue up to twice that amount of time. Any comp time received in lieu of overtime pay must be credited at the same rate as cash overtime. A comp time arrangement must be established pursuant to any applicable collective bargaining agreement, or an agreement or understanding between the school and employee before work begins.

In Closing

The changes in the overtime rule will affect higher education institutions along with most other employers, but special rules will apply to some of their employees. Because employees whose primary duty is teaching are not subject to the FLSA’s minimum wage and overtime requirements, college and university faculty will be unaffected by the changes but other school employees may be impacted.

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