



WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR

# Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act

May 18, 2016

## Introduction

Higher education is an important and diverse sector in our economy and civil society. It includes a wide variety of public and private institutions: community colleges, four-year colleges, and large research institutions—ranging from small schools to campuses that are virtual cities of tens of thousands of people. The Department of Labor (Department) recognizes the important contribution that higher education makes to this country and society.

The Department of Labor’s Final Rule on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act (FLSA) (the “Overtime Rule” or “Final Rule”) will strengthen overtime protections and provide greater clarity for both workers and employers alike across sectors, including higher education. The Final Rule updates the salary level required for the executive, administrative, and professional (“white collar”) exemptions to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of overtime-protected employees. The Department updated the salary level threshold above which certain “white collar” workers may be exempt from overtime to equal the 40th percentile of earnings of full-time salaried workers from the lowest wage Census Region.

Once effective, the rule will raise the salary level from its previous amount of \$455 per week (the equivalent of \$23,660 a year) to \$913 per week (the equivalent of \$47,476 per year) in 2016. The rule will also raise the compensation level for highly compensated employees subject to a more minimal duties test from its previous amount of \$100,000 to \$134,004 annually. The Final Rule establishes a mechanism for automatically updating the salary level (and compensation level for highly compensated employees) every three years, with the first update to take place in 2020. Salaried white collar employees paid below the updated salary level are generally entitled to overtime pay; such employees paid at or above the salary level may be exempt from overtime pay if they primarily perform certain duties. These changes take effect on December 1, 2016. The Final Rule does not include any changes to the duties tests, which also affect the determination of who is exempt from overtime.

As with most employees, the minimum wage and overtime provisions of the FLSA generally apply to employees at higher education institutions. Regardless of whether they are operated for profit or not for profit, institutions of higher education are subject to the provisions of the FLSA. However, higher education employers, like other employers, are not required to pay minimum wages and overtime compensation to executive,

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administrative, and professional employees who satisfy the salary level and other requirements for one of the white collar exemptions. In addition, certain provisions of the FLSA regulations apply to many white collar employees at higher education institutions that may make them exempt from overtime compensation, even though they earn below the new salary level. These include special provisions for employees whose primary duty is teaching and special salary level rules for academic administrative personnel. Finally, public universities or colleges that qualify as a “public agency” under the FLSA may compensate overtime-eligible employees through the use of compensatory time off (or “comp time”) in lieu of cash overtime premiums.

The Department is issuing this guidance on the application of the white collar exemptions in the higher education context at the same time as publication of the Final Rule in order to help institutions of higher education evaluate current practices and transition to the requirements of the Final Rule. Specifically, in view of the existing regulatory provisions specific to higher education and the changes introduced by the Final Rule to the salary level in particular, the Department is providing this guidance to assist these institutions in preparing for implementation of the Final Rule. Part I of this guidance provides a brief background on the FLSA’s white collar exemptions and how they apply generally. Part II of the guidance addresses categories of job occupations in the higher education sector which may fall under the white collar exemptions, and discusses other employees in higher education who might be affected by the Final Rule. Part III details some of the options employers may exercise in determining how best for their institution to ensure that they comply with the Final Rule. This guidance, however, is not a comprehensive guide to coverage and compliance under the FLSA. For additional, detailed guidance documents, please visit the Wage and Hour Division’s website at [dol.gov/whd](https://www.dol.gov/whd).

## I. Background on the White Collar Exemptions under the FLSA

The FLSA generally requires that employees be paid at least the federal minimum wage for all hours worked and overtime pay at a rate of at least one and one-half times their regular rate of pay for any hours they work beyond 40 hours in a workweek. As a general matter, coverage under the FLSA is broadly construed to ensure that the law provides employees with wage and hour protections, as Congress intended. The FLSA exempts from minimum wage and overtime requirements employees who are bona fide executive, administrative, or professional employees. *See* 29 U.S.C. 213(a)(1); 29 CFR Part 541. These exemptions

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Additionally, **receiving a particular salary, alone, does not indicate that an employee is exempt** from overtime and minimum wage protections.

are sometimes referred to collectively as the white collar exemptions.

