FLSA Background

WHAT IS THE FAIR LABOR STANDARDS ACT?

The Fair Labor Standards Act (FLSA) of 1938 (29 USC § 201 et seq.) is the United States’ federal wage and hour law, administered by the US Department of Labor. Among other things, it establishes the minimum wage and overtime pay, affecting employees in the private and government sectors. Everyone is “covered” but some employees are exempt from FLSA regulations and some are nonexempt. The FLSA requires one-and-one-half times the regular rate of pay in Overtime or Compensatory time be paid for all hours worked over 40 in a workweek for nonexempt employees.

WHAT DOES IT MEAN TO BE EXEMPT OR NONEXEMPT?

Exempt employees are excluded from overtime payment. Nonexempt employees are subject to the payment of overtime. Exemption is based on qualifying for all three of the following tests:

- Salary Basis Test. Employee must be paid on an annual salary basis; and
- Minimum Salary Test. Employees must be paid above a salary threshold amount that is currently $455 ($684 as of January 1, 2020) per week or $23,660 ($35,568 as of January 1, 2020) annually, and
- Duty and Discretion Tests. Employee must qualify as an executive, administrator, professional, or computer professional.

DOES THE VALUE OF MEALS AND LODGING THAT EMPLOYEES RECEIVE COUNT TOWARD THE FLSA MINIMUM SALARY REQUIREMENT?

No. Under 29 C.F.R. § 541.606, to be designated FLSA exempt, an employee is required to be compensated on a salary basis at a rate of not less than a specified level “…exclusive of board, lodging or other facilities.” The phrase “…exclusive of board, lodging, or other facilities” means “free and clear” of any claimed credit for “non-cash items of value that an employer may provide to an employee.” Therefore, any costs incurred by an employer in providing employees with meals or lodging cannot count towards the minimum salary requirement. See DOL Field Operations Handbook 22g09.

ARE INSTRUCTIONAL ACADEMIC STAFF AND OTHER EMPLOYEES WHOSE PRIMARY DUTY IS TEACHING OR INSTRUCTING SUBJECT TO THE MINIMUM SALARY THRESHOLD?

No. Instructional academic staff and others who qualify as “teachers” are not subject to the minimum salary threshold. To be exempt from FLSA overtime requirements as a teacher under 29 CFR § 541.303, the following two tests must be met:

- The employee’s primary duty must be imparting knowledge by teaching, tutoring, instructing, or lecturing, and
- The employee must be employed by an educational establishment.

Teachers who earn less than the minimum salary (including part-time teachers) are exempt as long as their primary duty is teaching.
ARE ATHLETIC COACHES EXEMPT AS “TEACHERS” UNDER THE FLSA?

Head coaches are generally exempt as “teachers.” Assistant coaches may be “teachers,” but it depends on their actual duties. If the primary duty of a coach is imparting knowledge by instructing – as opposed to such duties as scouting, recruiting and conditioning of athletes, arranging for equipment, devising game strategies, making travel plans, formulating budgets, and fundraising – then the coach is considered to be engaged in teaching and therefore exempt from overtime requirements and not subject to the minimum salary threshold test.

One DOL opinion letter states that Assistant Athletic Instructors (a.k.a. coaches) are exempt as “teachers” when they “…teach proper skills and skill development to student-athletes.” When teaching is not the primary duty, the coach may not be exempt. See DOL Field Operations Handbook 22i 22; DOL FLSA 2008-11.

IF AN EMPLOYEE HAS MULTIPLE JOBS, ARE THE EMPLOYEE’S SALARIES COMBINED WHEN DETERMINING WHETHER THE EMPLOYEE MEETS THE SALARY LEVEL TEST?

Yes. An employee is above the standard minimum salary threshold if his or her total salary is above the threshold. When the $684 per week threshold is adopted January 1, 2020, an employee’s combined weekly pay must be above that threshold.

WHAT DOES THE DOL MEAN BY “PRIMARY DUTY?”

The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to:

- the relative importance of the major or most important duty as compared with other types of duties;
- the amount of time spent performing the major or most important duty;
- the employee's relative freedom from direct supervision; and
- the relationship between the employee's salary and the wages paid to other employees for performance of similar work.

