The U.S. Department of Labor’s 2019 Revised White Collar Regulations

Part I: Overview of the DOL’s 2019 Final Rule and Its Impact on Nonprofits

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Introduction

In 2016, during President Obama’s administration, the United States Department of Labor (“DOL”) published its 2016 Final Rule updating regulations under the Fair Labor Standards Act (“FLSA”) governing the overtime exemptions for executive, administrative, and professional employees (commonly known as the “white collar exemptions” or “EAP exemptions”). The effective date of the 2016 Final Rule was to be December 1, 2016. However, as a result of litigation, implementation of the 2016 Final Rule was blocked and, thus, the 2016 amendments to the EAP exemptions never went into effect.

On September 27, 2019, during President Trump’s administration, the DOL published a 2019 Final Rule updating the EAP exemptions.¹ The effective date of the 2019 Final Rule is January 1, 2020.

Here, in Part I of this two-part article, Michael A. Frankel, Esq. and Joseph J. DiPalma, Esq., from Jackson Lewis P.C., explain in detail the major changes made by the DOL and how those changes will impact the nonprofit community. They also discuss the obligation of nonprofits to simultaneously comply with both the federal FLSA and applicable state wage and hour laws, and they provide a brief reminder to nonprofits about some of the limits on the use of volunteers.

In Part II, Christine Michelle Duffy, Esq., from Pro Bono Partnership, provides employers an overview of some considerations and strategies for addressing the changes discussed below. Part II will (1) help nonprofits navigate decisions relating to whether to reclassify exempt employees as nonexempt, (2) alert nonprofits to some hidden landmines, and (3) provide nonprofits tips for complying with the revised regulations.

¹ The DOL has a section of its website dedicated to the 2019 Final Rule. One publication of special note is the DOL’s new Small Entity Compliance Guide to the Fair Labor Standards Act’s Exemptions.
Overview of the 2019 Final Rule

Effective January 1, 2020, the 2019 Final Rule updates the FLSA regulations as follows:

- The required minimum weekly salary level for the EAP exemptions increases from $455 ($23,660 per year) to $684 ($35,568 per year).²

- The required minimum annual salary level for exempt highly compensated employees (HCEs) increases from $100,000 to $107,432. HCEs must receive at least $684 weekly.

- Employers will be permitted to use nondiscretionary bonuses, commissions, and incentive pay to satisfy up to 10% of the EAP minimum weekly salary level requirement. The employee would still need to be paid a weekly salary of at least $615.60 (90% of $684). Such payments must be made on an annual or more frequent basis and employers are permitted to make a “catch up” payment—i.e., if an employee has not earned sufficient commissions to satisfy the minimum salary level requirement on an annual basis, the employer can make up the difference without losing the exemption. The catch-up payment must be made by no later than the first pay period after the end of the year.³

Employers are not permitted to use catch-up payments for purposes of meeting the $684 minimum weekly salary requirement for the HCEs exemption. However, with respect to meeting the $107,432 minimum annual salary requirement, a catch-up payment can be made within one month after the end of the pay year.⁴

² The DOL did not increase the hourly rate in the regulation that permits certain computer employees to be paid $27.63 an hour (in lieu of being paid a weekly salary) and still be treated as exempt employees. The DOL did increase the required minimum salary level to $684 for those computer employees who are paid on a salary basis.

The separate minimum weekly salary levels for workers in U.S. territories and the motion picture industry were also revised.

³ The 2019 Final Rule provides that an employer is permitted to use any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary-of-hire year. If the employer does not identify in advance the year it wants to use, then the calendar year will apply.

⁴ The DOL has issued a fact sheet that provides examples of how the rules relating to nondiscretionary bonuses, commissions, and incentive pay apply in practice. See U.S. Department of Labor, Fact Sheet #17U: Nondiscretionary Bonuses and Incentive Payments (Including Commissions) and Part 541 Exempt Employees (Oct. 2019).
The 2019 Final Rule does not contain (1) any changes to the duties tests to qualify for the white collar exemptions or (2) any special exemptions or concessions for nonprofit organizations.

Nonprofit Organizations and the FLSA

The FLSA and the 2019 Final Rule do not provide nonprofit organizations an exemption from the federal minimum wage and overtime requirements. The FLSA overtime provisions apply to nonprofits (and for-profits) if either one of two conditions are met: (1) the employer is an “enterprise” “engaged in commerce or in the production of goods for commerce,” regardless of whether an individual employee was engaged in commerce (“enterprise coverage”) or (2) if an employee individually was “engaged in commerce or in the production of goods for commerce” (“individual coverage”). Whether a nonprofit or its employees are subject to the provisions of the FLSA under an enterprise or individual coverage theory must be determined on a case-by-case basis.

