From the Journal

FLSA: Can Someone Please Explain This Law?

As I edited this issue of the *CUPA-HR Journal* I had a taste of the frustration you must feel in attempting to understand and apply the Fair Labor Standards Act. That taste came shortly before I was supposed to send the issue to our designer. In reviewing the copy, our legal counsel suggested a small but crucial change in a description of an FLSA provision. I presented the revised text to the author, an attorney, who disagreed with the change. The author’s interpretation is the one we present. I wondered what you would do if two lawyers gave you different interpretations of an FLSA provision. The consequences of your making a choice with which the Department of Labor disagreed could be costly.

When we first decided to devote this issue of the *Journal* to the FLSA, we posted a request to the CUPA-HR CompSIG, our members-only listserv: Tell us the toughest challenge you face with respect to the FLSA. Here, in paraphrase, is some of what you said:

- Jobs that we consider to be exempt jobs don’t meet the FLSA requirement for exemption. Telling employees that they are to be reclassified as nonexempt is not a pleasant job because they perceive nonexempt status to be less prestigious than exempt status.
- I can’t figure out how to interpret the FLSA to determine whether a position is exempt or nonexempt. The exemption tests are outdated.
- I have trouble explaining the law to supervisors. I understand that overtime kicks in after 40 hours in a defined pay week, but supervisors use the logic of overtime kicking in after 80 hours in a biweekly pay period to “flex” hours without paying overtime.
- Exempt employees would like to be able to work, say, 32 hours in one week and 48 in the next week of a pay period or to use vacation leave or sick leave for partial-day absences, but the FLSA doesn’t appear to permit these options.
- The accumulation and use of comp time and the deduction of paid time off for partial-day absences are incredibly confusing matters.

Malcolm Hamilton, newly retired from Harvard University, summed up the frustration inherent in many of the comments that we received: “We’ve created a crazy workplace trying to meet the requirements of a 63-year-old law that was designed to correct conditions that no longer exist.” Some of the issues raised in the comments were too complex to address here—for example, the issue of required use of paid time off. (As one member noted, the
policy of charging a partial-day absence against an employee’s accumulated paid time off could mean that the employee is not paid on a salary basis and therefore is entitled to overtime pay. The member further noted that circuit courts disagree on such a policy’s compliance with the FLSA because they disagree on whether required use of paid time off results in a salary deduction.) Contributors to this issue of the *Journal*—lawyers, HR directors, and a former investigator with the DOL—attempted to address some of the other comments noted above.

Attorneys Shlomo Katz and Daniel Abrahams, who practice, lecture, and publish in the area of wage and hour law, acknowledge the difficulty of complying with a law that does not always reflect the modern workplace and the growth of the service economy. In “The Fair Labor Standards Act: An Introduction to the Law That Perplexes Us All,” Katz and Abrahams explain the general requirements of the FLSA. They cover exemptions, working time provisions, overtime compensation provisions, and employer liabilities as well as enforcement of the FLSA.

Marc Mootchnik, an attorney in the Office of General Counsel at California State University, takes a closer look at the executive, professional, and administrative exemptions under the FLSA. In “Who’s Exempt from the FLSA? A University Lawyer Analyzes Exempt/Nonexempt Classification of Employment Positions in Higher Education Institutions,” Mootchnik cites cases involving employment positions typically found at colleges and universities: public affairs managers, administrative assistants, residence hall counselors, and trainers. In addition, he addresses the sometimes-tricky matter of whether a given individual is an employee according to the FLSA. In that context he examines several cases involving students and volunteers.
Shlomo Katz and Daniel Abrahams

Interpreting and applying the FLSA is a sort of game that tests your sanity. Whether you are new to or more experienced than you wish with the FLSA, take heart in the fact that you are not alone in your confusion about compliance with this, in many ways, antiquated law. Two employment law experts attempt to shed light on the FLSA by walking you through its purpose, general requirements, exemptions, working time provisions, overtime compensation provisions, and imposition of employer liabilities.

The Fair Labor Standards Act of 1938 (FLSA) regulates wage payment and hours in the field of interstate commerce. Enacted by the U.S. Congress, this federal law prescribes minimum wage and hour requirements for all covered, nonexempt workers, including those at institutions of higher education, whether public or private, for profit or nonprofit.

Responsibility for administering and enforcing the FLSA has been delegated to the Wage and Hour Division of the Department of Labor (DOL). The division makes inspections and conducts investigations to determine compliance with the FLSA. It also issues FLSA rules, regulations, and interpretations and sometimes grants requests for FLSA exemptions.
The Fair Labor Standards Act

Purpose

The FLSA protects workers from receiving substandard wages by requiring payment of a specified minimum wage to employees of businesses and governments subject to the FLSA. It protects workers from being forced to work excessive hours by requiring the payment of overtime compensation. It also protects children from exploitation in the workplace. In 1964 the FLSA was amended by the Equal Pay Act of 1963 to prohibit discrimination on the basis of sex in wages paid to employees working in the same establishment.
Who’s Exempt from the FLSA?
A University Lawyer Analyzes Exempt/Nonexempt Classification of Employment Positions in Higher Education Institutions

Marc D. Mootchnik

Think you don’t need to review your exempt classifications? Think again. Case law suggests that examining those classifications on a case-by-case basis is a critical undertaking. An attorney for California State University cites cases involving public affairs managers, an administrative assistant, residence hall counselors, and a trainer in explaining the criteria for executive, administrative, and professional exemptions. In addition, he highlights two FLSA cases involving students (resident hall assistants and pharmacy students in an externship program) and one involving volunteers.

In 1938, Congress enacted the Fair Labor Standards Act after finding “labor conditions detrimental to the maintenance of the minimum standard of living.” A central intent of the act was to protect employees who lacked sufficient bargaining power to avoid exploitation by their employers (29 U.S. C. §202). The FLSA was not designed to protect all employees, however. Executive, administrative, and professional employees are excluded from coverage.

Universities and colleges often have questions about whether given individuals ought to be classified as exempt. Like other employers, these institutions have the burden of proving that a particular employee unmistakably falls within an exemption [Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190 (1966)]. HR professionals must not rely on position titles in deciding whether to designate employees as exempt, according to the Department of Labor, because titles “are of no determinative value” [29 C.F.R. §541.201(b)]. Instead, employers must examine the employees’ actual duties and functions. One administrative assistant may perform clerical work and clearly be non-exempt, but another administrative assistant may have sufficient independence in his or her job functions to be considered exempt.

The executive, administrative, and professional exemptions are examined below with reference to several employment positions typically found in colleges and universities. FLSA treatment of students and volunteers is also
examined.

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What Colleges and Universities Should Know about FLSA Compliance
A Former Investigator with the DOL Tells All

John Neighbours

Have you ever wished you could get advice on complying with the Fair Labor Standards Act from a Department of Labor insider? Now you can. A former Wage and Hour Division investigator tells us what he tells his college and university clients about mistakes related to record-keeping and work hours provisions as well as to the “white collar” exemption. He also explains why FLSA compliance can be more onerous for HR professionals in higher education than for their counterparts in other types of workplaces.

Any employment relationship covered by the Fair Labor Standards Act (FLSA) can, and frequently does, exist within institutions of higher learning. Just how the FLSA regulates that relationship depends, in part, on whether a college or university is public or private (only public institutions, for example, can offer comp time in lieu of cash pay for overtime) and even where the school is located (because the FLSA may be superseded by state wage and hour law). Often the largest employer in a given locale, a college or university may feel particularly vulnerable to allegations of FLSA violations by employees or organizations representing employees. No wonder institutions of higher learning fear disruptive (and sometimes expensive) interventions by the U.S. Department of Labor’s Wage and Hour Division.

I share their unease. As a former employee of the Wage and Hour Division and now a consultant on FLSA matters, I am acutely aware of employers’ struggle to comply with a 63-year-old law that does not reflect the modern workplace. I am also aware of—and discomfited by—unreliable interpretations of the FLSA’s meaning and applications. I am even more disturbed by the limited amount of information available to employers on “official” FLSA interpretations and on the facts and considerations in DOL enforcement actions.

When the Wage and Hour Division starts asking questions about FLSA compliance, any of three courses of action may be in the offing. First, the division may engage in a conciliation effort to arrive at a mutually agreeable resolution of a simple alleged violation affecting one employee or a defined group of employees. Ideally, a conciliation involves just a few telephone calls to
establish the parameters of the alleged problem, to articulate compliance measures, and to obtain assurances of corrective action.

Second, if resolution is not possible through the conciliation process, the affected employee(s) may be advised of his or her (their) right to pursue private action under Section 16(b) of the FLSA, or the matter might be subject to a limited investigation. Unlike conciliation, a limited investigation involves fact-finding (which may necessitate a site visit), records inspection, employee interviews, and face-to-face negotiations. Although the alleged problem may involve just a few issues and affect a relatively small number of employees, the fact-finding process virtually compels the Wage and Hour Division to investigate other institution policies and departments identical to the policies and departments involved in the alleged problem.

Third, the Wage and Hour Division may request the college or university to conduct a self-audit, which DOL closely monitors. I am aware of the outcome of self-audits conducted by two schools. In one case, many positions had to be reclassified, with the assistance of the Wage and Hour Division, as non-exempt, resulting in a back-wage liability of $1.4 million. In the second case, with which I was involved, the number of lost exemptions and the sum of the back-wage liability were substantially smaller.

Because little of what transpires in conciliation processes, limited investigations, and self-audits is made available in public records, translation of “official” interpretations and enforcement actions into sound and effective HR policy is impeded.

Both public and private higher education employers have been my clients. I’d like to share with you some of the lessons I’ve learned in working with these institutions on FLSA issues, as well as some of the guidance I’ve given them on the basis of my experience as an investigator with the Wage and Hour Division. But first I’d like to explain why I think higher education HR professionals may face an even tougher job in complying with the FLSA than HR professionals in some other workplaces.

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Are You Ready for a Department of Labor Investigation?

Linda Way-Smith, J.D.
Katharine B. Houlihan, J.D., and
Jacquenette M. Helmes, J.D.

A DOL investigator requests an appointment with an official at your institution in one or two weeks. Do you know what you need to do before the investigator arrives and while he or she is on your campus? By understanding the investigation process, you can secure the best possible outcome for your institution.

The Administrator or his designated representative may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter—Fair Labor Standards Act §211(a)]

With these words, Congress granted the Department of Labor (DOL) access to workplaces and employees nationwide to enforce the provisions of the federal wage and hour laws, including the Fair Labor Standards Act (FLSA). Between October 1, 1999, and September 30, 2000, the DOL Wage and Hour Division undertook 37,432 investigations, known as compliance actions, nationwide. Of those investigations, 64 were FLSA-related investigations of higher education institutions.

