

## DOL Update to Overtime Regulations

In May 2016, the U.S. Department of Labor finalized an update to the Fair Labor Standards Act (FLSA) that will have a significant impact on nonprofits. The update will double the salary threshold that exempts employees from overtime compensation from \$23,660/year to \$47,476/year and increases the HCE exemption from \$100,000 to \$134,004/year.

### What You Should Know

- Employees are only exempt from overtime compensation if they pass both the salary threshold and the duties test, also known as the white collar exemption.
- The updated regulation goes into effect on December 1, 2016.
- Nonprofits are not exempt from the FLSA.
- The minimum salary and compensation thresholds will automatically update every three years beginning January 1, 2020.

### Who Is Covered Under FLSA?

- Employees of any organization that has \$500,000 or more in business revenue are covered by FLSA. DOL provides an example of revenue that comes from a gifts shop counts towards business revenue, however grants, private contributions, and cash and non-cash donations to not count towards this amount. (It is likely that ticket sales would count as business revenue.)
- Employees that deal in interstate commerce are covered. Interstate commerce includes sending and receiving email and phone calls, making online purchases, etc. This means that most employees are covered under FLSA.
- The Creative Professional Exemption is not a new exemption. Similar to the duties test for the white collar professional exemption, an “employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. To be exempt from FLSA, individuals must meet both the professional requirement *and also* must have a salary higher than the threshold.  
[https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf)
- Amusement and recreational organizations that are seasonal (in operation for no more than seven months) are exempt from FLSA. Facilities maintenance does not count toward the seven-month season. <https://www.dol.gov/whd/regs/compliance/whdfs18.htm>

### Travel

- Travel Away from Home Community is travel that keeps an employee away from home overnight. If this time cuts across an employee’s regular work hours (even if it falls on a days when the employee does not work), the time is considered work time. DOL does not consider time spent on an airplane, train, boat, bus, or automobile as work time even if it falls outside of regular hours.  
<https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>
- Employees traveling internationally are not covered by FLSA, except for days where travel begins or ends within the U.S.

### Opportunities to Explore

- Educate affected employees about the reason for the change. Even if becoming overtime-eligible may result in larger paychecks, many exempt employees view conversion to non-exempt status negatively, regarding it as a demotion or a sign that their employer does not regard them as holding an important position. Employers should explain to affected employees that the change results from new regulations, that it is based only on their compensation level, and that it affects all similarly compensated employees nationwide in the same manner.

- Consider shifting the standard workweek if weekend events produce substantial overtime. Because overtime pay is calculated on a workweek basis, weekend events can produce significant overtime hours. If employers adopt a Wednesday – Tuesday workweek, however, employers can give employees time off on Monday or Tuesday to offset those extra weekend work hours during the same workweek, reducing or eliminating overtime payments. Note that any change to the standard workweek should be permanent, as employers are not permitted to regularly shift their workweeks so as to avoid overtime obligations.
- Measure and diagnose the anticipated impact on affected employees. Identify now those exempt employees who will be converted to overtime-eligible under the Final Rule, and start tracking their hours. For each such employee, identify the number and frequency of overtime hours worked, and the reasons for that overtime. Obtaining this information will enable employers to make informed decisions about whether and how to absorb the new overtime costs. Employers should also review any existing benefit plans that offer different benefits to exempt and non-exempt employees, and consider whether it is necessary or desirable to make any changes to those plans' eligibility rules or benefit levels.
- Adjust salaries to maintain exemptions or account for overtime. For employees whose salaries are close to the new threshold and who meet the duties test, employers may choose to raise their salaries to meet the new applicable threshold and maintain their exempt status. Employers may also choose to adjust the amount of an employee's earnings to reallocate them between the regular rate of pay and overtime compensation. The revised pay may be on a salaried or hourly basis (there is no requirement to convert employees to hourly pay status), but it must include payment of overtime when the employee works more than 40 hours in a week. Consideration should also be given to any administrative complications, particularly under any applicable state laws such as California, associated with creating a class of salaried, non-exempt employees.
- Identify delegable work tasks and offload the burden to part-time employees or, if legally feasible, contractors. Although there will be added costs in bringing on additional workers to take on tasks that a single hard-working employee now handles, it costs less to pay for those additional hours at a straight-time rate than at an overtime rate.
- Expect exempt employees to shoulder more of the burden. If it costs employers more money to have a junior or mid-level employee stay late at the office or come in on the weekend, higher-level exempt employees may need to take responsibility for those work commitments. (Be careful, however, not to load too many non-exempt tasks onto exempt employees to avoid diluting the exempt nature of their primary duties.) To help avoid overburdening those exempt employees, managers should monitor the productivity of their non-exempt staff to identify whether any employees have comparatively light workloads, below the 40 hours per workweek limit. To the extent tasks can be delegated to slightly less productive non-exempt staff so they are more fully utilized (without triggering overtime), that may offset somewhat the extra hours exempt employees are absorbing in order to reduce the overtime hours of their non-exempt colleagues.
- Trim activities that count as working hours but don't add sufficient value. Although it may alter the culture of the workplace to curtail or eliminate them, employers may not be able to maintain some activities that count as compensable working hours for non-exempt employees.
  - Some employers, for example, voluntarily provide paid lunch breaks. Switching a 30 minute lunch break from paid to unpaid – and ensuring that managers in fact allow their staff to spend the lunch break as they wish – could convert a 40-hour workweek to a 37.5-hour workweek, creating a buffer in which a non-exempt employee can work slightly longer workdays without triggering overtime payments. (Employers should be sure to comply with any state or local meal or rest break laws.)
  - Reconsider frequent staff meetings that consume work time.

