

DOL Proposed Overtime Reforms and the Impact on Nonprofits

On March 22, 2019, the U.S. Department of Labor published in the Federal Register its [proposed rule updating the overtime salary threshold](#) under the federal Fair Labor Standards Act, reopening rulemaking on an issue that has drawn significant attention and controversy over the past four years. The **salary threshold** for the white-collar exemption from overtime pay would rise to more than \$35,000 per year under the draft rules, which will not go into effect until after a period of public comment, analysis, and revision. The proposed regulations would also raise the salary threshold for **highly compensated employees** who are exempt from FLSA overtime pay requirements from \$100,000 per year to \$147,414 per year.

At issue is the provision of the federal Fair Labor Standards Act (FLSA) that exempts certain employees from the requirement that they receive time and a half overtime pay for work beyond 40 hours in a week. The salary threshold is one of three test required before a person can be deemed “exempt”; each exempt employee must (1) be paid on a salary basis; (2) be paid at least the salary threshold set forth by DOL (at issue in the proposed rules); and (3) satisfy a duties test as [executive](#), [administrative](#), or [professional](#) workers. The newly released draft regulations do not change the salary basis or duties tests; only the salary threshold is at issue.

The National Council of Nonprofits encourages all nonprofits to conduct a mission-based analysis of these proposed regulations. That means answering questions about how the proposed increase in the minimum salary levels would affect operations, resources, and staffing, as well as what impact the draft regulations would have on persons relying on the services and the mission of the nonprofit. Nonprofits should share their answers to those questions with the Department of Labor in the form of [comments to the proposed regulations](#) (RIN 1235-AA20). Public comments are due on **May 21, 2019**.

What’s Being Proposed?

The Department has issued [proposed overtime regulations](#) that would do three things, if implemented after a public comment period and further analysis. The Department proposes:

1. Updating the standard minimum level for salaried workers, raising it from \$455 per week (\$23,660 per year) to \$679 per week, or \$35,308 per year. The Department proposes retaining the existing method for setting the level, using the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South) and in the retail sector. As a result, the level would be nearly 50 percent higher than the current level that was last updated in 2004, but only half as much as the increase (to \$955/week; \$47,476/year) approved by the Obama administration in 2016, but that was blocked by a federal court.
2. Raising the standard salary minimum for **highly compensated employees** (HCE) from \$100,000 a year to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers, or about \$147,414 annually. This is the same method for adjusting the HCE threshold proposed by the Obama Administration.
3. Permitting employers to treat **nondiscretionary bonuses and incentive payments** (including commissions) paid on an annual or more frequent basis to satisfy up to 10 percent of the standard salary level. The Obama Administration had also adopted this change.

The Labor Department announced further that it intends to propose updates to the salary and compensation levels every four years to ensure that these levels continue to provide useful tests for exemption.

Background

Under the Fair Labor Standards Act (FLSA), employees are entitled to wages at or above the federal minimum wage and must be paid time and a half overtime for work after 40 hours in any work week.¹ In enacting the federal wage and hour law, Congress exempted from these standards executive, administrative, and professional employees, and left it up to the Secretary of Labor to define the terms of the exemption.

Persons who are properly classified as executive, administrative, or professional employees are considered “exempt employees.” All others are “non-exempt” and must be paid at least the minimum wage and overtime after 40 hours worked in a week.

Generally, employers have the burden of demonstrating that a worker is exempt from the overtime provisions by satisfying three tests. The **salary basis test** requires that the employee be paid a predetermined salary, rather than on an hourly basis, and that the amount paid is not adjusted based on whether the person worked certain hours. The **duties test** requires that the individual’s job duties must primarily involve [executive](#), [administrative](#), or [professional](#) duties as defined by the Labor Department regulations. The **salary level test** – which is the subject of the proposed regulations – requires that an employee be paid at or above a minimum specified amount. That amount is currently set in regulations at \$455 per week, or \$23,660 per year, and requires regulatory action by the Department of Labor to change it.²

There is a special category in the regulations that exempts “highly compensated employees” if their total annual compensation exceeds \$100,000 and they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee.

