White Collar Exemptions In The Academic Workplace

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Introduction

The United States Department of Labor's new white collar exemption regulations take effect on August 23, 2004, but leave questions unanswered when applied to the academic workplace. This article analyzes "gray area" jobs on campus under the new regulations, and provides helpful guidance to the educational establishment attempting to classify properly its employees as salaried exempt or hourly non-exempt under the new Fair Labor Standards Act ("FLSA") regulations. Because the positions discussed below have caused some confusion, the article clarifies the statutory and regulatory analysis applicable to such jobs. A number of positions historically treated as salaried may no longer be considered exempt under the new regulations, thereby requiring colleges and universities to track the hours worked by these employees for purposes of payment of overtime pay. The nature of many of these jobs will make this endeavor particularly challenging for many colleges and universities; therefore, the article gives practical suggestions for implementing the new regulations to ensure compliance.

Graduate Assistants

Graduate Assistants are not discussed specifically in the new white collar exemption regulations or in the Preamble to the new regulations. A U.S. Department of Labor ("DoL"), Wage & Hour Administration Opinion Letter dated August 22, 1967, however, discusses the application of the *current* exemption regulations to Graduate Assistants, and may be instructive for purposes of determining how graduate assistants will be treated under the *new* exemption regulations.

In the 1967 Opinion Letter, the DoL stated that a Teaching Assistant who is assigned a class or laboratory section for the purpose of instruction may qualify for exemption from the FLSA's overtime requirements because he or she is employed in the professional capacity of a teacher. An Academic Assistant, although not in charge of a class or laboratory section, but who answers students' questions and assists them in their academic work, may also qualify for the professional exemption as a teacher, according to the DoL. If the Assistant has as his or her primary duty a teaching activity, such as demonstrating laboratory experiments for the benefit of students, he or she may also qualify for exemption as a teacher.

In the case of a graduate student engaged as a Research Assistant, the DoL Opinion letter addressed a different but related issue, and stated that it will not assert that an employer-

employee relationship exists where such a student is engaged in original, professional-level research that is primarily for the purpose of fulfilling the requirements for an advanced degree, even though he or she may be performing such research under a grant or stipend. The DoL ruled that, because an employer-employee relationship did not exist, there is no application of the overtime provisions of the FLSA.

Similarly, in a June 28, 1994 Opinion Letter, the DoL reaffirmed its earlier position regarding Research Assistants, and determined that "in cases where graduate students in a graduate school are engaged in research in the course of obtaining advanced degrees and where the research is performed under the supervision of a member of the faculty in a research environment provided by the institution under a grant or contract," it would not assert that an employer-employee relationship exists between the students and the school, even if the student receives a stipend for his or her services under the grant or contract.

The DoL Opinion Letters issued under the old regulations, however, have only persuasive value under the new regulations. It remains to be seen what the DoL will do in the future as to enforcement, because the graduate assistant position is not discussed as an example of the teacher/professional exemption in the new regulations. To the extent that the 1994 Opinion Letter treated Research Assistants as non-employees, as opposed to employees who are exempt, the Opinion Letter should be considered reliable on similar facts, at least until any further word from DoL.

Whether Graduate Assistants can be classified properly under an exemption in the *new* FLSA regulations depends upon an analysis of the actual duties at the particular educational establishment. Teaching must be the primary duty for Graduate Assistants to be considered exempt under the professional exemption. The key is "imparting knowledge" in "employment as a teacher." 29 C.F.R. § 541.303(a). It is a good rule of thumb that Teaching Assistants and Academic Assistants are exempt under the FLSA. However, this is *only* a rule of thumb. Hopefully, many Teaching Assistants teach small seminars as breakouts from large lectures, without the professor present or active. Such a primary duty should be safe from attack. Research Assistants who have contact with professors, but not students, should be considered non-employees, if the facts support such status, or non-exempt employees, if necessary. Caution certainly is in order with this group, depending on the school and maybe even the particular department. Auditing actual duties is the safest route, even where the job has been considered salaried-exempt for a long time. There could be a lot of "task creep" in the wrong direction, though, as there is in many non-education jobs.

