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OVERTIME EXEMPTIONS AND RECORDKEEPING IN HIGHER EDUCATION

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I. FLSA Exemptions in Higher Education Institutions

The FLSA provides certain protections for individuals who are classified as employees. Employees are considered "non-exempt," *i.e.*, eligible for all of those protections (minimum wage and overtime) unless they fall within specific exemptions. The burden of proof is on the employer to establish that employees fall within an exemption.

Colleges and universities often struggle with unique challenges in determining whether certain jobs are exempt. The exemptions below only focus on the requirements under the FLSA. There are often different and more restrictive requirements under state law that must be considered as well.

A. Executive Exemption

An executive employee is one: (i) who is compensated on a "salary" or "fee" basis at a rate of not less than $455 per week; (ii) whose "primary duty" is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision; (iii) who customarily and regularly directs the work of two or more other employees; and (iv) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.100 *et. seq.*

This exemption is commonly thought of as the "supervisor" exemption. Concurrent performance of exempt or non-exempt work will not disqualify an employee from the executive exemption *if* the employee continues to meet the primary duty requirements. Executive employees generally decide on their own initiative to perform non-exempt work and remain responsible for their business operations, whereas non-exempt employees generally perform exempt work at the direction of a supervisor or for defined periods.

1. Head Coaches / Assistant Coaches

Based on the "normal" duties associated with the position, head coaches will usually meet the duties test of the executive exemption. Assistant coaches, particularly at larger institutions with significant sport programs may also be able to meet the duties test of the exemption, although assistant coaches should be reviewed with more scrutiny. *Id.*

2. Officers / Deans / Executive Deans

Based on the "normal" duties associated with these positions, they will usually meet the duties test of the executive exemption. *Id.*

3. Directors / Coordinators

The duties of these positions may not be consistent from one institution to another but they may meet the duties test of the executive exemption depending on their actual duties and responsibilities. *Id.*

B. Administrative Exemption

An administrative employee is one: (i) who is compensated on a "salary" or "fee" basis of not less than $455 per week; (ii) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or of the employer's customers; and (iii) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200 *et seq.*

This exemption historically generates the most litigation because it serves as a "catch all" when other specific exemptions do not neatly apply. The "discretion and independent judgment" test is often a hotly contested issue. The regulations distinguish discretion and independent judgment from the "use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." The performance of mechanical, repetitive, recurrent, or routine work is non-exempt work since it does not require discretion and independent judgment.

The phrase "matters of significance" refers to the level of importance or consequence of the work being performed. It does not merely mean that the employer will suffer financial losses if the employee fails to perform his/her job properly. For example, a bank teller docs not exercise discretion and judgment over matters of significance because he/she fills out a withdrawal slip improperly even though it becomes a costly mistake.

Colleges and universities often grapple with issues similar to those faced by other industries when relying on the administrative exemption.

1. IT Support Specialists

Section 13(a)(1) and 13(a)(17) exempts computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field who meet certain tests regarding their job duties and who are paid at least $455 per week on a salary basis or paid on an hourly basis, at a rate not less than $27.63 an hour.[1]

[1]The employee's primary duty must consist of: 1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; 3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

However, if IT Support Specialists cannot meet the highly technical requirements of the computer exemption, employers sometimes rely on the broader administrative exemption. Although DOL is generally skeptical that IT specialists meet this exemption and courts have found it does not apply, it remains a fact-specific inquiry. *See Martin* v. *Ind. Mich. Power Co.,* 381 F.3d 574 (6th Cir. 2004) (technical computer employee not exempt because primary duty was maintenance of computer system and thus not related to the administrative operation of the business).

2. <u>Administrative and Executive Assistants</u>

It is clear that "clerical" duties generally do not meet the administrative exemption. Thus, this exemption generally does not apply to an employee responsible for "performing duties that involve clerical or secretarial work, recording or tabulating data, and performing other mechanical repetitive and routine work." WH Admin. Op. FLSA 2005-8. However, DOL regulations state that *executive assistants* to senior administration who have been delegated genuine authority to act on behalf of the administrator by, for example, controlling access to the administrator, independently drafting correspondence on his/her behalf, and arranging travel schedules, can be exempt Administrative personnel. Specifically, 29 C.F.R. § 541.203(d) provides:

> An executive assistant or administrative assistant to a business owner or 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.

