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NACUBO

Advisory Report

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Compliance with the Fair Labor Standards Act

Guidance for Colleges and Universities

Written with the assistance and guidance of Littler Mendelson, P.C.

This article is intended to provide information only, and is not intended as and should not be considered legal advice.

On August 23, 2004, the United States Department of Labor's new white-collar overtime exemption regulations (April 23, 2004, 69 Federal Register p. 22260) took effect, but they leave many questions unanswered when applied to the academic workplace. The new regulations are the first major changes since 1949 to the definition of overtime-exempt employees under the Fair Labor Standards Act (FLSA). Although the regulations affect other industries more significantly than higher education, it is important that colleges and universities be aware of the new regulatory obligations because some positions on campus are impacted. This Advisory Report addresses issues that arose after the regulations were published and incorporates material from a Littler Mendelson, P.C. legal article. It also responds to questions submitted during the National Association of College and University Business Officers (NACUBO) Webcast (Impact of U.S. Department of Labor Overtime Rules on Colleges and Universities) on August 12, 2004, and other member inquiries.

In reviewing and applying the exemptions to employees, keep in mind that all employees are presumed to be entitled to overtime and that it is the employer's burden to prove that an employee is exempt under the FLSA and state overtime laws. Also, to be exempt from overtime, employees must meet both the job duties test and the salary basis test.

Job Duties Test/Primary Duty

No job is exempt from overtime based on the position title alone. The actual duties of the employee performing the job must be examined closely. All of the exemptions described below require an analysis of the employee's primary duty. Under the new regulations, the definition of primary duty is eased significantly. An employee's "primary duty" is defined for all exemptions as an employee's "main, major, or most important duty" in consideration of the job as a whole.

When determining primary duty, employers should consider the following factors:

- "the relative importance of the exempt duties as compared with other types of duties;
- the amount of time spent performing exempt work;
- the employee's relative freedom from direct supervision; and
- the relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by the employee.

Thus, employees who spend more than 50 percent of their time performing exempt work will generally

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satisfy the primary duty requirement." 29 C.F.R. §541.700(a). However, time alone is not the sole test, and the new FLSA regulations do not require exempt employees to spend more than 50 percent of their time on exempt tasks as a condition of exempt status (§541.700(b)).

Executive Exemption

In many ways, the executive exemption is the most clear-cut of the "white collar" exemptions. The executive exemption applies when all of the following occur:

- employee's primary duty is management of enterprise or subdivision;
- employee supervises two or more full-time employees;
- employee has the authority to hire or fire, or makes effective recommendations on such actions; and
- employee is paid a salary of at least $455 per week. (§541.100).

Head Coaches. Under the new FLSA regulations, faculty members who are engaged as teachers, but who also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams, are engaged in "teaching" and are therefore generally exempt under the FLSA's professional exemption (§541.303). A non-faculty member who is engaged as a head coach similarly qualifies for exemption, but as a bona fide executive employee, because he or she meets the following requirements: his or her primary duty is management of an enterprise in which the employee is employed, or of a customarily recognized department or subdivision thereof (§541.100 (a)(2)); he or she customarily and regularly directs the work of two or more other employees (§541.100(a)(3)); and he or she has authority to hire or fire other employees, or his or her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight (§541.100(a)(4)). Therefore, head coaches are generally not entitled to overtime pay under the new white-collar exemption regulations.

Q: Will a head coach be considered exempt if he or she has no assistant coaches?
A: As an exempt executive employee, the head coach would have to customarily and regularly direct the work of two or more other employees. The supervisees, however, do not have to be assistant coaches.

Q: Do the new criteria for the executive exemption cover employees who supervise students or volunteers?
A: The executive exemption would not cover an employee who supervises student workers or volunteers who are not employees. An executive has to supervise two or more full-time employees or the equivalent. The full-time employees requirement may be made up of part-time employees, so, for example, an executive can supervise one full-time employee and two part-time employees.

