



NASPA POLICY AND PRACTICE SERIES

The FLSA Final Overtime Rule A Resource Guide for Student Affairs Professionals

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OVERVIEW

The Fair Labor Standards Act (FLSA) Final Overtime Rule has substantially increased the salary threshold for exemption from overtime pay. The effect of the Final Rule will be felt by colleges and universities nationwide; many employees will now be eligible for overtime pay unless their salaries are brought in line with the new \$47,476 minimum salary threshold or their hours are confined to 40 hours in a given workweek. These changes, set to take effect December 1, 2016, occur at a time when many institutions face persistent budgetary pressure. Moreover, the Final Rule's impact on new types of employees not traditionally eligible for overtime pay will create the compliance challenge of tracking irregular hours or discerning between work and nonwork activities for many employees. Leaders in student affairs are not only faced with the responsibility to comply with the Final Rule, but to also ensure the operational sustainability of their departments or divisions.

This resource guide offers a tour through the Final Rule and existing overtime laws and regulations. Further, this guide provides considerations and cautions to support the compliance and management responsibilities of leaders in student affairs.

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EXECUTIVE SUMMARY

The Fair Labor Standards Act (FLSA) Final Overtime Rule has substantially increased the salary threshold for exemption from overtime pay. The effect of the Final Rule will be felt by colleges and universities nationwide; many employees will now be eligible for overtime pay unless their salaries are brought in line with the new \$47,476 minimum salary threshold or their hours are confined to 40 hours in a given workweek. These changes, set to take effect December 1, 2016, occur at a time when many institutions face persistent budgetary pressure. Moreover, the Final Rule's impact on new types of employees not traditionally eligible for overtime pay will create the compliance challenge of tracking irregular hours or discerning between work and nonwork activities for many employees. Leaders in student affairs are not only faced with the responsibility to comply with the Final Rule, but to also ensure the operational sustainability of their departments or divisions.

This resource guide offers a tour through the Final Rule and existing overtime laws and regulations. Further, this guide provides considerations and cautions to support the compliance and management responsibilities of leaders in student affairs.

OVERVIEW OF THE FLSA FINAL OVERTIME RULE

FLSA stipulates that an employee is eligible for overtime pay for work beyond 40 hours in a given workweek unless he or she satisfies a salary basis test, a salary level test, and a duties test for classification as a bona fide executive, administrative, or professional (i.e. white collar) employee. Though the duties test remains the same, and exempt employees must still be paid on a salary basis, the Final Rule has increased the salary level for exemption from overtime pay from \$23,660 per year to \$913 per week, or the equivalent of \$47,476 per year. These criteria form the architecture of the Standard Exemption, and employees must still satisfy all three tests to be exempt from overtime pay. Further, the United States Department of Labor initiated a three-year automatic update to the minimum salary level required for exemption from overtime pay and based the update to the Standard Exemption on the 40th percentile of salaried workers in the lowest-wage region of the United States (currently the South) as calculated by the Bureau of Labor Statistics. A full overview of the FLSA Overtime Rule, and a set of guided considerations, can be found on pages 6–9 of this resource guide.

CHALLENGES FOR STUDENT AFFAIRS LEADERSHIP

This resource guide considers the implications of the Final Rule on the management of student affairs departments and divisions. One major challenge, for instance, is the discernment between work and nonwork activity for the roles performed by many employees in student affairs, acknowledging that such decision points are vital toward accurately accounting for the effort of staff who live where they work, who work irregular or overnight hours, and who travel, to name a few. We must not overlook the tension leaders in student affairs may face to minimize overtime work by employees who will remain eligible for overtime pay while ensuring the delivery of critical resources and services on campus. This resource guide offers detailed discussion on these and other considerations on pages 17–19.

The resource guide also discusses the various categories of exemption as a bona fide executive, administrative, and professional employee. The discussion includes an overview of various categories of exemption that, due to special provisions articulated in existing overtime pay law and regulation, allow employers to establish alternative salary thresholds to those articulated under the Standard Exemption. However, considerations and cautions are provided for employers who may be discerning whether such alternatives may apply to the employees in their departments or divisions. The categories of exemption are discussed on pages 6–13.

As student affairs leaders consider the options they have to comply with the Final Rule, alternatives to cash pay for overtime hours may become a point of deliberation. To that end, it is imperative that leaders develop a deep understanding of the limitations associated with these alternatives, which include the use of compensatory leave (i.e., comp time) for employees within public colleges and universities or credit toward lodging for non-exempt employees whose arrangements meet conditions established under FLSA. Details, cautions, and considerations on the use and limitations of compensation alternatives are offered on pages 14–17.

GETTING STARTED

This publication provides tools to support an informed, organized, and strategic process to comply with the Final Rule. A flow chart is provided on page 20 that can serve as a visual aid to organize discussion and planning with appropriate institutional personnel, such as human resource officers, general counsel, and others who hold decision authority on institutional efforts to address the forthcoming changes brought on by the FLSA Final Overtime Rule.

The FLSA Final Overtime Rule

A Resource Guide for Student Affairs Professionals

On May 23, the U.S. Department of Labor (DOL) issued a Final Rule to the Fair Labor Standards Act Overtime Pay Regulations for Exempt Professional, Administrative, and Executive (i.e., white collar) Employees. The Final Rule revised the minimum salary that white collar employees must earn to be exempt from receiving overtime pay (i.e., time and one half) for working more than 40 hours in a given week (Defining and Delimiting the Exemptions, 2016). With an implementation date of December 1, 2016, college and university leaders, including those in student affairs, are faced with anticipating and addressing the financial and managerial implications of bringing their campuses into Fair Labor Standards Act (2011; FLSA) compliance.

The responsibility to ensure compliance with the new rule is met by several distinct challenges. First, the rapid and substantive increase to the salary threshold for exemption from overtime pay means that a significant number of student affairs employees will now qualify for overtime pay, unless their salaries are brought into compliance or their weekly work schedule is confined to a maximum of 40 hours. The considerable and unanticipated expense of the new rule occurs in a period of financial crisis in higher education, leaving many colleges and universities with uncertainty about sustainable solutions to cover these new costs. Further complicating the issue is the recognition by many student affairs leaders that their staff members regularly work long hours, particularly at critical junctures in the academic year, and approach their work with remarkably high levels of commitment and care. Second, institutional leaders will likely need to revisit management practices for previously exempt personnel, especially those with irregular hours or who live where they work, to ensure consistent and accurate procedures to account for time engaged in work and to comply with FLSA overtime pay laws and regulations. However, the new expectation to account for the hourly effort of job functions not historically subject to overtime pay is met by a lack of clear guidance by the DOL on distinguishing between *work* and *nonwork* for the nuanced roles performed by many employees in student affairs. These challenges add unique layers of complexity to the overarching commitment by institutional leaders to demonstrate accountability and compliance with the new rules.

This publication serves as a resource for leaders in student affairs who are responsible for anticipating and addressing the financial and operational impact of the new FLSA Final Overtime Rule for their departments or their larger divisions. In this publication, we provide an overview of the revised FLSA Final Overtime Rule and offer strategies and

resources on major areas of concern related to compliance. We also point to select areas for which concrete policy interpretation has not been provided by federal officials who hold enforcement authority on compliance with the Fair Labor Standards Act. In each section, we also offer points of consideration to support the efforts of student affairs leaders as they address how they will comply with the Final Rule. We end by referencing additional resources that may be helpful in the planning efforts of leaders in student affairs.

We acknowledge that decision authority rests as a strategic, informed, and defensible decision within the bounds of each campus. We also acknowledge that proximal differences and institutional uniqueness may cultivate points of inquiry that lie beyond the scope of this document. We offer this brief as one reference point to support strategic discussion among officials who hold decision authority on campus as it relates to complying with the FLSA Final Overtime Rule.

