

# U.S. Department of Labor's Fair Labor Standards Act (FLSA): 2016 Changes

Guide for Kenyon College Supervisors



## About This Guide

Effective on Dec. 1, 2016, additional Kenyon College employees will become eligible for overtime pay under changes to the U.S. Department of Labor's Fair Labor Standards Act (FLSA). This guide is designed to help supervisors:

- Determine which employees are impacted by the changes
- Develop strategies to remain compliant with the new regulations that align with institutional business needs
- Communicate effectively with impacted staff members

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# A Brief Guide to the U.S. Department of Labor's Fair Labor Standards Act (FLSA)

On Saturday, June 25, 1938, a landmark law was established known as the Fair Labor Standards Act of 1938 (FLSA). In its final form, the act applied to industries whose combined employment represented only about one-fifth of the labor force. In these industries, it banned oppressive child labor and set the minimum hourly wage at 25 cents, and the maximum workweek at 44 hours. FLSA determines whether a position is eligible for overtime pay. If a position is classified as “exempt,” it means that the position is not eligible for overtime pay. If a position is classified as “non-exempt,” it means that the position is eligible and must receive overtime pay at time and one-half for any hours worked above 40 hours in one workweek. The Fair Labor Standards Act (FLSA) impacts: Set minimum wage: Required overtime pay: Required recordkeeping: Prohibited child labor.

In May 2016 the U.S. Department of Labor (DOL) implemented a revised rule to extend overtime protection to any employee making less than \$47,476 per year, barring Department of Labor-mandated job exceptions, like “teachers” (professors, coaches, instructors, etc.) This means that any full-time, non-teaching employee earning less than this salary will be a non-exempt employee, eligible for overtime. The rule will raise the minimum salary level for exempt positions from its previous amount of \$455 per week (the equivalent of \$23,660 per year) to \$913 per week (the equivalent of \$47,476 per year) on Dec. 1, 2016. The former salary threshold for overtime eligibility was less than the national poverty level for a family of four. The purpose of the DOL’s decision regarding overtime eligibility is to:

- Encourage employers to hire more employees rather than pay overtime premiums
- Provide more income to middle class employees, resulting in economic growth
- Increase payroll tax contributions to Social Security and Medicare

The DOL is expected to automatically update the standard salary and compensation levels periodically, either by maintaining the levels at a fixed percentile of earnings or by updating the amounts based on changes in the Consumer Price Index for All Urban Consumers (CPI-U).

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## FLSA Impact at Kenyon College

### IF RECLASSIFIED AS NON-EXEMPT

1. Eligibility for overtime pay for hours worked above 40 in one workweek
2. Report hours worked through Banner web time-entry
3. Paid bi-weekly rather than monthly
4. Defined paid Sick/Personal/Family Leave policy
5. Will keep current vacation allotment

### IF REMAINING EXEMPT FROM OVERTIME

1. Employee must be paid on a salary basis, not an hourly basis
2. Duties must meet the criteria for executive, professional, administrative, computer or outside sales activities
3. Compensation rate (pro-rated if less than full-time) must be at least \$47,476 annually (\$913 per week) effective Dec. 1, 2016

# New Overtime Eligibility Rules: Supervisor Overview

This overview is intended to help supervisors discuss the upcoming FLSA changes with impacted individuals.

## Background: What Has Changed?

The federal government announced new rules in May that increase the salary at which an employee may be considered “exempt” from earning overtime pay. As a result, more employees are eligible for overtime pay (“non-exempt”). Eligibility for overtime pay is determined by several tests of job duties and pay under the Fair Labor Standards Act (FLSA). As of Dec. 1, 2016, the new salary threshold to be considered exempt under the FLSA is \$47,476 annually (\$913 per week), an increase from the previous threshold of \$23,660 (\$455 per week). The Department of Labor will review the threshold for future adjustments every three years going forward.

### **Institutional Approach:**

Kenyon has adopted a conservative approach that will provide supervisors the ability to comply with the revised salary threshold while managing the impact to their budgets and administration. Guidelines have been developed with a goal of administrative simplicity. Policies regarding overtime at Kenyon have been updated to match the federal standards. These updates include considering overtime on a weekly basis (as per the federal requirements), without the addition of a daily overtime component that Kenyon voluntarily provided in the past. This update and simplification to the Kenyon policy will allow a more flexible approach when scheduling weekly hours.