Universities have at least three characteristics that can complicate their efforts to prepare for an impending DOL investigation. First, many universities have fragmented human resource functions—individual departments are responsible for developing position descriptions and applying the FLSA. Second, universities are like small towns, with a wide range of positions, many of which were not contemplated by Congress when the FLSA was enacted in the 1930s. Third, the culture of many universities undermines even the most competent HR department’s FLSA compliance efforts by stigmatizing the distinction between exempt and non-exempt employees. Supervisors tend to rely on the honor system rather than on formal record-keeping procedures and to encourage employees to be project-oriented rather than work-day oriented.
Although DOL’s enforcement authority is sweeping, it is not limitless. Moreover, employers can positively influence the outcome of a DOL investigation by understanding the goals and process of the investigation, preparing for the investigator’s arrival, and demonstrating their desire to comply with the FLSA.

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Report from the Front Line
An Anonymous HR Director Recounts Her College’s Eight-Month DOL Investigation and the Lessons She Wishes She Had Read about Rather Than Experienced

No lesson is so well remembered as the one passed on by the person who learned it. Here now is the tale of one complaint about overtime pay in one department of a community college that triggered an eight-month, institution-wide investigation of exempt classifications.

An FLSA complaint about overtime could lead to employee reclassifications and payment of thousands of dollars in overtime to employees you thought were exempt. Think this outcome is just an urban legend? My community college doesn’t think so since the Department of Labor came knocking a year ago this fall.

As HR director, I’m usually involved in every personnel issue that arises at the college. But nothing had prepared me for the events of the eight months following the first call from the DOL investigator. He advised me that DOL had received a complaint from someone who may or may not be a current employee but who had worked for us sometime within the last two years. When I asked what job this employee did, he responded that the person was someone who worked for the maintenance department. Matter of factly, the investigator said that he would need the payroll records for all employees who had worked in that department for the last two years and would be by within a few weeks to pick them up. I told him that we would cooperate in any way necessary but that the school might need a little more than two weeks to collect all the material. He agreed and said he would call me back in two weeks for a status report.
New Effective HR Practices Featured on CUPA-HR’s Web Site

The University of Tennessee significantly reduced labor costs following delivery of a training program that empowered the housing department staff to improve customer service. Abandoning longevity-based pay, Colgate University instituted a Career Progression Program that, along with the university’s new pay-for-performance program, has given support staff members a financial incentive to augment their skills and competencies. Get inspiration from the stories of these and other schools’ effective HR practices.

You conduct a survey on the effectiveness of your institution’s HR department and find out your customers are highly dissatisfied with the efficiency of various HR processes and the timeliness, accuracy, and professionalism with which HR staff respond to requests for information and help. What do you do? Arizona State University (ASU) faced that situation in 1995. Six years later its HR department can say that it has made a 180-degree turnaround. Not only have its customers recognized the improvement but so too have the university’s president and the governor of Arizona.

ASU is one of the colleges and universities whose effective practice descriptions are featured on the CUPA-HR Web site. In addition, ASU is one of five institutions whose stories have been selected by an association task force to be forwarded to the Council of Higher Education Management Associations (CHEMA) for posting on a Web site devoted to effective practices throughout higher education (www.chemappractices.org). The practices for which those five institutions have been recognized are outlined below. CUPA-HR members can find more detailed descriptions of the practices at www.cupahr.org/membersonly/effectiveHR.html.
Experience You Can Count On Experts Weigh In on Compensation Issues in New Book of Essays

Can you ever insulate a compensation system from institutional politics? How do you work with unions? Is the transition from traditional job classification to broadbarding worth the effort? And what is broadbarding, exactly? How does a market pricing system really work, what is it likely to cost, and how soon should you expect it to pay off?

If any of these questions crosses your mind during an ordinary day, you are not alone. Whether you are making major changes to a universitywide classification system or simply writing a memo clarifying performance review procedures, you undoubtedly grapple with how to make sure compensation at your institution is fair, keeps pace with the marketplace, and offers workers an incentive to stay.

Last year Robert Foldesi—formerly of the University of Iowa and now the associate vice president and director of Human Resources at the University of Notre Dame—teamed up with colleagues John Toller of the University of Michigan and Steve Smith of Buck Consultants to assemble a text on the fundamentals of compensation philosophy and practice in higher education. The authors’ work on that project, which will be produced by CUPA-HR later this year, revealed a need to produce a second volume to address the realities of compensation administration at institutions of higher education.

Foldesi assembled a “brain trust” of seasoned compensation professionals at a wide range of institutions, from small private colleges to statewide public university systems, as well as scholars and consultants, to address how compensation policy has evolved, how it is changing now, and how new approaches are working out.

The new book, Contemporary Readings in Higher Education Compensation Practices, is an extended conversation with a dozen of the nation’s best thinkers on the topic. Authors such as the Texas A&M University System’s Patricia Couger and the Wharton School’s Howard Risher “tell it like it is” in frank, friendly language aimed at experienced peers as well as newcomers to the field of compensation administration.

The book includes three case examples from The Ohio State University, the University of Minnesota, and the University of Notre Dame, institutions that have implemented broadbarding or market pricing systems during the
past five years. The book also provides tips for working with a compensation consultant and a sample request for proposals, ideas for developing or modifying an institution’s compensation philosophy and principles, and detailed information on acquiring and using salary survey data.

Contemporary Readings in Higher Education Compensation Practices is available from CUPA-HR online at http://www.cupahr.org/HRpubsNow.html or by phone at 202-429-0311, ext. 2.

Contemporary Readings in Higher Education Compensation Practices
New Effective HR Practices Featured on CUPA-HR’s Web Site

Share Your School’s Effective HR Practices

CUPA-HR members are urged to share their successes with their counterparts at schools everywhere. The association seeks to publicize programs, services, initiatives, and technology applications that have been operational for more than one year and for which empirical data on benefits have been obtained. Descriptions are limited to 1,500 words and must be submitted electronically at www.cupahr.org/membersonly/effectiveHR.html. Next spring, a CUPA-HR National Office committee will select descriptions of five practices to forward to CHEMA for inclusion on its Web site devoted to effective practices throughout colleges and universities.
New Effective HR Practices Featured on CUPA-HR’s Web Site

continued

Training Staff
An effective training program can be a tremendous cost-saver. The University of Tennessee departments of human resources and training and development have the figures to prove it. The two departments documented a significant reduction in labor costs following delivery of a training program that empowered the staff of the university’s housing department to provide excellent customer service. In the past, problems and inquiries often required the input of three or more department members; now those same problems and inquiries routinely are handled by the first department member who hears them.

All housing department employees, including the executive director, attended custom-designed training sessions on creating the ideal work group, building connections with customers, delivering great service in spite of obstacles, engaging in teamwork, and bringing personal power to bear in helping customers. These sessions prompted the establishment of a customer service team to reinforce the concepts imparted during training, to troubleshoot customer service problems, and to plan for peak-time customer service requests. The result has been measurable improvements in customer service. According to the developers of the training program, the key to the program’s success was the trainers’ partnership with the housing department. Before developing training sessions, trainers spent considerable time learning about the department’s work and the problems that prevented the department from efficiently providing customer service.

Recruiting and Retaining Talent
In 1999 Seattle University was experiencing 30 percent turnover. A national economic boom was creating labor shortages, and many university employees were moving to “greener” pastures, particularly in the corporate world. A survey of campus workers revealed concern about compensation below Seattle-area market rates as well as interest in merit pay for top performers. In response, the HR department began redesigning the university’s salary program, developed a more extensive orientation program for new employees (the individuals most likely to move to a new employer), and established a new performance appraisal process.

As a result of the first initiative, the HR department identified new salary
benchmarks. Those benchmarks reflect salaries not only in local, private, higher education institutions but also in corporations in the region. In addition, the department got university executives and the school’s board of trustees to approve a pay range advancement of 4–6 percent, consistent with the department’s recommendation to make salaries more competitive. Subsequently, requests for classification upgrades fell by 60 percent.

The second initiative, enhancement of the university’s orientation program, was aimed at strengthening employee commitment to the university by helping new employees understand how their jobs advance the university’s mission—nurturing students’ academic life. The HR department partnered with the university’s Department of Mission and Jesuit Identity to create an expanded orientation program. That program includes two informational luncheons for new hires, mentors for new hires during their first six months of employment, and opportunities for new hires to engage in a volunteer effort related to student academic life.

The third initiative, redesign of the university’s performance appraisal process, is aimed at recognizing excellent performance and possibly linking it to merit pay. The HR department, working with many stakeholders, is designing a new performance appraisal instrument and process to be phased in beginning this fall. The university’s Executive Leadership Team is studying the pros and cons of implementing merit pay in some or all of the university’s staff departments.

**Advancing the Careers of Support Staff**

Colgate University, working with William M. Mercer, Inc., has established a program to help support staff advance their careers, in part by linking pay to their skills and competencies. The foundation of the university’s Career Progression Program is an annual assessment of skills and competencies demonstrated on the job. The skills assessment determines the pay grade of each support staff member; this assessment weights each of seven skills—analysis and data management, communications, supervisory and guidance skills, acquisition and purchasing, coordination, equipment operation, and software applications—according to its relevance and importance to a given job. The competency assessment determines a recommended pay range within the pay grade for the member. The competencies—adaptability and flexibility, attention to detail/concern for accuracy, composure and stress tolerance, continual learning, initiative, judgment and decision making, understanding of organization and procedures, problem solving, reliability, service orientation, and teamwork—are weighted equally.

The Career Progression Program, along with a new pay-for-performance program, has moved Colgate University away from longevity-based pay. The Career Progression Program gives support staff members a financial incentive to augment their skills, competencies, or both. It allows those staff members to be recognized and rewarded for skills and competencies
acquired within their current position and for their performance in that position.
New Effective HR Practices Featured on CUPA-HR’s Web Site

Initiatives That Paid Off

Transforming an HR Department
In 1997 ASU’s HR department began to address the problems uncovered by its 1995 survey and subsequent assessment efforts. Over the next three years the department worked with other university units to overhaul the university’s hiring process and classification and compensation process, delineate the roles of HR staff and unit managers, and improve the delivery of HR programs and services. By 1998 the department had reorganized itself on the basis of identified customer needs. It created a one-stop customer service center handling employment, benefits, payroll, records, and general information needs. To increase the effectiveness of individual employees and units, the department established workforce programs as well as an HR Partners’ Unit, which assigns an HR advisor to each university department and college and each area managed by a university vice president. The result was that the number of HR policies was reduced by 40 percent and that nearly all HR-related decisions were delegated to the university’s various units.

In 1999 the department administered another survey. This time 90 percent of respondents expressed satisfaction with the HR staff’s professionalism. That same year, the department received the ASU president’s medal for team excellence and the Arizona governor’s Spirit of Excellence Award.

Implementing a Best Practices-based Performance Appraisal Program
The University of New Mexico has created a performance appraisal program that emphasizes the collaboration of supervisors with their employees on development of performance goals and the support of employees by supervisors in meeting those goals. Each year, each employee and his or her supervisor meet to discuss, agree on, and document performance standards linked to the university’s values. Employees and supervisors also work together on a career development program for the employees. The plan might call for specific kinds of education and training, job assignments that will help the employee acquire or hone specific job-related competencies, or both. Throughout the year the supervisor coaches the employee and documents his or her performance. At the end of the year
the supervisor and employee review that performance and the supervisor makes a salary increase recommendation that reflects the results of the performance appraisal.