As discussed below, establishing that a white collar employee is exempt from the FLSA's overtime requirements involves assessing how the employee is paid, how much the employee earns, and whether the employee primarily performs the kind of job duties that Congress meant to exclude from the law's overtime protections. Job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not indicate that an employee is exempt from overtime and minimum wage protections. Rather, in order for a white collar exemption to apply, an employee's specific job duties and earnings must meet all of the applicable requirements provided in the regulations. To be clear, not all salaried white collar employees qualify for the white collar exemptions; in fact, many salaried white collar employees are entitled to minimum wage and overtime.

### **A. Three Tests Must Be Met in Order to Claim a White Collar Exemption**

The regulations implementing the white collar exemptions generally require individuals to satisfy three criteria to be exempt from overtime requirements:

- First, they must be paid on a salary basis not subject to reduction based on quality or quantity of work ("salary basis test") rather than, for example, on an hourly basis;
- Second, their salary must meet a minimum salary level, which after the effective date of the Final Rule will be \$913 per week, which is equivalent to \$47,476 annually for a full-year worker ("salary level test"); and
- Third, the employee's primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees (the "standard duties test").

The salary level is not a minimum wage requirement, and no employer is required to pay an employee the salary specified in the regulations, unless the employer is claiming an applicable white collar exemption. Administrative and professional employees may also be paid on a "fee basis." See 29 CFR 541.605. For additional information about payment on a fee basis, see [WHD Fact Sheet 17G](#).

Note that the discussion in this guidance focuses on the standard exemption. For additional information on the highly compensated employee exemption, which pairs a more relaxed duties test with a higher total earnings level (\$134,004 per year, beginning on December 1, 2016), see [WHD Fact Sheet 17H](#).

### **B. Primary Job Duties for Exempt Executive, Administrative, and Professional Employees**

Under the standard duties test, an employee's "primary duty" must be that of an exempt executive, administrative, or professional employee. Primary duty means the principal, main, major, or most important duty that the employee performs. See 29 CFR 541.700. Each exemption uses a different test for determining primary duty under the white collar exemptions.

To qualify for the executive exemption, an employee must have the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. Additionally, the employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent (for example, one full-time and two half-time employees are equivalent to two full-time employees), and have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

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To qualify for the administrative exemption, the employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance directly related to management or general business operations.

Regarding the professional exemption, there are several different kinds of exempt “professional” employees. These include “learned professionals,” “creative professionals,” teachers, and employees practicing law or medicine. Learned professionals must primarily perform work that requires advanced knowledge in a field of science or learning.

For additional details about the white collar exemptions generally, see [WHD Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer](#)

### **& Outside Sales Employees under the Fair Labor Standards Act (FLSA).**

Determining the primary duty of an employee requires assessment of multiple factors. As discussed in the Department’s longstanding regulations, the amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee, and employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Of course, all relevant factors must also be considered, with a major emphasis on the character of the employee’s job as a whole, rather than strictly the amount of time spent performing particular duties. The Final Rule made no changes to the standard duties test.

### **Basic Requirements for Claiming a White Collar Exemption under the Standard Duties Test**

	<b>EXECUTIVE</b>	<b>ADMINISTRATIVE</b>	<b>PROFESSIONAL</b>
Salary Basis Test	<ul style="list-style-type: none"> <li>Employee must be paid on a salary basis</li> </ul>	<ul style="list-style-type: none"> <li>Employee must be paid on a salary or fee basis</li> </ul>	<ul style="list-style-type: none"> <li>Employee must be paid on a salary or fee basis</li> </ul>
Standard Salary Level Test	<ul style="list-style-type: none"> <li>\$913 per week (\$47,476 per year for a full-year worker)</li> </ul>	<ul style="list-style-type: none"> <li>\$913 per week (\$47,476 per year for a full-year worker)</li> <li>Special salary level for certain academic administrative personnel</li> </ul>	<ul style="list-style-type: none"> <li>\$913 per week (\$47,476 per year for a full-year worker)</li> <li>Salary level test does <b>not</b> apply to doctors, lawyers, or teachers</li> </ul>
Standard Duties Test	<ul style="list-style-type: none"> <li>The employee’s “primary duty” must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well).</li> <li>Additional requirements provided in 29 CFR 541 Subpart B</li> </ul>	<ul style="list-style-type: none"> <li>The employee’s “primary duty” must include the exercise of discretion and independent judgment with respect to matters of significance.</li> <li>Additional requirements provided in 29 CFR 541 Subpart C</li> </ul>	<ul style="list-style-type: none"> <li>The employee’s “primary duty” must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</li> <li>Additional requirements provided in 29 CFR 541 Subpart D</li> </ul>

## II. Specific Considerations for Higher Education Institutions in Implementing the Final Rule

Because of special regulations that apply to certain personnel at higher education institutions, many white collar employees at higher education institutions are not subject to the salary level test or are subject to a different salary level test and therefore will not be affected by the new salary level. This Part addresses each of the white collar provisions as they apply in the higher education sector, helping to identify which employees may be impacted by the Final Rule and what potential adjustments employers may make.

