

**SOUTH DAKOTA BOARD OF REGENTS**

**Budget and Finance**

**AGENDA ITEM: 7 – B**

**DATE: August 4, 2016**

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**SUBJECT: BOR Policy 4:25 Revision – Overtime (First Reading)**

On May 18, the U.S. Department of Labor (DOL) released the final rule increasing the salary threshold for exemptions to the federal overtime pay requirements under the Fair Labor Standards Act (FLSA) from \$23,660 to \$47,476. DOL also announced that it will automatically increase the threshold every three years, and that employers will need to be in compliance with the new rule by December 1, 2016. A multi-campus HR committee has been working to prepare for these changes, and had a face to face meeting in Pierre on June 16-17, 2016.

The DOL issued a document that provides guidance and clarification on the application of the regulation for positions specific higher education. The guidance states:

1. Coaches and Assistant Coaches: The FLSA teacher exemption allows positions who have a primary duty of instruction to be exempt from the salary requirements under FLSA - the new guidance clearly states that coaches and assistant coaches may fall under this exemption if their primary duty is teaching, including the instruction of athletes how to perform their sport.
2. Graduate/ Undergraduate Research Assistants: The DOL views graduate and undergraduate students who are engaged in research under a faculty member's supervision in the course of obtaining a degree to be in an educational relationship - and not an employment relationship with the school or with a grantor. As such, the Department will not assert such workers are entitled to overtime. Graduate students whose primary duty is teaching or serving as a teaching assistant fall under the FLSA's teaching exemption.
3. Resident Hall Advisors/Community Assistants: Students who are participants in a bona fide educational program and who serve as resident advisors in exchange for reduced room and board charges or tuition credit similarly are not considered to be in an employment relationship with the institution.

(Continued)

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**DRAFT MOTION 20160804\_7-B:** I move to approve the first reading of the revisions to BOR Policy 4:25 as presented.

4. Academic administrative personnel: The administrative personnel that help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists and others with similar responsibilities are subject to a special salary threshold that does not apply to white-collar employees outside of higher education. These employees are not entitled to overtime compensation if they are paid at least as much as the entrance salary for teachers at their institution.

The DOL has not provided specific guidance on the term “minimum salary for teachers,” the practical course of action would be to use as the baseline the salary paid to those full-time, entry level instructors. CUPA-HR recently issued a whitepaper on the new regulations that states that the entry level baseline salary should be the minimum salary of a teaching position that is regularly hired for a continuing appointment, and goes on to state that this is the actual lowest salary paid, not an average. In a review of the last three years of entry level instructor salaries, the minimum salary at each institution ranges from approximately \$34,000 - \$40,000. Academic advisors make up a large number of the employees affected, and will need to be evaluated individually against the institutional entry level instructor salaries.

Human resource and athletic departments are doing a review of all coaching position descriptions to ensure that they meet the primary duty requirements to utilize the teaching exemption. Coaches that have a primary duty of recruitment or non-instructional duties will need to be converted to overtime eligible. Athletic trainers will likely be converted into overtime eligible status.

There are approximately 460 employees, excluding extension associates/specialists and athletic coaches, that fall under the new salary threshold. Two of the areas most impacted by this change are admissions counselors and resident hall directors, those positions will be converted into overtime eligible status. Post-doctoral researchers are being reviewed at each institution to do a cost-benefit analysis based on an estimated projection of overtime versus the amount to increase the salary. The campuses are doing a thorough review of all positions impacted by this change and will be ready to convert employees into overtime eligible positions for the December 2016 pay period.

In addition, the HR team has created the communication that will be sent to all employees who are being converted to an hourly rate. USD HR has also created a training program which will be shared with each institution so they can use it to train both supervisors and employees on timekeeping, leave, compensatory time, management of overtime through flextime, and so forth. Those employees who will become overtime eligible and are on less than 12 month appointments have been notified that they will not be placed on deferred pay and will only receive paychecks in the months they are on contract.

The human resources committee has made recommendations for revisions to BOR Policy 4:25, which regulates overtime, leave and timekeeping. This has been reviewed by SAC, AAC and

BAC and will go to councils for another review prior to the second reading. The proposed changes to BOR Policy 4:25 can be found in Attachment I. Substantive changes to the policy are outlined below:

1. Changing the title to Time and Leave Reporting to be more accurate of the content of the policy, this policy also addresses time and leave reporting for overtime exempt employees;
2. Increasing the compensatory time maximum accrual from 40 to 80 hours, this will allow for departments to manage compensatory time more effectively;
3. Addition of language that explicitly states that supervisors reserve the right to adjust an employee's workweek to manage overtime liability;
4. Clarifying the order that leave should be adjusted in the employee timesheet when time in a workweek exceeds 40 hours;
5. Adding language to direct how administrative leave should be paid for special holidays granted by the Executive Director (non-emergency closings);
6. Addition of language to require that an employee should have prior approval before accessing electronic systems and/or email outside of their normal schedule.

