



**White Paper: Understanding The Potential  
Impact of the DOL'S Proposed New  
Overtime Rule on Private Colleges and  
Universities**

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## I. INTRODUCTION<sup>1</sup>

As higher education institutions prepare budget projections for the 2016-2017 academic year, particular attention must be devoted to the potential impact of proposed new overtime and employee-classification standards currently under consideration by the United States Department of Labor (“DOL”). The DOL’s proposed new rule, if adopted as expected at some point during the 2016 calendar year, would more than double the minimum salary threshold necessary to classify many positions as exempt from overtime eligibility. Such an adjustment could convert exempt employees earning approximately \$24,000 to \$50,000 to non-exempt status, which would require overtime pay for such personnel whenever they work in excess of 40 hours during any workweek.

This proposed change would affect employers in all industries but poses particular challenges for colleges and universities because: (1) campuses require a unique breadth of different types of positions, many of which are not contemplated under the manufacturer-oriented framework of the Fair Labor Standards Act (“FLSA” or the “Act”) and accompanying regulations; and (2) the financial pressures and cultural norms within the academe tend to lead administrators and staff themselves to prefer “exempt” classification and avoid hourly pay considerations; a preference that may require some modification under the proposed rule for a potentially significant subset of positions on campus. The cost, logistics, and cultural adjustments involved with complying with the proposed new rule will require thorough analysis and nuanced communication with a variety of campus constituents regarding any changes that institutions may choose to make.

To assist colleges and universities as they prepare for the technical impact and employee-relations aspects of the proposed new rule, this paper provides a brief history of the FLSA and overview of the proposed salary threshold change; identifies potential areas of concern and consideration; and outlines a number of steps that schools could consider to prepare for the implementation of the rule, such as adjusting compensation and/or benefits, conducting self-

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audits, training supervisors and administrators, and developing a plan to communicate any changes to faculty and staff.<sup>2</sup>

## **II. BRIEF OVERVIEW OF THE FLSA AND THE DOL'S PROPOSED NEW OVERTIME RULE**

### **A. The Fair Labor Standards Act**

Enacted in 1938, the FLSA regulates wages and record-keeping standards, which affect both private and public institutions of higher learning. Among the FLSA's requirements is the payment of minimum wage and overtime compensation to certain employees.<sup>3</sup> According to the Act, an employer must pay most employees time-and-a-half for any time worked in excess of 40 hours in a workweek unless the employee is otherwise exempt from this requirement.<sup>4</sup> The Act provides various exemptions to the overtime requirement; however, those most relevant to higher education institutions include what are commonly referred to as the "white collar" exemptions. The white collar exemptions fall generally under three categories: executive, administrative, and professional.<sup>5</sup> Currently, to qualify for the white collar exemptions, an employee must generally satisfy three requirements: (1) the employee must be paid on a salary basis; (2) the salary must meet the minimum threshold level, currently set at \$455 per week or approximately \$23,660 per year; and (3) the employee's primary duties must fit into the duties generally associated with one of the exemptions.<sup>6</sup>

The DOL is tasked with administering and enforcing the FLSA and issuing regulations interpreting certain aspects of the Act. Although there have been changes and amendments to the FLSA over the years, the white collar exemptions have remained virtually unchanged since 2004.

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<sup>2</sup> Employee classification and overtime standards are also defined at a state law level, often in ways that vary from federal requirements under the FLSA and accompanying regulations. Significantly, California and New York have already implemented increases to their salary threshold levels, though those figures remain lower than the \$50,440 salary included in the proposed DOL rule. *See* Cal. Labor Code §515(a)-(c); *Id.* at §1182.12; 12 NYCRR §142-2.14(c)(4). While this paper is limited to addressing federal standards, each institution must also be mindful of applicable state-law requirements when determining the best approach to preparing for the anticipated new DOL rule and classifying employees.

<sup>3</sup> 29 U.S.C. §§ 206-07.

<sup>4</sup> *Id.* at §207; 29 C.F.R. § 541 et. seq.

<sup>5</sup> *See* 29 C.F.R. §§ 541.100, 541.200, 541.300. A table summarizing the requirements for each of these white collar exemptions is attached at the end of this paper. The FLSA provides for additional white collar exemptions as well, such as the outside sales and computer exemptions, but the executive, administrative, and professional exemptions are the main three exemptions affected by the DOL's proposed change to the FLSA regulations. There is also a teaching exemption that may apply to faculty of various designations, such as professors and coaches, the requirements of which will not be altered under the proposed new rule, unless subject to unique treatment at the state-law level. 29 C.F.R. § 541.303; *see also* 29 C.F.R. §§ 541.400, 541.500, 541.601.

<sup>6</sup> *See* 29 C.F.R. §§ 541.100, 541.200, 541.300.

