

# THE PROFESSIONALIZATION OF NON-EXEMPT WORK

UPDATING THE FAIR LABOR STANDARDS ACT (FLSA)

# HOW DID WE GET HERE...?

- Since its establishment in 1938, the Fair Labor Standards Act (FLSA) established in the interest of the U.S. employment market standardized:
  - The 40 hour work week
  - National minimum wage
  - Guaranteed time and a half overtime for certain jobs
  - Prohibited employment of minors in “oppressive child labor”
- Currently the Department of Labor (DOL) requires three “tests” be met in order to exempt employees from minimum wage protections and overtime:
  - Salary Basis Test – payment of a predetermined and fixed salary not subject to reductions due to variations in quality or quantity of work performed.
  - Salary Level Test – salary must meet a minimum specified amount.
  - Duties Test – employee’s job duties must primarily involve executive, administrative or professional duties as defined by standards outlined in the regulations.

# ...AND WHERE IS HERE?

- The Act has been reviewed and amended approximately 14 times with significant changes in 2004 and now in 2016.
- In 2004, the DOL established \$23,660/year as the Salary Level Test threshold, and introduced a new exemption for highly compensated employees. New standard Duties Tests were created.
- In 2014, President Obama directed the Department of Labor (DOL) to modernize regulations governing exemption of employees from the minimum wage and overtime pay protections.
- In July 2015, DOL published a notice of proposed rulemaking and received over 270,000 comments – higher education was particularly vocal.
- In May 2016, DOL announced publication of its “Final Rule” to update the FLSA regulations.

# THIS IS “HERE”

- Effective December 1, 2016:
  - Salary Level Test minimum of \$23,660 increases to \$47,476, meant to simplifying the identification of overtime-protected employees.
    - Strengthens existing overtime protections for 5.7 million additional “white collar” salaried employees and 3.2 million “blue collar” employees.
    - Extends overtime rights to an estimated 4.2 million workers who are currently exempt and converting to non-exempt.
  - Increasing the Salary Level Test threshold no longer relies solely on the Duties Test determination, which employers could manipulate to eliminate employee rights to overtime and compromise employment protections.

# ...AND IF YOU THOUGHT THAT WASN'T ENOUGH?

For the first time in FLSA history, the Final Rule also establishes automatic updating of salary and compensation levels every 3 years to maintain currency of Salary Level Test thresholds as measured by:

- The 40<sup>th</sup> percentile of a full time salaried worker in the lowest wage Census Region – currently the South – determining non-exempt employees.
- The 90<sup>th</sup> percentile of full time salaried workers nationally – determining highly compensated employees. (12/1/2016: \$100,000 to \$134,004)

According to the DOL, regularly updating compensation levels is the best method to ensure effective means of identifying overtime eligible “white collar” employees.

# SO WHAT DOES ALL THIS MEAN FOR UB GOING FORWARD?

## A Significant Paradigm Shift for Leadership and Staff:

- Over a 78 year period from the FLSA's inception, the nature of work and employment settings have changed significantly.
- Supervisors and management must realign their perceptions and ideas about what non-exempt employee work looks like:
  - Work in occupations requiring specialized knowledge.
  - Perform as professionals with independence.
  - Interpret/Inform policies and make decisions.
  - No longer restricted to routine repetitive work.
  - No longer directly supervised.
- 50% of USM non-exempt salary grades have mid-points ranging from \$44,812 to \$71,639, indicative of the value assigned to non-exempt work.
- Accurate application of the Duties Test eliminates risk of audit findings but often inviting difficult conversations due, in part, to conflict of interests.

# SO WHAT DOES THE DECEMBER 1 CHANGE MEAN FOR ME ?

## Effective November 23 pay period:

- Your position converts from exempt to non-exempt.
- Your leave earning will adjust based on your years of service.

