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Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees

In 2014, President Obama directed the Department of Labor to update and modernize the regulations governing the exemption of executive, administrative, and professional (“EAP”) employees from the minimum wage and overtime pay protections of the Fair Labor Standards Act (“FLSA” or “Act”). The Department published a notice of proposed rulemaking on July 6, 2015, and received more than 270,000 comments. On May 18, 2016, the Department announced that it will publish a Final Rule to update the regulations. The full text of the Final Rule will be available at the Federal Register Site.

Although the FLSA ensures minimum wage and overtime pay protections for most employees covered by the Act, some workers, including bona fide EAP employees, are exempt from those protections. Since 1940, the Department’s regulations have generally required each of three tests to be met for the FLSA’s EAP exemption to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (“salary basis test”); (2) the amount of salary paid must meet a minimum specified amount (“salary level test”); and (3) the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (“duties test”). The Department last updated these regulations in 2004, when it set the weekly salary level at $455 ($23,660 annually) and made other changes to the regulations, including collapsing the short and long duties tests into a single standard duties test and introducing a new exemption for highly compensated employees.

This Final Rule updates the salary level required for exemption to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of overtime-protected employees, thus making the EAP exemption easier for employers and workers to understand and apply. Without intervening action by their employers, it extends the right to overtime pay to an estimated 4.2 million workers who are currently exempt. It also strengthens existing overtime protections for 5.7 million additional white collar salaried workers and 3.2 million salaried blue collar workers whose entitlement to overtime pay will no longer rely on the application of the duties test.

* Key Provisions of the Final Rule *

The Final Rule focuses primarily on updating the salary and compensation levels needed for EAP workers to be exempt. Specifically, the Final Rule:

1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South, which is $913 per week or $47,476 annually for a full-year worker;

2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is $134,004; and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule makes no changes to the duties tests.

Effective Date

The effective date of the Final Rule is December 1, 2016. The initial increases to the standard salary level (from $455 to $913 per week) and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on that date. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020.

Standard Salary Level

The Final Rule sets the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, currently the South ($913 per week, equivalent to $47,476 per year for a full-year worker).

The standard salary level set in this Final Rule addresses our conclusion that the salary level set in 2004 was too low given the Department’s elimination of the more rigorous long duties test. For many decades the long duties test—which limited the amount of time an exempt employee could spend on nonexempt duties and was paired with a lower salary level—existed in tandem with a short duties test—which did not contain a specific limit on the amount of nonexempt work and was paired with a salary level that was approximately 130 to 180 percent of the long test salary level. In 2004, the long and short duties tests were eliminated and the new standard duties test was created based on the short duties test and was paired with a salary test based on the long test.

The effect of the 2004 Final Rule’s pairing of a standard duties test based on the short duties test (for higher paid employees) with a salary test based on the long test (for lower paid employees) was to exempt from overtime many lower paid workers who performed few EAP duties and whose work was otherwise indistinguishable from their overtime-eligible colleagues. This has resulted in the inappropriate classification of employees as EAP exempt who pass the standard duties test but would have failed the long duties test.

The Final Rule’s salary level represents the most appropriate line of demarcation between overtime-protected employees and employees who may be EAP exempt and works appropriately with the current duties test, which does not limit non-EAP work.

The Department also is updating the special salary level for employees in American Samoa (to $767 per week) and the special “base rate” for employees in the motion picture industry (to $1,397 per week).

HCE Total Annual Compensation Requirement

The Final Rule sets the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally ($134,004 annually). To be exempt as an HCE, an employee must also receive at least the new standard salary amount of $913 per week on a salary or fee basis and pass a minimal duties test. The HCE annual compensation level set in this Final Rule brings this threshold more in line with the level established in 2004 and will avoid the unintended exemption of large numbers of employees in high-wage areas who are clearly not performing EAP duties.
Automatic Updating

The Final Rule includes a mechanism to automatically update the standard salary level requirement every three years to ensure that it remains a meaningful test for distinguishing between overtime-protected white collar workers and bona fide EAP workers who may not be entitled to overtime pay and to provide predictability and more graduated salary changes for employers. Specifically, the standard salary level will be updated to maintain a threshold equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. Similarly, the Final Rule includes a mechanism for automatically updating the HCE compensation level to maintain the threshold equal to the 90th percentile of annual earnings of full-time salaried workers nationally. The Final Rule will also automatically update the special salary level test for employees in American Samoa and the base rate test for motion picture industry employees. The Department will publish all updated rates in the Federal Register at least 150 days before their effective date, and also post them on the Wage and Hour Division’s website.

Regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees. Experience has shown that these earning thresholds are only effective measures of exempt status if they are kept up to date.

Inclusion of Nondiscretionary Bonuses and Incentive Payments

For the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, the Final Rule requires such payments to be paid on a quarterly or more frequent basis and permits the employer to make a “catch-up” payment. The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the standard salary level is capped at 10 percent of the required salary amount.

The Final Rule continues the requirement that HCEs must receive at least the full standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments, and continues to permit nondiscretionary bonuses and incentive payments (including commissions) to count toward the total annual compensation requirement. The Department concludes that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount for HCEs is not appropriate because employers are already permitted to fulfill almost two-thirds of the total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation.

Duties Tests

The Final Rule is not changing any of the existing job duty requirements to qualify for exemption. The Department expects that the standard salary level set in this Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt. As a result of the change to the salary level, the number of workers for whom employers must apply the duties test to determine exempt status is reduced, thus simplifying the exemption. Both the standard duties test and the HCE duties test remain unchanged.
For additional information, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
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Washington, DC 20210
Overtime Final Rule and Higher Education

**Higher Education Sector:** Higher education is a complex and important sector in our economy and civil society. It includes a large variety of institutions: public and private schools; community colleges, four-year colleges, and large research institutions; and small campuses of only a few hundred students and faculty and large campuses of thousands of people.

**Overtime Final Rule:** The Department of Labor’s final overtime rule updates the salary level required for the executive, administrative, and professional (“white collar”) exemption to ensure that the Fair Labor Standards Act’s (FLSA) intended overtime protections are fully implemented, and it provides greater clarity for workers and employers, including for higher education institutions. The final rule will also lead to better work-life balance for many workers, and it can benefit employers by increasing productivity and reducing turnover.

The final rule updates the salary threshold under which most white collar workers are entitled to overtime compensation to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census region, currently the South. The final rule will raise the salary threshold from $455 a week ($23,660 for a full-year worker) to $913 a week ($47,476 for a full-year worker) effective December 1, 2016.

**FLSA Includes Several Provisions that Limit Its Impact for Higher Ed:** Although employees at higher education institutions are generally covered by the FLSA’s minimum wage and overtime provisions, several provisions apply to many personnel at these institutions that make them ineligible for overtime and unaffected by this rule, regardless of whether they earn above the new salary threshold or not:

- **Bona fide teachers:** Teachers are not subject to the salary level requirement for the white collar exemption. Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing. Teachers include professors, adjunct instructors, and teachers of skilled and semi-skilled trades and occupations.
- **Coaches:** Athletic coaches and assistant coaches may fall under the 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 instructing athletes but also spend some time recruiting or doing manual labor and still be considered ineligible for overtime.
- **Graduate and undergraduate students:** Generally, the Department views graduate and undergraduate students who are engaged in research under a faculty member’s supervision in the course of obtaining a degree to be in an educational relationship and not an employment relationship with the school or with a grantor. As such, the Department will not assert such workers are entitled to overtime. Graduate students whose primary duty is teaching or serving as a teaching assistant fall under the FLSA’s teaching exemption. Students who are participants in a bona fide educational program and who serve as resident advisors in exchange for reduced room and board charges or tuition credit similarly are not considered to be in an employment relationship with the institution.
- **Academic administrative personnel:** The administrative personnel that 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 are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. These employees are not entitled to overtime compensation if they are paid at least as much as the entrance salary for teachers at their institution.

**Public Higher Education Institutions May Utilize Provisions for State and Local Employees:** Employees of public higher education institutions may also be public sector employees for whom specific provisions
in the FLSA will further limit the impact of the final rule. Specifically, public institutions may be able to use compensatory ("comp") time as an option to satisfy their obligation to provide overtime compensation.

**Comp time:** Pursuant to an agreement with employees or their representatives, state or local government agencies, including higher education institutions whose employees are treated as state employees under state law, may provide their employees with comp time instead of cash payment for overtime hours. Any comp time arrangement must be established pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding, any other agreement between the public agency and representatives of overtime-protected employees, or an agreement or understanding arrived at between the employer and employee before the performance of the work. This agreement may be evidenced by a notice to the employee that comp time will be given in lieu of overtime pay (for example, providing the employee a copy of the personnel regulations). The comp time must be provided at a rate of one-and-one-half hours for each overtime hour worked, instead of cash overtime pay. For example, for most state government employees, if they work 44 hours in one workweek (4 hours of overtime), they would be entitled to 6 hours (1.5 times 4) of comp time. When used, the comp time is paid at the regular rate of pay.

Most state and local government employees may accrue up to 240 hours of comp time. Employees engaged in seasonal activities (such as admissions counselors) may accrue up to 480 hours of comp time. An employee must be permitted to use comp time on the date requested unless doing so would “unduly disrupt” the operations of the agency.

**Higher Ed Impact Is Limited by Other Rules and Exemptions:** Many employees of higher-education institutions will not be affected by the rule, even if they do not qualify for the special rules for teachers:

- **Hourly workers:** The new threshold has no impact on the pay of workers paid hourly. Generally, hourly workers are entitled to overtime regardless of how much they make if they work more than 40 hours—nothing in the new rule changes that.

- **Workers with regular workweeks of 40 or fewer hours:** To the extent that many salaried white-collar employees at higher-education institutions have office jobs where they work no more than 40 hours, the changes to the overtime rules will have no effect on their pay.

- **Workers who fail the duties test:** Salaried workers who do not primarily perform executive, administrative, or professional duties are not eligible for the white collar overtime exemption and therefore are not affected by the final rule. Those employees already should be getting paid overtime for any hours they work over 40 in one week.

- **Highly compensated workers:** White collar workers who fail the standard duties test but are “highly compensated”—earn more than $134,004 in a year—are almost all ineligible for overtime under the highly compensated employee exemption, which has a minimal duties test. This exemption would cover some high-level managers at institutions of higher education. (You can see more information on HCE duties in WHD Fact Sheet #17H.)

**A Limited Number of Higher Education Workers Will Be Affected:** The overtime rule will impact limited groups of workers at higher-education institutions, including:

- **Postdoctoral researchers:**
  - **Sciences:** Postdoctoral researchers in the sciences are not covered by the teaching exemption. These employees are generally considered professional employees and are subject to the salary threshold for exemption from overtime. DOL has been working closely with NIH and NSF regarding their mutual interest in this area.
  - **Humanities:** Many postdoctoral researchers in the humanities also teach. To the extent that they have a primary duty of teaching, they will be subject to the teaching exemption and not entitled to overtime compensation. If they do not teach, however, and earn less than the new threshold, they will be eligible for overtime.

- **Non-academic administrative employees:** For administrative employees who do not meet the special provision for academic administrative employees, such as admission counselors and recruiters, they will be eligible for overtime if they
earn below the salary level set in the final rule and they work more than 40 hours in a week.

• Other salaried workers: To the extent that higher-education institutions employ workers whose duties are not unique to the education setting—like managers in food service or supervisors of security guards—they will be covered by the final rule, just like their counterparts at other kinds of institutions and businesses, unless another exemption applies.

**Higher Education Employers Have Discretion to Choose Between Several Options**

The Department does not dictate what option employers should use to comply with the revised regulations. In fact, many options are available to all employers for complying with the new salary threshold. These options include:

• **Raise salaries**: For workers whose salaries are close to the new threshold and who meet the duties test, employers may choose to raise these workers’ salaries to meet the new threshold and maintain their exempt status.

• **Evaluate and realign employee workload**: Employers can limit the need for employees to work overtime by ensuring that workloads are distributed to minimize overtime and that staffing levels are appropriate for the workload.

• **Pay overtime above a salary**: Employers also can continue to pay newly overtime-eligible employees a salary basis and pay overtime for hours in excess of 40 per week. The law does not require that newly overtime-eligible workers be paid on an hourly basis. This approach works for employees who usually work 40 hours or fewer, but have seasonal “spikes” or periods of activity when overtime hours are required, for which employers can plan and budget the extra pay during those periods.

o For employees who work a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule.

o For an employee with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

• **For public schools, utilize comp time**: Public sector employers—unlike private sector employers—can provide comp time at time and one-half rather than cash overtime payments, in appropriate circumstances.