## **B. The Key Change In Proposed New Overtime Rule: Doubling Of Minimum Salary Level**

In March 2014, the Obama administration directed the DOL to modernize and streamline existing overtime regulations for executive, administrative, and professional employees. More than a year later, in June 2015, the DOL's Wage and Hour Division released its proposed new overtime rule for the white collar exemptions. While lengthy (295 pages), the crux of the suggested changes is an increase in the salary threshold test: the new rule would more than double the minimum salary level necessary to meet any of the white collar exemptions. The DOL also specifically referenced the anticipated impact upon higher education institutions, which suggests that DOL enforcement initiatives may focus on college and university compliance with the new rule (if adopted).

As stated above, the current minimum salary threshold for the white collar exemptions is \$455 per week or approximately \$23,660 per year. The featured change of the proposed rule would increase the minimum weekly salary to the current 40<sup>th</sup> percentile of weekly earnings for full-time salaried workers based on the Bureau of Labor Statistics (BLS) data.<sup>7</sup> Based upon current data, this is expected to result in a new minimum salary of \$970 per week, or approximately \$50,440 annually, for 2016. In addition, because the salary level would be connected to the BLS data, the minimum salary threshold would fluctuate (and likely increase) annually without the need for further rulemaking – a first for the FLSA.<sup>8</sup>

Although the new salary threshold would not alter the exempt status under federal law for a key demographic on campus - tenured, tenure-track, non-tenured track, or adjunct faculty members – industry groups estimate that as many as 3.4 million employees in education and health services positions may be affected by the rule's increase in the minimum salary level required to be exempt.<sup>9</sup> In addition, nuances of state law could bear on whether faculty at some institutions could be affected by a new federal minimum salary threshold requirement, which counsels in favor of schools consulting their applicable state laws on that issue before focusing analysis only on non-faculty personnel.

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<sup>7</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 128 (proposed July 16, 2015), *available at* <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=28355&AgencyId=14> (last visited January 14, 2016). The proposed rule similarly increases the salary threshold necessary to qualify for the highly compensated employee exemption to at least \$122,148 (also to be adjusted annually), an increase over the current threshold salary of \$100,000. In addition to the salary requirement, a highly compensated employee must also regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

## **C. Anticipated Date For Issuance Of A Final Rule**

Adding a degree of complexity to institutional efforts to comply with the expected salary threshold increase is the continued uncertainty regarding when, and even whether, the new rule as written will become effective. The lack of clarity stems from the administrative process related to rule-making, which required the DOL to issue the proposed rule for public comment over a 60-day period. The public-comment period ended on September 4, 2015 and resulted in 264,093 comments for the DOL to review, which is ongoing. Currently, there remains no concrete date for implementing the new rule. The Solicitor of Labor, Patricia Smith, has commented that a revised rule will likely be issued in “late 2016,”<sup>10</sup> and there are other industry sources predicting that the final rule may come as early as July, 2016. As with other administrative action during an election year, developing expectations regarding the upcoming presidential election could impact when the DOL issues the final rule.

On balance, it is prudent for institutions to expect that the final rule will be issued some time in 2016. It is also anticipated that employers may have as little as 30 to 60 days to prepare between the issuance of the final rule and the deadline for adjusting payment arrangements to achieve compliance. As a result, higher education administrators should prepare as much as feasible now for the potential impact of the new rule on their respective institutions.

## **D. Salary Level Is Not Enough: Exempt Employees Must Also Perform Exempt Job Duties**

For all of the categories of positions described in this paper, it is important to remember that the proposed salary threshold is just one element that must be met for an employee to meet one of the white collar exemptions. The duties performed by these individuals must also actually qualify as exempt. Employers often mistakenly assume that all salaried employees are exempt and not eligible for overtime. Such a belief fails to consider the duties element of the white collar exemptions, which is worth careful consideration for each position.

Although the DOL has not yet proposed any changes to the duties test, the Department did request comments in response to questions related to potential changes in the duties test. The questions focused on whether a test should be implemented requiring that an employee spend a certain amount of time performing exempt duties, thus perhaps forecasting the DOL’s preference that a quantifiable percentage be met for exempt status.<sup>11</sup> Changes to the duties test could come in either the final rule or in a second notice of proposed rule-making. Therefore, schools should confirm that the duties requirements are met for those positions classified as exempt.

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<sup>10</sup> Lauren Weber, *New Rule for Overtime Pay Coming Later Than Anticipated*, THE WALL STREET JOURNAL (Nov. 11, 2015, 6:25 p.m.), <http://www.wsj.com/articles/new-rule-for-overtime-pay-coming-later-than-anticipated-1447284341>.

<sup>11</sup> It should be noted, however, that such a potential change at the federal level will not affect institutions in California where a 50% threshold already exists on the state level.

Most of the jobs at issue on campus will be analyzed under the administrative exemption. That exemption requires that the employee's primary duties be office or non-manual work directly related to management of the institution's business or operations and involve "the exercise of discretion and independent judgment with respect to matters of significance."<sup>12</sup> In other words, not every administrative position will qualify for this exemption.

