



## NPCC's OVERTIME FACTSHEET Current as of: May 18, 2016

**BREAKING NEWS TODAY:** President Obama and Secretary Perez announced that the Department of Labor's final rule on overtime under the Fair Labor Standards Act will automatically extend overtime pay eligibility to 4.2 million workers. The rule will entitle most salaried white collar workers earning less than \$913 a week (\$47,476 a year) to overtime pay.

### **FACTS:**

- **Effective Date:** This final rule will become effective December 1, 2016.
- **Future Increases:** automatically increased every 3 years, starting in 2020, by a mechanism we haven't learned yet.
- **Threshold salary** (the salary amount at which the FLSA can apply): employees earning less than \$47,476 per year may be entitled to overtime pay.
- **Duties Test<sup>1</sup>:** This is defined by statute, but it is important to remember that white-collar employees can be exempt from overtime only if their jobs meet all three of the "duties" tests for executive, administrative, or professional employees. In addition to receiving a salary at or above the new thresholds, each exempted employee must also exercise the **job duties** of those categories and be paid on a **salaried basis**.<sup>2</sup>

### **IMPACT:**

As of today, changes to the Fair Labor Standards Act (FLSA) mean that nonprofits must evaluate all employees making less than \$47,476 per year to see whether they should: adjust the employee's salary AND/OR begin tracking and paying overtime. **However, New York State wage and hour law minimum wages may increase and will apply to most, if not all, New York nonprofits.**<sup>3</sup> This fact sheet is **not legal advice** and you should consult counsel with specific questions.

If a nonprofit or its employer is covered by the FLSA, then these regulations require that the employer/nonprofit:

- (1) Raise salaries above the minimum threshold; OR
- (2) Pay overtime above a salary (in excess of 40 hours a week); OR
- (3) Evaluate and realign employee workload to ensure nobody works above 40 hours a week; OR

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<sup>1</sup> The four main exemptions are for "executive" employees, "administrative" employees, "professional" employees, and "computer" employees – with each exemption subject to its own "duties" test that examines the responsibilities attendant to the employee's job. Despite the simplicity of these titles, the application of the exemptions is complicated and is a frequent area of litigation and legal risk. Do not take these names at face value; **when in doubt, consult with counsel over the application of these exemptions to particular employees.**

<sup>2</sup> From the National Council of Nonprofits, [www.councilofnonprofits.org](http://www.councilofnonprofits.org).

<sup>3</sup> Please note, even if you do not meet the thresholds to be covered under the FLSA, that New York wage and hour laws cover nearly all employees and currently provide for equal or greater protections than federal law. **Thus, all non-profits with workers in New York State should currently be focused on compliance with New York's wage and hour laws. However, it is highly likely that New York State will raise its salary threshold to a level at or above the federal threshold once the federal regulations are finalized.** It is also possible that there may be some period of time when federal law once again sets the minimum salary for exempt employees in New York.

(4) Adjust employees' base pay downward and pay overtime accordingly to get to original salary<sup>4</sup>.

## **BACKGROUND ON OVERTIME LAW<sup>5</sup>**

Under the Fair Labor Standards Act (FLSA) that was first enacted in 1938, 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. 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, and professional duties as defined by the Labor Department regulations. The **salary level test** - which is the subject of the new regulations -- requires that an employee be paid at or above a minimum specified amount. That amount was last set in regulations in 2004 at \$455 per week, or \$23,660 per year. Changes to any of these tests require regulatory action by the Department of Labor.

There is a special category in the regulations that exempts "highly compensated employees" if their total annual compensation exceeds a certain amount (\$100,000 until this rule change, \$134,004 once the rule goes into effect) and they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee.

