

MICHIGAN STATE UNIVERSITY

April 27, 2016

MEMORANDUM

TO: Deans, Directors, and Chairpersons

FROM: June Youatt, Provost and Executive Vice President for Academic Affairs
Satish Udpa, Executive Vice President for Administrative Services

SUBJECT: Proposed Regulations of the Fair Labor Standards Act (FLSA)

You are receiving, contemporaneous with this memorandum, a communication from Human Resources related to this issue. The memorandum from Human Resources will provide action steps needed in the coming weeks and months; the estimated date of issuance of the final FLSA regulations is soon – spring or summer. Because this issue will have such a far-reaching impact on campus, we thought it important to share several comments along with the communication from Human Resources.



OFFICE OF THE
PROVOST

Michigan State University
Hannah Administration Building
426 Auditorium Road, Room 430
East Lansing, Michigan 48824

Phone: 517-355-6550
Fax: 517-355-9601
provost.msu.edu

As some of you may know, the FLSA governs how we pay employees. The law requires us to determine who is exempt and who is non-exempt and pay accordingly. The proposed modification of FLSA regulations is a significant issue – close to 800 employees are estimated to be impacted. This means almost 800 employees will likely lose their exempt status under the FLSA and will become entitled to overtime for every hour worked over 40 in a workweek.

While the high-level analysis has been completed, much of the impact will depend on decisions made by individual units, sometimes down to decisions regarding the individual employee. Following are items to note as you move through the analysis process while awaiting the final regulations.

- We have been working through our governmental relations and professional association colleagues to highlight, for those working on the issue in Washington, some of the areas we believe to have a negative impact on higher education. For example, we have stressed that the sudden and significant financial burden is a blow to the higher education community at a time when there is pressure to keep tuition costs down and where we have faced steady state de-investment. Additionally, we have stressed the need to look at higher education differently – there are many higher education jobs, traditionally exempt, that do not lend themselves to the less flexible, traditional 40 hour work week. Our colleagues have been working diligently to convince those

in Washington to consider alternatives such as a narrower and/or phased-in approach, giving us more time to budget and prepare. We are hopeful that these discussions will carry some weight as the federal government considers the proposed regulations not yet in final form.

- There is no central financial solution. The cost of compliance must be borne by the individual unit. Unfortunately, the compliance deadline is expected to be short and, unless the federal government decides to veer from the proposed regulations, some difficult decisions will likely have to be made. Whether to raise salaries for impacted individuals will be a difficult decision, but may be the best decision. Likewise, a difficult, but perhaps necessary decision may be a reduction in staff.
- There may be creative solutions. Flexible schedules may be pursued. Workloads may be modified and/or redistributed. A combination of part-time employees rather than a full-time employee may be utilized. There may be efficiencies accomplished when one takes a hard look at necessary staffing. Human Resources will partner with you to assist in the implementation of the final regulations.
- The largest employee group impacted is post-doctoral individuals (i.e., Research Associates). The minimum salaries required by NSF and NIH are below \$50,440. Many post-docs work well in excess of 40 hours in a week. We have, through our governmental relations and association colleagues, stressed the problematic impact on post-docs given the nature of their work. However, we urge you to think about solutions in the event the proposed regulations do not change, such as including a higher level of support for your post-docs in all future proposals.
- Representatives of Sponsored Programs Administration will continue to work with their federal contacts regarding such issues as whether overtime prohibitions in federal grants will be lifted in order to comply with the final regulations.
- A significant change in the way we conduct business will occur. Tracking hours of non-exempt employees is critical for FLSA compliance. It will be incumbent on the individual supervisor to ensure this occurs in terms of hours worked. The FLSA requires that non-exempt individuals be compensated for each hour worked and requires careful documentation by the unit to track this. In some units, in particular on the academic side, supervisors may not be accustomed to doing this with respect to certain employees. Those employees will, likewise, not be accustomed to having their time closely monitored. However, compliance is critical; the cost of liability in this area for lack of compliance is significant. Supervisors will need to work closely with employees for compliance, as well as to address concerns regarding the potential of such a sudden change in employment status.

Thank you for your attention to this matter. We look to your leadership in order to minimize, to the extent possible, any negative impact to the MSU community. Human Resources and Office of the General Counsel are leading the implementation process and are available to assist. Please carefully review the information they are providing and continue to follow updates.

MICHIGAN STATE UNIVERSITY

April 27, 2016

MEMORANDUM

TO: Deans, Directors, and Chairpersons

FROM: Theodore H. Curry II, Associate Provost and Associate Vice
President for Academic Human Resources

Sharon E. Butler, Assistant Vice President for Human Resources

SUBJECT: Action Required: Proposed Regulations of the Fair Labor Standards
Act (FLSA)

We distributed a memorandum to MSU leaders on January 6, 2016 regarding the impending changes to the Fair Labor Standards Act (FLSA) regulations (attached). We write now to provide an update and to inform you about **steps you will need to take at the unit level.**

As indicated in the January 6, 2016 memorandum, the FLSA is a federal act that, in general, requires overtime and a minimum wage for all non-exempt employees. Under current FLSA regulations, an employer can classify an employee as exempt from overtime under what are referred to as the white collar exemptions, only if the employee meets both of the following tests: (1) *salary level test* – they make above a certain salary level, currently \$23,660 annually, **and** (2) *duties test* – their duties consist of certain executive (i.e., supervisory), administrative or professional functions. Exceptions to the salary level test are provided for employees who fall into specific categories such as teachers, doctors, and lawyers.



