



FRATERNAL LAW™

A Fraternity Law Periodical Published by
Fraternal Partners, a Division of Manley Burke,
a Legal Professional Association

New Overtime Regulations Increasing Salary Threshold Become Final **John Christopher, Manley Burke LPA, john.christopher@manleyburke.com**

On September 24, 2019, the proposed Department of Labor rules modifying overtime pay became final. The new rules will be effective January 1, 2020.

Among other items, the new rule updates the salary and compensation levels needed for workers to be exempt. The standard salary level in the new rule is set at \$684 per week (\$35,568 for a full-year worker). This is an increase of \$229 per week over the existing rule adopted in 2004. According to the Department of Labor, the salary amount accounts for wage growth since the 2004 rulemaking by using the most current data available at the time the Department drafted the final rule.

The new rule allows employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level. The Department of Labor states that the new rule is permitting the inclusion of bonus and incentive payments in recognition of evolving pay practices. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, they must make such payments on an annual or more frequent basis.

In the event an employee does not earn enough in nondiscretionary bonus or incentive payments to retain exempt status for a given year, the new rule permits the employer to make a “catch-up” payment within one pay period of the end of the year. The “catch up” payment may be up to 10 percent of the total standard salary level for the preceding year. The catch-up payment will only count toward the prior year’s salary amount and not toward the salary amount in the year in which it is paid.

The Department further states that experience has shown that fixed earning thresholds become substantially less effective over time and that lengthy delays between updates necessitate disruptively large increases when overdue updates finally occur. To avoid these issues, the Department of Labor intends to update the earnings thresholds “more regularly” in the future through the notice-and-comment rulemaking mechanism.

Arming Your Organization Against Fraud

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Fraud does not discriminate. Any organization, big or small, is susceptible to fraud and the financial loss, headaches, and embarrassment that inevitably follows. Recently, a well-known fraternal organization fell victim to fraud within their organization. This is an extremely unfortunate and costly event to recover from. Could the same misfortune fall upon your own organization? Without the proper safeguards, the answer is a definite “YES!” Here are a few basic ways you can arm your organization against fraud.

1. Do not place too much responsibility on one or a few employees

It is common for fraternal organizations and foundations to operate with a small staff. The majority of the budget is often allocated to programming and fundraising, leaving little resources for expanding back office staff. As a result, significant control is placed in the hands of a limited number of people, like the CEO/executive director or financial managers. Trusting one individual with too much responsibility is like throwing down a welcome mat and inviting fraudulent opportunities through your front door.

The most critical element of fraud prevention is segregation of duties. Review the responsibilities of each employee involved in financial activities to identify ways they could commit fraud while performing their core responsibilities. Does one person collect the incoming checks, make the deposits, and reconcile the general ledger and bank accounts? Re-allocating these duties to two different staff members is a relatively easy and effective method to prevent an employee from intercepting the incoming checks and depositing to their own account, all while covering their tracks in the accounting system.

If your staff is small and you do not have the luxury of splitting these of duties between different employees, consider alternatives like a lockbox at your banking institution. Instead of sending donations to your headquarters, donations are mailed to a P.O. Box and bank employees retrieve the checks and make the deposit on your behalf. Upon deposit, your organization will receive scanned copies of the checks and any accompanying documentation to enter the receipts into the donor database and general ledger.

Another example of proper segregation is to assign check signing authority to someone who is not involved with account reconciliation. This prevents an employee from writing an unauthorized check, signing it, and hiding it in the general ledger where it won't be noticed. Also keep in mind who has access to the bank accounts and what they can do with that access. Who can request wires or transfers? Is someone else monitoring this activity so that unauthorized or improper withdrawals and transfers would be noticed?

2. Create clear policies and monitor your employees

Make sure your policies explain that violations will result in disciplinary action, including the possibility of employment termination and criminal prosecution. And if an employee violates your policy, do exactly as you promised. To ensure that employees understand your policy, require them to acknowledge that they have read and agree to follow it. Proper oversight of employees goes a long way in preventing fraud. Your policies state that expense reports should be accompanied by receipts showing business purpose, but you continue to approve the expense reports without proper documentation—what message does this send to your employees? They might be tempted to throw a few personal charges on their report next time without too much fear of getting caught. When minimal staffing is an issue, enlist the help from board members. The board president or treasurer can help monitor bank activities by receiving a copy of the bank statement each month and examining for unusual wires or transfers, unusual check payments, etc. A board member can also serve as a secondary check signer for large check payments or when the main signer is out of the office or unavailable.