There is also a subcategory of the administrative exemption under which other employees on campus may qualify – the "academic administrative exemption." To fall under this exemption, the work performed must relate to the academic operations and functions in a school. Examples of positions that may qualify for this standard include department chairs responsible for various academic subject matters and academic counselors who perform work related to the administering of school testing programs, assisting students with academic problems, or advising students regarding degree requirements. Like other administrators, by the very nature of their duties related to academic instruction or training, those who meet the academic administrative exemption will exercise discretion and independent judgment with respect to matters of significance.<sup>13</sup>

Faculty members, on the other hand, will mostly remain exempt because they tend to qualify for the professional exemption, commonly referred to as the "teaching exemption," by virtue of their roles as educators. While the minimum salary level threshold applies to the other white collar exemptions, it is not applicable to the teaching exemption under federal law.<sup>14</sup>

Because most exempt employees must satisfy both the new salary threshold and perform exempt duties, it is important for institutions to audit each position's job duties on a case-by-case basis to ensure compliance. As part of this process, and as explained in more detail in Section IV below, the institution should review the actual duties of each individual employee in a particular position to determine if their duties are truly exempt.

### **III. THE PROPOSED RULE'S POTENTIAL IMPACT ON INSTITUTIONS OF HIGHER EDUCATION**

The new salary threshold in the DOL's proposed overtime rule has the potential to significantly impact higher education institutions in a number of ways, including organizationally, financially, and culturally with respect to staff as well as faculty morale. The proposed increased salary threshold would directly affect the exempt classification of a number of staff across campus, primarily those falling under the administrative and executive exemptions, such as recruiters, counselors, coaches, and mid- or low-level managers. Personnel

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<sup>12</sup> 29 C.F.R. § 541.202.

<sup>13</sup> Fact Sheet #17C: Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA), Department of Labor, *available at* [http://www.dol.gov/whd/overtime/fs17c\\_administrative.htm](http://www.dol.gov/whd/overtime/fs17c_administrative.htm) (last visited January 18, 2016).

<sup>14</sup> 29 C.F.R. § 541.303(d).

in other exempt positions could also be affected indirectly, depending upon how the institution chooses to address the increased salary threshold. For instance, if an institution condenses salary distribution in ways that could create perceptions of unfairness, faculty who remain ineligible for overtime may experience a drop in morale resulting from a reduced gap between faculty salaries and administrative staff compensation.

In this Section, we discuss various groups of positions that will likely feel the brunt of the new salary threshold. The list described below is not intended to be all-inclusive but, rather, to highlight those groups of employees for which the proposed is rule is most likely to have the greatest impact on campus.<sup>15</sup>

## **A. Administrative Positions That Proposed Rule Would Impact Most Directly**

Personnel most likely to be significantly affected by the higher salary requirement would be administrative staff, as institutions of higher education generally employ a large number of moderately-paid exempt administrative employees in a wide range of positions with compensation below the proposed \$50,440 salary threshold.

### *1. Administrative Positions with Considerable Travel and/or “Busy Seasons”*

Many colleges and universities employ a number of individuals in positions that involve substantial travel, either at set times or throughout the year, or that require significantly increased working hours during “busy seasons.” While titles may vary by institution, such positions may include recruiters or other admissions office personnel, as well as development officers or fundraisers. A survey of institutions identified the following salary ranges for these types of positions: (1) recruiters and admissions counselors – \$34,022 to \$40,641; and (2) fundraisers and gift officers – \$39,150 to \$108,175, depending on the type of gift the individual solicits and their level of seniority within the institution.<sup>16</sup>

If compensation paid for these positions does not meet the new salary threshold on a particular campus, leadership would face a particularly significant financial challenge because such employees likely work more than 40 hours a week (sometimes significantly more over substantial periods of time) and would be eligible for material amounts of overtime pay under the proposed rule. An institution could be faced with choosing to either pay somewhat unpredictable and expensive overtime if these positions are re-classified as non-exempt or become responsible for significant salary raises to qualify these positions as “exempt” under the new rule. Due to the nature of these positions (i.e., travel and/or high level of work hours during busy seasons), if they

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<sup>15</sup> In particular, this paper does not address positions on campus that traditionally raise vexing overtime questions but earn far less than the existing minimum salary threshold, such as residence hall advisors.

<sup>16</sup> College and University Professional Association for Human Resources, *2014-15 Professionals in Higher Education Salary Survey*, available at <https://www.higheredjobs.com/salary/salaryDisplay.cfm?SurveyID=33>. (last visited January 14, 2016).

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are re-classified as non-exempt, institutions may also have difficulty accurately tracking hours worked each week for overtime purposes. As discussed more fully in Section IV below, it may be prudent to consider varied options to address the new salary threshold, ranging from raising salaries, to hiring more employees to avoid overtime, to consolidating positions and re-allocating existing salary into expected overtime pay.