DOL cautions, however, that this example "should not be read to expand the administrative exemption to include secretaries or other clerical employees." *Id.*

3. <u>Assistant Coaches</u>

Certain assistant coaches may qualify for the administrative exemption. For example, administrative duties might include recruiting, establishing game schedules, financial planning and budgeting, procurement and purchasing, public relations, marketing, compliance, facilities management, and fundraising. An assistant coach who is also a member of a university or association committee, or leading a group of employees involved in a special project might qualify. In all cases, to qualify for the administrative exemption, the assistant coach must exercise discretion and independent judgment as to significant matters. Thus, recruiting work is not likely to qualify if it involves using objective standards established by the head coach to assess candidates who have been pre-selected by the head coach. However, if the assistant coach plays a pivotal role in determining which schools to visit, which students to recruit and offer scholarships to, and how to recruit those students, the exemption may be available.

C. <u>Educational Establishments and Administrative Functions</u>

In addition to the standard administrative exemption described above, the regulations contain special rules for educational institutions, including K-12 schools and institutions of higher education. Educational administrative employees must have as their primary duty

"administrative functions related to academic instruction or training in an educational establishment or department or subdivision thereof." This means "work related to the academic operations and functions in a school rather than to administration along the lines of general business operations." The regulations (29 C.F.R. § 541.204 *et. seq.)* specify that eligible employees include:

- Superintendent or other head of an elementary or secondary school system and any assistants responsible for administration of 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;

- Principal and any vice principals responsible for the operation of an elementary or secondary school;

- Department heads in institutions of higher education responsible for the administration of the Mathematics Department, the English Department, the Foreign Language Department, etc.;

- Academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements and other employees with "similar responsibilities;"

- Academic advisors and "intervention specialists" may fall under the academic administrative personnel exemption. For example, DOL has found academic advisors and intervention specialists exempt where the employees' primary duties involved assisting students in academic pursuits by aiding them in their class selection, educational goals, and graduation requirements. *See* DOL Opinion Letter, FL.SA 2005-42. Specifically, the primary responsibilities of the exempt academic advisors and intervention specialists were described as: (i) orienting students regarding admissions, placement testing, registration processes, policies, procedures, sources and programs; (ii) reviewing academic records, placement tests and other standardized test results with students in order to develop course selections consistent with their career choices and degree requirements, and (iii) developing a term-by-term schedule and an outline for a program of study. By contrast, in another opinion letter. DOL found admission counselor recruiters not exempt because, among other things, they spent the majority of their time away from campus recruiting, making high school visits, facilitating campus visits, and their primary responsibility was to "sell" student and parents to college. *See* USDOL Opinion Letter, 1999 WL 776054.

    (i) Jobs that will generally qualify for the academic exemption: college/university administrators involved with faculty and curriculum; department administrators; lab administrators; academic counselors advising students on academics, administering testing.

(ii) Jobs that will generally not qualify for the academic exemption: social workers; psychologists; food service managers; dieticians; enrollment / admission counselors; recruiters.

D. Professional Exemption

A professional exempt employee is one who is: (1) compensated on a salary or fee basis at a rate of not less than $455 per week: and (2) whose primary duty is the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.300 *et. seq.*

1. Teachers as Exempt Professionals

An employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed is an exempt professional regardless of compensation. 29 C.F.R. § 541.303. The salary basis test does not apply to teachers. There is no requirement that teachers have an advanced degree.

2. Assistant Coaches

Depending on the duties actually performed by assistant coaches, they may be exempt under a number of exemptions: academic administrator, executive, administrative, professional and/or teacher exemptions. As always, this analysis is very fact-sensitive.