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

## **FAQS**

### **How does this rule affect New York nonprofits?**

The FLSA, under which this rule was made, applies only to all nonprofits who either

- (1) Have revenues in excess of \$500,000 from business activities (called "enterprise coverage") – contributions, membership fees, many dues and donations (cash and non-cash) are not counted toward the \$500,000 threshold.; or
- (2) Have employees who engage in work across state lines (inter-state commerce). If you produce goods to be sent to another state, order supplies from an out-of-state vendor, make out-of-state business phone calls, and/or travel or work across states, you may be engaged in inter-state commerce and subject to this FLSA rule<sup>6</sup>; or

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<sup>4</sup> Employers who choose to convert exempt employees to non-exempt status will want to carefully select the pay rate for these newly non-exempt employees. In conducting such conversions, employers may find it useful to estimate the expected overtime for a given role and then select an hourly rate that, once overtime is factored in, causes the combined straight-time and overtime compensation to approximate the prior salary level. See, [Forthcoming Federal Overtime Rules Deserve Your Attention, by Eric Hoffman and Sean Kim, Sidley Austin LLP.](#)

<sup>5</sup> From the National Council of Nonprofits, [www.councilofnonprofits.org](http://www.councilofnonprofits.org).

<sup>6</sup> From the National Council of Nonprofits ([www.councilofnonprofits.org](http://www.councilofnonprofits.org)): *Individual Coverage*: Even if the employer does not meet the standard for "enterprise coverage," an individual employee will be covered by the FLSA if he or she engages in interstate commerce or in the production of goods and services for interstate commerce. This can include such activities as regularly making out-of-state phone calls, receiving and sending mail or email, ordering goods from out-of-state suppliers (such as Amazon), and handling credit card

- (3) If the nonprofit is a hospital, school or preschool, government agency, or a business providing medical or nursing care for residents, it is subject to the FLSA regardless of income.

### **If a nonprofit is covered under the FLSA, are all employees entitled to overtime?**

Employees not entitled to overtime include:

1. “Highly compensated employees,” defined as white collar workers earning more than \$134,004 a year.
2. Executive, administrative and professional employees who have salaries above the minimum threshold of \$47,476 a year and exercise the **job duties** of those categories. For more information, see [Classifying Employees Correctly](#) in the resource section of the National Council of Nonprofits' website.
  - Hourly paid workers. The new threshold has no impact on the pay of workers paid hourly.
  - Employees with a regular (actual) workweek of 40 hours or less.

*NOTE: If your nonprofit is NOT covered under FLSA, and individual employees do not engage in interstate commerce, then again, these overtime regulations do NOT apply to you.*

### **DECISIONS NONPROFITS MUST MAKE:**

If a nonprofit is covered by the FLSA, then should the non-profit maintain the pay levels of the affected employees and convert them to non-exempt status (which could lead to substantial amounts of overtime pay), or should they raise the salaries of these employees to meet the new minimum threshold?

Some considerations to take into account:

- **COST:** Employers should factor into their budgets not only the expected salary increases or overtime costs, but also the compliance-related costs of tracking hours where the employer previously did not.
- **PAY RATE:** Employers who choose to convert exempt employees to non-exempt status will want to carefully select the pay rate for these newly non-exempt employees. Employers may find it useful to estimate the expected overtime for a given role and then select an hourly rate that, once overtime is factored in, causes the combined straight-time and overtime compensation to approximate the prior salary level.
- **MORALE:** Many employees who are converted to an hourly rate may find the transition demoralizing or irritating, as they will no longer have the prestige of a salary and will be required to keep track of the hours they work like other non-exempt employees.

### **RESOURCES:**

For further analysis, please review [NPCC's memo, co-sponsored by the Lawyers Alliance of New York and written by law firm Sidley Austin LLP, on this rule](#) (NOTE: the threshold salary was reduced by \$3,000 in today's rule so use these figures when reviewing the NPCC memo).

You can also learn more at an upcoming workshop! We will cover the overtime changes at a workshop on June 7<sup>th</sup>. [Register here](#).

### **OTHER RESOURCES:**

[Venable Nonprofit News Memo](#)

[White House Fact Sheet](#)

[DOL Overview and Summary](#)

[Overtime Final Rule and the Non-Profit Sector](#)

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transactions. The [DOL special guidance for nonprofits](#) provides three examples to help nonprofit employers understand their obligations.