Nonprofit Overtime Webinar

What Nonprofits Need to Know and Do about the Overtime Final Rule

November 5, 2019
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  *Nonprofit Advocacy Matters* and
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  [www.councilofnonprofits.org/connect](http://www.councilofnonprofits.org/connect)
What We’ll Cover

1. **Why** an Overtime Webinar Specifically for Nonprofits?

2. **Who** is covered by the FLSA?

3. **What**: The Overtime Final Rule – U.S. Department of Labor presentation

4. **How**: Complying with Overtime Law
Our Presenters

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Legal Director and General Counsel

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Partner
Why an Overtime Webinar Specifically for Nonprofits?
FLSA Coverage and Context

Who is Covered by the Fair Labor Standards Act?
FLSA Coverage and Context

FLSA Basic Principles

▪ All covered employees must be paid at least the federal minimum wage for each hour worked.

▪ All covered employees must be paid time and one-half the regular rate of pay in any workweek in which they work over 40 hours.

▪ Any employer claiming an exemption has the burden to prove that the exemption applies.
FLSA Coverage and Context

Overtime basics

- All covered employees must receive overtime unless they are otherwise exempt.
- **Reason**: Prevent abuse and spread the work/create jobs.
- Non-exempt employees must receive overtime pay hours over 40 in a workweek.
- Must pay time and one-half times an employee’s regular rate of pay.
- If an employer knows or should have known a worker is working overtime, they must pay it even if not authorized.
FLSA Coverage and Context

Who is Covered by the Fair Labor Standards Act?

- Enterprise Coverage
  - $500,000 in annual revenues from interstate commerce
  - Contributions not counted
  - State law may make coverage automatic
FLSA Coverage and Context

Who is Covered by the Fair Labor Standards Act?

- Enterprise Coverage
- Individual Coverage
  - Workers whose work regularly involves them in commerce between States ("interstate commerce").
  - E.g., use internet, phone, order online, etc.
FLSA Coverage and Context

Who is Covered by the Fair Labor Standards Act?

- Enterprise Coverage
- Individual Coverage
- **Bottom Line**: Virtually every employer and employee is covered by the FLSA and/or state law equivalent
Who is an exempt salaried employee?

- Employees must meet three conditions:
  1. Are paid on a salary basis,
  2. Are paid a salary of at least the minimum salary threshold, and
  3. Primary duties are defined as exempt.

- Salary alone is never enough to exempt an employee.
This presentation is for general information and is not to be considered in the same light as official statements of position contained in the Department’s regulations.
Webinar Topics

- Executive, Administrative and Professional Employee’s Exemption Overview
- Overtime Final Rule Overview
- Changes in the Final Rule
  - Standard Salary Level
  - Highly Compensated Employee Annual Compensation Level
  - Special Salary Levels for U.S. Territories
  - Non-Discretionary Bonuses
- Provisions That Remain Unchanged
“Executive, Administrative, and Professional” Exemptions
The most common FLSA minimum wage and overtime exemption – often called the “EAP” exemption – applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees
Three Tests for Exemption

• Salary Basis

• Salary Level

• Job Duties
New Overtime Rule
Overview

- **November 2016** – 2016 Final Rule Preliminarily Enjoined

- **July 2017** – Request for Information

- **August 2017** – 2016 Final Rule Invalidated

- **March 2019** – Notice of Proposed Rulemaking

- **September 2019** – Final Rule Published

- **January 1, 2020** – Final Rule Effective Date
New Overtime Rule
Changes

• Salary Level Increases

• Special Salary Levels

• Nondiscretionary Bonuses
New Overtime Rule
Standard Salary Level

• **Standard salary level**

<table>
<thead>
<tr>
<th>Currently enforced</th>
<th>Effective 1/1/2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>$455 per week</td>
<td>$684 per week</td>
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29 CFR 541.600
## New Overtime Rule
### Highly Compensated Employees

