

## U.S. DEPARTMENT OF LABOR ISSUES FLSA'S NEW OVERTIME RULE

On April 26, 2024, the U.S. Department of Labor (“DOL”) published its long-anticipated final rule revising the “white-collar” exemptions of its overtime pay regulations.<sup>i</sup> These changes will have significant budgetary, programmatic, and human resource implications for colleges and universities as they seek to comply with the Fair Labor Standards Act (“FLSA”), which requires overtime pay at time-and-one-half for employees unless they are exempted by the statute and its regulations.<sup>ii</sup> The final rule takes effect in a two-step process with the first step occurring on July 1, 2024 and the second and final step on January 1, 2025. The rule covers all employers and has no special provisions or carveouts for colleges and universities.

This issue brief summarizes the new overtime rule and how it will impact campuses, offers perspective on how to comply with the new regulation, and answers some questions campus leaders may be asking. However, deep dives will be required across campuses to assess the final rule’s applicability to individual employees and institutional budgets. Equally important, careful attention, planning, and communication is necessary to minimize the final rule’s possible negative impact on campus culture and employee morale.

Of greatest interest and effect for campuses, for many employees, the final rule requires that they be paid overtime when working more than 40 hours in a work week *unless*

- They meet a **salary basis test** by being paid above a new threshold as of July 1, 2024 of \$43,888 annually (or \$844 per week) and then ultimately increasing to \$58,656 (or \$1,128 per week) as of January 1, 2025; *and*
- They meet a **duties test** that requires that they primarily work in a delineated “*bona fide* executive, administrative, or professional capacity.”<sup>iii</sup>

The final rule significantly raises the current salary threshold of \$35,568 and directs that the threshold increase every three years based on the salary level for the 35th percentile for full-time salaried workers of the lowest-wage Census region in the country (currently the Southeast). The duties test is unchanged by the final rule.

The changes apply to employers in all sectors but will pose specific challenges for higher education. Employees in many corners of campuses—from residence halls to research labs—are likely to be affected. The final rule has a short implementation time period for the first-step increase of the salary threshold to \$43,888 followed a mere six months later with the second-step increase to \$58,656, a nearly 65 percent increase when fully implemented over seven months. This presents a challenging employee realignment process for all institutions while they are locked into the existing budgetary, tuition, and programmatic aspects of the 2024-25 academic year. As a result, it is imperative that institutions take immediate steps to assess and address the final rule’s impact.

These steps include:

- Identifying potentially affected employees (who may include postdocs and even some individuals holding faculty appointments);
- Reviewing the primary job duties of potentially affected employees and reaffirming or modifying their classifications (as “exempt” or “non-exempt” from overtime payment obligations);
- Raising some employees’ salaries above the new threshold, and considering whether to reduce other employees’ salaries to offset newly mandated overtime payments to those employees; and,
- Assuring that user-friendly time tracking mechanisms are available on an array of digital platforms and are understood and utilized by all employees who are required to be paid overtime if they work more than forty hours in a work week, particularly any formerly exempt employees who are reclassified as non-exempt.

## FLSA and Final Rule Details

The FLSA’s “white-collar” overtime payment exemptions are enunciated in the FLSA regulations. Three categories of exemptions—the executive, administrative, and professional categories—require that an employee be paid not less than a minimum salary and perform certain requisite duties that require independent judgment and discretion. All employees who do not fit within these or other exempt categories—such as the teacher or computer professional exemptions—are non-exempt. The FLSA requires that college and university employers, like all other employers, pay their non-exempt employees overtime at a rate of time-and-one-half of their regular rate of pay for all hours worked in excess of 40 in a workweek. Following an unsuccessful effort by the Obama administration to revise these overtime regulations in 2016 (the revisions were blocked by a federal court), the DOL issued a request for information (“RFI”) in 2017 seeking comment about how it should go about updating the overtime regulations. A notice of proposed rulemaking (“NPRM”) followed in 2019, proposing to increase the minimum salary threshold necessary for an *executive*, *administrative*, or *professional* exemption to apply. DOL finalized this rulemaking in 2019, setting a new salary threshold of \$35,568 per year (\$684 per week), effective January 1, 2020. In 2022, the DOL issued another NPRM to further update the salary levels necessary to qualify for these “white-collar” overtime payment exemptions, resulting in the final rule announced on April 26, 2024.