The university’s new performance appraisal program is enhancing productivity by aligning the goals of the individual employee with department and university goals. The program is enhancing staff development by helping supervisors and employees pinpoint the resources that the latter need to do their jobs effectively and advance their careers. Finally, the program is spurring excellent performance because it is linked to a new pay-for-performance system that is replacing across-the-board salary increases. Now the university can systematically identify top performers and give them rewards commensurate with their achievements.

Implementation of the performance appraisal program was a multi-year effort. It involved the development of a multifaceted communications campaign and an extensive performance-appraisal training program for supervisors and staff. This training program consists of several workshops to help supervisors (1) work with their employees on developing performance goals and standards, (2) effectively coach their staff, and (3) perform an honest and motivating performance evaluation. Another workshop helps staff understand how to participate in the performance appraisal program. This guidance is also available on the university’s Web site.
Lessons

Several lessons can be learned from our audit by the DOL. (Every part of me wishes that you had learned them and that I could be the one reading about them.) Here they are:

1. Review your job descriptions to ensure that they reflect actual duties and responsibilities. Be sure that each employee is familiar with his or her job description and that those with supervisory responsibilities are actually supervising employees.

2. Review job descriptions for advisors and outreach staff to determine whether those individuals can be classified as exempt academic personnel under the FLSA.

3. Cooperate and be forthright with the DOL investigator. Help get him or her in and out by having your internal accountability staff assist you in collection of data and preparation of spreadsheets.

4. Know your FLSA classifications and be sure that any consultant you hire to review employee classifications is familiar with the types of employment positions typically found at colleges and universities.

5. Stay abreast of DOL investigation targets. After our audit we discovered that the DOL had been scrutinizing CPA firms. That focus may have led to the department’s interest in our accountants. Those of you with licensed vocational nurses teaching in your nursing or allied health programs should be aware that DOL has been investigating pay to vocational nurses working for home health agencies.

6. Get sound legal advice when dealing with an audit or reviewing employee classifications.

Good luck to you all!
Report from the Front Line

Surprise, Surprise

I think I may have started to cry, but the scene’s a little fuzzy now. I had heard horror stories about DOL audits. After 20 years of working in HR management my turn to experience an audit had finally come. I walked out of my office and gathered my staff. I told them about the call and what it meant. Then we quickly took action.

I notified the college’s president and my vice president of the DOL audit. We developed a plan of action and began collecting the requested data. Our Office of Accountability was called in to begin number crunching to determine the overtime for which we might be liable. At our college the payroll responsibility is split between HR staff and staff at our business office, which actually cuts the checks. (The business office does the overtime calculations.) The initial finding was that we had made overpayment and underpayment on almost every payroll for the first 23 months of the time period investigated. The reason was that the 2080 rule for calculating hourly rates was not in use during those months. In any event, we prepared a spreadsheet that showed our calculations of underpayment and overpayment.

We showed our findings to the investigator at the first meeting with him. The investigator told us that all the current employees who were underpaid would be interviewed. In the absence of any documented proof of overtime hours worked, the DOL takes the employee’s word in determining how much overtime is owed. We were also advised that as part of the investigation, the investigator would conduct spot interviews of our exempt staff to be sure that everyone was classified correctly.

We were surprised that a complaint about the calculation of overtime could open such a wide investigation. But then the investigator gave me a DOL flyer and pointed out some information that triggered more trepidation. He noted that anyone classified as a professional had to possess a Bachelor’s degree. We explained that many of our teachers in technical areas possessed only an associate’s degree or a certification because no four-year degree is given in their field of expertise. I explained that all the faculty members whom we classified as exempt had certifications. I tried to imagine the response of our faculty who would lose their professional
classification. We hired a reputable placement consultant to review our employee classifications. He had several recommendations for changes.

Then came the interviews of the maintenance staff. We were not permitted to sit in on the interviews. The investigator took the spreadsheets we had prepared and called us back before the December holiday break to tell us to cut checks for everyone in the maintenance department for whom we showed underpayments. (The overpayments we could not collect back from the employees.) The investigator then requested that the audit be expanded to include ALL classified employees. We went through the same routine as that for the maintenance employees and had similar results: a few underpayments but many more overpayments for overtime hours.
Report from the Front Line

The Other Shoe Drops

I left for the holiday break knowing that spot interviews awaited us in the spring. Fortunately, the investigator wanted to start with the accountants. I rejoiced as I recalled that all of our accountants had four-year degrees in accounting and supervised their own departments.

My joy was short-lived. After interviewing the accountants, the investigator determined that only one was exempt. The others performed routine duties and did not supervise employees because the comptroller was the ultimate boss! When I broke the news to the accountants, they were upset because they perceived a diminution in their employee status. They wanted to prepare appeals.

We submitted more detailed descriptions of the accountants’ duties. A few weeks later, the investigator said that his bosses in Washington had rejected the accountants’ classification as exempt. We were privy neither to the report nor to “Washington’s” comments on this matter. My vice president and I did meet with the investigator’s supervisor, and he reviewed each matter under investigation with us. He told us not to worry: We only had to change the accountants to a non-exempt status. We were relieved that the audit was finally over!

Two weeks later came another phone call. The investigator wanted to interview the accountants again to determine if they really worked overtime. By this time, I think these employees were seeing dollar signs. I, on the other hand, had many sleepless nights. How to explain to the college’s board of directors that employees classified as exempt were not supervising but instead performing only routine work?

The good news is that DOL calculated the overtime payments for the accountants at only the half-time rate instead of the one-and-one-half-time rate. Checks were cut, and the accountants enjoyed vacations and new wardrobes. The bad news is that we paid out several thousands of dollars. The manager of the accounting department is now flooded with requests for overtime.
Are You Ready for a Department of Labor Investigation?

References


U.S. Department of Labor. *Wage and Hour Field Operations Handbook*, sections 50e00-01 (1982), 51a01(c) (1980); 51a03(b) (1980); 51a04 (1980); 51a05(a)-(d) (1980); 51a05(e) (1980); 51a12(a)-(b) (1973); 52a02 (1937); 52a03 (1982); 52a04 (1973); 52a05 (1982); 52a09 (1970); 52a11 (1976); 52b00(a) (1971); 52b01 (1971); 52c00 (1967); 52c01 (1967); 52c02 (1967); 52d00 (1976); 52d01 (1976); 52d02 (1976); 53c17(a) (1993); 53c19(a) (1993); 53d00 (1993); 53d01 (1993); 53g03 (1980).

*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (Wage and Hour administrator has the right to conduct an investigation or to determine whether an employer is subject to the FLSA, and if so, whether the act is being violated).


Are You Ready for a Department of Labor Investigation?

An Investigation Is Launched

Approximately 90 percent of investigations result from a current or former employee’s complaint to the DOL’s local Wage and Hour Division office. The DOL responds to each complaint on a “worst first” basis, prioritizing allegations according to their seriousness and the number of employees affected rather than the date that the complaint was filed [Handbook §51a01(c)]. By the time an employer receives an investigation notice, the complaint may have been pending for some time.

The remaining 10 percent of audits are investigations of employers in industries targeted by the Wage and Hour Division on the basis of the probability of violations; investigations of leads from other investigations, field observations, contacts with unions and trade associations, or published reports about the working conditions of specific employers or in specific industries; or re inspections to assess whether an employer has corrected violations (Handbook §50e00, 01). DOL policy prohibits an investigator from revealing the reason for the investigation, the existence of a complaint, or the identity of the complainant, presumably to protect complainants from possible retaliation (Handbook §52d00).
Are You Ready for a Department of Labor Investigation?

Investigation Process

A DOL investigation routinely begins with a letter request from the investigator for an appointment with an appropriate official of the establishment on a date one to two weeks after the date of the letter. Reasonable requests for postponement of the appointment for preparation or scheduling purposes may be made by telephone call or return letter and will generally be accommodated. Employers are well advised to use the lag between the letter’s arrival and the appointment to (1) reflect on what might have prompted the investigation; (2) review overtime pay policies and records for nonexempt employees; (3) review salary policies, position descriptions, and records for exempt employees; and (4) contact colleagues at nearby institutions to determine whether they are aware of other recent DOL enforcement activity. HR professionals should use the lag time to take advantage of available internal and external legal advice and assistance.

In preparing for a DOL investigation, employers should anticipate the investigator’s needs. They should review relevant written policies and forms used for record keeping, revise outdated position descriptions to reflect actual duties and the current organizational chart, and identify and explain inconsistencies or apparent discrepancies between written policies and practices. (Although employers are permitted to redact extraneous information from their documents to meet the DOL’s specific requests, destroying records that are normally kept in the course of business is never appropriate.) Employers should also determine who will attend the initial meeting with the investigator and select an employee with discretion and judgment to provide support to the investigator during the visit. If the investigation’s target can be identified in advance, employers might profit from interviewing supervisors about employees’ work hours and actual duties and about general departmental morale.

As a matter of agency policy, investigations begin during working hours at
the employer’s establishment; however, an employer may request an after-hours meeting. The investigator will seek the consent of an official with authority to permit the investigator’s entry onto the premises (Handbook §52a02, §52a04). An employer who refuses entry will ultimately be served with an administrative subpoena that will be enforced in federal court (Handbook §52a05). A situation in which an employer would force an investigator to obtain a subpoena prior to entry onto the premises is difficult to imagine. Employers certainly should not force an investigator to obtain a subpoena to gain entry without first seeking legal advice.

The investigation itself has four parts: an opening conference, at which the scope of the investigation will be revealed and some background information obtained; the examination of records; the interview of employees; and a closing conference, at which any violations and associated liability will be discussed. Each of these four parts merits further examination.
Are You Ready for a Department of Labor Investigation?

Scope of Investigation

The FLSA grants the Wage and Hour Administrator the authority to “investigate and gather data regarding wages, hours, and other conditions and practices of employment” [29 U.S. C. §211(a)]. That general mandate has been given shape by a series of policies and practices that have developed over time. These internal policies, described below, give employers significant insight into the probable scope of an investigation as well as the procedures that will be followed.

Generally, the geographic scope of Wage and Hour investigations will be confined to a single “establishment,” defined as “all activities of the employer located in close vicinity or close proximity and operated or directed by the same management . . .” [Handbook §51a12(a)-(b)]. Satellite campuses that are geographically distant and subject only to general supervision by a headquarters or other office are treated as separate establishments [Handbook §51a12(a)-(b)]. Although its physical location may be limited, an investigation will likely expand beyond an individual complaint to any potential violation involving all other employees of the establishment and all other statutes enforced by the Wage and Hour Division, such as the Service Contract Act and the Equal Pay Act [Handbook § 51a03(b)]. Moreover, the DOL investigator will report suspected violations of other federal and state employment laws, such as safety laws, to the appropriate administrative agency [Handbook §52a11, §53g03].

