Association of College & University Housing Officers - International

www.acuho-i.org

What is "Work" for Campus Housing & Residence Life Professionals

A Report from the FLSA Symposium

Scottsdale, AZ

October 6, 2016

Prepared by:

Holly M. Asimou
Research Initiatives Manager
ACUHO-I

Mike Adams
HR Administrator
Residential & University Services
Michigan State University

November 2016

WHAT IS "WORK" FOR CAMPUS HOUSING & RESIDENCE LIFE PROFESSIONALS

THE SYMPOSIUM

On October 6, 2016, ACUHO-I offered the "What is 'Work'" Symposium at the Business Operations Conference in Scottsdale, Arizona. The purpose of this event was to delve deeper into the topic of Fair Labor Standards Act (FLSA) compliance, and specifically as it relates to the concept of compensable time or "work" for live-in housing and residence life (HRL) professionals. This event represented the inaugural *Just in Time* program; a series that was designed to provide timely education around issues of imminent concern for the association and the profession at-large.

Facilitated by Michigan State University human resources professional, Mike Adams, and involving speakers from both the American Council on Education (ACE) and Arizona State University Human Resources, this program was attended by 37 institutional leaders from across the country. This report includes relevant information about FLSA, the conversations that took place at the symposium, analysis of current models of "work", and culminates with a call-to-action for the profession.

STATEMENT OF THE PROBLEM

Since the May 23, 2016 update to Fair Labor Standards Act (FLSA), industries including higher education, have had to negotiate how the Final Rule would impact their operations and more specifically, how they compensate their employees. Higher education employers are uniquely challenged in this regard because of the "cost, logistics, and cultural adjustment" involved with making such decisions within their environments (Land & Rotman, 2016, p. 1). Student affairs divisions face even greater complications because their professional roles have not "historically been subject to overtime pay," and up to this point, ambiguous direction has been offered regarding what counts as "work" activity in this realm (Morse & Asimou, 2016, p. 5), and particularly during non-traditional work times.

For HRL departments, this evaluative process is murkier. This is the case because of the unique work arrangement that has existed between institutions and live-in staff; employees who live where they work, whose role is distinctly tied to their on-call responsibilities, and who up to this point, have been compensated in part with free room and board. It is on this level of HRL employment that this report will focus, as this is the area of primary concern for the profession and the impetus behind the associated symposium.

CLASSIFICATION OF STAFF

One of the most challenging aspects of FLSA for employers at-large, and certainly HRL departments, is the methodology for classifying staff as either exempt (i.e., not eligible for overtime pay) or non-exempt (i.e., eligible for overtime pay) employees. The exempt classification requires employees to satisfy three tests: (1) they must be paid on a "salary basis," (2) they must be paid a "salary level" of at least $913 per week (or $47,476 per year), and (3) they must meet the "standard duties test," which means that their primary duties must fall into one of three categories (i.e., executive, professional, or administrative) (Defining and Delimiting the Exemptions, 2016). While most higher education employees fall into the standard exemption (as described above), some HRL leaders have reported considering the application of the teacher and academic administrator exemptions to their live-in staff. Broadly speaking, the teacher exemption is applicable to those whose primary function is teaching and the academic administrator exemption can be applied to those whose primary duties relate to administrative functions within the academic environment (DOL, 2016a).

Although the number of HRL departments that have decided they will, in fact, pursue these exemptions is currently unknown, their consideration speaks to the fact that live-in staff members take on a number of different roles within their institutions. For example, many professionals within these positions teach resident assistant training courses and serve as advisors, which might suggest that these exemptions are a possibility. Additionally, there tends to be a great deal of variance in the live-in staff

roles from institution-to-institution, which means that on any given campus an exemption might seem more or less plausible. In these cases, HRL professionals are encouraged to vet these options carefully with the guidance of their general counsel and/or human resources professionals.

WHAT IS WORK?