As noted earlier in this issue brief, as of July 1, 2024, the salary threshold for these exemptions increases to \$43,888 annually (or \$844 per week), and six months later (January 1, 2025) it increases to \$58,656 (or \$1,128 per week). Faculty continue to be exempt from overtime *regardless of salary* via a “teacher” exemption so long as “their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge.”<sup>iv</sup> Computer professionals performing delineated primary duties remain exempt from overtime so long as they are paid above the final rule’s new salary threshold or compensated hourly at not less than \$27.63.<sup>v</sup>

The final rule also raises the salary threshold for another overtime exemption that will be applicable to some campus employees. FLSA regulations provide that “highly compensated” employees who satisfy some, but not all, of the duties test applicable to either the professional, computer professional, executive, or administrative classification may be exempted from overtime pay. The final rule raises the salary threshold for this exemption, from its current level of \$107,432 to \$132,964 as of July 1, 2024, and then to \$151,164 as of January 1, 2025.<sup>vi</sup>

The salary thresholds under the final rule will automatically increase every three years based on data from the Bureau of Labor Statistics; however, the DOL will have the ability to delay a scheduled increase in the event of “unforeseen economic or other conditions.” Employers will receive at least 150 days of prior notice before the scheduled increases.

## The Final Rule in the Higher Education Context<sup>vii</sup>

The teaching exemption has a rather broad application, covering employees so long as the individual's primary duty is teaching, tutoring, instructing (including in a research context), or lecturing. These bona fide teachers include professors, adjunct professors, and teachers of skilled and semi-skilled trades and occupations. Certain academic administrative personnel who interact with students outside the classroom, such as academic counselors, will qualify as exempt, if they are paid at least as much as the entrance salary for faculty at their institutions.

The final rule's impact on postdoctoral fellows is also significant. Those who primarily conduct research, as opposed to teaching, will continue to fall outside the teaching exemption. Their annual salaries will need to be above the new minimum threshold; otherwise, they must be paid overtime. For postdocs whose teaching responsibilities legitimately bring them within the teaching exemption, the final rule does not mandate that they be paid overtime, no matter their salaries.

Colleges have long assumed that athletic coaches, many of whom earn less than the new salary thresholds, were exempt under the teaching exemption. While this classification continues to be appropriate if a coach's primary duties are teaching or instructing athletes how to improve their sports, coaches who primarily recruit, break down film, etc. are unlikely to qualify as bona fide teachers; they must be paid overtime unless they are paid at least the new salary threshold then in effect and can meet the "white-collar" exemption duties test.

The list of other potentially affected employees is long. Student admissions counselors average around \$45,000. Entry-level alumni relations officers may not make much more, and residence hall managers average less. Others who may earn less than the new minimum salary threshold include those in student affairs (financial aid counselors, student activities officers), administrative support (human resources professionals, contract managers), auxiliary services (parking managers, ticket managers), athletics (trainers, facilities managers, publicity and communications staff), food service (shift managers and special events staff), and community outreach/educational extension functions (agricultural extension agents, industry extension consultants).

With the final rule now in place, institutions will be assessing and pricing out the most obvious FLSA compliance strategies for employees who will need to be treated differently than they are now on July 1 and then again on January 1, 2025. These strategies include:

- Increasing salaries of exempt employees who are paid less than the new salary threshold then in effect (including the rare part-time employees who occasionally work more than 40 hours in a week and whose full-time equivalent salary is above that threshold but, in fact, receive a salary below it); or
- Reclassifying formerly exempt employees as non-exempt and either (i) avoiding overtime work by them, (ii) paying them overtime at their current compensation levels, or (iii) managing the combination of their base pay and overtime to roughly maintain current per employee compensation.

No solution is cheap or easy. Increasing salaries is expensive and may cause other categories of employees to complain that they are similarly entitled to raises. On the other hand, reclassification to non-exempt status can lead to increased costs in either overtime pay or implementing overtime controls, such as hiring additional part-time employees so that the same amount of work can be accomplished without overtime.

