

# Fair Labor Standards Act

## Revised Overtime Provisions

*By Susan Wyatt Sedwick and Evan Roberts*

**T**he US Department of Labor recently issued new regulations regarding the overtime provisions of the Fair Labor Standards Act (FLSA). The revised FLSA requirements go into effect on December 1, 2016. These regulations have the potential to significantly impact the research enterprises, including ongoing projects that involve post-doctoral fellows, other exempt professional staff and even research administration positions. While the goal of creating better work/life balance for employees is positive, this does create some difficult challenges for universities and especially sponsored projects. Responsibility for implementation of the FLSA revisions will vest with human resources offices, but it is critically important that the university research perspective and the impact on existing awards be taken into consideration when setting institutional policy.

As evidenced in Figure 1, in 2015 the FLSA exemption threshold fell below the poverty line as established for a family of four. The recent revision has more than doubled the previous threshold by raising the wage threshold for exemption from overtime from \$455 to \$913 per week or from \$23,660 to \$47,476 per year effective with disbursements paid on or after December 1, 2016. Past increases have been implemented sporadically but this revision also included provisions that require the threshold to be raised automatically every three years beginning January 1, 2020. The threshold was set at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) and in the future will be set using that same benchmark although the Census Region with the lowest wage level may change.

As in the past, the FLSA will continue to require compensation for overtime or compensatory time to be earned at a rate of *at least* 1.5 times the employee's regular hourly rate. The regulations require that

employers keep records of how many hours overtime-eligible employees work. However, the law does not require that overtime-eligible workers be paid hourly. To meet the effective date of December 1, 2016, institutions that are moving employees from exempt categories to time accrual as hourly employees must implement these changes at an earlier date to ensure disbursements on or after the effective date are in compliance. The new threshold has no impact on the pay of workers paid hourly who must already be paid overtime since those salaried workers do not primarily perform executive, administrative, or professional duties and thus are not eligible for the white collar overtime exemption.

There are two points to keep in mind: Exempt means that an employee is exempt from the overtime standards but employees don't qualify for the exemption from overtime solely on the amount they are paid. The Standard of Duties Test specifies the types of duties that are being performed. This is a really important distinction. If the duties for the individual meet the standards test, to be considered exempt, the employee must also be paid at the minimum rate or above. If that employee's salary does not meet the salary threshold requirements, then the employee still qualifies for overtime.

On May 18, 2016, the Department of Labor has published useful *Guidance for Higher Education Institutions on Paying Overtime under the FLSA* ([www.dol.gov/whd/overtime/final2016/highered-guidance.pdf](http://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf)). This document outlines the specific exceptions for, and impact on, higher education. The FLSA revisions did not change the prior standing that students engaged in research or serving as resident advisors are in an educational not employment relationship and therefore, overtime is not applicable. Employees whose primary duty is teaching fall under the FLSA's teaching exemption. There are additional exceptions for administrative personnel who 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 who are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. These employees are not entitled to overtime compensation if they are paid at least as much as the entrance salary for teachers at their institution.

For the academic research enterprise, the biggest impact has been seen for post-doctoral fellows. To the extent that post-doctoral fellows have

a primary duty of teaching, they will be subject to the teaching exemption and not entitled to overtime compensation. A post doc will be eligible for overtime if their primary duty is not teaching and they earn less than the new threshold. It is fairly standard practice and a long held expectation that post docs work more than 40 hours per week. It is an institutional decision on whether to require all post docs to be paid at a minimum level at or above \$47,476. Some set minimum thresholds while others allow the employing unit that discretion.

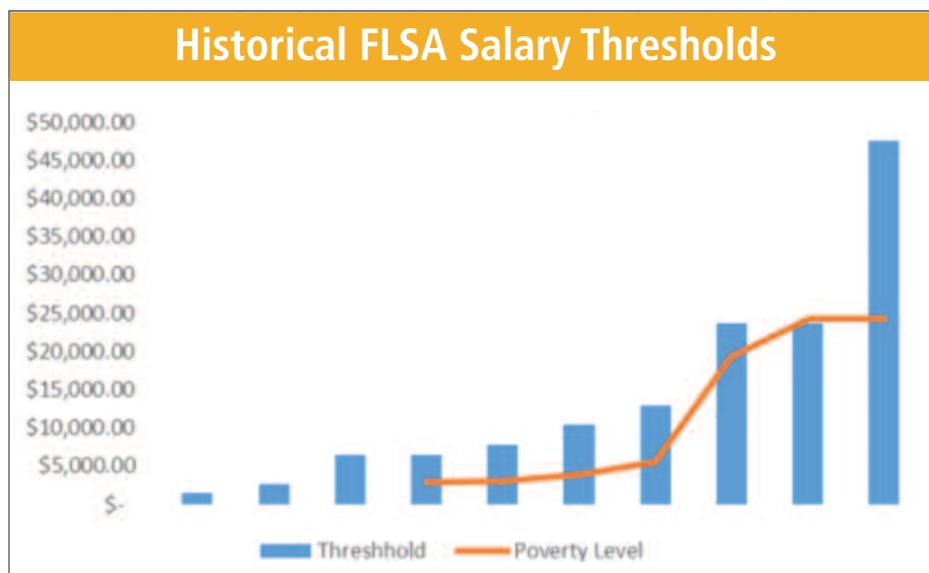
Stipends that support subsistence, travel, supplies, etc. associated with a research project are normally not considered to be an employer/employee relationship and would not be subject to the FLSA provisions. However, in the case where a stipend is paid as compensation for an expectation that work will be performed, there would be an employer/employee relationship that would be subject to the FLSA. The sponsor may stipulate this in the award. Otherwise, institutional policy would prevail.

