Wage and hour lawsuits are at an all-time high and continue to be the biggest source of liability for employers. According to data from the Federal Judicial Center, the number of wage and hour cases filed in federal courts represent a 438 percent increase over the last 15 years. And with the impending changes to the Fair Labor Standards Act (FLSA)’s overtime regulations, this number will almost certainly continue to rise. Here’s a quick recap of the proposed changes: The minimum threshold an employee must be paid to qualify as managerial, professional or administrative employees exempt from overtime requirements would change from the current $455 a week ($23,660 annually) to $970 a week ($50,400 annually). DOL has proposed automatically escalating this minimum salary on an annual basis by attaching it to the 40th percentile of weekly earnings for all full-time salaried workers or by indexing the $970/week number to the Consumer Price Index. Once the final rule goes into effect, employers will have 60 days to comply. Given the stakes, the need to minimize FLSA compliance risks and manage associated challenges has never been greater.
Regardless of the form it takes, when the new overtime rule goes into effect, colleges and universities will be faced with mountains of administrative work in order to reassess and reclassify potentially hundreds of positions. To reduce the risk of legal challenges and associated costs, it is critical that institutions be proactive when addressing issues related to FLSA.

Areas where FLSA mistakes are typically found include:

- **Position misclassification.** Does the position meet the exemption criteria? Will the original designation still be valid when the new rule takes effect? Data from CUPA-HR’s 2015-16 Professionals in Higher Education Salary Survey show that individuals in nearly 50 common professional-level positions on campus may see their status change from exempt to non-exempt if the overtime rule goes into effect in its current form. Because of the nature of the work they perform, of particular concern for colleges and universities is the classification of admissions counselors, resident hall managers, postdoctoral researchers and coaches — the vast majority of whom are currently classified as exempt but may need to be reclassified if the rule takes effect as is.

- **Employees working off the clock.** Remote access to e-mail and networks increases the likelihood that an employee may work outside of his or her normal working hours. Should you be tracking this work in all instances?

- **Volunteers, interns and independent contractors.** To be covered by the FLSA provisions, a worker must be an “employee.” Many employers get tripped up on the independent contractor vs. employee designation and open themselves up to scrutiny in this area.

In addition to the risks associated with FLSA compliance, there are a multitude of challenges that can complicate policy enforcement. Among them:

- **Federal and state legislation.** Laws related to compensation are complex, vary from state to state and frequently change. And many exemption criteria are ambiguous. However, the onus is on employers to be in compliance with all relevant federal, state and local wage and hour regulations — you can’t claim ignorance.

- **Technology and telework.** Many employees now have 24/7 connectivity, and mobile devices put access in the palm of their hands. Additionally, the number of employees who work remotely is on the upswing. Thus, it is becoming increasingly difficult for employers to track precisely how much time employees spend working. Does checking e-mail at 8 p.m. count as compensable time for non-exempt employees? According to DOL, yes. Overtime work that is not requested but is “permitted” is viewed as compensable, especially when employees have been given the means and the ability to connect remotely. But in such instances, how can an employer know exactly when an employee starts and stops working?

- **Lack of knowledge.** It’s HR’s job to be in the know around the laws and regulations related to wage and hour issues, but what about managers and supervisors across the various departments and units on campus? What about employees

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**FLSA Resources to Help You Stay in the Know**

**Webinar** – To learn how several colleges and universities are preparing for the upcoming changes to the overtime regulations, see CUPA-HR’s free, on-demand webinar “FLSA Overtime: How, When and Why to Prepare.”

[www.cupahr.org/events/webinars.aspx](http://www.cupahr.org/events/webinars.aspx)

**FLSA Website** – For all the latest news and resources related to the overtime regulations and CUPA-HR’s advocacy efforts around the issue, keep an eye on CUPA-HR’s FLSA web page.

[www.cupahr.org/advocacy/flsa.aspx](http://www.cupahr.org/advocacy/flsa.aspx)

**FLSA Knowledge Center Toolkit** – This toolkit includes how-tos, readings, policies, presentations and more.

[www.cupahr.org/knowledgecenter/flsa.aspx](http://www.cupahr.org/knowledgecenter/flsa.aspx)

**Partnership to Protect Workplace Opportunity** – A grassroots coalition of more than 70 associations, businesses and other stakeholders dedicated to advocating the interests of its members in the debate on the overtime regulations.

