



## **PAYMENT OF COACHES AND ATHLETIC TRAINERS UNDER FEDERAL LAW**

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On May 18, 2016, the U.S. Department of Labor (DOL) announced its final rule revising the “white-collar” exemptions from the Fair Labor Standards Act (FLSA)’s minimum wage and overtime requirements. Although sweeping changes were possible, 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 (\$23,660 annually) to \$913 per week (\$47,476 annually). This new salary level will go into effect on December 1, 2016.<sup>1</sup>

Although the final rule did not make any revisions to the duties required to take advantage of the exemption, the substantial increase to the salary level brings increased importance to consideration of the duties required for the exemption. For example, as is discussed below in more detail, the exemption for employees who can be classified as “teachers” does not carry any salary requirement, and thus is unaffected by the final rule.

This white paper provides guidance to members in determining whether individuals employed by their institution as coaches or athletic trainers may be exempt under the FLSA following the implementation of the final rule. In addition, for those coaches and/or athletic trainers who are not determined to qualify for the exemption, this white paper provides guidance on best practices for ensuring compliance with the FLSA’s minimum wage and overtime requirements.

However, because the FLSA’s overtime requirements depend largely upon facts and circumstances that likely vary by school and even by team, this white paper is intended only to provide a general overview for compliance — it is not definitive. Although we consulted our outside legal counsel in preparing this white paper — the labor and employment lawyers at Seyfarth Shaw LLP — it is not a substitute for consulting your own counsel. Members classifying, or contemplating classifying, coaches or athletic trainers as exempt should conduct their own evaluation and consult counsel to assess the applicability of the FLSA’s exemptions.

### **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-

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<sup>1</sup> 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.

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 and outside salesmen.

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 (\$23,660 annually). As of December 1, 2016, that level will increase to \$913 per week (\$47,476 annually).<sup>2</sup> Notably, however, the salary level does not apply to teachers and outside sales employees, and can be limited for employees classified as “academic administrators.”
- 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,
- The employee’s “primary” (i.e., most important) duty must be a recognized exempt duty under the pertinent exemption(s).

For each of the above-mentioned exemptions, the duties requirements are the most complex and difficult requirements to analyze. That said, the salary requirements are just as important, especially given that the salary level is set to substantially increase on December 1, 2016. We detail the duties and salary requirements below.

## **DETERMINING THE EXEMPT STATUS OF COACHES AND ATHLETIC TRAINERS**

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” 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.” While an employee spending 50% of his or 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.”

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<sup>2</sup> The salary threshold cannot be prorated for part-time work, but it may be prorated for partial-year employees whose salary is paid throughout the year. For example, if an athletic trainer or coach works a 10-month schedule but receives paychecks over a 12-month period, then the amount of the checks may be prorated over the actual period of work (i.e., 10 months) to determine whether he or she is paid at least the salary threshold. In other words, if a 9-month employee earns \$45,000 for 9 months, but is paid over 12 months, he or she would meet the salary requirement because the 9-month weekly salary is \$1,153.85 (\$45,000/39 weeks), even though the weekly paycheck is \$865.38 (\$45,000/52 weeks). A similar calculation can be used for 10-month employees. It is, however, critical that the employee perform no work outside of the 9- or 10-month period.

A coach or athletic trainer can generally be classified exempt if his or her “primary” duty fits one of the categories described below. They may also satisfy the duty requirement if their primary duty is a combination of multiple of the responsibilities below. This “combination exemption” may be important to the exempt status of coaches at your institution, given the variety of duties many coaches perform.

Below, we discuss the potential exemptions applicable to coaches and athletic trainers. Due to the expected increase in salary level, we separate the discussion of those exemptions by their reliance upon that salary level.

### **A. Exemptions Without a Minimum Salary Requirement**

Two exemptions potentially applicable to coaches do not require the payment of any minimum salary. These exemptions are the teacher exemption (which is part of the professional exemption) and the outside sales employee exemption.

#### ***1) Coaches as Exempt Teachers [29 C.F.R. § 541.303]***

Coaches may qualify as exempt teachers.<sup>3</sup> This 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 U.S. Department of Labor has provided guidance on the application to coaches of the current duties test for the teacher exemption. In 2009, the Department issued an opinion letter regarding the application of the teacher exemption to coaches at a local public school. The school employed no full-time coaches, instead relying upon community members to meet its coaching needs. According to the letter, the coaches spent most of their time instructing student athletes in the rules and fundamentals of their sports, with the balance of their time going to activities such as recruiting, supervising team members during trips to and from games, disciplining team members and accounting for equipment. On these facts, DOL concluded that the coaches qualified as exempt teachers.

