

## DOL Proposed Overtime Reforms and the Impact on Nonprofits

Updated September 8, 2023

The U.S. Department of Labor (DOL) has [announced proposed new regulations](#) designed to update and revise overtime protections for millions of workers employed by nonprofits, for-profits, and governments. The draft regulations, which will not go into effect (if at all) until after a period of public comment and analysis, would increase the minimum salary level that white-collar employees must be paid (from \$35,568/year to \$55,068/year) to exempt them from overtime pay of time and half of wages for hours worked in excess of 40 in any week. The Labor Department is also proposing raising the minimum salary level for “highly compensated employees” from \$107,432/year to nearly \$144,000/year, and establishing a mechanism for automatically raising these salary levels in the future.

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, all while factoring in what is equitable to the nonprofit workforce. Nonprofits should share their answers to those questions with the Department of Labor in the form of [comments to the proposed regulations](#). Comments are due on November 7, 2023.

This memo describes DOL’s three proposed changes to its overtime pay rule, provides background on the issue, notes there is no exception for nonprofits, offers an analysis of the proposed rule from a nonprofit perspective, explains why nonprofits need to provide input to DOL.

### 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. Raising the standard minimum level for salaried workers from \$684 per week (\$35,568 per year) to what amounts to the 35<sup>th</sup> percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), which would be \$1,059 per week (\$55,068 annually) based on current data.
2. Raising the standard salary minimum for highly compensated employees from \$107,432 a year to the annualized weekly earnings of the 85<sup>th</sup> percentile of full-time salaried workers nationally, or \$143,988 per year.

3. Implementing a mechanism for automatically revising these two minimum earnings thresholds every three years using updated wage data.

The Department is not proposing changes to the standard duties test, discussed below.

## Background

Under the Fair Labor Standards Act (FLSA), employees are entitled to wages at or above the federal minimum wage (currently set at \$7.25/hour) and must be paid time and a half overtime for work after 40 hours in any work week. In enacting the federal wage and hour law, Congress exempted from these standards individuals employed in a “bona fide executive, administrative, or professional capacity” and left it up to the Secretary of Labor to define the terms of the exemption.<sup>1</sup> The exemption is commonly referred to as the “white collar” or executive, administrative, or professional (EAP) exemption.

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

Satisfying Three Tests: 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, and 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 \$684 per week, or \$35,568 per year, and requires regulatory action by the Department of Labor to change it.<sup>2</sup>

There is a special category in the regulations that exempts “highly compensated employees” from overtime pay requirements if their total annual compensation exceeds \$107,432 and they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee.

The statute provides that certain employees are automatically considered exempt and not subject to either the salary basis or salary level tests (for example, doctors, teachers, and lawyers).

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<sup>1</sup> 29 U.S.C. Sec. 213(a)(1).

<sup>2</sup> Fact Sheet #17A: [Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#), Wage and Hour Division, U.S. Department of Labor, Revised September 2019. See also, [Classifying Employees Correctly](#), National Council of Nonprofits website.

The draft regulations propose changing the two salary levels and implementing a system for annual adjustments that would eliminate the need for the Labor Department to go through the regulatory process to make future changes in the dollar levels.<sup>3</sup>

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.<sup>4</sup> Likewise, some states, such as California, Maine, and New York, have set the salary level test at a higher amount than is set in current U.S. Department of Labor regulations.<sup>5</sup>

## Is there a Nonprofit Exemption?

In its answers to Frequently Asked Questions, DOL states that there “is no exemption for nonprofit organizations under the FLSA or in the proposed rule.” The answer, however, goes on to confuse things by writing about charitable and other activities that may be considered as outside the coverage of the law.<sup>6</sup> The DOL will treat an employer (*enterprise*) as covered by the FLSA only if it has commercial sales of \$500,000 or more – a standard that most charitable nonprofits would not meet either by dollar volume or the nature of its activities. **However**, the Labor Department considers virtually every worker (individual) as covered by the wage and hour laws because their work causes them to engage in interstate commerce, including activities like sending and receiving mail, making out-of-state phone calls, and processing credit cards. In short, with rare exceptions, the workforces of charitable organizations are covered by the Fair Labor Standards Act. This means the proposed changes to the overtime regulations are something all charitable nonprofits should note and consider submitting public comments expressing your views.<sup>7</sup>

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<sup>3</sup> The Labor Department is also proposing to increase the salary levels in the U.S territories, which have not been changed since 2004.

<sup>4</sup> [State Minimum Wage Laws](#), Wage and Hour Division, U.S. Department of Labor, updated July 1, 2023.

<sup>5</sup> [Exempt Employees: Minimum Salary Requirements for 2023](#), *HR Newsletter*, ADP, Jan. 11, 2023.