[protectingopportunity.org](http://protectingopportunity.org)

Keep an eye on the CUPA-HR website (www.cupahr.org), as we’ll be offering several just-in-time resources designed to provide information, offer guidance and help with compliance efforts once the new rule takes effect.
With potentially hundreds of positions likely to be affected if DOL’s proposed overtime rule becomes reality, you may be wondering where or how to even begin evaluating positions on your campus. Following are some considerations for evaluating position classifications to ensure compliance.

1) Review positions that are below the proposed salary threshold ($50,440) and determine which ones, if any, your institution might want to adjust to the new threshold, so that those positions can remain exempt. This exercise would be particularly useful for positions that are already fairly close (within a few thousand dollars) to the new threshold.

2) If your institution chooses not to move these employees to the new threshold, you’ll need to convert them to an hourly equivalent (typically the annualized salary divided by 2080) and make them non-exempt. If an employee never works above 40 hours a week, this approach will not cost the institution any additional money. Work that exceeds 40 hours a week, however, would need to be compensated at time-and-a-half. The institution may also want to calculate the resulting overtime cost if all of the “switched to non-exempt” employees were to work 41 hours every week, rather than 40 (or 10 times that if the employees were to regularly work 50 hours rather than 40).

3) Once it is decided which positions will be raised to the new threshold, you then need to consider the collateral impact on internal salary equity against similarly situated positions and against positions higher up the same “job family tree.”

4) It is usually important to maintain a salary differential between positions that are adjusted to the new threshold and those currently at or near the threshold, so institutions would need to consider what salary adjustments might be needed.

An example: Development Officer I is currently paid $42,000 and Development Officer II (higher-level development officer) is currently paid $51,000. The institution decides that it is important for the Development Officer I to be an exempt position, so the salary is raised to $50,440 (the new threshold). However, this change will also require a salary adjustment for the Development Officer II to acknowledge the different expectations, knowledge and experience for the higher-level position. Simply moving the Development Officer I to the threshold would solve the immediate compliance challenge, but it would also create a significant internal equity challenge (salary compression).

Estimating the ripple effect of potential costs of addressing salary compression is quite complex. Using the same example, one way an institution could calculate an estimate would be to make subsequent adjustments of diminishing proportion (e.g., by half) at each higher position level (see table below).
themselves? They likely don’t know the ins and outs of the law, making it much more likely that they may inadvertently compromise compliance.

Tips for Remaining Compliant
There are a number of best practices employers can take to minimize FLSA risks and associated challenges. With the pending legislative changes and shifting dynamic of the workforce and workplace, now is the perfect time to audit processes and increase compliance efforts.

In a recent CUPA-HR webinar, Sibson Consulting offered several tips on what colleges and universities can do now to prepare for the changes to the overtime regulations, which could go into effect as early as mid-May.

• Identify employees that earn salaries in the $23,660 to $50,440 range and conduct an analysis of costs to bring employees to the minimum salary threshold, overtime hours actually being worked, wage compression issues and benefit cost changes.

• Review organizational structure and work with functional leaders to discuss how to modify and manage structure, jobs, staffing levels and career advancement/growth opportunities given the changes.

• Examine your current compensation structure to determine the effect of the reclassification of employees.

• Review all relevant policies (compensation and benefits, timekeeping, classification process, etc.) and make revisions where needed.

• Begin to develop training strategies to ensure compliance.

• Assess time and attendance processes, work flows and systems and develop plans to revise processes to support effective roll-out and administration of changes.

• Assess and monitor campus climate and the engagement of affected employees.

With the pending legislative changes and shifting dynamic of the workforce and workplace, now is the perfect time to audit processes and increase compliance efforts around the FLSA.

No small feat, to be sure. If there’s a silver lining, it’s that DOL favors employers who can show a good-faith effort to comply with the law. Your best bet to ensure that good-faith effort? Make sure policies are communicated, distributed, reiterated and strictly enforced; ensure the proper and swift reimbursement for any inadvertent compensation-related mistakes; make sure leaders understand their role in ensuring that compliance is part of the institutional culture; and make sure managers, supervisors and employees are aware of their responsibilities in regards to compliance.

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