Moreover, reclassification has intangible costs. Employees may experience, or at least perceive, diminished job autonomy due to manager-imposed hours restrictions. Those restrictions could inhibit opportunities for

early-career campus employees to “go the extra mile” that, in turn, may limit their development and advancement. For some employees, reclassification and lessened flexibility with work arrangements will result in a perceived loss of prestige and credibility. All of these could adversely affect employee morale.

Further complicating compliance is that many of the affected positions do not lend themselves to fixed work schedules such as contemplated by the rule. Campuses and college students do not have a nine-to-five cadence; neither do the lives of many employees who routinely, and often informally, work extended nights and weekends making campuses hum. Rather, campuses are full of people who do what needs to be done, when it needs to be done, until it is done, and in their own ways. In addition, to varying degrees, remote and hybrid work is here to stay in higher education. Its flexibility, however, carries with it the management challenge of accurately tracking work hours, particularly in the various campus roles that have a responsive, rather than completely scheduled, nature. While this work environment might challenge workforce management and analytics tools increasingly common in higher education administration, it is equally (at least) celebrated as a testament to the uniqueness of a campus community, the dedication of its employees, and the value delivered to the students who are part of it. Colleges will find ways to comply with the final rule and still preserve this culture.

Given the large number of employees who will be impacted by this rule, an obvious and understandable focus has been on how institutions, and ultimately their students, will pay for it. These costs may trickle down to students in the form of higher tuition and fees or reduced services. Layoffs are possible, particularly given the estimates of enrollment drops resulting from the serious problems arising from the implementation of the new FAFSA by the Department of Education.<sup>viii</sup>

## Strategies for Optimizing Compliance with the Final Rule

Colleges and universities have their work cut out for them to comply with the final rule by July 1, 2024 and then conduct similar steps prior to the January 1, 2025 deadline while making the transition as smooth as possible for students and employees. Prudent steps may include:

- **Audit existing exemptions.** Institutions should plan and undertake a comprehensive audit of positions and employees potentially impacted by the changes, focusing on currently exempt employees who earn salaries in the \$35,568 to \$43,888 range, while keeping in mind the second step increase to \$58,656 on January 1, 2025 as well as anticipated automatic increases in the future.
- **Review individual job duties and descriptions.** It is a good time to identify any employees potentially misclassified as exempt; reclassifications made this year may be less likely to raise flags about past errors. Institutions should review job descriptions to ensure that the primary duties of all exempt employees satisfy one of the statutory exemptions, and compare the description to the employee’s actual duties. Institutions should be particularly mindful of those employees who perform some teaching duties but who may not perform enough to qualify as their primary duties.
- **Develop a compliance strategy.** For each employee or classification affected by the final rule or identified as misclassified, institutions should determine how to achieve compliance, taking into consideration the nature of the position and the best interests of the institution. Possible solutions include raising salaries to the new minimum, adjusting duties, realigning and shifting workload to other exempt employees, reclassifying to non-exempt status and paying overtime, or adjusting base pay and overtime so that total annual compensation remains the same. There are several factors relevant to this consideration, including the number of hours worked by the employee, the practicality of imposing overtime controls, budgets, the nature of the position, the broader effects any reclassification will have on the department or institution, career

advancement, and staffing levels.

- **Plan communications.** An important part of a compliance strategy is determining how changes will be communicated to employees and crafting a careful message, keeping in mind that some employees will likely react negatively to these changes, particularly if they perceive a loss in compensation, autonomy, or status.
- **Review policies, practices, and tools.** Institutions should review their timekeeping and overtime policies, practices, and tools to determine where adjustments will be needed to comply with the final rule and to make sure adequate safeguards are in place to control overtime costs.
- **Additional training.** Employees reclassified as nonexempt, as well as managers and administrators, may need additional training regarding recording time and limitations on working overtime.

## Q&As

### Q: What needs to be done first?

A: Identify and quantify the magnitude of the issue. Assemble a task force to review all salaried (exempt) personnel currently making less than the new salary threshold then in effect. Then pursue a structured analysis on a departmental basis. As part of this initial process, it is also crucial to determine whether any employees currently treated as exempt from overtime payments have been misclassified.