To meet the enterprise coverage test, an entity must have annual revenues (volume of sales made or business done) of at least $500,000. However, regardless of the dollar volume of business, the FLSA automatically applies to schools, hospitals, nursing homes, other residential care facilities, and governmental entities.

Enterprise coverage focuses on the nature of the employer’s business. In general, nonprofit organizations are subject to the overtime provisions of the FLSA if they engage in commercial activities resulting in sales made or business done of at least $500,000. An organization that performs religious, educational, or charitable activities does not perform these activities for a business purpose and will generally not constitute an enterprise under the FLSA unless the activities compete in the marketplace with commercial businesses. The DOL only considers activities performed for a business purpose in determining whether the $500,000 threshold is met. Income received by a nonprofit in furtherance of its charitable activities is not included in the $500,000 threshold. Such noncommercial income would include contributions, membership fees, donations, and dues as long as the payer receives no more than a nominal benefit in return.

The revenue that a nonprofit organization derives from ordinary commercial activities will be counted toward the $500,000 threshold. For example, in addition to their religious, educational, or charitable activities, nonprofits that operate gift shops, thrift stores, or food establishments will have the revenue from such activities count toward the $500,000 threshold because these activities compete with other commercial businesses. Indicia of competition with commercial enterprises include advertising and soliciting customers.5

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5 In a guidance document for nonprofits that the DOL issued along with the 2016 Final Rule, the DOL provided the following three illustrations of how it will apply the enterprise coverage test to nonprofits:
Even if a nonprofit organization is not subject to enterprise coverage, individual employees at a nonprofit may still be subject to the protections of the FLSA if they are regularly “engaged in commerce or in the production of goods for commerce” between states unless an exemption applies. Examples of such activities include: (1) making out-of-state phone calls; (2) travel to other states; (3) receiving/sending interstate mail or electronic communications; (4) ordering or receiving goods from an out-of-state supplier; and (5) handling credit card transactions or performing the accounting or bookkeeping for those transactions. There is no particular percentage of activities to determine whether an employee is engaged in commerce. It is sufficient that the employee’s activities in commerce are regular and recurring, even where they are a small part of the employee’s regular job duties. A nonprofit attempting to argue that a specific employee is not engaged in interstate commerce under the individual coverage test runs the risk that the DOL in an audit (or the employee in a court during litigation) might disagree with the nonprofit’s conclusion that the employee’s activities do not have a nexus to interstate commerce.

Whether a nonprofit organization or its employees are subject to the FLSA is a fact-specific determination. Nonprofits need to make sure they are complying with the minimum wage and overtime requirements of the FLSA or, if an organization intends to take the position that it and its employees are not covered by the FLSA, then the nonprofit needs to carefully consider whether the facts will support that position.

Example: A non-profit animal shelter provides free veterinary care, animal adoption services, and shelter for homeless animals. Even if the shelter takes in over $500,000 in donations in a given year, because the shelter engages only in charitable activities that do not have a business purpose, employees of the animal shelter are not covered on an enterprise basis. [footnote omitted]

Example: A non-profit organization operates a thrift store in which its employees sell donated items. The thrift store is engaged in commercial activity by selling goods. If the thrift store on its own generates revenue of at least $500,000 in a year, the non-profit’s employees are protected by the FLSA on an enterprise basis and are entitled to minimum wage and overtime protection unless a specific exemption applies.

Example: A non-profit organization operates a sandwich shop. Many of the employees that work in the restaurant, including cooks and wait staff, are individuals who were recently homeless. Even though the restaurant’s operation includes charitable purposes, the restaurant is engaged in ordinary commercial activities as it competes with other restaurants. If it generates revenue of at least $500,000 a year, the restaurant employees are protected by the FLSA on an enterprise basis and are entitled to minimum wage and overtime unless a specific exemption applies.

The DOL removed the publication from its website in 2019. Thus, caution must be exercised in relying upon some portions of the publication.
State Specific Overtime Laws and Nonprofits

The 2019 Final Rule does not eliminate nonprofit organizations’ obligation to comply with both federal and state minimum wage and overtime laws. The minimum wage and overtime laws in Connecticut, New Jersey, and New York do not contain the enterprise and interstate commerce exclusions that are set forth in the FLSA. Therefore, nonprofits in these states might still be subject to the following state minimum wage and overtime laws even if they are not subject to the requirements of the FLSA. In addition, employers covered by both the FLSA and state minimum wage and overtime laws must apply the provisions of the FLSA and state laws that are most beneficial to employees.

