



College and University Professional Association for Human Resources

THE IMPACT OF THE DEPARTMENT OF LABOR'S EXEMPT SALARY INCREASE ON HIGHER EDUCATION EMPLOYERS

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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, 2016.¹

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 higher education institutions in determining which employees may be exempt under the FLSA following the implementation of the final rule. In addition, for those employees who are determined not to qualify for exemption, this paper provides guidance on best practices for ensuring compliance with the FLSA’s minimum wage and overtime requirements.²

However, because the FLSA’s overtime requirements depend largely upon facts and circumstances that likely vary by school, this white paper is intended only to provide a general overview for compliance — it is not definitive. Although we consulted our outside legal counsel — the labor and employment lawyers at Seyfarth Shaw LLP — in preparing this white paper, it

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 does not address issues related to coaches and certified athletic trainers. For a white paper addressing those issues, please see http://www.cupahr.org/knowledgecenter/kc_template.aspx?id=13600. In addition, certain issues specific to public and/or land-grant universities will be addressed in a forthcoming white paper.

is not a substitute for consulting your own counsel. Institutions 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.

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.³ 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 (\$23,660 annually). As of December 1, 2016, that level will increase to \$913 per week (\$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.
- 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. 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 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.

³ 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

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."

An employee can be classified as exempt if his or her "primary" duty fits one of the categories described below. He or she may also satisfy the duty requirement if his or 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.

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

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) Teacher Exemption [29 C.F.R. § 541.303⁴]

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.

College and university professors or adjunct instructors typically qualify for the teacher exemption (provided they have a primary duty of teaching, tutoring, instructing or lecturing). This includes faculty members who are engaged as teachers but who also spend a considerable amount of their time in extracurricular activities, such as acting as moderators or advisors for drama, speech, debate or journalism programs. The DOL has recognized these activities as part

⁴ 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.

of the school's responsibility in contributing to the educational development of students. The exemption also applies to some coaches, depending on their duties.⁵

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.

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.

Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession. It is unclear whether veterinarians, and, as may follow, interns/residents in a veterinary program, would qualify for exemption without regard to salary. A single court of appeals case appears to have determined veterinarians as falling within the practice of medicine exception to the salary requirement.⁶ DOL, however, does not appear to have opined on the issue, despite ample opportunity to do so.

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, institutions considering 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. To qualify as an academic administrator, the employee must satisfy the salary requirement (a salary of at least \$913 per week⁷ as of December 1, 2016) *or* the minimum salary for teachers at the institution⁸,

⁵ 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. We also intend to explore the application of the exemption to extension agents in a forthcoming white paper.

⁶ See *Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124 (9th Cir. 2004).

⁷ See Section II.E.2 for an explanation of how the salary can be computed for 9-month or 10-month employees.

⁸ 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).

and the employee's "primary" duty must consist of "administrative functions directly related to academic instruction or training." Academic administrative personnel are those who 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. Included are academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students regarding degree requirements.

As DOL has not provided specific guidance on the term "minimum salary for teachers," the prudent 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.⁹

It is important to remember that 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 thus do not qualify for the reduced salary provision. Jobs relating to building management and maintenance, jobs relating to student health, and academic staff such as social workers, psychologists, dining hall managers or dietitians do not perform academic administrative functions, and, thus do not qualify for this exemption. For example, positions such as mental health counselors in the student health center and positions in student life do not qualify for this exemption, because they do not engage in work directly related to the academic operations and functions of the university.

C. Exemptions That Require Payment of the Minimum Salary

The bulk of exempt employees are subject to the new salary level. This includes 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 requirement (a salary of at least \$913 per week¹⁰ 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. 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.

In higher education, work such as financial planning and budgeting, procurement and purchasing, public relations, marketing, compliance, facilities management and fundraising

⁹ This would be the actual lowest salary paid, not an average.

¹⁰ See Section II.E.2 for an explanation of how the salary can be computed for 9-month or 10-month employees.

would qualify for the administrative exemption, assuming the other factors are met. Positions such as admissions counselors and financial aid officers **may** qualify for the administrative exemption, depending on the amount of discretion and independent judgment they exercise.¹¹ In some cases, these positions may not exercise sufficient discretion and thus will not qualify for exemption regardless of how much they are paid.

