

Hot Topics in Labor and Employment for Higher Education

with Beverly Meyer & Rico Barrera



Bricker & Eckler
ATTORNEYS AT LAW

OVER TIME

REG TIME

Wage and Hour

Time Sheet

Date	Time In
2/7/15	
2/8/15	
2/9/15	
2/10/15	
2/11/15	
2/12/15	
2/13/15	

TIME SHEET

	Hrs.	Overtime
Tuesday		
Wednesday		
Thursday		
Friday		
Weekly Total		



Overtime Final Rule and Higher Education

Higher Education Sector: Higher education is a complex and important sector in our economy and civil society. It includes a large variety of institutions: public and private schools; community colleges, four-year colleges, and large research institutions; and small campuses of only a few hundred students and faculty and large campuses of thousands of people.

Overtime Final Rule: The Department of Labor's final overtime rule updates the salary level required for the executive, administrative, and professional ("white collar") exemption to ensure that the Fair Labor Standards Act's (FLSA) intended overtime protections are fully implemented, and it provides greater clarity for workers and employers, including for higher education institutions. The final rule will also lead to better work-life balance for many workers, and it can benefit employers by increasing productivity and reducing turnover.

The final rule updates the salary threshold under which most white collar workers are entitled to overtime compensation to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census region, currently the South. The final rule will raise the salary threshold from \$455 a week (\$23,660 for a full-year worker) to \$913 a week (\$47,476 for a full-year worker) effective December 1, 2016.

Several provisions apply to many personnel at these institutions that make them ineligible for overtime and unaffected by this rule, regardless of whether they earn above the new salary threshold or not:

- **Bona fide teachers:** Teachers are not subject to the salary level requirement for the white collar exemption. Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing. Teachers include professors, adjunct instructors, and teachers

of skilled and semi-skilled trades and occupations.

- **Coaches:** Athletic coaches and assistant coaches may fall under the exemption if their primary duty is teaching, which may include instructing athletes in how to perform their sport. If, however, their duties primarily include recruiting athletes or doing manual labor, they are not considered teachers. A coach could primarily be responsible for instructing athletes but also spend some time recruiting or doing manual labor and still be considered ineligible for overtime.
- **Graduate and undergraduate students:** Generally, the Department views graduate and undergraduate students who are engaged in research under a faculty member's supervision in the course of obtaining a degree to be in an educational relationship and not an employment relationship with the school or with a grantor. As such, the Department will not assert such workers are entitled to overtime. Graduate students whose primary duty is teaching or serving as a teaching assistant fall under the FLSA's teaching exemption. Students who are participants in a bona fide educational program and who serve as resident advisors in exchange for reduced room and board charges or tuition credit similarly are not considered to be in an employment relationship with the institution.
- **Academic administrative personnel:** The administrative personnel that help run higher education institutions are not considered to be in an employment relationship with the institution. These employees, including those who perform clerical and other duties, are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. These employees are not entitled to overtime compensation if they are paid at least as much as the entrance salary for teachers at their institution.

Public Higher Education Institutions May Utilize Provisions for State and Local Employees: Employees of public higher education institutions may also be public sector employees for whom specific provisions

Overtime Developments

Dated: July 18, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2017-15533 Filed 7-25-17; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1235-AA20

Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, U.S. Department of Labor.

ACTION: Request for information.

SUMMARY: The Department of Labor (Department) is seeking information from the public regarding the regulations located at 29 CFR part 541, which define and delimit exemptions from the Fair Labor Standards Act's minimum wage and overtime requirements for certain executive, administrative, professional, outside sales and computer employees. The Department is publishing this Request for Information (RFI) to gather information to aid in formulating a proposal to revise the part 541 regulations.

DATES: Submit written comments on or before September 25, 2017.

ADDRESSES: To facilitate the receipt and processing of written comments on this RFI, the Department encourages interested persons to submit their comments electronically. You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA20, to the following address: **Electronic Comments Policy and Information:** <http://www.regulations.gov>. For instructions on the Federal eRulemaking Portal, see <http://www.regulations.gov>.

