

Fair Labor Standards Act (FLSA) Changes Frequently Asked Questions

The Fair Labor Standards Act (FLSA) establishes wage and hour regulations for employers. The Department of Labor (DOL)'s Wage and Hour Division (WHD) administers FLSA regulations and recently revised rules to the executive, administrative and professional exemptions from overtime payment under the Fair Labor Standards Act.

Current FLSA Regulations

Under the current regulations, a position must satisfy three criteria to qualify as exempt from overtime:

1. The incumbent in the position must be paid on a salaried basis (the salary basis test);
2. The salary must be at least \$455/week, or \$23,660 annually (the minimum salary requirement or salary threshold);
3. The position's "primary duties" must be consistent with executive, professional or administrative positions as defined by DOL (the primary duties test).

FLSA Rules previously expected to take effect December 2016

Changes to the FLSA regulations were announced on May 18, 2016. These updates were slated to go into effect December 1, 2016; however, on November 22, 2016, a federal judge placed a preliminary injunction on the FLSA overtime rule, tentatively halting the legal requirement to make changes. Because implementation was well underway, University leadership made the decision to move forward with implementing all announced changes. Significant changes at that time were related to the minimum salary threshold. This impacted the classification and exemption status of over 800 staff and faculty at OSU.

- **Significant increase to the minimum salary threshold.**
The new rule would increase the threshold to \$913/week, or \$47,476 annually.
- **Increase to highly compensated employee threshold.**
The total annual compensation threshold for exempt highly compensated employees' would increase to \$134,004 from \$100,000.
- **The thresholds increase automatically.**
For the first time ever, the salary threshold would be tied to an automatic escalator-every three years to keep pace with inflation.

New 2020 FLSA Regulations

The DOL published new regulations on September 24, 2019. These updates are to take effect January 1, 2020. There are no changes made to the salary basis test or duties test. However, changes to the minimum salary threshold include:

- **Increase to the minimum salary threshold.**
The minimum salary threshold for individuals to be exempt from overtime will increase from \$455 per week (\$23,660 annually) to \$684 per week (\$35,568 annually).
- **Increase to highly compensated employee threshold.**
The total annual compensation threshold for exempt highly compensated employees' increases to \$107,432 from \$100,000.
- **The thresholds will be reviewed on a more regular basis.**
The new rule provides that the thresholds will be updated more regularly (but not on any set

fixed interval) in the future after notice and an opportunity to comment on any proposed changes before they are implemented.

When are the new regulations going to take effect?

The effective date of this final rule is January 1, 2020.

Will the University adopt a different salary threshold for overtime exemption?

Yes. The University will be adopting a higher salary threshold of \$38,040 annually for exemption that would meet any of the FLSA's standard duties tests. This higher threshold allows the University to mitigate the impact of anticipated future changes to the FLSA threshold.

What is FLSA exempt versus non-exempt status?

Employee eligibility for overtime pay is determined by regulations under the Fair Labor Standards Act (FLSA). Various tests of duties and salary threshold determine whether a position is considered "exempt" or "non-exempt," which refers to whether the job is exempt from overtime pay or not. Employees in non-exempt positions must be paid for overtime worked and are generally required to report time worked more frequently and in more detail than those in exempt jobs.

What about part-time staff?

For the purpose of FLSA, the pro-rated full-time rate (known as the comp rate) needs to be above the University \$38,040 salary threshold to meet the exemption status. Therefore, hours worked must be tracked in situations in which the compensation rate falls below the new threshold.

If I am impacted by this change, will my pay schedule change?

Most likely, yes. Most non-exempt employees are paid bi-weekly. Employees changing to exempt will be paid on the monthly payroll cycle. For payroll schedules, please to go <https://payroll.okstate.edu/schedules-deadlines>.

Will staff benefits change for positions that are re-classified to exempt?

Yes. Rates of annual leave accrual are determined by University policy and are not determined by FLSA regulations. Staff members whose positions are reclassified to exempt will change to the appropriate monthly annual leave accrual.

Will staff benefits be grandfathered for positions that are re-classified to non-exempt?

Yes. Rates of annual leave accrual are determined by university policy and are not determined by FLSA regulations. Staff members whose positions are reclassified to non-exempt will retain their rate of annual leave accrual. They will begin reporting hours on a bi-weekly basis and paid accordingly.