Existing (and unchanged) regulatory provisions specific to higher education mean that the Final Rule may have limited impact on teachers and academic administrators. The salary level and salary basis requirements for the white collar exemption do not apply to bona fide teachers. *See* 29 CFR 541.303(d), .600(e). Additionally, academic administrative personnel that help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists, and others with similar responsibilities, are subject to a special alternative salary level that does not apply to white collar employees outside of higher education. These academic administrative personnel are exempt from the FLSA's minimum wage and overtime requirements if they are paid at least the entrance salary for teachers at their institution. *See* 29 CFR 541.600(c).

To the extent that higher education institutions employ workers whose duties are not unique to the education setting, like managers in food service or at the bookstore, those employees will be covered by the new salary level, just like their counterparts at other kinds of institutions and businesses.

### A. Professional Exemption

#### i. In General

There are several different kinds of exempt "professional" employees. These include "learned professionals," "creative professionals," teachers, and employees practicing law or medicine. In higher education, employees eligible for the professional exemption often are either learned professionals (such as researchers), or teachers. The new salary level applies to "learned professionals" and "creative professionals," but it does not apply to teachers (or to

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employees practicing law or medicine). To qualify for the professional employee exemption as a “learned professional,” an employee must:

1. Receive compensation on a salary basis of not less than \$913 per week (the equivalent of \$47,476 a year); and
2. Primarily perform work requiring advanced knowledge in a field of science or learning, such as various physical, chemical, and biological sciences, theology, and architecture. The advanced knowledge is usually obtained while earning a degree. *See* 29 CFR 541.301.

In higher education, examples of non-teacher learned professionals that generally may meet the duties requirements for professional exemption include certified public accountants, certified athletic trainers, librarians, and psychologists, depending on the employee’s specific job duties and education. A job title alone is not sufficient for determining whether an employee satisfies the duties test.

Unless the individual is a teacher or practicing law or medicine, a professional employee must satisfy the salary basis and salary level tests as well as the duties test to be an exempt professional.

### ii. Postdoctoral Fellows

Postdoctoral fellows are employees who conduct research at a higher education institution after the completion of their doctoral studies. Postdoctoral fellows are not considered students because they are not working towards a degree. *See* Section D below for a discussion of student research assistants. Postdoctoral fellows often meet the duties test for the “learned professional” exemption but must also satisfy the salary basis and salary level tests to qualify for this exemption.

Under the 2016 National Institutes of Health (NIH) salary guidelines for postdoctoral research fellows, some fellows earn more than the revised salary level. Other postdoctoral research fellows earn less, although it is the Department’s understanding that many postdoctoral research fellow salaries are close to the new salary level, and that any differences are not more than a few thousand dollars a year. It is also our understanding that

NIH regularly reviews these salary levels, taking into consideration all relevant factors. Once the Final Rule is effective, higher education institutions may supplement any gap between the current salaries and the new salary level in order to maintain the exemption for these employees or will need to ensure that postdoctoral research fellows who conduct research and earn below the new salary level either do not work overtime or are paid overtime compensation for any hours worked over 40 per week. For overtime-eligible postdoctoral fellows, higher education institutions may comply with the FLSA’s recordkeeping requirements using any timekeeping method they choose, so long as it is complete and accurate. For example, a higher education institution may ask postdoctoral fellows to record their own times.

Some postdoctoral fellows in the humanities also teach. To the extent that a postdoctoral fellow’s primary duty is teaching, higher education institutions can classify such an employee as exempt from overtime under the teacher exemption discussed below. If a postdoctoral fellow does not primarily teach and earns less than the new salary level, the fellow will be entitled to overtime when the fellow works more than 40 hours in a workweek.