These principles were elaborated upon in guidance issued by DOL in connection with the final rule. In a guidance document, the Department notes that “athletic coaches and assistant coaches may fall under the [teacher] exemption if their primary duty is teaching, which may include instructing athletes in how to perform their sport. If, however, their duties primarily include recruiting athletes or doing manual labor, they are not considered teachers. A coach could primarily be responsible for coaching athletes but also spend some time recruiting or doing manual labor and still be [exempt].”

Thus, where a coach’s duty is primarily (that is in terms of relative importance and not

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<sup>3</sup> An athletic trainer with significant instructional responsibilities may also qualify under the teacher exemption.

necessarily in terms of time spent) instructing athletes in how to perform their sport, it appears that DOL will consider them exempt as teachers. Where the coach's responsibilities include instruction of physical health, team concepts and safety and/or where the coach is responsible for designing instructions for individual student athletes and for specific team needs, the ability to use the exemption is improved. Although not necessary, a student athlete's ability to receive academic credit may further enhance the ability to use the teacher exemption.<sup>4</sup>

## ***2) Coaches as 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. Although coaching is not the traditional field of work in which the outside sales exemption has been considered and applied, it might be possible at a for-profit institution to classify coaches' on-the-road recruiting duties as exempt outside sales work, if, among other things, the coach plays a decisive role in determining whether recruits are admitted and become tuition-paying students.<sup>5</sup> We are not aware of any guidance by DOL or any federal court decision regarding the possible application of the outside sales exemption to coaching. Accordingly, members considering the outside sales exemption should consult counsel prior to relying upon this fairly unique interpretation.

## **B. Exemption With Potentially Reduced Salary Level: Coaches as Exempt Academic Administrators [29 C.F.R. § 541.204]**

Coaches may perform the work of exempt academic administrators. To qualify as academic administrators, the coach must satisfy the “normal” salary requirements (a salary of at least \$913 per week<sup>6</sup> as of December 1, 2016) or the minimum salary for teachers at their institution in order to be considered for this exemption,<sup>7</sup> and his or her “primary” duty must consist of “administrative functions directly related to academic instruction or training.” For example, coaches who are responsible for administration of an academic department or who act as academic advisors to players, assisting them with academic issues and advising them on degree requirements, are performing exempt work.<sup>8</sup>

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<sup>4</sup> There are two cautionary points worth noting with respect to using the teacher exemption for coaches. First, the opinion letter referenced was withdrawn for technical reasons unrelated to the substance. The Department's more recent statements, however, indicate an acceptance of the principles articulated in the letter. Second, a prior opinion letter — issued under the pre-2004 rules — reached a different conclusion because the coaches spent an insufficient amount of their time (25%) in teaching-type activities.

<sup>5</sup> It does not appear that the outside sales exemption has even potential application to the work performed by athletic trainers.

<sup>6</sup> See footnote 2 for an explanation of how the salary can be computed for 9-month or 10-month employees.

<sup>7</sup> For example, if the minimum teacher salary at an institution is \$37,000, an exempt academic administrator would only need to be paid \$37,000 to qualify for exemption (assuming the duties performed met the standard).

<sup>8</sup> Of course, an athletic trainer who performs academic administrative duties would qualify as well.

## **C. Exemptions That Require Payment of the Minimum Salary**

### ***1) Coaches and Athletic Trainers as Exempt Administrators Over Other Areas [29 C.F.R. § 541.200]***

Depending on the circumstances, a coach or athletic trainer may also perform the work of an exempt administrative employee. To satisfy the administrative exemption, the coach must satisfy the salary requirements (a salary of at least \$913 per week<sup>9</sup> as of December 1, 2016), and his or her primary duty must be office or non-manual work that requires discretion or independent judgment with respect to significant matters. Such work could include, for example, recruiting, establishing game schedules, financial planning and budgeting, procurement and purchasing, public relations, marketing, compliance, facilities management and fundraising.

To qualify as exempt, the coach's or athletic trainer's administrative duties must involve the exercise of discretion and independent judgment as to significant matters. For instance, recruiting work is not likely to qualify if it involves using objective standards established by the head coach to assess recruits pre-selected by the head coach. On the other hand, if an assistant coach plays a decisive role in determining which schools to visit, which students to recruit and offer scholarships, and how to recruit those students, that portion of his or her job is likely to qualify. Similarly, a primary duty that entails establishing a departmental or team budget would likely qualify, while one that entails merely submitting expense reports likely would not.

Athletic trainers may similarly have administratively exempt duties. For example, where an athletic trainer has the responsibility for developing the overall sports medicine program, assisting in development of the budget, scheduling staff training, ensuring coverage at athletic events and managing inventory (including the authority to order supplies and materials), the athletic trainer may qualify as an exempt administrative employee, provided that he or she performs these tasks as his or her primary duty.