Generally, the investigator initially limits his or her investigation’s substantive scope to two aspects of the FLSA: whether the employer is appropriately recording and paying for hours of work by nonexempt employees and whether the employer has properly classified employees as exempt or nonexempt. But the investigator could review issues of coverage, compliance, and damages concurrently [Handbook §52b00(a)], a practice endorsed by the Supreme Court in Oklahoma Press Publishing Co. v. Walling.
Investigation of such issues may result in a request for payroll records even before a violation of the FLSA has been established. Employers should not shy away from suggesting that fact-finding to determine potential back pay be postponed until the substantive aspect of the investigation strongly suggests an actual violation.

The temporal scope of an investigation will be limited at the outset to a review of the employer’s records and practices during the two years before initiation of the investigation, unless the DOL regional solicitor contemplates litigation and instructs the investigator to make factual findings for a three-year period (the statute of limitations for willful FLSA violations of the FLSA) [Handbook §51a05(a)-(d)]. If criminal prosecution is contemplated, the investigation will encompass a five-year period [Handbook §51a05(e)]. Criminal prosecution is reserved for only the most egregious and repeated violations.
Are You Ready for a Department of Labor Investigation?

Self Audits

To handle cases in a more expeditious fashion, the Wage and Hour Division has developed a new investigation process. After the DOL’s initial contact, an employer may volunteer to undertake an internal review of its records and pay practices to identify any FLSA violations resulting in back-pay liability. The DOL is most likely to accept the employer’s offer of a self-audit when the scope of the inquiry is broad and will require numerous interviews.

After its internal investigation, a process that should be conducted or supervised by outside legal counsel with knowledge and experience in FLSA matters, the employer presents its findings in writing, with supporting documentation, to the Wage and Hour investigator. The investigator will meet with the employer to discuss the results and to attempt to reach an agreement resolving any back-pay violations, without litigation. If the investigator rejects the employer’s conclusions in whole or part, an investigation in accordance with the above-described procedures will ensue. To the extent that the investigator’s report is accepted, the employer will be released from further related obligations and penalties, and the matter is administratively closed.

This self-audit has advantages for both parties. For the DOL, employer compliance is obtained and employee rights are protected efficiently, and without a tremendous expenditure of departmental resources. For the employer, workplace disruptions are minimized and interaction between employees and the Wage and Hour investigator is limited. Furthermore, the employer’s cooperative attitude is likely to be recognized by the investigator, whose goal is to maximize compliance with the FLSA rather than punish employers who are making their best efforts to comply.
Are You Ready for a Department of Labor Investigation?

The Best Preparation

The best preparation for a DOL Wage and Hour audit is an ongoing routine of FLSA training and education. The more managers know about the act and how to apply it correctly, the less likely that violations will occur. By understanding the DOL’s investigation process, an HR professional can anticipate the investigator’s requests, represent the university’s positions in a well-documented and cooperative manner, and secure the best possible outcome for the institution.
Are You Ready for a Department of Labor Investigation?

Investigation Process

During an interview, investigators may inform employees of their legal rights under the FLSA and provide publications explaining those rights ([Handbook §52d01(a)-(b)]). The investigator may also inform employees of any back wages that the employer has agreed to pay ([Handbook §52d01(a)-(b)]). The investigator may not suggest in any way that employees should pursue a private cause of action in court against the establishment ([Handbook §52d02]).

Closing Conference

If an investigator has reached a finding that the establishment has violated the FLSA and has obtained supervisory review and approval of that conclusion, he or she will schedule a final meeting with the employer ([Handbook §53d00]). If the employer has any concern that the finding will be adverse, the employer should provide additional explanation, information, or legal authority to support its position before the finding is finalized and the meeting is held. Once the investigator has found a violation and computed the back wages due, the outcome of the investigation becomes more difficult to influence. Employers may make contact with the investigator as the investigation progresses to inquire about the status of the investigation. Investigators will not reveal their conclusions until obtaining supervisory approval but often appreciate and accept clarifying information and statements of the employer’s position on matters under review. A well-researched, cogent letter of explanation can head off an adverse finding. Employers may also request a meeting with the investigator’s supervisor or the area or regional DOL director to discuss any areas of factual or legal disagreement before the finding is final. In this event, employers may wish to seek legal counsel if they have not already done so.

Once the investigator’s conclusions are final, the investigator will inform the employer of his or her findings. If fact-finding on damages was postponed at the earlier stage, it will be undertaken at this point. With respect to determination of the amount of the back pay due, relevant factors include good-faith efforts made by the employer, the employer’s explanation for violations, the employer’s commitment to future
compliance, intervals between violations, the number of employees affected, and whether the violations follow a pattern [C.F.R. §578 (3)-(4)]. Thus, the employer’s attitude during the course of the investigation can influence the outcome.

If violations were found, the investigator will ask the employer to explain why they occurred. The investigator will then explain how to comply with the FLSA in the future, obtain the employer’s written agreement to do so, and formally request payment of a certain sum in back wages for each employee. The investigator will make every reasonable effort to obtain a voluntary agreement to pay back wages due, including negotiating with employers about the amount and the time period for which back pay is due. An employer that demonstrates its desire to be fair to employees and compliant with the FLSA is much less likely to be referred to the DOL Solicitor’s Office for litigation of the disputed matter. If an employer refuses to pay amounts found due, the investigator will advise the employer that the Wage and Hour Division will take such action as may be necessary to ensure compliance with the statutory and regulatory remedies available for collection [Handbook §53c17(a)]. The investigator must inform the employer that the investigation report will be sent to the DOL district director for further consideration [Handbook §53c19(a)].

The district director will conduct second-level negotiations to obtain compliance, payment in all cases involving back wages of $5,000 or more, or both (Handbook §53d01). The Wage and Hour Division may also notify employees of their rights in cases in which the employer refuses to pay back wages due; however, the employer must be advised of this intention [Handbook §53c19(a)]. The employer may appeal any Wage and Hour Division decision through the chain of command at the DOL and may seek recourse from the Solicitor’s Office to prevent prosecution.

In the event of litigation by either the DOL or the employee, a finding of liability could result in an order to pay unpaid back wages, an additional equal amount as liquidated damages, fines, imprisonment, or fees and costs, or some combination thereof [29 U.S.C. §216, §217 (1994)]. In addition, a penalty of up to $1,000 per violation (each employee due back wages counts as a “violation”) may be assessed for any repeated or willful violations of the FLSA’s minimum wage or overtime provisions [29 C.F.R. §578(3)-(4)].
Are You Ready for a Department of Labor Investigation?

Investigation Process

Examination of Records
The investigator may examine the records that the FLSA requires employers to maintain (29 C.F.R. §516.7–§516.8; Handbook §52b00) and may verify that required notices are posted (29 C.F.R. §516.4). Employers should arrange, in advance, to make a quiet and private area, empty of all extraneous documents, available to the investigator for the duration his or her visit. Only those records or documents specifically requested by the investigator should be provided and only when requested. A responsible person should be made available to review records with the investigator and to answer questions or provide context for the record review.

Investigators may not remove an institution’s records or copies of those records unless offsite use of the documents is essential to the investigation and the consent of an official with authority has been obtained (Handbook §52b01). Before consenting to the copying or removal of records, private institutions should clearly and specifically label each page that contains confidential, commercial information or trade secrets (for example, organizational charts, payroll records, and position descriptions) and provide a separate, verified statement that the release of those specified documents would harm the establishment’s competitiveness. This approach will give private institutions the maximum available protection from subsequent disclosure of documents in response to requests from the public under the Freedom of Information Act [FOIA, 5 U.S.C. §522(b)(7)(1994)]. Public institutions should consult their state’s Freedom of Information Act to determine whether records such as organizational charts, payroll records, and position descriptions are considered public documents, and whether the institution could benefit from attempts like the one just outlined to restrict the documents’ availability.

Interview of Employees
Investigators may interview employees to test the adequacy of their records, to substantiate or disprove allegations made by a complainant, to discover other violations in confidence, and to assess the validity of the claimed exempt classifications of employees [Handbook §52c00(a)]. Wage and Hour investigators may not interview high-level executives and managers about their exemptions [Handbook §52c00(c)]. The investigator may
conduct the interviews at the employer’s establishment, at a DOL office, at the employee’s home, or at any other suitable place [Handbook §52c01(b)] by phone or in person [Handbook §52c01(c)]. Investigators generally prefer in-person interviews, which permit them to prepare and obtain signatures on interview statements. Employers must provide the home addresses or telephone numbers of current or former employees if the investigator requests them.

Investigators will conduct interviews in a way that protects the privacy of the employee’s statements (Handbook §52c02). Investigators will not welcome but the employer may offer and the employee may request that another person, such as a parent, a translator, or even a representative of management be present for the interview (Handbook §52c02). If the employee makes such a request, the investigator will almost certainly interview the employee alone to determine that the request is purely voluntary.

Even if employees do not want a management representative present, employers should designate a representative to schedule the interviews, with the minimum of disruption to the workplace, and to brief the employees selected for interviews on what to expect and what their rights are in the interview. Employers may not make, and will not be well served by, any attempt to intimidate an employee selected for interview or to otherwise impede the ability of the investigator to obtain the information that he or she is permitted by law to obtain.

At the conclusion of an interview, the employee will probably be asked to sign the investigator’s summary of the interview. The summary will take the form of a witness statement. Before the interview, the employer should explain to the employee that (1) he or she is under no obligation to sign the statement, (2) he or she should not adopt any statement as his or her own without reviewing it for accuracy and completeness, and (3) he or she should sign no statement without securing a copy to keep for his or her own records. If the employee does not request and obtain a copy of the statement at the time of the interview, he or she may not obtain it until the investigation is closed. Employers may request, but not require, that employees share what transpired during the interview.
Are You Ready for a Department of Labor Investigation?

Investigation Process
continued

Opening Conference
The investigator will present his or her credentials (Handbook §52a03)—a shiny gold shield resembling a police badge, which can intimidate employers and employees alike. After informing the employer’s representative of the general purpose of the visit, the scope of the investigation, and the FLSA’s requirements, the investigator will obtain identifying information about the institution (such as its name and address), the identity of its officers, the number of its employees, the names and occupations of employees claimed to be exempt from the minimum wage and maximum hours provisions, and the name and address of any supervising office or headquarters (Handbook §52a09). The investigator may also ask for information to establish that the employer is an enterprise subject to the FLSA [Handbook §52a09(a)(4)]. Coverage of a college or university is unlikely to be a significant issue for investigation, given Congress’ specific designation of institutions of higher education as “enterprises engaged in commerce” [29 U.S.C. §203(s)(1)(B)], the DOL’s broad interpretation of the term “interstate commerce,” and the number of employees engaged by even the smallest higher learning institutions.

During the opening conference, the official representing the university should take the opportunity to provide the investigator with information about the institution and its mission. This brief description can help the institution project its desire to work with the DOL to ensure compliance and to put on a personal “face” so as not to be perceived as a large, impersonal employer.

