FLSA Changes Effective 12/1/2016

In May 2016, the Department of Labor published its final rule updating overtime regulations in the Fair Labor Standards Act (FLSA). The new overtime rules will become effective on December 1, 2016.

The key provisions of the Final Rule include updating the salary and compensation levels for Executive, Administrative, and/or Professional (“EAP”) exemptions as follows:

1. Sets the salary level threshold at $913 per week; $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 $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.

Additionally, the new overtime rules amend the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10% of the new standard salary level.

Application to Schools

“Preschools, elementary schools and secondary schools” are all “covered by the FLSA, and nothing in this Final Rule changes that coverage.” Defining and Delimiting the Exemptions, 81 Fed. Reg. 32391, 32398. The DOL notes that the FLSA’s minimum wage and overtime provisions apply to employees of educational institutions, “however, special provisions apply to many personnel at these institutions that make them overtime exempt.” Id.
Overtime exemptions still apply to an “employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools.” 29 U.S.C. 213(a). The minimum salary level threshold, however, is not applied to bona fide teachers. 29 CFR § 541.303(d). Therefore, the increase in the threshold salary level will not impact the overtime eligibility of bona fide teachers – they will remain exempt based on the nature of their work.

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity or imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. 29 CFR § 541.303(a). An educational establishment, in turn, is defined as “an elementary or secondary school system, an institution of higher education or other educational institution.” 29 CFR § 541.204(b). Preschool and kindergarten teachers may also qualify for exemption under the same conditions as teachers in elementary and secondary schools. See U.S. Department of Labor, Fact Sheet #46: Daycare Centers and Preschools Under the Fair Labor Standards Act (FLSA), https://www.dol.gov/whd/regs/compliance/whdfs46.pdf. Additionally, coaches or moderators/advisors in areas such as drama, speech, debate, or journalism may also be “engaged in teaching” and therefore be exempt. 29 CFR § 541.303(b).

**Key Takeaway:**

The increase in the threshold salary level will not impact the overtime eligibility of bona fide teachers – they will remain exempt based on the nature of their work. Preschool and kindergarten teachers may also qualify for exemption under the same conditions as teachers. Additionally, coaches or moderators/advisors in areas such as drama, speech, debate, or journalism may also be “engaged in teaching” and therefore be exempt.
Academic administrative employees are also exempt employees if their primary duty “is performing administrative functions directly related to academic instruction or training in an educational establishment or department of subdivision thereof.” 29 CFR § 541.204(a)(2).

Academic administrative employees are subject to the salary basis requirement, but there is a special provision that allows this requirement to be met if such employees are paid “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which [they are] employed.” 29 CFR § 541.204(a)(1). If the teachers’ base salary is at or below the salary level established by the new FLSA regulations, the academic administrative personnel will be exempt if their salary equals or exceeds the base pay. Academic administrative personnel subject to the exemption include Superintendents, principals and vice-principals, academic counselors and advisors, and other employees with similar responsibilities. Defining and Delimiting the Exemptions, 81 Fed. Reg. 32391, 32398; 29 CFR § 541.204(c)(1).

Collective Bargaining:

In general, the FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Collective bargaining agreements (“CBAs”) cannot waive or reduce FLSA protections. While the DOL has provided guidance for State and Local Governments relating to the Overtime Final Rule, the guidance document does not provide any suggestions relating to how school districts should handle the new requirements in connection with existing CBAs. The DOL’s guidance for State and Local Governments provides several options for employers to consider in determining how to best comply with the Final Rule, including: (1) raising salaries
for workers whose salaries are close to the new threshold and who pass the duties test; (2) paying overtime, or providing comp time for overtime hours in excess of 40 per week; (3) evaluating and realigning employee workload to limit the need for employees to work overtime; and (4) utilizing comp time rather than cash overtime payments. See U.S. Department of Labor, Overtime Final Rule and State and Local Governments, https://www.dol.gov/sites/default/files/overtime-government.pdf.

School districts also have the option of providing employees who work more than 40 hours in a week with comp time rather than cash payments. The comp time must be provided at a rate of 1 ½ hours for each overtime hour worked.

