

FLSA Overtime Rule

Implications and Strategies for Higher Education

SPEAKERS

Jim Ratchford

Partner, Higher Education Practice Leader

Garry Straker

Health & Benefits, Compensation & Human Capital



Cherry Bekaert

Benefits Consulting^{LLC}



A black and white photograph of a man in a suit walking away from the camera, carrying a briefcase. He is walking on a path that curves around a large, reflective globe. The background shows a field of crops under a cloudy sky. A green semi-transparent banner is overlaid across the middle of the image, containing the text.

“A Hard Day’s Work Deserves
a Fair Day’s Pay”

Agenda

- ▶ FLSA - Overtime Rules
- ▶ Financial Impact
- ▶ Key Provisions
 - Salary Test
 - Duties Test
- ▶ Higher Education Issues & Concerns
- ▶ Strategies



Timing of FLSA Changes

- ▶ May 18, 2016 - Final Rule Released
- ▶ December 1, 2016 (Thursday)- Effective Date of Final Rule
 - Exception for small residential providers of Medicaid-funded services for individuals with intellectual or developmental disabilities.

National Impact

- ▶ DOL estimates Final Rule will transfer income from employers to employees in the amount of **\$1,189.1 million**.

	Currently overtime exempt*	Gain new overtime protections or get a raise to the new threshold	Share of currently overtime exempt workers who gain new overtime protections or get a raise to the new threshold
TOTAL	22,514,000	4,228,000	19%
GENDER			
Female	9,089,000	2,352,000	26%
Male	13,425,000	1,876,000	14%

FLSA White Collar Exemption:

- ▶ **Duties Test** – Must primarily perform Executive, Administrative or Professional duties
- ▶ **Salary Basis** - Must be paid a fixed salary
 - Not subject to reduction due to quantity of work performed
- ▶ **Salary Threshold Test** - Must be paid the minimum required salary

Note: other exemptions exist for computer and outside sales professionals, teachers not subject to salary threshold test



Salary Threshold

CURRENT RULE		FINAL RULE
\$455/week Equivalent of \$23,660/year	Standard Salary Test Threshold¹	Set at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region \$913/week Equivalent of \$47,476/year
Annual salary threshold \$100,000/year (and simplified duties test)	Highly Compensated Workers (HCW) Salary Threshold	Set at the 90th percentile of full-time salaried workers nationally Annual salary threshold \$134,004 (No change to simplified duties)
None	Salary Threshold Update Mechanism	Every three years beginning January 1, 2020

¹ Salary threshold (and salary basis test) does not apply to teachers, lawyers, doctors, outside sales professionals

White Collar - Duties Tests

CURRENT RULE	EAP - Job Duties Tests	FINAL RULE
Employee's primary duty must be managing a customarily recognized department or subdivision of the enterprise (and managing 2 full time employees as well)	Executive	No Change
Employee's primary duty must include the exercise of independent judgement with respect to matter of significance	Administrative	No Change
Employee's primary duty must be to perform work that requires advanced knowledge in a field of science or learning	Professional	No Change

Note: Hourly computer employees who earn at least \$27.63 per hour and perform certain duties are exempt under section 13(a)(17) of the FLSA

FLSA Section 541.204

Educational Establishments and Administrative Functions

- ▶ The administrative exemption is also available to employees compensated on a salary or fee basis at the threshold rate or
- ▶ on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment, and
- ▶ whose primary duty is performing administrative functions* directly related to academic instruction or training in an educational establishment

* Administration of curriculum, quality and methods of instruction, measuring learning achievements of students, maintaining academic standards e.g. principals, assistant principals, academic counselors

Primary Duties

- ▶ Primary Duties – “the principal, main, major or most important duty that the employee performs”
 - Factors to consider include:
 - Amount of time spent performing exempt work
 - (50% or more generally satisfies primary duty requirement)
 - Freedom from direct supervision
 - Relative importance of exempt duties



Inclusion of Non-discretionary Bonuses and Incentive Payments (including commissions) Permitted

- ▶ Employers may use to satisfy up to 10% of the Standard Salary level

Non-discretionary Bonuses and Incentive Payments

- ▶ Payments required on a **quarterly or more frequent** basis.
- ▶ DOL permits the employer to make a **“catch-up” payment** no later than the next pay period after the end of the quarter.
- ▶ If catch-up payment is not made within the time frame allotted, the exemption is lost for the prior quarter



Discretionary Bonuses

- ▶ Discretionary bonuses may **not** be used to satisfy any portion of the salary level requirement.
- ▶ Discretionary bonuses are those “generally paid without prior contract, promise, or announcement, and the decision to provide the bonus and the payment amount is at the employer’s sole discretion.”
- ▶ Example: “on-the-spot” award or an unannounced year-end bonus.