The investigator may ask to tour the employer’s premises. A capable and knowledgeable official should always accompany the investigator to answer any questions that arise and to minimize the disruption caused by the investigator’s presence in the workplace. If the official notes any apparent violations of any law while accompanying the investigator, the situation should be promptly addressed and the correction brought to the investigator’s attention.
What Colleges and Universities Should Know about FLSA Compliance

My Advice

Generally speaking, the KISS (keep it swift and simple) is the best response to a DOL inquiry. A senior-level HR staff member should be designated as the (regular) contact person for such an inquiry. He or she should determine—and attempt to limit—the scope of the inquiry and quickly but thoroughly explore the allegations. In addition, he or she should, at the outset, seek to define the terms of closure for an inquiry and formulate a response (which may include a proposed resolution) that neither expands the scope of the inquiry nor involves submission to DOL of information not specifically requested. Finally, he or she should share DOL’s pursuit of timely closure.
What Colleges and Universities Should Know about FLSA Compliance

Tough Row to Hoe

The internal dynamics of higher education institutions can make FLSA compliance in those institutions especially onerous for HR professionals. Like HR professionals in other organizations, the higher education HR professional is expected to possess an exhaustive knowledge of all the laws and regulations applicable to the employment relationship, but at the same time he or she is one step removed from the actual implementation and enforcement of policies and practices that are supposed to ensure compliance with those laws and regulations. Higher education HR professionals have defined themselves as partners of and consultants to their client departments. The downside of this relationship between the HR department and other departments is that the other departments must now be relied on to implement and enforce approved policies and practices. After something has gone awry, the HR department has the unenviable task of both investigating the problem and acting as the interface between the protagonists in the matter, which may include the Department of Labor, some other government agency, or a union.

Further complicating higher education HR professionals’ role in FLSA compliance are potential realpolitik considerations. I refer to these “considerations” by the nicknames of the individuals who raise them: Dotty Dean, Dictator Emeritus, and Contentious Coach. These individuals think that they can compel the HR department’s acceptance of some self-serving interpretation of or special dispensation from the “rule.”
Warning! These Areas of FLSA Compliance Require Vigilance

HR professionals need to be particularly vigilant in the following areas of FLSA compliance:

- the status of student employees and quasi-employees and their special employment relationships,
- the as-yet-unrealized potential for problems stemming from the McNamara-O’Hara Service Contract Act and a school’s engagement in (generally research) contracts with agencies of the U. S. government,
- record-keeping and work hours provisions, and
- exemption from FLSA provisions for “white collar” employees.

The Wage and Hour Division does not appear to be actively pursuing matters in the first two of these areas, so we will focus on the latter two.

Most of the matters in which the Wage and Hour Division gets involved pertain to record keeping and work hours. I would venture a guess that more than three-quarters of the cases in which back wages are assessed are related to these matters. Most of the time the non-exempt classifications are the classifications solicited and monitored by employee associations or unions.

If, as I think, FLSA problems pertaining to non-exempt employees are generally those about which most HR practitioners are aware and expert, why do these problems persist? Some observers might answer that the problems recur because the FLSA doesn’t speak to the realities of today’s workplace and therefore is difficult to interpret and apply. My experience suggests that the recurrence of certain FLSA problems is primarily the result of departments acting autonomously and often with impunity with respect to FLSA compliance. Because higher education HR departments only reluctantly police their clients, those clients often believe that they are

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Record Keeping and Work Hours Provisions

Exemption from FLSA Provisions for "White Collar" Employees

My Advice
free to interpret and apply the FLSA as they wish.
In many cases, employees are complicit in the disregard of FLSA standards for hours worked and record keeping. What evolves is a “you scratch my back and I’ll scratch yours” arrangement whereby supervisors suggest or agree to work schedule adjustments. A varied schedule, sometimes involving overtime, is actually worked, but time records indicate only the standard schedule. The employee foregoes overtime pay but informally and unofficially receives comp time at some unspecified future date. The employing department avoids payment of budget-busting overtime.

I’ve encountered the “side agreements” I’ve just described in public institutions (where under Reg. 553 compensatory time is permitted) and even in those public schools in which comp time is codified in school policy. Such agreements probably represent more than 35 percent of typical non-exempt back-wage liabilities. HR professionals know, but offending departments usually do not know, that the agreements do nothing to prevent employees from legally requesting unpaid overtime premium pay at some future date. Furthermore, the agreements may invalidate otherwise valid comp time policies.

Perhaps the second most frequent violation of record-keeping and work hours provisions involves work performed before or after scheduled shifts and during meal breaks. Time records must show the actual number of hours worked each day and each week, including the time worked before and after scheduled shifts and during meal breaks. Although such extra work may be performed for the benefit of management, it suggests that an employee might be overburdened or under-skilled. Having lunch at one’s desk while continuing to work might appear to be the act of a conscientious employee. But the equal or greater likelihood is that such availability reflects either penuriousness on the part of a manager or an employee’s seeking to unilaterally adjust his or her schedule. Neither situation bodes
well for the employer.

Perhaps the third most frequent violation of record-keeping and work hours provisions involves “authorized” hours worked or “authorized” overtime. Purportedly under-budgeted departments will sometimes seek to disallow hours that they have—inadvertently or deliberately—permitted employees to work by asserting that, by policy, they were not authorized. When work is performed away from, or outside the hours of, close supervision, reliance is placed on an employee’s judgment. After the work has been performed, the time is compensable.

The above (easily anticipated and identifiable) problems probably account for nearly 90 percent of FLSA violations affecting non-exempt employees. Other such violations stem from more peculiar, perhaps artful, applications of FLSA provisions and from the “elusiveness” of official interpretations of the FLSA that outline the handling of very specific situations or types of employees.
What Colleges and Universities Should Know about FLSA Compliance
A Former Investigator with the DOL Tells All

Exemption from FLSA Provisions for "White Collar" Employees

The FLSA Reg. 541 exemption for salaried executive, administrative, and professional employees, when properly applied, does away with the record keeping (that is, timecard), minimum wage, and overtime provisions of the FLSA. That exemption represents not only an administrative convenience but an overtime cost savings to employers.

For more than 15 years, the DOL has promised—but failed—to study and update the “white collar” exemption, which is almost entirely based on considerations and language found in a 1940 report. The report states that the exemption is only as relevant as its required salary tests, which haven’t been adjusted in more than 25 years.

According to the most recent (1975) salary test, a “highly paid executive” is one who receives $250 or more per week. Let’s take a look at this figure. Minimum wage for a 40-hour week is currently $206.00. At the time of the 1975 salary increase, the minimum wage for a 40-hour week was $84.00. Were the same mathematical relationship maintained over time, the salary test would today be $612.50 per week . . . but then the minimum wage itself has been stagnant for more than a few years.

The Wage and Hour Division acknowledged the irrationality of the current salary tests as far back as June 1979, when it added the following language to its Field Operations Handbook:

The present salary tests have been in effect since 4/11/75, and, consequently, many employees who now meet the salary tests, including the ‘upset’ salary, may not meet one or more other tests for exemption. Thus, it will be necessary to carefully review the exempt status of employees for whom the exemption is claimed, including relatively highly paid employees, and pay closer attention to the duties, responsibilities, and other criteria.

But language in the regulation and in FLSA case law contradicts this instruction to examine more closely duties, responsibilities, and other criteria. That language indicates that if the $250 salary test for highly paid executives is met, less stringent testing of the other exemption criteria is necessary. Given that the
Wage and Hour Division has launched no initiative to emphasize reliance on the other criteria, it appears to have taken the easier course of relying, in practice, on the salary test.

Given the irrationality of the existing salary tests, significantly more effort must be made to determine appropriate applications of the “duties” tests. Unfortunately, little if any recent Section 541 case law is based on litigation in which DOL has provided official interpretations of the application of these tests, and few official DOL opinion letters are generally available to provide reliable guidance on application of the white-collar exemption.
What Colleges and Universities Should Know about FLSA Compliance
A Former Investigator with the DOL Tells All

Exemption from FLSA Provisions for "White Collar" Employees
continued

From personal experience, I have drawn the following conclusions:

- Of the three main categories of exempt workers, the executive (supervisory) is most easily verifiable and the professional is most problematic.
- Colleges and universities tend to overuse, and abuse, classification titles such as specialist, coordinator, supervisor, manager, and director as well as title adjectives such as assistant, junior, and deputy to justify the white-collar exemption. The titles may signify the importance of positions to the organization, but if the persons holding those titles merely apply established policies and procedures and do not regularly exercise discretion and independent judgment, they should not be designated exempt employees.
- An indicator of the possible misclassification of employees as exempt is a departmental organization chart in which nearly all the positions are exempt. The question naturally follows, “Who is doing the non-exempt administrative work that flows from the regular exercise of discretion and independent judgment by all these important people?”
- To be eligible for exemption as an executive, an individual must direct employees, not students (unless they are also employees), devices such as computers, or inanimate objects such as sports equipment. An exempt supervisor must supervise... employees. An executive or supervisor may be non-exempt if he or she engages in a significant amount of non-exempt production work (see Reg. 541.115).
- In the recently exempted activities of computer-related occupations, a critical distinction must be made between software-related activities (such as systems analysis and programming) and hardware-related activities (set-up, configuration, adjustment, and repair). The person performing the former activities may be exempt, but the person performing the latter activities will almost always be non-exempt.
- Accountants, accounting coordinators, and even accounting supervisors are more often than not engaged in non-exempt work. They would need to have managerial responsibilities to qualify for exemption (see Reg. 541.115).
- Student advisors or counselors without an advanced degree in student administration or counseling are probably not providing the kind of
counseling that would qualify them for exemption as professional employees.

- Many reporting, announcing, administrative, and technical staff engaged in PBS broadcasting activities have inappropriately been classified as exempt. Schools should examine the recent case law pertaining to the private-sector counterparts of these staff.

- High wages do not an exempt position make. Many positions found to be non-exempt were paid substantially in excess of $250 per week, the salary test for the highly paid executive. People with technical, trade, and craft classifications often pass the salary test.
Who's Exempt from the FLSA?

Conclusion

The making of exempt/non-exempt classifications is filled with potential pitfalls. Even determination of whether an individual is an employee can be difficult. But all employers, including universities and colleges, are expected to understand the FLSA and accurately apply it with respect to covered employees. Because violations of the FLSA carry steep penalties, HR professionals should consult with their college or university attorney before making classification determinations and deciding who is an employee.
Who’s Exempt from the FLSA?

FLSA Exemptions

Executive Exemption
The executive exemption is designed primarily for managers and supervisors. To qualify as an exempt executive, an employee must (1) have as his or her primary duty the management of the enterprise or one of its customarily recognized departments; (2) customarily and regularly direct the work of at least two other employees; (3) have the authority to hire, fire, or promote; (4) regularly exercise discretion; and (5) devote less than 20 percent of his or her workweek to nonexempt activities not directly or closely related to the exempt work. Employees who earn more than $250 per week need only satisfy the first two criteria [29 C.F.R. §541.1].

The Department of Labor has determined that the following types of activities are generally considered to be exempt executive work: interviewing, selecting, and training employees; setting pay rates and work hours; directing and planning work; appraising work performance; handling complaints, grievances, and discipline; determining the methodology of work; apportioning work among subordinates; and providing for the safety of employees and property. Whether an employee’s primary duties are executive must be determined on a case-by-case basis, but an employee who spends more than half of his or her time performing executive duties is likely to be exempt. Even if the person spends less than half his or her time performing these duties, he or she may be exempt on the basis of (1) the relative importance of his or her managerial duties, (2) the frequency with which he or she exercises discretion, (3) his or her relative freedom from supervision, and (4) the difference in the salary that he or she makes and the salaries of others paid for performing non-exempt work [(29 C.F.R. §541.102 and §541.103)].