AN OVERVIEW OF EXISTING LAW AND THE FINAL RULE

Under the Fair Labor Standards Act, employees must be paid overtime (i.e., at time and one half) when working more than 40 hours in a workweek, unless they meet conditions either established through the Standard Exemption for bona fide Executive, Administrative, or Professional Employees or by classification as a Highly Compensated Employee (HCE). The overtime pay regulations under the Fair Labor Standards Act are enforced by long-established tests to determine employee eligibility for or exemption from overtime pay.

THE CONTEXT

First, a salary basis test establishes the minimum salary an employee must earn to be exempt from overtime pay. Second, a *duties test* determines whether the employee performs *primary duties* that are associated with bona

vide executive, administrative, or professional (i.e., white collar) employees (FLSA, 2011; Defining and Delimiting the Exemptions, 2016). In exchange for higher pay, however, the DOL has allowed employers to designate individuals as HCEs as long as they meet a less rigorous duties test and earn no less than minimum weekly earnings and annual salaries set forth in regulation (U.S. Department of Labor [DOL], 2008d; Defining and Delimiting the Exemptions, 2016). It is important to also note that, subject to a minimum wage as well as overtime pay for work beyond 40 hours in a given week, student employees are generally not subject to the Fair Labor Standards Act Overtime Pay Regulations for Exempt Professional, Administrative, and Executive (i.e., white collar) Employees (DOL, 2016b; Defining and Delimiting the Exemptions, 2016). Further, prior to the Final Rule, no mechanism was in place to provide for automatic updates to the minimum salary level for an employee to be exempt from overtime pay.

THE FINAL RULE AND THE CURRENT STATE

The Final Rule left much of the existing law and regulation undergirding overtime pay intact. Employees must still satisfy a duties test, salary basis test, and salary level test to be exempt from overtime pay, for example. Further, the DOL did not amend the duties test and still requires employees to be paid on a salary basis as articulated under existing FLSA law and regulation. However, DOL updated the salary level that a white collar employee must earn to be exempt from overtime pay. DOL also established an automatic update to the minimum salary level every 3 years (Defining and Delimiting the Exemptions, 2016). Student employees are unaffected by the Final Rule. What follows is a guided tour of the rule as it relates to the Standard Exemption, the treatment of HCEs, and an overview of the automatic salary update initiated by the Department of Labor.

THE STANDARD EXEMPTION

The Standard Exemption will affect the vast majority of employees working in student affairs functions on college and university campuses. To qualify for the Standard Exemption from overtime pay, white collar employees must meet a salary basis test, a salary level test, and a duties test (DOL, 2016b; Defining and Delimiting the Exemptions, 2016). The salary basis test requires that an employee be compensated on a salary, as opposed to hourly, basis. In addition, the Final Rule increased the minimum threshold to meet the salary level test from \$23,660 per year to \$913 per week, or the equivalent of \$47,476 per year. To satisfy the third component, the duties test, the employee's primary duties must involve work typically performed by exempt executive, administrative, or professional employees. Unless an employee satisfies the salary basis test, the salary level

test, *and* the duties test, she or he must be paid overtime for work beyond 40 hours in a given week at a rate of time and one half the individual's regular rate of pay (Defining and Delimiting the Exemptions, 2016).

The DOL has specified key terms to help institutions classify employees whose primary duties involve work associated with exempt executive, administrative, or professional employees under the Standard Exemption. First, the DOL articulates that primary duty means "the principal, main, major or most important duty that the employee performs" (DOL, 2016a, para. 2). The DOL further articulates work activities under each of the different exempt employee arrangements: executive, administrative, and professional.

Employees qualify for an *executive exemption* if their primary duties involve "managing the enterprise" or an established department of the enterprise as well as managing two or more full-time employees (DOL, 2008b, p. 1). In addition, workers qualify for an *administrative exemption* if their primary duties "include the exercise of discretion and independent judgment with respect to matters of significance" (DOL, 2008a, p. 1). Finally, employees qualify for a *professional exemption* if, as the DOL (2008c) articulates, their primary duties involve work that requires "advanced knowledge" (p. 1), their work occurs in "a field of science or learning" (p. 1), and/or their work requires "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor" (p. 2).

Employers may question whether an employee's duties involve sufficient "discretion and independent judgment with respect to matters of significance" (Defining and Delimiting the Exemptions, 2004, p. 22,263) to satisfy the duties test for the administrative exemption. In regulations undergirding the administrative exemption, the DOL has articulated that

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed . . . Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular

segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. (Defining and Delimiting the Exemptions, 2004, p. 22,263).

For the professional exemption, it is important to note that bona fide teachers, lawyers, and doctors are exempt from earning overtime pay, regardless of salary level, as long as they can satisfy the duties test specifically tailored to each (DOL, 2008c). This means that the \$913 weekly earnings, or \$47,476 annual salary threshold, does not apply to employees that can justifiably be classified as bona fide teachers, lawyers, and doctors under the professional exemption. Later in this brief, we will discuss the specifics of the teacher exemption and recommend caution to institutions that may be considering how this exemption could apply to employees in student affairs.

THE STANDARD EXEMPTION AND THE DETERMINATION OF PRIMARY DUTIES

When determining whether an employee can be classified as an exempt executive, administrative, or professional employee under the duties test, it is important to note that job titles are not dispositive of a specific exemption. Instead, the employer must examine the actual job duties assumed

by a particular employee and use these as the basis for determining whether the primary duties of the position align with exempt administrative, executive, or professional employee status (DOL, 2016a).

Although time spent performing specific job functions is an important factor in establishing the primary duties of an employee, it is not the singular consideration (DOL, 2016a). If a specific duty constitutes half or more of an employee's time each week, for instance, the duty will typically be accepted as an employee's primary duty. For example, if a program coordinator spends 30 hours or more in a given week developing and delivering student leadership development programs, and this role requires the use of discretion and judgment to provide significant contributions to the delivery of such programs, this position would likely meet the duties test as an exempt administrative employee.

However, DOL guidance on primary duties acknowledges that job functions considered to be the most important, major, or principal for a job may not necessarily require 50% or more of an employee's time on a regular basis (DOL, 2016a). In these instances, the DOL has articulated several common factors that an employer may consider in classifying the primary duties of an employee. In addition to time as described above, the DOL has outlined three factors for classifying primary duties that include, but are not limited to, "the relative importance of the major or most important duty as compared with other types of duties; . . . the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for performance of similar work" (DOL, 2016a, para. 2).

Student affairs leaders could gain a clear sense of primary duties by auditing employee job descriptions to determine a defensible classification of exempt status as a bona

A NOTE ON HIGHLY COMPENSATED EMPLOYEES

Though most exempt employees within an institution's division of student affairs likely fall under the Standard Exemption, the DOL also provides exemption from overtime pay for other employees who can be classified as HCEs under DOL regulations (DOL, 2008d). In the Final Rule, the DOL increased the total annual compensation to be classified as an HCE from \$100,000 per year to the 90th percentile of annual earnings of full-time salaried workers (presently \$134,004) (Defining and Delimiting the Exemptions, 2016). Because FLSA overtime regulations examine work on a week-by-week basis, however, the DOL also articulated that HCEs must earn at least \$913 per week like those who fall under the Standard Exemption. In addition, the DOL requires HCEs to pass a minimal duties test in lieu of higher annual earnings (DOL, 2008d). Specifically, the DOL articulates that the employee's primary duty includes the performance of "office or nonmanual work" and the "employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt, administrative, or professional employee" (DOL, 2008d, p. 1). Further, the DOL noted that the employee can be classified as an exempt Highly Compensated Employee if he or she earns at least the minimum salary and manages no fewer than two other employees (DOL, 2008d).