## SOUTH DAKOTA BOARD OF REGENTS

### Policy Manual

**SUBJECT:** ~~Overtime~~ Time and Leave Reporting

**NUMBER:** 4:25

The ~~State of South Dakota~~ South Dakota Board of Regents is considered to be one employer. An employee cannot be both a “paid” employee and a “non-paid” volunteer while performing the same type of work for the same employer. All overtime must be approved prior to the hours being worked. Failure to comply with any provisions of this policy may subject the employee to disciplinary action, up to, and including termination.

#### 1. Employees Eligible For Overtime Pay

Employees are determined to be eligible for overtime based on the duties and level of compensation of the individual position. Employees eligible for overtime compensation shall normally be paid in a combination of cash and compensatory time. ~~Exceptions to the normal pay method may be approved by campus leadership if the budget allows.~~ Overtime will accrue at the rate of time and one-half based on a forty (40)-hour workweek. Employees may have their compensatory time carried forward to subsequent pay periods. However, the maximum accumulation of compensatory time is ~~40~~eighty (80) hours with the exception of production workers for the College of Agriculture and Biological Sciences who ~~shall may~~ accrue up to 160 hours. Compensatory time exceeding this maximum must be paid or used. ~~in the next pay period. Institutional business officers or their designee will make this determination with consultation provided by the Board of Regents Office and the Bureau of Human Resources.~~ The Board of Regents reserves the right to pay cash, at any time, to the employee for any or all accrued compensatory hours.

##### A. Work Week

The standard workweek shall be from 12:00 a.m. Sunday through 11:59 p.m. Saturday.

##### B. Overtime Payment

Overtime pay will be computed as actual hours worked in excess of 40 hours during a work week. ~~with the exception of a small number of specified staff.~~ In computing overtime, ~~hours,~~ holiday hours and leave hours ~~will not be~~ not considered as hours worked.

### C. Work Week Adjustments

~~Employees and managers~~ Managers and employees are expected to adjust the workweek whenever possible to avoid an overtime liability. For example, if an employee works forty (40) hours in the first four days of the normal workweek, every effort should be made to adjust the work schedule within the workweek so that the employee ~~will~~ does not work more than forty (40) hours. In this example, the employee would not report for work the last day of the workweek. Supervisors reserve the right to adjust the schedule of the employee.

### D. Leave Time

Annual leave, compensatory time, sick leave, court and jury leave, personal leave, military leave, and any other leave time will not be ~~counted as~~ considered hours worked.

If approved annual leave, ~~or~~ sick leave, or compensatory time are used in any combination with hours worked, and totals more than forty (40) hours during the work week, the ~~amount of leave an employee must take should~~ be reduced to bring the total hours paid to forty (40) hours for the week. ~~If an employee works more than 40 hours, no leave time should be deducted from the employee's balance, with the exception of employees who meet the criteria outlined in the following paragraph. If multiple types of both sick and annual leave have been taken in a week that requires adjustment, of leave, the sick leave should be adjusted before annual leave. the adjustments should be applied in the following order:~~

1. Personal Leave
2. Sick Leave
3. Annual Leave
4. Compensatory Time

If an employee works more than forty (40) hours, no leave time should be deducted from the employee's balance, with the exception of employees ~~Work schedules will not be adjusted for employees~~ who have reached the maximum annual leave balance, and whose annual leave was approved prior to working the overtime. In such situations, H hours that will prevent the employee from losing ~~that~~ the current pay period's annual leave accrual will be paid. ~~For example, if an employee had prior approval to take annual leave on a Friday and was required to work more than 40 hours Monday through Thursday, the employee should be paid for the amount of annual leave requested that is necessary to prevent a loss of annual leave.~~ Payment to employees with scheduled annual leave applies only to employees with maximum annual leave balances.

Employees who are on military leave, or court and jury leave will be paid the leave hours at straight time regardless of other hours worked during the week.

The leave time will not be considered ~~counted as~~ hours worked. The appointing authority may require employees to report to work during hours outside of the military or court and jury leave.