### **Who Will Be Impacted?**

Full-time, non-teaching employees earning below \$47,476 per year who are currently considered exempt under the FLSA will either receive a salary adjustment to be in compliance with the new minimum, or be reclassified to non-exempt as of Dec. 1, 2016. The few who are receiving salary adjustments were already close to the threshold and the standard cost of living increase scheduled for July 1, 2017 will be reduced accordingly or eliminated.

### **Part-Time Employees:**

Part-time, non-teaching employees with a compensation rate (pro-rated full-time rate) below \$47,476 who are currently considered exempt under the FLSA will either receive a (pro-rated) salary adjustment to be in compliance with the new minimum, or be reclassified to non-exempt as of Dec. 1, 2016.

For more information, visit the U.S. Department of Labor’s Wage and Hour Division at [dol.gov/whd/flsa](http://dol.gov/whd/flsa).

# What Kenyon College Employees Who Become Eligible for Overtime Can Expect

1. They will report all hours worked through Banner web time-entry
2. They will receive their pay every two weeks rather than once per month
3. They will earn overtime for any hours worked over 40 in one workweek
4. They will keep their current vacation allotments and any new vacation given for years of service will be based on the current policy for exempt employees
5. They will receive defined sick/personal/family time leave each year based on the current policy for non-exempt employees
6. They will receive a letter from the Office of Human Resources providing details that are specific to them

## Considerations for Supervisors with Employees Reclassified as Non-Exempt

### **Managing Overtime:**

Supervisors may need to set new expectations and change department schedules or behaviors to best manage overtime according to their budgets. Overtime may occasionally be necessary and should be pre-approved by the supervisor; however, whether pre-approved or not, it must always be paid. A clearly defined approval process can assist you and your employees in managing both time and budget resources. Supervisors and employees should review the updated section of the Handbook which addresses overtime policies at Kenyon.

<http://www.kenyon.edu/directories/offices-services/human-resources/employee-handbooks/administration-and-staff-handbook/wage-and-salary-policies/>

## **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 their “principal activity” and the time on that day at which they cease such principal activity or activities. The workday may therefore be longer than the employee’s scheduled shift.

## **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 after the end of a shift to finish an assignment. The reason they stayed longer than their normally scheduled shift is immaterial. The hours are work time and are compensable. The employee may also be allowed to come in late on another day (during the same workweek only) to balance their weekly hours to the expected weekly schedule. It is the responsibility of the supervisor to monitor and approve changes to the weekly schedule.

## **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 they 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 15 minutes or less, are common (and promote the efficiency and happiness of the employee) and are customarily paid 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 unauthorized extension of the break may result in disciplinary action. Bona fide meal periods (typically 30 minutes to one hour) generally are not compensated as work time. The employee must be completely relieved from duty for the purpose of taking the meal period. The employee is not relieved if they are required to perform any duties, whether active or inactive, while eating.

## **Mobile Devices:**

Mobile devices expand the opportunity for work to be performed outside of normal work hours. Employees who were previously classified as exempt may be used to responding to emails or calls after hours, but these activities must be counted as paid work time (and potentially overtime) for non-exempt employees. You may need to set a new expectation with employees about answering emails or calls outside of normal hours.

## **Lectures, Meetings and Training Programs:**

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four important criteria are met: attendance is voluntary; the event or activity takes places outside of working hours; it is not job-related and no other work is concurrently performed.

# Travel Time

- ***Home to Work Travel:***

An employee who travels from home before the regular workday and returns to their home at the end of the work day is engaged in ordinary home-to-work travel, which is not compensable work time.

- ***Home to Work on a Special One-Day Assignment in Another City:***

If 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 the time the employee would normally have spent 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 the 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 normal workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. Time that is spent in travel away from home outside regular working hours when the employee is a passenger on an airplane, train, boat, bus or automobile is not considered work time.

# Frequently Asked Questions

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## *What should be discussed with employees who will be reclassified to non-exempt and now be eligible for overtime?*

Supervisors may need to set new expectations and change department schedules or behaviors in order to manage hours worked within budgets. It is important to clearly communicate any new standards or business processes to newly non-exempt employees, especially if their duties will not be changing. Considerations include:

- **Guidelines for using mobile devices outside of normal work hours to respond to calls or emails**
- **Expectation to seek approval for overtime**
- **How to track and report time worked**
- **Adjustments to work schedules when work must occur outside of normal business hours**

Communicating a clearly defined overtime approval process to non-exempt employees can assist you in managing both time and budget resources. However, while non-exempt employees should seek pre-approval before working overtime, it is important to remember that all overtime must be paid, whether pre-approved or not.