• **Adjust employees’ base pay and pay overtime**: Employers can adjust the amount of an employee’s earnings to reallocate it between regular wages and overtime pay. This method works for employees who work a relatively small amount of predictable overtime. The revised pay may be on a salaried or hourly basis (there is no requirement to convert workers to hourly pay status), but it must include payment of overtime when the employee works more than 40 hours in a week.

For more detail on the FLSA and higher education, please see [here](#).
Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act

May 18, 2016

Introduction

Higher education is an important and diverse sector in our economy and civil society. It includes a wide variety of public and private institutions: community colleges, four-year colleges, and large research institutions—ranging from small schools to campuses that are virtual cities of tens of thousands of people. The Department of Labor (Department) recognizes the important contribution that higher education makes to this country and society.

The Department of Labor’s Final Rule on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act (FLSA) (the “Overtime Rule” or “Final Rule”) will strengthen overtime protections and provide greater clarity for both workers and employers alike across sectors, including higher education. The Final Rule updates the salary level required for the executive, administrative, and professional (“white collar”) exemptions to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of overtime-protected employees. The Department updated the salary level threshold above which certain “white collar” workers may be exempt from overtime to equal the 40th percentile of earnings of full-time salaried workers from the lowest wage Census Region.

Once effective, the rule will raise the salary level from its previous amount of $455 per week (the equivalent of $23,660 a year) to $913 per week (the equivalent of $47,476 per year) in 2016. The rule will also raise the compensation level for highly compensated employees subject to a more minimal duties test from its previous amount of $100,000 to $134,004 annually. The Final Rule establishes a mechanism for automatically updating the salary level (and compensation level for highly compensated employees) every three years, with the first update to take place in 2020. Salaried white collar employees paid below the updated salary level are generally entitled to overtime pay; such employees paid at or above the salary level may be exempt from overtime pay if they primarily perform certain duties. These changes take effect on December 1, 2016. The Final Rule does not include any changes to the duties tests, which also affect the determination of who is exempt from overtime.

As with most employees, the minimum wage and overtime provisions of the FLSA generally apply to employees at higher education institutions. Regardless of whether they are operated for profit or not for profit, institutions of higher education are subject to the provisions of the FLSA. However, higher education employers, like other employers, are not required to pay minimum wages and overtime compensation to executive,
administrative, and professional employees who satisfy the salary level and other requirements for one of the white collar exemptions. In addition, certain provisions of the FLSA regulations apply to many white collar employees at higher education institutions that may make them exempt from overtime compensation, even though they earn below the new salary level. These include special provisions for employees whose primary duty is teaching and special salary level rules for academic administrative personnel. Finally, public universities or colleges that qualify as a “public agency” under the FLSA may compensate overtime-eligible employees through the use of compensatory time off (or “comp time”) in lieu of cash overtime premiums.

The Department is issuing this guidance on the application of the white collar exemptions in the higher education context at the same time as publication of the Final Rule in order to help institutions of higher education evaluate current practices and transition to the requirements of the Final Rule. Specifically, in view of the existing regulatory provisions specific to higher education and the changes introduced by the Final Rule to the salary level in particular, the Department is providing this guidance to assist these institutions in preparing for implementation of the Final Rule. Part I of this guidance provides a brief background on the FLSA’s white collar exemptions and how they apply generally. Part II of the guidance addresses categories of job occupations in the higher education sector which may fall under the white collar exemptions, and discusses other employees in higher education who might be affected by the Final Rule. Part III details some of the options employers may exercise in determining how best for their institution to ensure that they comply with the Final Rule. This guidance, however, is not a comprehensive guide to coverage and compliance under the FLSA. For additional, detailed guidance documents, please visit the Wage and Hour Division’s website at dol.gov/whd.

I. Background on the White Collar Exemptions under the FLSA

The FLSA generally requires that employees be paid at least the federal minimum wage for all hours worked and overtime pay at a rate of at least one and one-half times their regular rate of pay for any hours they work beyond 40 hours in a workweek. As a general matter, coverage under the FLSA is broadly construed to ensure that the law provides employees with wage and hour protections, as Congress intended. The FLSA exempts from minimum wage and overtime requirements employees who are bona fide executive, administrative, or professional employees. See 29 U.S.C. 213(a)(1); 29 CFR Part 541. These exemptions
Job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not indicate that an employee is exempt from overtime and minimum wage protections.

are sometimes referred to collectively as the white collar exemptions.

As discussed below, establishing that a white collar employee is exempt from the FLSA’s overtime requirements involves assessing how the employee is paid, how much the employee earns, and whether the employee primarily performs the kind of job duties that Congress meant to exclude from the law’s overtime protections. Job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not indicate that an employee is exempt from overtime and minimum wage protections. Rather, in order for a white collar exemption to apply, an employee’s specific job duties and earnings must meet all of the applicable requirements provided in the regulations. To be clear, not all salaried white collar employees qualify for the white collar exemptions; in fact, many salaried white collar employees are entitled to minimum wage and overtime.

A. Three Tests Must Be Met in Order to Claim a White Collar Exemption

The regulations implementing the white collar exemptions generally require individuals to satisfy three criteria to be exempt from overtime requirements:

• First, they must be paid on a salary basis not subject to reduction based on quality or quantity of work (“salary basis test”) rather than, for example, on an hourly basis;
• Second, their salary must meet a minimum salary level, which after the effective date of the Final Rule will be $913 per week, which is equivalent to $47,476 annually for a full-year worker (“salary level test”); and
• Third, the employee’s primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees (the “standard duties test”).

The salary level is not a minimum wage requirement, and no employer is required to pay an employee the salary specified in the regulations, unless the employer is claiming an applicable white collar exemption. Administrative and professional employees may also be paid on a “fee basis.” See 29 CFR 541.605. For additional information about payment on a fee basis, see WHD Fact Sheet 17G. Note that the discussion in this guidance focuses on the standard exemption. For additional information on the highly compensated employee exemption, which pairs a more relaxed duties test with a higher total earnings level ($134,004 per year, beginning on December 1, 2016), see WHD Fact Sheet 17H.

B. Primary Job Duties for Exempt Executive, Administrative, and Professional Employees

Under the standard duties test, an employee’s “primary duty” must be that of an exempt executive, administrative, or professional employee. Primary duty means the principal, main, major, or most important duty that the employee performs. See 29 CFR 541.700. Each exemption uses a different test for determining primary duty under the white collar exemptions.

To qualify for the executive exemption, an employee must have the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. Additionally, the employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent (for example, one full-time and two half-time employees are equivalent to two full-time employees), and have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.
The **salary level is not a minimum wage requirement**, and no employer is required to pay an employee the salary specified in the regulations, unless the employer is claiming an applicable white collar exemption.

To qualify for the administrative exemption, the employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance directly related to management or general business operations.

Regarding the professional exemption, there are several different kinds of exempt “professional” employees. These include “learned professionals,” “creative professionals,” teachers, and employees practicing law or medicine. Learned professionals must primarily perform work that requires advanced knowledge in a field of science or learning.

For additional details about the white collar exemptions generally, see [WHD Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (FLSA)](https://www.dol.gov/whd/fact-sheets). Determining the primary duty of an employee requires assessment of multiple factors. As discussed in the Department’s longstanding regulations, the amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee, and employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Of course, all relevant factors must also be considered, with a major emphasis on the character of the employee’s job as a whole, rather than strictly the amount of time spent performing particular duties. The Final Rule made no changes to the standard duties test.

### Basic Requirements for Claiming a White Collar Exemption under the Standard Duties Test

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<td>Salary Basis Test</td>
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<td>• Employee must be paid on a salary or fee basis</td>
<td>• Employee must be paid on a salary or fee basis</td>
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<td>Standard Salary Level Test</td>
<td>• $913 per week ($47,476 per year for a full-year worker)</td>
<td>• $913 per week ($47,476 per year for a full-year worker)</td>
<td>• $913 per week ($47,476 per year for a full-year worker)</td>
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<tr>
<td>Standard Duties Test</td>
<td>• The employee’s “primary duty” must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well). • Additional requirements provided in 29 CFR 541 Subpart B</td>
<td>• The employee’s “primary duty” must include the exercise of discretion and independent judgment with respect to matters of significance. • Additional requirements provided in 29 CFR 541 Subpart C</td>
<td>• The employee’s “primary duty” must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. • Additional requirements provided in 29 CFR 541 Subpart D</td>
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II. Specific Considerations for Higher Education Institutions in Implementing the Final Rule

Because of special regulations that apply to certain personnel at higher education institutions, many white collar employees at higher education institutions are not subject to the salary level test or are subject to a different salary level test and therefore will not be affected by the new salary level. This Part addresses each of the white collar provisions as they apply in the higher education sector, helping to identify which employees may be impacted by the Final Rule and what potential adjustments employers may make.

Existing (and unchanged) regulatory provisions specific to higher education mean that the Final Rule may have limited impact on teachers and academic administrators. The salary level and salary basis requirements for the white collar exemption do not apply to bona fide teachers. See 29 CFR 541.303(d), .600(e). Additionally, academic administrative personnel that 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, are subject to a special alternative salary level that does not apply to white collar employees outside of higher education. These academic administrative personnel are exempt from the FLSA's minimum wage and overtime requirements if they are paid at least the entrance salary for teachers at their institution. See 29 CFR 541.600(c).

To the extent that higher education institutions employ workers whose duties are not unique to the education setting, like managers in food service or at the bookstore, those employees will be covered by the new salary level, just like their counterparts at other kinds of institutions and businesses.

A. Professional Exemption

i. In General

There are several different kinds of exempt “professional” employees. These include “learned professionals,” “creative professionals,” teachers, and employees practicing law or medicine. In higher education, employees eligible for the professional exemption often are either learned professionals (such as researchers), or teachers. The new salary level applies to “learned professionals” and “creative professionals,” but it does not apply to teachers (or to
employees practicing law or medicine). To qualify for the professional employee exemption as a “learned professional,” an employee must:

1. Receive compensation on a salary basis of not less than $913 per week (the equivalent of $47,476 a year); and
2. Primarily perform work requiring advanced knowledge in a field of science or learning, such as various physical, chemical, and biological sciences, theology, and architecture. The advanced knowledge is usually obtained while earning a degree. See 29 CFR 541.301.

In higher education, examples of non-teacher learned professionals that generally may meet the duties requirements for professional exemption include certified public accountants, certified athletic trainers, librarians, and psychologists, depending on the employee’s specific job duties and education. A job title alone is not sufficient for determining whether an employee satisfies the duties test.

Unless the individual is a teacher or practicing law or medicine, a professional employee must satisfy the salary basis and salary level tests as well as the duties test to be an exempt professional.

ii. Postdoctoral Fellows

Postdoctoral fellows are employees who conduct research at a higher education institution after the completion of their doctoral studies. Postdoctoral fellows are not considered students because they are not working towards a degree. See Section D below for a discussion of student research assistants. Postdoctoral fellows often meet the duties test for the “learned professional” exemption but must also satisfy the salary basis and salary level tests to qualify for this exemption.

Under the 2016 National Institutes of Health (NIH) salary guidelines for postdoctoral research fellows, some fellows earn more than the revised salary level. Other postdoctoral research fellows earn less, although it is the Department’s understanding that many postdoctoral research fellow salaries are close to the new salary level, and that any differences are not more than a few thousand dollars a year. It is also our understanding that NIH regularly reviews these salary levels, taking into consideration all relevant factors. Once the Final Rule is effective, higher education institutions may supplement any gap between the current salaries and the new salary level in order to maintain the exemption for these employees or will need to ensure that postdoctoral research fellows who conduct research and earn below the new salary level either do not work overtime or are paid overtime compensation for any hours worked over 40 per week. For overtime-eligible postdoctoral fellows, higher education institutions may comply with the FLSA’s recordkeeping requirements using any timekeeping method they choose, so long as it is complete and accurate. For example, a higher education institution may ask postdoctoral fellows to record their own times.

