Center FOR NON-PROFITS

Helping organizations build a better New Jersey

What Your Non-Profit Needs to Know About the New Overtime Rules

On May 18, 2016, the U.S. Labor Department (DOL) announced final overtime regulations (warning: the linked regulation is 508 pages!) that specify that most employees earning less than $47,476 per year will be entitled to overtime compensation, regardless of whether they are currently classified as executive, administrative, or professional (white-collar) workers. **The new overtime rules take effect on December 1, 2016.**

Non-profits employ about 10% of New Jersey's private workforce, and many are likely to be affected by the new rules. The Center for Non-Profits is providing this article, developed by the North Carolina Center *for* Nonprofits and adapted with permission, to highlight key details about the DOL overtime rules and how they will apply to non-profits. This article is not intended to be legal advice. Consult a qualified attorney to seek legal guidance for your specific situation.

What are the major provisions under the regulations?

The Fair Labor Standards Act (FLSA) is a federal law that provides that employees – except for those who are specifically exempt – are required to:

1. Be paid at least the minimum wage (currently $8.38 per hour in New Jersey, increasing to $8.44 on January 1, 2017); and
2. Receive overtime pay at one-and-one-half times their regular rate of pay for all time worked in excess of 40 hours in any work week.

Most FLSA rules apply equally to non-profit employers as well as other employers. Many non-profit employees are exempt from FLSA's overtime pay requirement if they:

1. Are paid on a ***salary basis***;
2. Are paid at least the ***minimum salary level*** under the DOL regulations. Effective December 1, 2016, this minimum salary will change from at least $455 per week ($23,660 per year) to the new level of at least $913 per week ($47,476 per year);
3. Exercise ***job duties*** that are classified as exempt under FLSA (see next section).

Job Duties Exemptions – White-collar employees can only can be exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) only if their jobs meet the duties tests for executive, administrative, ***or*** professional employees (there are also exemptions for salespersons and computer employees; these exemptions are not reviewed in this document). In addition to receiving a salary at or above the new thresholds, each exempted employee must still also exercise the job duties of at least one of those categories and be paid on a salaried basis. ***The final DOL regulations make no changes to the duties test.***

The job duties exemptions under the FLSA regulations include:

- ***Executive*** employees who are paid a salary exceeding the minimum threshold (effective December 1, at least $913 per week or $47,476 per year), whose main duty is management of a large part of the non-profit's operations and who regularly supervise at least two other employees. For more on the executive exemption, see this DOL fact sheet.

- ***Professional*** employees who are paid a salary exceeding the minimum threshold (effective December 1, at least $913 per week or $47,476 per year), and whose jobs are based on recognized professional knowledge (such as attorneys, CPAs, doctors, registered nurses, some social workers, and creative professionals). For more on the professional exemption, see this DOL fact sheet.
- ***Administrative*** employees who are paid a salary exceeding the minimum threshold (effective December 1, at least $913 per week or $47,476 per year), and whose primary duties are non-manual work that include the exercise of discretion and independent judgment. For more on the administrative exemption, see this DOL fact sheet.
- ***Highly compensated*** employees who are salaried and who regularly perform at least some of the job duties of an executive, professional, or administrative employee. Under the regulations, the minimum annual salary threshold for "highly compensated" employees will rise from $100,000 to $134,004. ***Note that the salary threshold doesn't apply to teachers, lawyers, and doctors who are exempt as professional employees.***

Other key changes

The DOL regulations make several other important changes to these rules. These include:

- ***Automatic increases:*** The final rule establishes a mechanism for automatically updating the salary and compensation levels every three years, with the first update to take place in 2020.
- ***Delayed enforcement for some Medicaid funded service providers:*** Shortly after releasing the final regulations, DOL announced that it will not enforce the higher salary thresholds until March 17, 2019 for providers of Medicaid funded services for individuals with intellectual disabilities in residential homes and facilities with 15 or fewer beds. This means that a few non-profits will have an additional 28-month grace period before having to pay overtime for affected employees.
- ***Penalties:*** After releasing the final regulations, DOL increased the penalties for willful violation of the overtime rule to $1,894 per violation (up from $1,100 per violation). The increased penalties are effective on August 1, 2016. Non-profits that fail to pay overtime to non-exempt employees may also be subject to state penalties and civil litigation.

Does federal or state law apply to your non-profit's employees?

In New Jersey, the answer is **YES**. New Jersey is one of 10 states that incorporate by reference the then-current FLSA regulations into the state wage and hour law. This means that the changes to the DOL overtime regulations will automatically be made to the New Jersey State Wage and Hour Law on December 1, 2016. [1]

How have non-profits reacted to the DOL overtime rules?