<sup>6</sup> FAQ #13, [Frequently Asked Questions](#), Wage and Hour Division, U.S. Department of Labor, posted Aug. 30, 2023; “Thus, the proposed rule may impact nonprofit organizations that have an annual dollar volume of sales or business done of at least \$500,000. In determining coverage, only activities performed for a business purpose are considered. Charitable, religious, educational, or similar activities of organizations operated on a nonprofit basis where such activities are not in substantial competition with other businesses are not considered. Employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce.”

<sup>7</sup> An historical note: The Fair Labor Standards Act, enacted in 1938, was one of the first workforce laws when federal pre-emption was a new concept. The FLSA ties federal authority over private workplaces by relying on the Commerce Clause of the Constitution, and thus requires a showing of impact on interstate commerce. It is for this reason that the FLSA doesn’t determine coverage based on the number of employees, like more recent labor laws such as the Age Discrimination in Employment Act of 1967 (20 or more employees) and the Americans with Disabilities Act of 1990 (15 or more employees).

## Analysis and Nonprofit Perspective

Congress delegated to the U.S. Department of Labor the responsibility for regularly updating the rules governing which executive, administrative, and professional employees may be exempted from the overtime requirements under the Fair Labor Standard Act. The regulations were last updated in 2019 (effective January 1, 2020), and before that had remained unchanged from the 2004 revisions. In 2015- 16, the Obama Administration engaged in rulemaking to raise the overtime salary level tests, but the published final rule was blocked by a federal court and did not go into effect.<sup>8</sup>

In its materials accompanying the proposed rule, the Labor Department explains that it “is committed to keeping the earnings thresholds up to date for the benefit of both workers and employers,” and that through “this rulemaking, the Department seeks to update the salary level test to more effectively identify who is employed in a bona fide executive, administrative, or professional capacity.” The Department estimates that the proposed rule, if implemented as currently drafted, would “restore and extend overtime protections to 3.6 million salaries workers,” including about 38,000 white collar employees at nonprofit organizations.<sup>9</sup> The Labor Department also estimates that the rule, once implemented, would impose \$1.2 billion in direct costs on employers in the first year.

The proposals to increase the two salary thresholds are not mere adjustments for inflation. If that had been the case, the Department would be proposing a 18.1% increase,<sup>10</sup> rather than the 55% hike for the standard threshold and 35% for the Highly Compensated Employee threshold.

In proposing the increases to the two thresholds, the Department instead is utilizing a new methodology for setting the rates. The current standard salary threshold of \$684 per week was set in 2019 based on the equivalent to the 20<sup>th</sup> percentile of weekly earnings of full-time salaried workers in the South Census Region, the lowest regional rate at that time. The new proposal would set the rate at the equivalent of the 35<sup>th</sup> percentile in the same region, indicating that the Labor Department believes the prior Administration pegged the rate using the correct data set but at the wrong percentile.<sup>11</sup>

Regarding the salary level threshold for highly compensated employees, the current regulations put in place effective Jan. 1, 2020, set the rate at \$107,432 per year. That level is based on the total annual compensation threshold for the 80<sup>th</sup> percentile of full-time salaried worker earnings nationwide.

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<sup>8</sup> *Nevada v. U.S. Department of Labor*, 275 F.Supp.3d 795 (E.D. Tex. 2017).

<sup>9</sup> See Table 9 (pp. 151-52). As shown in Table 31 (pp. 229-30), the DOL estimates that there are 596,300 nonprofit organizations employing 10,318,000 employees earning \$249.6 billion, adjusted to reflect 2022 numbers.

<sup>10</sup> CPI Inflation Calculator, [in2013dollars.com](https://in2013dollars.com), accessed Sept. 4, 2023, comparing data from January 2020 through July 2023.

<sup>11</sup> In the 2016 rule during the Obama Administration, the Department proposed setting the salary level equal to the 40<sup>th</sup> percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). See [84 FR 51236–37](#) (describing prior methodologies).

The proposed rulemaking seeks to raise the level by instead relying on a rate based on the 85<sup>th</sup> percentile for the same dataset. This proposal essentially splits the difference between the current rule, set at the 80<sup>th</sup> percentile, and the Obama-era proposed rule, which sought to set the rate at the 90<sup>th</sup> percentile.