Q: How low can an organization go to designate a "subdivision"? Could a mailroom supervisor be an exempt executive employee if he or she directs the work of two or more other full-time employees?
A: A customarily recognized department or subdivision must have a permanent status and a continuing function, such as a mailroom. A mailroom supervisor could be an exempt executive employee if he or she meets the other requirements for the executive exemption.

Regular Administrative Exemption

The difficulties in applying the administrative exemption remain largely unresolved under the new FLSA rules. The administrative exemption applies when:

- employee's primary duty is the performance of office or non-manual work directly related to management or general business operations of employer or employer's customers/clients; and
- employee's primary duty includes exercise of discretion and independent judgment "with respect to matters of significance"; and
- employee is paid a salary (or fee) of at least $455 per week. (§541.200).

The FLSA regulations explain the types of decisions that allow an employee to exercise discretion and independent judgment, including that the employee:

- has the authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting operations;

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- has the authority to commit the employer in matters that have significant financial impact;
- has the ability to waive or deviate from established practices without prior approval;
- provides expert advice to management; and/or
- resolves problems as they arise or recommends how problems can be resolved. (§541.202(b)).

Examples: a college or university's financial services staff or human resources representatives

Q: How many of these factors must be met in order for the employee to be exempt?
A: An employee does not have to meet all 10 of the factors listed in the regulations, and may meet other similar factors to show that he or she exercises discretion and independent judgment. The list of requirements is illustrative and should be used for an analysis of an employee's job duties.

Q: How will an executive secretary be classified under the new regulations (for example, the secretary to the president of a university)?
A: An executive assistant or administrative assistant to a senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance. Of course, the assistant also would have to meet the requirements of the salary basis test.

Academic Administrative Exemption

Within Subpart C of the FLSA regulations, pertaining to Administrative Employees, the U.S. Department of Labor (DoL) has included a specific academic administrative exemption (§541.204). This exemption applies when:

- employee's primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment, department, or subdivision thereof; and
- employee is paid a salary of at least $455 per week.

Examples: college/university administrators involved with faculty and/or curriculum, department administrators, laboratory administrators and academic counselors advising students on academics

Academic Counselors. Academic counselors are generally exempt under the administrative exemption for educational establishments (§541.204). Their primary duty must be "performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof." No distinction is drawn in the new FLSA regulations between public and private schools, or between those operated for profit and those that are not for profit. The academic counselor must be engaged in "work related to the academic operations and functions in a school," and include "operations directly in the field of education." Academic counselors who perform work such as administering school testing programs, assisting students with academic problems, and advising students concerning degree requirements are performing academic administrative functions (§541.204(c)(1)).

Admissions Recruiters/Enrollment Counselors. Admissions recruiters are generally not exempt under the academic administrative exemption (§541.204). The Preamble (69 Federal Register 22147) to the FLSA final regulations explains that the DoL Opinion Letters[1] issued February 19, 1998 and April 20, 1999 under the old FLSA regulations elaborate on the condition that the academic administrative exemption is limited to employees engaged in work relating to the academic operations of a school, rather than work relating to the general business operations of the school. Thus, enrollment counselors who engage in general outreach and recruitment efforts to encourage students to apply to the school do not qualify for the academic administrative exemption because their work is not sufficiently related to the school's academic operations. The April 20, 1999 DoL Opinion Letter noted that, depending upon the employee's duties, he or she might qualify for the regular administrative exemption because the work related to the school's general business operations and involved tasks in the nature of general "sales" promotion. The Preamble to the regulations states specifically that, consistent with DoL Opinion Letters issued under the old regulations, admissions counselors are not included as an

[1] "Opinion letters" are written guidance issued by the U.S. Department of Labor to clarify a specific issue or position. An employer who acts in good faith reliance upon and conformity with such a written ruling or interpretation of the Wage-Hour Administrator could have a valid defense to any claimed liability for violation of the FLSA.

