FLSA Fact Sheet #2: Utilizing a Fluctuating Work Week Schedule or Shorter Appointment Periods for Certain Employees

Introduction
As employees who were previously exempt from overtime pay become nonexempt under the new federal Fair Labor Standards Act (FLSA) salary threshold taking effect on January 1, 2020, UNC and its constituent institutions have numerous options to assure and maintain compliance. Among these options is to adjust employment work schedules and arrangements, where possible, to reduce the amount of overtime incurred or to maintain an employee's exempt status.

This Fact Sheet provides more information on two available options: 1) utilizing a fluctuating workweek for employees or 2) establishing a shorter appointment period (e.g., 9-month, 10-month, or 11-month) based on the operational needs of the employing department and institution.

Fluctuating workweek
FLSA allows the use of a "fluctuating workweek" method in calculating an employee's pay and overtime payment to allow for certainty and predictability in salary for the employer and the employee. Under a fluctuating work week arrangement, an institution agrees to pay an FLSA non-exempt employee a fixed amount in salary each week regardless of the number of hours worked, which limits additional overtime costs. Importantly, though, the U.S. Department of Labor (DOL) would expect an employer utilizing the fluctuating workweek method to set the agreed-upon weekly pay amount high enough to ensure that the employee is compensated at or above the applicable minimum wage for each hour worked. Understandably, this arrangement is best suited for positions that have unpredictable, irregular, or fluctuating time demands on a week-to-week basis (e.g., admissions counselors, athletics coaches, game operations staff, and other employees whose work is tied to the academic calendar, etc.).

As an example:
Assume an employee agrees to a pay rate of $600 per week, regardless of the number of hours worked. If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $15.00, $16.00, $12.00, and $12.50, respectively. Because the salary arrangement ($600) has covered the employer's straight-time pay obligation for all hours worked during each of the four weeks, only additional half-time pay is due. For the first week the employee is entitled to be paid $600; for the second week $600.00; for the third week $660 ($600 plus 10 hours at $6.00 or 40 hours at $12.00 plus 10 hours at $18.00); for the fourth week $650 ($600 plus 8 hours at $6.25, or 40 hours at $12.50 plus 8 hours at $18.75).

The benefit of this arrangement for the employing institution is that for each overtime hour worked (>40 hours) in a week, the institution would owe the employee only half of the regular rate for that week. Payment for overtime hours at one-half the employee's regular rate for the week satisfies the overtime pay requirement because the agreed-upon salary arrangement accounts for the straight time regular rate of all hours worked. Because fluctuating workweeks have the potential to create varying regular rates from week to week and pay overtime at one-half the regular rate, it is likely less administratively burdensome to satisfy all overtime compensation for fluctuating workweek employees as pay and not in compensatory time.

Shorter appointment periods

Certain UNC employees, such as athletics coaches and athletic trainers, may have uneven time demands throughout a year. In these circumstances, it may make sense for the employing institution to utilize a shorter appointment period, such as nine or ten months to align with the operational needs of the institution. Some UNC institutions already utilize 9- and 10-month appointments for athletic employees.

A primary benefit of the shorter appointment period is that an employee's annual pay can be prorated over the shorter period of actual work in determining the employee's salary for FLSA purposes. For example, an employee with an annual salary of $30,000 on a 10-month appointment would meet the revised salary threshold of $35,568. Because the $30,000 salary, which can be paid on a 12-month basis, is considered payment for 10 months of work the employee's effective monthly pay rate is $4,000 per month. When the $3,000 per month rate is prorated over a 12-month period it is equal to an annual rate of $36,000, above the salary threshold. For employees paid on a salary basis who are primarily engaged in exempt duties, this prorated pay calculation may move them above the new FLSA salary threshold and exempt them from overtime pay. It works best if the break is for a period of consecutive months; however, it may be possible for the employing institution to consider periodic breaks throughout a 12-month period. Any such proposal should be reviewed with the employing institution's human resources staff and legal counsel.

There also are administrative costs and complications that result from shorter appointment periods. For instance, it is likely that the employee would still receive his/her pay over the 12-month period in order to continue receiving benefits for all 12 months, which will increase the employer's cost of benefits compared to the months of work received by the institution. Administratively, the employing institution must plan for how the employee's duties will be fulfilled for the months outside of his/her appointment and assure that the employee is not performing work for the employing institution during any period of non-employment. For example, email access for employees on shorter appointment arrangements may need to be suspended outside of the appointment period as a means of avoiding compensable work time.