#### **E. Holiday Pay**

Holiday hours will not count as hours worked for purposes of computing overtime. All overtime-eligible employees who work at least one (1) shift or are on paid leave during the calendar week in which the holiday falls are eligible for holiday pay. For payroll purposes, a holiday is no more than eight (8) hours. An employee who is on leave without pay for the entire week when a holiday occurs will not receive holiday benefits. Employees who are newly hired ~~into the system~~ and who begin work the day after the holiday will not receive the holiday pay hours.

As provided by South Dakota law, an employee must be compensated with time off or cash reimbursement for holiday hours. An employee who is required to work on a holiday may be compensated in one of two (2) ways.

- 1) They could take off an equal number of hours at a later date, or;
- 2) They could receive straight time paid in cash for an equal number of hours.

For example, overtime eligible employees who work thirty-two (32) or more hours in a week when an eight (8) hour holiday is observed will be paid straight time for the “extra” hours over thirty-two (32) and up to forty (40). If an overtime eligible employee actually works more than forty (40) hours, exclusive of the eight (8) holiday hours, time and one-half (1.5x) will be paid for those hours over forty (40).

Part-time employees will receive prorated holiday pay depending upon the average number of hours they have worked in the previous three months of their appointment.

#### **F. Administrative Leave**

Administrative Leave may be granted by the Executive Director, or in accordance with BOR Policy 4:40. Administrative leave approved for reasons that do not fall under BOR Policy 4:40 will be paid as follows for overtime eligible employees:

- 1) Employees will not receive administrative leave pay in excess of the scheduled shift, or more than forty (40) hours per week;
- 2) Only leave eligible employees who are scheduled to work during the administrative closing are eligible for paid administrative leave;
- 3) Administrative leave will be granted only for the number of hours the work location was administratively closed, not to exceed the number of hours for which the employee was scheduled to work;
- 4) Employees required to work so essential functions can be performed must report to work at prearranged worksites, unless otherwise instructed. The

procedure for identifying these employees will be established by each institution. Those overtime eligible employees that are required to work will receive payment for the administrative leave hours (at a straight rate) plus the hours they were required to work.

- 5) In the event that administrative leave is granted in less than an eight (8) hour increments, the leave shall be recorded for the number of hours granted, and the remainder of the day will be recorded as regular hours worked and/or the appropriate leave type.

**FG. Inconvenience Pay**

Overtime eligible employees, with the exception of employees covered by law enforcement civil service, who have fulfilled both of the following conditions are guaranteed a minimum of three (3) hours pay regardless of the hours actually worked if:

- 1) The employee has completed the normal shift and left the work place; and
- 2) The employee is unexpectedly required to return to work.

Employees who are called in prior to the beginning of their scheduled shift and are allowed to continue working through the shift are ~~not eligible~~ineligible for inconvenience pay. Only the hours actually worked are used in the computation of overtime.

Up to three hours of inconvenience pay hours (not actually worked) will be compensated as straight time and will not be used to calculate overtime. For example, if an overtime eligible employee has worked for forty (40) hours, is unexpectedly called back to work, and works for ~~one (1) additional hour~~ an additional one hour, the employee is paid as follows:

|  |    |
|--|----|
| Hours Worked                             | 41 |
| Inconvenience pay hours at straight time | 2  |

If the employee is on-call and the on-call hours are compensable as hours worked, inconvenience pay is not required.

Inconvenience pay does not apply if the employee is not required to actually leave ~~his~~their residence for the work site. For example, employees who can deal with a problem on the phone without leaving their residence are ~~not eligible~~ineligible for inconvenience pay. ~~However,~~ the time spent at their residence dealing with the problem is considered hours worked.

**GH. On-Call Time**

Employees may be required to report to work in their off hours on short notice. If calls to perform work are so frequent or the readiness for work conditions are so restrictive that the employee is not ~~really~~-free to use the intervening periods effectively for his or her own benefit, the time must be considered hours worked.

Time spent on-call is considered hours worked if the employee is required to remain on the employer's premises or at a location specified by the employer. ~~Employees who use beepers, cell phones and other communicating devices are considered to be not working, and the hours are not compensable.~~ When employees are called out on a job assignment, only the time actually spent working is considered as hours worked. Inconvenience pay for up to three hours may be required. Employees who live at the work site are ~~not eligible~~ ineligible for inconvenience pay. If an employee is issued an electronic communication device, the issuance does not qualify on its own as compensable on-call time.

**I. Electronic Access**

Except with prior approval, overtime eligible employees may not access Board of Regents electronic systems, or e-mail while they are not at work. Use of remote e-mail or other electronic systems is an obligation to compensate. If an overtime eligible employee does utilize e-mail or other electronic systems remotely, they are required to record their time and enter it into the timekeeping system.