Some postdoctoral fellows in the humanities also teach. To the extent that a postdoctoral fellow’s primary duty is teaching, higher education institutions can classify such an employee as exempt from overtime under the teacher exemption discussed below. If a postdoctoral fellow does not primarily teach and earns less than the new salary level, the fellow will be entitled to overtime when the fellow works more than 40 hours in a workweek.

iii. Special Provisions for Teachers

Employees in higher education institutions who are teachers will not be affected by the Final Rule. The salary level and salary basis requirements do not apply to bona fide teachers. See 29 CFR 541.303(d), .600(e). Accordingly, the increase in the standard salary level in this Final Rule will not affect the overtime exemptions of bona fide teachers.

Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. See 29 CFR 541.204(b), .303. Educational establishments include institutions of higher education.

Exempt teachers in higher education may include college and university professors or adjunct instructors. Faculty members who are engaged as

Employees in higher education institutions who are teachers will not be affected by the Final Rule.
teachers but also spend a considerable amount of their time in extracurricular activities are still engaged in the primary duty of teaching. Extracurricular activities might include coaching athletic teams or acting as moderators or advisors for drama, speech, debate, or journalism. Such activities are a recognized part of the school’s responsibility in contributing to the educational development of the student. In all situations, examining the particular duties of the employee is how the applicability of an exemption must be determined (rather than location, job title, or other criteria).

a. Coaches

Athletic coaches employed by higher education institutions may qualify for the teacher exemption. Teaching may include instructing student-athletes in how to perform their sport. On the other hand, if coaches’ primary duties are recruiting students to play sports or visiting high schools and athletic camps to conduct student interviews, they are not considered teachers.

The amount of time an employee spends instructing student-athletes in a team sport is a relevant—but not exclusive—factor in determining the employee’s exempt status. For example, assistant athletic instructors who spend more than half of their time instructing student-athletes about physical health, teamwork, and safety likely qualify as exempt teachers. In contrast, assistant coaches, for example, who spend less than a quarter of their time instructing students and most of their time in unrelated activities are unlikely to have a primary duty of teaching.

b. Adjunct Instructors

Adjunct instructors may also be exempt as teachers if they are employed and engaged as teachers in an educational establishment, where their primary duty is teaching, tutoring, instructing or lecturing. Like full-time faculty members, adjunct or part-time instructors are not subject to the salary level or salary basis tests provided they have a primary duty of teaching.

B. Administrative Exemption

i. In General

The new salary level applies to administrative employees, including in higher education. To qualify for the administrative employee exemption (not the special provisions for academic administrative employees, discussed below), an employee must:

1. Receive compensation on a salary basis of not less than $913 per week (the equivalent of $47,476 a year);
2. Have a primary duty that is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers;
3. Additionally, the employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Such administrative employees in the higher education context might include, for example, admissions counselors or student financial aid officers, depending on the employees’ specific job duties (as job title alone is insufficient to ensure that an employee satisfies the duties test).

ii. Special Provisions for Academic Administrative Employees

There are special regulatory provisions for some administrative employees—known as “academic” administrative employees—whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. To be exempt, academic administrative employees must either be paid on a salary or fee basis of not less than the salary level, or be paid on a salary basis at least equal to the entrance salary for teachers in the same educational establishment. See 29 CFR 541.204. To the extent that this entrance salary is below the salary level established in the Final Rule, academic administrative employees will be exempt if their salary equals or exceeds the establishment’s entrance salary for teachers.
Exempt academic administrative employees must have the primary duty of performing administrative functions directly related to academic instruction or training. In higher education institutions, academic administrative personnel generally eligible for this exemption include department heads, academic counselors and advisors, intervention specialists who must be available to respond to student academic issues, and other employees with similar responsibilities. For example, academic counselors who perform work such as administering school testing programs, assisting students with academic problems, and advising students concerning degree requirements would satisfy the duties test for this exemption.

*Example:* An academic advisor at a community college assists students with class selection and educational goals. The advisor earns $42,000 a year ($807.70 a week) on a salary basis, which is also the college’s entrance salary for teachers. Among other things, the advisor assists with placement testing and the course registration process, and helps students to develop course selections consistent with their career choices and degree requirements. In this example, assuming the advisor meets the duties test for academic administrative professionals, the employer would not be required to pay overtime for more than 40 hours worked even though the academic advisor is paid a salary less than $913 per week, because the advisor’s salary is at least equal to the entrance salary for teachers at that institution.

Employees who work in higher education but whose work does not relate to the educational field are not performing academic administrative work. For example, if an employee’s work relates to general business operations, building management and maintenance, human resources, or the health of students and staff, the employee may meet the requirements for a different white collar exemption, but does not perform academic administrative functions.

**C. Executive Exemption**

The new salary level applies to executive employees, including in higher education. To qualify for the executive employee exemption, an employee must:

1. Receive compensation on a salary basis of not less than $913 per week (the equivalent of $47,476 a year);
2. Have the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent (for example, one full-time and two half-time employees are equivalent to two full-time employees); and
4. Have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

*See 29 CFR 541.100.*

*Example:* A university maintenance department, which is responsible for maintaining the academic buildings and grounds of the university, employs a groundskeeping crew lead. The crew lead coordinates the work of three groundskeepers and makes recommendations for their terminations and promotions. The crew lead earns $38,000 a year ($731 per week) on a salary basis. The crew lead does not meet the new salary level, and therefore is eligible for overtime compensation when she works more than 40 hours a week. The university does not need to determine whether the crew lead meets the duties test, because she does not pass the salary test.

**D. Students**

As a general matter, most students who work for their college or university are hourly workers who do not work more than 40 hours per week. The Final Rule will not affect these students. Students receiving a salary as graduate teaching assistants or research assistants, and many residential assistants will also not be affected by the Final Rule, even if they work more than 40 hours per week and are paid less than the new salary level.

i. **Graduate Teaching Assistants**

Graduate teaching assistants who have teaching as their primary duty are not subject to the salary tests and, therefore, remain exempt under the Final Rule.

ii. **Research Assistants**

Generally, the Department 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. As such, the Department would not assert an employment relationship with either the school or any grantor funding the research. Thus, in these situations, the Department will not assert
that such workers are entitled to overtime. This is true even though the student may receive a stipend for performing the research. WHD Opinion Letter 1994 WL 1004845 (June 28, 1994).

Example: A graduate student is enrolled at a university in the process of obtaining a Ph.D. in the biomedical sciences. In addition to coursework toward the university’s degree requirement, the student will engage in original, professional-level research. The student receives a stipend from the university of $25,000. The Department will not assert that the student is entitled to overtime because the Department does not consider the student an employee of the school. This is the case even if the student receives health insurance from the university and if the stipend is subject to federal income taxes.

iii. Residential Assistants

Student residential assistants enrolled in bona fide educational programs who receive reduced room or board charges or tuition credits from the university are not generally considered employees under the FLSA, and therefore are not subject to the FLSA’s wage and hour requirements. See e.g. Field Operations Handbook (FOH) 10b24.

iv. Students in an Employment Relationship

An employment relationship will generally exist with regard to students whose duties are not part of an overall education program and who receive some compensation. For example, students who work at food service counters, sell programs or usher at athletic events, or who wait on tables or wash dishes in dining halls in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act. See FOH 10b24h. Most of these students will not be affected by the Final Rule, however, because they are paid hourly and are not performing executive, administrative, or professional duties. As was already the case, these students are entitled to minimum wage and overtime compensation whether or not they earn above the new salary level.

E. Hourly Employees, Blue Collar Employees, and White Collar Employees Who Do Not Meet the Duties Test

Many employees of higher education institutions, including hourly workers, blue collar workers, and white collar workers who fail the duties tests, will not be affected by the Final Rule, because these workers are already overtime-protected. Such workers are entitled to overtime regardless of how much they make if they work more than 40 hours. Nothing in the Final Rule changes that.

III. Options for Compliance with the Final Rule

The Overtime Rule may impact select groups of workers at higher education institutions, including post-doctoral fellows, administrators, and other salaried workers who meet the duties test for one of the white collar exemptions, but not the new salary level. Colleges and universities may ensure compliance for those employees affected by the rule in a number of ways, including providing pay raises that increase workers’ salaries to the new threshold, spreading employment by reducing or eliminating work hours of individual employees working over 40 hours per week for which no overtime is currently being paid, adjusting wages and hours, or paying overtime. The Department does not dictate or recommend any method.

This rule does not require employers to convert a salaried employee making less than the new salary threshold to hourly status: employers can pay non-exempt employees on a salary basis and pay overtime for hours worked beyond 40 per week. Higher education institutions should already have systems in place for tracking non-exempt employees’ hours. These existing systems can be used for newly overtime-protected employees impacted by the Overtime Rule. As long as they are complete and accurate employers may use any method they choose for recording hours. There is no requirement that employees “punch in” and “punch out.”

The method for compliance, which is entirely within each employer’s discretion, will likely depend on the circumstances of that institution’s workforce, including how much employees currently earn and how often employees work overtime, and may include a combination of responses. Some potential responses for educational institutions are discussed below.

A. Numerous Options for Compliance

i. After evaluation, no changes to pay or hours necessary

Many institutions of higher education have white collar employees who satisfy one of the duties tests for exemption and earn between the old salary level ($455 per week) and the new salary level ($913 per
week). Employers should evaluate all such white collar employees to determine which employees do not work more than 40 hours per workweek. The Final Rule will not affect these employees’ pay because even if they become nonexempt they will not work any overtime. They can continue to be paid on a salary basis as before.

ii. Raise salaries

Employers may choose to raise the salaries of workers who meet one of the duties tests, and who regularly work overtime, to or above the new salary level to maintain their exempt status. For academic administrative employees, educational institutions merely have to ensure that such workers do not earn less than the entrance salary for teachers under that college’s employ to remain exempt.

*Example:* An annual giving officer for a university is paid a salary of $45,000 a year. The annual giving officer’s job duties qualify the counselor for the administrative (but not academic administrative) exemption. The counselor regularly works overtime as a result of outreach activities. The employer may choose to raise the annual giving officer’s salary to $47,476 a year to maintain the counselor’s administrative exemption.

iii. Pay overtime above a salary

Employers also can continue to pay employees a salary and pay overtime for hours in excess of 40 per week. Although the FLSA requires employers to keep records of how many hours overtime-eligible employees work, the law does not require that overtime-eligible workers be paid on an hourly basis. Rather, any employer, including institutions of higher education, may continue to pay employees a salary covering a fixed number of hours, which could include hours above 40. There are several ways to pay a salary and pay overtime.

An employer might pay employees a salary for the first 40 hours of work per week, and then pay overtime for any hours over 40. Employers may choose to do this, for example, for employees who work 40 hours per week and do not frequently work overtime, or who do not consistently work the same amount of overtime.

*Example:* Alexa, a budget director at a college, earns a fixed salary of $41,600 per year ($800 per week) for a 40 hour workweek. Because her salary is for 40 hours per week, Alexa’s regular rate is $20 per hour. If Alexa works 45 hours one particular week, the employer would pay time and one-half (overtime premium) for five hours at a rate of $30/hour. Thus, for that week, Alexa should be paid $950, consisting of her $800 per week salary and $150 overtime compensation.

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**Table: What are some options for responding to changes to the salary level?**

- Raise salaries to maintain exemption
- Pay current salaries, with overtime after 40 hours
- Reorganize workloads, adjust schedules or spread work hours
- Adjust wages

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Employers also have the option of paying a straight time salary for more than 40 hours in a week for employees who regularly work more than 40 hours, and paying overtime in addition to the salary. Using this method, the employer will only be required to 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.

*Example:* Jamie, an HR manager at a university, earns a fixed salary of $44,200 per year ($850 per week) for a 50 hour workweek. The salary does not include the overtime premium. Because
the salary is for 50 hours per week, Jaime’s regular rate is $17 ($850/50). In a normal 50 hour week, the employer would pay Jamie the additional half time overtime premium for the 10 hours of overtime ($8.50 per hour). If Jamie worked more than 50 hours in a week, the employer would also owe overtime compensation at time and a half the regular rate ($17 x 1.5) for hours beyond 50 (because the salary does not cover any payment for those hours).

It is also possible for an employer and employee to agree to a fixed salary for a workweek of more than 40 hours, in which the salary includes overtime compensation under certain conditions. If, however, the employee’s schedule changes in any way during any week (either by working more or fewer hours), the employer must adjust the salary for that week. Employees must be paid based on the hours actually worked during each workweek. This method of paying for overtime, therefore, might be most helpful for employees who consistently work the same amount of overtime every week.