## 2. *Other Administrative Staff*

Even for positions that do not involve travel or seasonally increased hours, institutions of higher learning employ a significant number of individuals in a variety of administrative positions earning less than \$50,440, which have traditionally been classified as exempt and involve work beyond a 40-hour week. These positions and average range of salaries may include, for example:

- Career counselor (\$44,028-\$48,375)
- Academic advisor (\$41,126-\$44,285)
- Research assistant and scholars (\$36,834-\$114,600)
- Human resources staff (\$41,327-\$81,201)
- Head student affairs staff (\$42,984-\$106,239)<sup>17</sup>

Because such positions have traditionally been exempt, the employees have not been eligible for overtime pay, and therefore likely have not closely tracked their hours. Nevertheless, their duties are extensive and professional in nature, so many employees in these positions likely work more than 40 hours per week relatively frequently. Increased hours have become even more common as schools have experienced budget issues and sought to become more fiscally efficient by streamlining staff.

Due to the sheer volume of moderately-paid exempt administrative positions, it will be crucial for each institution to consider both the financial and administrative impact of the need to re-classify these positions. Each institution should evaluate the budgetary impact of raising the current salary of those employed in these positions to meet the new threshold, as compared to the institution's ability to fund, accurately track, and manage the overtime hours required if they re-classify these positions as non-exempt. Specific considerations that can inform such analysis are presented below in Section IV.

## 3. *The Proposed Rule's Potential Impact on Athletic Staff*

Athletic department personnel at many schools may also be significantly impacted by the new salary threshold, depending on the level of competition, particular sport, and size of athletic department. Positions with average salaries potentially affected by the proposed rule include:

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<sup>17</sup> *Id.*

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- Head Coaches (\$31,620-\$303,121)
- Assistant Coaches (\$30,000-\$124,750)
- Head Strength and Conditioning Coach (\$41,584-\$66,915)
- Athletic Trainer/Physical Therapist (\$39,457-\$49,257)
- Head of Athletic Academic Affairs (\$56,948-\$85,000)
- Other Department Heads (\$43,911-\$123,000)<sup>18</sup>

As shown above, at many institutions, head coaches and assistant coaches may be paid less than the proposed \$50,440 threshold. Similar to faculty members, coaches may remain exempt under the “teaching exemption” if their primary job duties are related to instructing student-athletes.<sup>19</sup> This exemption is available regardless of whether the coach, or assistant coach, has a dual position within his or her college or university, as discussed in more detail below. According to one opinion letter issued by the DOL in 2008, a coach, athletic instructor or similar employee who spends at least 50% of their working time teaching “proper skills and development to student-athletes” will generally qualify for the teaching exemption.<sup>20</sup> Also, even if teaching is not a primary duty, a coach earning more than the new salary threshold may remain exempt under either the executive or administrative exemption, depending on the actual job duties performed. Like all classifications, this needs to be determined on a case-by-case basis.<sup>21</sup>

With respect to other moderately-paid athletic staff members who do not qualify for the teaching exemption, schools need to consider their current salaries and actual job duties, as well as the institution’s ability to accurately track hours worked, when determining if such positions would become eligible for overtime under the proposed new rule. Such assessments may be important because athletic events typically require that such staff travel or work on weekends or in the evenings and often involve extended hours during portions of the year (e.g., during competitive season or key recruiting periods). If salaries for such positions are currently below the proposed salary threshold, their conversion to non-exempt status could create obligations for extensive overtime pay if the positions are not restructured.

In addition, certain positions requiring licenses or other certifications, such as physical therapists or athletic trainers, may fall under one of the white collar exemptions. Potentially applicable exemptions include the “executive exemption” if a “head” trainer or therapist supervises others, or the “learned professional exemption” if the position requires certain certifications and other educational credentials usually acquired through a course of prolonged

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<sup>18</sup> *Id.*

<sup>19</sup> 29 C.F.R. § 541.303(b).

<sup>20</sup> FLSA2008-11 Opinion Letter, Department of Labor (December 1, 2008), *available at* [http://www.dol.gov/whd/opinion/FLSA/2008/2008\\_12\\_01\\_11\\_FLSA.htm](http://www.dol.gov/whd/opinion/FLSA/2008/2008_12_01_11_FLSA.htm) (last visited January 14, 2016).

<sup>21</sup> Again, applicable state law should also be consulted before relying on the teaching exemption.

academic study, such as a graduate or professional degree.<sup>22</sup> An institution, however, must proceed with caution when applying the learned professional exemption because not all physical therapist or trainer positions require the advanced training to qualify for the exemption. Therefore, an institution must take into account the degree and licensing requirements of the positions, as well as the actual degree and licensing credentials of the individuals holding these positions.

## **B. Impact on Faculty (Tenured, Tenure-Track, Non-Tenure Track, and Adjuncts)**

As briefly mentioned above, the proposed new salary threshold under federal law technically will not apply to the classification of nearly all faculty because of the FLSA's teaching exemption, whether faculty positions are tenured, tenure-track, non-tenure track, or adjuncts. Thus, most current faculty salary levels would remain compliant with the new rule under federal regulations. Before an institution relies entirely on the teaching exemption for faculty earning less than any new salary threshold, however, state law requirements should also be reviewed.