### iii. Special Provisions for Teachers

Employees in higher education institutions who are teachers will not be affected by the Final Rule. The salary level and salary basis requirements do not apply to bona fide teachers. *See* 29 CFR 541.303(d), .600(e). Accordingly, the increase in the standard salary level in this Final Rule will not affect the overtime exemptions of bona fide teachers.

Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. *See* 29 CFR 541.204(b), .303. Educational establishments include institutions of higher education.

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

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teachers but also spend a considerable amount of their time in extracurricular activities are still engaged in the primary duty of teaching. Extracurricular activities might include coaching athletic teams or acting as moderators or advisors for drama, speech, debate, or journalism. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student. In all situations, examining the particular duties of the employee is how the applicability of an exemption must be determined (rather than location, job title, or other criteria).

#### a. Coaches

Athletic coaches employed by higher education institutions may qualify for the teacher exemption. Teaching may include instructing student-athletes in how to perform their sport. On the other hand, if coaches' primary duties are recruiting students to play sports or visiting high schools and athletic camps to conduct student interviews, they are not considered teachers.

The amount of time an employee spends instructing student-athletes in a team sport is a relevant—but not exclusive—factor in determining the employee's exempt status. For example, assistant athletic instructors who spend more than half of their time instructing student-athletes about physical health, teamwork, and safety likely qualify as exempt teachers. In contrast, assistant coaches, for example, who spend less than a quarter of their time instructing students and most of their time in unrelated activities are unlikely to have a primary duty of teaching.

#### b. Adjunct Instructors

Adjunct instructors may also be exempt as teachers if they are employed and engaged as teachers in an educational establishment, where their primary duty is teaching, tutoring, instructing or lecturing. Like full-time faculty members, adjunct or part-time instructors are not subject to the salary level or salary basis tests provided they have a primary duty of teaching.

## B. Administrative Exemption

### i. In General

The new salary level applies to administrative employees, including in higher education. To qualify for the administrative employee exemption (not the special provisions for academic administrative employees, discussed below), an employee must:

1. Receive compensation on a salary basis of not less than \$913 per week (the equivalent of \$47,476 a year);
2. Have a primary duty that is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;
3. Additionally, the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Such administrative employees in the higher education context might include, for example, admissions counselors or student financial aid officers, depending on the employees' specific job duties (as job title alone is insufficient to ensure that an employee satisfies the duties test).

### ii. Special Provisions for Academic Administrative Employees

There are special regulatory provisions for some administrative employees—known as “academic” administrative employees—whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. To be exempt, academic administrative employees must either be paid on a salary or fee basis of not less than the salary level, **or** be paid on a salary basis at least equal to the entrance salary for teachers in the same educational establishment. *See* 29 CFR 541.204. To the extent that this entrance salary is below the salary level established in the Final Rule, academic administrative employees will be exempt if their salary equals or exceeds the establishment's entrance salary for teachers.

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Exempt academic administrative employees must have the primary duty of performing administrative functions directly related to academic instruction or training. In higher education institutions, academic administrative personnel generally eligible for this exemption include department heads, academic counselors and advisors, intervention specialists who must be available to respond to student academic issues, and other employees with similar responsibilities. For example, academic counselors who perform work such as administering school testing programs, assisting students with academic problems, and advising students concerning degree requirements would satisfy the duties test for this exemption.

*Example:* An academic advisor at a community college assists students with class selection and educational goals. The advisor earns \$42,000 a year (\$807.70 a week) on a salary basis, which is also the college's entrance salary for teachers. Among other things, the advisor assists with placement testing and the course registration process, and helps students to develop course selections consistent with their career choices and degree requirements. In this example, assuming the advisor meets the duties test for academic administrative professionals, the employer would not be required to pay overtime for more than 40 hours worked even though the academic advisor is paid a salary less than \$913 per week, because the advisor's salary is at least equal to the entrance salary for teachers at that institution.

Employees who work in higher education but whose work does not relate to the educational field are not performing academic administrative work. For example, if an employee's work relates to general business operations, building management and maintenance, human resources, or the health of students and staff, the employee may meet the requirements for a different white collar exemption, but does not perform academic administrative functions.

### C. Executive Exemption

The new salary level applies to executive employees, including in higher education. To qualify for the executive employee exemption, an employee must:

1. Receive compensation on a salary basis of not less than \$913 per week (the equivalent of \$47,476 a year);
2. Have the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

3. Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent (for example, one full-time and two half-time employees are equivalent to two full-time employees); and
4. Have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

See 29 CFR 541.100.