Does exemption status affect pay at OSU?

Exemption status has an impact on overtime pay and time reporting.

- Overtime for Non-exempt Employees: Non-exempt staff must record all hours worked, including overtime hours, and will receive additional pay for overtime. Therefore, supervisors should approve overtime before extra hours are worked.
- Time Reporting: Non-exempt staff record all hours on a biweekly schedule. Applicable comp time or overtime hours are recorded and paid accordingly.

How and when will affected employees be notified of any changes?

Communications are underway with executives and leaders in affected units and detailed communications will be available in the coming months for individuals directly affected.

Is a non-exempt job still considered a professional position?

The designation of exempt or non-exempt is simply a legal designation and does not impact the importance of an employee's work or contribution.

Do the new FLSA rules affect faculty?

The new rules do not affect instructional faculty (tenure track, clinical track and lecturers). Research faculty and librarians may be affected.

Are post-doctoral researchers affected by the new FLSA rules?

Post docs may be affected by the new rules (unless the **primary** duty is teaching).

Are graduate research assistants (GRA) and graduate teaching assistants (GTA) affected?

When instruction is the primary duty, the new rules do not apply, so teaching assistants will not become eligible for overtime pay. When research assistants are engaged in research in the course of obtaining a degree, they will not become eligible for overtime pay under the new rules.

Do all monthly employees making less than the threshold have to change to hourly?

There are a few provisions for higher education which identify personnel that would be unaffected by the rule, including teachers, doctors and lawyers. Academic administrative personnel who help run the institution and interact with students outside the classroom such as academic counselors, intervention specialists and others with similar responsibilities are subject to a special salary threshold specific to higher education.

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.

Who qualifies as an academic administrative employee?

Employees whose primary duty is performing administrative functions directly related to academic instruction qualify as academic administrators. In Fact Sheet #17S entitled "[Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act \(FLSA\)](#)" the DOL references Title 29 of the Code of Federal Regulations part 541.204 which states:

"Employees engaged in academic administrative functions include: 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."

In addition, “Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions.”

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. coach) 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](#).

Will employees have the option of accruing compensatory time rather than taking pay at the overtime rate?

State and local government employers can pay their nonexempt employees at least 1 ½ hours of paid compensatory time off for each hour of overtime worked rather than paying a premium rate for the overtime. Keep in mind an agreement or policy needs to be in place for an employee to accrue compensatory time. This can be a one-time agreement provided in departmental regulations, orientation or at time of hire, just as long as the agreement is made known prior to the work being performed and the employee understands all over time will be handled accordingly in the future.

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.

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.

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. If an employee's primary duty is the performance of nonexempt work, that employee must record all hours worked, and hours worked beyond 40 in a workweek must be compensated at time-and-one-half.

Can employees opt out of this change if they want to continue to be considered a salaried or exempt employee? Or if they are nonexempt and would like to continue to receive overtime compensation?

No. The FLSA is a federal law. The determination of an employee's FLSA status is governed by the requirements of the federal law – it is not an employee choice. It is at the discretion of the organization with regard to each individual's compensation, position responsibilities, position exemption status for positions with same or similar titles, and the new regulation.

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. The FLSA regulations require employees to make at least the weekly minimum threshold per week to be exempt. If the employee makes more than the weekly threshold during the academic year but less than the weekly threshold in the summer, that employee will be exempt during the academic year but nonexempt during the two months of the summer.

If a part-time lecturer also holds a part-time non-instructional academic staff position, does the employee qualify for the exemption as a teacher?

It depends. If the employee's primary duty is teaching, he or she qualifies for the teachers' exemption.

Do daycare center employees qualify for the "teacher" exemption?

It depends. Preschool teachers and other daycare center employees who are employed by an educational institution are FLSA exempt if their primary duty is teaching. In its [Field Operations Handbook](#) DOL states that preschool employees "engaged in the intellectual activities of teaching, tutoring, instructing, or lecturing in order to impart knowledge" meet the primary duty test for exemption as teachers. But "employees whose primary duty is to provide custodial care for children" do not qualify for the teacher exemption.

Are Residence Hall Assistants exempt or nonexempt under the FLSA?