The amount of time spent performing the specific duty can be a useful guide in determining whether such work is the primary duty of an employee. Employees who spend more than 50 percent of their time performing a specific duty will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing requires exempt employees to spend more than 50 percent of their time performing a specific duty. Employees who do not spend more than 50 percent of their time performing their major or most important duty may nonetheless meet the primary duty requirement if the other factors (listed above) support such a determination.

IF AN EMPLOYEE HOLDS MORE THAN ONE JOB, CAN THE EMPLOYEE HAVE MORE THAN ONE FLSA STATUS DESIGNATION?

No. Regardless of how many concurrent jobs an employee holds, the employee’s status must be either exempt or nonexempt. For example: Employee X, whose total salary is below the minimum salary threshold, holds a part-time instructional academic staff position as a lecturer. The employee
also holds a part-time position as a recreational specialist. If Employee X’s primary duty is teaching as a lecturer, then the employee’s designation is exempt because teaching is the employee’s primary duty, and the employee qualifies for the “teacher” exemption regardless of salary. But if the primary duty is determined to be work as a recreational specialist, the FLSA designation will be nonexempt because total salary is under the minimum salary threshold.
FLSA Changes

WHAT CHANGES HAS THE DEPARTMENT OF LABOR (DOL) PROPOSED?

On September 24, 2019, DOL announced a final rule update to the salary threshold for exemptions to the FLSA’s overtime pay requirements. DOL will raise the standard salary threshold from its current level of $455 per week or $23,660 annually to $684 per week or $35,586 annually. This new minimum salary threshold will become effective January 1, 2020.

WHO WILL THE RULE CHANGE AFFECT?

If an employee’s rate of pay is below the new minimum salary level, that employee (unless he or she qualifies for one of the exceptions, such as the “teacher” exception) must be nonexempt. Employees whose pay is below the threshold and who are designated as nonexempt will have to account for their hours on an hourly basis.

WHO IS EXCLUDED FROM THESE CHANGES?

Faculty and instructional academic staff whose primary duties are teaching will remain exempt regardless of their salaries. Teachers, lawyers, and doctors qualify for an exemption as professionals. To be properly designated as a teacher, however, an employee must have actual instructional duties. Those who support teaching activities without actual teaching interaction will most likely be designated as nonexempt.

WILL SOME EMPLOYEES RECEIVE A PAY INCREASE FOR THE PURPOSE OF MAINTAINING THE EMPLOYEE’S EXEMPT STATUS?

There is no additional funding for such pay increases, but some UW System institutions may in some cases decide to raise the pay rate of some employees that are close to the threshold up to the threshold amount in order to preserve their exempt status. But institutions do not have to move any employees to the new threshold.

IF MY FLSA STATUS WILL CHANGE TO NONEXEMPT, MAY I OPT OUT OF THIS CHANGE IF I WANT TO CONTINUE TO BE CONSIDERED A SALARIED OR EXEMPT EMPLOYEE?

No. Generally, employees may not waive their FLSA rights.
Timekeeping

HOW IS TRACKING HOURS WORKED DIFFERENT FOR AN HOURLY NONEXEMPT EMPLOYEE?

Nonexempt employees must account for their time worked rather than accounting for leave used. For example, nonexempt employees are not supposed to work during (unpaid) lunch breaks, and lunches of 30 minutes (or more) are unpaid time. All time worked must be reported.

AS A NONEXEMPT EMPLOYEE, CAN I STILL WORK EARLY AND LATE? CAN I CHECK MY MESSAGES FROM HOME?

Nonexempt employees can make arrangements with their employer to work from home occasionally, to check messages at night, or to completely change their daily schedules to different hours than were previously expected, but all time worked except de minimis (or minimal) periods of time must be accounted for and recorded as “time worked.” Any alternative arrangements will have to be made with the individual school/college/division for which the employee works.

IF COMPENSATORY TIME IS PERMITTED AT MY INSTITUTION, HOW MUCH COMP TIME CAN BE ACCUMULATED?