*Example:* A university maintenance department, which is responsible for maintaining the academic buildings and grounds of the university, employs a groundskeeping crew lead. The crew lead coordinates the work of three groundskeepers and makes recommendations for their terminations and promotions. The crew lead earns \$38,000 a year (\$731 per week) on a salary basis. The crew lead does not meet the new salary level, and therefore is eligible for overtime compensation when she works more than 40 hours a week. The university does not need to determine whether the crew lead meets the duties test, because she does not pass the salary test.

### D. Students

As a general matter, most students who work for their college or university are hourly workers who do not work more than 40 hours per week. The Final Rule will not affect these students. Students receiving a salary as graduate teaching assistants or research assistants, and many residential assistants will also not be affected by the Final Rule, even if they work more than 40 hours per week and are paid less than the new salary level.

#### i. Graduate Teaching Assistants

Graduate teaching assistants who have teaching as their primary duty are not subject to the salary tests and, therefore, remain exempt under the Final Rule.

#### ii. Research Assistants

Generally, the Department views graduate and undergraduate students who are engaged in research under a faculty member's supervision in the course of obtaining a degree as being in an educational relationship with the school. As such, the Department would not assert an employment relationship with either the school or any grantor funding the research. Thus, in these situations, the Department will not assert



that such workers are entitled to overtime. This is true even though the student may receive a stipend for performing the research. WHD Opinion Letter 1994 WL 1004845 (June 28, 1994).

*Example:* A graduate student is enrolled at a university in the process of obtaining a Ph.D. in the biomedical sciences. In addition to coursework toward the university's degree requirement, the student will engage in original, professional-level research. The student receives a stipend from the university of \$25,000. The Department will not assert that the student is entitled to overtime because the Department does not consider the student an employee of the school. This is the case even if the student receives health insurance from the university and if the stipend is subject to federal income taxes.

### iii. Residential Assistants

Student residential assistants enrolled in bona fide educational programs who receive reduced room or board charges or tuition credits from the university are not generally considered employees under the FLSA, and therefore are not subject to the FLSA's wage and hour requirements. *See e.g. [Field Operations Handbook \(FOH\) 10b24](#).*

### iv. Students in an Employment Relationship

An employment relationship will generally exist with regard to students whose duties are not part of an overall education program and who receive some compensation. For example, students who work at food service counters, sell programs or usher at athletic events, or who wait on tables or wash dishes in dining halls in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act. *See* FOH 10b24(b). Most of these students will not be affected by the Final Rule, however, because they are paid hourly and are not performing executive, administrative, or professional duties. As was already the case, these students are entitled to minimum wage and overtime compensation whether or not they earn above the new salary level.

### **E. Hourly Employees, Blue Collar Employees, and White Collar Employees Who Do Not Meet the Duties Test**

Many employees of higher education institutions, including hourly workers, blue collar workers, and white collar workers who fail the duties tests, will not be affected by the Final Rule, because these workers are

already overtime-protected. Such workers are entitled to overtime regardless of how much they make if they work more than 40 hours. Nothing in the Final Rule changes that.

## III. Options for Compliance with the Final Rule

The Overtime Rule may impact select groups of workers at higher education institutions, including post-doctoral fellows, administrators, and other salaried workers who meet the duties test for one of the white collar exemptions, but not the new salary level. Colleges and universities may ensure compliance for those employees affected by the rule in a number of ways, including providing pay raises that increase workers' salaries to the new threshold, spreading employment by reducing or eliminating work hours of individual employees working over 40 hours per week for which no overtime is currently being paid, adjusting wages and hours, or paying overtime. The Department does not dictate or recommend any method.

This rule does not require employers to convert a salaried employee making less than the new salary threshold to hourly status: employers can pay non-exempt employees on a salary basis and pay overtime for hours worked beyond 40 per week. Higher education institutions should already have systems in place for tracking non-exempt employees' hours. These existing systems can be used for newly overtime-protected employees impacted by the Overtime Rule. As long as they are complete and accurate employers may use any method they choose for recording hours. There is no requirement that employees "punch in" and "punch out."

The method for compliance, which is entirely within each employer's discretion, will likely depend on the circumstances of that institution's workforce, including how much employees currently earn and how often employees work overtime, and may include a combination of responses. Some potential responses for educational institutions are discussed below.