1. Connecticut: The Connecticut Minimum Wage Act requires employers to compensate nonexempt employees who work more than forty hours per week at a rate not less than one and one-half times the employee’s regular rate of pay. The Connecticut Department of Labor has promulgated regulations specifying the weekly salary requirements and duties that executive, administrative, and professional employees must perform to be exempt from these overtime requirements. See Conn. Agencies Regs. 31-60-14(a), 31-60-15(a) and 31-60-16(a). As of October 2019, all of the Connecticut minimum weekly salary levels are below $684. See Exempt/Non-Exempt Employees for the Purposes of [Connecticut] Wage and Hour Laws.

2. New Jersey: With respect to executive, administrative, and professional employees, New Jersey follows the federal DOL’s white collar regulations set forth in 29 C.F.R. Part 541, including both the duties tests and the required minimum weekly salary, which currently is $455 and will increase to $684 beginning January 1, 2020. See N.J. Admin. Code 12:56-7.1 to -7.2.

3. New York: New York Labor Law section 652(3) provides nonprofit employers with an ability to opt out of New York’s overtime requirements within six months after an entity is organized as long as the organization certifies under oath that it pays all employees the applicable minimum wage. All other nonprofit organizations must compensate nonexempt employees who work more than forty hours per week at a rate not less than one and one-half times the employee’s regular rate of pay.

The New York Department of Labor has promulgated regulations specifying the weekly salary requirements and duties that executive, administrative, and professional employees must perform to be exempt from these overtime requirements. See 12 NYCRR §142-3.12. Executive and administrative employees must be paid a minimum weekly salary in order to qualify for the exemption. There are different required minimum weekly salary levels for executive and administrative employees in (1) New York City (with separate levels for large and small employers), (2) Nassau, Suffolk, and Westchester counties, and (3) the rest of New York State. All of the New York minimum
weekly salary levels exceed $684. There is no salary requirement for professional employees in New York.

Volunteers

Unlike for-profit businesses, nonprofits may use unpaid volunteers under certain circumstances. The 2019 Final Rule makes no changes to the rules governing nonprofits’ use of volunteers. The DOL considers the following factors to determine whether particular activities are properly non-compensable volunteerism: (1) nature of the entity receiving services; (2) receipt by the individual (or expectation thereof) of any benefits for performing the services; (3) the amount of time involved; (4) whether regular employees are displaced; (5) whether the services are offered freely and without coercion; and (6) whether the services are of the kind typically associated with volunteer work.6

Nonprofits should note that the DOL has stated that “[i]ndividuals generally may not … volunteer in commercial activities run by a non-profit organization such as a gift shop.”7 In other words, those workers would be covered by the FLSA and its minimum wage and overtime requirements.

Questions

If you have any questions regarding the content of this article, please contact one of the following Pro Bono Partnership lawyers:

- For Connecticut and New York nonprofits: Jennifer Grudnowski, at (914) 328-0674 x335.
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Pro Bono Partnership, the Center for Non-Profits, The Connecticut Community Nonprofit Alliance (The Alliance), Lawyers Alliance for New York, and Nonprofit New York wish to thank Michael A. Frankel, Esq. and Joseph J. DiPalma, Esq., from Jackson Lewis P.C., for preparing this overview of the 2019 Final Rule for the benefit of the nonprofit communities in Connecticut, New Jersey, and New York.


7 U.S. Department of Labor, Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA) (Aug. 2015). The DOL made the same point in the guidance document for nonprofits that the DOL issued along with the 2016 Final Rule, explaining that gift and thrift stores are commercial activities. As noted above, the DOL removed the publication from its website in 2019. Thus, caution must be exercised in relying upon some portions of the publication.
The Center for Non-Profits is New Jersey’s statewide umbrella organization for the non-profit community. Through advocacy, public education, expert guidance, training, and cost-saving programs, the Center champions and strengthens non-profits individually and collectively.

The Connecticut Community Nonprofit Alliance (The Alliance) is the largest Connecticut statewide advocacy organization representing nonprofits, with a membership of more than 300 community organizations and associations across the state. Nonprofits deliver essential services to more than half a million people each year and employ almost 14% of Connecticut’s workforce.

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Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods. By connecting lawyers, nonprofits, and communities, Lawyers Alliance for New York helps organizations to develop and provide housing, stimulate economic opportunity, improve urban health and education, promote community arts, and operate and advocate for vital programs that benefit low-income New Yorkers of all ages.

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Pro Bono Partnership is a nationally recognized provider of free business and transactional legal services to nonprofits that are enhancing the quality of life in neighborhoods throughout Connecticut, New Jersey, and New York. The Partnership assists nearly 800 nonprofits annually with more than 1,700 legal matters by recruiting and supporting more than 1,400 volunteer lawyers each year. Free legal help allows nonprofits achieve their goals of managing risk, building capacity, and better serving their constituencies.
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