Also, a minority of faculty members who do not instruct students and thus cannot meet the teaching exemption may still qualify for exempt status under the "academic administrative exemption." To meet this exemption, the employee must primarily perform administrative functions directly related to academic instruction or training in an educational establishment. Qualifying for the academic administrative exemption allows the institution an option when it comes to the salary requirement: either pay the minimum salary level threshold or a salary equivalent to the entrance salary of teachers in the same establishment. Therefore, if the starting salary of teaching faculty at a particular institution is less than the anticipated salary threshold, the institution may compensate those employees who meet the academic administrative exemption below the new proposed salary level threshold, while still lawfully classifying these employees as exempt.

Nonetheless, if an institution adjusts salaries for other positions to comply with the new rule without increasing faculty compensation, this may result in morale issues among faculty members that institutions should be prepared to address and manage. As some administrative employee salaries increase to satisfy the new salary threshold, faculty members earning less than or even just above the new salary threshold may expect a similar adjustment to their pay to maintain the current relative separation within the institution's overall compensation spectrum. Indeed, potentially significant morale issues are likely to arise if faculty witness administrative

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<sup>22</sup> 29 C.F.R. § 541.301(e)(8). ("Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited 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").

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employee salary increases without receiving similar adjustments for what institutions have historically considered more valuable faculty roles.

For example, consider an institution that currently pays full-time, tenure-track faculty starting salaries of \$55,000, while paying a maintenance supervisor with oversight of 20 employees a \$40,000 salary. If the maintenance supervisor's salary is raised above \$50,000 to exceed the new salary threshold and faculty pay remains unchanged, faculty groups are likely to criticize a plan to pay "less credentialed" staff what seems akin to faculty salary levels. Average faculty salary data reveals that this is a real concern given the proximity of starting salaries for various faculty members across institutions, as follows:

- Lecturer (\$47,996-\$70,425)
- Instructor (\$47,995-\$66,286)
- Assistant Professor (\$54,751-\$95,312)
- Associate Professor (\$63,195-\$109,658)
- Professor (\$78,896-177,600)
- No Rank (\$48,485-\$81,813)<sup>23</sup>

It bears repeating that these figures reflect *average salaries*. Many institutions pay starting faculty salaries to tenure-track and even tenured positions that fall below the lower end of the various ranges reflected above, creating more risk of perceived unfairness if staff salaries are moved above the \$50,440 threshold.

Unfortunately, feelings of unfairness and diminished value among faculty have and could contribute to a wide array of employee relations issues on campus unrelated to FLSA classification concerns, including union organizing campaigns. The recent trend of organizing efforts on campus, mostly among adjunct professors (full- and part-time) and graduate students, has already been fueled by perceptions of unfairness or pursuit of better pay and benefits. While these campaigns generally have not extended to full-time, tenured track and tenured professors, future organizing efforts within those broader faculty pools could become more prominent.<sup>24</sup> Therefore, institutions should carefully consider the impact on their faculty when raising salaries for other groups of employees to meet the new DOL salary threshold, and craft careful

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<sup>23</sup> Colleen Flaherty, *Modest Gains in Faculty Pay*, INSIDE HIGHER ED (April 13, 2015), <https://www.insidehighered.com/news/2015/04/13/aaup-full-time-faculty-salaries-22-percent-year> (last visited January 14, 2016) (citing the American Association of University Professors' (AAUP) Annual Report on the Economic Status of the Profession).

<sup>24</sup> Recently, the National Labor Relations Board allowed adjunct and full-time non-tenured track professors to unionize. *Pacific Lutheran*, 361 NLRB No. 157 (Dec. 16, 2014). The Board found that these groups of employees did not meet the criteria to be exempt from the Board's jurisdiction as managerial employees. And, while existing legal precedent still considers tenure-track and tenured professors at private institutions managerial employees who cannot organize, there are indications that the Board may reverse such precedent moving forward.

communication to avoid instilling bitterness that could result in increased union activity among faculty members.

### **C. Employees with Dual Roles on Campus**

Another group of potentially impacted personnel involves what can be a relatively significant subset of employees who work in more than one capacity, often within different departments or functions on campus that may operate completely independently from each other. Generally, determining whether such employees are eligible for overtime turns on whether the primary duties of their combined roles satisfy any of the exemptions described above. For example, an assistant coach who also teaches physical education and kinesiology classes may qualify for the teaching exemption if the teaching role is the primary function of the combined duties, even if the assistant coach role would otherwise be non-exempt. In such circumstances, the institution could avoid adjusting the individual's compensation and still classify the employee as exempt under the teaching exemption under federal law, even if total pay is less than the proposed new DOL salary threshold. Although the DOL has not adopted a duties test similar to that in place in California (which requires an individual to perform exempt duties at least 50% of the time), the applicability of the teaching exemption is strengthened when the individual's teaching or instructing duties account for 50% or more of the individual's time.

In addition to the athletic context, the dual role analysis described above commonly applies to the exempt status of faculty members who may perform administrative duties or serve as department chairs. If the professor's administrative functions rather than teaching role are her primary duties, the teaching exemption may not be available. Depending on the nature of the professor's administrative functions, she may still qualify for either the administrative exemption or the academic administrative exemption, but only if she meets the applicable minimum salary threshold.