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

To satisfy the executive exemption, an employee must satisfy the salary requirement (a salary of at least \$913 per week¹² 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 university; (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.

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, as their primary duty is not directly related to the academic operations and functions of the university. Also, as discussed in more detail below, room and board is not counted as salary for the purposes of meeting the minimum salary threshold.¹³

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

To qualify as an exempt professional, 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.

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.¹⁴

¹¹ It is critical that each position be reviewed for compliance with the duties test. Job titles are not dispositive of exempt status under the FLSA.

¹² See Section II.E.2 for an explanation of how the salary can be computed for 9-month or 10-month employees.

¹³ See Section II.E.4 for an explanation of the salary requirement and room and board.

¹⁴ In some rare circumstances, postdoctoral fellows may have a primary duty of teaching. If that is in fact the case, the salary tests would not apply.

Under the 2016 National Institutes of Health 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 need to treat these fellows as non-exempt. The minimum salary exemption may be met by salary payments from multiple sources in a joint employment relationship.¹⁵

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 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 (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, no salary would be required.

E. Salary-Related Issues

1) Part-Time Employees

The minimum salary requirement cannot be pro-rated for part-time employees. Whether employed on a full-time or part-time basis, as of December 1, 2016, an employee whose exempt status depends upon compliance with the salary obligation must be paid at least \$913 per week. It makes no difference to the analysis if the employee is earning \$800 per week for a 75 percent schedule. As explained above, teachers, doctors, lawyers and outside sales employees are not subject to the salary tests and, as a result, may be employed on a part-time basis at any salary. For all other employees who fall below the salary level, they must be treated — in all respect — as non-exempt employees.

2) Partial-Year Employment

The salary threshold may be prorated for partial-year employees whose salary is paid throughout the year. For example, if an employee 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 the employee is paid at least the salary threshold. In other words, if a 9-month employee earns \$45,000 for nine months, but is paid over 12 months, that employee 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

¹⁵ See Section II.E.3 for an explanation of the salary requirement and room and board.

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.¹⁶

3) Salary Paid by Multiple Sources

In some circumstances, salary amounts paid by multiple entities may be combined to determine whether the salary level has been met. DOL has specifically identified the situation in which an individual is jointly employed by two or more employers as permitting combination of the amounts. It is critical, however, that each payment meet the “salary basis” requirements.¹⁷

4) Room and Board Do Not Count Toward Salary Level

The costs incurred by an employer to provide an employee with board, lodging or other facilities does not count toward the minimum salary amount required for exemption. DOL specifically requires that employers pay the salary “exclusive of board, lodging or other facilities.”¹⁸

Employers may nevertheless provide these items to their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment. “Other facilities” refers to items similar to board and lodging, such as meals, dormitory rooms and tuition furnished by a college to its employees.¹⁹

In addition, where an employee is **required** to reside on premises, the cost of such residence to an employee may not reduce the employee’s salary below the minimum salary. If, on the other hand, the employee is not required to reside on the premises, rental payments will not reduce the employee’s salary, provided that he or she is treated the same as other individuals for the purposes of negotiations.²⁰

F. Student Workers²¹

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

¹⁶ DOL’s position with respect to the payment of an annual salary earned in a shorter period can be found in Chapter 22 of WHD’s *Field Operations Handbook* (FOH) at 22g10. See note 4 for a link to Chapter 22 of the FOH.

¹⁷ DOL’s position with respect to combining the payment of salary from joint employers can be found in Chapter 22 of the FOH at 22g22. See note 4 for a link to Chapter 22 of the FOH.

¹⁸ 29 C.F.R. § 541.600(a). See note 4 for a link to the regulations.

¹⁹ DOL’s position with respect to salary basis and board, lodging and other facilities can be found in Chapter 22 of the FOH at 22g09. See note 4 for a link to Chapter 22 of the FOH.

²⁰ See WHD Opinion Letter CCH-WH ¶30,951 (Jan. 23, 1969).

²¹ 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>

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.²² 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.²³ 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 test²⁴, or (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 or tracking time, paying overtime for hours worked 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.