The rules on accumulating compensatory time allow an accumulation of not more than 80 hours. Any excess comp time over that limit has to be paid out. Any compensatory time earned in a calendar year which is unused by April 30 of the following year will be converted to a cash payment and included in the earnings for the pay period that includes May 1. See UW System Administrative Policy 1277 (formerly TC 3) Compensation for more information. Please note that not all UW System institutions permit the accrual of comp time.

IF THE PRIMARY DUTY OF AN EMPLOYEE WITH MULTIPLE JOBS IS THE PERFORMANCE OF NONEXEMPT WORK, MUST THE EMPLOYEE TRACK TIME SPENT PERFORMING EXEMPT WORK (E.G., TIME SPENT TEACHING)?

Yes.
Special Situations

WILL THE SALARIES OF PART-TIME EMPLOYEES BE PRO-RATED TO KEEP THEIR SALARIES ABOVE THE NEW THRESHOLD?

No. Pay for part-time appointments will not be pro-rated under the new regulations. An employee with a .5 FTE appointment, to a position that would pay $60,000 (over the threshold) for 1.0 FTE, is paid $30,000. $30,000 is below the anticipated minimum salary threshold, and the employee will be nonexempt.

WHAT ABOUT EMPLOYEES THAT WORK A NINE-MONTH ACADEMIC YEAR WITH AN EXTRA TWO MONTHS' CONTRACT IN THE SUMMER? IS THE TOTAL PAY AVERAGED OVER 11 MONTHS SO THE EXEMPTION WILL REMAIN IN PLACE ALL YEAR?

No. If the FLSA regulations require employees to make at least $684 per week to be exempt, and if the employee makes more than $684 per week during the academic year but less than $684 per week in the summer, that employee will be exempt during the academic year but nonexempt during the two months of the summer.

CAN NONEXEMPT ACADEMIC STAFF EMPLOYEES OPT TO CONVERT TO UNIVERSITY STAFF?

No.
Effects on Your Pay and Benefits

I AM AN ACADEMIC STAFF MEMBER ON A SALARIED APPOINTMENT DOCUMENT. HOW WILL THE UNIVERSITY ENSURE I AM PAID THE FULL AMOUNT?

For Academic Staff members who are a full-time employee, (i.e. working 40 hours a week), are still engaged in an appointment document will continue to receive a salaried wage until the conclusion of their appointment. If employees are renewed at the conclusion of their appointment, they will be transitioned to an hourly rate of pay in which they will enter time for approval. During the transition period, employees will be required to monitor time and seek approval and report hours worked, over 40 hours, in the standard workweek, (Sunday through Saturday).

For Academic Staff members who are less than a full-time employee, (i.e. working less than 40 hours a week), they will be required to keep time in the HRS system on an hourly basis, rounding to the nearest fifteen-minute increments. These hours must be approved by their supervisor.

I UNDERSTAND THAT MY PAID TIME OFF ACCRUES PER PAY CYCLE. HOW WILL THIS IMPACT MY PAID LEAVE ACCRUAL?

For those Academic Staff members who are full-time employees, you will be on a salaried – non-exempt schedule; meaning you will receive your wages paid every two-weeks without having to enter hours. This automatic schedule will continue to provide accrual of benefits at the appropriate rate. On July 1, 2020, you will be required to keep track of hours in the HRS system. This means that your time worked each week will be recorded and paid based on that approved record. Leave accrual will be applied during period that you have actual recorded and approved hours.

For those Academic Staff members who are less than full-time employees, you will only accrue leave based on the hours you were paid.

WILL I BE PAID FOR MY OVERTIME?

Yes. Consistent with UWL’s policy on overtime, employees will earn compensatory time, or in rare instances, be paid for the overtime worked. Overtime must be approved in advance of working beyond 40 hours in the standard workweek.
Supervisor Information

WILL I HAVE TO APPROVE TIME AND LEAVE NOW?

Yes. Supervisors of affected employees will now need to approve time on a regular basis – even during the transition period. You will be reminded by UW Shared Services Payroll Operations of when approvals are required.

DO I NEED TO ASSIGN A BACK-UP TIME APPROVER?

Yes. Now is the time to consider who should be the back-up time approver in case you are unavailable to approve time. This could be a peer at the same level as you in the same work unit, your supervisor or a division leader. Contact Human Resources if you have questions about who should be a back-up approver.