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example of an exempt academic administrative employee.

Q: How do we treat Resident Hall Directors and/or Assistants? Is there guidance from the Department of Labor on these positions? In 1981, the 10th circuit (*Marshall v. Regis Educational Corp.*) said resident assistants were not employees under FLSA.
A: The U.S. DoL has issued guidance applicable to a college student employed as a "resident assistant" who lives in a dormitory. The DoL determined that any reasonable agreement between the college and the employee that takes into consideration all of the applicable facts will be accepted. The agreement must indicate the number of hours the employee will work and the hours he or she may use for personal activities. It is significant that the DoL emphasized that the reasonable agreement must be an employee-employer agreement and should be in writing. An exact record of hours worked is not required. You may keep a time record showing the schedule adopted in the agreement and indicate that the employee's work time generally was the same as the schedule.

In 1981, the U.S. Court of Appeals for the Tenth Circuit in *Marshall v. Regis Educational Corp.,* 666 F. 2d 1324 (10th Cir. 1981), held that resident assistants were not "employees" within the meaning of the FLSA, but rather were student recipients of financial aid. If your college is located within the jurisdiction of the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus portions of Montana and Idaho), then this decision is applicable to your institution. If not, the conservative approach is to follow the DoL guidance.

Learned Professional Exemption

The primary duty of a learned professional is work requiring an advanced type of knowledge. Such work entails the following:

- predominantly intellectual in character;
- "consistent" exercise of discretion and judgment in science or learning;
- "prolonged" course of specialized intellectual instruction (B.A., B.S., or more advanced); and
- a salary (or fee) of at least $455 per week (for non-teaching professionals). (§541.301).

Examples: graduate teaching assistant, graduate academic assistant, athletic trainers, librarians

Teachers. Teachers are exempt professional employees and are not held to the $455 per week salary minimum. According to the FLSA regulations, "any employee with a primary duty 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 an educational establishment by which the employee is employed" is exempt from overtime (§541.303(a)). Included in this definition are "(t)hose faculty members who are engaged as teachers but [who] also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate, or journalism are engaged in teaching. Such activities are a recognized part of the school['s] responsibility in contributing to the educational development of the student" (§541.303(b)). The salary requirements of the FLSA do not apply to teaching professionals.

Q: We have several non-exempt employees who teach credit and non-credit courses. During each semester, they receive a contract amount and extra compensation. Do we have to track their time spent for preparing for class and for grading papers?
A: If they are true teachers, they should be classified as exempt and salaried. Any additional amount of money given to them will not destroy the exemption. If they are not true teachers, though, examine the job further to see if they are classified properly.

Q: Are librarians exempt professional employees?
A: A head librarian who oversees the library or a department and staff would likely qualify as executive exempt. Librarians at the next level down may qualify as professional employees. An advanced degree is required, and assuming that discretion and independent judgment are exercised, a case could be made for the learned professional exemption to apply.

Assistant Athletic Trainers. Athletic trainers are generally exempt under the learned professional exemption of the new FLSA regulations (§541.301(8)). The new FLSA regulations state that athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited

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by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption (§541.301(8)). To the extent that an assistant athletic trainer does not possess these qualifications, however, he or she most likely would be classified as non-exempt under the new regulations.

An August 24, 1998 DoL Opinion Letter on this subject determined that the duties and responsibilities of assistant athletic trainers did not meet all the requirements for exemption as professionals. The assistant athletic trainer reported to a head athletic trainer, and assisted that individual with sports programs by providing supervision, training, evaluation, care, treatment prevention, and rehabilitation. The DoL decided that the duties and responsibilities did not meet the requirements for exemption under the FLSA because the employee lacked the discretion and independent judgment in the performance of his work required under the administrative exemption, and because the assistant athletic trainer spent more than 50 percent of his time on non-exempt work.