### Q: What are my options?

A: (i) Increase the salaries of current exempt staff to the new salary threshold then in effect. (ii) Reduce workloads to eliminate or minimize overtime pay obligations. (iii) Convert to hourly or salaried nonexempt, and pay time-and-one-half for all overtime hours over 40 at the employee's regular rate of pay. (iv) Adjust employee base pay and pay overtime; this involves reallocating earnings between regular wages and overtime pay to maintain current total compensation levels for an employee, based upon anticipated overtime needs. **DO NOT** implicitly or explicitly suggest that employees may work off the clock.

### Q: What are the hidden traps?

A: (i) Rollup costs. If some employees' salaries are increased to the new statutory minimum, this may result in salary compression at the next higher salary band levels, and addressing the compression would result in additional costs. (ii) If employees are reclassified as non-exempt, control of after-hours work (research, late night emails, etc.) must be addressed. **DO NOT** implicitly or explicitly suggest that employees may work off the clock. (iii) If you are in one of the handful of states with higher salary thresholds for exempt employees than the federal law (Alaska, California, Colorado, New York, and Washington), make sure these are met.

### Q: What are the key non-compensation considerations and action steps?

A: A communication plan must be developed to manage any changes ultimately implemented because of the new regulations. Employee morale must be a focus of individual and collective attention, as some institutionally dedicated, hard-working staff may be upset at the loss of status, flexibility in their work hours, etc.

## Q: For employees who must receive overtime, may we offer comp time instead?

A: If you are a public institution, yes...though with conditions. State colleges and universities will continue to be able to offer comp time in lieu of overtime pay for non-exempt personnel, consistent with existing regulations. Employees of state colleges and universities may accrue up to 240 hours of comp time and are permitted to use it on the date requested unless doing so would “unduly disrupt” the operations of the institution. However, private institutions cannot satisfy their overtime obligations by providing comp time and must pay overtime-eligible employees an overtime premium for hours worked over 40 in a workweek.

## Q: How do we address RAs (student resident advisors)?

A: Student resident advisors who receive reduced room and board or tuition credits are students and not employees covered by the Fair Labor Standards Act.

## Q: What about staff who are provided campus housing and board and paid below the salary threshold? May we factor in the value of the housing and board when determining whether they are above or below the FLSA salary threshold?

A: No. To qualify for exemption, an employee must earn the minimum salary specified under the rule “exclusive of board, lodging or other facilities.” The phrase “exclusive of board, lodging or other facilities” means “free and clear” of any claimed credit for “non-cash items of value that an employer may provide to an employee.”<sup>ix</sup> Thus, the costs incurred by an employer to provide an employee with board, lodging, or other facilities may not count toward the minimum salary amount required for exemption.

## Q: We have many part-time exempt employees who make a good salary, but because they only work 50-75 percent time, their actual pay will fall below the final rule’s salary threshold. May we use their full-time equivalent salary when determining whether they may continue to be classified as exempt?

A: No. So long as part-time employees do not exceed 40 hours of work in a week, there is no issue. But if they exceed 40 hours, they must be paid at least \$913 per week (or the higher state law threshold, if there is one) or else receive overtime compensation.

---

<sup>i</sup> 89 Fed. Reg. 32842 (April 26, 2024)

<sup>ii</sup> 29 U.S.C. § 213.

<sup>iii</sup> 81 Fed. Reg. 32546.

<sup>iv</sup> 29 CFR § 541.303 - Teachers

<sup>v</sup> 89 Fed. Reg. 32842, 32894.

<sup>vi</sup> 89 Fed. Reg. 32842, 32972.

<sup>vii</sup> See U.S. Department of Labor Wage and Hour Division Fact Sheet #17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA). <https://www.dol.gov/agencies/whd/fact-sheets/17s-overtime-educational-institutions>.

<sup>viii</sup> Katharine Meyer, *FAFSA rollout means fewer students will enroll in college next year*, Brookings, May 7, 2024

<sup>ix</sup> 29 CFR § 541.606 - Board, lodging or other facilities