A December 1, 2008 DOL opinion letter concluded that "Assistant Athletic Instructors" (AAIs) at an institution of higher education are exempt under the teacher exemption. According to the opinion, the AAIs' teaching duties comprise at least 50% or more of their time and include instruction of physical health, team concepts and safety. The AAIs work under the supervision of a head coach and arc responsible for designing instructions for individual student-athletes and for team needs and have a great deal of independent discretion and judgment as to the manner and method of teaching. It is worth noting that DOL specifically mentioned that the job description contained many non- exempt teaching duties such as developing recruitment strategies, recruiting and follow- up on prospective students, researching and targeting high schools and athletic camps as sources for potential student-athletes, and visiting high schools and athletic camps to conduct student interviews. However. DOL assumed, based on the employer's representation, that 50% or more of the time was spent on exempt teaching duties, and therefore sufficient to support the conclusion that the AAIs' primary duties were teaching. *See* FLSA-2008-l I DOL Opinion Letter.

3. Graduate Teaching Assistants / Gradate Academic Assistants

In a 1967 DOL opinion letter, DOL stated that a teaching assistant who is assigned a class or laboratory section for the purpose of instruction may qualify for the teaching exemption. An academic assistant, although not in charge of a class or laboratory section but answers students' questions and assists them in their academic work, may also qualify for the teaching

exemption. The primary duty must be teaching to be considered exempt. If the graduate assistant / teaching assistant teaches small seminars as breakouts from large lectures without the professor's involvement or participation, his/her primary duty would most likely be considered teaching. *See* Wage & Hour Administration Opinion Letter, August 22, 1967.

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

On May 18, 2016 DOL issued Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act. A copy can be obtained at

https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf

Although the Guidance addressed the "almost" new overtime rule, it provides helpful summary on certain exemptions common in higher education that remain useful.

II. Status of the "Almost" New Overtime Exemptions

The Rule which was supposed to take effect on December 1, 2016 focuses primarily on updating the salary and compensation levels needed for employees to be exempt.

1. Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region which when issued was $913 per week or $47,476 annually for a full-year worker;
2. Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is $134,004; and
3. Establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.

A. Injunction

On November 22, 2016, in a surprising ruling, U.S. District Judge Amos Mazzant in Texas blocked the new rules from taking effect by granting a nationwide preliminary injunction which was sought by 21 states and a number of business groups.

On December 8, the Fifth Circuit Court of Appeals granted the U.S. Department of Labor's motion seeking an expedited briefing schedule on its appeal of the district court injunction of the overtime rule that was scheduled to take effect on December 1. In granting the motion, the Court of Appeals actually issued a more expedited briefing schedule than the one requested by the DOL.

Briefing was scheduled to be completed by February 7, 2017 but DOL requested an additional 30 days to file a reply brief to allow leadership to adequately address the issues.

B. State Laws

There has been an effort at the state level to pass legislation increasing the salary level and/or adopt the new Rule.

For example, New York City (large employers) to be considered exempt under Executive or Administrative exemption:

$825 per week on or after December 31, 2016
$975 per week on or after December 31, 2017
$1,125 per week on or after December 31, 2018

Other minimum salary requirements for employers turn on size and location.

III. Record keeping Compliance

A. Basic Recordkeeping Rules

The FLSA requires all employers to "make, keep, and preserve" records of their employees' "wages, hours, and other conditions and practices of employment." 29 U.S.C. 11(c). DOL regulations spell out in detail the information and data that must be recorded at 9 C.F.R. §516.2(a):

For all employees, including exempt employees, records must show:

- Full name and Social Security number
- Home address
- Date of birth if under 19
- Sex and occupation in which employed
- Time of day and day of week on which employee's workweek begins

In addition, for non-exempt employees the following records must be kept:

- Regular hourly rate, the basis on which wages are paid, and the nature and amount of compensation excluded from the regular rate under section 29 U.S.C. § 207(e)
- Hours worked each workday and total work hours in the workweek
- Straight time earnings for all work hours, excluding overtime
- Total overtime premiums for overtime hours
- Additions to and deductions from wages
- Total wages for each pay period

- Date of payment and pay period covered

No particular type of timekeeping method is required. The DOL's Fact Sheet #21, "Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)" (available at http://www.dol.gov/whd/regs/compliance/whdfs21 .pdf) notes that "'Employers may use any timekeeping method they choose," whether a time clock, time tracking by a designated time keeper, or having workers write down their own times on a timesheet. "Any timekeeping plan is acceptable as long as it is complete and accurate."