Teaching and Academic Assistants. In a 1967 Opinion Letter, the DoL stated that a teaching assistant who is assigned a class or laboratory section for the purpose of instruction may qualify for exemption from the FLSA's overtime requirements because he or she is employed in the professional capacity of a teacher.

An academic assistant, although not in charge of a class or laboratory section, but who answers students' questions and assists them in their academic work, may also qualify for the professional exemption as a teacher, according to the DoL. If the assistant has as his or her primary duty a teaching activity, such as demonstrating laboratory experiments for the benefit of students, he or she may also qualify for exemption as a teacher.

Whether graduate teaching/academic assistants can be classified properly under an exemption in the new FLSA regulations depends upon an analysis of the actual duties at the particular educational establishment. Teaching must be the primary duty for graduate assistants to be considered exempt under the professional exemption. The key is "imparting knowledge" in "employment as a teacher" (§541.303(a)). It is a good rule of thumb that teaching assistants and academic assistants are exempt under the FLSA. However, this is *only* a rule of thumb. Many graduate assistants teach small seminars as breakouts from large lectures, without the professor being present or active. Such a primary duty should be safe.

Creative Professional Exemption

The new definition of an artistic professional is somewhat broader than the definition in the old FLSA regulations. The creative professional exemption requires the following:

- primary duty is the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor; and
- employee is paid a salary of at least $455 per week. (§541.302.)

Graphic Artists. A graphic artist could qualify under the creative professional exemption under the new rules if the employee's primary duty is the performance of work requiring invention, imagination, originality, or talent in the graphic arts (as opposed to routine mental, manual, mechanical, or physical work) (§541.302). A July 2, 1996 DoL Opinion Letter issued under the old regulations explained that a graphic artist performing work that is original and creative, the results of which are dependent primarily upon the invention, imagination, or talent of the employee could qualify for the professional exemption, while a graphic arts technician, who engages in drawing or reproduction from flat illustration and operating an offset duplicating machine to reproduce copies, and who performs otherwise technical duties, generally would not meet the conditions for exemption, notwithstanding that this technician may well possess the training for original artistic production.

Computer Professional Exemption

The exemption for computer professionals has been streamlined somewhat under the new regulations. It applies as follows:

- employee's primary duty is the application of systems analysis techniques and procedures, including consulting with users, to determine hardware and software specifications;
- the design of computer systems based on and related to user specifications;

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- the creation or modification of computer programs based on and related to system design specifications;
- the creation or modification of computer programs related to machine operating systems; or
- a combination of these duties, the performance of which requires the same level of skills; and
- employee is paid a salary of at least $455 per week or $27.63 per hour or more. (§541.400.)

Q: What about a computer employee who performs a combination of tasks, including designing and analyzing systems, as well as maintaining and repairing systems, where his or her time is divided equally between these two responsibilities?
A: The computer professional exemption applies to this employee only if his or her primary duty is the design and analysis of computer systems. "Primary duty" means the principal, main, major, or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Time alone is not the sole test.

Combination of Duties

Given the variety of duties that educational institution employees often perform, they may meet the criteria in more than one exemption category. The "combination exemption" may be applied when an exempt employee's work consists of the duties that meet two or more exemptions.

Assistant Coaches/Association Head Coaches. The positions of assistant coach and associate head coach are not addressed in the new FLSA exemption regulations or the Preamble to the regulations. An August 24, 1998 DoL Opinion Letter, however, analyzes the application of the prior FLSA exemption regulations to assistant coaches and associate head coaches, and may be useful for purposes of determining how assistant coaches and associate head coaches will be treated under the new rules. The Opinion Letter determined that neither an assistant coach nor an associate head coach qualified as exempt under either the professional or the administrative exemption, as explained below.