The Department of Labor has recognized that the “vast majority” of cases involving managers and supervisors are easily recognized as falling within the executive exemption. In the university setting, persons such as deans and the like will typically be exempt. Not every case is so easy, however. A 1995 case illustrates the fine line in deciding whether an employee may be exempt. In Auer v. Robbins [65 F.3d 702 (8th Cir. 1995)], the court determined that a public affairs manager was exempt even though he spent 80 percent of his time performing work also performed by his subordinates. After considering the factors suggested by the Department of Labor, the
court determined that the manager’s work in coordinating media relations and disseminating information and his supervision of 10 employees outweighed the fact that he spent more than half his time performing the same work as his nonexempt subordinates. This case also illustrates the importance of considering every position on a case-by-case basis.

**Administrative Exemption**

Administrative employees are employees whose duties consist of either “[t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer” or “[t]he performance of functions in the administration of an educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried thereon” [29 C.F.R. §541.2(a)].

To qualify for the administrative exemption, the employee must (1) customarily and regularly exercise discretion and independent judgment, (2) regularly and directly assist an employee employed in a bona fide executive or administrative capacity or perform specialized work or special assignments under only general supervision, and (3) devote no more than 20 percent of his or her time to activities not directly or closely related to the performance of work that is considered exempt. Employees who earn at least $250 per week need only meet the first of these three criteria [29 C.F.R. §541.2(d)].
Who’s Exempt from the FLSA?

Students and Volunteers

Students employed by a university or under particular curricula often present a different issue: whether the student is an employee. Students working as sales clerks in the bookstore are no doubt employees subject to the FLSA. Indeed, their employee status is easily recognized as they will be listed on the campus payroll. But what about students providing services to the campus in exchange for tuition credits and the like? Students engaged as resident hall assistants in exchange for reduced room rates and tuition credits are not generally considered employees and thus are not subject to the FLSA [*Marshall v. Regis Educational Corp.*, 666 F.2d 1234 (10th Cir. 1981)]. The educational purpose of the resident assistant program will override the fact that the students also perform various administrative services for the university. Thus, RAs are much like student athletes who receive scholarships or student leaders who receive tuition credits.

Some universities provide programs through which students are required to perform work for a third party without pay in exchange for the opportunity to obtain practical experience. Students working under such programs may not be considered employees under the FLSA Wage and Hour Division Opinion Letter (WH AdmOp.), March 31, 1970]. The Wage and Hour Division has opined that such students may be characterized as trainees rather than employees, provided that

- The training is similar to that which would be given in a vocational school.
- The training is for the benefit of the trainees or students.
- The trainees or students do not displace regular employees but work under their close observation.
- The employer that provides the training derives no immediate advantages from the activities of the trainees or students and on occasion has operations impeded by training.
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for time spent in training.
Not all six criteria must be met, but the totality of the circumstances must establish that the student is truly a trainee gaining experience and not simply working for the employer [Reich v. Parker Fire Protection Dist., 992 F.2d 1023 (10th Cir. 1993)].

Similarly, students engaged in “clinical clerkship and externship” courses as part of their degree program are not considered employed so as to be governed by the FLSA (WH AdmOp, July 1, 1977). The Wage and Hour Division was asked to consider an externship program offered in a pharmacy school through which students worked at a hospital or community pharmacy under close supervision by a pharmacist. The school charged the students tuition for the “course” in exchange for which they received credit. The Wage and Hour Division concluded that the work was “of such predominant benefit to the student” that there could be no employment relationship. On the other hand, an employment relationship would exist in a post-graduation internship program. Consequently, distinguishing training of a specialized nature primarily designed to benefit the student from other types of work primarily designed to benefit the employer is important. Students who are required to perform regular office work for the school are unlikely to qualify as trainees under the six criteria described above (WH AdmOp, Dec. 7, 1972). Volunteers are treated much like externs or clerks in that they provide services without compensation.

Therefore volunteers are not considered employees [Rogers v. Schenkel, 162 F.2d 596 (2nd Cir. 1947); WH AdmOp, Apr. 21, 1967]. The volunteer exception can be controversial, and DOL investigators often scrutinize its use. Schools should consult legal counsel before using volunteers.

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FLSA Exemptions

continued

Not every employee working in a field generally thought of as professional falls under the professional exemption. Consider librarians. Those who perform routine or purely mechanical work, rather than professional work, should not be considered exempt. Colleges and universities should review the tasks actually performed by their librarians to determine whether they fall under the professional exemption.

Congress has determined that certain computer systems analysts, programmers, software engineers, and similarly skilled computer technicians may also fall within the professional exemption [29 U.S.C. §213(a)(17); 29 C.F.R. §541.303]. To be exempt, the employee must have one of the following primary duties: (1) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (2) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, based on and related to user or system design specifications; (3) design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (4) a combination of such duties, the performance of which requires the same level of skills. This exemption applies only to employees with highly specialized knowledge, not to trainees, entry-level employees, or employees who manufacture or repair computer equipment. Such employees must have sufficient education and experience, but unlike other professional employees, they are not required to possess a particular academic degree to be given the professional exemption. Colleges and universities should not designate information technology workers as exempt unless a thorough review of their responsibilities demonstrates that these workers fall within the exemption.
Who’s Exempt from the FLSA?

FLSA Exemptions

continued

The Department of Labor (DOL) has identified three groups of employees who typically fall within the administrative exemption. The first group is executive and administrative assistants. Exempt employees in this group normally work for a person whose duties are of such scope and require so much attention that they must be delegated. The second group is staff employees.

Employees in this group typically provide advice or recommendations to management, ensure compliance with company or department policies and contracts, or perform functions (such as planning, purchasing, contracting, or negotiating) of substantial importance to the management or operation of the organization or one of its units. The third group is employees who perform or oversee special projects.

In *Szymula v. Ash Grove Cement Co.*, 941 F.Supp. 1032 (D.C. Kan. 1996), the court held that an administrative assistant was exempt because she handled workers’ compensation claims, advised management regarding policies, and oversaw protocols affecting secretaries in her area. In *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997), the court held that a public affairs employee was exempt because the employee dealt directly with third parties, disseminated information to the public, gathered information, and created proposals that affected the company’s operations. One court rejected the argument that resident hall counselors were administrative employees when their jobs consisted of maintaining dormitories and providing security and custodial services, as such duties are considered manual [*Alabama A & M University v. King*, 643 So.2d 1366 (Ala. Civ. App. 1994)].

A critical element of the administrative exemption is the requirement of “discretion and independent judgment,” meaning that the employee “has the power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance” [29 C.F.R. §541.207 (a)]. Consider this requirement in the context of employees involved in contracting with third parties. Employees who actually negotiate the terms of contracts and thus exercise some independent judgment are probably exempt, whereas those employees who serve only to process the paperwork
according to prescribed standards will be held nonexempt.

With regard to higher education, the Department of Labor has recognized as exempt administrative employees those persons engaged in the overall academic administration of the college or university. Those persons include department heads and their assistants whose duties are primarily concerned with administration of matters such as curriculum, quality and methods of teaching, and other aspects of the teaching program.

**Professional Exemption**

The professional exemption is intended to recognize persons who have acquired professional knowledge as a result of prolonged study in a particular field. College professors are among the clearer examples of employees who fall within the professional exemption. The Department of Labor regulations exempt employees “[w]hose primary duty consists of the performance of . . . teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the . . . educational establishment or institution by which he is employed” [29 C.F.R. §541.3(a)(2)]. Coaching is also considered an activity traditionally associated with teaching and, thus, will generally be considered exempt [29 C.F.R. §553.30(c)(5)].

Team physicians clearly fall within the professional exemption [29 C.F.R. §541.3(a)(1)]. Athletic trainers may also be exempt, depending on the requirements to be qualified as a trainer. In *Owsley v. San Antonio Independent School Dist.*, 187 F.3d 521 (5th Cir. 1999), the court held that a trainer was exempt for two reasons. First, he was required to have specialized training directly related to his professional duties (even though his training was not at the same level as that for lawyers, doctors, or professors). Most athletic trainers lack such specialized training, and thus should not be classified as exempt. Second, the trainer exercised discretion in his duties by virtue of his role in performing physical examinations, assessing injuries, establishing training procedures, and communicating the condition of athletes to their parents and coaches. It did not matter that the team physician also reviewed athletes’ conditions or injuries or that the trainer acted within standard treatment guidelines. The court distinguished the trainer in that case from trainers lacking specialized training, who will be considered non-exempt because they do not meet the “learned” prong of the exemption test.
The Artful Application: Beware of the department that exhibits too great a facility with FLSA interpretation. One department in a public school had developed a somewhat self-serving mastery of the FLSA’s workweek concept. The department desired greater scheduling flexibility but didn’t want to be inconvenienced with comp time or overtime. To allow the flexing of hours, the department proposed a plan to adjust the departmental workweek to begin and end at noon Friday. Although “technically” permissible under the FLSA, the plan was flawed in practical terms. In the real world people have difficulty escaping the work patterns to which they’ve grown accustomed in the traditional workweek, which ends at the close of business Friday. What results, more often than not, is an inaccurate recording of the hours of work, which translates into overtime violations and back wage liabilities. When legal but atypical work-hour policies are implemented, effective and continual communication of the policies and monitoring of their consistent application becomes critical.

The Lost Interpretation: At one public school, the police department was permitting its officers to be employed by a private security agency (as regular police departments are permitted to do by Reg. 553.227). What appeared problematical to me was the school’s hiring of its own off-duty officers through the private agency, at the non-overtime private agency rate, to perform additional duties at the school. This practice could have cost the school an estimated $162,000 in back wages. Because the school was paying police at time and one half after 40 hours a week for regular employment, I suggested that it make use of the traditional police overtime exemption—the Section 7(k) work “period” provision, which permits police to work more than the standard 40 straight-time hours. Fortunately, one of the senior exempt officers had a friend—one of the few remaining gray beards in the DOL national office—who brought my attention to a rather ancient opinion letter which, by way of reference to Congressional hearings, indicated that college and university employees were not intended to be included within the 7(k) exemption. According to the letter, such employees were locked into the standard 40-hour workweek. One wonders what other special exemption exclusions lie hidden in the DOL archives.
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Conclusion

Although the FLSA has regulated the private sector since the 1930s and applied to public schools since the 1970s, most schools are noncompliant with the act in some respect. They continue to struggle with a law and regulations that do not always reflect the modern office workplace and the growth of the service economy. Schools should periodically review their compensation policies and classification determinations and work toward compliance.
The Fair Labor Standards Act

FLSA Requirments

Minimum Wage
Most employees covered by the FLSA must be paid a minimum wage of $5.15 per hour, whether they are paid on an hourly or a salary basis. The Secretary of Labor may issue a certificate that permits colleges and universities to employ students at a wage rate not less 85 percent of the applicable minimum wage if the certificate is necessary to give students on-campus employment opportunities. The FLSA requires the Secretary to ensure that below-minimum-wage employment is unlikely to reduce the full-time employment opportunities of non-students.

