The Fair Labor Standards Act (FLSA) Wage and Hour Division: DOL Changes the Regulations and It Will Impact Head Start. Changes take effect on December 1, 2016!

Dr. Tim Nolan

Please Note: The following policy brief is information pulled together to help you better understand both some of the questions that you must answer and the changes you might need to make in relationship to the Department of Labor (DOL) Wage and Hour Act regulatory changes. Each agency is unique. Each grantee should seek counsel from their own attorney and accountant to address the local agency variables as well as the impact of unique state regulations that might impact aspects of implementation of the Act. I am not seeking to provide legal or financial advice.

As you might well know, the Department of Labor has changed the Wage and Hour dimensions of the Fair Labor Standards Act (FLSA) as it addresses who is eligible for exemption from the Act, defining who must be paid overtime if they work in excess of 40 hours per week. To highly simplify the situation, and as a bit of an Executive Briefing, the following points define the overall direction of the changes:

A. The process of how one is determined to be exempt from the Act, and therefore who must be paid overtime, has not changed and continues to be established by a combination of three items:
   1. The professional nature of the job, with extensive regulations defining this
   2. The fact that the job holders are considered salaried
   3. A minimum salary level that must be paid in order for the position to be exempt

B. DOL has not touched the rules as to the type of work that is part of defining exemption. Therefore, no change here. If positions in your agency fit the definition in the original Act, those positions would still be eligible to be exempt.

C. The position must continue to be defined as “salaried.” No change here.

D. The new minimum salary has been essentially doubled and is now $47,476 annually or $913 weekly. This is the big and far-reaching change!

E. The new regulations kick in on December 1, 2016.

Here are a few more observations as I examine how Head Start will be impacted...

1. The rules change certainly does apply to Head Start grantees, regardless of the hopes of some that they do not.

2. I have potentially GREAT NEWS!! There is an interesting automatic exemption from the original Wage and Hour Act that continues to be in place, not impacted by the new regulations. Teachers (and lawyers and doctors) are fully exempt from the Wage and Hour dimensions of the FLSA and are NOT subject to the compensation minimums! I found this reference and related definitions and have attached them for you below. Further verification was received through legal counsel given to two Head Start grantees, working with two independent attorneys, as well as a direct phone call to DOL.
Two areas that you will need to review with your accountant and attorney advisors are, first, the status of non-certified or non-licensed teachers. DOL allows a relatively open interpretation as to the status of these individual as it pertains to exemption, which is outlined in the attached references below. The second consideration is whether you are an “educational institution,” which needs to be defined for your agency, given differing definitions for grantees and states.

3. The Obama Administration, after some apparent lengthy internal struggle, decided not to touch the “exempt duties” dimension of this, leaving this as is. They went directly to the easiest-to-understand and measure: the threshold income figure. They moved this figure up approximately 101%, from $23,660 to $47,476. The weekly minimum threshold for income is $913.00. The regulations also indicate that this would be reviewed by DOL and increased every three years into the future.

4. The impact upon Head Start grantees will be situational. Those who have not historically salaried very many positions will have the least exposure. One Midwest grantee with 560 employees has never salaried teachers and has fewer than a dozen staff, less than 2% of their workforce, impacted by these regulations. Other agencies have many salaried positions and have exposure of 35-40% of their total staff. There are also differences based upon what type of organization is operating the Head Start grant. Programs with higher wage structures may find fewer of their staff impacted by these changes.

5. Non-profits are not exempt from the law and the DOL has created a briefing page to emphasize this. A couple of small examples not impacted by these regulations are small non-profits like museum gift shops and graduate teaching assistants. There is little hope here for any relief for Head Start grantees.

6. The regulations kick in on December 1, 2016, allowing the White House to veto any congressional attempt to override, modify or rewrite these rules should this occur. It seems well-assured that the new regulations will begin December 1.