OFFICE OF THE PROVOST

Michigan State University
Hannah Administration Building
426 Auditorium Road, Room 430
East Lansing, Michigan 48824

Phone: 517-355-6550
Fax: 517-355-9601
provost.msu.edu

The change is that the Department of Labor (DOL) has proposed increasing the salary level test to approximately **\$970 a week, or \$50,440 a year**. This means **employees who are currently making between \$23,660 and \$50,440, and are currently classified as exempt, will become non-exempt** if the final regulations pass in their proposed form. Employees who become non-exempt must receive overtime pay for hours worked over forty in a workweek at a rate not less than time and one-half their regular rate of pay. There are exceptions, the most significant of which for MSU is the “teacher exemption.” If an employee falls within the teacher exemption category, they are exempt from the overtime provisions even if their salary is lower than \$50,440.

A high-level analysis has been conducted by central administration to determine the potential university-level impact and is available for review within [MSU Google Drive](#). However, this analysis is only for assessment of potential overall impact. The specific impact will ultimately depend on different choices made at the local level (as

well as the specific language in the final regulations). We recognize the uniqueness within each college, department and unit and are not proposing a one-size-fits-all solution to address the proposed change. To be as prepared as possible, we are asking each unit to conduct a unit impact analysis within the next 30 days and to initiate discussions on how the impact will be handled. This communication will also be shared with MAU fiscal officers. Steps for conducting this analysis are provided below:

What you need to do as a unit:

1. Review information on www.hr.msu.edu/flsa/ and use material there as guidance.
2. Identify which employees make less than \$50,440 and are currently not entitled to overtime (classified as exempt).
3. Analyze and identify whether an exception applies. The exceptions, again, are generally lawyer, doctor/including residents, teacher and outside sales. Included on www.hr.msu.edu/flsa/ is a list of jobs we have determined meet the Teacher Exemption. Work with Human Resources or Academic Human Resources to make this determination if needed.
4. For those for whom an exception does not apply, analyze how much overtime the impacted employees typically work. Overtime is defined as hours worked over forty in a work week.
5. Make projections about possible impact and potential ways to address the impact. The regulations are not final, so we do not have a definitive salary level at this point. Please recognize that the salary level could change – we are using the proposed salary level of \$50,440 for budget projection and modeling purposes only. Units will be expected to manage the financial impact within their own budgets. In making projections, analyze which of the following options may make sense for the employees impacted:
 - a. Budget to raise salaries to \$50,440, with additional fringe cost of 19.05%.
 - b. Budget to pay overtime for all newly non-exempt employees. Note that the fringe cost for overtime payments (i.e., 7.65%) is lower than the fringe cost of raising salaries.
 - c. Analyze whether restricting overtime hours is possible. You will need to consider whether restricting work hours makes sense for particular employees. Included in that assessment should be such factors as the possible redistribution of duties and the cost to productivity if the work is not performed.
 - d. You will also want to look creatively at the use of flexible work hours. Nothing in the FLSA precludes an employee working non-traditional hours, such as 10 a.m. to 7 p.m. If the bulk of the work occurs during

those hours, changing an employee's schedule to fit the timing of the work is one method of addressing the overtime issue. Please consult any applicable collective bargaining agreements and/or with Employee Relations in regard to unionized employees.

- e. There is an alternative to paid overtime – providing employees compensatory time off at a rate of time and a half is a possibility for MSU. However, there are numerous restrictions involved in the use of this alternative, including the requirement that the agreement be voluntary between the employer and employee prior to work performed, the limited employer discretion regarding when it may be used and the mandatory cash payout for the unused time upon termination.¹

Please make note of the following issues in conducting your projections:

1. Salary compression. Will raising salaries for some mean salaries will have to be raised for others in the unit? How will this impact the overall salary structure of the unit?
2. Annual updating. The DOL is proposing that the salary level be raised every year – adjusted either using the Consumer Price Index or a national percentile of the salary of full-time workers. If considering raising the salary to \$50,440, are monies available in the budget to increase the salary each year?
3. Morale issues. Will the conversion of employees from exempt to non-exempt cause some to feel that they have been demoted? Is there a way to mitigate against this?
4. Time tracking. Please note for those who will be categorized as non-exempt, it is critical that you, as a unit, are able to track the time of those employees. Failure to carefully track non-exempt employees' time exposes the institution to significant legal risk.

Assistance from administration:

Our offices, along with the Office of the General Counsel and the Office of Planning and Budgets, will be conducting a number of forums for budget officers and others in your units. In addition, the web page we created, www.hr.msu.edu/flsa/ on the Human Resources website, contains tool kits, example analyses and other helpful information.

Included in these resources will be FLSA exemption checklists and assistance from our offices in reviewing any current FLSA classifications you believe may need reviewing.

FLSA lawsuits can be very costly. Compliance with the new regulations is important. The date of issuance of the final regulations is unknown, but estimated to be **spring**

¹ Please see http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.1.30&idno=29#sg29.3.553_112.sg2 for more details.

or summer 2016, with an effective date likely to be 60-90 days thereafter. We will continue to communicate regularly regarding any status updates.

Please forward this communication to appropriate individuals within your units.

Questions can be directed to:

- ❖ Academic Human Resources: Melanie Trowbridge, mjt@provost.msu.edu, or Kara Yermak, burtkara@provost.msu.edu.
- ❖ Human Resources: Reneè Rivard, rivardr@hr.msu.edu
- ❖ Office of the General Counsel: Kristine Moore, krmoore@msu.edu