DISCUSSION QUESTIONS

1. What would you determine to be the primary duties of each newly affected employee that may now be classified as a bona fide executive, administrative, or professional employee under the FLSA? Is your justification documented and defensible against the criteria articulated by the DOL for classifying an employee's primary duties?
2. How many employees stand to be affected by the new salary threshold (i.e., \$913 in weekly earnings, or the equivalent of \$47,476 annually) of the Final Rule? What will the cost be to increase the salary levels of each to align with the new threshold or to classify as nonexempt and offer overtime compensation?
3. If raising salaries is not an option and overtime pay must be limited, how many overtime hours will each affected employee need to work per week, on average, and what are the cost implications for your department or division? Further, how many hours do employees work on each of their tasks per week?
4. For employees who will be classified as nonexempt, are there opportunities to revisit their duties and reassign or minimize less critical job responsibilities, in order to avoid overtime pay?
5. Though it is important to affirm the passions and talents of hard-working professionals, how might you communicate to employees who will be reclassified as nonexempt and who may be working during "off time" that such activity should not be performed due to the need to limit overtime pay?

ADDITIONAL INFORMATION

U.S. Department of Labor. (2008). *Exemption for administrative employees under the Fair Labor Standards Act* (Fact Sheet No. 17C). Retrieved from https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

U.S. Department of Labor. (2008). *Exemption for executive employees under the Fair Labor Standards Act* (Fact Sheet No. 17B). Retrieved from https://www.dol.gov/whd/overtime/fs17b_executive.pdf

U.S. Department of Labor. (2008). *Exemption for professional employees under the Fair Labor Standards Act* (Fact Sheet No. 17D). Retrieved from https://www.dol.gov/whd/overtime/fs17d_professional.pdf

U.S. Department of Labor. (2008). *Highly-compensated workers and the Part 541-exemptions under the Fair Labor Standards Act* (Fact Sheet No. 17H). Retrieved from https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf

U.S. Department of Labor. (2014). *Am I an employee? Employment relationship under the Fair Labor Standards Act* (Fact Sheet No. 13). Retrieved from <https://www.dol.gov/whd/regs/compliance/whdfs13.pdf>

U.S. Department of Labor. (2016). *Definition of primary duty*. Retrieved from http://webapps.dol.gov/elaws/whd/flsa/overtime/glossary.htm?wd=primary_duty

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 29 C.F.R. § 541 (2016). Retrieved from <https://www.federalregister.gov/articles/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>

U.S. Department of Labor. (2016). *Guidance for higher education institutions on paying overtime under the Fair Labor Standards Act*. Retrieved from <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

fide executive, administrative, or professional employee. Leaders may need to develop tracking methods for the relative amounts of time each duty is performed by an employee and to document the relative importance of each duty. In cases where time may not be the most important factor in determining an employee's primary duty or duties, it may be helpful to tether job functions to the mission of the student affairs functional area or division, if not the overarching institutional mission. Of course, important responsibilities may not be present in the institutional mission statement, and an employer may still consider these when classifying an employee under the categories of exemption as a bona fide executive, administrative, or professional employee. In the classification, employers must ensure that the designated primary duties used to justify classification as exempt are defensible relative to the other functions, should an institution be audited for compliance with the FLSA.

THE AUTOMATIC UPDATE

Prior to the Final Rule, the DOL utilized a set salary level to determine whether employees satisfied the salary level test for exemption from overtime pay. In the Final Rule, the DOL amended this practice to instead utilize a percentile of earnings by full-time salaried workers (Defining and Delimiting the Exemptions, 2016). For the Standard Exemption, the minimum salary level will be based on the 40th percentile of *weekly earnings* (i.e., \$913 per week) of all full-time salaried workers in the *lowest wage Census Region of the United States, currently the South* (Defining and Delimiting the Exemptions, 2016). For HCEs, the minimum salary will be based on the 90th percentile (i.e., \$134,004) of *annual earnings* among full-time salaried workers *nationally* (Defining and Delimiting the Exemptions, 2016). At least 150 days prior to the implementation of the new minimum salary threshold, the DOL will publish on the Federal Register and the DOL Wage and House Division website the salary equivalent associated with each percentile as calculated by the U.S. Bureau of Labor Statistics (Defining and Delimiting the Exemptions, 2016).

It is important for student affairs leaders to be aware of the newly implemented automatic update to the minimum salary thresholds for overtime pay. The change to an automatic update as opposed to a set salary level means that professionals who hold financial and managerial responsibility in student affairs will need to anticipate and address new financial liability and management implications that may result from an increase in the threshold.

The Final Rule portends significant implications for the operational management of student affairs divisions across all institutional types and sectors. Among these implications are the following:

- ◇ The Final Rule poses unanticipated financial liabilities after budgets have been set and institutional revenue may already be under heavy pressure.
- ◇ The Final Rule may also mean that division leaders and supervisors must now think strategically, and for the first time, about how the Overtime Pay Regulations under FLSA apply to the functional areas and employees that fall within the student affairs division on campus.
- ◇ Leaders in student affairs may be deliberating whether to increase the salary levels of employees to exempt these individuals from overtime pay, to maintain the salary level of these employees and offer overtime pay for work in excess of 40 hours, or to maintain salary levels below the threshold and implement legally compliant strategies to limit overtime work.
- ◇ Student affairs leaders may also be considering how to discern between *work* and *nonwork* for certain employees, particularly those in live-in positions.
- ◇ These leaders may still be determining how to ensure proper staffing and coverage in light of fiscal pressures that preclude the ability to offer overtime pay, and may be deliberating how certain credits and exemptions do or do not apply to their divisions and functional areas.

This publication serves as a resource guide to support efforts by leaders in student affairs to understand the FLSA Final Overtime Rule and existing law and regulation undergirding overtime pay. Further, this publication serves as a guide to processes and considerations that will promote planning and compliance with the overtime pay regulations under the FLSA.

CONSIDERING SPECIAL PROVISIONS FOR EXEMPT ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES

As discussed in the previous section, a reasonable and defensible determination of primary duties serves as a guide to whether an employee is exempt from overtime pay as a bona fide executive, administrative, or professional (i.e., white collar) employee under the FLSA. To that end, and although the three categories of exemption as a white collar employee have been described, it is also important to note that certain types of administrative and professional employees are provided special treatment under existing overtime regulations. Exempt administrative employees who can be classified as academic administrators under FLSA, for example, qualify for an alternative minimum

salary threshold. In addition, certain types of professional employees, including bona fide teachers, are exempt from earning overtime pay regardless of salary level (DOL, 2016b; Defining and Delimiting the Exemptions, 2016).

In this section, we provide detailed descriptions for various types of exempt administrative and professional employees that receive special treatment under the Fair Labor Standards Act. Then, we provide considerations and cautions for student affairs leaders who may be discerning whether these special regulatory provisions can be applied to the employees in their functional areas.

SPECIAL PROVISIONS FOR ACADEMIC ADMINISTRATORS

The FLSA provides special regulatory provisions for exempt administrative employees who can be classified as academic administrators (DOL, 2008a, 2016b; Defining and Delimiting the Exemptions, 2016). The DOL articulates that, to be classified as an academic administrator, the employee's primary duties involve "performing administrative functions directly related to academic instruction or training in an educational establishment" (DOL, 2016b, p. 7). To be exempt from overtime pay, employees whose job functions fall under the primary duties of academic administrators must either earn the salary level of \$913 per week *or be paid a salary that meets or exceeds the entrance salary for teachers at the institution*. At least two questions should come to mind as student affairs leaders consider whether the academic administrative exemption applies to the employees in their departments or divisions.

1. Who are the employees whose primary duties can defensibly be categorized under the academic administrator exemption?

As discussed earlier, the answer begins with the recognition that the DOL requires that the performed functions of a particular position, and not the job title, determine whether an employee's primary duties meet the established duties test for exemption as a bona fide executive, administrative, or professional employee. This same principle applies to the academic administrator exemption. That said, employers in student affairs should exercise caution in discerning whether an employee's primary duties more appropriately align with the academic administrator, as opposed to a different, exemption.