To the extent that the Graduate Assistant is a "part-time employee" and is working 40 or fewer hours in a workweek, he or she would not be entitled to any overtime pay, regardless of the classification of the position. Moreover, if a Graduate Assistant is spending time, for example, in the chemistry lab for his or her own personal study or research, not related to work to be performed for the college or university, that time is non-compensable, and does not need to be included for purposes of calculating whether the individual worked more than 40 hours in a workweek.

Coaches

Under the new regulations, faculty members who are engaged as teachers, but who also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams, are engaged in "teaching" and are therefore generally exempt under the FLSA's professional exemption. 29 U.S.C. § 541.303. A non-faculty member who is engaged as a coach similarly qualifies for exemption, but as a bona fide executive employee, because he or she meets the following requirements: his or her primary duty is management of an enterprise in which the employee is employed, or of a customarily recognized department or subdivision thereof (29 U.S.C. § 541.100 (a)(2)); he or she customarily and regularly directs the work of two or more other employees (29 U.S.C. § 541.100(a)(3)); and he or she has authority to hire or fire other employees, or his or her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight (29 U.S.C. § 541.100(a)(4)). Therefore, head coaches are not entitled to overtime pay under the new white collar exemption regulations.

Assistant Coaches/Associate Head Coaches

The positions of Assistant Coach and Associate Head Coach are not addressed in the new FLSA exemption regulations or the Preamble to the regulations. An August 24, 1998 DoL Opinion Letter, however, analyzes the application of the *current* FLSA exemption regulations to Assistant Coaches and Associate Head Coaches, and may be useful for purposes of determining how Assistant Coaches and Associate Head Coaches will be treated under the *new* exemption regulations. The Opinion Letter determined that neither an Assistant Coach nor an Associate Head Coach qualified as exempt under the current regulations, under either the professional or the administrative exemption, as explained below.

In the Opinion Letter, the Assistant Coach reported to and was under the direct supervision of the Head Coach of the sport he was coaching. He assisted in the coordination of the athletic program (scouting, recruiting and conditioning of athletes, arranging for equipment, devising game strategies, making travel plans, formulating budgets and fundraising). The DoL determined that Assistant Coaches spent only 25% of their time teaching and 75% on unrelated activities, and therefore, they could not qualify as "teachers" under the professional exemption. Nor could they qualify under the administrative exemption because they did not exercise sufficient discretion and independent judgment.

The DoL Opinion Letter also addressed the position of Associate Head Coach, where the individual worked in conjunction with the Head Coach to develop and administer strength training programs. He was responsible for instructing and organizing all aspects of the strength and conditioning program, including the technical supervision, and evaluation and preparation for practices and competition. The DoL determined that the primary duty of the Associate Head Coach was working directly with the students in "hands-on" operations, as opposed to performing functions as a department head,

administering such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program. Therefore, the DoL determined that Associate Head Coaches did not meet the criteria for the administrative exemption.

Assistant Coaches and Associate Head Coaches most likely will not be properly classified as exempt under the new regulations. Accordingly, if employees were misclassified in the past, this is an opportunity for educational institutions to reclassify those employees to hourly non-exempt status to ensure that their workforce is in compliance with the FLSA.

Assistant Athletic Trainers

Athletic Trainers are generally exempt under the learned professional exemption of the *new* regulations. 29 U.S.C. § 541.301(8). The new FLSA regulations state that Athletic Trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption. 29 U.S.C. § 541.301(8). To the extent that an Assistant Athletic Trainer does not possess these qualifications, however, he or she most likely would be classified as non-exempt under the *new* regulations.

The August 24, 1998 DoL Opinion Letter (discussed above) issued under the *current* regulations determined that the duties and responsibilities of Assistant Athletic Trainers did not meet all the requirements for exemption. The Assistant Athletic Trainer in that letter reported to a Head Athletic Trainer, and assisted that individual with sports programs by providing supervision, training, evaluation, care, treatment prevention, and rehabilitation. The DoL decided that the duties and responsibilities did not meet the requirements for exemption under the FLSA because the employee lacked the discretion and independent judgment in the performance of his work required under the administrative exemption, and because the Assistant Athletic Trainer spent more than 50% of his time on non-exempt work.

As with the position of Assistant Head Coach/Associate Head Coach, the effective date of the new regulations presents colleges and universities with an opportunity to correct any misclassifications of employees.