As live-in staff members typically exercise a great deal of "discretion and independent judgment" (DOL, 2016a) with regards to the operation of their buildings and the health and safety of their residents, the crux of the classification determination for HRL departments is often whether they can and should pay them the exempt salary threshold amount of $913 per week (or $47,476 per year). The alternative to this, of course, is to classify them as non-exempt, which would render them eligible for overtime pay at one and-a-half times their hourly rate. As the classification of this position is considered, the lynchpin is often the amount of compensable activity or "work" in which they engage, as this data helps to determine how much compensation the individual would receive as an hourly employee. As professionals in the field deliberate about this decision, they should consider a number of nuanced concepts, including "waiting time"; "on-call time"; and incidental contact, as they are instructive for understanding what is allowable under FLSA.

Waiting Time

The idea of "waiting time" is one of the most important parts of the conversation surrounding compensable time for live-in staff. To fully grasp this aspect of the issue, it is important to note that as a general rule, there are two types of employees who must be considered: those who are "waiting to be engaged" (*not working*) and those who are "engaged to wait" (*working*), and this determination is dependent on the totality of circumstances involved (DOL, 2008a).

At the symposium, these concepts were discussed at length using the examples of plumbers versus firefighters. Generally speaking, plumbers can be considered "waiting to be engaged," as their work arrangement typically involves responding to service calls, but they otherwise have control over

their own time, and to the extent that it can be used for their own "purposes" (DOL, 2008a). Alternatively, during their shifts, firefighters are never entirely free from duty, as they are largely restricted to staying at the firehouse between runs. This is true even though they have the ability to engage in non-job-related activity while on the firehouse premises, such as reading, eating, or sleeping, for example (DOL, 2008a).

On-Call Time

The plumber and firefighter scenarios were helpful applications for the what is "work" conversation, because the on-call responsibilities of live-in staff members, can be similarly conceptualized. With those scenarios as our starting place, our human resources facilitators pointed out several related considerations for live-in staff, including: (1) whether they are required to stay on campus or within very close proximity to campus during on-call duty rotations, (2) how quickly they need to respond to duty calls, and (3) how frequently they receive calls. These were provocative questions for participants because geography, response time, and use of time restrictions make it far more likely that on-call time is considered "work," and therefore compensable.

Additionally, the speakers discussed the implications of length of duty for compensable time. More specifically, participants engaged in conversations about the applicable DOL guidance, which states that on-call time under 24 hours is considered "work," even if sleeping and "personal" activities are allowed (DOL, 2011). Important to note for duty shifts exceeding 24 hours at a time, the parties can agree that up to 8 hours of sleep and meals are not compensable (DOL, 2011). Additionally, to make such an agreement, the staff member would have to be provided appropriate facilities and these activities could not be interrupted (DOL, 2011).

Incidental Contact

Finally, there was conversation surrounding incidental or *de minimis* contact with students, which is a very common after-hours experience for live-in professionals on campus. According to the

DOL, work that is “infrequent” and that occurs “for insignificant periods of time” and that cannot be “precisely recorded may be disregarded” (DOL, 2016b). Still, our human resource professional experts cautioned that this concept is very subjective and could be problematic for accurately tracking compensable time. With this in mind, they recommended strategies for balancing the need for parameters with the desire to cultivate community with residents. Amongst these recommendations was the referral of students to their normal business hours for non-emergency situations, and establishing a general policy that after-hours work must be approved by their supervisor ahead of time.

ANALYSIS

When an industry moves into a time of change and uncertainty, it is often helpful for an analysis to include the ideas that have been put forth; and what the consensus, advantages, and disadvantages of each of those models entail. While this analysis is certainly not comprehensive, it will attempt to address many of the questions that have been repeated on a frequent basis both at the symposium and through conversations with professionals in the field.

Exemptions

While recently there has been less buzz about exemptions to the new FLSA salary threshold for live-in professionals, it is an area that should be quickly examined. As previously mentioned, the two exemptions that are most widely discussed amongst HRL circles, are the teaching and academic administrative employee exemptions. In both cases, national consensus has concluded that these exemptions are not viable options for an overwhelming majority of campuses.

Teaching exemption. The following deconstruction will also provide guidance to those considering the adjunct instructors’ subsection of the teaching exemption, as well. The teaching exemption has some generic language and includes some things that are very likely to attract the interest of housing professionals at first glance. Specific reference to extracurricular activities led to a great deal of initial optimism that this could be a potential exemption for live-in housing professionals.