B. Consequences of Inaccurate Time Records

The recordkeeping provisions of the FLSA are enforced by the Wage and Hour Division of the DOL. and there is no private right of action for recordkeeping violations. *E.g., Elwell v. University Hosps. Home Care Servs.*, 276 F.3d 832, 843 (6th Cir. 2002). However, the consequences of failing to keep accurate records can be severe in the event of FLSA wage and hour litigation. In *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946), the Supreme Court lightened employees' burden of proof as to the hours they worked for which they were not appropriately compensated. An employee can carry this burden with any evidence (including their own testimony) about uncompensated work performed from which work hours can be determined by "reasonable inference." In the wake of *Mt. Clemens,* this generous burden of proof has been used consistently in cases alleging off-the-clock work, which by definition allege work not reflected in time records, and overtime work by misclassified employees for whom accurate time records typically do not exist.

C. Recordkeeping in the Digital Age and Evolving Workplace

1. Today's Workplace

Employees are increasingly working remotely, whether from their homes or other remote locations. It is also increasingly common for even non-exempt employees to be issued smartphones. laptops, or other equipment that allows them to work remotely and to be available 24/7 for questions or emergencies. Some employees are issued this equipment with the expectation that they will check their emails and voicemails during off duty hours. The workplace is also becoming increasingly flexible, with employees telecommuting and/or working flexible schedules to accommodate family responsibilities. Those remote hours cannot be captured on time clocks or other timekeeping equipment. How then to keep an accurate record of compensable "remote access work," as required.

2. DOL's Unfulfilled Promise To "Modernize" Recordkeeping Rules

In 2009, DOL added to its regulatory agenda modernizing the FLSA's recordkeeping requirements to keep pace with the evolving workplace. The contemplated amendments were, among other things, "to modernize certain . . . recordkeeping requirements consistent with the increasing emphasis on 'flexiplace' and 'telecommuting' work arrangements. Modernization of the

recordkeeping requirements will allow for automated and electronic recordkeeping systems and methods to take the place of mandatory paper records. To date, however, the agency has not issued the promised regulations.

The DOL has, however, produced a time keeping "App" for smartphones that empowers employees to keep track of their own work hours. The App, available at http://www.dol.gov/whd/ enables employees to directly track work hours, generate weekly reports and email those reports to others. It operates like a stopwatch, recording start/stop times and break times. The DOL touts the App as enabling employees to keep their own records so they do not have to rely on their employer's records. Many have viewed this as potentially undermining employers' efforts to ensure their own records are accurate.

3. <u>Developing a Timekeeping Plan</u>

Although it is the employer's obligation to maintain accurate records, its ability to record remote work time is extremely limited and in many cases impossible. Employers must develop a policy and a timekeeping plan that allows for the determination of what work is compensable and how to record the time spent on that work. Employers can and should require employees to accurately report the time they work, whether on timesheets or through emails to management or payroll. Putting the burden on employees is not completely foolproof in terms of preventing liability for inaccurate time records. *See, e.g., Kubel v. Black & Decker. Inc.*, 643 F.3d 352. 363 (2nd Cir. 2011) (if timesheets employee submitted appear inaccurate or incomplete employee may still prove unrecorded work time under *Mt. Clemens Pottery).*

Therefore, the plan should include an audit and review process, to ensure that records and reports are reviewed regularly and that any timekeeping anomalies - for example, no time reported on days a manager knows the employee answered emails and responded to questions - are discussed with the employee and resolved. Indeed, email, text and/or phone records may well be available should litigation ensue, which would likely make a sufficient initial showing that work was performed during off-duty hours, making periodic review and auditing essential. Accurate time reporting should not only be required, that requirement should be enforced. Finally, it is critical that managers be trained on the compensability of "remote access work" and the importance of accurate timekeeping.