- **Highly Compensated Employee**

<table>
<thead>
<tr>
<th>Currently enforced</th>
<th>Effective 1/1/2020</th>
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</thead>
<tbody>
<tr>
<td>$100,000 per year</td>
<td>$107,432 per year</td>
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29 CFR 541.601
# New Overtime Rule
## Special Salary Levels

- **American Samoa** (29 CFR 541.600)
  
<table>
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<tr>
<th>Currently enforced</th>
<th>Effective 1/1/2020</th>
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</thead>
<tbody>
<tr>
<td>$380 per week</td>
<td>No change</td>
</tr>
</tbody>
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- **Puerto Rico, Virgin Islands, Guam, CNMI** (29 CFR 541.600)
  
<table>
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<th>Currently enforced</th>
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</tr>
</thead>
<tbody>
<tr>
<td>$455 per week</td>
<td>No change</td>
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- **Motion Picture industry** (29 CFR 541.709)
  
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<tr>
<th>Currently enforced</th>
<th>Effective 1/1/2020</th>
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</thead>
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<tr>
<td>$695 per week</td>
<td>$1,043 per week</td>
</tr>
</tbody>
</table>
The $684 per week may be paid in equivalent amounts for periods longer than one week:

- Biweekly: $1,368
- Semimonthly: $1,482
- Monthly: $2,964
New Overtime Rule
Nondiscretionary Bonuses

- Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised in advance to employees (e.g., bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula).

- May be used to satisfy up to 10% of the standard salary and special salary levels.
  - Minimum of 90% (approx. $616 per week) of standard salary level must be paid as a weekly salary.

- Bonuses must be paid on an annual or more frequent basis.
New Overtime Rule
Catch-Up Payments

• If an employee does not earn enough from nondiscretionary bonuses, commissions, or incentive payments to meet the standard salary level in the 52-week period – an employer may make a “catch-up” payment within one pay period after the end of the 52-week period.

• Any such “catch-up” payment will count only toward the prior 52-weeks salary amount and not toward the salary amount during the period in which it is paid.
New Overtime Rule
Example 1 - Year 2020

1/2/2020 – 12/30/2020

January – June
$616 per week + $1,300 bonus

July – December
$616 per week + $2,500 bonus
New Overtime Rule
Example 1 - Year 2020

Minimum Salary Level

$684 per week = $35,568 per year

Employer Paid

$616 per week = 90% of standard salary level

$616 X 52 weeks = $32,032

Jun Bonus $1,300 + Dec Bonus $2,500 = $35,832

Total paid = $35,832 exceeds the minimum amount of $35,568 per year
New Overtime Rule
Example 2 - Year 2020

1/2/2020 – 12/30/2020

January – June
$616 per week + $1,300 bonus

July – December
$616 per week + $2,000 bonus

Catch-Up Payment
$236
New Overtime Rule
Example 2 - Year 2020

Minimum Salary Level

$684 per week = $35,568 per year

Employer Paid

$616 per week = 90% of standard salary level

$616 X 52 weeks = $32,032

Jun Bonus $1300 + Dec Bonus $2000 = $35,332

Total paid = $35,332 is $236 less than the minimum amount of $35,568 required per year
New Overtime Rule
Highly Compensated Employees

- Annual compensation level is increased from $100,000 to $107,432.
- HCEs must continue to receive at least the full standard salary level amount each pay period ($684 per week) on a salary or fee basis without regard to the payment of nondiscretionary bonuses, commissions, and incentive payments. (No Change)
- Nondiscretionary bonuses, commissions, and incentive payments may be counted towards the highly compensated employees’ total annual compensation requirement. (No Change)

**Note:** The HCE test *does not* allow employers to credit nondiscretionary bonuses, commissions, or incentive payments towards the standard salary level weekly requirement.
Salary Basis Test

• An exempt employee must regularly receive a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
• The compensation cannot be reduced because of variations in the quality or quantity of the work performed
• If employer chooses to use nondiscretionary bonuses and incentive payments to meet the standard salary level, the employee must be paid at least 90% of the standard salary level for any week in which the employee performs any work
• Need not be paid for any workweek when no work is performed
Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business.

- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.
No Salary Requirements

• The salary level and salary basis tests do not apply to:
  – Outside Sales Employees
  – Doctors
  – Lawyers
  – Teachers
  – Employees in certain computer-related occupations paid at least $27.63 per hour
• The Final Rule did not make any changes to the Duties Tests
Executive Duties
No Changes

• Primary duty is management of the enterprise or of a customarily recognized department or subdivision

• Customarily and regularly directs the work of two or more other employees

• Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight
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.

Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
Professional Duties
No Changes

• Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction

OR

• Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
To qualify for the computer employee exemption an employee, such as a computer analyst, programmer, or software engineer, must receive either:

- A guaranteed salary or fee of $684 per week or more, or
- An hourly rate of not less than $27.63 per hour and
- And their primary duty must be in design, development, or creation of computer systems, systems analysis etc. (as defined in the regulations).
• WHD website at: www.dol.gov/whd/overtime2019/


• The 17 Series fact sheets can be found at: https://www.dol.gov/whd/fact-sheets-index.htm

• Contact Local WHD Offices at 1-866-4-US-WAGE
Complying with Overtime Law
HOW: Complying with Overtime Law

**What We’ll Cover**

- Common Misperceptions
- Examples of Nonprofit Job Duties
- Promoting Wage and Hour Compliance
- Understanding the Interplay of Federal and State Laws
Common Misperceptions

1.
2.
3.
4.
Common Misperceptions

1. Provide comp time
2.
3.
4.
Common Misperceptions

1. Provide comp time
2. Allow volunteering after 40 Hours
3.
4.
Common Misperceptions

1. Provide comp time
2. Allow volunteering after 40 Hours
3. Switch to Indep. Contractors
Common Misperceptions

1. Provide comp time
2. Allow volunteering after 40 Hours
3. Switch to Indep. Contractors
4. Change job titles
Common Misperceptions

1. Provide comp time
2. Allow volunteering after 40 Hours
3. Switch to Indep. Contractors
4. Change job titles
Considering Nonprofit Examples
Considering Nonprofit Examples

Executive Director in a 2-person nonprofit
Considering Nonprofit Examples

Teacher
Considering Nonprofit Examples

Database Manager
Considering Nonprofit Examples

Website Designer/Graphic Artist
Considering Nonprofit Examples

Administrator/Social Worker
Promoting Compliance
Promoting Compliance

1. Audit employee FLSA classifications
Promoting Compliance

1. Audit employee FLSA classifications
2. Address current exempt employees who no longer meet the new salary threshold
   - Maintain exempt status by increasing salary to meet new threshold
   - Reclassify as non-exempt
Promoting Compliance

3. If reclassifying to non-exempt, determine how best to balance compliance, financial consequences and employee relations issues

- Hourly rate plus overtime
  - Adjust hourly rate so that total compensation will be the equivalent of current compensation
- Fixed salary plus overtime
Promoting Compliance

3. If reclassifying to non-exempt, determine how best to balance compliance, financial consequences and employee relations issues (cont.)

- Manage overtime worked
  - Require permission and/or realignment of job duties
- Adjust workweek
- Outsource departments/functions
Promoting Compliance

4. Make determination regarding affected employees and communicate to each employee in writing
   - Letter explaining compensation and classification changes and effective date
   - New job description
Federal and State Laws
Federal and State Laws

**Rule:** Higher labor standard (state or federal) prevails

- Higher Salary Level Thresholds
  - **Adopted:** CA, NY, PA, WA
  - **Proposed:** CO, ME, MA, MI

- Different Definitions of Overtime
  - CA (8 hr/day), CO (12 hr/day)

- Different Duties Tests
Questions?
Ideas?
Reflections?

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