The obstacle to utilizing this exemption is the direct and clear wording from the FLSA guidelines that were put forth by the DOL on May 18th of 2016. It reads, "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 (DOL, 2016). Most problematic for live-in housing professionals is the requirement that the primary duty be teaching. As we have moved closer to the December implementation deadline for the new FLSA threshold, national consensus seems clear that the teaching exemption is not a viable option for the typical live-in housing professional.

Academic administrative exemption. This exemption was also examined by several institutions when the first wave of guidance was released by the DOL. The general logic associated with its application was that all administrative work done by live-in housing professionals enhances and is related to the academic instruction of students; or in other words, that housing professionals are "intervention specialists" as defined in the DOL guidance to higher education from May 18th 2016. In both cases, the guidance from the DOL defines the categories of positions intended, and live-in housing professionals are not included on the list. This is another example of an exemption that initially seemed promising, but has since received very little attention as we progress towards the December implementation deadline. It is also quite clear that the general national consensus is that this exemption is not a viable option for the vast majority of live-in housing professionals.

Charging for Room and Board

This section addresses room and board, and whether they can legally be charged back to the employee. The analysis considers multiple scenarios, and your campus' specific information should lead you to the proper section of analysis.

We require our professionals to live-in/on and they cannot opt out. If you require your staff to live-in/on, it is also almost certain that the benefit of that staff living-in/on is primarily to you the

employer, rather than to the employee. If you require someone to live-in/on and the benefit is to you as the employer, then that free room is part of that employee's compensation (i.e., not their salary, but their compensation). This is an important distinction because the value of the room cannot count toward their base salary for the purposes of meeting the minimum FLSA salary threshold, but it is part of their compensation because it is required and for your (employer) benefit. It is for all of these combined reasons that the general consensus across the nation is that it is not permissible to charge rent when you require the employee to live-in/on, and the benefit of that live-in/on status is for the benefit of the employer. I can state that our campus labor attorney at Michigan State University gave us that specific counsel, and I can also point to the GLACUHO region that came to consensus on this same point, after consulting with their specific campus legal and HR experts. There are other specific examples of campuses being given this guidance as well, but the overarching theme here is that if you require living in/on for employer benefit, you cannot then charge the employee for their compensation that you have required them to receive.

We do not require our professionals to live in/on. If you do not require your staff to live-in/on it is a much clearer path to being able to charge rent. Housing departments should still check with their legal and HR experts, especially because there are IRS tax implications for both the institution as well as for the professionals impacted. The important difference here is that you as an institution are providing an opt-in service that you now can charge for.

Charging for board. In virtually all situations you should be able to charge for a meal plan if your campus decides to do so. This is another area where it is important to check in with your legal and HR experts because there is the possibility of IRS ramifications, depending on how you choose to charge for the meal plan. One area of potential concern for live-in housing professionals is if resident interaction is part of your evaluation process. If staff start being held accountable for not interacting with students in

a dining hall setting you may create a job necessity, and that would be something to evaluate. This also becomes a concern when we move into sections detailing what work is and what work is not.

Duty

Without a doubt, duty is the area of greatest complexity when one considers FLSA through the lens of the live-in/on professional. Understanding what duty hours should or should not be counted as hours worked is imperative to proper compliance with the law. The penalties for failure to pay what should have been compensable hours is significant, carrying in addition to back pay, the possibility of fines to the offending employer. As with many things within the world of human resources, how to define which hours are compensable is evaluated on a case-by-case basis.

There are several factors that are utilized by the DOL to determine if those on duty are considered "engaged to be waiting" (i.e., firefighters; or essentially those paid even when they are waiting for the next duty call), or "waiting to be engaged" (i.e., plumbers; or those paid only for the times they responded to calls for service). The two most important factors to consider are: (1) how restrictive the duty requirements are, and (2) the frequency with which the duty impacts the employee's ability to live their life normally while on call.

Scenario 1. University A requires their staff members who are on duty to return duty calls as quickly as possible, and expects a physical response time (if needed) within 15 minutes. This essentially limits on call staff to being within a 15-minute radius of campus at all times during their duty week. During a typical duty week, 15-20 calls come in and are fielded by the on-call professional. The calls vary in scope and severity, with some being simple notifications and others being physical responses to an incident location.

