



Q&A

Department of Labor's New Guidelines on the FLSA White Collar Exemption

What do the new regulations change?

There are four major changes in the FLSA white collar exemption rules:

- 1) The compensation level for executive, administrative and professional workers has been increased to \$913 per week; \$47,476 annually for a full-year worker.
- 2) Sets an automatic updating schedule of the compensation levels to every three years, with the first adjustment occurring in 2020.
- 3) The new total annual compensation requirement for highly compensated employees subject to the minimal duties test to be the annual equivalent of the 90th percentile of full-time salaried workers nationally, i.e., \$134,004.
- 4) Allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

When do I have to be in compliance?

By December 1, 2016.

Do regulations apply to faculty?

No. The Department of Labor (DOL) specifies that individuals whose primary duty is teaching are exempt from the salary threshold and overtime rules. (This includes adjunct faculty.)

Faculty members who are engaged as employees in higher education institutions and are teachers will not be affected by the final rule. According to guidance for higher ed institutions on paying overtime under FLSA, teachers who also spend a considerable amount of time in extracurricular activities are still engaged in the primary duty of teaching. Extracurricular activities may include coaching athletic teams; acting as moderators; or advisors for drama, speech, debate or journalism. Such activities are a recognized part of the school's responsibility of 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).



How are coaches classified?

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 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.

Are there other exceptions for higher education?

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\(c\)](#).

How are employees who work directly or indirectly with students classified?

To the extent that higher education institutions employ workers whose duties are not unique to the education setting, those employees will be covered by the new salary level, just like their counterparts at other kinds of institutions and businesses. This includes individuals whose work relates to general business operations; building management and maintenance; human resources; the health of students and staff; and managers in food service or at the bookstore.

Does salary alone qualify an individual for the white collar exemption?

No. The employee's primary job duties must involve the kind of work associated with the standard duties test for executive, administrative or professional employees. [View information on the standard duties test](#) (page four).

Are we required to increase the salaries of all employees who are currently exempt?

No. You need only to adjust the salary if you want the employee to continue to be exempt under the white collar exemption. Otherwise, you can pay for overtime worked.



If we choose not to increase the salary of an employee who is currently exempt to the new threshold, must we convert the pay to an hourly basis?

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."

What about postdoctoral fellows?

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. Institutions 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 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.

What about students?

Generally, most students who work for their colleges or universities 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, 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.

Are there any exceptions for students who are 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 rule. See [Field Operations Handbook 10b24](#) Most of these students will not be affected by the final rule 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.



What is the Department of Labor's (DOL) guidance on research assistants?

Generally, the DOL 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, DOL would not assert an employment relationship with either the school or any grantor funding the research. In these situations, DOL 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.

How do we treat residential assistants under the guidelines?

Student residential assistants enrolled in educational programs who receive reduced room or board charges or tuition credits from the university are not considered employees under FLSA and are not subject to the FLSA's wage and hour requirements.

I heard that compensatory time can be used in lieu of overtime pay. Is that true?

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 at a rate of one and one half hours for each hour of overtime worked. 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 DOL 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. Community colleges are included in this group. 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.

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).

If an employee meets the duties test and minimum salary threshold for exemption but is subsequently reduced to half-time, with an attendant decrease (by one-half) in salary, would that individual still be considered exempt by virtue of prorating the salary?

No. The DOL has spoken in this [opinion letter](#). This was reaffirmed in the 2016 ruling.



How are others interpreting the salary component of the “academic administrative personnel” FLSA exemption? For example, Our teachers are 9 month positions, but most of our academic advisors are 12 month positions. I believe we'd need to first annualize the 9 month teacher entrance salary to apply this to our 12 month academic advisor positions which would put the salary level over the \$47,476 threshold rendering this exemption not as helpful in terms of a potential lower salary threshold for these "academic administrative" positions. I believe we'd still be looking at the \$47,476 threshold, and not something lower, for this group of positions.

You may want to refer to the [DOL Website on FLSA Q&A](#).

We are a seasonal property open eight months per year. Is the \$47,476 based on twelve months of time open per year?

The new salary is \$913 per week. During the eight-month period that employees work at your property, you will need to guarantee that at least \$913 per week is paid for an exempt employee. See FOH 22g10 concerning rules for annual salary earned in a shorter period, which can be found at the following link: https://www.dol.gov/whd/FOH/FOH_Ch22.pdf. From the [DOL Field Operations Handbook](#):

- “22g00(c)
For academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as stated in 29 CFR 541.204(a)(1)(b)”
- “22g10.
Annual salary earned in a shorter period. The exemption is not lost in the situation where an annual salary covering a duty period of less than a year, when prorated over the full 12 months, computes to an amount less than the required minimum, provided that the amount of salary when prorated over the actual duty period meets the required minimum amount (e.g., employment provided by schools for 10 months of the year, under which the annual salary is paid in 12 equal monthly installments throughout the year).”