In its publication *Guidance for Higher Education Institutions on Paying Overtime Under the Fair Labor Standards Act*, the DOL (2016b) offers examples of institutional personnel whose job functions tend to qualify for the academic administrator exemption. Among the personnel listed were those who may fall under the

division of student affairs at a college or university, such as the following:

- ◇ Academic advisors whose primary duties involve assisting students to understand academic degree program requirements
- ◇ Intervention specialists who help students address academic problems
- ◇ Academic counselors whose primary duties involve administering school testing programs

These roles share the common element that their duties are directly tied to the student's academic standing and progress within a degree program at the institution. The limitation, however, is that the guidance did not provide an exhaustive list of the types and functions that can be accepted under the duties test for the academic administrator exemption. Without explicit guidance, institutions may be inferring associated duty types and functions that are, in fact, a misclassification. In cases where the determined entrance salary for teachers at the institution is lower than the established minimum earnings of \$913 per week, misclassification could translate into an adverse audit finding or increased legal liability in a labor dispute. Although myriad student affairs job functions contribute toward the academic standing or progress of students, employers cannot presume that the academic administrator exemption will best apply to those who do not administer academic support programs or academically advise students on the requirements associated with academic degree programs at the institution. As such, it is important to exercise careful judgment in deeming employees as eligible for the academic administrator, as opposed to a different, exemption.

2. How do student affairs leaders determine the entrance salary for teachers at their institution?

This question is met by the challenge that guidance has not been issued by the DOL on the criteria by which an educational institution determines an entrance salary for teachers. However, it is important to note that neither the academic administrator exemption nor the regulatory provisions that articulate an institution may use the entrance salary for teachers are new to the overtime pay regulations. This essentially means that an entrance salary for teachers may already be established at colleges and universities that are considering the academic administrator exemption for employees whose primary duties align with the duties test for this classification. In cases where job functions that align with the duties test for academic administrators fall within the departments of a student affairs division, leaders in student affairs who may be considering this exemption should consult with institutional

officials in human resources, academic affairs, or other areas as appropriate to determine whether an entrance salary for teachers has been established at the institution.

However, some institutions may have not previously had to determine an entrance salary for teachers, but may employ individuals whose duties align with the academic administrator exemption and, given their compensation level as compared with the new minimum threshold, now stand to qualify for overtime pay unless their salaries are brought in alignment with the Final Rule and its existing regulations. In these cases, leaders in student affairs should connect with officials in academic affairs, human resources, the general counsel's office, and others who may need to be involved in determining a reasonable entrance salary for teachers at the institution.

In an absence of clear guidance, the DOL offers important definitions that may be useful in determining an appropriate entrance salary for teachers at the institution. Among them is the definition of *salary basis* within the context of the test used to determine whether an employee's pay aligns with the requirements articulated in regulations undergirding exemption from overtime pay for bona fide executive, administrative, or professional employees. Specifically, the DOL articulates that compensation on a salary basis means that an employee's pay is predetermined and is not subject to change as a result of the quantity or quality of work performed (Defining and Delimiting the Exemptions, 2016). In that context, adjunct instructors who are compensated on a course-by-course basis depend on the availability of such courses to be paid by the institution, thereby basing pay not on salary but on course load. It is likely inappropriate to include faculty who are not paid on a salary basis to determine the entrance salary for teachers at the institution as the basis for an alternative salary level for exempt academic administrators.

Although a lack of guidance may presume substantial latitude on the part of the institution to determine an entrance salary for teachers as an alternative salary level for academic administrator employees, colleges and universities are faced with the responsibility to develop defensible approaches to comply with regulation. To that end, institutions should be as consistent as possible in determining the nature of faculty arrangements that can be considered when determining the entrance salary of teachers at the institution. It may be a more defensible approach to determine the entrance salary of teachers at the institution based on the earnings of full-time, salaried faculty as opposed to part-time faculty. Such an approach may withstand scrutiny on the use of an alternative salary threshold for academic administrators who may work full time, but whose salaries were compared against those of part-time employees at the institution.

For institutions that may be interested in considering the entrance salary of teachers at the institution as an alternative threshold for exemption from overtime pay for academic administrators, it may be helpful to compile the salaries of all full-time faculty (tenure and nontenure) at the institution. The absence of guidance on how to operationalize entrance salary provides difficulty for developing sound criteria for establishing an alternative salary threshold. Some institutions may consider the lowest salary of full-time faculty within the most recent year for which such information is available as one measure, whereas others may calculate some form of an average of full-time faculty (i.e., beginning nontenured, tenure-track assistant, or tenured associate professor or above) to set an entrance salary. Important to reiterate, however, is that this decision will be best positioned through a collaborative effort with officials who hold stake not only in compliance with labor regulation, but also in the compensation of faculty at the institution.

SPECIAL PROVISIONS FOR CERTAIN EXEMPT PROFESSIONAL EMPLOYEES

Under the professional exemption, employees can qualify as learned or creative professionals, employees practicing medicine or law, and teachers (DOL, 2008d). For the purposes of this resource guide, and because lawyers and doctors fall outside the scope of employment within student affairs, this section will focus on the creative professional, learned professional, and teacher exemptions.

LEARNED PROFESSIONALS AND CREATIVE PROFESSIONALS

Though variations in the duties test are noted in the learned professional and creative professional exemptions, both categories require that employees be paid at least the minimum salary of \$913 per week, or the equivalent of \$47,476 per year, as articulated in the Final Rule (DOL, 2008c). However, it is highly unlikely that employees in student affairs will meet the duties tests for classification as either a learned or creative professional, and will instead be more appropriately classified through another category of exemption under the FLSA. Below are the duties tests for each category as a quick reference:

Creative Professional Exemption: The DOL (2008c) articulates the duties test for creative professionals as follows: "The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor" (p. 2). The DOL (2008c) further states that, although judgments on the appropriateness of classification as a professional employee is typically made on a case-by-case basis, those who typically meet this duties test include, but are not limited to "actors, musicians,

composers, soloists, certain painters, writers, cartoonists, essayists, [and] novelists” (p. 2).

Learned Professional Exemption: The DOL (2008c) also describes the duties test for learned professionals: “The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; the advanced knowledge must be in a field of science or learning; and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction” (p. 1). In guidance issued to colleges and universities on paying overtime under the FLSA, the DOL further stated that the learned professional exemption does not apply to teachers (these employees are given special provisions that will be discussed later in this document), but it does apply to professionals whose work typically requires specialized knowledge and may include, but not be limited to, licensed mental health practitioners or certified professionals in accounting or athletic training (DOL, 2016b). It is important to remember, however, that learned professionals must still be paid on a salary basis at no less than the minimum threshold of \$913 per week to be considered exempt from overtime pay.

THE TEACHER EXEMPTION

Under current FLSA overtime pay regulations, bona fide teachers are not subject to the minimum salary threshold of \$913 in weekly earnings articulated in the Final Rule (DOL, 2008c). To qualify for the teacher exemption, the employee’s *primary duties* must classify the individual as a bona fide teacher through a duties test established by the DOL. To meet the duties test for exemption as a bona fide teacher, the DOL (2008c) articulates that the employee must have “a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge” (p. 3).