A. Factors Considered by Employers in Increasing Salary

One of the issues facing employers is the fact that the new salary level often cuts directly through a classification — some employees have salaries in excess of the new level, while others fall below. This can be due to many reasons, including seniority and experience.

Higher levels of education, skill, experience, responsibility and seniority should (and currently do) correspond to increased compensation. Employers thus attempt to avoid actual or perceived disparity between job titles and comparative compensation. Employees with "higher" positions, more job responsibility and better qualifications than others expect to be paid accordingly. If an employer fails to do so, the salary compression will negatively impact employee morale in the workplace.

For example, assume that a group of currently-exempt employees earn \$700 per week and their supervisors earn \$1,000 per week. The decision to raise the employees' salary to \$913 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.

²² 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.

²³ See WHD Opinion Letter 1994 WL 1004845 (June 28, 1994).

²⁴ Assuming that the employee qualifies in an exemption that requires a salary.

These increased costs have a direct and complicated impact on the determination on whether to reclassify a position to non-exempt as a result of the increased minimum salary level. There are real administrative expenses associated with these decisions. The decision on classification cannot be made in a vacuum; it must consider the impact on other positions from a salary compression standpoint.

Against these very real costs associated with increasing salary levels — for affected employees, for regional cost-of-living differences and to address salary compression — employers must weigh the consequences of reclassifying affected employees to non-exempt status.

B. Factors Considered by Employers in Converting to Non-Exempt Status

Converting an employee to non-exempt status means that the employer must treat the employee as non-exempt for all purposes. As discussed below, this means accurately tracking time, ensuring compliance with the minimum wage and overtime provisions and properly computing the regular rate of pay for overtime.

With respect to tracking time, many of the difficulties in doing so are addressed in the “Best Practices for Ensuring Minimum Wage and Overtime Compliance for Non-Exempt Employees” section below. As can be seen from that discussion, although the hours of work regulations provide fairly relevant guidance in determining what parts of a “normal” workday are compensable, they are less helpful in addressing the modern workplace. Guidance from DOL on these issues has been non-existent to date, creating significant risks for employers. Faced with this uncertainty, many employers have decided that non-exempt employees would not have remote access or work-related mobile devices. Many employers will make the same decision with respect to newly-reclassified workers. Many others will not.

It is also the employer’s obligation to keep adequate records of employees’ time. Although many employers will simply allow newly non-exempt employees to record their own daily hours, many employers will require their employees to thoroughly track time, not simply to write down “8” at the end of each workday. Small amounts of time, repeated daily, by hundreds of employees add up quickly and result in massive exposure for employers.

In addition to the hours worked issues, there are significant issues related to regular rate of pay. Many times, when employees are converted to non-exempt status, they find that they have lost their ability to earn incentive pay. Under the existing rules for calculating overtime rates for hourly workers, many incentive payments must be included in a non-exempt employee’s “regular rate” (i.e., the basis for overtime rate) of pay. Faced with the difficult calculation (and recalculation) of these overtime rates — sometimes looking back over every pay period in a year — employers often simply forgo these types of incentive payments to non-exempt employees rather than attempt to perform the required calculations.

In determining whether to convert an employee to non-exempt status, employers must also consider the impact on morale. Employees often view reclassifications to non-exempt status as “demotions.” Particularly where other employees within the same organization will continue to

be exempt,²⁵ it is easy to see why. The non-exempt employee will now need to account for his or her time in a way he or she has not had to previously. In addition, because of the increased attention that must be paid to the hours worked by the non-exempt employee, he or she is likely to be at a competitive disadvantage to the exempt employee in the same role. Many training opportunities will now become compensable time under the FLSA and where those opportunities would put the non-exempt employee into an overtime situation, his or her access to those opportunities may be limited; the same is not so for his or her exempt colleague.

Similarly, the non-exempt employee may be limited in his or her ability to “get it done” now that he or she must record and account for all hours worked. These types of intangibles — being known as someone who “gets the job done” — are often considered in whether an employee receives a promotion, bonus or training opportunity. In addition, the employer may now need to find some other way to get the work done — for example, by reallocating the work to other employees, including, potentially, part-time or temporary employees.