In the Opinion Letter, the assistant coach reported to and was under the direct supervision of the head coach of the sport he was coaching. He assisted in the coordination of the athletic program (scouting, recruiting, and conditioning of athletes, arranging for equipment, devising game strategies, making travel plans, formulating budgets, and fundraising). The DoL determined that since assistant coaches in that case spent only 25 percent of their time teaching and 75 percent on unrelated activities, and therefore, they could not qualify as "teachers" under the professional exemption. Nor could they qualify under the administrative exemption because they did not exercise sufficient discretion and independent judgment.

The DoL Opinion Letter also addressed the position of associate head coach, where the individual worked in conjunction with the head coach to develop and administer strength-training programs. He was responsible for instructing and organizing all aspects of the strength and conditioning program, including the technical supervision, and evaluation and preparation for practices and competition. The DoL determined that the primary duty of the associate head coach was working directly with the students in "hands-on" operations, as opposed to performing functions as a department head, administering such matters as curriculum; quality and methods of instructing; measuring and testing the learning potential and achievement of students; establishing and maintaining academic and grading standards; and other aspects of the teaching program. Therefore, the DoL determined that associate head coaches did not meet the criteria for the administrative exemption.

However, the educational institution that requested the Opinion Letter apparently did not seek the DoL's opinion on the possible application of the combination exemption. In some schools, it may be possible to treat assistant or associate head coaches as combination teacher/administrators.

Q: Our institution has assistant coaches classified as administrative exempt. Are we in compliance with the new regulations?
A: With a compressed pay schedule corresponding to the athletic season, you should be able to meet the salary test. If you have a head coach and a large staff of assistant coaches, it may be difficult to make all the assistant coaches administrative exempt employees. On the other hand, some of them may qualify. You may be able to get the first two primary

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assistant head coaches qualified as administrative employees. The challenge is that for the employees to be doing high-level work as administrators, they must be spending a lot of time in the office and in liaison with the university. Also, they need to be exercising independent judgment and discretion. Teacher/administrator is another possibility. The NCAA recently issued guidance on assistant coaches to athletic directors at their institutions, which may be helpful in evaluating these positions.

Salary Basis and Salary Level

As noted above, most of the exemptions (with the exception of a teaching professional) require that an exempt employee be paid a minimum of $455 per week, which comes to $23,660 annually. Employees who receive paychecks over a 12-month cycle, but work on a 10- or 11-month schedule, may have their paychecks compressed into the period of actual work to ensure that they are making the necessary $455 minimum per week.

Executive employees must be paid on a salary basis. Administrative and professional employees must be paid on a salary or fee basis. Generally, employees must be paid their full salary for all weeks in which they perform any work, regardless of quantity or quality of the work. It is for this reason that a "part-time" salary cannot be extrapolated into its "full-time" equivalent to meet the $455 minimum per week.

Q: Is there any time you can ignore the $455 per week threshold if the position passes all the other tests?
A: Yes, but to a limited extent. If an employee is properly classified as a teacher or a teaching assistant, you don't have to worry about salary basis and minimum salary level. However, this is a special treatment for teachers and a few other positions (attorneys and physicians). In these cases, the only focus is on the duties test. All other positions must meet the minimum weekly salary amount of $455.

Q: What if our workweek is less than 40 hours?
A: If your employees are not working more than 40 hours in a workweek, you do not have to be concerned with overtime. However, you must still determine whether or not they are exempt for record-keeping purposes. If they are non-exempt, or hourly, you need to keep track of their hours.

Q: If the workweek is 35 hours at a university, will employees be eligible for overtime compensation if they work more than 35 but fewer than 40 hours per week?
A: No, not under the Fair Labor Standards Act which only requires overtime pay for hours over 40 per week. There may be a more stringent requirement to pay overtime under state law.