Neither. Generally, Residence Hall Assistants (or “dormitory counselors”) are not considered employees for FLSA purposes, as long as they are students and receive reduced room and board charges. A court action (Marshall v. Regis Educational Corporation, 666 F.2d 1324 (10th Cir. 1981) specifically held that student residence hall advisors were not employees covered by the FLSA because, taking into account the totality of the circumstances, the students were primarily receiving personal educational benefits from their service. Moreover, the DOL Field Operations Handbook states that if a college student (who is in a bona fide educational program) serves as residence hall assistant and receives remuneration in the form of reduced room or board charges, payment of cell phone expenses, tuition credits and the like, that student is not an employee within the meaning of the FLSA. See [DOL Field Operations Handbook 10b 24](#).

Do residence hall managers perform academic administrative work?

Probably not. DOL guidance indicates that unless the primary duty of a residence hall manager is performing administrative functions directly related to academic instruction, a residence hall manager does not qualify for the academic administrative employee exemption.

Are student assistants subject to FLSA requirements?

The following table lists the probable FLSA status of individuals with student assistant job codes:

POSITION	FLSA STATUS
Fellow	Non-employee for the purposes of the FLSA – a fellowship does not create an employment relationship
Scholar	Non-employee for the purposes of the FLSA – a scholarship does not create an employment relationship
Trainee	If the primary beneficiary of the work performed is the individual, non-employee for the purposes of the FLSA
Teaching Assistant	Exempt employee – primary duty is teaching (See DOL Guidance for Higher Ed Institutions at p. 8)
Research Assistant	If the primary beneficiary of the work performed is the individual, non-employee for the purposes of the FLSA (See DOL Guidance for Higher Ed Institutions at pp. 8-9)
Lecturer	Exempt employee – primary duty is teaching (See DOL Guidance for Higher Ed Institutions at p. 8)
Program Assistant	Employee for the purposes of the FLSA – generally nonexempt, but may qualify for an exemption (See DOL Guidance for Higher Ed Institutions at p. 9)
Project Assistant	Employee for the purposes of the FLSA – generally nonexempt, but may qualify for an exemption (See DOL Guidance for Higher Ed Institutions at p. 9)
Graduate Assistant	FLSA exempt employee if primary duty is teaching, nonexempt employee if duties are not part of an overall education program (See DOL Guidance for Higher Ed Institutions at pp. 8-9)

Undergraduate Assistant	Employee for the purposes of the FLSA – generally nonexempt, but may qualify for an exemption (See DOL Guidance for Higher Ed Institutions at pp. 8-9)
Undergraduate Intern	If the primary beneficiary of the work performed is the individual or if the internship involves activities generally recognized as extracurricular, non-employee for the purposes of the FLSA (See DOL FOH 10b24(b))

Where can I get more information?

Complete information on the new rule is available from the [Department of Labor’s Wage and Hour Division](https://www.dol.gov/eis/whd/) or in the CFR at <https://www.federalregister.gov/documents/2019/09/27>. Please contact Human Resources osu-hr@okstate.edu with any additional questions.

	Current Rules	Proposed Rules (Dec. 1, 2016)	New Rules (in effect Jan. 1, 2020)	OSU Rules (Jan. 1, 2020)
Salary Level	\$455 weekly (\$23,660 per year)	\$913 weekly (\$47,476 per year)	\$684 weekly (\$35,568 per year)	Approximately \$732 weekly (\$38,040 per year)
Highly Compensated employees (HCE) Limit	\$100,000 annually HCEs are considered exempt without regard to the duties test	\$134,004 annually	\$107,432 annually	\$107,432 annually
Automatic adjusting of salary limits	None	Adjusted every three years, based on the salary levels listed above	Thresholds will be updated more regularly (but not on any set fixed interval) in the future after notice and an opportunity to comment on any proposed changes before they are implemented	N/A
Bonuses	Nondiscretionary bonuses and commissions don’t count toward the standard salary level	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments and commissions	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments and commissions (paid at least annually)	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments and commissions (paid at least annually)

		(paid at least quarterly)		
Duties Test	See current duties test description at https://www.dol.gov/whd/overtime/fs17a_overview.pdf	No changes to the standard duties test	No changes to the standard or HCE duties test	No changes to the standard or HCE duties test