Without a deeper examination of the scope and application of this test within postsecondary settings, and given the educational functions performed by many in student affairs, leaders may be wondering whether this exemption applies to employees who hold primary duties outside of course instruction. In fact, in the public comment period for the proposed overtime pay regulations, the National Education Association and College and University Professionals in Human Resources asked the DOL for clarification on (a) who may qualify as a bona fide teacher and (b) whether nonteaching staff may qualify (Defining and Delimiting the Exemptions, 2016). In the publication of the Final Rule, the DOL responded directly to this inquiry:

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge... in an educational establishment. § 541.303(a). An educational establishment is “an elementary or secondary school system, an institution of higher education or other educational institution.” 19 § 541.204(b). *Teachers may include professors, adjunct instructors, primary and secondary school teachers, and teachers of skilled and semi-skilled trades and occupations.... Academic administrative personnel subject to the exemption include: Superintendents; principals and vice-principals; department heads in institutions of higher education; academic counselors and advisors; and other employees with similar responsibilities. Academic administrative employees are subject to the salary basis requirement, but the Department notes that a special provision allows this requirement to be met if such employees are paid “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which [they are] employed.” § 541.204(a)(1) [emphasis added].* To the extent that this entrance salary is below the salary level established in this rule, academic administrative personnel will be exempt if their salary equals or exceeds the entrance salary. Employees whose work relates to general business operations, building management and maintenance, or the health of students and staff (such as lunch room managers), do not perform academic administrative functions. § 541.204(c). (Defining and Delimiting the Exemptions, 2016, p. 32,398)

Still, the language raises questions about whether cocurricular instruction is aligned with the primary duty of “imparting knowledge in an educational establishment” as noted above. In fact, the DOL has acknowledged that “such activities are a recognized part of the school’s responsibility in contributing to the educational development of the student” (DOL, 2016b, p. 7). In its publication *Guidance for Higher Education Employers on Paying Overtime Under the Fair Labor Standards Act*, the DOL (2016b) engaged the use of extracurricular activities in defining the scope of its application in determining a primary duty of teaching under the exemption. Specifically, the guidance states the following:

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

DISCUSSION QUESTIONS

1. For employees who will be classified under a special administrative or professional exemption, has the institution taken precaution to ensure that these employees would pass the scrutiny of an external audit that would evaluate whether the assigned primary duties are appropriate relative to the performed functions of the position?
2. For purposes of staff who may satisfy the duties test for academic administrators, does the institution have an entrance salary for teachers already established?
3. If an entrance salary is not established on your campus and certain staff may qualify for the academic administrator exemption, is there an opportunity to bring partners in human resources, academic affairs, and other stakeholders to determine a defensible calculation of teacher entrance salary at the institution?

ADDITIONAL INFORMATION

U.S. Department of Labor. (2008). *Exemption for administrative employees under the Fair Labor Standards Act* (Fact Sheet No. 17C). Retrieved from https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

U.S. Department of Labor. (2008). *Exemption for professional employees under the Fair Labor Standards Act* (Fact Sheet No. 17D). Retrieved from https://www.dol.gov/whd/overtime/fs17d_professional.pdf

U.S. Department of Labor. (2016). *Guidance for higher education institutions on paying overtime under the Fair Labor Standards Act*. Retrieved from <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

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). (DOL, 2016b, pp. 6-7)

However, the DOL has also defined important boundaries that suggest a limited scope in the application of the teacher exemption to those whose primary duties are tied to extracurricular activities in postsecondary settings. In the Final Rule and the guidance to higher education that accompanied it, the DOL further clarified that, to meet the duties test for the exemption, the employee must not only be engaged in the primary duty of teaching, but also be “employed and engaged in this activity as a *teacher* [emphasis added]” (DOL, 2016b, p. 3). This language suggests that the exemption can be appropriately applied to those whose employment relationship with the institution involves the primary duty of course or classroom instruction in a faculty role. Given that the teacher exemption provides substantial latitude for employers to determine the salary level of employees who satisfy its duties test, it is imperative for leaders to carefully scrutinize the appropriateness of the teacher exemption within student affairs. Specifically, leaders in student affairs should consider whether the teacher exemption would be defensible against scrutiny as to whether another classification (i.e., Standard Exemption, Academic Administrator Exemption) would be more appropriate instead.

One example of a scenario that may lead to an adverse finding of a compliance audit is an employer that assigns a credit-bearing course to staff who are otherwise engaged in cocurricular or administrative functions, and then classifying the employee’s primary duties as a teacher for purposes of applying the teacher exemption. It is important to remember that the DOL offers criteria that an employer should consider in assigning primary duties for purposes of classification for exemption as a bona fide executive, administrative, or professional employee. Recall from earlier in this brief that such factors include, but are not limited to, the time devoted to perform the duty or the relative importance of such duties as compared with other functions. Not only would an auditor likely examine the time or relative importance of the teaching duties of an employee classified as a teacher for purposes of the exemption, but the auditor may also consider the performed duties of the employee relative to those classified as bona fide teachers who are engaged in course or classroom instruction. Such a review may lead to scrutiny as to whether the employee could more appropriately be classified under another exemption. Employers should utilize the factors offered by the DOL to determine primary duties and guide the careful and defensible classification of exemption for each employee under the FLSA.

ALTERNATIVE COMPENSATION IN LIEU OF OVERTIME PAY

The FLSA offers existing compensation alternatives in lieu of overtime cash pay for certain employees. In this section, we describe two alternatives to overtime cash pay within the context of student affairs. First, we note that Section 3(m) of the FLSA allows employers to apply credit toward the compensation of qualifying non-exempt employees, but its boundaries make this alternative too restrictive for application in postsecondary settings. Second, noting that the alternative applies only to public colleges and universities under federal law, we discuss compensatory leave (i.e., comp time) in detail. We then frame discussion questions to help guide leaders who may be considering whether these alternatives are appropriate within their institutional contexts.

SECTION 3(M) OF THE FLSA

Under certain conditions, Section 3(m) of the FLSA allows employers to add room and board as credit toward the cash wages of non-exempt employees that can, in turn, be applied to the minimum salary threshold (DOL, 2015). However, because of the boundaries outlined in this section, it is highly unlikely that the Section 3(m) credit can be applied in postsecondary settings. Under current law, five conditions must be met for an employer to apply the Fair Labor Standards Act Section 3(m) Credit toward employee wages:

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.
5. The employer maintains accurate records of the costs incurred in furnishing the lodging.

In Field Assistance Bulletin No. 2015-1, *Credit Toward Wages Under Section 3(m) of the FLSA for Lodging Provided to Employees*, the DOL (2015) outlines important distinctions between employment arrangements that do and do not qualify for a credit under the law. Though all five conditions must be met, three such conditions offer particular resonance to the limitations of the Section 3(m) Credit within higher education settings. In particular, the *regular provision*, *voluntary acceptance*, and *employee benefit* criteria add boundaries around who may qualify for such a credit in higher education.

First, the regular provision condition requires the employer to demonstrate that the lodging is regularly provided to

employees in similar occupations in the same community (DOL, 2015). In other words, if an employer is seeking to use the Section 3(m) Credit, precaution must be taken by the employer not to exclude the provision of lodging to other employees. If the institution provides room and board only to those who stand to be affected by the Final Rule, for instance, it is not likely that the institution will satisfy the condition that the lodging is regularly provided to employees in similar occupations at the institution.

Second, the condition of voluntary acceptance will automatically disqualify those who are required by the employer to live on campus to perform the functions of a particular position (DOL, 2015). Residence life professionals who are required to live on campus as a condition of employment, for instance, will not satisfy the voluntary acceptance criteria, and will therefore be ineligible for the Section 3(m) Credit.

Third, the employee benefit condition adds texture to the requirements for claiming a Section 3(m) Credit to employees in student affairs (DOL, 2015). To satisfy this condition, the employer must demonstrate that the responsibilities and functions of the employee do not interfere with nonwork activities of the employee while on the premises (DOL, 2015). The nature of work performed by live-in residence life staff illustrates the heavy challenge faced by institutions to demonstrate that the employee, and not the employer, is the primary beneficiary of institutionally provided lodging under Section 3(m). Residence life staff are often confronted with unanticipated and immediate situations that require their attention during off-duty hours. These staff regularly experience interrupted sleep to address incidents on the premises or contribute to an on-call rotation that requires their attention around the clock. As articulated in the Field Assistance Bulletin, the DOL (2015) considers such responsibilities to comprise a lodging arrangement that primarily benefits the employer.