Evaluation of scenario 1. The 15-minute response time and location radius is highly restrictive. The 15-20 calls during a typical duty week is also likely to be seen as highly impactful, since each duty day 2-3 calls on average are expected to be fielded. This is a scenario that is probably very familiar to

most housing professionals across the nation. While this is certainly not every duty system, this scenario provides an excellent look at the difficulties surrounding the duty expectations on many campuses.

Unfortunately, as a field, we do not have a dualistic framework that we can turn to in evaluating duty. From consultations with labor attorneys, my personal HR background, and FLSA research I have conducted, as well as hearing from many campuses across the nation; this situation is seen by most as "engaged to be waiting" (*work*ing). That essentially means that the staff member should be compensated for all their duty hours, unless they work a shift longer than 24 hours. As previously noted, if shifts of more than 24 hours are worked, by agreement of both employer and employee a sleep period of not more than 8 hours can be set with specific hours delineated. Keep in mind however, that if the employee works during that sleep period (i.e., they take a duty call, send or field emails, place calls to update other staff, etc.), then they would have to be compensated for that time even though it fell during the designated sleep time. Additionally, if 5 hours of sleep time is not achieved, then there is no reduction in time allowed. There are also schools that would view this scenario as too risky to chance. Essentially, meaning that they aren't certain which way the DOL would rule if pressed, but due to the large possible financial consequences they would prefer to assume staff to be "engaged to wait."

Scenario 2. A university requires duty staff to return calls via phone as soon possible, but has a physical response time of 45 minutes. This essentially means that staff members on call can drive and go to the two larger size towns about 45 minutes from campus during their duty week. A typical duty week has 4-5 duty calls varying in scope and intensity.

Evaluation of scenario 2. Both the response time as well as the number of calls during a typical duty week would be seen as much less invasive, and therefore much less likely to restrict a person on call's everyday life while they are on duty. For these reasons, this situation is seen very differently than scenario 1. This scenario is seen by most as a "waiting to be engaged" situation (i.e., like a plumber, who is not compensated unless they receive a call and respond to it).

Scenario 3. Everything in between scenarios 1 and 2. This is the massive gray area that gives both HR and legal experts on campus a great deal of anxiety. This is also where your local campus experts will guide your response, because there will not be consensus on this issue across the nation until several years have passed, or until someone gets reported to the DOL and the DOL makes a ruling one way or the other.

Work

Another area that requires attention is the distinction between "work" and *de minimus*, and when *de minimus* becomes work that should be compensated. First, we must understand that viewing our work through the eyes of the DOL fundamentally changes things. For a long time, we have worked in a world where being present and available for students and going the extra mile, were expectations and badges of honor. Now, we have to view those things as compensable hours. If your staff moves to non-exempt, what I just described becomes compensable time. For example, if a student sits down with one of your professional staff members at a dining hall and proceeds to chat with that professional for 45 minutes about their upcoming student conduct case, or some situation happening on their floor; your professional staff member just logged 45 minutes of compensable time. If you email your non-exempt staff member at 9:30 at night asking for a call and email on a situation that you need to report on in the morning, the time that they spend preparing, writing, sending, and calling are now all compensable time, as well. Additionally, your non-exempt staff member that attends an RA program from 7-10 pm on a random Thursday, just logged 3 compensable hours. If your non-exempt staff member wants to meet the residents early in the semester and walks the building stopping and chatting with residents, they also just logged compensable hours.

I give all of these examples to illustrate that we now have to look differently at literally everything about this role. The employer has the right to require overtime to be pre-approved by a supervisor. However, if you do not set this up as a requirement, you will start receiving hours as time

worked, just like what is listed above and without any way to curb those hours until you set an alternative expectation. Also important to note, if your employees are engaging in work, but simply not reporting it because they "love their job" or "don't need to be paid for that type of thing," you as an employer are just as culpable for a labor violation. The standard here is whether you knew or should have known that employees were working but not reporting the hours. Bottom line: non-exempt employees cannot choose. If they work, they must be paid. If you begin to have employees performing overtime without permission, you can hold them accountable through employee discipline for not following your clear directive to get all overtime cleared in advance by a supervisor, but you still must pay the hours if they worked them.