Example: Andre, a college admissions counselor, has an agreement with his college where he is paid a fixed salary of $39,520 year ($760 per week) for a 45 hour workweek. The fixed salary includes both straight time for the first 40 hours ($16 regular rate x 40 hours) and overtime compensation for hours 41-45 ($24 overtime rate x 5 hours). If Andre’s schedule changes in any way for any week, his salary needs to be adjusted for that week to reflect the hours actually worked.

Finally, 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. See 29 CFR 778.114 for additional information and criteria for this payment method.

Higher education institutions may already have systems in place for tracking non-exempt employees’ hours. These existing systems can be used for newly overtime-protected employees impacted by the Overtime Rule. As long as they are complete and accurate, employers may use any method they choose for recording hours. Employers may use their own system to keep track of employees’ work hours or require employees to enter their own time into payroll programs. See WHD Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA).

There is no requirement that employees “punch in” and “punch out.” An employer does not need to require an employee to sign in each time she starts and stops work. The employer must, however, keep an accurate record of the number of daily hours worked by the employee. To do so, an employer could allow an employee to just provide the total number of hours worked each day, including the number of overtime hours, by the end of each pay period. For employees who work a fixed schedule, a higher education institution need not track the employee’s exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule, if that is true. See 29 CFR 516.2(c); WHD Fact Sheet #21. Only when the employee deviates from the schedule is the employer required to record the number of hours worked each day on an exceptions basis. Many employees, both exempt and non-exempt, track their daily and weekly hours by simply recording their hours worked for the employer.

iv. Reorganize Workloads, Adjust Schedules, or Spread Work Hours

Employers may wish to reorganize workload distributions or adjust employee schedules in order to comply with the Final Rule. For example, work assignments that are predictable could be assigned at the beginning of the workweek (rather than, for instance, late in the day on Friday for an employee who typically works Monday through Friday) in order to manage overtime hours. Or, when employees regularly perform duties outside of a 9 to 5 workday, colleges and universities may consider adjusting those employees’ schedules to encompass when most of the work takes place, so that they will not work more than

Employers can continue to pay employees a salary and pay overtime for hours in excess of 40 per week.
There is no requirement that employees “punch in” and “punch out.”

40 hours each workweek. (The FLSA does not specify days or schedules, such as a Monday—Friday workweek or a 9 to 5 workday; this is provided only as an example of a schedule that many workers follow.)

Example: Pat, an employee in the admissions office of a university, currently begins work at 8am Monday—Friday. Under the Final Rule’s new salary level, she would be newly entitled to overtime compensation. Pat greets and pre-interviews potential applicants to the university. Since most applicants are in high school, the majority of applicants schedule their appointments between the hours of 2pm and 6pm, and Pat routinely works until 6:30pm. The university may wish to adjust Pat’s schedule such that she doesn’t need to begin work until 10am, thus limiting the number of overtime hours she works.

Employers can hire new employees or increase the work hours of staff who work less than 40 hours per week to reduce or eliminate overtime hours.

v. Adjust Wages

Employers 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. Employers may prefer this option for their employees who work a consistent and relatively small number of overtime hours. Employers may not, however, reduce an employee’s hourly wage below the highest applicable minimum wage (federal, state, or local), or continually adjust wages each workweek in order to manipulate the regular rate. The employees’ hours worked must still be recorded, and overtime must be paid according to the actual number of hours worked each week.

Example: Assume an admissions counselor earns $37,000 per year ($711.54 per week). The admissions counselor regularly works 45 hours per week. The employer may choose to instead pay the employee an hourly rate of $15 and pay time and one-half for the 5 overtime hours worked each week.

\[
\text{\$600.00 (40 hours x \$15 / hour)} \\
+ \text{\$112.50 (5 OT hours x \$15 x 1.5)} \\
\text{\$712.50 per week}
\]

Alternatively, the employer may choose to pay the employee a salary for 40 hours of $600 and pay the overtime for hours in excess of 40 per week.

\[
\text{\$600.00 (salary for 40 hours/week, equivalent to \$15/hour)} \\
+ \text{\$112.50 (5 OT hours x \$15 x 1.5)} \\
\text{\$712.50 per week}
\]

B. Compensatory Time at Public Universities

Public universities or colleges that qualify as a “public agency” under the FLSA may compensate overtime-eligible employees through the use of compensatory time off (or “comp time”) in lieu of cash overtime premiums. A college or university is a public agency under the FLSA if it is a political subdivision of a State. In applying the term “political subdivision,” the Department considers whether (1) the State directly created the entity, or (2) the individuals administering the entity are responsible to public officials or the general electorate. For example, a State university system created by state legislation and administered by a board appointed and removable by the governor is likely a political subdivision of the State, and, therefore, a public agency under the FLSA. See WHD Opinion Letter, 2009 WL 649021 (Jan. 16, 2009); see also WHD Opinion Letter, 1995 WL 1032498 (July 17, 1995) (advising that a public community college could provide comp time in lieu of overtime premiums). Private higher education institutions must, however, pay their overtime-eligible employees a cash premium for all overtime hours at a rate not less than one and one-half.
times the regular rate at which the employee is actually employed. Note that overtime-eligible employees generally may not accrue more than 240 hours of comp time, but employees engaged to work in a public safety activity, an emergency response activity, or a seasonal activity may accrue as much as 480 hours of comp time. See 29 U.S.C 207(o)(3)(A).

If an overtime-eligible public employee receives comp time instead of overtime pay, the comp time must be credited at the same rate as cash overtime: no less than 1.5 hours of comp time for each hour of overtime worked. See 29 CFR 553.22. Additionally, any comp time arrangement must be established pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding, any other agreement between the public agency and representatives of overtime-protected employees, or an agreement or understanding arrived at between the employer and employee before the performance of the work. This agreement may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay (for example, providing the employee a copy of the personnel regulations). See 29 CFR 553.23.

Example: An admissions counselor at a large state university earns $38,000 a year. The advisor has a written agreement with the university that he will receive compensatory time at a rate of time and one-half for every overtime hour worked instead of overtime pay in cash. During a two-week period when admissions work is heavy, the advisor works 50 hours each of the two weeks and accumulates 20 hours of overtime, resulting in 30 hours of available comp time. The advisor then uses the comp time to take time off later in the year. This arrangement is permissible.

IV. Conclusion

The Overtime Rule updated the regulations to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of overtime-eligible workers, making the exemption easier for employers and workers to understand and apply. This guidance is provided to help employers in higher education understand their responsibilities and options for complying with the FLSA’s overtime provisions following publication of the Final Rule.
United States Department of Labor
Wage and Hour Division
Wage and Hour Division (WHD)

FLSA2005-42
October 24, 2005

Dear Name*,

This is in response to your letters inquiring whether Academic Advisors and Intervention Specialists (Advisors) at a community college in Name* (College) qualify for exemption from minimum wage and overtime requirements under section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(1). This provision exempts employees employed in a bona fide executive, administrative, or professional capacity, “including any employee employed in the capacity of academic administrative personnel.” The regulations regarding the section 13(a)(1) exemption can be found in 29 C.F.R. Part 541, revised effective August 23, 2004 (69 Fed. Reg. 22,122 (Apr. 23, 2004)).

You state in your inquiry that these Advisors assist students in their academic pursuits by aiding them in their class selection, educational goals, and graduation requirements. In particular, your letter and the job descriptions you provided state that the primary responsibilities of both Academic Advisors and Intervention Specialists include orienting students regarding admissions, placement testing, registration processes, policies, procedures, resources and programs; reviewing academic records, placement tests and other standardized test results with students in order to develop course selections consistent with their career choices and degree requirements; and developing a term-by-term schedule and an outline of a program of study. Employees in both positions also review degree audits and transcripts to verify the fulfillment of graduation requirements. With regard to students with poor academic performance, they have authority to override holds in the student database system and permit students to register after considering the individual student’s needs. The employees also assist students in overcoming academic difficulties, as well as learning, psychological, or physical disabilities. While the Advisors do participate in college recruitment activities, you state that these duties are performed less than 20 percent of the time and are not a primary duty. In addition, the Intervention Specialists are also responsible for teaching life skills courses.

The exemption for academic administrative employees is contained in 29 C.F.R. § 541.204 (copy enclosed). This section specifically recognizes the exempt status of employees whose primary duty is to perform “administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision” and who meet the salary tests. 29 C.F.R. § 541.204(a)(2). An “educational establishment” is an “elementary or secondary school system, an institution of higher education or other educational institution.” 29 C.F.R. § 541.204(b). Section 541.204(c) describes work “directly related to academic instruction or training” as “work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education.” The regulation further states that employees engaged in academic administrative functions include “academic counselors who perform work such as administering school testing programs, assisting students with academic problems, and advising students concerning degree requirements.” 29 C.F.R. § 541.204(c)(1). Therefore, based on your description of their primary duties, it is our opinion that the Academic Advisors and Intervention Specialists at the college are exempt from the overtime and minimum wage requirements contained in the FLSA pursuant to section 13(a)(1) of the Act and the regulations, 29 C.F.R. § 541.204, assuming that the advisors’ compensation meets the exemption’s salary requirements. The academic administrative exemption requires that employees be compensated on “a salary or fee basis at a rate of not less than $455 per week” or “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which [they are] employed.” 29 C.F.R. § 541.204(a)(1).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have
represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; Hultgren v. County of Lancaster, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: 29 C.F.R. §§ 541.200-.204

* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).
10b23 **School employees: after hours work.**

(a) In some cases school employees will work outside of their normal working hours where a third party (either public or private) uses the school facilities. For example, a community organization may use the school cafeteria for a banquet or the auditorium for a concert, and the food service or custodial employees of the school will perform the necessary services. Time spent in the operation of a school and the maintenance of school property, both during and after regular school hours is normally considered hours worked under the Act. School employees engaged in the operation and maintenance of school facilities during periods in which their services are made available to a third party are considered to be jointly employed by the school and the third party if the school itself contracts for the use of such employees. The total time spent in work for the joint employers will be counted as hours worked and paid for in compliance with the minimum wage and overtime pay provisions of the Act.

(b) If the school does not require that its employees be utilized by nonschool organizations when using school facilities but such employees are hired merely for the convenience of the outside group and are paid directly by them, the hours worked and compensation paid to such employees for this time need not be included in determining compensation due to the employee for their employment by the school.

10b24 **University or college students.**

(a) University or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the Act. In addition to the examples listed in FOH 10b03(e), students serving as residence hall assistants or dormitory counselors, who are participants in a bona fide educational program, and who receive remuneration in the form of reduced room or board charges, free use of telephones, tuition credits, and the like, are not employees under the Act.

(b) On the other hand, an employment relationship will generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation. Thus, students who work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act.

10b25 **Fraternal orders: officers and volunteers.**

WH will not assert that an employment relationship exists under the Act for persons who volunteer their services, including those who are elected, to a fraternal order not as employees and without contemplation of pay. Included would be such persons as the secretary and director or trustees of individual lodges. The payment of a nominal sum would not affect the status of a bona fide volunteer. See FOH 12a03.

10b26 **School-related work programs.**

(a) Pursuant to the provisions of section 14(d) of the FLSA, WH will take no enforcement action with respect to minimum wage or overtime for public or private elementary or secondary students employed by any school in their school district in various school-related work programs, provided that such employment is in compliance with applicable child labor provisions. This position is adopted without prejudice to the rights of individual employees.
10b THE EMPLOYMENT RELATIONSHIP

10b00 Employment relationship required for FLSA to apply.

In order for the FLSA to apply there must be an employer-employee relationship. This requires an “employer” and “employee” and the act or condition of employment. FLSA sections 3(d), (e), and (g) define the terms “employer,” “employee,” and “employ.”

10b01 FLSA employment relationship distinguished from the common law concept.

The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of the master and servant relationship. The difference between the FLSA employment relationship and the common law employment relationship arises from the FLSA statement that “[E]mploy includes to suffer or permit to work.” The courts have indicated that, while “to permit” requires a more positive action than “to suffer,” both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for him or her by another is sufficient to create the employment relationship under the FLSA.

10b02 Method of compensation not material.