In analyzing the proposed changes to the overtime rule, the fundamental question, and one that may ultimately be resolved in the courts, is whether the Labor Department is properly balancing the impact of the *duties test* and the *salary level test*. In 2016, the Obama Administration had published a final rule that would have more than doubled the standard salary level threshold. The rule was struck down by a federal court the next year on the grounds that the higher threshold effectively eliminated any need to consider the duties of executive, administrative and professional employees, a result that the court found impermissible under the FLSA. The district court judge wrote, “By raising the salary level in this manner, the Department effectively eliminates a consideration of whether an employee performs ‘bona fide executive, administrative, or professional capacity’ duties.” This, the judge found, exceeded the Department’s statutory authority because “Congress was clear that the determination should involve at least a consideration of an employee's duties.”<sup>12</sup>

The real debate therefore is over which percentile should be utilized to set the rate that preserves the salary basis test as an *initial screen* for determining executive, administrative, or professional status, before turning to the duties tests for a more fine-tuned assessment. In other words, does the proposed standard salary threshold of \$1,059 per week serve as a legitimate first screening, or does it sweep in too many *bona fide* executive, administrative, and professional employees? While DOL is relying on data collected by the Bureau of Labor Statistics, **the answer to that question can only be gleaned from the application of real-world examples that employees and employers provide during the public comment period** that will be open until early November.

A separate issue is whether the Department of Labor must go through formal rulemaking each time it seeks to adjust the thresholds, if it has the authority to adopt an automatic mechanism for future increases, and, if so, what mechanism would be appropriate? In its proposed rule, the Labor Department is seeking to make automatic adjustments to both thresholds by recalculating the levels every three years using the previously discussed percentiles.<sup>13</sup>

The questions over the appropriateness of the proposed changes to designated percentiles of the two data sets will be the subjects of economic and political debates for many months to come. That broad debate will not include an analysis of how nonprofit wages and salaries compare to the sets of data currently under consideration **unless charitable employers and employees weigh in by providing data, examples, and other information.**

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<sup>12</sup> *Nevada v. U.S. Department of Labor.*

<sup>13</sup> This analysis will not address the legality or advisability of whether the Department of Labor should establish a mechanism for automatically revising the salary levels.

## The Need for Nonprofit Input

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

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 – **unless individual nonprofits take the time to review the regulations and offer comments to the Department of Labor prior to the due date of November 7, 2023.**

A nonprofit leader observed that on workforce standard issues, charitable organizations tend to take a different perspective than groups representing workers or individual employers. She said, “charitable nonprofits tend to experience moral support and operational anxiety,” as in wanting to help individuals earn enough to dispense with the need for nonprofit serviced but feeling anxiety over how the nonprofit will pay for government-mandated increased costs.

With this duality in mind, the National Council of Nonprofits encourages all nonprofits reviewing the proposed regulations 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, all while factoring in what is equitable to the nonprofit workforce. 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 that set reimbursement rates or impose salary caps too low, 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 fact situations would you ask the Department of Labor to address to reduce confusion and clarify gray areas of the law? In the past, the Department has been criticized for explaining the law and offering examples as if all employees worked in a factory setting. Are

there unique nonprofit jobs, such as in development/fundraising or volunteer management, that need clarification as to how and when the FLSA overtime rule applies?

And if the Department of Labor is open to further revisions:

4. What substantive changes to the draft regulations would your organization seek? Should there be a separate minimum salary level based on a percentile of nonprofit salaries? If so, should higher education and hospitals be included in such a grouping of salaries?<sup>14</sup>
5. 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, 2024, or phased in over a period of time?
6. Should nonprofits with existing government grants and contracts be exempt from the implementation of any new rules until the time that the local, state, or federal government pays the higher amounts for the higher salary rate? Stated another way, should governments be required to adjust existing grants to reflect the added costs of the proposals, or, in the alternative, should the change require governments to automatically adjust wages up to the minimum salary levels or perhaps reopen the grants for renegotiations?

These are only a few of the many questions that nonprofits likely 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](mailto:info@councilofnonprofits.org).

## Submitting Comments to DOL

Nonprofits should share their answers to those questions with the Department of Labor in the form of [comments to the proposed regulations](#). Comments are due in early November.

## Additional Resources

- [Notice of Proposed Rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees](#), Wage and Hour Division, U.S. Department of Labor, Aug. 30, 2023.
- [Frequently Asked Questions About the Proposed Rule](#), Wage and Hour Division, U.S. Department of Labor, Aug. 30, 2023.
- [Press Release: Department of Labor Announces Proposal to Restore, Extend Overtime Protections for 3.6 Million Low-Paid Salaried Workers](#), Wage and Hour Division, U.S. Department of Labor, Aug. 30, 2023.
- **Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)**, Wage and Hour Division, U.S. Department of Labor, Revised September 2019.

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<sup>14</sup> Generally, NCN favors broad rules without carveouts, based on the view that nonprofit employees should not be treated as second-class workers and the charitable sector should not be considered the employer of last resort. We recognize, however, that some nonprofits with unique missions could justify narrow adjustments to the rules.