On the concept of *de minimus*, you must talk with your local HR experts. Each campus will have to make a judgment if they will use *de minimus* or if they believe it to be a risk they are not willing to take. Understanding how to differentiate between one email and a chain of emails that erupt because of that one email, is important because that is when something moves from *de minimus* into compensable time. This can be very tricky, and you will need the support and understanding of your campus partners to ensure everyone understands and is on the same page with this.

Without a doubt, adjustments to the FLSA changes is a major agent of change in our world. As campuses consider their options, it is also an excellent time to help others better understand the incredible work that is being done by live-in/on staff. This adjustment period can also serve as an opportunity to examine our practices and double our efforts on the most important things, such as serving our students well and helping to grow the senior housing officers of the future.

Association Perspective

According to ACUHO-I's second FLSA straw poll administered in October 2016, the majority of respondents (62%) indicated that they were considering the option of classifying live-in staff as non-exempt and paying overtime. On the other hand, less than half (44%) of participants reported that they

were considering the classification of live-in staff as exempt, and raising salaries to the new threshold level. Participants also reported that they were most likely to define "work" while on call, as only during the time staff are responding to an incident (70%), as opposed to awake time (16%) and all time on-call (24%). These data points suggest that while many in our field are leaning towards regarding their live-in staff members as plumbers, there are also some that believe they might be firefighters. Like the analysis above, this data illustrates that multiple models will exist on our campuses.

As the association has provided resources to professionals working towards FLSA compliance, several things have become clear. First, FLSA represents a complicated phenomenon for the field, and one for which it is difficult to identify a one-size-fits-all model. Certainly, there are similarities between institutions which allow for the gleaning of insights across campuses. However, there are as many budgetary, cultural, and operational differences which make campus operations unique, and require professionals to make different decisions that work best for their staffs and residential communities. Second, there is a strong commitment amongst housing and residence leaders to understand FLSA and provide fair compensation to our very essential live-in staff members. We see this at events like the symposium and hear this everyday as we meet with institutional decision-makers and share guidance on this issue. Third, our service to students and impacted staff depends on our ability to articulate the value of our work to decision-makers outside of student affairs, many of whom may not have an understanding of the field, but need one in order to help make decisions about position classifications. Finally, as the analysis section of this report suggests, the environmental realities are changing and the profession will need to change with it. This will likely mean making changes to our staffing structures, professional roles, and ultimately the way we manage residential communities. Responding to these changes will require us to be thoughtful about our compliance decisions and focused on serving our students. This also means that after December 1st, there will be more work to do. And, we hope that you will join us on this journey to learn more.

REFERENCES

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 29 C.F.R. §542 (2016). Retrieved from https://www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and

Land, P. G., & Rotman, S. K. (2016). *White paper: Understanding the potential impact of the DOL's proposed new overtime rule on private colleges and universities.* Retrieved from NAICU website: http://www.naicu.edu/docLib/20160129_DOLOvertimeWhitePaper.pdf

Morse, A. Q., & Asimou, H. M. (2016). *The FLSA final rule: A resource guide for student affairs professionals* (NASPA Policy & Practice Series). Retrieved from ACUHO-I website: http://www.acuho-i.org/Portals/0/img/edevt/Policy_and_Practice_No_1_FLSA_DOWNLOAD2.pdf

U.S. Department of Labor. (2008a). *Hours worked under the Fair Labor Standards Act (FLSA)* (Fact Sheet No. 22). Retrieved from https://www.dol.gov/whd/regs/compliance/whdfs22.htm

U.S. Department of Labor. (2008b). *Exemption for professional employees under the Fair Labor Standards Act* (Fact Sheet No. 17D). Retrieved from https://www.dol.gov/whd/overtime/fs17d_professional.pdf

U.S. Department of Labor. (2011). *Hours worked* (Regulations Part 785). Retrieved from https://www.dol.gov/whd/regs/compliance/wh1312.pdf

U.S. Department of Labor. (2016). *Guidance for higher education institutions on paying overtime under the Fair Labor Standards Act*. Retrieved from https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf

U.S. Department of labor. (2016). *FLSA hours worked advisor: Recording hours worked*. Retrieved from https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenEE29.asp