

**Question:** I am the HR director of a large public university. Lately, we have been looking at our jobs, and we think that some of the jobs that we currently treat as exempt should really be non-exempt. I have approached the president and told him of the result of my review and the penalties of non-compliance, but my advice – to correctly designate the jobs as non-exempt – seems to be falling on deaf ears. What can I tell him that will get his attention to the seriousness of the problem? —J. G.

**CompDoctor:** Well, J. G., I hope your president is familiar with the expression “inviting the camel to stick his nose under your tent.” Given the scenario you outline, there is a very good likelihood that he will become intimately acquainted with one camel in the form of the U.S. Department of Labor’s Wage and Hour Division fairly soon should ANY affected employee decide that the university has been treating them unfairly by not paying them their richly deserved overtime. While you have talked to your president about the penalties for non-compliance, we assume that he does not fully appreciate the consequences of letting this particular camel stick its nose under the university’s tent.

Putting aside all of the legal reasons for complying with the law, the DOL version of the TV show “Fear Factor” should be enough to get one’s attention. If DOL does come in to investigate a particular claim, and they find that an employee is due overtime pay, they typically reach a couple of other conclusions as well. The most significant one is that if you were short-changing one employee, you must have been short-changing others. If there is smoke, there must be fire is their motto. At that point, they begin to review all of your jobs, along with your general pay practices. Should they find other cases where overtime was due but not paid, the university becomes open to sizable additional back pay and penalties. In this day and age, when public universities are scrounging for every nickel just to keep up, do you really want or need to incur the potential costs that such an audit could uncover. In a large university, can you honestly say that the problem is limited to the position(s) you have already identified?

Something that the president may not understand (but you need to know with

absolute clarity) is that even though an employee may claim (today) that they are “professional” or that they “have no problem with working whatever hours are needed to get the job done,” the employee cannot waive his/her rights under the Fair Labor Standards Act. Although they may be happy today, should a problem arise, they can go to the DOL tomorrow and file a claim for back pay. This is a very common occurrence and one that your president needs to understand.

Although the Department of Labor has proposed certain changes to the exemption criteria, any changes will not go into effect until late in 2004, and that assumes that there are no further roadblocks that affect implementation of the changes. As you know, the Congress has approved the funding legislation and the President has signed the authorization bill. Consequently, DOL is now in a position to issue its final revisions to the rules. However, there is always the chance that there could be a court challenge to the new rules. During the comment period, numerous suggestions were made including a compromise that would ensure that all individuals currently receiving overtime would continue to do so regardless of whether their job could become exempt. This, of course, is an eminently logical solution since the collective bargaining process was never designed to address complicated issues such as which jobs should or should not be paid OT regardless of the minimum requirements established by the Department of Labor. The fact that the duties tests that are currently used were first established in 1940 and last updated in 1949, or the fact that the salary basis test was last updated in 1975, does not seem to matter to elected officials who are endowed with infinite knowledge and wisdom when it comes to updating the regulations.


Please note that the new rules proposed by DOL would allow exemption of certain

jobs that are now often treated as non-exempt. University jobs that appear to be of particular interest to DOL include athletic trainers and dietary managers. In our experience, the administrative and para-professional jobs that you have been treating as exempt create significant potential exposure to the university.

The best course of action for you and the university would be to review the actual duties performed by those employees who you believe may be incorrectly categorized, along with a sample of other jobs within the university that are classed as administrative or professional, to determine if your exposure is greater than you think it might be. While you will need to take appropriate corrective action once you know how the position should be categorized, the fact that you have taken a positive

action may help should you subsequently be subjected to a DOL inquiry or audit.

Then, when the camel comes calling, you can simply feed it some munchies and send it back to the desert.

*The CompDoctor™ is the team of Jim Fox and Bruce Lawson of Fox Lawson & Associates LLC, a compensation and human resources consulting firm that specializes in assisting governments in fixing their compensation and classification systems. They are seriously irreverent about their specialty. You may reach them at [www.foxlawson.com](http://www.foxlawson.com). If you have a question you would like to have them answer, please write to them at [jfox@foxlawson.com](mailto:jfox@foxlawson.com) or [blawson@foxlawson.com](mailto:blawson@foxlawson.com). They will try to include it in the next issue of CompDoctor™.*—

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