Finally, for administrative personnel with dual roles who currently earn less than the proposed salary threshold but do not qualify for the teaching exemption, institutions will want to carefully analyze the employee's primary duties and then consider the restructuring concepts discussed below in Section IV.

### **IV. PREPARING FOR THE IMPLEMENTATION OF THE RULE**

Because the implementation period for compliance with a new rule may be short and the effect upon already constrained budgets could be significant, institutions of higher education should prepare now for changes that will likely be needed. Below, we identify certain actions to consider in order to effectively position your institution to comply with various aspects of the proposed rule, while minimizing the extent of personnel disruption.

**A. Steps Toward Compliance With New Salary Threshold**

To prepare for compliance with the proposed new rule, institutions should consider taking the following step-by-step approach:

**1. Step 1: Identify Potentially Affected Exempt Employees**

The first step is to identify all of the institution's currently exempt employees who are paid a yearly salary between \$23,660 and \$50,440. This includes identifying those positions covered by all of the white collar exemptions, including the teaching exemption. For a global perspective that includes the potential impact on finances and morale, each institution would benefit from understanding how many total employees and which groups of employees the increased salary threshold may affect – directly and indirectly.

**2. Step 2: Identify and Consider Options for Addressing the New Salary Threshold**

After identifying exempt employees within the relevant salary range, schools would be well served by considering the following options for compliance, while also managing within the institution's budgetary constraints:

- a. *Increase salaries to meet the anticipated new salary threshold of \$50,440*

Increasing salaries is one goal of the DOL's proposed rule, and that may likely happen for some positions on campus. However, efforts to comply with the new threshold while not exceeding budget constraints could lead to adjustments other than increased wages. The cost of raising the salaries of all currently exempt employees to the salary threshold of \$50,440 would be significant for nearly every institution. And, this cost would continue to escalate over time because the minimum salary would be tied to a BNA index that is likely to increase that threshold every year. By way of example, estimated annual cost increases range from \$62 million dollars for the State University System of Florida (12 Universities) to \$17 million to \$14.8 million for a single-campus, private institution.<sup>25</sup> Smaller, liberal arts colleges with fewer employees should anticipate smaller increased costs but would still experience increases of significant magnitude relative to overall employee costs, which would likely require a series of structural changes.

Most institutions will find it impractical to implement an across-the-board salary increase for exempt employees to meet the minimum threshold. Instead, for each group of positions with salaries below the \$50,440 threshold, most institutions will need to evaluate the advantages and

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<sup>25</sup> College and University Professional Association for Human Resources, *DOL's Proposed Overtime Rule: Higher Education's Comments & Concerns*, available at [http://www.cupahr.org/advocacy/files/FLSA\\_OT\\_Talking\\_Points\\_Sept2015.pdf](http://www.cupahr.org/advocacy/files/FLSA_OT_Talking_Points_Sept2015.pdf) (last visited January 14, 2016).

disadvantages of raising salaries above that threshold versus other options that may better suit the institution's needs and budget requirements.

b. *Convert some exempt employees to hourly, non-exempt status*

As an alternative to raising the salaries of all exempt employees, an institution may consider raising the salaries of certain exempt positions, while converting other positions to non-exempt status. Employees in re-classified positions will be entitled to overtime compensation for all hours worked over 40 in a workweek at the rate of one-and-one-half times their regular rate of pay.

While re-classification allows for the potential to earn overtime, it does not necessarily mean that employees will actually work and earn overtime pay. Even so, the likely increase in payroll costs as a result of earned overtime is a significant and valid concern for nearly all institutions of higher education. Institutions can take certain pro-active steps to avoid or minimize the number of overtime hours worked, thus dulling the financial consequences of potential overtime costs, such as:

**Implement and enforce a policy that requires a supervisor to pre-approve any overtime.** Such a policy would assist departments with budgeting and controlling overtime costs and should be implemented, even if no currently exempt employees are re-classified. At the same time, it is important to remember that all non-exempt employees must be paid for any overtime actually worked, even if it is not pre-approved. Supervisory personnel must be held accountable for controlling the amount of overtime worked and for ensuring employees properly record their hours worked so they can be paid accordingly. Supervisory personnel would need to diligently monitor hours actually worked to achieve the full cost-saving benefits of this type of policy. If hours and overtime have not previously been carefully monitored, as remains prevalent on many campuses, the proposed rule offers institutions a chance to adjust such cultural norms to achieve more structured compliance.