The fact that no compensation is paid and the worker is dependent entirely on tips does not negate his/her status as an employee, if other indications of employment are present. If the worker is paid, the fact that he or she is paid by the piece or by the job or on a percentage or commission basis rather than on the basis of work time does not preclude a determination that the worker is, on the facts, an employee with respect to the work for which such compensation is received.

10b03 Religious, charitable, and nonprofit organizations, schools institutions, volunteer workers, members of religious orders.

(a) There is no special provision in the FLSA which precludes an employer-employee relationship between a religious, charitable or nonprofit organization and persons who perform work for such an organization. For example, a church or religious order may operate an establishment to print books, magazines, or other publications and employ a regular staff who does this work as a means of livelihood. In such cases there is an employer-employee relationship for purposes of the Act.

(b) Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be “employees.” However, the fact that such a person is a member of a religious order does not preclude an employer-employee relationship with a state or secular institution.

(c) In many cases the nature of religious, charitable, and similar nonprofit organizations and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for the services rendered. For example, members of civic organizations may help out in a sheltered workshop; women’s organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly; mothers may assist in a
school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross; working with children with disabilities or disadvantaged youth; helping in youth programs as camp counselors, scoutmasters, or den mothers; providing child care assistance for needy working mothers; soliciting contributions or participating in benefit programs for such organizations; and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employer-employee relationship.

(d) Although the volunteer services (as described in (c) above) are not considered to create an employment relationship, the organizations for which they are performed will generally also have employees performing compensated services whose employment is subject to the standards of the Act. Where such an employment relationship exists, the Act requires payment of not less than the statutory wages for all hours worked in the workweek. However, there are certain circumstances where such an employee may donate services as a volunteer, and the time so spent is not considered to be compensable work. For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. Wage and Hour (WH), or the Wage and Hour Division (WHD), will not consider that an employer-employee relationship exists with respect to such volunteer time between the establishment and the volunteer or between the volunteer and the person for whose benefit the service is performed. Another example is where an office employee of a church may volunteer to perform non-clerical services in the church preschool during off-duty time from his or her office work as an act of charity. Conversely, a preschool employee may volunteer to perform work in some other facet of the church’s operations without an employment relationship being formed with respect to such volunteer time. However, this does not mean that a regular office employee of a charitable organization can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from exigencies of the operations conducted by the employer.

(e) As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramas, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution. Also, the fact that a student may receive a minimal payment for participation is such activities would not necessarily create an employment relationship.

(f) The sole fact that a student helps in a school lunchroom or cafeteria for periods of 30 minutes to an hour per day in exchange for their lunch is not considered to be sufficient to make him or her an employee of the school, regardless of whether he or she performs such work regularly or only on occasion. Also, the fact that students on occasion do some cleaning up of a classroom, serve the school as junior patrol officers or perform minor clerical work in the school office or library for periods of an hour per day or less without contemplation of compensation or in exchange for a meal or for a cash amount reasonably equivalent to the price of a meal or, when a cash amount is given in addition to a meal, it is
only a nominal sum, is not considered sufficient in itself to characterize the students as employees of the school. A similar policy will be followed where the students perform such tasks less frequently but for a full day, with an arrangement to perform their academic work for such days at other times. For example, the students may perform full-day cafeteria service four times per year. In such cases, the time devoted to cafeteria work in the aggregate would be less than if the student worked an hour per day. However, if there are other indicia of employment, or the students normally devote more than an hour each day or equivalent to such work, the circumstances of the arrangement should be reviewed carefully.

(g) In the ordinary case, tasks performed as a normal part of a program of treatment, rehabilitation, or vocational training in the following situations will not be considered, under section 3(g) of the Act, as work of a kind requiring a hospital patient, school student, or institutional inmate to be considered an employee of the hospital, school, or institution conducting the program, for purposes of the FLSA: tasks performed by individuals committed to training schools of a correctional nature, which are required as a part of the correctional program of the institution as a part of the institutional discipline and by reason of their value in providing needed therapy, rehabilitation, or training to help prepare the inmate to become self-sustaining in a lawful occupation after release.

(h) WH will not assert that initial participation by a student with disabilities in a school-work program constitutes an employment relationship if certain conditions are met. However, after an employment relationship has developed, the provisions of the Act will be applicable.

(i) The conditions under which an employment relationship initially will not be asserted are:

1. The activities are basically educational, are conducted primarily for the benefit of the participants, and comprise one of the facets of the educational opportunities provided to the students. The student may receive some payment for their work in order to have a more realistic work situation, or as an incentive to the student or to insure that the employer will treat the student as a worker.

2. The time in attendance at the school plus the time in attendance at the experience station (either in the school or with an outside employer) does not substantially exceed the time the student would be required to attend school if following a normal academic schedule. Time in excess of 1 hour beyond the normal school schedule or attendance at the experience station on days when school is not in session would be considered substantial.

3. The student does not displace a regular employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees who would be employed by the school or an independent contractor including, for example, employees of a contractor operating the food service facilities at the school.

(j) The shift to an employment relationship may occur shortly after the placement or it may occur later. As a general guide, work for a particular employer, either a private employer or the school, after 3 months will be assumed by WH to be part of an employment relationship unless the facts indicate that the training situation has not materially changed. Thus, if the conditions which warranted the finding that the student is not considered an employee continue, he or she may remain for a period of time as a trainee rather than an employee. On
The Department of Labor’s recently announced revisions to the Fair Labor Standards Act (FLSA) will make more than 4 million currently exempt U.S. workers eligible for overtime pay, unless their salaries are raised. Among them are an estimated 37,000 to 40,000 junior scientists who have emerged as critical players in modern biomedical research. There has been considerable concern in both the public and private sectors about how this change will affect the United States’ ability to carry out leading edge research in an efficient, cost-effective manner. But as leaders of the nation’s biomedical research and labor agencies, we are confident the transition can be made in a way that does not harm — and actually serves to enrich — the future of our research enterprise.

Commonly called postdoctoral researchers, or “postdocs,” these junior scientists have recently received a doctoral degree (typically a Ph.D.) and successfully defended a research thesis grounded in extensive training in biochemistry, genomics, computer science, or another area of science. However, these individuals are not yet at the point where they can set up their own laboratories and
become independent researchers. Consequently, many embark upon a postdoctoral fellowship in a more senior scientist’s lab to gain a few years of additional training and experience. The average annual pay for a postdoc is currently estimated to be about $45,000, but this varies greatly by region and funding source.

Current law entitles all workers in the United States to overtime pay, unless they are exempted because they are paid on fixed, preset salaries; are engaged in executive, administrative, or professional duties; and are paid at least $23,660 per year. The figure of $23,660 was set in 2004 and has not kept up with inflation. Under the new rule, which was informed by 270,000 public comments, the threshold will be increased to $47,476 effective December 1, 2016.

Many biomedical postdocs are supported by the National Institutes of Health (NIH), either through specific grants, known as Ruth L. Kirschstein National Research Service Awards (NRSA), or through standard research grants awarded to their laboratory chief, typically known as a Principal Investigator. Despite the postdocs' extensive training, expertise, and high level of responsibility, many experts believe their starting salaries are too low. For example, in the first three years after receiving their degree, NRSA awardees currently receive awards of $43,692; $45,444; and $47,268 — all below the newly issued overtime threshold.

Under the new FLSA overtime threshold, universities, teaching hospitals, and other institutions that employ postdocs have a choice: they can carefully track their fellows' hours and pay overtime, or they can raise their salaries to levels above the threshold and thereby qualify them for exemption. Biomedical science, by its very nature, is not work that neatly falls into hourly units or shifts. So, from our vantage point, it seems that the only option consistent with the professional nature of scientific work is to increase salaries above the threshold.

We are fully supportive of the increased salary threshold for postdocs. Indeed, the NIH has been increasing those salaries gradually over the last several years, even in the face of challenging budget circumstances. But we acknowledge that more is needed, and we agree with a number of leaders in biomedical science who have bemoaned the current state of affairs, arguing that postdoctoral fellows are generally paid salaries that do not adequately reflect their advanced education and
expertise. Some experts have even explicitly called for starting pay for biomedical postdocs to rise to at least $50,000 annually.

In response to the proposed FLSA revisions, NIH will increase the awards for postdoctoral NRSA recipients to levels above the threshold. At the same time, we recognize that research institutions that employ postdocs will need to readjust the salaries they pay to postdocs that are supported through other means, including other types of NIH research grants. While supporting the increased salaries will no doubt present financial challenges to NIH and the rest of the U.S. biomedical research enterprise, we plan to work closely with leaders in the postdoc and research communities to find creative solutions to ensure a smooth transition.

Our nation should embrace the fact that increasing the salary threshold for postdocs represents an opportunity to encourage more of our brightest young minds to consider choosing careers in science. Biomedical science has never been more exciting or promising than now, and we need to do all we can to support the next generation of scientists.

Francis S. Collins, M.D., Ph.D., is Director of the U.S. National Institutes of Health. Thomas E. Perez, J.D., is the U.S. Secretary of Labor.

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PAYMENT OF COACHES & ATHLETIC TRAINERS UNDER FEDERAL LAW

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’s (FLSA) 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 (i.e., $23,660 annually) to $913 per week (i.e., $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 members in determining whether individuals employed by their institution as coaches or trainers may be exempt under the FLSA following the implementation of the Final Rule. In addition, for those coaches and/or 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.

Because the FLSA’s overtime requirements depend largely upon facts and circumstances that likely vary by school and even by team, however, 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 trainers as exempt should conduct their own evaluation and consult counsel to assess the applicability of the FLSA’s exemptions.

I. 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”

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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.
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 (i.e., $23,660 annually). As of December 1, 2016, that level will increase to $913 per week (i.e., $47,476 annually).\(^2\) 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; and

- 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.

II. DETERMINING THE EXEMPT STATUS OF COACHES AND 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 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.”

A coach or trainer can generally be classified exempt if his or her “primary” duty fits one of the categories described below. She may also satisfy the duty requirement if her primary duty is a combination of multiple of the responsibilities below. This “combination exemption” may

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2 The salary threshold is not 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 coach works a ten-month schedule, but receives paychecks over a twelve-month period, then the amount of the checks may be prorated over the actual period of work (i.e., ten months) to determine whether she is paid at least the salary threshold.
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 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. 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, the Department concluded that the coaches qualified as exempt teachers.

These principles were elaborated upon in guidance issued by the Department 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, no necessarily in terms of time spent -- instructing athletes in how to perform their sport, it appears

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3 An athletic trainer with significant instructional responsibilities may also qualify under the teacher exemption.
that the Department 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.\(^4\)

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.\(^5\) We are not aware of any guidance by the Department of Labor 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 (i.e., a salary of at least $913 per week as of December 1, 2016), or the minimum salary for teachers at their institution in order to be considered for this exemption, and 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.\(^6\)

C. Exemptions that Require Payment of the Minimum Salary

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

Depending on the circumstances, a coach or trainer may also perform the work of an exempt administrative employee. To satisfy the administrative exemption, the coach must satisfy the salary requirements (i.e., a salary of at least $913 per week as of December 1, 2016),

\(^4\) 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.

\(^5\) It does not appear that the outside sales exemption has even potential application to the work performed by athletic trainers.

\(^6\) Of course, an athletic trainer who performs academic administrative duties would qualify as well.
and 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 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 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 she performs these tasks as her primary duty.

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

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

3. Coaches and 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 professional exemption. They must also be paid a minimum salary of at least $913 per week (as of December 1, 2016).

Similarly, coaches who are degree 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 -- e.g., the requisite salary level -- continue to apply. For example, if it is necessary to “tack” together the teacher exemption and the executive exemption in order to establish an exempt primary duty 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.

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

In the wake of the significant salary increase, members may find that budgetary constraints require that certain coaching or 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.

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 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 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 am to 7 pm, and the team boards a bus to an out-of-state meet at 7:30 pm, arriving at the hotel at 11:30 pm, 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.

C. 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 smartphones 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 her smartphone to text a recruit outside of her normal working hours, the time spent texting would need to be added to 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 will not be paid for the hours spent on these tasks outside of his 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 a member 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 during normal working hours, and/or crafting working hours to accommodate these tasks as part of the coach’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.

“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 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 her cellphone, and to make those blocks part of the expected work hours; in still others, the member may decide to allow continued cellphone usage and remote access without restrictions, and to deal with the ramifications of the “extra” hours through overtime pay.

