



CT COMMUNITY NONPROFIT ALLIANCE



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

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

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September 8, 2017 Update: On November 22, 2016, a federal district court in Texas issued a preliminary injunction blocking the implementation of nearly all of the 2016 revisions that the United States Department of Labor (DOL) made to its regulations governing the overtime exemptions for executive, administrative, and professional employees and which are discussed in this article. See [State of Nevada v. United States Department of Labor](#) to read the November 2016 decision. On August 31, 2017, the district court issued summary judgment in favor of the plaintiffs and declared the DOL's 2016 revisions invalid and unenforceable. See [State of Nevada v. United States Department of Labor](#) to read the August 2017 decision. On September 6, 2017, the U.S. Court of Appeals for the Fifth Circuit dismissed the DOL's appeal from the preliminary injunction.

It appears that the litigation is now over. In view of these developments, an employer currently is not obligated to pay white collar employees a weekly salary of more than \$455 in order for the employees to retain their exempt status under federal law and New Jersey law.

However, an employer still must comply with state laws that establish a minimum weekly salary that is higher than \$455 in order for white collar employees to be deemed exempt from overtime requirements in those states. For example, in Connecticut, the minimum weekly salary for white collar employees to be deemed exempt from overtime requirements is \$475 and in New York it is \$825 for New York City employers with 11 or more employees, \$787.50 for New York City employees with 10 or fewer employees, \$750 for employers in Westchester, Nassau, and Suffolk Counties, and \$727.50 for those employers outside of New York City and Westchester, Nassau, and Suffolk Counties.

Note that the DOL has started new rulemaking, which still might result in an increase in the federal and New Jersey minimum weekly salary for white collar workers. If and when those regulations are issued, Pro Bono Partnership will post a revised version of this two-part article.

On May 23, 2016, the United States Department of Labor (“DOL”) published in the Federal Register its [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 Final Rule is December 1, 2016.

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](#), which will be posted one week after Part I, [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. An abbreviated version of Part II will be [posted](#) on The Geraldine R. Dodge Foundation blog.

Overview

The Final Rule updates the FLSA regulations as follows:

- Increases the salary level from \$23,660 per year (\$455 per week) to \$47,476 per year (\$913 per week) for the EAP exemptions beginning December 1, 2016;
- Increases the salary level for exempt highly compensated employees from \$100,000 per year to \$134,004 per year beginning December 1, 2016;
- Provides for automatic adjustments to the salary level every three years. The three-year increases will be set at the 40th percentile for the lowest wage Census region for the standard salary level and the 90th percentile for salaried workers nationally for highly compensated employees. The DOL will publish the new rates at least 150 days before their effective date. The three-year adjustments will occur on January 1, beginning in 2020. The first set of adjustments, therefore, will be published on or before August 2, 2019. The DOL estimates that the EAP salary level will increase to \$51,168 (and the highly compensated level will increase to \$147,524) at the time of the first adjustment in 2020.
- Employers will be permitted to use nondiscretionary bonuses, commissions, and incentive pay to satisfy up to 10% of the EAP salary level requirement. Such payments must be made on a quarterly or more frequent basis and employers are permitted to make a “catch up” payment — *i.e.*, if the employee has not earned sufficient commissions to satisfy the salary level requirement on a

quarterly 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 quarter. (Highly compensated employees must receive the full salary minimum amount of \$913 weekly and employers may not rely on 10% incentive compensation as an offset.)

- The Final Rule does not contain any changes to the duties tests to qualify for the white collar exemptions.

The Final Rule does not contain any special exemptions or concessions for nonprofit organizations. However, the DOL issued [guidance](#) for nonprofit organizations along with the Final Rule regarding the FLSA's current requirements as it pertains to nonprofits.

Nonprofit Organizations and the FLSA

The FLSA does not provide an exemption from the minimum wage and overtime requirements for nonprofit organizations. The Final Rule also does not provide for any exemptions specifically applicable to nonprofits. The FLSA overtime provisions apply to nonprofits 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, organizations 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.