Mail: Address written submissions to Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: This RFI is available through the **Federal Register** and the <http://www.regulations.gov> Web site. You may also access this document via the Wage and Hour Division's (WHD) Web site at <http://www.dol.gov/whd/>.

All comment submissions must include the agency name and Regulatory Information Number (RIN 1235-AA20) for this RFI. Response to this RFI is voluntary and respondents need not reply to all questions listed below. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI. Submit only one copy of your comment by only one method (e.g., persons submitting comments electronically are encouraged not to submit paper copies). Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this RFI; comments received after the comment period closes will not be considered. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period. Electronic submission via <http://www.regulations.gov> enables prompt receipt of comments submitted as the Department continues to experience delays in the receipt of mail in our area. For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this RFI may be obtained in alternative formats (Large Print, Braille, Audio, etc.) by contacting the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this RFI may be obtained in alternative formats (Large Print, Braille, Audio, etc.) by contacting the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number).

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's Web site at <http://www.dol.gov/whd/america2.htm> for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Labor Standards Act (FLSA or Act) generally requires covered employers to pay their employees at least the federal minimum wage (currently \$7.25 an hour) for all hours worked, and overtime premium pay of not less than one and one-half times the employee's regular rate of pay for any hours worked over 40 in a workweek. See 29 U.S.C. 206(a)(1)(C); 29 U.S.C. 207(a)(1). Section 13(a)(1) of the FLSA, however, exempts from both minimum wage and overtime protection "any employee employed in a bona fide executive, administrative, or professional capacity" and expressly delegates to the Secretary of Labor the power to define and delimit these terms through regulation. 29 U.S.C. 213(a)(1). This exemption is frequently referred to as the "white collar" exemption.

For more than 75 years, the Department's part 541 regulations implementing the exemptions under Section 13(a)(1) of the Act have generally defined the terms "bona fide executive, administrative, or professional capacity" by the use of three criteria. With some exceptions, for an employee to be exempt: (1) The employee must be paid on a salary basis ("salary basis test"); (2) the employee must receive at least a minimum specified salary amount ("salary level test"); and (3) the employee's job must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test"). See 29 CFR part 541.

The Department issued the initial part 541 regulations in October 1938, slightly

less than four months after the FLSA became law. 3 FR 2518 (Oct. 20, 1938). These regulations established duties tests for executive, administrative, and professional employees, and also set a minimum compensation requirement of \$30 per week for exempt executive and administrative employees and a salary basis test for exempt professional employees. In 1940, the Department amended the part 541 regulations by establishing a \$50 per week (\$200 per month) salary level for administrative and professional employees. 5 FR 4077 (Oct. 15, 1940). The Department again amended the part 541 regulations nine years later, in 1949, establishing a two-tier structure for assessing compliance with the salary level and duties tests. 14 FR 7705, 7706 (Dec. 24, 1949). Employers could satisfy either a "long" test based on the previous test—combining a rigorous duties test and lower salary level—or a new "short" test—combining an easier duties test

DOL Proposed Rulemaking

Employees?

- Bona fide teachers and instructors
- Other academic administrative personnel
- Graduate/Undergraduate Students
- Coaches
- Resident Advisors
- Work Study Participants

WEEKLY TIME SHEET

Public Universities and Compensatory Time

	Time In	Time Out	Hours
Monday	9:00 AM	5:00 PM	10
day	9:00 AM	6:00 PM	
		2:00 PM	



The Dangers of Stipends

A black and white photograph of a roller coaster track, showing a large loop and several vertical supports. The track is set against a dark sky with some clouds. The image is used as a background for the text.

Unionization of Athletes and Grad Students: The Pre-Northwestern NLRB Rollercoaster Ride

*Leland Stanford
Junior University*

214 NLRB 621 (1974)

Graduate assistants are not employees because their primary purpose is to obtain an education



New York University (NYU I)

332 NLRB 1205 (2000)

Graduate assistants are employees because “they perform work, or provide services, for the Employer under terms and conditions (e.g., hours of work and instructional curriculum) controlled by the employer.”