Overtime
A non-exempt, covered employee who works in excess of 40 hours per week ordinarily is entitled to overtime compensation at a rate of one and one-half times his or her regular rate of pay. The FLSA does not require payment of overtime for weekend, evening, or holiday work or for work in excess of eight hours a day. Overtime is due only for work in excess of 40 hours per week unless the state imposes stricter requirements.

Section 7(o) of the FLSA gives state and local government employers (including public colleges and universities) as well as their employees and employee representatives some flexibility regarding compensation for statutory overtime hours. This subsection authorizes a public agency that is a state, a political subdivision of a state, or an interstate governmental agency to provide compensatory time off (with certain limitations) in lieu of monetary overtime compensation that would otherwise be required under Section 7. Comp time must be at the rate of not less than one and one-half hours of comp time for each hour of overtime work. The offer and acceptance of comp time in lieu of overtime payment in cash is conditioned on the employer and the employee (or the employee representative) reaching an agreement or understanding before the performance of overtime work.
Joint Employment
Under the FLSA, an employee can be a joint employee of two employers, who are jointly liable for the employee’s entire pay. The hours worked by that employee for both employers must be aggregated to determine whether the employee has worked more than 40 hours in a workweek.

Joint employment can arise when a graduate student is paid by a university to teach a university course and is separately paid by a professor to do research or when a nurse at the university hospital also works for a private nurse registry and is assigned to that same hospital. The general test of whether employment is joint employment is economic reality. Joint employment is more likely to be found if poor performance in one position results in a loss of pay, discipline, or even firing in the other position.
The Fair Labor Standards Act

FLSA Exemptions

The FLSA contains exemptions from the minimum wage and overtime provisions for persons employed in a bona fide executive, administrative, or professional capacity and for certain other employees. Because of the remedial purpose of the FLSA, these exemptions are narrowly construed.

DOL has issued regulations (see 29 Code of Federal Regulations Part 541) to be used in determining whether an employee qualifies as exempt. The regulations contain both a “long test” and a “short test” for determining an employee’s status. If the employee earns a salary of at least $250 per week, the short test is applied.

As any HR professional can attest, the minimum salaries used to determine who is a highly paid exempt employee are woefully outdated. An individual may qualify as an exempt executive employee if he or she satisfies the duties test (discussed below) and receives a salary of only $155 per week per year.

To be classified as an exempt executive, administrative, or professional employee, the worker must be paid on a “salary basis” (see 29 C.F.R. §541.118). Special salary-basis rules apply for public-sector employees. Basically, the private-sector rules allow no deductions in salary for sickness or illness if no leave is provided. If a bona fide leave plan exists, deductions in salary for absences of at least one full day because of sickness or illness are permissible. A pay deduction can also be made for full-day absences for personal reasons. No payment need be made when no work is done during the entire workweek. But the full salary must be paid in the event of disciplinary suspension of less than a full week, except when the employee has committed a major safety violation. Deductions in salary may not be made for absences caused by jury duty, witness obligations, or temporary military leave.

Executive Exemption
The executive exemption is for persons whose primary duty is management
of the business. DOL regulations define management as interviewing, selecting, and training employees; directing and evaluating the work of other employees; handling complaints and grievances; disciplining employees; planning and assigning work; and determining how that work will be done. An employee need not devote more than 50 percent of his or her time to management to have management be his or her “primary duty” (though the amount of time spent on that activity is a useful guide in determining whether a person should have an executive exemption). Other relevant considerations include the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employer exercises his or her discretionary powers, and the closeness with which the employee is supervised.

To qualify as an exempt executive employee under the long test, the employee must receive a salary of at least $155 per week; have management as his primary duty; supervise two or more other employees on a regular basis; be involved in the selection, discharge, or promotion of other employees; and customarily and regularly exercise discretionary powers. At least 80 percent of the employee’s work time must be devoted to performing these duties.

To qualify as an exempt executive employee under the short test, the employee must make a salary of at least $250 per week, have management of the enterprise or a discrete unit thereof as his primary duty, and regularly supervise two or more employees.

**Administrative Exemption**

Administrative employees are “white collar” employees who perform “work of substantial importance to the management or operation” of the enterprise. The administrative exemption is for people who perform work related to the administrative operations, rather than the production or sales operations, of the business. Administrative operations include activities such as advising management, planning, negotiating, representing the agency, purchasing, promoting sales, and research and control.
The Fair Labor Standards Act

Working Time

Employees must be paid the minimum wage of $5.15 an hour for all hours worked. Unless otherwise specified, the workweek for all employees is defined as the seven calendar days beginning at 12:00 am Sunday and ending 12:00 am the following Sunday. The employer is free to establish any starting date and time for the workweek that will run 168 consecutive hours.

Management must exercise strict control of its employees to see that no unauthorized work is performed. Mere promulgation of a rule prohibiting unauthorized work is insufficient. Management must enforce the rule.

Waiting Time

Employees must be compensated for all waiting time while on duty unless (1) the employee is completely relieved from duty and allowed to leave the job or (2) the employee is relieved until a definite specified time and the period is long enough for the employee to use as he or she sees fit (see 29 C.F.R. §785.14).

On-call Time

If employees must remain on the employer’s premises or so near them that they cannot use time freely, the time is compensable working time. If employees can come and go, although they must leave a telephone number at which they can be reached, the time usually is not compensable time. Employees whose work requires them to regularly be on call should be provided with beeper equipment at the employer’s expense and be allowed to use the time as they please.

Rest Periods

Rest periods are considered compensable working time if they last 20 or fewer minutes. Thus, coffee and smoking breaks generally are compensable because they are of insufficient duration for employees to use them as they please (see 29 C.F.R. §785.18).
The Fair Labor Standards Act

FLSA Overtime Compensation

Overtime Requirement
The FLSA requires covered employers to pay their non-exempt employees overtime compensation for all hours worked in excess of 40 per week.

Regular Overtime Pay
Usually overtime must be compensated at a rate of one and one-half times the employee’s “regular rate” of pay. This rate is defined as the hourly rate actually paid for a normal (non-overtime) workweek. Everything the employee receives by way of compensation for hours of employment (for example, periodic bonuses or shift premiums) must be included in the regular rate of pay. For employees paid on a salary, commission, or piece-work basis, the hourly rate of pay is calculated by dividing the employee’s total compensation by the total hours actually worked in the week for which the compensation was paid.

Half-time Method of Overtime Pay Calculation
For salaried employees with a fluctuating workweek (one without fixed hours) and for which the salary does not fluctuate, regardless of the number of hours worked, overtime pay may be calculated by the “half-time” method. To perform this calculation, reduce the employee’s salary to its weekly equivalent and divide it by the number of hours actually worked in the week in question. This figure is the employee’s regular rate of pay for that week. Payment of one-half this hourly rate for all hours worked in excess of 40, in addition to payment of the salary, satisfies the FLSA overtime compensation requirement because the extra hours have already been paid for, in part, by the salary.

Overtime compensation liability under the half-time approach is relatively small. For a 45-hour week, 5.5 percent additional pay is required to meet the overtime obligation. In a 50-hour week, 10 percent additional pay is required; in a 60 hour week, a 16.7 percent premium is required.
An example of half-time at work would involve an employee who is paid a salary of $500 a week for all hours worked. The employee works 50 hours in one week; his or her regular rate is $10.00 an hour ($500 divided by 50). His or her half-time rate is $5.00 an hour ($10.00 x 1/2) for each hour of overtime worked. The total extra compensation due is $50.00. Compare this figure with the premium for overtime for hourly workers under the standard time and one-half calculation: $187.50.

Use of half-time is only permissible when the employee is paid a salary and the employee gets the salary regardless of which hours he or she works (see 29 C.F.R. § 778.114). It can be used to calculate back wages for salaried employees who are later identified as nonexempt employees.

**Part-Time Workers**
The FLSA does not require overtime until an employee works 40 hours a week. Non-exempt, salaried employees who have a prior agreement to be compensated at a fixed salary for working a schedule of as many 40 hours per week may be given comp time during the so-called gap time between hours worked and 40 hours per week. This gap time is known as “non-FLSA comp time.” Payment for gap time constitutes a benefit because the employer was not required to pay additional compensation (see 29 C.F.R. §553.28). Of course, employers must be sure to pay sufficient compensation to satisfy the $5.15 minimum wage requirement for all hours worked.

**Compensatory Time**
Under the 1985 amendments to the FLSA, state and local governments are permitted to use compensatory time. Private employers, however, are not permitted to use comp time in lieu of cash overtime payments to nonexempt employees. One form of time-off plan allows employees to take time off in one workweek at straight time or in another workweek in the same pay period at premium time.
The Fair Labor Standards Act

Employer Liabilities

Wages
Employers that fail to pay their employees the minimum wage specified by the FLSA are liable to the employees for the amount of unpaid minimum wages.

Overtime Compensation
Employers that fail to pay their employees overtime compensation as required by the FLSA are liable to the employees for the amount of the unpaid overtime.

Liquidated Damages
Employers that fail to make required minimum wage or overtime payments are also liable to their employees for liquidated damages equal to the amount of the unpaid wages or overtime. This liability amounts to “double backpay.” Trial courts have discretion to free employers of liquidated damages if the violation was the result of a mistake made in good faith and the employer had a reasonable basis to believe that it was in compliance with the FLSA.

Attorneys’ Fees
Employees that prevail in court are entitled to collect their attorneys’ fees, which can be substantial even when damage claims are small. Employers may only seek to collect fees from the plaintiff in the event of egregious conduct, such as bad faith in litigation.

Civil Money Penalties
The FLSA allows assessment of civil money penalties by the DOL for willful or repeated FLSA violations. These penalties are up to $1,000 for minimum wage and overtime violations and $10,000 for child labor violations. The money is paid to the U.S. Treasury.
The Fair Labor Standards Act

FLSA Enforcement

The FLSA authorizes employees to bring suit against their employers for unpaid minimum wages or overtime compensation in either federal or state court. There are constitutional limits on suing state governments in federal and state court. Certain state entities, including public universities, may have a constitutional immunity to private law suits. Class actions require that individual employees “opt in” and join the suit; otherwise, the FLSA prohibits representative class suits. The lawsuit ordinarily must be filed within two years of the non-payment. If the violation was “willful,” the employee has three years in which to file a lawsuit.

Government Suits
The Secretary of Labor may sue to recover unpaid wages and liquidated damages on behalf of employees. Once the Secretary files suit, the employee’s right to sue is cut off, unless the employee has already filed his or her action. In addition, the Secretary may sue for reinstatement and back pay on behalf of an employee discharged for filing a complaint or for testifying in proceedings under the FLSA. The Secretary may also sue for issuance of an injunction against future violations of the FLSA.

The Secretary may bring suit for unpaid wages and damages in “any court of competent jurisdiction.” Suits for injunctive relief must be brought in federal district court. The two-year and three-year limitations on the filing of law suits also are applicable to suits by the secretary for unpaid wages.

