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THE FLSA OVERTIME REGULATIONS ARE CHANGING DECEMBER 1, 2016: COLLEGES AND UNIVERSITIES WILL BE READY.

By Karen Baillie

We've had plenty of time to adapt and now the new rules are clear. Colleges and universities will be ready. In the spring of 2014, President Obama signed a Presidential Memorandum directing the Department of Labor (DOL) Wage and Hour Division to update the regulations governing overtime pay, as the salary threshold at the time was \$455 per week, or \$23,660 annually, which is below the federal poverty line for a family of four. According to the administration, this created a situation where many workers whom the Fair Labor Standards Act intended to protect were instead classified as exempt.

In response, on July 6, 2015, the DOL published a Notice of Proposed Rulemaking, which suggested a weekly salary threshold of \$972 and an annual salary of \$50,440. The DOL accepted comments until September 4, 2015, and then reviewed over 270,000 comments from a broad array of constituencies, including small business owners, Fortune 500 corporations, employer and industry associations, individual workers, worker advocacy groups, unions, non-profit organizations, law firms representing both employers and employees, educational organizations and representatives, religious organizations, economists, congressmen and women, federal government agencies, state and local governments and representatives, tribal

governments, professional associations and other members of the public.

On May 18, 2016, the DOL Wage and Hour Division published its final rule, confirming proposed changes to 29 CFR §541 "Defining and Delimiting the Exemptions for Executives, Administrative, Professional, Outside Sales and Computer Employees." The changes are effective December 1, 2016, which is good news for employers as it gives them some additional breathing room to prepare for the new rule.

Under the Fair Labor Standards Act, employees who qualify for one of the exemptions are excluded from both the minimum wage and overtime protections. As a result, employees may work any number of hours in the workweek and may not be subject to the Fair Labor Standard Act's minimum wage and overtime protections. In general, regardless of job title, employees must meet both a duties test as well as a salary test to qualify for an exemption. The new rule does not alter any of the duties tests, but addresses only the salary test. In raising the threshold salary, the new rule is expected to decrease the number of exempt workers and to increase the number of employees entitled to overtime.

Specifically, the new rule makes three changes:

1. The new rule doubles the minimum salary a worker typically has to be paid to be exempt from overtime. Starting December 1, 2016, the new rate will be \$913 a week (or \$47,476 per year).

There are some existing exemptions to which the salary threshold does not apply and employees can continue to qualify as exempt regardless of salary. These include teachers, lawyers, doctors, and outside sales professionals. In addition, certain academic administrative employees can be paid a salary lower than the required salary if it is at least as high as that paid to entry-level teachers at the educational establishment where the academic administrative employee works. These regulations are unchanged by the new rule.

2. The second change the new rule makes is to increase the threshold salary for the highly-compensated employees' exemption from \$100,000 annually to \$134,004 annually. The proposed regulations had used \$122,148, so this is a significant increase from the proposed regulations.
3. The third change is that the new rule automatically updates both salary thresholds every three years, by keeping the levels tied to the 40th percentile of earnings in the lowest-wage census area (for most exemptions) and the 90th percentile of earnings of all full-time salaried workers (for the highly-compensated employees exemption). The Rule requires the DOL to publish the updated rates in the Federal Register at least 150 days before their effective date.

On the same day the final rule came out, the DOL also published several additional guidance

documents and fact sheets, including a Fact Sheet entitled [Overtime Final Rule and Higher Education](#) (May 18, 2016) and a [Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act](#) (May 18, 2016), as well as similar sets of fact sheets for [Non Profits](#) and [State and Local government employers](#).

These documents remind university employers that, under existing regulations, **many professional workers, including most teachers, doctors and lawyers are overtime exempt without regard to their pay, because the salary tests do not apply to them.** In addition, colleges are reminded that **certain academic administrative professionals who meet the duties test need can be exempt without being paid the \$47,476 annual salary if they are paid at least the entry level salary for teachers at their institution.** The Higher Education Guidance document collects some DOL insight into how DOL interprets existing regulations as they apply to several common positions at institutions of higher education. Some highlights include:

The DOL reminds colleges and universities that teachers engaged in the activity of teaching, lecturing or imparting knowledge may be considered exempt professionals and do not need to be paid the minimum salary. In contrast, non-teacher learned professionals at colleges and universities will need to be paid the minimum salary in order to be considered exempt. Specifically, "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."

Post Docs. The DOL clarified that postdoctoral fellows, employees who conduct research at a higher education institution after the completion of their doctoral studies, are not considered students because they are not working towards a degree. Postdoctoral fellows may qualify under the professional exemption as 'learned

professionals,' but they "must also satisfy the salary basis and salary level tests to qualify for this exemption." "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." Of course, if the post doc does have a primary duty of teaching, then the post doc can qualify for the teaching professional exemption without complying with the salary test.

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," which includes institutions of higher education.

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 is a relevant – but not exclusive factor in determining the employee's exempt status. For example, assistant athletic instructors who spend more than half 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."

Students. In its Guidance for Higher Education, the DOL reiterates that student workers whose work is related to progress toward their degree are not considered workers and the DOL will not assert jurisdiction over their work. Specifically, the DOL guidance contains the following useful clarifications:

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."

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."

Resident 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."

Students in an Employment Relationship. "An employment relationship will generally exist with regard to students whose duties are not part of an overall education programs 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 ... These students are entitled to minimum wage and overtime compensation whether or not they earn above the new salary level."

The Academic Administrative Exemption. The DOL, in the new Guidance for Higher Education, reminds Colleges and Universities that it may avoid overtime for a subset of administrative employees, called "academic administrative employees" if they are paid an amount at least what the institution pays to starting teachers. This rule does not apply

to all administrative employees – it applies only to those whose work is related to the teaching function. The DOL Guidance sheds some light on this distinction:

“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, [in addition to meeting the duties tests] academic administrative employees must either be paid on a salary 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. 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.”

“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.”

“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.”

What’s Next? Colleges and universities, like all other employers, will need to use the coming months to review their workforces and to determine whether any changes are needed. This is a great opportunity to reclassify any previously misclassified employees as well as to realign duties and expectations to comply with the new rule and with the operational needs of the employer. Some potential actions include:

1. requiring all employees to keep an accurate record of their time worked and to report their time to the employer.
2. raising salaries to allow individual workers to qualify for the EAP exemptions.
3. communicating in writing with employees how many hours a weekly salary is expected to cover (35? 40? 45? 50?) and how overtime will be handled.
4. retraining overtime eligible employees on the employer’s rules regarding overtime, for example, that employees should not work overtime without permission, but that employees do need to record their hours accurately.
5. adding staff or adjusting job duties to minimize the need for overtime
6. adjusting job duties so that individual employees qualify for exemptions. ◆

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