### **A. Numerous Options for Compliance**

- i. After evaluation, no changes to pay or hours necessary

Many institutions of higher education have white collar employees who satisfy one of the duties tests for exemption and earn between the old salary level (\$455 per week) and the new salary level (\$913 per

week). Employers should evaluate all such white collar employees to determine which employees do not work more than 40 hours per workweek. The Final Rule will not affect these employees' pay because even if they become nonexempt they will not work any overtime. They can continue to be paid on a salary basis as before.

ii. Raise salaries

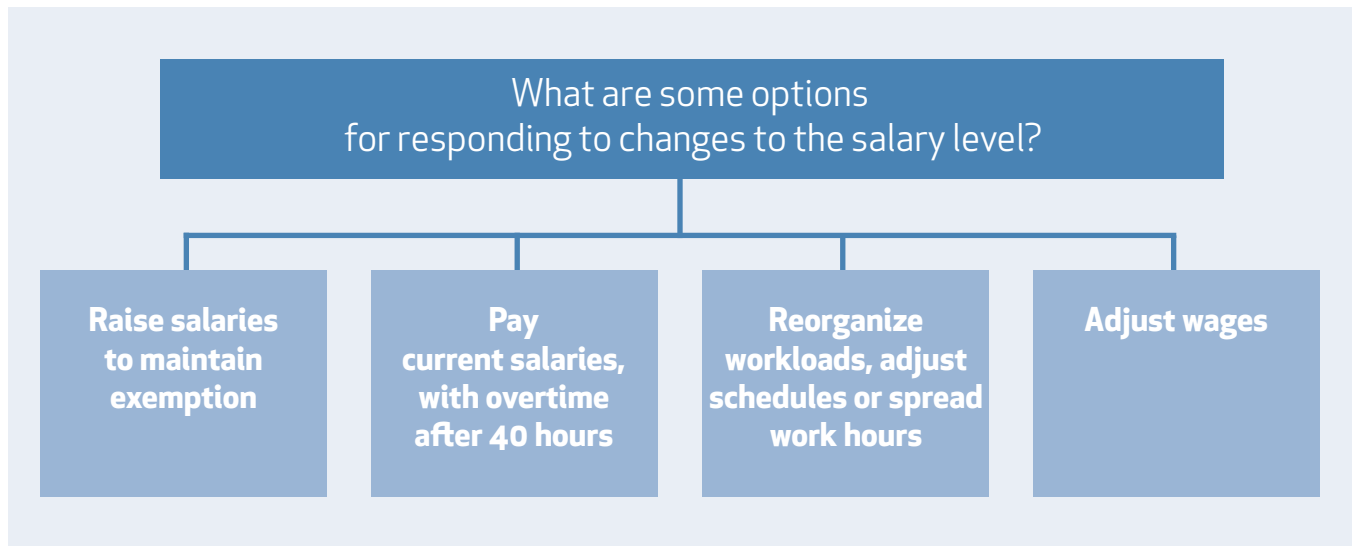
Employers may choose to raise the salaries of workers who meet one of the duties tests, and who regularly work overtime, to or above the new salary level to maintain their exempt status. For academic administrative employees, educational institutions merely have to ensure that such workers do not earn less than the entrance salary for teachers under that college's employ to remain exempt.

*Example:* An annual giving officer for a university is paid a salary of \$45,000 a year. The annual giving officer's job duties qualify the counselor for the administrative (but not academic administrative)

be paid on an hourly basis. Rather, any employer, including institutions of higher education, may continue to pay employees a salary covering a fixed number of hours, which could include hours above 40. There are several ways to pay a salary and pay overtime.

An employer might pay employees a salary for the first 40 hours of work per week, and then pay overtime for any hours over 40. Employers may choose to do this, for example, for employees who work 40 hours per week and do not frequently work overtime, or who do not consistently work the same amount of overtime.