3. Watch for indicators of employee distress or changes in personal behaviors

It is not common that an employee would walk into work one day and declare to themselves, “Today is the day I commit fraud!” It is often something that has built up over months and usually stems from financial burdens or undue pressure felt by the employee that they can use to rationalize their illegal and unethical behaviors. Supervisors and board members can watch for indicators of the burdens and pressures that may ignite the desire to commit fraud. Even with these safeguards, you cannot have absolute protection against fraud—no organization can. But you can reduce the risk of substantial fraud losses by recognizing your vulnerabilities and taking appropriate steps to mitigate them and to investigate thoroughly when fraud is suspected. Choosing to ignore fraud and hope for the best may result in suffering both financial and reputational damage.

Criminal Charges Filed Against Five Fraternity Members

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Although no evidence of hazing was found surrounding the death of an eighteen-year-old UC Irvine freshman who died after attending his fraternity’s “Big Brother Night,” five members of the fraternity have now been criminally charged in connection with his death.

Noah Domingo was found to have a blood alcohol level of roughly 0.331 when he died on January 12, 2019 at an off-campus house affiliated with the Sigma Alpha Epsilon fraternity. The coroner determined that Noah’s cause of death was accidental acute ethanol intoxication.

The five individual fraternity members against whom misdemeanor charges have been filed were named on the lease to the off-campus house where Noah passed away. They have all been charged with violating the local municipal code that prohibits a party or gathering where underage drinking is permitted. If convicted, each could be required to serve up to six (6) months in jail.

Additionally, Noah's "big brother" has been charged with a count of furnishing alcohol to a minor causing great bodily injury. He faces up to eighteen (18) months in jail. Another member has been charged with a separate count of furnishing alcohol to a minor, for which a maximum sentence of six (6) months of jail time could be imposed.

Ohio University's Effort to Eliminate Hazing Ignores the Rights of its Students

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"...THE GROUP IS NOT TO MEET IN ANY CAPACITY, officially or unofficially. This includes organizational meetings, meetings of the executive board, organizational programming, social events, philanthropic events, and any trip or travel. This also includes communication with and among the group via any social media platform or application. To reiterate, I expect there to be no other communication with your members, unless preapproved by me."

So dictated the Assistant Dean of Students and Director of Ohio University's Office of Community Standards and Responsibility.

In other communications, the Ohio University (OU) Assistant Dean indicated a desire to "uphold the values of our institution." Apparently, those values do not include recognizing the constitutional rights of the University's students and the members of the numerous groups that recently received Cease and Desist orders from OU. The Assistant Dean may have significant power and responsibility, but that does not include the prior restraint on freedom of speech.

Last fall at OU, Collin Wiant, a Sigma Pi pledge, died. A lawsuit alleging his death resulted from hazing is pending. So it is understandable that OU would be especially concerned about addressing hazing issues. But does that justify a broad deprivation of the rights of students to freely assemble, speak and communicate freely, and to appropriate due process? Of course not.

Yet those rights are precisely what OU failed to recognize last month. The University received several reports of hazing by IFC member groups. Rather than concentrating on those groups, a Cease and Desist order was issued to all IFC member groups, as well as to the band and the rugby team. Later, three NPC member groups were added solely as a result of two very short anonymous emails that appeared to be from a single source who claimed to have been a student at OU more than five years ago.

Those Cease and Desist orders—nowhere provided for in any University public policy or regulation—were claimed to not be:

"a University sanction...{however} you and your organization are expected to comply with the terms of this directive. It is important to note that failure to comply with the conditions of a lawful directive of a university official would be considered a violation of the Ohio University Student Code of Conduct."

It is difficult to comprehend how a state university can view a prior restraint on the freedom of speech and the establishment of an Assistant Dean as the censor of communication among its students as being a lawful directive.

Ohio University's Office of Sorority and Fraternity Life piled on, issuing a five-page, single-spaced, "Frequently Asked Questions" document. Among the answers provided were the following:

Can members, even those not living at the house, still hang out at the house? Groups under a Cease and Desist directive from the Office of Community Standards and Student Responsibility and groups under a University-Directed suspension may not congregate at their house.

Can we talk to each other? ... You may continue to communicate with your friends on a 1:1 basis but should reduce conversations to personal topics as opposed to sorority/fraternity operations and updates.

Can we play intramurals? Individuals are still able to play intramurals? Individuals are still able to participate in intramurals, but you are not able to participate as an organization or as a group of people that could be associated with your organization.

Can the House Director have a groupme chat with students living in the house? The house director can continue to communicate with those members living in the house? The house director can continue to communicate with those members living in the chapter facility for matters pertaining only to the house.