The Problem for School Employers

There seems to be no ability to use collective bargaining agreements or pre-existing employment contracts as a basis for an exemption from the new overtime rules. This may be particularly problematic for union employees like nurses or librarians, who are earning less than $47,476. Administrative or clerical staff who are not engaged in educational activities, like curriculum development or special education coordination, will also be newly eligible for mandatory overtime.

Limiting Overtime

Because more employees will be classified as non-exempt, it will be important for school districts to establish policies that will limit employee overtime hours. For example, non-exempt
employees who check emails from home raise overtime concerns. Under the FLSA, employers must pay their employees for checking and responding to e-mail during what would usually be the employee’s personal time.\textsuperscript{1} Districts, therefore, should consider establishing a policy with rules prohibiting work outside of business hours. In the alternative, the policy should require employees to obtain in advance written authorization for the work, report all time spent working and provide a procedure to do so. We suggest that school employers work with counsel to establish new overtime rules that limit their exposure.

\begin{quote}
\textbf{Key Takeaway:}
\textit{Districts may want to establish a general policy that prohibits employees from working more than 40 hours in a week without permission. Additionally, school districts should have a policy in place for non-exempt employees that addresses working remotely and outside of normal work hours.}
\end{quote}

\begin{quote}
\textbf{Existing Contracts}

Any contractual relationship with employees that is inconsistent with the new overtime rules should be closely scrutinized. \textit{We recommend that any union employees newly eligible for overtime be treated as hourly.} It is sensible to open negotiations with the Association on the limited issue of modifying the working conditions solely for newly non-exempt employees. This may take the form of a negotiated side letter of agreement pending global negotiations.
\end{quote}

\textsuperscript{1}“The FLSA defines the term ‘employ’ to include the words ‘suffer or permit to work.’ Suffer or permit to work means that if an employer requires or allows employees to work, the time spent is generally hours worked. Thus, time spent doing work not requested by the employer, but still allowed, is generally hours worked, since the employer knows or has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done.” U.S. Department of Labor, FLSA Hours Worked Advisor, http://webapps.dol.gov/elaws/whd/flsa/hoursworked/screen1d.asp.
Specifically, CBA provisions which permit or encourage salaried employees to work more than 40 hours per week, should be modified and salary should be reclassified as hourly compensation for newly non-exempt employees. Schools should work with legal counsel to craft language appropriate to any existing CBA.

*District or Supervisory Union employment contracts must be amended to better fit the new overtime rules where the employee has become non-exempt.* Contracts that contemplate salary for newly non-exempt employees are illegal and present significant financial exposures to the employer. The employer should revise those few contracts to reflect an hourly wage based on the established salary. The newly non-exempt employees should not have any concerns about the changes required by the new rules as it will only increase their earning potential under the revised contract since they will be eligible for overtime while earning the same pay for 40 hours per week.

**Key Takeaway:**

*District or Supervisory Union employment contracts must be amended to better fit the new overtime rules where the employee has become non-exempt.*
**Additional background:**

The Fair Labor Standards Act ("FLSA") is a federal law that sets minimum wage, overtime pay, equal pay, recordkeeping, and child labor standards for employees covered by the Act. Covered employees fall into two different categories: exempt and nonexempt. Exempt employees are not covered by the minimum wage and overtime requirements under the FLSA.

The new overtime rules focus primarily on updating the salary and compensation levels needed for EAP workers to be exempt. Specifically, the Department sought to “revise the regulations so that they effectively distinguish between overtime-eligible white collar employees who Congress intended to be protected by the FLSA’s minimum wage and overtime provisions and bona fide EAP employees whom it intended to exempt.” *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391, 32392 (May 23, 2016) (to be codified at 29 CFR pt. 541).*

Three common exemptions from the minimum wage and overtime provisions include the Executive Exemption, the Administrative Exemption, and the Professional Exemption. There are three general requirements for Executive, Administrative, and/or Professional ("EAP") workers to be exempt: (1) they generally must be paid on a salary basis; (2) they must meet the job duties of a particular exemption (defined by statute); and (3) they must be paid at or above a statutorily-defined salary. Additionally, highly compensated employees ("HCE") who perform one of the duties of an EAP employee and are paid a statutorily-defined annual compensation are exempt.