Not all federal agencies have issued guidance. NIH has announced it will increase postdoctoral NRSA stipends to levels at or above the new threshold. NSF has also issued guidance on the FLSA but the current salary levels funded through NSF post-doctoral fellowship programs are already above the FLSA threshold. NSF does not plan on adjusting award amounts for existing projects involving impacted post docs and other employees since NSF already allows for rebudgeting as needed to meet the requirements. However, if funds on existing

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As background, the US government began tracking work hours in 1890 when the average work week for manufacturing employees was 100 hours per week. This marked the emergence of labor unions and collective bargaining. Over the next 50 years, many industries were pressured to reduce the hours required for workers. In 1938 the Fair Labor Standards Act was passed and limited the work week to 44 hours. In 1940, Congress amended the FLSA to further limit the work week to 40 hours and standardizing the 8-hour work day. America's overtime law was enacted to protect workers mandating that workers get paid extra when they work extra. The rules also discourage employers from working employees long hours by making it more expensive to do so through a time-and-a-half pay premium. ■

Figure 1: Historical FLSA Salary Threshold Increases



projects are not adequate, principal investigators are advised to contact their program director.

The FLSA also allows that employees of *public higher* education institutions who qualify as public sector (state) employees may be able to accrue compensatory (“comp”) time as an option to satisfy the institutional obligation to provide overtime compensation. Any comp time arrangement must be established pursuant to the applicable provisions of a collective bargaining agreement or state regulation or stipulated in a memorandum of agreement between the employer and employee before the performance of the work. As with cash overtime pay, compensatory time must be earned at a rate of one-and-one-half hours for each overtime hour worked. The regulations include the proviso that an employee must be permitted to use comp time on the date requested unless doing so would “unduly disrupt” the operations of the agency.

The FLSA regulations are not prescriptive and so it is critical that institutions look at the financial implications and impact of each option for compliance. For sponsored awards, that responsibility may fall on the PI but sponsored projects offices should consider providing guidance and assistance in this area. There are several options for addressing situations where exempt employees who are currently paid less than the overtime threshold and work overtime. As illustrated in Figure 2, there are three options for compliance:

1. Reclassify and pay overtime or offer compensatory time at a rate of 1.5 of the employee’s hourly rate
2. Raise the salary of an employee who would normally work overtime to at least the minimum threshold
3. Limit the employee’s hours to 40 hours per week

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There are pros and cons to each option. Reclassifying employees to non-exempt allows base salaries to remain constant and provides for fiscal neutrality if the risk of overtime is slight or can be satisfied with compensatory time. However, if employees are working overtime, it is because there is work that needs to get accomplished. Moving from an exempt position to a non-exempt position may change retirement eligibility since there may be different options available to exempt and non-exempt. Consider the case where an employee has been contributing under one plan but is not vested and then is forced to move to a different plan. What happens to their status in the old plan?

For professional positions that meet the duties test, employers should consider the impact this might have on morale of not only those reclassified, but others with more experience doing the same type of work who would remain exempt and thus ineligible for overtime. If overtime/ compensatory time is likely, how will employees who are exempt feel about their less

Figure 2: Options for Compliance



experienced colleagues earning overtime/comp time or not being required to work overtime, thus increasing the demands on the exempt employee? Raising salaries to the minimum threshold avoids overtime and maintains certainty for monthly salary obligations. Beyond the issue of how these increases are funded is the potential for salary equity issues when less experienced employees received salary increases while those currently earning above the threshold do not.

This is an opportunity for research administration offices to provide assistance to principal investigators. It is imperative to engage PIs and departmental administrators in the conversation. This could easily impact lab coordinators and other research personnel beyond post docs. New proposals should take this into consideration when budgeting for anticipated overtime or seasonal fluctuations in workloads due to field work or during times where experiments are running around the clock.

This can be a highly emotional change management challenge. Communication is critical and should be ongoing and two-way. The biggest risk associated with the regulatory changes is the potential for employees to not report their overtime. It must be conveyed and stressed that asking employees not to report overtime or creating a culture where that happens will ultimately result in non-compliance. This is a risk area that is ripe for whistleblowing. Be cognizant that having the authority to make decisions won’t necessarily translate as a positive if units are required to absorb the costs (this includes PIs). ■



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