Ultimately, an employer can decide to pay for the hours worked or the employer can decide not to allow the hours to be worked or it can land somewhere in the middle with limitations on the hours worked. There is no one-size-fits-all solution and members should consult with counsel to ensure they are addressing these issues as best they can.
This memorandum provides guidance to Wage and Hour Division (WHD) field staff regarding credit toward wages under section 3(m) of the Fair Labor Standards Act (FLSA) for lodging provided to employees. Section 3(m) of the FLSA allows an employer to, under certain circumstances, count as wages “the reasonable cost ... to the employer of furnishing such employee with board, lodging, or other facilities.” 29 U.S.C. § 203(m). This memorandum explains the requirements for taking the credit, as well as the proper method of accounting for it in calculating wages, when an employer provides lodging to employee.

Although the topics addressed in this memorandum apply broadly, a number of examples specific to live-in domestic service employees appear below because WHD anticipates that many employers of home care workers will make use of the section 3(m) credit now that Federal minimum wage and overtime protections apply to many such workers pursuant to the Home Care Final Rule, Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013).[1] WHD emphasizes, however, that Section 3(m) applies in a variety of contexts, and nothing in this FAB is meant to limit an employer’s use of section 3(m) under other circumstances in any way.

**Discussion**

Section 3(m) provides, in relevant part, that:

“Wage” paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other
facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee. Provided further, that the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value.

29 U.S.C. § 203(m). The question whether an employer may properly count the value of lodging as a part of an employee’s wages can arise in a variety of contexts. For example, some farm workers live in employer-provided housing near the fields in which they work. Additionally, some domestic service workers, such as home care workers or nannies, live at the home in which they provide services.

A. Requirements for Claiming a Section 3(m) Credit

Based on the Department’s regulations and longstanding interpretation of section 3(m), an employer who wishes to claim the section 3(m) credit for lodging must ensure that the following five requirements are met:

1. The lodging is regularly provided by the employer or similar employers;
2. The employee voluntarily accepts the lodging;
3. The lodging is furnished in compliance with applicable federal, state, or local law;
4. The lodging is provided primarily for the benefit of the employee rather than the employer; and
5. The employer maintains accurate records of the costs incurred in furnishing the lodging.

1. Lodging Regularly Provided by the Employer or Similar Employers

Employers may take advantage of section 3(m) only if the lodging is “furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities.” 29 C.F.R. § 531.31 (citing Walling v. Alaska Pac. Consol. Mining Co., 152 F.2d 812 (9th Cir. 1945); Field Operations Handbook (FOH) § 30c02(a)).

Because live-in domestic service employees, for example, often reside at their employers’ private homes without paying rent, this requirement is met for those workers. Similarly, agricultural workers are often provided housing during the harvest season by their employers, so this requirement is met for workers under those circumstances as well. Wage and Hour Investigators (WHIs) will need to consider whether this requirement is met for other types of employees whose employers claim a section 3(m) credit based on the circumstances presented in the particular investigation.

2. Voluntary Acceptance

Employees must accept lodging voluntarily and without coercion in order for an employer to take advantage of section 3(m). 29 C.F.R. § 531.30; see also 552.100(b); Wage & Hour Opinion Letter WH 513 (Feb. 24, 1982). WHD will normally consider the lodging as voluntarily accepted by the employee when living at or near the site of the work is necessary to performing the job. For example, this requirement is typically met when a live-in domestic service employee and the employer have an understanding that the employee will live on the premises as a condition of employment, or when an apartment complex provides a free apartment to the complex manager. See Wage & Hour Opinion Letter WH 513 (noting that “voluntary acceptance of a job can be construed as voluntary acceptance of the facilities only when the facilities are integral to performing the job (as with room and
board for a live-in housekeeper and babysitter) and the employee understood this when accepting the job” (citing Lopez v. Rodriguez, 668 F.2d 1376 (D.C. Cir. 1981)); see also Brock v. Carrion, Ltd., 332 F. Supp. 2d 1320, 1325 (E.D. Cal. 2004) (determining that lodging was accepted voluntarily where an apartment manager who lived on-site “does not actually assert that he was coerced” and had signed an employment agreement).[3] In other circumstances, WHIs should look for an indication, such as a written agreement, that the employee voluntarily agreed to live in a residence provided by the employer.

3. Compliance with Federal, State, and Local Laws

Employers may not include the cost of lodging as part of employees’ wages if the lodging is “in violation of any Federal, State, or local laws, ordinance or prohibition.” 29 C.F.R. § 531.31; see also FOH § 30c02(b). For example, the WHD will not allow a section 3(m) credit if the lodging provided does not have or has been denied a required occupancy permit or is not zoned for residential use. See FOH § 30c02(b). Similarly, courts have disallowed an employer’s use of the section 3(m) credit in circumstances in which lodging was substandard or not compliant with law. See, e.g., Soler v. G & U, Inc., 768 F. Supp. 452, 465-66 (S.D.N.Y. 1991) (holding that an employer could not take advantage of section 3(m) because migrant farm workers’ camp was operated in violation of the relevant state permit due to overcrowding); Osias v. Marc, 700 F. Supp. 842, 845 (D. Md. 1988) (“Because the Department of Labor’s investigative report found the housing to be seriously substandard, the employer may not credit the cost of furnishing the facilities against minimum wage obligations.”); Strong v. Williams, No. 78-124-Civ-TG, 1980 WL 8134, at *4, 5 (M.D. Fla. April 22, 1980) (holding that an employer could not claim credit for housing provided to migrant farm workers when the employer was “not authorized to house migrant workers under 7 U.S.C. § 2044(a)(4),” the Federal Farm Labor Contractors Registration Act).

WHIs should be aware of and look into any suggestions that employer-provided lodging is substandard such that its condition violates law.

4. Primary Beneficiary

An employer may not include the cost of lodging in an employee’s wages unless the employee receives the primary benefit of the lodging. See 29 C.F.R. § 531.3(d)(1); see also FOH § 30c01(c); Ramos-Barrientos v. Bland, 661 F.3d 587, 595-98 (11th Cir. 2011) (accepting as consistent with statutory and regulatory texts the Secretary’s position that lodging must primarily benefit the employee in order for a wage credit to be taken). Lodging is ordinarily presumed to be for the primary benefit and convenience of the employee. See FOH § 30c03(a)(2).[4] But this presumption is rebutted in circumstances in which lodging is “of little benefit to employees,” such as “where an employer requires an employee to live on the employer’s premises to meet some need of the employer.” Id; see also Soler v. G. & U., Inc., 833 F.2d 1104, 1110 (2d Cir. 1987) (explaining that “in appropriate circumstances, ... the presumption [that housing facilities may be included in wages under section 3(m)] is subject to challenge and rebuttal under the Regulation’s balancing of benefits standard” and that if housing “is not a benefit running primarily to the employee, but rather a burden imposed upon the employee in furtherance of the employer’s business,” the housing may not be included in the employee’s wage).[5]

In particular, an employer may not claim the section 3(m) credit if “the employer requires the employee to leave an existing home and live on the employer’s premises to be ‘on call’ to meet the needs of the employer.” Wage & Hour Opinion Letter FLSA-1331 (Nov. 5, 1996); see also Soler, 833 F.2d at 1110-11 (holding that, among other factors, where
workers “were not required to live on the farms as a condition of employment” and “were not ‘on call,’” a determination that housing was for their benefit was not arbitrary and capricious).

WHIs must consider the nature of the employment relationship and review the specific circumstances of each case to determine whether the lodging provided is primarily for the benefit of the employee. In the case of live-in domestic service employees, the Department recognizes that such employees typically are not working all of the time that they are on the premises of their employer and, ordinarily, they may at times engage in normal private pursuits, such as sleeping, eating, watching television, or reading a book and may leave the premises if they choose. 29 C.F.R. § 785.23; 29 C.F.R. § 552.102(a). There are, however, scenarios in the home care context in which an employee lives with a recipient of home care services in order to provide assistance throughout the day and/or night. Although the acuity level of the recipient of services does not determine whether the lodging is for the benefit of the employer or the employee, the employer’s demands on an employee’s time is relevant to a determination of who primarily benefits from the employee’s living at the residence. In other words, whether the employer has provided a live-in domestic service employee with specific time periods during which the employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for her own purposes (i.e., has provided bona fide off-duty time) is one factor that may help determine who primarily benefits from the living arrangement and the lodging provided. For example, if a college student moved into the extra bedroom in a home owned by an 80-year-old man to provide him assistance with bathing and dressing for two hours in the mornings and preparing for sleep for one hour each night, but the student was otherwise free to spend her time as she pleased, those facts would weigh in favor of a finding that the lodging was primarily for the benefit of the employee. Similarly, if a property management company provided a plumber with a reduced-rent apartment in one of its complexes in exchange for the plumber being available two weekends per month for emergency calls, that factual scenario would weigh in favor of a finding that the lodging was provided primarily for the benefit of the employee.

As explained, however, if the employer’s demands on an employee’s time are so great or constant that the employee is working or is “engaged to wait” while on the premises, particularly overnight in the domestic service context, these facts would likely support a finding that the lodging is primarily for the benefit of the employer. Therefore, where an employee provides round-the-clock care, or if the employee’s sleep or off-duty time is regularly interrupted to perform work for the employer, the lodging typically will be deemed as primarily for the benefit of the employer. In such circumstances, a section 3(m) credit for the lodging will not be permissible (recognizing, however, that circumstances can change over time and the credit may be available at a later date). These circumstances could arise, for example, in the case of a live-in nanny who tends to a baby throughout the night, a home health aide who serves an individual with a health condition that requires her to have constant assistance, including overnight, or a handyman who provides services to the apartment complex in which he resides who is constantly responding to emergency calls during his off-duty hours.

Whether the employer has provided an employee with adequate lodging is another factor that may help determine who primarily benefits from the living arrangement and the lodging provided. For example, if an employer provides an employee with private living quarters such as a separate bedroom that is furnished (with, for example, a bed, night table, and dresser) where the employee is able to leave her belongings and spend her off-
duty time, this factor weighs in favor of a finding that the primary beneficiary of the lodging is the employee. Similarly, if the employer provides the employee with access to a kitchen and a private bathroom, such facilities support a finding that the lodging is primarily for the benefit of the employee (although such facilities are not a prerequisite for taking the section 3(m) credit). Such private quarters typically ensure that the employee is able to engage in normal private pursuits as she would in her own home. Even when the employee is provided private living quarters, however, lodging will typically be deemed primarily for the employer’s benefit if the employee is “on-call” 24 hours a day or his or her sleep and off-duty time is regularly interrupted. If an employee is only provided a cot or couch to sleep on in a living space shared with the employer, this fact would suggest that the employee is not provided adequate off-duty time or is unable to use such time as she chooses and therefore that the lodging is primarily for the benefit of the employer.

5. Accurate Recordkeeping

Records substantiating the cost of furnishing lodging. Pursuant to the FLSA recordkeeping regulations, in order to take a wage credit under section 3(m), an employer must maintain accurate records of the costs incurred in furnishing lodging to the employee. See 29 C.F.R. § 516.27(a); see also 29 C.F.R. § 552.100(d); Wage & Hour Opinion Letter, 1994 WL 1004832 (June 1, 1994); FOH § 30c05(a). These records “shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost.” 29 C.F.R. § 516.27(a)(1). For example, records could include proof of mortgage or rental payments and utility bills. If an employer does not provide records to support its claim of a section 3(m) lodging credit, the employer has not met this prerequisite for including lodging costs in employees’ wages. 

With respect to live-in domestic service employees only, an employer that does not provide such records may claim a certain amount—up to seven and one-half times the statutory minimum hourly wage for each week lodging is furnished, currently $54.38 (7.5 x $7.25)—toward wages rather than the reasonable cost or fair value of the housing provided. 29 C.F.R. § 552.100(d).

Records regarding wage calculations. The Department’s regulations require an employer to keep records showing section 3(m) additions to or deductions from wages if those additions or deductions affect the total cash wages owed. See 29 C.F.R. § 516.27(b). Specifically, if because of a section 3(m) credit, an employee receives less in cash wages than the minimum wage for each hour worked in the workweek, the employer “shall maintain records showing on a workweek basis those additions to or deductions from wages.” Id. An employer must also maintain such records if an employee is owed overtime in a workweek and the employer has taken a section 3(m) credit. Id.