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[1] In response to nonprofits' concerns about the proposed overtime regulations, DOL issued guidance for non-profits that highlights how the overtime rules will affect nonprofit organizations. In this guidance, DOL notes that non-profit employees are only covered by FLSA if they meet one of two coverage tests:

1. Through ***enterprise coverage***, which applies to every employee of a nonprofit hospital, an organization that provides medical or nursing care for residents, a school, or a preschool (all of these are specifically mentioned in the statute), or any other nonprofit with annual commercial sales of $500,000 or more. Most nonprofit activities probably wouldn't be considered "commercial sales", meaning that many nonprofits don't have enough commercial sales to be enterprises whose employees are all covered by FLSA.
2. Through ***individual coverage***, which applies to any individual employee whose regular job functions include transactions in interstate commerce. The term "interstate commerce" is very broad, and includes things like sending and receiving mail, making out-of-state phone calls, and processing credit cards.

However, the DOL guidance fails to mention that in states like New Jersey that incorporate by reference the then-current FLSA regulations into the state wage and hour law, the changes are automatic and will apply regardless of whether "enterprise coverage" or "individual coverage" is triggered under federal law.

DOL's summary of the new overtime rules explains that the intent of the rule change is to raise wages and/or reduce working hours for an estimated 4.2 million Americans. According to "The Nonprofit Overtime Implementation Conundrum," a recent report from the National Council of Nonprofits: "Generally, nonprofits have been expressing moral support for the policy of raising the minimum salary level of white collar employees, but experiencing operational anxiety in trying to figure out how to pay the new required additional costs in very tight, or even declining, revenue environments while providing the same level of services." New Jersey's non-profits have largely mirrored these sentiments.

Unless private and governmental funders will provide immediate support for these increased labor costs, non-profits will need to make some hard operational choices in order to comply with the regulations.

What are some options for non-profits to comply with the overtime rules without going (too far) over budget?

What a non-profit ***can*** do and what it ***should*** do to adapt to the changes are two separate questions to be weighed based on the organization's finances, mission, contractual obligations, and other factors. Here are some of the solutions (many of them far less than ideal) that non-profits have identified:

1. ***Raise employees' salaries so they remain exempt.*** One solution for some non-profits is to raise (currently) exempt employees' wages so their salaries are higher than the new threshold. This makes the most sense for employees whose current salaries are only slightly lower than the new threshold (*e.g.* employees with salaries of $45,000 per year). Non-profits should note, however, that the salary threshold will be adjusted every three years, so they will need to continue to raise their employees' wages, or they will face the same issues again in 2020 (and in 2023, and in 2026 . . .). This option may not be feasible (at least in the short-term) for non-profits with workers whose salaries are significantly lower than the new threshold of $47,476 per year.
2. ***Pay overtime to employees above a salary.*** Non-exempt workers can still be paid on a salary basis rather than an hourly basis. This means that these employees would be paid the same amount whether they work a full 40 hours or less in a workweek. However, if salaried, non-exempt employees work more than 40 hours in a workweek, they are still entitled to time-and-half pay for all hours worked in excess of 40 hours in the week. One advantage of this option is that workers may be less likely to feel like their reclassification to non-exempt is a "demotion" if they are still paid on a salary basis and don't have to track hours worked unless they are eligible for overtime.
3. ***Consider using the fluctuating workweek method of overtime payment.*** *Warning: This paragraph (like the fluctuating workweek method itself) is confusing; you may need to read it more than once to understand it!* The "fluctuating workweek" method, which is permitted under DOL regulations, allows employers to pay non-exempt employees on a salary basis for hours that fluctuate from week to week with the mutual understanding that the fixed salary is the compensation for hours worked each week (not including extra overtime compensation). ***Employers that use the fluctuating workweek method only need to pay half of the regular hourly rate of pay for that workweek (rather than time-and-a-half) for hours worked in excess of 40 hours in a workweek.*** By paying half-time rather than time-and-a-half for overtime, employers may be able to reduce overall salary expenses. Non-profits considering this method should:
    - Be certain that the agreed-upon salary is at least the minimum wage of $8.38 per hour ($8.44 per hour after January 1, 2017), even in the weeks when the employee will be working the longest hours;
    - Recognize that employees' weekly rate of pay (and the amount of additional half-time overtime pay) will fluctuate from week to week, since it is calculated by dividing the weekly salary by the number of hours worked in any particular workweek.
    - Have a written agreement in place with any employees being paid under the fluctuating workweek method to be certain that both your non-profit and the employee understand and agree to this payment arrangement; and

- Read the [DOL regulation on the fluctuating workweek method]. The second paragraph includes a good example of how this method actually works.