C. Options for Compliant Pay

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 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 reclassify 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 going forward. There are several different options, including hourly, salary plus overtime and fluctuating workweek.²⁶

1) Hourly

Colleges and universities can simply convert a previously exempt employee to hourly status. 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.

- Employee A currently earns \$31,200 per year and generally works five hours of overtime. University X divides current weekly salary (\$600) by 40 to arrive at an hourly rate of \$15.00 per hour. If Employee A actually works five hours of overtime, his compensation for the week will be \$712.50 (\$600 straight time + \$112.50 overtime).

²⁵ Nothing in the FLSA prohibits classifying some employees as exempt and other employees performing the same tasks as non-exempt. Employers should take care, however, to ensure compliance with other laws that may come into play when similar employees are treated differently for compensation purposes.

²⁶ Not every method is permissible in every state. Employers should discuss permissible options with qualified counsel prior to implementing any method other than hourly.

- Employee B currently earns \$31,200 per year and generally works five hours of overtime. University Y divides current weekly salary (\$600) by 47.5 ($40 + (1.5 \times 5)$) to arrive at an hourly rate of \$12.63 per hour. If Employee B actually works five hours of overtime, her compensation for the week will be \$599.93 (\$505.20 straight time + \$94.73 overtime).

When paying by the hour, employers are under no obligation to “guarantee” an employee pay for those hours under 40. Thus, if Employee A or Employee B works less than 40 hours, he or she would be paid the hourly rate multiplied by the number of hours worked.

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. In the examples above, Employee A could receive a guaranteed salary of \$600 a week even when he does not work 40 hours; overtime would be calculated in the same manner as described above. Similarly, Employee B could receive a guaranteed salary of \$505.20.

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.

- Employee C currently earns \$40,040. College Z decides that Employee C will be reclassified as non-exempt and will continue to receive a straight-time salary of \$770 per week for hours worked up to 50. Employee C would receive \$770 per week, plus the half-time rate of \$7.70 per hour ($\$770 \div 50 \div 2$) for hours worked between 40 and 50, plus \$23.10 ($\$770 \div 50 \times 1.5$) for all hours worked over 50.
- Of course, College Z could also decide to reduce Employee C’s salary such that working a 50-hour week would result in her current salary level. In this example, the new salary would be \$700 ($\$770 \div 55 \times 50$) for hours worked up to 50. Employee C would receive \$700 per week, plus the half-time rate of \$7.00 per hour ($\$700 \div 50 \div 2$) for hours worked between 40 and 50, plus \$21.00 ($\$700 \div 50 \times 1.5$) for all hours worked over 50.

When paying in this manner, it is important to remember that the salary **cannot** be a guarantee for straight-time and overtime hours. Thus, even though the second example is intended to compensate the employee \$770 per week for 50 hours, if the employee works more than 40 hours, but less than 50 hours, 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 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 the employee 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.

- Employee D is paid a salary of \$600 a week with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. During the course of four weeks, Employee D works 40, 37.5, 50 and 48 hours.
- The regular hourly rate of pay in each of these weeks is \$15.00, \$16.00, \$12.00 and \$12.50, respectively. Because the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid \$600. For the second week, \$600.00. For the third week, \$660 (\$600 + 10 hours at \$6.00). For the fourth week, \$650 (\$600 + 8 hours at \$6.25).

D. Communicating and Implementing the Decision to Reclassify

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, and not the employee's value to the organization.

Employers will need to explain the new method of pay. For those employers 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 for 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, institutions may find that budgetary constraints require certain positions to be classified as non-exempt. 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 employers should take special care to ensure minimum wage and overtime compliance.

A. 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.

B. 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-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 toward hours worked.²⁷

C. 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.

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.

D. 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.

²⁷ 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 9:00 a.m. to 5:00 p.m. Monday-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.

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.

E. 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.”²⁸ 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 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, can decide not to allow the hours to be worked or can 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.

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

CUPA-HR
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Knoxville, TN 37932
877-287-2474
www.cupahr.org

²⁸ See 29 C.F.R. § 785.13.