7. The impact upon Head Start grantees is going to be both financial and emotional. The obvious financial exposure is the need to carefully manage work patterns to avoid having to pay overtime rates of pay for some of the most currently expensive members of the staff. This may require daily and weekly monitoring of work patterns. This will profoundly change our relationship with some of our most valued staff! Failure to do so could cause significant increase in personnel costs. Additionally, several benefits are linked to compensation, thus magnifying the increased cost should overtime become a frequent activity. You are going to want to carefully introduce these likely permanent changes to these work relationships. We will all need to look at what we can do to lessen loss of staff.
8. Almost as significant is the change in perceived status that these changes will bring to those who move from careers as a salaried person to hourly while experiencing constant monitoring of their work hours. The biggest impact upon our already beleaguered work force will be the loss of status and possibly self-esteem as salaried individuals suddenly see themselves as hourly workers. Again, careful planning and focused nurturing of staff is necessary. Changing the perceived status of teachers and others, for example, might increase our already too high turnover rate as people feel less important and less in charge of the way they go about their work.

9. The regulations indicate that the employer is not required to reclassify salaried employees as hourly workers. They may still be classified as “salaried.” However, their hours must be tracked, and they must be paid overtime for anything over the 40 hours per week threshold. This will certainly create complex challenges in that, in order to manage the number of potential overtime hours, one must manage the "first 40 hours" each week as well. One cannot easily have staff acting as though they are salaried during the first 40 hours and then suddenly shift to an hourly mentality, potentially increasing the number of overtime hours to be paid.

10. Grantees are going to have to consider whether it will be necessary to create new systems with which to track hours worked much more closely for those who find themselves no longer exempt from the DOL regulations. This will likely create an increased cost to implement the new regulations.

11. Organizationally, we are going to be hit by a change in our ability to have "surge" activities, like recruitment, being managed with the flexibility of hours worked under a salary situation. Surge activities will likely require spending more dollars.

12. DOL provides alternatives...a. raise individual salaries to the new threshold. b. hire more workers to pick up hours normally worked by salaried individuals in excess of 40 hours. c. redesign job duties, likely creating new positions. In a business that sells goods and services to customers, this could lead to increased prices in order to create more income with which to pay these expenses. In Head Start, where our income is largely fixed by our funding sources, there is no chance of targeted new dollars to offset increased costs coming before the December 1 implementation date.

13. This dilemma could lead to even fewer children receiving Head Start services, a dangerous slippery slope as this becomes the "bank from which too many withdrawals are being made." This is especially true of small-to-medium sized grantees that have a much smaller "bank" of numbers of children served from which to make such reductions.

14. What constitutes "work" is now under deep analysis. Long ago, this was simple. Even today it might be for some positions. For example, our bus drivers can usually only be "working" if they are at our site and preparing for or actually driving a bus.
Professionals today are electronically connected to their work. Does accessing the computer on Thursday night or Saturday morning constitute "work" for which their hours contribute to the base 40 hours and therefore impact overtime pay? Some corporations are examining the possibility of limiting access to corporate computers, internal intranet systems, message systems, etc. during off hours to control this, an almost impossible task. Additionally, all such access leaves an "electronic trail" providing evidence of work being performed, even when not authorized by the employer.

Teachers frequently work at home preparing for their work with children. How does one manage this time?

Family service workers and teachers communicate with parents online through email, texts, and social media. How does one monitor this without interrupting our need to communicate? Communication is no longer an 8 AM to 4:30 PM Monday through Friday situation.

15. What about staff who travel? Does all travel time count against the 40 hour base? What about talking into the night with clients and colleagues on the phone, online or at a meeting? I’ve attached DOL Fact Sheet #22 which addresses this.

16. There will be staff who choose to work without writing down their hours. When this happens, it puts the employer at GREAT risk. If there is even one "disgruntled ex-employee" who claims that this has occurred, especially with any knowledge on the part of the employer, the IRS has the ability to step in and create an "open season" where any current or past employee working during a defined number of work months or years can claim overtime, and it is up to the employer to prove that they did not work during this period, an almost impossible thing to prove!