Academic Counselors

Academic Counselors are generally exempt under the new administrative exemption for educational establishments. 29 U.S.C. § 541.204. Their primary duty must be "performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof." No distinction is

drawn in the new regulations between public and private schools, or between those operated for profit and those that are not for profit. The Academic Counselor must be engaged in "work related to the academic operations and functions in a school," and include "operations directly in the field of education." Academic administrative functions include Academic Counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements. 29 U.S.C. § 541.204(c)(1).

Admissions Recruiters/Enrollment Counselors

Admissions Recruiters are generally not exempt under the academic administrative exemption. 29 U.S.C. § 541.204. The Preamble to the *new* regulations explains that the DoL Opinion Letters issued February 19, 1998 and April 20, 1999 under the *current* regulations elaborate on the condition that the academic administrative exemption is limited to employees engaged in work relating to the academic operations and functions of a school, rather than work relating to the general business operations of the school. Thus, Enrollment Counselors who engage in general outreach and recruitment efforts to encourage students to apply to the school do not qualify for the academic administrative exemption because their work is not sufficiently related to the school's academic operations. The April 20, 1999 Opinion Letter noted that, depending upon the employee's duties, they might qualify for the general administrative exemption because their work related to the school's general business operations and involved work in the nature of general "sales" promotion. The Preamble states specifically that, consistent with DoL Opinion Letters issued under the *current* regulations, Admissions Counselors were not included as an example of an exempt academic administrative employee.

Other Administrative Employees At Educational Institutions

Employees engaged in academic administrative functions under *new* regulation 29 U.S.C. § 541.204(c)(1) include: the superintendent or other head of an elementary or secondary school system, and certain assistants; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education; academic counselors; and other employees with similar responsibilities.

Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, food service managers or dieticians generally do *not* perform academic administrative functions. Such employees, however, may qualify under other exemptions. Moreover, the Preamble to the new regulations states that Enrollment/Admissions Counselors generally do not qualify for the academic administrative exemption.

Summer Camp Counselors

Summer Camp Counselors, particularly those working at a college or university, are *not* addressed under the new regulations.

Exempt teachers under the professional exemption include nursery school teachers. 29 U.S.C. § 541.303(b). Exempt academic administrative employees include employees who perform administrative functions directly related to nursery school programs. 29 U.S.C. § 541.204(b). Of persuasive value is a DoL Opinion Letter dated September 20, 2000, which determined that preschool employees, whose primary duty is to protect and care for the needs of children (as opposed to providing educational activities) would not ordinarily meet the requirements for exemption as teachers. Furthermore, the DoL Opinion Letter explained that work that can be performed by employees with education and training below the college level would not be work at a bona fide professional level within the meaning of the current regulations. Under these guidelines, Summer Camp Counselors would be properly classified as non-exempt under the *new* regulations.

Graphic Artists

A Graphic Artist could qualify under the creative professional exemption under the *new* regulations if the employee's primary duty is the performance of work requiring invention, imagination, originality or talent in the graphic arts (as opposed to routine mental, manual, mechanical or physical work). 29 U.S.C. § 541.302. A July 2, 1996 DoL Opinion Letter issued under the *current* regulations explained that a Graphic Artist performing work that is original and creative, the results of which are dependent primarily upon the invention, imagination or talent of the employee could qualify for the professional exemption, while a Graphic Arts Technician who engages in the drawing or reproduction from flat illustration, operating an offset duplicating machine to reproduce copies and who performs otherwise technical duties generally would not meet the conditions for exemption, notwithstanding that this technician may well possess the training for original artistic production.

Conclusion

In conclusion, educational institutions should undertake an audit of their workforces, by August 23, 2004, or as soon thereafter as practical, to ensure that their employees are properly classified as exempt or non-exempt employees under the new FLSA regulations. Such an audit may also review the status of campus contributors under prior DoL opinions as to employee or non-employee status. Exempt status and non-employee status are significant for many colleges and universities. Particular jobs at particular institutions must be examined carefully to preserve them or to make adjust ments, as necessary. Finally, educational institutions in several states should be mindful that state law may impose more stringent requirements than federal law as to certain exemptions.

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