

LABOR & EMPLOYMENT

ALERT

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THE DOL'S FINAL OVERTIME RULE:
SURVIVAL STRATEGIES FOR NONPROFIT ORGANIZATIONS

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Under the Department of Labor's final overtime rule, the threshold salary level for white collar exempt employees will increase from the current \$455 per week to \$913 per week (\$47,476 per annum) on December 1, 2016. The new rule also increases the exempt annual salary threshold for highly compensated employees from \$100,000 to \$134,004. These salary thresholds will automatically adjust every three years, making it likely that the white collar exempt employee salary threshold will rise above \$50,000 in a few short years.

Although there had been speculation that the final rule might exempt higher education and nonprofit employers from the full impact of these changes, the new rule contains no such relief. Nonprofit organizations, particularly those with government contracts that require them to provide services at a fixed cost, will face difficult choices in managing their workforce under the new framework. It is critical that nonprofit organizations start planning now for the December 1 deadline.

Such planning should include: (1) an analysis of your organization and workforce to confirm which employees are subject to FLSA requirements; (2) an evaluation of the current job duties, workload and hours worked for covered employees; and (3) the development and implementation of a compliance plan.

FLSA Coverage

A nonprofit employer is a covered employer under the FLSA if it is an enterprise engaged in commerce or if its employees are individually engaged in commerce.

Enterprise coverage. A nonprofit organization is a not covered enterprise under the FLSA unless its annual gross volume of sales made or business done is at least \$500,000. The FLSA defines an "enterprise" as "the related activities performed . . . by any person or persons for a common business purpose." 29 U.S.C. § 203(r)(1). For nonprofit organizations, enterprise coverage only applies to the activities performed for a commercial business purpose (e.g., operating a gift shop) and income from contributions, membership fees, many dues, and donations are not counted toward the \$500,000 threshold. Nonprofit organizations that do not "engage in ordinary commercial activities" or "serve the general public in competition with ordinary commercial enterprises" do not typically qualify as enterprises under the FLSA. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 297-99 (1985).

Certain categories of entities, however, are specifically identified as covered enterprises under the FLSA without regard to the amount of revenues generated (commonly referred to as "named enterprises"). Such named entities include hospitals, entities providing medical and nursing care to residents, certain types of schools, certain types of railroad and transportation providers, and governmental agencies. 29 U.S.C. § 203(r)(2).

Individual coverage. Nonprofit organizations that are not covered on an enterprise basis may still have employees who are covered individually. An employee who regularly engages in interstate commerce is covered by the FLSA. Such activities include making

out-of-state phone calls, mailing information or conducting business out-of-state through the U.S. mail, ordering or receiving goods from an out-of-state supplier, or handling credit card transactions.

Although the DOL did not change the tests for enterprise and individual coverage in its final overtime rule, nonprofit organizations should take this opportunity to reexamine the scope of their FLSA obligations as a first step toward managing the impacts of the new rule.

Workforce Assessment

Employers must next analyze their workforce to determine which categories of covered employees may be impacted by the final rule. This assessment should obviously include the identification of all currently exempt employees whose pay will no longer meet salary thresholds, a review of their job duties, and an audit of hours worked. If accurate time records for these employees have not been maintained, the employer should immediately start tracking all hours worked and gathering data regarding current workloads and job duties. This assessment should also include a review of all workplace policies that govern where, when and how employees do their jobs and how they account for their time.

Compliance Plan

The Department of Labor has made it clear that employers have the freedom to choose how to restructure their workforce to comply with the new overtime rule. Options include:

Raising salaries. For employees whose salaries are close to the new threshold (and who still satisfy the duties test), employers may choose to raise their salaries to preserve their exempt status.

Maintaining current salary but paying overtime after 40 hours. The final rule does not require that an employee newly eligible for overtime be converted to an hourly employee. The employer must, however, maintain accurate records of all hours worked by salaried employees eligible for overtime to ensure compliance.

Modifying employees' base pay and paying overtime. Employers may adjust the amount of an employee's earnings to reallocate it between the employee's regular rate of pay and overtime compensation. The

revised pay may be paid on an hourly or salaried basis as long as the employee receives overtime after 40 hours. The employer may not, however, reduce an employee's hourly wage below the highest applicable minimum wage.

Adjusting schedules, spreading work hours and reorganizing workloads. Employers can limit the need for employees to work overtime by modifying job duties and workloads and ensuring that staffing levels are appropriate for the workload. Such reorganization may also eliminate or deprioritize activities that are not essential to the nonprofit organization's core mission.

Using volunteers where permitted. The final rule does not change the rules governing when a nonprofit organization may use volunteers. A volunteer is not an employee for purposes of the FLSA if the individual volunteers freely for public service, religious or humanitarian objectives without the expectation of compensation. Volunteers typically service on a part-time basis and must not displace employees or perform work that would otherwise typically be performed by employees. ♦

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