4. ***Reorganize workloads or adjust schedules***. One way that some non-profits can mitigate the costs of complying with the new rules is by shifting job functions among employees. For example, if one member of your administrative staff typically works 50 hours in a week, whereas a development staffer typically needs about 30 hours in a week to complete his job (spending another 10 hours during the work day making personal phone calls), it might make sense to shift some job responsibilities from the administrative employee to the development staffer so that they both have about 40 hours of work to do in a week. (Note: We realize that real-world situations are rarely as clean and simple as this hypothetical example.)
5. ***Adjust employees' wages so you are paying approximately the same total compensation after the rule changes.*** Yes, this means reducing the salaries of employees who will be reclassified as non-exempt, but paying them time-and-a-half their salary for the hours they work in excess of 40 hours per week. One way this can be done is to set a lower base hourly wage rate that take into account a certain number of time-and-a-half hours each week for individuals who typically work overtime; the result is that they can receive the same pay based on a lower official wage rate. The upside of this is that it maintains labor costs at close to their current level. The downside of this option is that salary decreases tend to have a negative effect on employee morale.
6. ***Limit the number of hours non-exempt staff can work.*** For some non-profits, it may make sense to establish policies that non-exempt staff may only work 40 hours per week or must receive approval from their supervisors to regularly work overtime. This option may help improve employees' awareness of how they spend their time and can lead to increases in efficiency and productivity. However, it may not be appropriate for some types of program staff, such as emergency service providers, residential care providers, and case workers working with non-profit clients such as adoptive families or victims of domestic violence.
7. ***Consider changing how you define your workweek.*** Under state and federal law, non-profits can define their workweek as any period of seven consecutive days. For some non-profits with programs and events on Fridays and weekends, it may make sense to adopt a Wednesday through Tuesday workweek so non-exempt employees can take extra time off on Mondays and Tuesdays to avoid working more than 40 hours in a workweek.
8. ***Recognize that overtime is only required when non-exempt employees work more than 40 hours in a week.*** Some non-profits have 35-hour or 37.5-hour workweeks. These non-profits are not required to pay time-and-a-half for employees who are working "overtime" (*e.g.* 36+ or 38+ hours per week) but who have not exceeded 40 hours in a workweek.
9. ***Make lunch breaks unpaid.*** Some non-profits allow non-exempt staff to count their lunch breaks as working hours. By making lunch breaks uncompensated time, non-profits may be able to increase the total productive working time that employees can provide within a 40-hour workweek.
10. ***Expect exempt staff to work more.*** The reality is that the most cost-efficient short-term solution for some non-profits may be to shift some additional job functions to the executive director or other exempt staff who are paid $47,476 per year or more. If non-profits are considering this option, it is important to ***be certain that these staff members still meet one of the duties tests*** to qualify as exempt employees.
11. ***Replace some full-time workers with part-time staff or contractors***. Typically, part-time employees don't receive overtime pay since they rarely work more than 40 hours in a week. By shifting more work to part-time employees, non-profits may be able to reduce overall labor costs. Also, the FLSA does not apply to independent contractors, so non-profits may want to consider outsourcing some of their work to contractors. Note, however, that ***it is important for non-profits to be careful not to misclassify true employees as independent contractors,*** since the IRS, DOL, and the state of New Jersey actively enforce worker misclassification claims. Last summer, DOL issued an [Administrator's Interpretation] that explains the standards for determining whether a worker is an independent contractor.
12. ***Limit telecommuting.*** Employees often work longer hours (often without realizing it) when they work from home or use their mobile devices for work-related email, phone calls, social media, and texting. Some non-profits may wish to revisit their telecommuting policies if more of their employees

will be non-exempt under the new overtime rules. Limiting the ability of employees to work remotely can help minimize inadvertent overtime, but can also have negative consequences for employee morale (more time away from home), employee productivity (more distractions in the office), and the environment (more time commuting). *Tip on after-hours emails*: Stop sending emails after hours to non-exempt employees. The time they spend reading and responding counts as compensable time. And if you can't help it, at least encourage recipients to wait until work time to take action.

13. ***Reduce employee benefits.*** With diminishing revenue and rising costs, many non-profits have already been forced to cut employee benefits like health insurance and retirement savings. Unfortunately, further reducing employee benefits may be a short-term way that non-profits can comply with the overtime rules without adding to overall labor costs. Since shifting employees from exempt to non-exempt may impact the level of benefits they receive, consider re-evaluating all employee benefits to ensure fairness.
14. ***Eliminate or reduce some programs or services.*** This is obviously one of the least desirable options for non-profits. However, if a particular program or service requires staff to work long hours (and receive overtime pay for much of this work) without adequate compensation from private or governmental funders, your non-profit may need to make hard choices about whether it makes sense to reduce service levels or eliminate the program altogether.
15. ***Eliminate some fundraising events.*** That's right: for some non-profits, it might make (counterintuitive) financial sense to cut back on revenue-raising activities. If staff typically work long hours on fundraising events, non-profits may want to consider whether these events will bring in sufficient revenue to justify the additional labor costs.