Though highly unlikely that the Section 3(m) credit will be used toward the weekly minimum wage calculation of non-exempt employees, the DOL has published technical assistance to guide employers in the calculation and application of the Section 3(m) Credit toward the compensation of qualifying employees. In Section D of Field Assistance Bulletin No. 2015-1, the DOL (2015) notes that the employer cannot exceed the “reasonable cost” or “fair value” of the facilities furnished to the employee as lodging, noting that differences may exist between what may be deemed a reasonable cost or a fair value. In these instances, the DOL directs the employer to use whichever is less. Further, the DOL offers two distinct definitions for reasonable cost and fair value:

“Reasonable cost” is not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished to . . . employees. . . . In other words, “reasonable cost” does not include a profit to the employer or to any affiliated person. . . . 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. . . . 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 . . . must take into account the specific circumstances. . . . 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. (DOL, 2015, para. 24–27)

Each campus will likely arrive at its own determination of the reasonable cost for lodging, valued on a workweek-by-workweek basis, due to myriad factors that influence such a calculation for an on-campus residence facility. Because some residence halls vary in their capacity, physical size, or other considerations, reasonable cost may differ from one facility to the next. To the extent that such information is already available, determining the actual cost per meal, as opposed to the published price for a campus meal plan, and the cost for utilities will also be necessary to determine reasonable cost.

As is the case in determining reasonable cost, no established formula exists to calculate fair value. The DOL (2015) instead suggests a few approaches an employer may consider in determining a fair value for lodging. Specifically, it states that employers may do the following:

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.nuduser.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. (DOL, 2015, para. 30–31)

Though an institution may find other data sources to be more reliable, those articulated in the guidance by the DOL offer potentially useful references that may align with the methods of inquiry an auditor may employ to determine compliance with the Section 3(m) Credit. Further, it is clear that the DOL’s main interest in determining whether an employer is “profiting” from the credit is to examine (a) whether a sound calculation of reasonable cost or fair value are determined and (b) that the lesser of the two is chosen as the benchmark for the application of lodging toward employee wages on a workweek-by-workweek basis.

Once the employer has calculated the reasonable cost and the fair value of lodging under the guidelines, the employer must use the lesser of the two calculations and apply the value to the cash wages earned in a given week (DOL, 2015). For any amount below the minimum wage threshold, qualifying non-exempt employees will be eligible for overtime pay at a rate of one and one half their rate of hourly earnings for each hour in excess of 40 per week (DOL, 2015).

A NOTE ON TUITION AND OTHER COMPENSATION

Employers may be considering whether other forms of compensation, such as tuition remission, can count toward a non-exempt employee’s earnings toward the minimum wage calculation. Unless the compensation is named under FLSA regulation, the employer should not consider it as a creditable form of compensation. Tuition is such an example of what an employer may consider to be compensation, but that is not authorized as a creditable form of compensation under FLSA and its overtime pay regulations.

COMPENSATORY LEAVE

The FLSA allows public entities, including public colleges and universities, to offer compensatory leave, or comp time, in lieu of cash pay for work in excess of 40 hours per week (DOL, 2011). It is important to note that the employer must award compensatory leave at a rate not less than one and one half hours for each overtime hour worked. In addition, the employee can accrue only a maximum of 240 overtime hours, which equates to 160 hours of actual overtime hours worked, and must be allowed to use these hours as requested unless the employer can justifiably determine that the time off would pose an “undue disruption” to organizational operations (DOL, 2011). Such a disruption may include the occasional occurrence that an office or division would be unable to cover mission-critical functions or remain open during business hours, and leaders in student affairs who offer compensatory leave in lieu of overtime pay should take precaution to ensure that all other options, such as assigning the duties to other staff within the office, are exhausted before denying a request for compensatory leave.

DISCUSSION QUESTIONS

1. If the Section 3(m) Credit is being considered, would it be helpful to measure employee demand for lodging as a way to determine whether the institution can accommodate capacity?
2. Has the institution already determined updated figures for reasonable cost or fair value of lodging that fit under the scope of the Section 3(m) Credit?
3. If the institution has not yet determined updated figures for reasonable cost or fair value, are there opportunities to consult with appropriate personnel to identify a figure not to exceed the institution's cost to provide the lodging to its employees? If so, who are the appropriate personnel on your campus to determine these figures?
4. Are housing market and other cost-of-living data for your local service area available to examine fair value?
5. For public institutions considering compensatory leave in lieu of overtime pay, is there an opportunity for those who manage employees in student affairs to examine how many overtime hours each staff member works per week, on average?
6. Knowing how many overtime hours that employees may be working, and noting that staff can accrue up to 240 hours of comp time (equating to 160 actual hours worked of overtime), would this information allow managers to offer compensatory leave in lieu of overtime pay while planning coverage or assigning tasks to accommodate employee leave?
7. Alternatively, would offering comp time impose too substantial a burden on the coverage and completion of critical functions within the office or division?
8. Unused comp time must be paid out when employees separate from their employer (whether they are terminated or leave voluntarily). Does your institution have policies in place that govern the use of comp time? If comp time will be offered as a new compensation alternative within your division or department, in what period of time will employees be required to use the comp time? How might you prepare for or anticipate comp time payouts from a budgetary perspective?

ADDITIONAL INFORMATION

U.S. Department of Labor. (2008). *Exemption for administrative employees under the Fair Labor Standards Act* (Fact Sheet No. 17C). Retrieved from https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

U.S. Department of Labor. (2008). *Exemption for professional employees under the Fair Labor Standards Act* (Fact Sheet No. 17D). Retrieved from https://www.dol.gov/whd/overtime/fs17d_professional.pdf

U.S. Department of Labor. (2016). *Guidance for higher education institutions on paying overtime under the Fair Labor Standards Act*. Retrieved from <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

An important consideration for employers who may be thinking about whether to offer compensatory leave (i.e., comp time) is the time it may take for an employee to catch up from work missed due to the utilization of compensatory leave. Employees returning from compensatory leave may find themselves performing duties to catch up on missed work while performing their other duties, possibly leading to the continued accrual of overtime or the compounding of such hours until the maximum of 240 overtime hours is reached. At least two management challenges are created in cases where employees cannot draw down their accrued comp time. First, an employee is entitled to a cash payout for each unused hour of comp time upon the individual's separation from employment. Second, the employee is entitled to cash pay once the 240 overtime hour maximum is reached. These scenarios pose significant, and, particularly in the case of an unanticipated departure, potentially substantial budgetary implications for leaders of departments or divisions of student affairs.

WHAT COUNTS AS WORK?

As previously mentioned, one of the challenges posed by the Final Rule for divisions of student affairs is how to define “work.” From the outset, this question led professionals in student affairs to pause. For most, chance encounters with students outside of the student center are viewed as being as equally fundamental to one's role as coordinating the midnight breakfast during finals or facilitating a resident assistant training session. These are simply aspects of the student affairs professional's job, but they often resemble compensable time from the vantage point of the Fair Labor Standards Act. Specifically, FLSA broadly defines compensable time as when an employer allows an employee “to suffer or permit to work” (United States Department of Labor, 2014, p. 1). Such a definition, applied in determining an employee's hourly effort during the workweek, means that anything resembling work should generally be counted toward compensable time.

The new Final Rule will require student affairs leaders to reconsider and reimagine the roles of their staffs and the services they are accustomed to providing students. This is particularly true for student affairs leaders who decide the reclassification of staff members to nonexempt is necessary. As they work toward this change, they will need to shift their view of the profession to a more quantifiable enterprise where more must be done with less, or deliberate and strategic decisions must be made to do less altogether. This alteration will also necessitate paying greater attention to the minutiae involved with the work of their staffs, including a concerted look at how they spend their time and a reconsideration of the responsibilities on which entry-level professionals should and should not be focused.