Q: What is included in an employee's salary to reach the $455 per week threshold? Are benefits provided by the employer (for example, insurance and parking) included?
A: An exempt employee must be compensated on a salary basis at a rate of not less than $455 per week, exclusive of board, lodging, or other facilities. Administrative and professional employees may also be paid on a fee basis. This question is not explicitly discussed in the new FLSA regulations. However, the language of various provisions of the regulations and the Preamble suggest that the $455 minimum is to be met on a weekly basis when work is performed during the workweek. Therefore, employee benefits, like insurance and parking, would not be included.

Q: We have a few executive assistants who do not meet the new job duties test under the administrative exemption, although they are compensated between $50,000 and $60,000 per year. Is it sufficient that they meet the salary requirement because they are compensated at such a high level?
A: No. The executive assistants must meet both the job duties and salary basis tests. Under the test for "highly compensated employees," however, an employee with total annual compensation of at least $100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

Deductions from Compensation

The new FLSA regulations provide that an employee is not paid on a salary basis if deductions from the employee's compensation are made for absences occasioned by the employer or by the operating requirements of the institution (§541.602(a)). The prohibition against deductions from pay, however, is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or

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more full days for personal reasons, other than sickness or disability.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness, or temporary military leave, the college or university can offset any amounts received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. (§541.602(b)(1)-(7).)

There are a number of employment practices that are not regulated by FLSA including vacation, holiday, or sick pay. These are a matter of agreement between the employer and employee.

The regulations also provide that an employer who makes improper deductions from salary shall lose the exemption if it did not intend to pay employees on a salary basis (§541.603(a)). If the college or university has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions (§541.603(b)). However, the new regulations contain a "safe harbor" provision, which provides that if the institution has a "clearly communicated policy" that prohibits improper pay deductions and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the college or university will not lose the exemption for any employees, unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints (§541.603(d)). The DoL explained that "a clearly communicated policy" is a written policy that is distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook, or publishing the policy on the employer's Intranet (§541.603(d)).

Other Positions on Campus

Q: How do we treat graduate research assistants?
A: The new FLSA regulations address only the classification of exempt and non-exempt employees. The regulations do not address, or modify, who is, and who is not, considered an employee. If an individual is not an employee of your institution, the FLSA does not apply. Non-employee status is a separate, but important, issue.

In the case of a graduate student engaged as a research assistant, a DoL Opinion Letter dated August 22, 1967 stated that the DoL will not assert that an employer-employee relationship exists where such a student is engaged in original, professional-level research that is primarily for the purpose of fulfilling the requirements for an advanced degree, even though he or she may be performing such research under a grant or stipend. The DoL ruled that, because an employer-employee relationship did not exist, there is no application of the overtime provisions of the FLSA.

Similarly, in a June 28, 1994 Opinion Letter, the DoL reaffirmed its earlier position regarding research assistants, and determined that "in cases where graduate students in a graduate school are engaged in research in the course of obtaining advanced degrees and where the research is performed under the supervision of a member of the faculty in a research environment provided by the institution under a grant or contract," it would not assert that an employer-employee relationship exists between the students and the school, even if the student receives a stipend for his or her services under the grant or contract.

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Research assistants who have contact with professors, but not students, should be considered non-employees if the facts support such status, or non-exempt employees, if necessary. Caution certainly is in order with this group, depending on the school, the department, and the program. Auditing actual duties is the safest route, even where the job has been considered non-employment or salaried-exempt for a long time.

To the extent that the graduate assistant is a "part-time employee" and is working 40 or fewer hours in a workweek, he or she would not be entitled to any overtime pay, regardless of the classification of the position. Moreover, if a graduate assistant is spending time, for example, in the chemistry lab for his or her own personal study or research, not related to work to be performed for the college or university, that time is non-compensable and does not need to be included for purposes of calculating whether the individual worked more than 40 hours in a workweek. However, non-exempt employees need to have their hours recorded under the FLSA.

To see additional guidance from the American Council on Education on graduate research assistants, visit ACE's Web site.