What are the policy options to address this issue?

Practical solutions

In "The Nonprofit Overtime Implementation Conundrum," the National Council of Nonprofits highlights two systemic solutions that would help minimize non-profits' "operational anxiety" as a result of the new overtime rules:

1. ***A government-nonprofit grant/contract reopener.*** About one-third of overall revenue for the non-profit sectors comes from government grants and contracts. Many non-profits that provide public services on behalf of governments pursuant to grants and contracts are already underpaid for the actual costs of their work. The increased labor costs of complying with the DOL overtime rules will only exacerbate this problem. The National Council of Nonprofits notes that: "Nonprofits need ways to reopen or renegotiate existing government grants and contracts either to receive reimbursement rates that incorporate the increased costs or that adjust performance obligations. Since the new costs are the result of changes to federal law, it is appropriate for the federal government to give direction to government program officers at the federal, state, tribal, and local levels on how to revise existing grants and contracts to ensure that nonprofits are treated fairly by being made whole or put in no worse position."
2. ***Short-term transition support.*** If private funders – including foundations, individuals, and businesses – expect non-profits to comply with labor laws (meaning they will have additional operating costs) without cutting programs and services, it is imperative that they provide immediate additional financial resources to non-profits to maintain their current operations and service levels and to ensure compliance with wage and hour laws.

Unrealistic solutions

Congress is considering three approaches to delay or prevent the implementation of the DOL overtime rules:

1. Adopting a resolution of disapproval under the Congressional Review Act;
2. Passing legislation such as the Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773 to nullify the proposed rule; or
3. Including a provision in an appropriations bill to block enforcement of the rule for a year.

It is extremely unlikely that any of these legislative responses will ultimately be successful prior to the end of the current Congressional session, since they would require President Obama's approval or sufficient votes to override a veto. We have also been told that a rollback in the next Congressional session is unlikely as it would be tantamount to taking away an existing workplace benefit, which is extremely rare. In other words, don't hold count on Congress to invalidate these rules.

What should my non-profit do now?

1. ***Do your math homework.*** Determine which of your currently exempt employees are paid a salary below the $47,476 threshold. Ask employees to track or estimate how many hours per week they are currently working. (To avoid singling out some employees with lower salaries, you may want to consider asking all employees to track or estimate their time.) Use this information to assess what your non-profits' compliance costs will be.
2. ***Determine the best option(s) for your non-profit.*** Figure out which of the compliance options described above (or which combination of these options) is the best path forward for your organization. Or come up with other creative solutions.
3. ***Be transparent with your staff.*** Explain to any affected employees the reasons for their changes in their classification, pay, or work hours.
4. ***Make any necessary changes to your personnel policies.*** And don't forget to share your updated policies with all employees.
5. ***Talk with your funders.*** Investigate whether any government agencies that provide funding to your non-profit through grants and contracts are willing to reopen these agreements to increase reimbursement rates or adjust performance expectations. See whether your private funders would be willing to provide temporary emergency support for the additional costs of maintaining your programs and services while staying in compliance with these new rules.
6. ***Make the best of the situation.*** If your non-profit hasn't recently reviewed the classification of your workers, now is a great time to do it. The rule changes can be an opportunity to begin the good practice of regularly reviewing whether your workers are employees or independent contractors and whether they are exempt or non-exempt from FLSA.

Additional Resources

For updates and links to additional resources, visit the Center for Non-Profits' website at www.njnonprofits.org/US_LaborOvertimeRules.html.

The Center also joined with our friends at Pro Bono Partnership, the attorneys at Jackson Lewis P.C. and sister organizations in New York and Connecticut to issue a legal summary of the new rules. This summary comes in two parts: Part I, by the attorneys at Jackson Lewis, describes the major changes made by the DOL and how those changes will affect the non-profit community. Part II, by Christine Michelle Duffy, Esq., Senior Staff Attorney at Pro Bono Partnership, presents some considerations and strategies to help non-profit employers plan for and comply with the changes.

For more information, contact the Center for Non-Profits at 732-227-0800 or center@njnonprofits.org

SPECIAL WEBINAR RECORDING - Federal Overtime Regulations: It's Not Just About the Salary
Non-profits also need to be aware that even if the salary threshold is met, employees must still satisfy other criteria, particularly the administrative, executive or professional "duties tests," in order to be exempt from overtime requirements. The Center for Non-Profits hosted a webinar on November 9, 2016, regarding the new DOL rules; this webinar, presented by Maxine Neuhauser, Esq., of Epstein Becker Green, focused on the duties tests that must be met for an employee to be eligible for one of these "white collar exemptions." The webinar recording is available to Center members. more information