## *Are there exceptions to the new salary threshold under the FLSA?*

Yes. Salaried employees not subject to the salary threshold test include faculty, athletic coaches and others.

## *The employees in my area are used to having flexibility in their work hours. Can this continue if some of them become non-exempt?*

Yes. Alternate scheduling is allowed within the same workweek. For example, if an employee normally works 8 hours a day, and has a personal appointment on Monday that only allows them to work 6 hours, the supervisor and employee can agree that the employee will make up the 2 hours later in the same workweek. Another example would be if a typical schedule is 8 hours a day during the day, and the department needs an employee to work a special event for 4 hours during the evening. The schedule may be changed to give the employee 4 hours of time off at another time during the same workweek.

## *Can non-exempt employees telecommute?*

The college does not currently have a formal telecommuting policy. Any telecommuting arrangement should be evaluated on a case-by-case basis. Several factors for evaluation include: the type of work performed, including collaboration and level of interaction with others; the employee's ability to work independently with little direct or daily supervision; and the supervisor's ability to monitor and evaluate the employee. Additionally, there need to be clear expectations about work schedules and accurate tracking of hours worked for non-exempt employees.

### ***Does an employee need to be paid for overtime if I did not approve it?***

Yes. Overtime hours worked by non-exempt employees, even if unapproved, must be paid. Therefore, it's important to establish overtime rules and communicate them to everyone in your department. You can help by establishing rules regarding seeking approval in advance for projects or events that may be deadline driven and require additional hours.

### ***Does time spent answering emails or using a mobile phone for work outside of normal hours count toward overtime for non-exempt employees?***

For non-exempt employees who respond to emails or calls outside of normal work hours or while on lunch breaks on a "regular" basis, that time is counted as work time for overtime purposes. If a non-exempt person responds to emails or calls "very occasionally," then court cases have considered that to be "de-minimis" and therefore not counted for overtime purposes. However, supervisors have discretion to establish overtime approval processes. If an employee continues to work overtime without supervisor approval, then the supervisor could begin taking possible disciplinary action with the employee.

### ***Can I require overtime for non-exempt employees?***

Yes. Supervisors can require overtime work when necessary and with pay. Whenever possible, you should give advance notice to employees.

### ***Can I offer a non-exempt employee "comp time" (unpaid time-off taken in a future workweek) instead of overtime?***

No. FLSA regulations state that non-exempt staff are to be paid for overtime hours worked. Other forms of payment, such as compensatory time off, (unless it is within the same workweek) are not to be used. Remember that rearranged work schedules may be an option in lieu of overtime, as long as the hours worked do not exceed 40 in a single workweek. These types of schedules provide flexibility for both the department and the employee. If an employee's hours worked exceed 40 in a single workweek, they must be paid overtime. Please talk with human resources if you want to further explore special or alternate scheduling options.

### ***If I require evening work in my area for an event or other function, can I reduce a non-exempt staff member's daytime hours and replace them with evening work as long as they don't work more than 40 hours in a workweek?***

Yes, you can adjust the work hours of an employee to meet needs. Advance notice of such changes should be given to the employee if possible. You can rearrange hours from day to day within the same week, but the regulations do not provide you with the discretion to move hours from one week to the next without incurring overtime for the week in which the hours worked exceed 40 (even if the hours worked in the preceding week were less than 40).

### ***How will vacation allotments be affected for employees who are reclassified to non-exempt status due to this FLSA change?***

This "grandfathered" group of employees will retain their existing vacation benefits and earn vacation in the future based on the vacation schedule for exempt employees.

## ***Does an employee need to be paid for overtime if I did not approve it?***

Are all employees impacted by the 2016 FLSA changes? The revised FLSA salary threshold for exempt employees is \$47,476 annually or \$913 per week. Employees may be considered exempt under the FLSA if they make at least \$913 during the weeks that they are employed and their duties meet the exemption test.

*Note: Professors, coaches and instructors are not subject to the FLSA salary threshold if their primary duty is instructional.*

## ***What happens if employees move from full-time to part-time?***

After Dec. 1, 2016, if an exempt employee moves from full-time to part-time, the employee will be reclassified as non-exempt if the change causes the compensation rate to fall below \$47,476. Managers should be sure to discuss this implication with human resources before considering a reduced schedule for an exempt employee.

## ***Can a non-exempt employee waive overtime?***

No, employees don't have the option of waiving the legal requirements.