Q: How will the July 2004 National Labor Relations Board (NLRB) Brown University decision, holding that graduate student assistants who perform services at a university in connection with their studies have a predominantly academic, rather than economic, relationship with their school, affect the new FLSA regulations?
A: It helps. Be mindful that these are two different statutes interpreted by two different agencies. The NLRB definition of employee is not exactly the same as the definition of employee under the FLSA, but they are similar. It is a helpful decision that you would want to raise if you have a DoL auditor on campus, particularly if you assert that a particular job is actually non-employment. The best example is the graduate research assistants who are enrolled in a degree program; they partly work and partly do their own research. The NLRB's Brown University decision declares them to be non-employees.

Q: OMB Circular A-21 says that to charge tuition for a graduate student research assistant to a grant or contract, there must be an 'employer-employee' relationship with the institution. How should this be interpreted in light of the FLSA?
A: This illustrates one of a number of circumstances where there exists a "disconnect" in the application of federal laws and rules for different purposes (i.e., employment, tax, grants and contracts). Campus administrators often find that OMB rules do not coincide with IRS rules related to graduate student employment. Both agencies have in the past shown a tolerance for the employer institution treating a graduate student as an employee for OMB/indirect cost compliance purposes, but primarily a student (or non-employee) for purposes of the FICA exemption for example. In practice, NACUBO is aware that the federal agencies recognize the disconnect in many cases.

Q: We currently employ resident hall directors who are classified as exempt employees. They are paid a salary of over $455 a week, but do not meet the $23,660 annual salary because they only work nine months of the year. These employees are not paid when they are off during the summer. Do these resident hall directors still meet the new salary requirements under the revised regulations to qualify them as exempt employees?
A: Yes, they do meet the salary requirements as long as they are getting paid $455 per week. You do not have to reach the $23,660 annual threshold. However, you do have to examine that the employee's job duties are appropriate for them to be classified as exempt, particularly if they are going to be classified under the administrative exemption. You have to ensure they are exercising discretion and independent judgment.

Q: We have many laboratory personnel whose positions require a four-year degree in a relevant science, but whose duties do not seem to pass the job duties test because the lab personnel are usually conducting experiments following established protocols. How should they be treated?
A: You might want to look at beefing up the duties to try to preserve the exemption – not so much by changing the salary or changing the degree requirement. It seems as though you already have an employee exempt under the professional exemption. But you do want to get the person involved in the theoretical part of the science in terms of the administration of the lab and interfacing with the professors. The new regulations say that procedures and handbooks do not automatically disqualify an

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employee, but you do not want an exempt job to be rote or automatic.

Q: How do we classify admissions recruiters under the new regulations? The position requires frequent travel, and employees are often on-duty for many hours during peak times of the year.
A: Under the new regulations, institutions are hard-pressed to classify admissions recruiters as exempt employees. This particular position is discussed at length in the Preamble to the regulations. (§541.204, Preamble.) The best chance at exempt status for this employee is if the individual is the head of admissions recruitment or an administrative exempt employee. But the regulations are clear that these individuals would not be exempt under the academic administrative exemption because their duties are not directly related to the educational mission of the institution. Someone who administers the recruiting program and is not involved directly in the outreach effort may be administrative exempt. Others who perform general admission recruiting duties are not classified as exempt, and their hours should be tracked.

Q: How should we treat our development and fundraising staff? Duties include ensuring long-term financial support for college programs by identifying, cultivating, and soliciting donors and prospective donors for major and planned gifts, among others.
A: This is somewhat similar to admissions recruiters in that it is difficult to connect to the academic administrative exemption. While development and fundraising are certainly the lifeblood of the institution, they are not directly related to education. However, don't give up on the regular administrative exemption, particularly if the employee is deciding on fundraising strategies and dealing with large donors. These activities support the general business operations of the school and include a fair amount of office work. The office work can be performed literally in the office at the institution, or virtually from the field. If they are doing the highest-level work in the fundraising field, there is a good chance at the administrative exemption.