- Evaluate whether travel to an in-person meeting is necessary, or whether a video conference call or shared screen technology would be sufficient.
- Scrutinize whether, and how many, non-exempt employees need to participate in calls or meetings, or whether subsequent debriefings would free them up to perform work that might otherwise require overtime.
- Consider using the fluctuating workweek method of calculating overtime for employees who do not work regular schedules. Employees that have regularly fluctuating hours may be paid a fixed salary (as long as there is a mutual understanding between the employer and the employee). With a fixed salary, employers may only need to pay half time payment on top of the regular salary (as opposed to time and a half) for hours worked, not to exceed 50. However, the salary will fluctuate each week based on whether the individual works more than or less than 40 hours per week. Additionally, the employee's salary may not fall below the minimum wage during weeks when hours worked exceed 40 hours. <https://www.dol.gov/whd/regs/compliance/WH1262.pdf> Page 8.

**Take Note:**

- December 1 is a Thursday, which means that updated employee classification and salaries need to be in place prior to that pay period. Check with your company's payroll service as they may have a deadline to receive and implement changes.
- The updated overtime regulations are for full-time salaried employees. Employees who are part-time, hourly, or contracted, or who are interns and apprentices, are not impacted by this update. *However*, the Department of Labor does offer specific guidelines for these other types of employees and employers should ensure that they have an understanding of those guidelines. Employers should also research their state labor departments to see if state policy has any impact on the federal regulations.
- The FLSA rulings are specifically tied to a 40-hour week, not to a daily maximum. Local regulations and collective bargaining agreements still apply to daily overtime calculations.
- Be mindful of "wage compression" with existing employees earning salaries in the low \$50,000s when developing compensation strategies.

**Resources**

- Overtime Final Rule and the Nonprofit Sector (DOL)  
<https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf>
- Preparing for the FLSA Overtime Rule Change – Checklists  
<https://www.501commons.org/resources/blog/501CommonsovertimerulechangesCHECKLIST.pdf>
- Classifying employees correctly <https://www.councilofnonprofits.org/tools-resources/classifying-employees-correctly>
- Archived webinars and compliance and challenges to nonprofits (Independent Sector)  
[https://www.independentsector.org/overtime-rules-for-nonprofits-watch?cldee=YmdyeWRIQG\\_RhbmNldXNhLm9yZw%3d%3d](https://www.independentsector.org/overtime-rules-for-nonprofits-watch?cldee=YmdyeWRIQG_RhbmNldXNhLm9yZw%3d%3d)
- Guidance for Nonprofit Organizations (DOL)  
<https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>
- Independent Sectors Comments on the Proposed Rulemaking  
[https://www.independentsector.org/uploads/Policy\\_PDFs/Independent\\_Sector\\_Overtime\\_Comments\\_1.pdf](https://www.independentsector.org/uploads/Policy_PDFs/Independent_Sector_Overtime_Comments_1.pdf)

**Background**

The U.S. Department of Labor proposed an update to FLSA during the 2015 summer, with the initial threshold increase set at \$50,440. DOL accepted comments on the proposed regulations in September 2015. OPERA America signed on to a letter from Independent Sector (OPERA America is a member) urging DOL to provide additional time to prepare comments. This request for an extension was denied. Independent Sector filed comments on behalf of the charitable sector that urged DOL to:

- Have a phased-in implementation should this proposed rule be finalized;
- Account for regional economic and market differences;
- Have an open process should there be changes to the duties test.

OPERA America joined a small group of national nonprofits for a meeting with DOL in December 2015, sharing our questions and concerns around current overtime regulations.

Neither OPERA America nor the nonprofit sector opposed an increase to the salary threshold. The threshold was clearly overdue for an increase. OPERA America does recognize that many nonprofit opera companies work on tight budgets and lean staff and that this regulatory change will be challenging.

Please note, OPERA America is not able to provide legal guidance on compliance decisions regarding employee classifications. Please seek legal counsel should you have specific questions regarding your employee classifications.