The DOL provided the following three specific illustrations of how it will apply the enterprise coverage test:

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.

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. The new regulations and guidance from the DOL serve as an important reminder to nonprofits to make sure they are complying with the minimum wage and overtime requirements of the FLSA or, in the event an organization intends to take the position that it and its employees are not covered, that it carefully consider whether the facts will support that position.

Non-Enforcement Period for Certain Providers of Medicaid-funded Services

The DOL also announced in a statement outside the Final Rule that it will not immediately enforce the new salary level with respect to providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in (1) residential homes or (2) facilities with 15 or fewer beds. Accordingly, the DOL will not bring enforcement actions based on the updated salary threshold prior to March 17, 2019. This does not insulate these employers from DOL enforcement of other aspects of the regulation, only the increased salary level. Moreover, this non-enforcement policy will not protect employers from private litigation as a result of the new salary standard.

State Specific Overtime Laws and Nonprofits

The 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 exemptions 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.

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 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), at www.ctdol.state.ct.us/wgwkstnd/laws-regs/adminregs.htm.
2. New Jersey: In New Jersey, there are no minimum annual revenues that a nonprofit must receive before New Jersey's wage-hour laws apply. Thus, all nonprofits must comply with New Jersey's wage-hour laws with respect to their New Jersey-based employees.

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 minimum required weekly salary, which currently is \$23,660 per year (\$455 per week) and will increase to \$47,476 per year (\$913 per week) beginning December 1, 2016. See N.J. Admin. Code 12:56-7.1 to -7.2, at http://lwd.dol.state.nj.us/labor/wagehour/lawregs/nj_state_wage_and_hour_laws_and_regulations.html.

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 salary requirements and duties that executive, administrative, and professional employees must perform to be exempt from these overtime requirements. See 12 NYCRR §142-3, at www.labor.ny.gov/formsdocs/wp/CR142.pdf. Executive and administrative employees must currently be paid a salary of at least \$675 per week to qualify for the exemption. 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 DOL's 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 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.

In one of the three examples the DOL provided to illustrate the enterprise coverage test (see above), the DOL opined that a thrift store operated by a nonprofit is engaged in commercial activity by selling goods. In the same [guidance document](#), the DOL also stated that "individuals generally may not volunteer in commercial activities run by a non-profit organization (such as a gift shop)." 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 CT Community Nonprofit Alliance, Lawyers Alliance for New York, and the Nonprofit Coordinating Committee of 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 DOL's Final Rule for the benefit of the nonprofit communities in Connecticut, New Jersey, and New York.

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 [CT Community Nonprofit Alliance](#) represents more than 550 community nonprofit organizations and associations across the state and is the largest advocacy organization representing community nonprofits in Connecticut. Together, Alliance members serve more than 500,000 Connecticut residents each year.

[Jackson Lewis P.C.](#) represents management exclusively in workplace law and related litigation. The firm assists employers in their compliance efforts and represents employers in matters before state and federal courts and administrative agencies.

[Lawyers Alliance for New York](#) is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.

The [Nonprofit Coordinating Committee of New York](#) is the "go-to" capacity building and information resource for local nonprofits. With programs designed to provide valuable benefits for 501(c)(3) organizations, NPCC serves as the voice and information source for the New York City area nonprofit community to create a sector that is better informed, managed, governed, and represented at all levels of government.

[Pro Bono Partnership](#) is a nationally recognized provider of free business and transactional legal services to nonprofits enhancing the quality of life in neighborhoods in Connecticut, New Jersey, and New York, having assisted over 2,350 nonprofits with more than 10,500 legal matters since its founding in 1997. The Partnership recruits and supports volunteer attorneys with a range of specializations to help nonprofits achieve their goals, avoid risk, and better serve their constituencies.

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