*Example:* Alexa, a budget director at a college, earns a fixed salary of \$41,600 per year (\$800 per week) for a 40 hour workweek. Because her salary is for 40 hours per week, Alexa's regular rate is \$20 per hour. If Alexa works 45 hours one particular week, the employer would pay time and one-half (overtime premium) for five hours at a rate of \$30/hour. Thus, for that week, Alexa should be paid \$950, consisting of her \$800 per week salary and \$150 overtime compensation.



exemption. The counselor regularly works overtime as a result of outreach activities. The employer may choose to raise the annual giving officer's salary to \$47,476 a year to maintain the counselor's administrative exemption.

iii. Pay overtime above a salary

Employers also can continue to pay employees a salary and pay overtime for hours in excess of 40 per week. Although the FLSA requires employers to keep records of how many hours overtime-eligible employees work, the law does **not** require that overtime-eligible workers

Employers also have the option of paying a straight time salary for more than 40 hours in a week for employees who regularly work more than 40 hours, and paying overtime in addition to the salary. Using this method, the employer will only be required to pay an additional half time overtime premium for overtime hours already included within the salary, and time and a half for hours beyond those included in the salary.

*Example:* Jamie, an HR manager at a university, earns a fixed salary of \$44,200 per year (\$850 per week) for a 50 hour workweek. The salary does not include the overtime premium. Because

the salary is for 50 hours per week, Jaime's regular rate is \$17 (\$850/50). In a normal 50 hour week, the employer would pay Jamie the additional half time overtime premium for the 10 hours of overtime (\$8.50 per hour). If Jamie worked more than 50 hours in a week, the employer would also owe overtime compensation at time and a half the regular rate (\$17 x 1.5) for hours beyond 50 (because the salary does not cover any payment for those hours).

It is also possible for an employer and employee to agree to a fixed salary for a workweek of more than 40 hours, in which the salary includes overtime compensation under certain conditions. If, however, the employee's schedule changes in any way during any week (either by working more or fewer hours), the employer must adjust the salary for that week. Employees must be paid based on the hours actually worked during each workweek. This method of paying for overtime, therefore, might be most helpful for employees who consistently work the same amount of overtime every week.

*Example:* Andre, a college admissions counselor, has an agreement with his college where he is paid a fixed salary of \$39,520 year (\$760 per week) for a 45 hour workweek. The fixed salary includes both straight time for the first 40 hours (\$16 regular rate x 40 hours) and overtime compensation for hours 41-45 (\$24 overtime rate x 5 hours). If Andre's schedule changes in any way for any week, his salary needs to be adjusted for that week to reflect the hours actually worked.

Finally, where employees have hours of work which fluctuate from week to week, employers can pay a fixed salary that covers a fluctuating number of hours at straight time if certain conditions are met, including a clear mutual understanding between the employer and employee. See 29 CFR 778.114 for additional information and criteria for this payment method.

Higher education institutions may already have systems in place for tracking non-exempt employees' hours. These existing systems can be used for newly overtime-protected employees impacted by the Overtime Rule. As long as they

are complete and accurate, employers may use any method they choose for recording hours. Employers may use their own system to keep track of employees' work hours or require employees to enter their own time into payroll programs. See [WHD Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

There is no requirement that employees "punch in" and "punch out." An employer does not need to require an employee to sign in each time she starts and stops work. The employer must, however, keep an accurate record of the number of daily hours worked by the employee. To do so, an employer could allow an employee to just provide the total number of hours worked each day, including the number of overtime hours, by the end of each pay period. For employees who work a fixed schedule, a higher education institution need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule, if that is true. See 29 CFR 516.2(c); WHD Fact Sheet #21. Only when the employee deviates from the schedule is the employer required to record the number of hours worked each day on an exceptions basis. Many employees, both exempt and non-exempt, track their daily and weekly hours by simply recording their hours worked for the employer.

#### iv. Reorganize Workloads, Adjust Schedules, or Spread Work Hours

Employers may wish to reorganize workload distributions or adjust employee schedules in order to comply with the Final Rule. For example, work assignments that are predictable could be assigned at the beginning of the workweek (rather than, for instance, late in the day on Friday for an employee who typically works Monday through Friday) in order to manage overtime hours. Or, when employees regularly perform duties outside of a 9 to 5 workday, colleges and universities may consider adjusting those employees' schedules to encompass when most of the work takes place, so that they will not work more than

**Employers can continue to pay employees a salary and pay overtime for hours in excess of 40 per week.**

## There is no requirement that employees “punch in” and “punch out.”

40 hours each workweek. (The FLSA does **not** specify days or schedules, such as a Monday–Friday workweek or a 9 to 5 workday; this is provided only as an example of a schedule that many workers follow.)