I hope this is helpful. I know that it is not capturing everything, but these are things that future-focused folks in the field are discussing or have been discussing. I also know that there are typos, and things that might have been expressed more articulately, but I wanted to get these thoughts and information to you quickly.

On a sunny, beautiful morning in Wisconsin, it is great to be on the sunny patio writing. While other possibilities exist as to how one might spend their days, this topic is of PROFOUND importance to Head Start and EHS grantees, our associations and all of us who care about having our beloved Head Start thrive as challenge after challenge keep confronting us and our members!

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References for the above:
The following is reference data of importance as grantee management, Boards of Directors and grantee legal counsel decide what is necessary to implement the new regulations defining the Wage and Hour Act.

I’ve included the DOL Definitions necessary to be considered a teacher. The first 2 pages are from Title 29 Department of Labor website. I’ve provided the definitions from the Federal Electronic Code of Federal Regulations effective May 27, 2016. *Areas emphasized in red are added for the ease of the reader,* and were not in color in the original Federal regulations.

**Title 29: Labor**  
Browse Part 531 | Browse Part 552

**PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES**

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§ 541.303 Teachers.

(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. The term “educational establishment” is defined in §541.204(b).

(b) Exempt teachers include, but are not limited to: Regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.

(d) The requirements of §541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.

This data is current as of May 27, 2016
Defining what constitutes an "educational establishment". Note: this might vary from state to state based upon your state's statute or law.

§541.204 Educational establishments.
Link to an amendment published at 81 FR 32549, May 23, 2016.
(a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act also includes employees:
(1) Compensated for services on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and
(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.
(b) The term “educational establishment” means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term “other educational establishment” includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

See the attached DOL Fact Sheet #17 D: Exemption for Professional Employees Under the Fair Labor Standards Act. (FLSA).

See the attached DOL Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA). This is a very useful discussion of what constitutes work time under the act. It addresses travel time, attendance at training or conferences and other useful areas.
United States Department of Labor
Wage and Hour Division

The Department announced a Final Rule focused primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. For more information, see http://www.dol.gov/whd/overtime/final2016/.

Wage and Hour Division (WHD)

(Revised July 2008) (PDF)

Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees: learned professionals and creative professionals.

See other fact sheets in this series for more information on the exemptions for executive, administrative, computer and outside sales employees, and for more information on the salary basis requirement.

Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and

https://www.dol.gov/whd/overtime/fs17d_professional.htm
The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Primary Duty

"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.

Work Requiring Advanced Knowledge

"Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreeed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers,
cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

**Recognized Field of Artistic or Creative Endeavor**

This includes such fields as, for example, music, writing, acting and the graphic arts.

**Teachers**

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

**Practice of Law or Medicine**

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

**Highly Compensated Employees**

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

**Where to Obtain Additional Information**

For additional information, visit our Wage and Hour Division Website: [http://www.wagehour.dol.gov](http://www.wagehour.dol.gov) and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at [www.dol.gov/contacts/state_of.htm](http://www.dol.gov/contacts/state_of.htm).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.
Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning what constitutes compensable time under the FLSA. The Act requires that employees must receive at least the minimum wage and may not be employed for more than 40 hours in a week without receiving at least one and one-half times their regular rates of pay for the overtime hours. The amount employees should receive cannot be determined without knowing the number of hours worked.

Definition of "Employ"

By statutory definition the term "employ" includes "to suffer or permit to work." The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place. "Workday", in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

Application of Principles

Employees "Suffered or Permitted" to work: Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.

Waiting Time:

Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

On-Call Time:

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Rest and Meal Periods:
Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer’s rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

**Sleeping Time and Certain Other Activities:**
An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night’s sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

**Lectures, Meetings and Training Programs:**
Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

**Travel Time:**
The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

**Home to Work Travel:**
An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

**Home to Work on a Special One Day Assignment in Another City:**
An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

**Travel That is All in a Day’s Work:**
Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

**Travel Away from Home Community:**
Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee’s workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

**Typical Problems**

https://www.dol.gov/whd/regs/compliance/whdfs22.htm
Problems arise when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his/her desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.

Where to Obtain Additional Information
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