A number of courts have denied employers’ attempts to claim a section 3(m) credit in circumstances in which those employers have not maintained proper records of costs or wage calculations. See, e.g., Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500, 1514 (11th Cir. 1993) (reversing a district court’s dismissal of workers’ claims of minimum wage violations because deductions for the cost of housing and utilities are impermissible when employer has failed to comply with the recordkeeping provisions of the FLSA and thus cannot substantiate the alleged reasonable cost of the housing provided (citing Marshall v. DeBord, No. 77-106-C, 1978 WL 1705 (E.D. Okla. July 27, 1978))); Donovan v. Williams Chem. Co., 682 F.2d 185, 189-90 (9th Cir. 1982) (reversing a district court’s allowance of a section 3(m) credit for housing because “[t]he employer has the obligation, under the regulations, to keep records concerning costs” and that burden does not shift in the
B. Collective Bargaining Agreements

An employer may not include in an employee’s wage the cost of lodging "to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement [(CBA)] applicable to the particular employee." 29 C.F.R. § 531.6(a); see also 29 U.S.C. § 203(m); FOH § 30c01(b). The determination of whether a CBA contains an exclusion of the cost of lodging that would otherwise qualify for a section 3(m) credit "will be based upon the written provisions" of the CBA. FOH § 30c01(b).

In the course of an investigation, the WHI should determine whether the employee is a member of a union or subject to a CBA. For example, some live-in home care workers are parties to CBAs with the State administering the Medicaid-funded program through which they are employed. If so, the WHI should obtain a copy of the CBA to determine whether it prohibits the employer from claiming a section 3(m) lodging credit.

C. Application of a Section 3(m) Credit

If an employer satisfies the five requirements for claiming the section 3(m) credit and the value of the facilities furnished is not excluded from wages pursuant to a CBA, the amount claimed must comply with statutory and regulatory guidelines, and the employee’s wages must be properly calculated.

D. Reasonable Cost or Fair Value

The section 3(m) credit may not exceed the “reasonable cost” or “fair value” of the facilities furnished, whichever is less. 29 U.S.C. § 203(m); FOH § 30c01(a).

Reasonable cost. In this context, “reasonable cost” is “not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.” 29 C.F.R. § 531.3(a); see also FOH § 30c05(a). In other words, “reasonable cost” “does not include a profit to the employer or to any affiliated person.” 29 C.F.R. § 531.3(b). The actual cost to an employer of providing lodging to such a worker could be, for example, a portion of the monthly mortgage or rental payment as well as utility payments. See, e.g., FOH § 30c06(d)(2) (“When the employer leases a property from another person, the amount of rent paid by the employer to the other person is considered part of the ‘reasonable cost’ provided that the rent charged provides no profit for the employer, directly or indirectly.”).

The source of the funds the employer uses to provide the property is not relevant. The actual cost an employer pays may include money from the employer’s savings or income and/or other funds provided to the employer, such as public assistance provided to certain individuals who employs home care workers. For purposes of calculating a section 3(m) credit, it is significant only that an employer, rather than the employee or another party that is not an employer, pays for the housing, not how the employer obtained the funds for such payments.
The portion of the cost of the residence in which an employee lives that may be counted as part of wages must be a reasonable approximation of the worker’s share of the housing. See FOH § 30c06(d)(3) (explaining that the cost of lodging is to be divided among the employees living in a particular facility based on the amount of space provided to each employee). There is no formula for determining the appropriate fraction of the mortgage, rental, or other costs of the lodging that applies to a particular employee; instead, the employer or WHI must take into account the specific circumstances. For example, in a large house in which a family of five and a home care worker reside, the amount might most appropriately be determined based on the ratio of the square footage of the employee’s bedroom to the square footage of the entire house. On the other hand, in an apartment shared by a recipient of home care services and a paid roommate, where the two individuals have equal use of the kitchen and common living spaces, the appropriate amount of a section 3(m) credit might be half of the rental cost of the unit. Similarly, if three agricultural workers are sharing a small cottage provided by the employer, then the appropriate amount of a section 3(m) credit that could properly be counted toward each employee’s wages would likely only be one-third of the cost of the cottage.

Additionally, reasonable cost is to be calculated on a workweek-by-workweek basis so it can be added to cash wages for purposes of assessing whether the employer’s minimum wage obligation has been met and determining the regular rate of pay upon which any overtime compensation due must be calculated, as described below. See FOH § 30c06(d)(3) (explaining that it is necessary to determine the “weekly reasonable cost”). The weekly reasonable cost can be calculated based on a monthly mortgage or rental amount by multiplying the monthly amount by 12 and dividing by 52. As to costs that vary over time, such as utility bills, a WHI should consider the specific costs for the time period covered in an investigation, based on the employer’s records, although the WHI may in his or her discretion use (or accept an employer’s use of) average amounts, if the approximation is reasonable.

The employer bears the burden of establishing, with records, the reasonable cost of lodging. 29 C.F.R. § 516.27; FOH § 30c05(a). Records of mortgage payments, a rental agreement and records of rent checks, or utility bills, for example, suffice as bases for actual cost calculations. In addition, records regarding sources of public assistance to the employer used to pay for housing, such as records regarding Housing Choice Vouchers, may be among the records used to fulfill this requirement. As noted above, an employer of a live-in domestic service employee that does not provide records is subject to an exception to this general rule: the employer may claim up to seven and one-half times the statutory minimum hourly wage, currently $7.25, for each week lodging is furnished toward wages. 29 C.F.R. § 552.100(d). In other words, in the absence of records, the employer may credit for lodging no more than $54.38 (7.5 x $7.25) per week to the wages if the employee is a live-in domestic service employee.

Fair value. Section 3(m) of the FLSA gives the Secretary authority to determine the “fair value” of lodging for purposes of an employer’s claiming the section 3(m) credit. 29 C.F.R. § 531.2(a); FOH § 30c01(a). If the actual cost to the employer exceeds the rental value of the lodging, 29 C.F.R. § 531.3(c); FOH § 30c06(c), or the employer otherwise establishes a “reasonable cost” that “appears to be excessive in relation to the facilities furnished,” FOH § 30c01(a), the employer may only count the lower fair value of the lodging toward wages.

As with assessments of reasonable cost, there is no specific formula for determining fair value. WHIs may approximate the fair value of lodging by considering average rental prices in the area for similar homes. Investigators may estimate these amounts by, for example, using fair market rent data for a particular locality as published by the U.S. Department of Housing and Urban Development, available at http://www.huduser.org/portal/datasets/fmr.html, searching for comparable rental units online, or requesting information from local real estate brokers or other experts. Investigators may also consider the reasonable cost of lodging claimed by similarly situated employers if such information is available.
Because an employer may not profit from the section 3(m) credit, an employer may only use the fair value of housing as the amount credited toward wages if that amount is equal to or lower than the amount the employer actually pays for the housing.

E. Wage Calculations

To calculate an hourly rate including the section 3(m) credit, the value of the lodging is added to cash wages (excluding overtime compensation) and divided by the hours worked in a given week. The credit goes toward the employer’s minimum wage obligation and therefore is included in the determination of the employee’s regular rate of pay for purposes of calculating any overtime compensation due. See 29 C.F.R. § 531.37(b) (“Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished as additions to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee’s regular rate of pay.”); 29 C.F.R. § 778.116 (“Where ... an employer furnishes lodging to his employees in addition to cash wages the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.”); FOH § 30c01(c) (“The reasonable cost to the employer of furnishing board, lodging, or other facilities (or the fair value thereof) must be included in the employee’s [regular rate] of pay for the purposes of computing [overtime] pay.”).

An employer’s claiming the section 3(m) credit only in overtime weeks, or in a greater amount in overtime weeks, is cause for suspicion. 29 C.F.R. § 531.37. An employer may not use the section 3(m) credit for the purpose of evading the overtime compensation requirement. Id.

For example, assume a live-in domestic service employee receives $6 per hour as well as room and board, for which the reasonable cost is $100 per week. If the employee works 30 hours in a workweek, the $180 ($6 x 30) cash wages is added to the $100 in section 3(m) credit for a total of $280 received in the week, which amounts to a regular rate of $9.33 ($280 / 30) per hour. Assuming the room and board credit is properly taken, this payment structure complies with the federal minimum wage requirement (that an employer pay at least $7.25 per hour).[9]

If during the following week, the same live-in domestic service employee worked for 50 hours, the employer’s minimum wage obligation would still be met, but the employee, if not exempt from the overtime requirement,[10] would be due overtime compensation of one and a half times her regular rate of pay for each hour worked over 40. Specifically, she would receive $300 ($6 x 50) in cash wages plus $100 in section 3(m) credit for a total of $400, which amounts to a regular rate of $8 ($400 / 50) per hour. Her third party employer would then owe her an additional $40 ($8 x .5 x 10) in overtime compensation.

The section 3(m) credit may also be the sole payment an employee receives, provided it is sufficient to cover the employer’s minimum wage obligation. See 29 C.F.R. § 531.36(a) (“Deductions for board, lodging, or other facilities may be made in nonovertime workweeks even if they reduce the cash wage below the minimum wage.”). For example, a maintenance supervisor at an apartment complex who works for 12 hours per week could be compensated entirely by not being charged rent. If the reasonable cost of his lodging is $500 per month (or $115.38 per week, calculated by multiplying $500 by 12 months and dividing by 52 weeks), and the employer has complied with the section 3(m) requirements described above, this arrangement complies with the FLSA because the employee receives a regular rate of $9.62 per hour ($115.38 / 12).

Furthermore, section 3(m) applies to lodging furnished by the employer as compensation to an employee regardless of whether the employer calculates charges for such lodging as additions to or deductions from wages. 29 C.F.R. § 531.29. In other words, it is not relevant for purposes of calculating an
employee’s wages whether the employee has received housing free of charge (additions to cash wages) or has paid rent as a deduction from a paycheck or otherwise (deductions from wages).[11]

F. Joint Employment
As a general matter, under the FLSA any worker may be jointly employed by more than one employer. 29 C.F.R. § 791.2(a); see also Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998) (“The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act.”). If it is determined, after applying the fact-specific economic realities test, that joint employment exists, then both or all employers will be jointly and severally liable for compliance with the FLSA. 29 C.F.R. § 791.2(a). In such circumstances, all employers may take credit toward their joint wage obligation for housing costs paid by any of them. See id. (“[A]ll joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.”). For example, a farm owner and a farm labor contractor may jointly employ agricultural workers who receive housing as part of their employment arrangement; in such circumstances, regardless of which employer pays for the housing, provided all of the requirements described above are met, the reasonable cost or fair value of the housing may be credited toward the employers’ joint FLSA wage obligations.

Joint employment is prevalent in the home care industry; a recipient of home care services (consumer) and a private home care agency, or a consumer and a public entity administering a Medicaid-funded home care program, might jointly employ a home care worker.[12] It is not uncommon for a consumer and home care agency to jointly employ a live-in domestic service employee, and for the employee to receive cash wages from the agency and housing from the consumer (such as if the home care agency pays a set amount per hour of work to that employee and the consumer pays rent on an apartment in which the employee and consumer reside). In such circumstances, the amount properly claimed as a section 3(m) credit and the cash wages are combined, as described above, to determine the total wages received for purposes of determining whether the employee has been paid in compliance with the FLSA and calculating any overtime compensation due.[13]

Conclusion
If an employer claims a section 3(m) credit for lodging provided to an employee, the WHI must conduct a detailed analysis that includes interviews and a review of all necessary records to determine if the requirements described above are met and if so, the appropriate amount of the credit.

Please contact Derrick Witherspoon, Chief, Branch of FLSA/Child Labor at (202) 693-0715 with any questions.

[1] Detailed information about the Home Care Final Rule, including the regulatory changes it made and the meaning of several terms used in this FAB, such as “domestic service employment,” “third party employer,” and “private home,” is available at http://www.dol.gov/whd/homecare/. In particular, the preamble to the Final Rule explains that a “live-in domestic service employee,” a term used frequently in this document, is a domestic service employee, such as a home care worker or nanny, who resides at the worksite on a “permanent basis” or for “extended periods of time.” See 29 C.F.R. § 785.23; FOH § 31b20; 78 Fed. Reg. 60,474.