This type of evaluation is a particularly daunting task for departments that require staff to work untraditional hours and in diverse settings, such as staff who live alongside students and respond to campus incidents, student activities professionals who coordinate ongoing campus programming throughout the academic year, and staff in recreational sports who travel with students for off-site competitions or programs.

The DOL has provided some general guidance for qualifying work (or “compensable time”), although not specifically regarding the work of student affairs professionals (United States Department of Labor, 2008e). The lack of specificity on the strategies to account for the unique roles of professionals within certain employment contexts does add difficulty to comply with FLSA. At this point, leaders in student affairs must study, interpret, and apply the available guidance to their departments and larger divisions. In this regard, we recommend that student affairs leaders work with their respective human resource and general counsel offices, and have conversations with their peers in similar functional areas on other campuses.

We explain the DOL-provided guidance for “hours worked” here, as it is most pertinent to student affairs work. Note the terms discussed here are not exhaustive of the available terminology, and the DOL document itself should be referenced for a comprehensive understanding of the guidance. We will also offer recommendations for how to track work. Note that these recommendations are based on the tracking methods professionals have shared with professional associations, namely NASPA–Student Affairs Administrators in Higher Education and Association of College and University Housing Officers–International (ACUHO-I). With this in mind, we encourage professionals utilizing this document to continue to communicate with each other so we can gather a collective list of strategies that are useable in the variety of institutional contexts in our higher education system. Finally, it is important to keep in mind that much of this section will be framed through the lens of the residence life area. This is because, although the Final Rule stands to impact the student affairs profession generally, the potential impact on the compensation and arrangement of the live-in role is quite dramatic. Further, due to the overnight and irregular hours worked by residence life staff, leaders across various student affairs functional areas, such as campus activities and recreation, may also be able to glean useful considerations that apply to the challenges and complexities they may be navigating.

According to the DOL's (2008e) fact sheet *Hours Worked Under the Fair Labor Standards Act (FLSA)*, the workweek involves any time in which the employee is “required to be on the employer's premises, on duty, or at a prescribed workplace” (p. 1) and the workday encapsulates the period of

time in which the employee begins and ends the “principal activity” of her or his work. Notable for student affairs professionals, many of whom are known to work beyond what is required, is the idea that work is compensable if it is simply “permitted to be performed.” That is, the activity itself is not defined only by the requirement of work but by the knowledge that work is being done. This aspect of the FLSA’s definition of work is important for divisions of student affairs leadership, because as hours of work are counted for the purposes of Final Rule compliance, leadership will have to explicitly address and enforce the expectation that nonexempt staff not engage in work in excess of their allocated time. This stands to be a particularly murky task, as professionals are increasingly connected via cell phones and other devices that blur the lines between work and nonwork time. This may lead some professionals, without the establishment of clear boundaries with their supervisors, to immediately respond to e-mails that could have otherwise waited until the next business day. In addition, staff who have regular engagement with students, including situations that involve unanticipated and immediate action, may pose difficulty with balancing hourly work load with the necessity of covering critical student affairs functions. As residence life leaders consider this challenge, they will need to also keep in mind that informal touch points between live-in staff and residential students tend to be more likely for these staff members than for other student affairs professionals whose roles do not place them in contact with students after the work day has ended. Although incidental contact of this nature is essential to the live-in position, leaders in residence life and their staff members will want to consider how they will conceptualize incidental contact in the scope of work. In addition, supervisors may want to consider developing clear guidelines that help staff discern between correspondence that can wait until regular work hours and that which must be addressed immediately and beyond the regular work day.

Residence life leaders may have concerns about incidental contact between nonexempt live-in staff and residential students. Incidental contact refers to the chance encounters that live-in professionals often have with residential students as they are going about their lives off-duty and outside normal business or on-call hours. An example of such contact would be an infrequent encounter initiated by a student with a non-exempt live-in staff member and during which time the student, not the staff member, elected to discuss a topic that is related to the staff member’s job function. Understandably, leaders in residence life are most concerned with the degree to which these types of unplanned encounters qualify as compensable time and/or how these interactions can be accurately tracked toward an employee’s compensable time. In an advisory on recording employee time, DOL

(2016c) stated that “infrequent” work that occurs for “insignificant periods of time beyond the scheduled working hours, [and] which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded” (para. 2). Referring to such incidental interactions as *de minimis* or insignificant, this guidance provided some insight into the degree to which employers, including those in student affairs, should be concerned with counting brief interactions that last “a few seconds or minutes in duration.” In these instances, what seems to be most important is the regularity of the work activity (i.e., the degree to which it is “identifiable work time”) and the amount of time engaged.

Certainly on the issue of incidental encounters, and all matters related to quantifying compensable work, professionals should consult with legal counsel and human resources professionals. To the extent that interactions remain infrequent and insignificant, however, the DOL’s (2016c) advisory on recording insignificant periods of time as compensable under FLSA does provide some insight into how chance encounters might be accommodated within the framework of the Final Rule. Specifically, communicating with live-in staff members that non-essential or non-crisis encounters should be discussed or handled during regular business hours may help to minimize the frequency and time of incidental interactions during off-work hours. Further, as it relates to the management of a department or division, leaders in student affairs can clarify that such incidental interactions are not accompanied by an expectation to work. As a matter of compliance, however, those who manage departments or divisions of student affairs must ensure that, in recognition of the scope of the DOL’s (2016c) advisory, such practices are confined only to infrequent encounters that comprise brief periods of time. It may be helpful to ask staff to record such incidents, their frequency, and estimates of time to ensure common understanding about whether these accord with the DOL’s (2016c) advisory. Such a strategy can help to operationalize the frequency, nature, and duration of incidental interactions and help guide common practice with staff about what types of non-essential or non-crisis encounters can wait until regular business hours and those that may require the immediate attention of staff and that instead resemble compensable time. Important to note, however, is that such a practice does not mean staff should discourage all off-work hours altogether—a practice that would be nearly impossible to implement. Instead, the purpose is to ensure a consistent and defensible approach to discern between compensable and non-compensable time and to ensure consistency and compliance with the Final Rule and its underlying regulations, guidance, and technical advisories.

For professionals with on-call responsibilities, such as live-in residence life staff, the determination of on-call time as work is a particularly important consideration, especially as the work time of nonexempt staff is counted and overtime is accrued. According to the DOL, the lynchpin, insofar as FLSA is concerned, is whether the employee has the flexibility to leave the employer's property while on call or, more generally, the extent to which the employee's freedom is impacted. With common duty restrictions in place, such as the requirement that live-in staff remain in their residential building or on campus while on call, it is very likely that live-in staff should indeed be viewed as engaged in work. A parallel concept to the on-call arrangement is the determination of when waiting time qualifies as work. In this case, the determining factor is whether the worker is "engaged to wait" or "waiting to be engaged" (DOL, 2008e), with the former most aptly illustrated by the image of a firefighter at the firehouse awaiting an alarm to sound (i.e., working) and the latter exemplified by an employee, like a nurse on call, who has a stretch of time in her or his day completely relieved from duty and during which she or he is not constrained to be on the employer's premises (i.e., not working). Also important to consider as on-call hours are evaluated in terms of compensable work is how to treat sleeping hours while on call. In this case, the DOL seems to treat the amount of time on call as the essential element of consideration. More specifically, the DOL (2008e) indicated that if an employee is on call for less than 24 hours, sleep time (and other personal activities) should be considered work time, whereas if the individual is on call for 24 hours or more, sleep time (of at least 5 hours and at a maximum of 8 hours) could be deducted from work time, as long as accommodations are provided and the sleep is mostly uninterrupted. Travel is also a nuanced factor insofar as calculable work time is concerned, with everyday home-to-work travel not considered as work, but travel to work in a different city, traveling between sites, and regular work hours while traveling out of town qualifying as actual work time.