Board, Lodging or other compensation

- ▶ To qualify for exemption the employee must earn the minimum salary threshold “exclusive of board lodging or other facilities”
 - “other facilities” includes meals
- ▶ Other forms of compensation remain excluded from the salary level test including payments for:
 - medical, disability, or life insurance,
 - contributions to retirement plans
 - other fringe benefits.

Expected Growth in Thresholds

- ▶ Based on historical wage growth in the South, by January 1, 2020, the standard salary level is likely to be approximately \$984 per week (\$51,168 annually for a full-year worker)
 - Represents 2.5% annual growth
- ▶ HCE total annual compensation requirement is likely to be approximately \$147,524.
 - Represents 3.3% annual growth

Compensatory Time for Public Sector Employees

- ▶ No change to “comp time” provisions
 - Employees may receive “comp time” instead of cash payment for overtime hours.
 - Pursuant to CBA, MOU, any other agreement with representatives, or between employer and employee.
 - “comp time” must be provided at a rate of 1.5 hours for each hour of overtime.

Time & Attendance

- ▶ Employer has the burden to maintain an accurate record of the number of daily hours worked for each employee.
- ▶ Newly overtime-eligible employees do not have to punch a time clock to record start and end times of their work period.
- ▶ The DOL does not mandate a particular method employers must use for recordkeeping and an employer has some discretion to choose.

Use of Electronic Devices

- ▶ Consider establishing policies that govern working remotely and after hours
- ▶ Policies should require employees to report all the time that they work— regardless of whether it's from the office, or from home
- ▶ Institutions can forbid employees to work from home and discipline them if they do - but that doesn't relieve them from the obligation to pay them overtime



Part-Time Employees

- ▶ No specific salary test for Part-time employees.
- ▶ Need to track hours accurately
- ▶ Will need to be paid overtime if they do not meet threshold.

What Should Institutions Do?

Evaluate The Potential Impact Considering:

Financial Costs	Organizational & Cultural Challenges	Work Processes & Operations	Change Management, Communication, & Training
Begin modeling impact of overtime payments, salary increases, benefit changes, staff levels	Recruitment and retention, succession planning, career paths and development, employee engagement and morale	Workload distribution and capacity, revise internal procedures and systems, maximize efficiencies	Comprehensive training and education at all levels, timely well tailored communication from Senior Management

Campus Positions That May Be Impacted

▶ Higher Education Institutions may have 20% to 30% of exempt positions impacted, depending on location

- ▶ Admissions Counselors
- ▶ Financial Aid Counselors
- ▶ Development Officers
- ▶ Student Services
- ▶ Librarians
- ▶ Researchers
- ▶ Coaches and Assistant Coaches (non-teaching)

Coaches Assistant Coaches



- ▶ May qualify for exemption as teacher
- ▶ Teacher's not subject to salary threshold
- ▶ Guidance indicated that coaches who provide instruction to student athletes qualify as teachers
- ▶ Most coaches would not be considered academic administrative employees (and therefore subject to lowest salary teacher threshold).

Coaches and Assistant Coaches

- ▶ Coaches working a ten month contract but paid over twelve months
 - Pro-rate salary over actual period of work
- ▶ In this situation it is critical that employee does not work outside of ten month period.
- ▶ Will coaches jobs be redefined?

Post Docs

- ▶ Postdoctoral researchers who do not teach typically qualify for professional exemption.
- ▶ NIH indicated they may increase grant funded salaries.
- ▶ If additional funding does not appear – will these jobs be classified as non-exempt?
- ▶ Postdoctoral researchers that teach must have a “primary duty” of teaching to qualify for teacher exemption

Admissions Counselors

- ▶ Many admissions counselors will not meet the salary threshold.
- ▶ More senior staff could hit the salary threshold and qualify for exemption based on degree of discretion and independent judgement.
- ▶ Does it make sense to pay them hourly?

Potential Compensation Issues

Pay Structures

Salary
Compression

Time and
Attendance

Job Evaluation

Benchmarking

Strategies

1. **Increase** base salary to meet threshold
2. **Maintain** current base salary & pay overtime
3. **Lower** current base salary & pay overtime
4. Use **Comp time**

Strategies

1. **Change** business processes/operations
2. **Improve** efficiency to minimize overtime
3. **Redefine** Job roles
4. **Hire** additional part-time workers

What About Pay Data Reporting?

- ▶ February 1, 2016: EEOC proposed rule issued
 - Allow EEOC to address issues of pay disparity based on gender and race/ethnicity
- ▶ Effective date: September 2017
- ▶ Any changes to compensation structures should be considered in context of internal equity and pay data reporting

What Questions Do You Have?

Garry Straker

*Health & Benefits, Compensation
& Human Capital*

860.280.6333

gstraker@cherrybekaertbenefits.com

Jim Ratchford

704.940.2600

jratchford@cbh.com

1111 Metropolitan Avenue
Charlotte, NC 28204