In 2016, the Obama Administration issued regulations to raise the salary threshold to \$913 per week (\$47,476 per year) and the minimum threshold for Highly Compensated Employees to \$134,004 per year. A federal district court in Texas [struck down those regulations](#), ruling that the Labor Department exceeded its authority. Many nonprofits expressed concern that the Obama Administration's 2016 overtime rule would have created significant [new costs for their organizations](#). Other nonprofits appreciated that the DOL's 2016 overtime rule would have raised pay and reduced working hours for many nonprofit employees, and helped lift out of poverty many individuals that the nonprofits served.

While much of the focus is on the federal overtime rules, it is important to acknowledge that states have the power to set higher standards for non-exempt and exempt employees. Currently, 29 states have set minimum wage levels [higher than the federal minimum wage](#) of \$7.25 per hour. Likewise,

¹ Smaller nonprofits are exempt from the FLSA, if their “business purposes” revenues are less than the general \$500,000 threshold – and importantly, that threshold excludes “charitable, religious, educational, or similar activities of organizations operated on a non-profit [sic] basis where such activities are not in substantial competition with other businesses.” See DOL FAQ #5:

<http://www.dol.gov/whd/overtime/NPRM2015/faq.htm#5>. Nonprofit and other employers may still be covered by state wage and hour laws.

² See, generally, **Classifying Employees Correctly**, National Council of Nonprofits website; <https://www.councilofnonprofits.org/tools-resources/classifying-employees-correctly>.

some states, such as California and New York, have set the salary level test for exempt employees at a higher amount than is set in current and proposed U.S. Department of Labor regulations.

Analysis and Nonprofit Perspective

There is no debate that the current salary level test amount of \$455 per week (\$23,660 per year) is low by current standards. By comparison, the federal poverty level in 2018 for a family of four was \$25,100 per year.³ The poverty level in 2004, when the overtime salary level was last reset, was \$18,850 per year.⁴ It is therefore reasonable for the Department of Labor to update the standard based on changing costs of living. The real debate is over the details: Are the proposed salary levels for exemptions set correctly?

The newly proposed regulations call for about a 50 percent increase in the salary level test set 15 years earlier, a period that saw an increase in the federal poverty level of 33 percent. The change would recalculate the threshold based on the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South) and in the retail sector. This is the same method used in 2004. The Labor Department estimates that in 2020, “1.1 million currently exempt employees who earn at least \$455 per week but less than the proposed standard salary level of \$679 per week would, without some intervening action by their employers, gain overtime eligibility.”

Based on its own analysis, the Department estimates that about seven percent of nonprofit and government employees nationally will be affected by the higher salary threshold (compared to five percent of for-profit employees). It acknowledges, “To the extent that employers respond to this rule by restricting employee work hours, this rulemaking could negatively affect the quality of public services provided by local governments and nonprofits.”

The Department is also proposing an adjustment to the salary minimum for “highly compensated employees” (HCEs) by setting the rate based on the 90th percentile of weekly earnings for full-time salaried workers. It applies the same analysis for the standard salary level. This is the same basis adopted by the Obama Administration in its 2016 regulations. At the time, the Department explained that it considered the 90th percentile of full-time salaried workers appropriate “because it brings the required compensation level more in line with the level established in 2004; therefore, it will ensure that, as in 2004, the HCE exemption covers only those employees who are at the very top of today’s economic ladder and minimizes ‘the possibility that workers in high-wage regions and industries could inappropriately lose overtime protection.’”

The current Labor Department estimates that an estimated 201,100 individuals who are currently exempt workers earning at least \$100,000 per year but less than the proposed HCE annual compensation level of \$147,414 per year would also gain overtime eligibility, assuming their job duties or assignment don’t change.

Impact on Government Grants and Contracts

Once the Labor Department issues new regulations, nonprofits with government grants and contracts at any level of government (local, state, tribal, or federal) will likely be put in the position of having to comply with new federal requirements that impose new costs not known when those grants and contracts were signed. Unlike businesses that can raise prices, or governments that can raise taxes or curtail public services, nonprofits with government grants and contracts may find

³ Federal Poverty Level, Department of Health and Human Services; <https://www.healthcare.gov/glossary/federal-poverty-level-FPL/>.