Are we (advisory board members) permitted to contact our new members with any update or statement of support? As advisors you can contact your members regarding University or organizations updates. However, please note that you should not be communicating with chapter members regarding details of the investigation.

For weeks, the University withheld information it claimed justified these cease and desist orders, arguing in the Q&A that, "to protect the integrity of the administrative process, the University needs to withhold the reports of hazing until the administrative investigation is complete."

Pushed by public records demands from many sources, the University finally was forced to comply with Ohio's public records law and released the allegations against each group to each group, and all of the allegations were also released to the media. But, at least as of this writing, they have not released the source of the allegations. Indeed, instead of releasing the original emailed allegations regarding the three women's groups, the University released official university Incident Reporting Forms, on which the emails, without their source, were restated but with redactions.

Withholding information regarding the source deprived many of the accused groups of the ability to attempt to prove that the allegations against them are bogus. In the anonymous emails, one of the women's groups was accused of "forcing girls to do drugs," and another was accused of requiring girls to "sit on dryers nearly naked" while circling their "fat in sharpie markers." The anonymous report was the sole basis for the Cease and desist orders to the three groups and the justification for the plan to require every member of each organization to individually attend a 45-minute interrogation session.

Finally, common sense and better judgment prevailed, and on October 30, 2019, the three women's groups were notified that the investigations of their chapters "will not be continuing at this time." Unfortunately, significant damage had already been done to the three women's groups and their members. Recall the aftermath of the bogus Rolling Stone article reporting false allegations of sexual misconduct at the University of Virginia.

National and International Fraternities and Sororities share the concerns of colleges and universities regarding hazing. Virtually all of them make clear in their own rules that hazing is banned. They support holding accountable any student who engages in hazing. They have and continue to support legislation that defines criminal hazing and the criminal prosecution of those who violate such laws. And they attempt to work with the institutions where they have chapters to address hazing issues. But it does not help when a university is not following any process defined anywhere in its published Code of Conduct or other publicly available policies.

In the end, especially at a state university, there must be respect for the rights of the individuals impacted by university actions; that includes members, the chapter, the house corporation, and the national fraternity. That did not happen at Ohio University.

Details Emerge on Bogenberger Settlement

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In its January 2019 issue, Fraternal Law reported on the settlement in the case of the David Bogenberger hazing death in an article entitled, "Largest Ever Settlement Reached in Hazing Case." [1]

After six years of litigation involving more than 44 defendants, the case settled for \$14 million dollars. Fraternal Law Partners has now learned that the overwhelming majority of that settlement was paid by the 44 individual defendants, which included 22 members of the chapter who had been found guilty of misdemeanors, and 22 women who, according to the Illinois Supreme Court, had actively participated in the hazing that resulted in the alcohol poisoning death of David Bogenberger. The Pi Kappa Alpha Chapter at Northern Illinois University where the death occurred was responsible for paying less than 2% of the settlement. The International Fraternity was previously dismissed from the suit, a dismissal upheld by the Illinois Supreme Court. [2]

In fact, more than 98% of the total settlement came from the individuals who engaged in the conduct that led to the death of David Bogenberger.

Thus, in the end it was those individuals who violated the law, broke university policy, and ignored fraternity (and sorority) rules that, appropriately, bore the lion's share of the settlement burden.

[1] Tim Burke, *Largest Ever Settlement Reached in Hazing Case*, 158 *Fraternal L.* 10 (Jan. 2019).

[2] *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 104 N.E.3d 1110 (Ill. 2018).

2020 Fraternal Law Conference Registration Now Open!

We are thrilled to announce that the 2020 Fraternal Law Conference will once again be at Great American Ballpark, the home of the Cincinnati Reds baseball team! The Ballpark has some fantastic meeting and event space in a setting like no other! Our guests will be staying directly across the street from the Ballpark at the brand new AC Hotel by Marriott overlooking the Ohio River in downtown Cincinnati.

The Conference will be all day on Thursday, November 5, 2020, and will conclude at noon on Friday, November 6, 2020. More details to follow.

Register: <https://fraternallawconference.regfox.com/2020-fraternal-law-conference>

Pricing:

Early Bird (11/4/2019-12/31/2019): \$490

Early Registration (1/1/2020-5/31/2020): \$515

Standard Registration (6/1/2020-11/4/2020) \$540

Stay tuned to fraternallaw.com for more details!

The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

Fraternal Law is published four times a year as a non-profit service of Manley Burke, LPA, 225 West Court Street, Cincinnati, Ohio 45202, (513) 721-5525. Please address all editorial inquiries and all subscription correspondence to this address or to mkamrass@manleyburke.com.