**Implement a fluctuating workweek system of pay.** The fluctuating workweek method is an option to keep overtime costs down, most likely for those non-exempt employees with predictable busy seasons. It has been traditionally underutilized but could offer a useful option, particularly in circumstances where an institution is comfortable paying an employee full salary, even in weeks that the employee works less than their full complement of hours. Under this option, a non-exempt employee must be guaranteed a weekly salary for all hours worked (not just 40 hours), at a rate that is at least the minimum wage for every hour worked that week. The weekly salary is fixed and cannot be adjusted for fluctuations in actual hours worked under 40 per week. But, for any hours worked that exceed 40 during a workweek, the employee must receive an extra one-half

times his or her regular rate<sup>26</sup> of pay; this premium is less than the typical overtime rate of one-and-one half times the regular rate of pay.<sup>27</sup> However, it is important to note that this option is only available for non-exempt employees whose hours truly fluctuate from week-to-week.<sup>28</sup> Although there is no clear definition of how much fluctuation is sufficient, this method would generally apply to those employees whose hours vary above and below 40 hours per workweek on a regular basis. Importantly, the hours do not have to be so irregular that they cannot be controlled by management. An example of a position that may qualify for this type of payment method would be a recruiter, who generally works more than 40 hours a week for a period of weeks or months (perhaps working 60, 70 or even 80 hours per week), and then works only 25 to 35 hours outside the recruiting season.

**Consider restructuring pay.** For those positions where overtime will be a necessity, institutions may also consider reducing salaries or hourly wages to offset the overtime costs, such that the employees' overall compensation remains unchanged. An analysis of the actual work hours required of each position and potential overtime should be completed to arrive at the new compensation arrangement. Although an employee's guaranteed salary or hourly wage may be lower under this approach, the addition of overtime pay would be intended to allow the employee to earn the same or potentially slightly more total compensation than their previous, exempt salary. One drawback of this approach, depending on the amount of expected overtime and when it could be earned, is that the employee's cash flow would become somewhat less predictable, which may present morale issues that require careful communication or counsel in favor of limited use of this approach. From a budget and compensation perspective, this option is best suited to positions with relatively fixed and predictable work schedules, such as those with seasonal periods of time that require substantial work that exceeds 40 hours per week.

**Restructure positions.** There are also a few ways to restructure positions that can help ease the financial impact of potential overtime. These include:

- Reduce hours required of positions by reviewing the duties and assignments of a position to determine where changes can be made to more effectively manage travel time and hours worked.
- Instead of paying existing employees overtime, hire additional low-level, non-exempt employees at a lower compensation rate than the current,

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<sup>26</sup> 29 C.F.R. § 778.114. The regular rate is determined by dividing the employee's total non-overtime compensation by the total number of hours worked during the workweek.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

reclassified employees to reduce the need for current employees to work more than 40 hours per week. The additional employees could be full or part-time depending upon budgetary constraints.

- In a somewhat related approach, consider reducing the number of full-time employees for a particular position or department and replace them with more part-time employees who would not need to work overtime and would not become eligible for benefits (thus saving the cost of benefits for the reduced number of full-time employees).
- When necessary, reduce the number of employees in a particular position and use the salary of any laid-off employees to cover overtime costs for the remaining employees.

None of these options is likely to be suitable for every institution or for all groups of positions within an institution that may require adjustment in order to comply with the proposed new rule without exceeding budgetary constraints. Most institutions will need to consider a combination of the above options, as well as other changes. Considering each option or combinations of the various options for each group of positions affected by the new rule would be a prudent approach to managing these issues.

*c. Consider shifting benefits to salary*

If funding is not currently available to raise an exempt employee's salary to the new threshold, institutions could also consider reducing the extent of various benefits offered to employees to shift funds to support higher base salaries. Generally, such an adjustment for benefits (*e.g.*, health-insurance premiums, retirement contributions, or tuition reimbursement) has the potential to impact more than the intended employees because many benefit arrangements are offered to other groupings of employees, including those who receive compensation above and below the salary exemption threshold. It might therefore create a sense of unfairness to use such benefit reductions to fund salary increases for only a portion of employees. However, as many schools are already considering adjustments to benefit arrangements to address other budgetary needs, such benefit changes could be implemented in concert with the salary adjustments. If this option is considered, schools should review any proposed adjustments with their benefits counsel or advisors for compliance with other applicable laws (such as ERISA, the Affordable Care Act, and the Internal Revenue Code) and the terms of the plan documents.

Moreover, to the extent employees receive any other direct payment besides salary, such as a bonus, the bonus could be converted into salary as a means of attempting to move the employee above the new \$50,440 threshold. In limited situations where employees earning salaries below the new threshold are eligible for bonus payments, such an adjustment could allow an institution to satisfy the new threshold without any, or with only minimal, increased

total cost. Schools should consider reviewing compensation and benefit packages currently offered to potentially affected groups of positions to determine if such conversions might be possible.

### **3. Step 3: Review Job Descriptions and Employees' Actual Duties**

Higher education institutions should also take a fresh look at whether the exempt positions affected by the proposed new salary threshold actually meet the duties test for the applicable exemption. Employee misclassification remains a common problem, and colleges and universities are far from immune. Although it is impossible to predict, the new rule and adjustments to positions are likely to increase employee awareness and regulatory scrutiny of this issue. Now is a good time to start preparing for this added level of awareness and scrutiny.

