

# PUBLICATION

---

## Overtime Overhaul — DOL Tells Higher Education Not To Worry, But Should You?

**Authors: Dena Holly Sokolow**

**May 18, 2016**

After two years of wait, debate and overall angst for employers across the country, the new overtime rules were announced today. The details of the rule are available, but final publication of the rule in the Federal Register will not be until May 23, 2016. Although this new overtime regulation will still significantly impact employers in virtually every industry, the Department of Labor (DOL) specifically assured higher education that this change should have minimum impact on its institutions, claiming that only "a limited number of higher education workers will be affected by the Final Rule;" however, there are still many questions left unanswered regarding the new rules' impact on higher education. The DOL published specific guidelines for higher education providing insight for lingering questions as to how the Final Rule would apply to some specific positions, including athletic coaches and graduate assistants, but mostly reminding the higher education community of existing exemptions and special provisions such as the teacher exemption, special salary requirements for administrators and use of comp time for public employers.

Overall, there are some positive changes from the rule initially proposed by the DOL last year. The most important news is that the Office of Management and Budget (OMB) listened to employers' concerns about the complexity of compliance and provided an extended period, until **December 1, 2016**, before the rule becomes effective.

We will present a webinar on Thursday, May 26, to go over the changes, as outlined below. Please refer to the end of the alert for more details.

### The Changes

The salary threshold is still doubling – so it is difficult to call this "good news," – but the OMB did make some concessions that will make the Final Rule a little more palatable for employers:

- **The 2016 salary threshold will be \$913/week, which is \$47,476/year.** This is \$2,964 less than the originally proposed \$50,440 salary threshold. The salary threshold will be based upon the 40th percentile of the lowest-wage region, the South, rather than the entire country as initially proposed. This change is likely the result of criticism the DOL received for basing its proposed rule on national statistics, which did not take into account regional salary fluctuations. For the Highly Compensated Employee Exemption (HCE), however, the DOL is still basing the new wage on the weekly earnings of the 90th percentile of full-time salaried workers nationally, which will mean **an increase in the HCE annual salary threshold from \$100,000 to \$134,004.**
- **Bonuses and incentives (including commissions) can be included to satisfy up to ten percent of the standard salary level.** For the first time, non-discretionary bonuses and incentives (including commissions – which is a shocker, since the DOL basically said no commissions in the proposed rule) can be included, AND the rule allows employers to make a "catch-up" payment. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the salary threshold, the Final Rule requires such payments to be paid on a quarterly or more frequent basis. If an employee does not earn enough in nondiscretionary bonuses and incentive payments (including

commissions) in a given quarter to retain their exempt status, the Final Rule permits a "catch-up" payment at the end of the quarter. The employer has one pay period to make up for the shortfall.

- **The automatic updates will be every three years beginning January 1, 2020.** Rather than the initially proposed annual updates, the Final Rule provides for updates every three years. This will be based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage region, which is currently and will likely remain the South.
- **No changes to the duties test.** There was some speculation that the DOL would revise the duties test in the Final Rule, but they did not touch it. But that doesn't mean they won't make changes to the test in the future.

## Higher Education Specifics

- **Coaches:** Athletic coaches and assistant coaches may fall under the teacher exemption if their primary duty is teaching (even if they do some recruiting and other tasks). The DOL specifically states that teaching can include instructing athletes in how to perform their sport. Coaches who are primarily responsible for recruiting and/or manual labor will not be exempt.
- **Graduate and undergraduate students:** The DOL provided insight into their interpretation that graduate and undergraduate students are not really employees subject to the requirements of the FLSA. If a student is engaged in research under a faculty member's supervision in the course of obtaining a degree, the DOL does not consider them to be in an "employment relationship" with the school. As such, graduate and undergraduate students will not be entitled to overtime. Graduate students whose primary duty is teaching or serving as a teaching assistant fall under the FLSA's teaching exemption.
- **Resident Advisors:** Students who are participants in a bona fide educational program and who serve as resident advisors in exchange for reduced room and board charges or tuition credit similarly are not considered to be employees of the institution and, therefore, are not entitled to overtime.
- **Academic administrative personnel:** Higher education administrative personnel, such as department heads, academic counselors and advisors, intervention specialists and others with similar responsibilities are still not entitled to overtime compensation if they are paid at least as much as the entrance salary for teachers at their institution.
- **Public Higher Education:** The DOL reminded public higher education institutions that they can use compensatory (comp) time as an option to satisfy their obligation to provide overtime compensation.
- **Postdoctoral researchers:** Those who engage only in research activities and do not teach are not covered by the teaching exemption and will be entitled to overtime if they earn below \$47,476.
- **Non-academic administrative employees:** Those who do not meet the special provision for academic administrative employees, such as admission counselors and recruiters, will be eligible for overtime if they earn below \$47,476.
- **Other salaried workers:** To the extent that higher education institutions employ workers whose duties are not unique to the education setting – like managers in food service or supervisors of security guards – they will be covered by the Final Rule, unless another exemption applies.

These changes will be effective during the next academic year, so adjustments may be required by the July 1 start to many schools' fiscal-year budgets. Now is the time to review, analyze, prepare and reclassify employees to comply with the Final Rule. Baker Donelson shareholder Dena Sokolow will host a complimentary webinar on May 26 from 3:00 to 4:00 p.m. EDT to discuss the new overtime rules' impact on higher education institutions and suggested best practices. [Click here](#) for more information.