[2] Several courts have rejected the WHD’s position, expressed in 29 C.F.R. § 531.30, that employees must voluntarily accept meals instead of cash wages for the employer to properly count toward its minimum wage obligation the reasonable cost or fair value of those meals. See, e.g., Herman v. Collis Foods, Inc., 176 F.3d 912,
This presumption of voluntariness can, of course, be overcome, such as in cases involving coercion. See Lopez, 668 F.2d at 1380 (explaining that “even where an employee voluntarily and knowingly accepts a job which, by its nature, requires board and lodging in the employer’s home, an employer may impose ‘coerdcve’ conditions—that is, conditions so onerous and restrictive that the employee’s continued employment and acceptance of the board and lodging ceases to be voluntary’”); Marshall v. Intraworld Commodities Corp., No. 79 C 918, 1980 WL 2097, at *4 (E.D.N.Y. June 9, 1980) (rejecting an employer’s claim of section 3(m) credit because the employee, brought from outside the United States and made to work six or seven days a week at his employer’s home and office, “had no other place to live and no choice but to accept the food and facilities provided to him” and therefore the voluntary acceptance requirement was not met). Although such circumstances are not the norm, WHIs are advised to be attentive to any signs that the presumption of voluntariness is not applicable in a particular case.

In contrast, the primary benefit requirement typically prohibits employers from claiming certain other types of expenses as part of wages pursuant to section 3(m). Specifically, an employer’s business expenses, such as tools of the trade, other materials and services incidental to carrying on the employer’s business, utilities, taxes and insurance, business-related travel expenses, and uniforms required by the nature of the business, are primarily for the convenience of the employer. 29 C.F.R. § 531.3(d); FOH § 30c04. Furthermore, expenses imposed on the employer by law are for the primary benefit of the employer. Wage & Hour Opinion Letter, 1997 WL 998029 (Aug. 19, 1997) (explaining that “an employer may not take credit for facilities which the employer is required by law or regulation to provide”); see also Bland, 661 F.3d at 595-98 (accepting the Department’s position that the cost of housing provided to employees on H-2A visas was primarily for the benefit of the employer, and thus could not be credited as part of wages under section 3(m), because regulations required that employers provide housing free of charge to H-2A workers).

Lodging will also be considered for the primary benefit of the employer if “the employee must travel away from home to further the employer’s business.” FOH § 30c03(a)(2). For example, hotel or other expenses incurred when an employer requires an employee to travel with the employer (such as if a home health aide accompanies an individual with disabilities to a work conference across the country or a nanny accompanies her employer’s family on vacation to provide child care services) may not be included as part of wages under section 3(m). Similarly, lodging would be considered to be for the primary benefit of the employer if an employee of a chain of retail stores incurs lodging expenses because she was required to travel to a store in another state in order to train new employees at that location.

An exception applies in circumstances in which the amount of any possible section 3(m) credit is not relevant: if in any workweek an employee whose employer furnishes lodging to her receives at least the minimum wage in cash and is not owed any overtime compensation, her employer is not required to keep records of the value of the lodging as to that workweek. 29 C.F.R. § 516.27(c).

Whether an individual is an “affiliated person” depends upon the facts of the situation, although “[a] spouse, child, parent, or other close relative of the employer,” “a partner, officer, or employee in the employer company or firm,” “a parent, subsidiary, or otherwise closely connected corporation” or “an agent of the employer” who furnishes lodging will be deemed an “affiliated person.” 29 C.F.R. § 531.33(b).
In the domestic service context, if a person receiving services owns the home in which he and his employee live and therefore makes no mortgage or rental payment, the section 3(m) credit could be for the cost of paying property taxes, utilities, and other necessary costs of maintaining the home.

This example also appears in Administrator’s Interpretation No. 2014-1, available at http://www.dol.gov/whd/opinion/adminintrprtn/FLSA/2014/FLSAI2014_1.pdf, which addresses the application of the FLSA to shared living arrangements for the provision of home care services.

If a live-in domestic service employee is solely employed by the recipient of services (or that person’s family or household member), no overtime compensation is due because the sole employer may claim the live-in domestic service employee exemption from the Act’s overtime requirements. 29 U.S.C. § 213(b)(21); 29 C.F.R. § 552.102, .109(c).

When an employee is reimbursed for expenses incurred on behalf of his or her employer, however, such payments are not considered to be compensation for hours worked. Such payments therefore do not count toward wages under section 3(m) (and are excluded from the regular rate for purposes of overtime calculations).


In circumstances involving a live-in domestic service employee, joint employers can have different wage obligations, because those receiving home care services and their families or households may take advantage of the live-in domestic service employee exemption from the FLSA’s overtime compensation requirement, but any third party employer may not. See 29 C.F.R. § 552.109(c). Nevertheless, any contribution toward wages the consumer (or the consumer’s family or household) has made, including by paying for lodging provided to the employee, may be counted toward the third party employer’s wage obligation.
Residence Hall Directors Under The New FLSA Exemption Rules

By Bill Pokorny on June 1, 2016

One of the issues that colleges and universities are struggling with under the new FLSA overtime exemption rules is how to compensate residence hall directors. While responsibilities vary from institution to institution, residence hall directors generally are responsible for overseeing students living in a college or university residence hall. Their duties may include counseling students, applying and enforcing rules of conduct, coordinating and scheduling other workers, supervising student RAs, and similar responsibilities relating to the residence hall and its student residents. These positions can meet the “duties” test for exempt status under the administrative exemption, provided that they exercise the required level of discretion and independent judgment in the course of their duties. In some cases they might also qualify for an executive exemption if they supervise at least 2 or more other full-time employees (or more part-time employees whose hours are equivalent to two full-time workers). Residence hall director salaries usually are not large, in part because part of their compensation is typically provided in the form of free room and board. Residence hall directors are often required to live in their assigned residence hall. They often have extensive “on call” hours during which they are expected to be in or near their assigned residence hall, available to respond to any issues that may arise.

This combination of low salary and long “on call” hours is what makes these positions so difficult for colleges and universities under the new rules. Often the salaries for these positions fall far enough below the new minimum salary of $47,479 that a salary increase to the new minimum is not an option. Paying overtime may be equally cost-prohibitive if an employee is required to be “on call” in the residence hall and therefore potentially entitled to overtime pay for extended periods of each week, well beyond a typical 8-hour work day. So what can colleges and universities do with their residence hall directors under the new rules?

Credit for Room and Board

Many of our higher education clients have asked us whether they can count room and board toward the new $913 per week minimum salary. Unfortunately the answer to that is no. The regulations specifically provide
that the minimum salary is “exclusive of board, lodging or other facilities,” meaning that any such benefits cannot be counted toward the $913 minimum.

However, if residence hall directors are re-classified as non-exempt employees, colleges and universities may be able to count the value of food, housing and other facilities provided to employees toward their wages for purposes of minimum wage. But don’t get too excited. Restrictions do apply.

For lodging, the credit under Section 3(m) of the FLSA is allowed only where five requirements are met:

1. Lodging must be regularly provided by the employer or similar employers;
2. The employee must voluntarily accept the lodging;
3. The lodging must be furnished in compliance with applicable federal, state, or local laws;
4. The lodging must primarily benefit the employee, rather than the employer; and
5. The employer must maintain accurate records of the costs incurred in the furnishing of the lodging.

While most of these requirements can be met, number 4 may pose a problem for resident directors who are required to live in the residence hall so that they can be “on call” during overnight hours. (For a discussion of this issue, see DOL Field Assistance Bulletin No. 2015-1.)

Further, even if the credit is allowed, only the lesser of the “reasonable cost” or “fair value” of the lodging may be counted toward the employee’s wages. “Cost” here means the share of the actual operational costs for providing the housing fairly allocated to the room or rooms provided to the resident hall director. How this is calculated is beyond the scope of this post, but suffice it to say that the amount will likely be significantly less than what students typically pay to live in the same residence hall.

Similar rules apply to credit for meals. Institutions can take credit only for the reasonable cost of meals furnished to employees. This means the marginal cost of the food itself, without any markup for profit or fixed costs that would be incurred regardless of whether the meal is provided to the employee. Again, this is likely to be far less than the rate charged to students for a typical dining hall meal or meal plan.

**Academic Administrator Exemption**

Some higher education institutions may also be wondering whether residence hall directors might qualify for the “academic administrator” exemption. That exemption applies to administrative employees of an education institution whose primary duties are administrative functions directly related to academic instruction or training. Unlike other administrative employees, academic administrators can be paid less than the minimum salary provided in the regulations, so long as their salary is at least equal to the starting salary of exempt teaching professionals in the same institution. Unfortunately, this exemption probably does not apply to most residence hall directors, as their job duties typically do not directly relate to academic matters such as curriculum, quality or methods of instruction, measuring and testing achievement, academic and grading standards, etc.

**Strategies for Managing Overtime**

If meeting the new minimum salary level to classify residence hall directors as exempt is not an option, colleges and universities will likely need to find ways to manage their expenses by restructuring the way residence hall directors operate.

One likely approach is to re-think the rules regarding when residence hall directors are required to be present in their facilities. Generally speaking, if an employee is required to be physically present at a given location...
for the benefit of the employer, the employee is working and is entitled to be paid for their time. So, if a non-exempt residence hall director is required to be present in the dormitory in case they are needed, they are likely entitled to pay for that time, even if much of it is spent studying, sleeping, or watching Game of Thrones rather than doing anything resembling work.

One way of dealing with this problem is to relax the requirement of physical presence and instead tell residence hall directors that they are free to go about their business, but are “on call” and required to return to the residence hall within a reasonable period of time (e.g., 30 or 45 minutes) if needed to deal with a student situation. Provided that the restrictions associated with the “on call” time are not so strict as to prevent the employee from going about his or her personal business, on call time generally need not be paid under the FLSA. Some colleges and universities may also elect to restructure their residence hall director schedules so that there is one “on duty” director available for a group of residence halls during key times. Others may simply increase the total number of directors and adopt staggered schedules so that no director has to work more than 40 hours in a given week.

Another option for filling the gap if residence hall director schedules must be cut back is to increase reliance on student Resident Advisors. Generally, the Department of Labor takes the position that traditional student RAs are students, not employees, and are not entitled to minimum wages or overtime pay under the FLSA. While student RAs cannot serve all of the functions of a resident hall director, a combination of student RAs present in the residence hall with a resident director “on call” and available on short notice may address the need.

Controlling Costs Through Compensation Adjustments

Because any response to this issue is likely to involve significant change to existing practices, colleges and universities should take the opportunity now to consider other creative ways to manage total costs for these positions. For example, the FLSA permits employers to adopt different pay rates for different sorts of work. Residence hall directors could be paid a lower rate – as low as the minimum wage – for time when they are required to be in the residence hall but are not actually working, and at a higher rate during designated “office hours” or when responding to actual student issues.

If a residence hall director’s actual work hours vary significantly from week to week, it may also be worth considering whether they can be paid on a fluctuating workweek basis (explained in our prior post), which might significantly reduce the total cost of overtime.

Recording Time

Whatever measures a college or university takes to control overtime costs, they will now be required to record work hours for any residence hall directors who are reclassified as non-exempt under the new rules. This may present some challenges, particularly for employees who are not used to recording their time. Whether an institution elects to use paper time sheets or a sophisticated electronic timekeeping and payroll system, it will need to carefully plan and communicate its expectations for any newly non-exempt employees and their direct supervisors. In particular, this includes adopting and effectively communicating clear policies regarding what hours are expected, what counts as “work” time, and how that time is to be recorded.

Other thoughts?

There is no “one size fits all” solution for this issue. Each higher education institution will need to strike their own balance between maintaining expected levels of service in the residence halls and controlling labor costs in a time of already-strained budgets and shrinking revenue. How is your institution addressing this
THE IMPACT OF THE DEPARTMENT OF LABOR’S EXEMPT SALARY INCREASE ON HIGHER EDUCATION EMPLOYERS

By Alex Passantino, Seyfarth Shaw LLP

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

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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. 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.

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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

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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.

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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.

I) 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. 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 week 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.

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.

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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.\textsuperscript{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

\textsuperscript{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 Workers\(^{21}\)

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

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\(^{16}\) 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.


\(^{21}\) 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](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. 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. 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 test, 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.


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

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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, 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.

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 x 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 ÷ 50 ÷ 2) for hours worked between 40 and 50, plus $23.10 ($770 ÷ 50 x 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 ÷ 55 x 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 ÷ 50 ÷ 2) for hours worked between 40 and 50, plus $21.00 ($700 ÷ 50 x 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.

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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.

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28 See 29 C.F.R. § 785.13.