EXE Accrual	
Years	Rate
1-20	22 days
21+	25 days

NEX Accrual	
Years	Rate
up to 1	11 days
Start of year 2	12 days
Start of year 3	13 days
Start of year 4	14 days
Start of year 5	15 days
Start of year 11	20 days
Start of year 21+	25 days

- Your selected retirement program is “grandparented” with you.
- Recording your time is more exacting as any time worked over 40 hours in a workweek is considered overtime and paid at time and a half (see Timesheet Job Aid handout)
- You are required to have a minimum 30 minute unpaid lunch break. All other work hours are paid.
- When the State of Maryland approves an annual merit award, currently non-exempt employees can only earn 2.5%.
- In order to be eligible for “acting” pay (temporary assignment to higher level position), must perform in that capacity for a minimum of 21 days prior to receiving additional pay.

# SO WHAT DOES THE DECEMBER 1 CHANGE MEAN FOR ME ?

## A Significant Paradigm Shift for Affected Employees & Supervisors:

- Non-exempt employees have employment and overtime protections:

Non-Exempt	Exempt
6 month probationary period	12 month probationary period
Progressive discipline	“At will” employment
Termination for cause	“No fault” separation
Appeal rights	No appeal rights

- This FLSA change impacts “different” kinds of work necessitating review of USM & UB policies and Collective Bargaining MOUs through a different lens:
  - The need for work schedule flexibility
  - The opportunity to telework
  - The value of merit increases
  - Uncoupling of employment benefits from FLSA designations
  - Acting pay 21 day waiting period



# SO WHAT DOES ALL THIS MEAN FOR HOW I DO MY WORK?

**Effective November 23, 2016 your employment interests are represented in a collective bargaining environment by AFSCME and the Memorandum of Understanding (MOU) between UB and AFSCME.**

## Key UB-AFSCME MOU Excerpts:

- The standard workweek for full-time non-exempt employees consists of forty (40) hours per week.
- The University schedules its employees to meet the operational needs of the University; however, will make a good faith effort to provide employees with consecutive hours in the workday and consecutive days in the workweek.
- Two paid duty free rest breaks of **fifteen (15)** minutes.
- A duty free lunch break of 30 minutes (minimum) for employees scheduled to work 6 hours or more. All efforts will be made to ensure the lunch break occurs between the 3rd and the ending of the 5th hour of the employee's work schedule.
- For all hours actually worked in excess of 40 hours in a workweek, an employee shall be paid one and one-half (1.5) times his/her regular straight-time rate of pay for that workweek. All hours associated with paid leave shall be considered as hours worked for the purposes of computing overtime.
- The employer provides notice of required overtime work at least four (4) hours in advance of work day schedule's end and at least one full work day's notice in advance of an additional day overtime. However, if circumstances beyond the control of the employer arise which make it impossible to provide such advance notice, employees are not relieved of the requirement to work overtime.

# SO WHAT DOES ALL THIS MEAN FOR HOW I DO MY WORK?

**Effective November 23, 2016 your employment interests are represented in a collective bargaining environment by AFSCME and the Memorandum of Understanding (MOU) between UB and AFSCME.**

## Key UB-AFSCME MOU Excerpts:

- An employee assigned to on-call status is eligible to receive compensation at the rate of one dollar (\$1.00) per hour up to a maximum amount of twenty-four dollars (\$24) per day, plus appropriate wages for all hours worked.
- The University subscribes to the tenets of progressive discipline, where appropriate. No employee shall be disciplined without cause.
- Employees affected by a University decision to lay off employees shall be allowed to exercise displacement rights.
- Employees who are adversely affected by a layoff shall be placed on a recall list for a period of 2 years.
- For a period of 3 calendar years from the effective date of layoff, the employee shall be granted priority consideration for interviews for vacancies in the classification from which the employee was laid off, any lower classification in that job series, any classification for which the employee has completed an original probationary period, or any other position vacancy for which the employee meets the minimum qualifications.

Questions?