



**National Association for
College Admission Counseling**

Guiding the way to higher education

Fair Labor Standards (FairPay) Regulations Fact Sheet:

Academic Counselors and Admission/Enrollment Counselors

On April 23, 2004, the U.S. Department of Labor, Wage and Hour Division, issued final regulations governing overtime pay, entitled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." These regulations dictate to all employers which employees are qualified to receive overtime pay (non-exempt) and which do not have to be paid overtime (exempt). The Department of Labor maintains a quick-reference Web page for the new regulations at:
<http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm>

How do the new regulations apply to academic counselors and admission/enrollment counselors?

Under the Fair Labor Standards Act (FLSA), section 13(a)(1), "any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools" qualifies as an exempt employee. *Academic counselors* are considered exempt employees under the new regulations. However, *admission or enrollment counselors* (also referred to as 'officers,' 'advisors,' and 'recruiters' in NACAC parlance) are not considered academic personnel under either the old or the new regulations, and therefore not exempt using the academic personnel definition. However, admission counselors can be considered exempt as administrative employees, provided that they meet the criteria for that exemption.

Academic Counselors

Academic counselors are considered exempt under Section 541.204 of the new regulations, "Educational Establishments." *Academic counselors* "who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements" *are exempt*. The full text of Section 541.204 is included in Appendix A and is available as part of the full regulations.

Admission or Enrollment Counselors

Admission/enrollment counselors may be designated as exempt under the new regulations. Admission/enrollment counselors are not automatically designated as exempt under the academic administrative exemption because they are not considered academic personnel under either the old or the new regulations.

Admission/enrollment counselors "who engage in general outreach and recruitment efforts to encourage students to apply to the school did not qualify for the academic exemption because their work was not sufficiently related to the school's academic operations." (Excerpted from Preamble to final rule; full text citation included as Appendix B).

Admission/enrollment counselors may be designated as exempt under the general administrative exemption provided by the new regulations: “However...depending on the employees’ duties, they (admission/enrollment counselors) might qualify for the general administrative exemption because their work related to the school’s general business operations and involved work in the nature of general sales promotion work.” (Excerpted from Preamble to final rule; full text citation included as Appendix B).

According to the new regulations, an exempt general administrative employee is one who meets all of the following criteria:

- Earns more than \$23,660 per year;
- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

To further determine whether the responsibilities of admission/enrollment counselors qualify them as exempt administrative employees, review 29 CFR 541, Subpart C - Administrative Employees (Section 541.200-203 and citations within). The Department of Labor issued opinion letters in 1998 and 1999 that still constitute the prevailing guidance on determining whether admission/enrollment counselors qualify as exempt employees.

Appendix A: Educational Establishments

Sec. 541.204 Educational establishments.

(a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term “educational establishment” means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term “other educational establishment” includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state’s educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase “performing administrative functions directly related to academic instruction or training” means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.; **academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.** (emphasis added)

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under Sec. 541.200 or under other sections of this part, provided the requirements for such exemptions are met.

Appendix B: Admission Counselor Note, Preamble to Final Rule (69 FR 22147-8)

The American Council on Education suggests that we (Department of Labor) include admissions counselors and academic counselors on the list of examples of exempt academic administrative employees.

The Department has provided guidance on these positions in opinion letters dated February 19, 1998 (1998 WL 852683), and April 20, 1999 (1999 WL 1002391). In those letters, the Department addressed the exempt status of academic counselors and enrollment or admissions counselors. Those letters elaborate on the regulatory requirement that the academic administrative exemption is limited to employees engaged in work relating to the academic operations and functions of a school rather than work relating to the general business operations of the school.

Thus, academic counselors performing the job duties listed in the 1998 opinion letter were found to qualify for the academic administrative exemption because their primary duty involved work such as administering the school's testing programs, assisting students with academic problems, advising students concerning degree requirements, and performing other functions directly related to the school's educational functions. In contrast, enrollment counselors who engage in general outreach and recruitment efforts to encourage students to apply to the school did not qualify for the academic administrative exemption because their work was not sufficiently related to the school's academic operations.

However, the 1999 letter noted that, depending upon the employees' duties, they might qualify for the general administrative exemption because their work related to the school's general business operations and involved work in the nature of general sales promotion work. Consistent with these opinion letters, we have added academic counselors as an example of exempt academic administrative employees in final subsection 541.204(c), but not admissions counselors.