To prepare to achieve compliance, schools should start by collecting and reviewing the existing job descriptions for any exempt positions. However, it is important that the inquiry not end there because job descriptions are often out of date or inaccurately summarize the duties and responsibilities of a job.<sup>29</sup> Any review process should ensure that all job descriptions are current and reflect employees' actual job duties. If a position is classified as exempt, the job description should clarify that the primary duties of the position meet the elements of the applicable duties test. Conversely, if the current and accurate job description reveals that the employee's duties are primarily non-exempt, the impending changes to the exemption rules may provide a good opportunity to re-classify the position. Of course, the reverse may be true as well: if a review of the position shows that a non-exempt employee is performing duties that would qualify as exempt and their compensation is close to, meets, or exceeds the new minimum salary threshold, it may be administratively and financially efficient to raise the salary and re-classify the position as exempt.

Although the current FLSA regulations do not require an employee to spend a certain quantifiable threshold of time performing exempt duties, applicable rules may be adjusted to include that requirement in the next year or so. Because changes in the duties test may be adopted in the near future, prudent employers should review an employee's actual duties now as part of this audit process.<sup>30</sup>

### **B. Practical Considerations for Implementing Changes**

After identifying potentially impacted positions and selecting from the array of options for achieving compliance if the new DOL rule is adopted, institutions will need to plan

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<sup>29</sup> See *Indergit v. Rite Aid Corp.*, 293 F.R.D. 632, 638 (S.D.N.Y. 2013) ("Accordingly, even where an employee's job description appears to exempt him from eligibility for FLSA overtime pay, if that employee's actual duties vary from the seemingly exempt description, such that they are engaged primarily in rote, manual, and non-discretionary tasks, he would be misclassified, despite the exempt nature of his job description").

<sup>30</sup> A review of job duties could include analyzing the typical day of the position, reviewing documents, and talking with the manager or supervisor.

systematically to properly implement such adjustments. The primary considerations to do so include time-keeping systems, training, and communication with all personnel.

Accurately recording non-exempt employees' hours worked and resulting overtime is already important, but it will become even more essential if significant numbers of exempt employees are re-classified as non-exempt, overtime-eligible employees. Therefore, institutions should review and possibly update their time-recording software and systems, particularly for hours worked outside of the office (*e.g.*, answering telephone calls or responding to texts or emails), as well as their time records and processes for editing time (*e.g.* lunch deductions, other automated time keeping deductions, and mistakes).

Similarly, schools should emphasize and support administrator and supervisor training on these policies and practices to ensure consistency and compliance. Like any modification to long-standing cultural conventions on campus, tracking time worked for personnel unfamiliar with the need to do so will require substantial diligence. As budget pressures require higher education administrations to do more with less, this new daily tracking requirement could easily falter if not emphasized as a significant priority.

Last, colleges and universities should carefully plan and consistently communicate with employees, managers, and faculty across the institution, both before and after any re-classifications or other significant changes in compensation or benefits. Communications with re-classified employees are particularly important, as both employees and their supervisors will have to change their mindsets about what becoming an hourly employee does and does not mean. Right or wrong, many people may view non-exempt classification as signifying less professional status, even when the actual role of their position remains unchanged. To counteract such potential for reduced morale, institutions are likely to benefit from straightforward explanations that the new overtime rule issued by the DOL requires such reclassifications on campuses across the country. Such efforts could help ease the transition for some, knowing that the move is not personal to them but more generally required to comply with federal law. Institutions could also highlight, where applicable, the possibility that certain groups of employees may have the opportunity to earn more with overtime. Overall, it will be important for all communications with employees to be truthful and set the right tone for each particular campus, and even each particular group of employees impacted by the adjustments.

## V. CONCLUSION

The precise degree of adjustments the DOL will require for the minimum salary threshold to qualify for exemption from overtime remains unclear. Yet, an increase close to, if not at, the levels in the proposed new rule is sufficiently likely as to require preparation now for the expected impact on institutional budgets and personnel. There will likely be a short period of time for institutions to delicately balance other budgetary pressures with the myriad of options for complying with the new rule once implemented.

## SUMMARY OF WHITE COLLAR EXEMPTIONS UNDER THE FLSA

EXEMPTION	REQUIREMENTS
<b>Executive</b>	<ul style="list-style-type: none"> <li>• Must meet the minimum salary threshold</li> <li>• Primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise</li> <li>• Must supervise 2 full-time employees or equivalent</li> </ul>
<b>Administrative</b>	<ul style="list-style-type: none"> <li>• Must meet the minimum salary threshold</li> <li>• Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance</li> </ul>
<b>Academic Administrative Exemption</b>	<ul style="list-style-type: none"> <li>• Must meet either: (1) the minimum salary threshold; or (2) a salary equal to the entrance salary for teachers in the same institution</li> <li>• Primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment</li> </ul>
<b>Professional</b>	<ul style="list-style-type: none"> <li>• Must meet the minimum salary threshold</li> <li>• Primary duty is the performance of work requiring advanced knowledge that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment</li> </ul>
<b>Teaching Exemption</b>	<ul style="list-style-type: none"> <li>• Not required to meet the minimum salary threshold</li> <li>• Primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge</li> <li>• Employed and engaged in the performance of the primary duty in an educational establishment</li> </ul>