As student affairs leaders consider how they will count the work of staff members who will be eligible for overtime pay (e.g., entry-level staff; live-in residence life staff; student activities professionals; employees who are likely to travel, such as employees in recreational sports offices), they must grasp the nuances associated with the DOL's definitions of work. Moreover, balancing the FLSA definitions along with the requirements of these positions will require leaders to consider different management strategies, including the possibility of creative staffing structures and revised expectations for employees. One of the more creative approaches to balancing the work time of live-in residence life staff, who have significant on-call

DISCUSSION QUESTIONS

1. What are the steps that you are taking to determine if reclassification of live-in staff would be necessary? Have you considered a time study? Have you re-evaluated position descriptions?
2. Considering the DOL's general guidance on the definition of work, how do you think that you will count on-call hours given the definition of waiting time and on-call time? Is there an opportunity to consult with your human resources department/general counsel on how they interpret these definitions for your campus?
3. What guidance will you offer to live-in professionals regarding incidental interactions with students and how they attend to virtual communication after hours?
4. FLSA compliance information is still relatively new for student affairs professionals, including leaders in these divisions. How will you manage the training of live-in staff on the definitions of work and the expectation that they will need to track work hours?

ADDITIONAL INFORMATION

U.S. Department of Labor. (2008). *Hours worked under the Fair Labor Standards Act (FLSA)* (Fact Sheet No. 22). Retrieved from <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>

United States Department of Labor. (2016). FLSA hours worked advisor: Recording hours worked. Retrieved from <https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenEE29.asp>

Figure I. Flow Chart for Determining Exempt or Nonexempt Status Under the Fair Labor Standards Act*



*Note. To be used as a discussion guide for readers to understand the FLSA Overtime Rule only and not in place of campus-specific planning processes or consultation with campus human resources and/or general counsel.

**Note. Under certain conditions, employers may also consider alternatives to overtime cash pay (e.g., comp time at public institutions).

duties, involves hiring a second layer of staff to handle all or most of the on-call responsibilities, particularly evening on-call hours, which add up quickly. Other possibilities may be adjusting the amount of time that live-in staff spend in the office during normal business hours, evaluating the necessity of their attendance at meetings or distinguishing meetings that are essential from the nonessential, allowing for a flexible work schedule during on-duty times, and minimizing the ancillary duties that staff members take on in favor of the most essential responsibilities. Having live-in staff participate in time studies wherein they record all their activities, particularly highlighting time on task while on call (e.g., attending to a lockout, responding to an alcohol incident), is also a positive step so that managers have a good idea of the activities that engage their staffs and how these undertakings play into their principal duties.

Residence life departments have reported a variety of methods for tracking time engaged in work, including Web-based/virtual options, institutional tracking systems, and paper time sheets, to name a few. Other institutions have indicated that their institutions are not yet sure how they will track time. In many cases, institutions are still studying their staff activity to determine whether it will be possible and worthwhile to move them to exempt status and eliminate the need for tracking at all.

GETTING ORGANIZED

Now that we have provided a guided tour of the FLSA overtime pay regulations and statutes, leaders in student affairs may also be looking for resources to organize the process by which to determine who may be eligible for overtime pay, whether reclassifying an employee as exempt from such pay may be an option, or whether special provisions or compensation alternatives and credits may apply. To that end, Figure 1 offers a flow chart to help leaders in student affairs organize their thoughts and planning efforts and to understand how the FLSA Final Overtime Rule may affect the employees within their departments or divisions.

Recall from the information provided throughout this resource guide that employees must satisfy a salary basis test, a salary level test, and a duties test to be classified as exempt from overtime pay. The Standard Exemption sets criteria for the exemption of bona fide executive, administrative, and professional employees from overtime pay. However, special provisions apply to certain administrative (i.e., academic administrators) and professional employees that may result in an alternative

salary threshold, provided that the employee can satisfy a duties test specific to the special provision. As discussed in this publication, however, employers must exercise caution and use heavy scrutiny in determining the appropriateness of special provisions for employees in student affairs. Finally, and to the extent that certain conditions can be met, certain employers may be allowed to utilize alternatives to compensation (e.g., comp time) or apply credit toward employee wages (i.e., Section 3(m) Credit) articulated under the FLSA. Also discussed earlier in this publication, such alternatives also require careful scrutiny by employers before they are utilized in place of cash pay for overtime work.

As leaders reflect on the process outlined in Figure 1, it is important to note that this chart may not reflect all considerations tied to determining employee eligibility for or exemption from overtime pay; states may have additional requirements undergirding overtime compensation, for instance. Instead, we offer this chart as a visual guide for the key decision points as employers consider the determination of exempt or nonexempt status under the FLSA overtime pay statutes and regulations. For a full set of considerations specific to each campus setting, conversation and planning with all stakeholders involved in compliance with the FLSA is the best strategy to anticipate and address the forthcoming changes to overtime pay.

CONCLUSION

The rapid and substantial change brought on by the FLSA Overtime Rule carries significant budgetary and operational implications for colleges and universities. This publication provides a guided tour of the existing law and regulations undergirding exemptions, special provisions, and credits regarding overtime pay, and embeds each within the unique roles and functions of student affairs employees. This resource guide's purpose is to serve as a reference for leaders in student affairs who are deliberating a set of strategies to manage the new rule on their campuses. It is our hope that the information and resources provided in this document will help leaders understand options and restrictions under current law and regulation as a means to comply with the Final Rule.

ADDITIONAL RESOURCES

Overtime: Webinar for Higher Education. This webinar offered by the DOL provides resources and considerations specific to higher education leaders as they look to comply with the new Overtime Rule on campus. A free recording of the webinar is available at <https://www.dol.gov/whd/overtime/final2016/webinars.htm>.

Strategies for Managing the New FLSA Overtime Rule in Student Affairs. Hosted by NASPA, and in partnership with ACUHO-I, NIRSA: Leaders in Collegiate Recreation, the National Association for Campus Activities, and the Association of College Unions International, this guided discussion with leading student affairs professionals offers considerations and strategies for addressing the changes brought forth by the new Overtime Rule. A free recording of this event is available at <https://olc.naspa.org>.

FLSA and Housing and Residence Life Professional Compensation. Hosted by ACUHO-I, professionals in residence life and public policy discuss the Overtime Rule as it applies to residence life. A free recording of this event is available to both members and guests (guests can create a free account) through the ACUHO-I Library (<http://library.acuho-i.org>).

Making Sense of the FLSA Overtime Rules for Your Housing and Residence Life Department. Hosted by ACUHO-I, professionals in residence life and public policy will continue the discussion of the Overtime Rule as it applies to residence life, taking into consideration institutional type and capacity, and what we have learned so far. A free recording of this event is available to both members and guests (guests can create a free account) through the ACUHO-I Library (<http://library.acuho-i.org>).

FLSA Overtime Final Rule: What You Need to Know and Do Now. Hosted by the College and University Professional Association for Human Resources (CUPA-HR), leading experts provide an overview of the Final Rule and the key aspects of implementation and compliance facing higher education. A free recording of the event is available at <http://www.cupahr.org/events/webinar-20160525.aspx>.

New Federal Overtime Regulation and Higher Education. Hosted by the American Council on Education, and in partnership with CUPA-HR, NASPA, and the law firm Ballard Spahr, this discussion with campus leaders and legal experts offers insight into the implications and next steps for complying with the Final Rule. A free recording of the event is available at <http://www.acenet.edu/events/Pages/New-Federal-Overtime-Regulation-and-Higher-Education.aspx>.

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