Q: How should we treat our financial aid administrators and coordinators who advise students and parents of the financial aid process and financial aid programs? We believe these employees perform duties key to the university's primary purpose and mission.
A: The regular administrative exemption applies if the employees are exercising sufficient independent judgment and discretion.

Other Issues

Q: Public institutions frequently have policies defining the availability of compensatory time for non-exempt employees. Do the new regulations permit any leeway for independent institutions to offer comp time to their non-exempt employees?
A: The new regulations do not address compensatory time for private employers. Therefore, no compensatory time is allowed at this time for private institutions. There have been efforts in Congress that would allow private institutions to offer compensatory time to their employees, but that legislation did not pass, and it does not look like it will be resurrected any time soon.

Q: Employees want to know if they can sign away their rights to be non-exempt, even if their jobs should be classified as non-exempt?
A: No. FLSA rights may be waived only with the supervision of the DoL or a court of law.

Q: How do we treat consultants?
A: Consultants are typically not employees. Only employees are subject to the FLSA regulations. Consultants should be handled by independent contractor agreements. They should be classified as independent contractors at the outset and given independent contractor agreements that comply with federal and state law. Ideally, they are paid on a project-by-project basis and receive little direction from the institution as to how the contractor should complete a project.

Q: Where can copies of the U.S. Department of Labor Opinion Letters be found?
A: The U.S. Department of Labor previously had the Opinion Letters available on its Web site, but recently removed them. You can obtain recent letters from any computerized legal search service. If you are looking for older letters, you will have to go to a law library and search legal publication binders for hard copies.

Q: What are the minimum requirements for "tracking time"? For example, if we have a part-time employee earning a stipend and working between 15-20 hours a week, what record-keeping proof must be maintained of hours

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worked? Do you have practical suggestions on how to begin doing this?
A: Every employer covered by the FLSA must keep certain records for each covered, non-exempt employee. There is no required form for the records, but the records must include accurate information about the employee and data about the hours worked and the wages earned. The basic records that an employer must maintain include the following:

- the time and day of the week when the employee's workweek begins;
- the hours worked each day;
- the total hours worked each workweek;
- the basis on which the employee's wages are paid;
- the regular hourly pay rate;
- the total daily or weekly straight-time earnings;
- the total overtime earnings for the workweek;
- all additions to or deductions from the employee's wages;
- the total wages paid each pay period, and the date of payment; and
- the pay period covered by the payment.

You may use any timekeeping method you choose. For example, you may use a punch clock, have a timekeeper keep track of an employee's work hours, or ask the employee to write time worked on a timesheet. Any timekeeping plan is acceptable as long as it is complete and accurate. For an employee on a fixed schedule, you may keep a record showing the exact schedule of daily and weekly hours and indicate that the employee did follow the schedule. When an employee works for a longer or shorter period of time than the schedule shows, you must record the number of hours the employer actually worked, on an exception basis.

Conclusion

Educational institutions should undertake an audit of their workforces to ensure that their employees are properly classified as exempt or non-exempt employees under the new FLSA regulations. Such an audit may also review the status of campus contributors under prior DoL opinions as to employee or non-employee status. Exempt status and non-employee status are significant for many colleges and universities. Particular jobs at institutions must be examined carefully to preserve their exempt status or to make adjustments, as necessary. Finally, educational institutions in several states should be mindful that state law may impose more stringent requirements than federal law as to certain exemptions.

This article is intended to provide information only, and is not intended and should not be considered legal advice.

For further information, visit the FLSA Resource Page on the NACUBO Web site.

To share information, provide comments, or ask questions, please contact Michele Madia at michele.madia@nacubo.org, or 202-861-2554. To contact Littler Mendelson, e-mail Maria Perugini Baechli, MPBaechli@littler.com, or Joe Harkins JHarkins@littler.com.

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