### ***2) Coaches and Athletic Trainers as Exempt Executives [29 C.F.R. § 541.100]***

Some coaches and athletic trainers may qualify as exempt executives. To satisfy the executive exemption, the coach or athletic trainer must satisfy the salary requirements (a salary of at least \$913 per week<sup>10</sup> as of December 1, 2016), and it must be the case that: (1) his or her primary duty is management of a recognized part of the sports medicine program or athletic department or the team; (2) he or she customarily and regularly directs the work of two or more full-time equivalent employees; and (3) he or she has meaningful input into hiring, firing or other changes in status of subordinate employees.

### ***3) Coaches and Athletic Trainers as Exempt Professionals [29 C.F.R. § 541.300]***

Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the board of certification of the National Athletic Trainers Association generally meet the duties requirements for the learned

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<sup>9</sup> See footnote 2 for an explanation of how the salary can be computed for 9-month or 10-month employees.

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professional exception. They must also be paid a minimum salary of at least \$913 per week<sup>11</sup> (as of December 1, 2016). Similarly, coaches who are degreed and certified athletic trainers, and who possess and use those qualifications in their work, may qualify for the professional exemption.

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

A coach or athletic trainer who performs a combination of exempt duties described above for executive, administrative, professional and outside sales employees may still qualify for exemption. Thus, a coach 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 — i.e., 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 for a coach, the salary requirement would apply. If, on the other hand, the coach’s primary duty was clearly teaching and no additional duties were necessary to establish an exempt primary duty, no salary would be required.

### **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 coaching or athletic trainer 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 coach or athletic trainer 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.

#### **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.

#### **Travel Time**

One difficulty members will face with a non-exempt member of a coaching staff 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

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<sup>11</sup> See footnote 2 for an explanation of how the salary can be computed for 9-month or 10-month employees.

traveling from place to place during the course of a day is included in the hours worked. Thus, if a non-exempt coach arrives at the office to begin paperwork or film review, then travels to the field for practice later in the day, then the time spent traveling to the field must be included in the coach's hours worked.

Out-of-town travel can cause particular problems. If the coach's trip takes place in a single day — for example, a visit to an in-state recruit who lives in a town 60 miles from campus — then all of the time spent traveling will be included in the hours worked by the coach. If the trip is out of town and overnight, then only those hours spent traveling during the coach's normal working hours are included in the hours worked — unless the coach is performing work during the travel. For example, if a coach normally works from 7 a.m. to 7 p.m., and the team boards a bus to an out-of-state meet at 7:30 p.m., arriving at the hotel at 11:30 p.m., then the time spent as a passenger on the bus is not compensable. If the coach was reviewing team-related paperwork, preparing a game plan or watching film on his tablet, however, then the time spent doing so would be included in the hours worked. Similarly, if the coach was responsible for supervision of the student athletes while on the bus, then the time would be included.

Resolution of these travel time issues will depend on a wide variety of factors, including the number of coaches for the team, the ability to assign supervisory responsibility to one (but not another) coach during the travel and the likelihood or necessity that the coach will otherwise perform work while traveling. In addition, in many circumstances, it may not be possible to schedule the travel outside of the coach's normal workday, and, therefore, all of the travel time would be included in hours worked regardless of what else the coach did on the bus.

### **Remote Access/Cellphone/Smartphone**

Another significant problem area for non-exempt coaches is their ability to work outside of normal hours, such as accessing networks remotely and using cellphones and smart phones to communicate with others on the coaching staff, student athletes or recruits. These actions are all likely "work" under the FLSA and thus would need to be included in the hours worked by that coach. If the coach used his or her smart phone to text a recruit outside of his or her normal working hours, the time spent texting would need to be added to his or her time for the day. In addition, due to the application of some legal principles developed for a 1960s workforce, time spent waiting for a call or in between text and response may also become time that must be included in the coach's work hours.

Unfortunately, there are limited solutions for the remote access/cellphone issue. The coach cannot agree that he or she will not be paid for the hours spent on these tasks outside of a normal workday. The law requires that the coach be paid for those working hours — particularly if those hours would cause the coach 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 coach's "normal" schedule.

### **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 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.

“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.

### **Managing Working Hours**

As the employer, it is the institution's obligation to manage non-exempt coaches and athletic trainers 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.

The precise contours of how an employer goes about doing so 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 coach; in others, it may be necessary to schedule specific blocks of time for the coach to work remotely or use his or her cellphone, and to make those blocks part of the expected work hours; in still others, the employer 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.

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