**HJ. Job Related Training**

Attendance at conferences, workshops, meetings, or classes is considered hours worked if the State pays travel expenses, registration fees, or tuition or if the employee is not required to take annual leave or leave without pay or to adjust the work schedule. This policy applies to any training for which the State pays, including night classes and continuing education at universities or adult education classes sponsored by high schools, unless all of the following conditions are met:

- 1) Attendance is outside of the employee's regular working hours;
- 2) Attendance is in fact voluntary and not directed ~~by or suggested by~~ management;
- 3) The course, lecture or meeting is not directly related to the employee's job; and
- 4) The employee does not perform any productive work during such attendance.

If all of the criteria are met, the training need not be ~~counted~~ considered as hours worked.

Reduced tuition allowed by SDCL 3-20 does not constitute proof of job relatedness for purposes of determining whether such training should be ~~counted~~ considered as hours worked.



**IK. Travel Time**

Time spent in travel will be ~~considered counted~~ as hours worked. Layovers at airports where the employee is not free to pursue personal interests is also included as time spent in travel and ~~considered counted~~ as hours worked. -Actual meeting time outside of the normal work schedule is also considered hours worked.

Hours in which employees are free to do as they please and time spent relaxing and sleeping are not ~~compensable~~. considered hours worked.

Social activities at conferences outside of normal working hours are not considered working time unless the employee has been directed by management to attend the activity for the purpose of hosting guests or fulfilling a work-related function. For example, if management has directed an employee to coordinate and host a banquet as part of the institution's obligation at a conference, those hours are considered ~~working time~~ hours worked. If ~~a volunteering an~~ employee chooses to attends a banquet at a conference and does not have an assigned role, the hours are not compensable.

**JL. Recordkeeping**

All overtime eligible employees will complete accurate records of hours worked and leave time taken. The records ~~will~~ reflect the date, number of hours worked, and leave time taken for each pay period.

**2. Employees ~~Not Eligible~~ Ineligible For Overtime**

Employees who are exempt from the overtime requirements of the FLSA are ~~not eligible~~ ineligible for compensatory time.

**A. Leave Time**

Employees who are ~~not eligible~~ ineligible for overtime compensation are expected to be available to the public, co-workers and subordinates to provide assistance and guidance on policy problems and questions.

Employees who are ~~not eligible~~ ineligible for overtime are not required to take annual, sick, personal, military, or court and jury leave for absences of less than a full day except as may be applicable when annual, sick, or personal leave is used as family medical leave. If the employee is absent from the job for a full day during the pay period, some type of leave must be taken, unless prior approval for a leave of absence is obtained.

Employees must continue to obtain approval from their supervisor prior to an absence from work. Managers are expected to set the normal working hours and

approve time away from the job for employees ~~not eligible~~ineligible for overtime, regardless of whether leave must be taken. Employees and managers should keep in mind when requesting and approving time away from the job that such employees are compensated not for the amount of time spent on the job, but rather for the general value of services performed. Before time away from the job is approved, managers and employees are expected to ensure that the needs of the public and other state employees who rely on them can reliably be met.

## **B. Holiday Pay**

Non-overtime-eligible employees who work at least one shift or are on paid leave during the calendar week in which the holiday falls are eligible for holiday pay. For payroll purposes, a holiday is no more than eight (8) hours. An employee who is on leave without pay for the entire week when a holiday occurs will not receive holiday benefits. Employees who are newly hired ~~into the system~~ and who begin work the day after the holiday will not receive the holiday pay hours.

## C. Administrative Leave

Administrative Leave may be granted by the Executive Director, or in accordance with BOR Policy 4:40. Administrative leave approved for reasons that do not fall under BOR Policy 4:40 will be paid as follows for employees ineligible for overtime:

- 1) Only leave eligible employees who are scheduled to work during the administrative closing are eligible for paid administrative leave;
- 2) Administrative leave will be granted only for the number of hours the work location was administratively closed, not to exceed the number of hours for which the employee was scheduled to work;
- 3) Employees required to work so essential functions can be performed must report to work at prearranged worksites, unless otherwise instructed. The procedure for identifying these employees will be established by each institution;
- 4) When administrative leave is granted in less than eight (8) hour increments and an employee is absent for the entire day, they will not receive administrative leave for the partial day and must report the appropriate leave type for the workday.

## **ED. Recordkeeping**

All employees will submit complete accurate leave records. The records will reflect the date and type of leave time taken for each pay period.

**SOURCE: Current Policy Manual 8.6; 8.6.2; BOR, December 1998; BOR, August 2001; BOR, June 2003; BOR, May 2008, 2016.**