⁴ The 2004 HHS Poverty Guidelines; <http://www.aspe.hhs.gov/poverty/04poverty.shtml>

themselves contractually bound to maintain services at increased costs that may not be expressly covered by existing written agreements. Federal for-profit contractors are entitled to seek “labor standards adjustments” or “equitable adjustments” to protect them from government-mandated labor cost increases, but that right is not currently available to nonprofits performing work under government grants. We encourage nonprofits with government grants and contracts to respond to the Labor Department’s proposed regulations and clearly articulate both the impact that cost changes in the middle of grant/contract performance would have on the organization and the need for treatment equal to for-profit government contractors whenever new regulations are implemented. See [The Nonprofit Overtime Implementation Conundrum](#), National Council of Nonprofits.

The Need for Nonprofit Input

The effect of the proposed overtime regulations, if implemented, would vary widely for nonprofit organizations. Larger organizations that regularly compete with for-profit and governmental organizations (e.g., hospitals) would likely experience different challenges than smaller nonprofits that provide services on behalf of governments pursuant to grants and contracts. There likely would also be wide variations in the impact of the proposed regulations on rural versus urban nonprofit operations.

As was the case with the last round of overtime rulemaking, the only assured point here is that the impact on the sector will be defined by academics, bureaucrats, and others based on assumptions and data from other sectors; that is, unless individual nonprofits take the time to review the regulations offer [comments to the proposed regulations](#) (RIN 1235-AA20). Public comments are due on **May 21, 2019**.

In reviewing the proposed regulations, the National Council of Nonprofits encourages all nonprofits to conduct a *mission-based analysis* of the proposed regulations. That means answering questions about how the proposed increase in the minimum salary levels would affect operations, resources, and staffing, as well as what impact the draft regulations would have on persons relying on the services and the mission of the nonprofit. Below are several questions that can help shape an organization’s analysis.

If the draft regulations were to be implemented as written:

1. What effect – positive or negative – would the proposals have on your organization’s ability to advance its mission? Variables could include the need to raise more money, serve fewer people, or not being able to perform under government grants or contracts, among many others.
2. What effect – positive or negative – would the proposals have on the individuals and communities your organization serves? For example, would higher compensation, if realized, reduce the number of individuals seeking services from the organization, and thus cut the workload of the organization or enable you to pursue other mission objectives?
3. What transition rules do you think would be appropriate for your nonprofit and similarly situated organizations? Should implementation of final regulations be delayed until a certain date, i.e., July 1, 2016, or phased in over a period of time? Should nonprofits with existing government grants and contracts be exempt from the implementation of any new rules until the time that government pays the higher amounts for the higher salary rate?
4. What data do you have – and can share – to reinforce the points you make to the Department of Labor?

These are only a few of the questions that nonprofits will be asking in the coming months. We encourage you to share additional questions, as well as your thoughts on them, with the National Council of Nonprofits. Contact info@councilofnonprofits.org.

Submitting Comments

Nonprofits should share their answers to those questions with the Department of Labor in the form of [comments to the proposed regulations](#) (RIN 1235-AA20). The government recommends submitting individualized comments to regulatory proposals. The comments don't have to be complex or written in a special format or legal style. Comments "can express simple support or dissent for a regulatory action." The government website, [Regulations.gov](#), advises that "a constructive, information-rich comment that clearly communicates and supports its claims is more likely to have an impact on regulatory decision making." See [Taking the Mystery Out of Filing Comments on Proposed Rules](#) for tried and true tips.

Additional Resources

- DOL Notice of Proposed Rulemaking: [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees](#) (RIN 1235-AA20). Public comments are due on **May 21, 2019**.
- [DOL News Release](#), March 7, 2019
- [DOL Overtime Pay](#) webpage
- [Requests for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees](#), DOL rulemaking, July 26, 2017
- [Classifying Employees Correctly](#), National Council of Nonprofits website

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