Criminal Actions
The Department of Justice can criminally prosecute persons who commit willful (generally, repeated) violations of the FLSA. The first reported offense may bring a fine up to $10,000. Subsequent offenses may bring a $10,000 fine and up to six months imprisonment.

Record-keeping Requirements
Every employer covered by the FLSA must keep records on wages, hours, sex, occupation, and other terms and conditions of employment. No particular form is specified. For covered non-exempt employees, the following must be maintained:

- name, home address, and birth date for employees under 19 years of age;
- sex and occupation;
- hour and day workweek starts;
- regular hourly rate for overtime;
- daily or weekly straight time earnings;
- overtime pay;
- deductions or additions to wages;
- total wages paid; and
- date of payment and pay period.

Special employee records are required for exempt employees and special employment arrangements (see 29 C.F.R. Part 516). Certain records must be kept between two and three years.
Working Time
continued

Meal Times
Meal times are compensable unless (1) they generally are at least 30 minutes long; and (2) the employee is relieved of all duties, including answering the telephone; and (3) the employee is free to leave his or her duty post. The employee need not be permitted to leave the premises if he or she is otherwise completely freed from duties during the meal period. All employees should be encouraged to leave, at least, their work stations and to perform no work tasks during lunch time. Ideally, assigned lunch or meal periods for each employee will be conspicuously posted in the work location or agreed upon and adhered to strictly (see 29 C.F.R. §785.19).

Sleeping Time
If an employee’s tour of duty is less than 24 hours, the time that he or she is allowed to sleep remains working time. If the tour of duty is 24 hours or longer, as many as 8 hours may be excluded from compensable working time if the employee is allowed to sleep. Special rules apply to certain public-sector employees.

Training Time
No compensation is required for attendance at training programs and lectures provided that attendance is outside regular working hours, voluntary, results in no productive work, and is not directly related to the employee’s job. Attendance is not voluntary if required by the employer or if the employee is given to understand or led to believe that his or her present working conditions or continued employment would be adversely affected by nonattendance (see 29 C.F.R. §785.27 through §785.32).

Travel Time
Home-to-work travel time generally is not compensable. By contrast, travel time from one work site to another work site is compensable time. If the employee has been called back to work after going home, the time he or she spends traveling to work may be compensable. DOL has taken no position on this issue, although a special statutory provision was enacted in 1996 to deal with employees who are dispatched from their homes in company-owned vehicles.
As a general rule (see 29 C.F.R. §§ 785.33 et seq), out-of-town travel is compensable working time. When all four of the following criteria are met, out-of-town travel is not compensable:

- The travel involves an overnight stay. (Travel completed in one day is compensable.)
- The travel is on a common carrier, including a bus, plane, boat, train, and even a car carrying other passengers. (Driving of a car is deemed physical labor and is compensable.)
- The travel is outside regular working hours.

(Travel during regularly scheduled working hours, including Saturdays, Sundays, or holidays is compensable.) The employee does not work while traveling, and the travel itself is not the employee’s principal job duty.

**Starting and Quitting Time**

Employees should be officially notified of the specific time before which they may not start work each day, and of the time beyond which they shall not be permitted to work. Preliminary and postliminary activities may be compensable and should be avoided whenever possible. Assignment of work to be done at home is to be avoided, as time for such work is usually considered working time and is subject to the overtime provisions of the FLSA.
The Fair Labor Standards Act

FLSA Exemptions

To be classified as an administrative employee, an individual must receive a salary of at least $155 per week as well as primarily perform office or non-manual work directly related to the management policies or general business operations of the business and customarily and regularly exercise discretion and independent judgment. In addition, the individual must regularly and directly assist the owner or an administrative or executive employee and either (1) perform specialized or technical work under general supervision or (2) execute special assignments under general supervision. At least 80 percent of the employee’s time must be devoted to performing these duties.

To qualify as an administrative employee, the employee need not be involved in the formulation of management policies or in the operation of the business as a whole. He or she need only perform work that affects policy or be responsible for executing policies. The employee cannot perform the “line” or “production” work, however.

To qualify as an administrative employee, the employee must also be involved in decision making (that is, must exercise “discretion and independent judgment” in performing work). He or she must compare and evaluate possible courses of conduct and act or make a decision after considering the various possibilities. This decision-making power must be real and substantial, free from immediate direction or supervision, and exercised with regard to matters of consequence.

To qualify as an exempt administrative employee under the short test, an employee must earn a salary of at least $250 per week and perform office or non-manual work directly related to management policies or general business operations of the company as his or her primary duty—work that requires the exercise of discretion and independent judgment.

Professional Exemption

Exempt professional employees include persons in professions of a recognized status that require the use of professional knowledge acquired through long study (the “learned profession category”) and persons in artistic professions. Persons employed as teachers or registered nurses are also exempt professional employees.
To qualify as a professional in the learned professions category under the long test, the employee must earn at least $170 per week and have as a primary duty work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. The work must require the consistent exercise of discretion and independent judgment and be predominantly intellectual and varied in character. At least 80 percent of the employee’s time must be devoted to this professional work.

The long test for persons in the artistic professions requires that they receive a salary of at least $170 per week and that they perform work that (1) is original and creative in character in a recognized field of artistic endeavor, the result of which depends primarily on the invention, imagination, or talent of the employee; (2) requires the consistent exercise of discretion and independent judgment; and (3) is predominantly intellectual and varied in character and is of such character that the result realized cannot be standardized in relation to a given period of time. At least 80 percent of the employee’s time must be devoted to this artistic work.

Under the short test, an employee who earns at least $250 per week and whose primary duty consists of performing work requiring invention, imagination, or talent in a recognized field of artistic endeavor qualifies as a professional employee. The regulations define recognized fields of artistic endeavor as including music, writing, the theater, and the plastic and graphic arts. In determining whether someone qualifies for the artistic profession exemption, the focus is on the extent to which the employee’s work is the product of his own creativity.

Under the short test, an employee who is compensated with a salary of at least $250 per week and whose primary duty is performing work requiring knowledge of an advanced type will also qualify as an exempt professional employee. Work requiring knowledge of an advanced type includes work requiring the consistent exercise of discretion and independent judgment.

A special duties test exists for computer programmers, system analysts, and other software professionals. These individuals can be exempt if they are paid on other than a salary basis and earn at least $27.63 an hour for every hour worked.
Child Labor
The FLSA contains provisions that regulate the minimum wages and maximum working hours of minors in certain occupations. Employment of minors under the age of 18 in a hazardous occupation is forbidden. Children ages 14 to 16 may be employed outside school in certain non-manufacturing, non-mining, non-hazardous occupations with restrictions on the hours worked. Children younger than age 14 may be employed in certain agricultural occupations with stringent restrictions.

Equal Pay
The Equal Pay Act Amendment requires the payment of equal wages to male and female workers in the same establishment who perform work under similar working conditions that require equal skill, effort, and responsibility.

Non-covered Employees
For any workers not covered by the FLSA, employers need not worry about federal minimum wage and overtime laws, although they may be subject to state minimum wage and overtime laws. Employers do not have to keep wage records for non-covered workers.

Bona Fide Volunteers and Trainees
According to the FLSA, to employ means to “suffer or permit to work” [29 U.S.C. §203(g)]. This definition poses a problem for volunteers. Bona fide volunteers motivated by charitable or civic concerns are not considered employees under the FLSA. Sham volunteers or covered employees will not qualify and will be considered employees. Generally, an employee cannot volunteer to do the same kind of work for which he or she is paid at other times. Under the 1985 amendments to the FLSA, state or local government volunteers may be paid expenses, reasonable benefits, or a nominal fee (see 29 C.F.R. §553.100 through §553.106). Bona fide “trainees” who receive no compensation and meet a six-part test are also not covered by the FLSA.

Independent Contractors
Employers who hire bona fide independent contractors are not responsible for FLSA violations. To qualify as an independent contractor, an individual
should not be controlled with respect to the method by which he or she performs work, should have an opportunity to make a profit or to bear a loss, and should manage and invest in his or her business. With respect to meeting the economic reality test for independent contractors, the less permanent the working relationship, the better, and the higher the degree of skill required to perform the work, the better. The independent contractor exception is subject to careful review by DOL. Legal counsel should be consulted before a school establishes a bona fide independent contractor relationship.
From the Journal

continued

John Neighbours, a consultant to schools on FLSA matters, gives readers the benefit of his experience as a former employee of the Wage and Hour Division. In “What Colleges and Universities Should Know about FLSA Compliance: A Former Investigator with the DOL Tells All,” he identifies red flags concerning record keeping, work hours, and the “white collar” classification. In addition, he explains why HR professionals in higher education may have a tougher time preventing problems with FLSA compliance than their counterparts in other types of workplaces.

Linda Way-Smith, University of Virginia Employee Benefits director, and attorneys Katharine Houlihan and Jacquenette Helmes provide guidance on what to do when the DOL comes knocking. In “Are You Ready for a Department of Labor Investigation?” Way-Smith, Houlihan, and Helmes note three characteristics of colleges and universities that can complicate those institutions’ efforts to prepare for an impending investigation. But they also explain how schools can positively influence the investigation’s outcome. In examining each step of the investigation process, they identify actions that HR professionals should take to secure the best possible result for their institution.

Our final article on the FLSA is an anonymous, first-person account of the events that followed the DOL’s initial call to a community college in reference to a complaint about calculation of overtime: “Report from the Front Line: An HR Director Recounts Her College’s Eight-Month DOL Investigation and the Lessons She Wishes She Had Read about Rather Than Experienced.” The title pretty much says it all. We published this anonymous account not only because it illustrates some points of which some readers may be unaware—for example, the authority of the DOL to broaden its scope of investigation well beyond examination of a particular allegation—but also because it provides details about an actual investigation. As John Neighbours points out in his article, employers do not have enough information about facts and considerations in DOL enforcement actions. That we get these facts and considerations from an HR professional, rather than from a DOL investigator, makes them no less valuable. We are grateful that our anonymous author was willing to share her school’s story and in doing so help other schools better understand not only the DOL’s objectives in conducting investigations but also the turns that those investigations can take.
In the penultimate article of this issue, we share some **HR practices** that have been found worthy of special recognition. In February, CUPA-HR invited its members to submit descriptions of their most effective practices so that the association could make them available online. A task force selected descriptions of five of the practices to forward to the Council of Higher Education Management Associations for posting on a Web site devoted to effective practices in higher education. In the final article of this issue of the Journal, you’ll discover what makes these practices so impressive. We hope that they inspire you to share descriptions of your own effective practices.

Last, but certainly not least, we describe **Contemporary Readings in Higher Education Compensation Practices**, the latest book from CUPA-HR (see page 28). Written by seasoned compensation professionals and consultants, the essays in *Contemporary Readings* address some of the questions that our members are asking with increasing frequency—questions, for example, about the payoffs of broadbanding, the costs of a market-based compensation system, and the sound uses of salary survey data. Whether you are considering a significant change in your institution’s compensation philosophy and system or merely tweaks in that system, you can benefit from the insights and experience reflected in these essays.

**Melissa Edeburn**
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