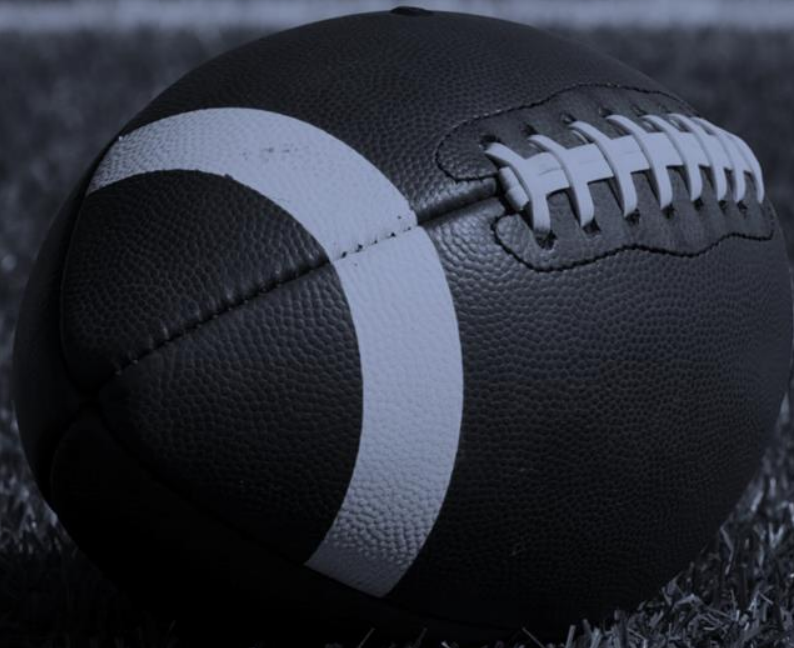
Brown University

342 NLRB 483 (2004)

Reversed *NYUI*

Graduate students are not employees because their principal time commitment was obtaining a degree, and the relationship was primarily educational





Northwestern Football Decision 362 NLRB No. 167



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NCAA responds to union proposal

Donald Remy

NCAA Chief Legal Officer

This union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education. Student-athletes are not employees, and their participation in college sports is voluntary. We stand for all student-athletes, not just those the unions want to professionalize.

Many student athletes are provided scholarships and many other benefits for their participation. There is no employment relationship between the NCAA, its affiliated institutions or student-athletes.

Student-athletes are not employees within any definition of the National Labor Relations Act or the Fair Labor Standards Act. We are confident the National Labor Relations Board will find in our favor, as there is no right to organize student-athletes.

Tags: [Press Releases](#) • [Division I](#) • [Division II](#) • [Division III](#) • [Donald Remy](#)

Columbia University Graduate Student Union Decision

364 NLRB No. 90 (Aug. 23, 2016)

- NLRB first looked at incredibly broad definition of “employee” and found no exceptions applied
- Board overrules *Brown University* decision, rejecting focus on “primarily educational” employment relationship
- Board applied common law test to determine whether student assistants were “employees”

The background of the slide is a dark grey or black color, densely populated with light blue question marks. The question marks are of varying sizes and are slightly out of focus, creating a sense of depth and repetition. A solid green horizontal band runs across the middle of the slide, containing the text.

So what now?



Marijuana – HB 523



A hand holding a cannabis leaf in front of a field of cannabis plants. The image is in grayscale, with a green horizontal band across the middle containing the text.

Employment Law Impact

BEVERLY MEYER

bmeyer@bricker.com

RICO BARRERA

fbarrera@bricker.com

TWITTER

@BrickerHigherEd

UPCOMING WEBINARS

DEC. 19, 12:00PM

Medical Marijuana on Campus

JAN. 17, 12:00PM

Emerging Issues Under the New DCL



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