*Example:* Pat, an employee in the admissions office of a university, currently begins work at 8am Monday–Friday. Under the Final Rule’s new salary level, she would be newly entitled to overtime compensation. Pat greets and pre-interviews potential applicants to the university. Since most applicants are in high school, the majority of applicants schedule their appointments between the hours of 2pm and 6pm, and Pat routinely works until 6:30pm. The university may wish to adjust Pat’s schedule such that she doesn’t need to begin work until 10am, thus limiting the number of overtime hours she works.

Employers can hire new employees or increase the work hours of staff who work less than 40 hours per week to reduce or eliminate overtime hours.

### v. Adjust Wages

Employers can adjust the amount of an employee’s earnings to reallocate it between regular wages and overtime so that the total amount paid to the employee remains largely the same. Employers may prefer this option for their employees who work a consistent and relatively small number of overtime hours. Employers may not, however, reduce an employee’s hourly wage below the highest applicable minimum wage (federal, state, or local), or continually adjust wages each workweek in order to manipulate the regular rate. The employees’ hours worked must still be recorded, and overtime must be paid according to the actual number of hours worked each week.

*Example:* Assume an admissions counselor earns \$37,000 per year (\$711.54 per week). The admissions counselor regularly works 45 hours per week. The employer may choose to instead pay the employee an hourly rate of \$15 and pay time and one-half for the 5 overtime hours worked each week.

**\$600.00 (40 hours x \$15 / hour)**

**+ \$112.50 (5 OT hours x \$15 x 1.5)**

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**\$712.50 per week**

Alternatively, the employer may choose to pay that employee a salary for 40 hours of \$600 and pay the overtime for hours in excess of 40 per week.

**\$600.00** (salary for 40 hours/week, equivalent to \$15/hour)

**+ \$112.50 (5 OT hours x \$15 x 1.5)**

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**\$712.50 per week**

### B. Compensatory Time at Public Universities

Public universities or colleges that qualify as a “public agency” under the FLSA may compensate overtime-eligible employees through the use of compensatory time off (or “comp time”) in lieu of cash overtime premiums. A college or university is a public agency under the FLSA if it is a political subdivision of a State. In applying the term “political subdivision,” the Department considers whether (1) the State directly created the entity, or (2) the individuals administering the entity are responsible to public officials or the general electorate. For example, a State university system created by state legislation and administered by a board appointed and removable by the governor is likely a political subdivision of the State, and, therefore, a public agency under the FLSA. *See* WHD Opinion Letter, 2009 WL 649021 (Jan. 16, 2009); *see also* WHD Opinion Letter, 1995 WL 1032498 (July 17, 1995) (advising that a public community college could provide comp time in lieu of overtime premiums). Private higher education institutions must, however, pay their overtime-eligible employees a cash premium for all overtime hours at a rate not less than one and one-half

times the regular rate at which the employee is actually employed. Note that overtime-eligible employees generally may not accrue more than 240 hours of comp time, but employees engaged to work in a public safety activity, an emergency response activity, or a seasonal activity may accrue as much as 480 hours of comp time. *See* 29 U.S.C 207(o)(3)(A).

If an overtime-eligible public employee receives comp time instead of overtime pay, the comp time must be credited at the same rate as cash overtime: no less than 1.5 hours of comp time for each hour of overtime worked. *See* 29 CFR 553.22. Additionally, any comp time arrangement must be established pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding, any other agreement between the public agency and representatives of overtime-protected employees, or an agreement or understanding arrived at between the employer and employee before the performance of the work. This agreement may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay (for example, providing the employee a copy of the personnel regulations). *See* 29 CFR 553.23.

*Example:* An admissions counselor at a large state university earns \$38,000 a year. The advisor has a written agreement with the university that he will receive compensatory time at a rate of time and one-half for every overtime hour worked instead of overtime pay in cash. During a two-week period when admissions work is heavy, the advisor works 50 hours each of the two weeks and accumulates 20 hours of overtime, resulting in 30 hours of available comp time. The advisor then uses the comp time to take time off later in the year. This arrangement is permissible.

## IV. Conclusion

The Overtime Rule updated the regulations to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of overtime-eligible workers, making the exemption easier for employers and workers to understand and apply. This guidance is provided to help employers in higher education understand their responsibilities and options for complying with the FLSA's overtime provisions following publication of the Final Rule.