

Electronic Alert

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New Overtime Rules: Special Provisions for Employers in Higher Education
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Today the United States Department of Labor released its long-awaited final rules on the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). The new rules take effect December 1, 2016, allowing a longer implementation period than originally expected. Although the new rules apply generally to employers in higher education (as they do to nearly all employers), there are specific FLSA provisions for employees whose primary duty is teaching, as well as for academic administrative personnel. Remember that exemptions generally require that the employee satisfy both salary and duties tests. Remember too that employers are covered by both federal and state law, so if state law imposes more stringent requirements, employers must satisfy the requirements that are more beneficial for the employee.

Higher minimum salary thresholds.

The most sweeping change made by the new rules is a doubling of the minimum salary level required for the white collar exemptions. Once the rules take effect, the minimum salary level will be raised from the current \$455 per week (or \$26,660 per year) to \$913 per week (or \$47,476 per year). The new rules also raise the minimum allowable salary for highly compensated employees (who must satisfy only a minimal duties test) from \$100,000 per year to \$134,004 per year. These thresholds will be automatically updated every three years, starting in 2020. Employees of higher education institutions whose duties are not unique to the education setting (like certified athletic trainers, certified public accountants, psychologists, and food service and bookstore managers) will generally be subject to the new salary level to support an exemption, assuming the applicable duties test is also met.

Special considerations for employers in higher education.

The new rules do not change existing law applicable to employers in higher education. Employees whose primary duty is teaching, tutoring, instructing or lecturing are not required to meet the new salary threshold to support an exemption. The same is true for certain academic administrative personnel (such as department heads, academic counselors and advisors, and other advisors) who are paid at least the entrance salary for teachers.

There are other positions unique to higher education under federal law (always remember state law could be different—for example, Oregon private educational institutions still must pay teachers on a salary basis of at least minimum wage):

- **Adjunct instructors** should qualify as teachers - so the new federal salary threshold will not apply.
- **Athletic coaches** who qualify as teachers need not meet the new salary threshold; those that do not qualify as teachers (such as coaches whose primary duty is recruiting) will need to meet the new threshold to support an exemption. “Teaching” for a coach can include instructing athletes on how to play a sport.



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- **Graduate teaching assistants** whose primary duty is teaching do not need to meet the new federal salary thresholds.
- **Postdoctoral fellows** will need to satisfy the new minimum salary threshold in order to support an exemption. The NIH salary guidelines, for example, place less experienced postdocs below the minimum threshold, and more experienced postdocs above it. Many fellows also teach, which could support an exemption if it is the primary duty. Employers in higher education may choose to supplement a fellow's compensation to maintain an exemption.
- **Research assistants** doing research under a faculty member's supervision in the course of obtaining a degree are considered to be in an educational (and not employment) relationship with the school; the new rules do not change that relationship even if a stipend is offered.
- **Residential assistants** who are students and are participating in a bona fide educational program in exchange for reduced room and board or tuition credit are not considered employees subject to the requirements of the FLSA, and the new rules will not change this treatment.

Compliance options for employers in higher education.

Like all employers subject to the new rules, employers in higher education have options to ensure they remain in compliance, but since the most significant change in these rules is, as expected, the higher salary threshold, many employers will first consider whether to raise the salary or reclassify the employee as nonexempt. Public institutions may be able to use comp time subject to state law. The Department of Labor identifies the following options: raise salaries, realign employee workload, pay salary + overtime, and adjust base pay with overtime added.

DOL resources.

Make sure to download the DOL fact sheet on Overtime Final Rule and Higher Education at <https://www.dol.gov/sites/default/files/overtime-highereducation.pdf> and the longer DOL guidance at <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf> as a starting point for your policy review.