

Nonprofits and the new Overtime Rule

The Final Rule Updating the FLSA Exempt Salary Threshold 2016



FAQ: Nonprofits and the new Overtime Rule

The following is regarding the Final Rule Updating the FLSA Exempt Salary Threshold 2016.

Question: What is the new rule and when does it go into effect?

Answer: The “new rule” is simply the same rule with an increase in one part (minimum salary) of a three-part test to determine which positions qualify as exempt (excluded) from overtime and other protections under the Federal Labor Standards Act (FLSA). The increase in the minimum salary has more than doubled, from \$23,600 to \$47,476 nationwide. This is often referred to as the “white collar” exemption. This rule goes into effect December 1, 2016.

Question: Do nonprofits have an exemption from the increased salary threshold?

Answer: Don't bet on it! Neither the FLSA nor the Department of Labor's (DOL) regulations provide an exemption from overtime requirements for nonprofit organizations. According to the DOL, nonprofit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in a sufficient amount of sales made or business done, such as operating a gift shop or providing veterinary services for a fee. **However**, employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce.

Question: What is interstate commerce?

Answer: Interstate commerce is commercial trade, business, the movement of goods, information, money or transportation from one state to another.

Examples include: ordering, receiving and/or using goods from an out-of-state vendor, making phone calls, sending emails or postal mail to someone in another state. Credit card transactions also count as interstate commerce.

These days, it would be the very rare employee that is not engaged in some sort of interstate commerce and therefore not entitled to the protections of the FLSA, including overtime and minimum wage.

Question: I was unaware that there has been an exemption for nonprofits that do not have business income greater than \$500,000 annually and do not engage in interstate commerce. Is this correct? Is this interpreted narrowly or broadly?

Answer: You are correct. It is very narrowly interpreted and the DOL is not known for narrowly construing the concept of interstate commerce. It is the very rare employee that is not engaged in some sort of interstate commerce in this day and age. The example shared by many is the janitor that doesn't use a computer, doesn't use a phone or order their own supplies. Given that, is this employee not entitled to a minimum

wage, overtime and other job protections under the FLSA? The answer is, they would be individually covered. Most janitors have tools that are used such as vacuum cleaners, mops, rags, sponges, cleaners and such that are typically made and bought from another state or country, and transported across state or national lines.

Question: Does the salary calculation include benefits such as paid health care?

Answer: No. Any benefits you provide and pay for cannot be included in the calculation for the minimum salary level.

Question: If we pay an employee more than \$47,476 a year, can we automatically assume they are exempt from overtime?

Answer: No. In order for a position to qualify for an exemption, three test areas must be met. (ALL of the tests!)

- 1) The position must be paid a salary.
- 2) The position must be paid at least the minimum salary per federal or state law (whichever is most beneficial to the employee).
- 3) The position must meet the job duties test (each exemption has different duties to qualify).

Question: Is the exemption always tied to the position? If we have a group of people earning more than \$47,476 per year in a position and have another group of people earning less than \$47,476 per year in the same position, can we simply reclassify the two positions? One with non-exempt duties and one with exempt duties?

Answer: Yes. It is the job duties, level of responsibilities, plus what and how a position is paid that determines whether a position qualifies as exempt or nonexempt. As for reclassifying the two positions, one as nonexempt and one as exempt, the answer is yes, as long as the job qualifies.

Question: What defines a HCE (highly compensated employee)? Is it their current salary? Does this new rule mean we need to raise HCE's to \$134,000 annually?

Answer: The highly compensated employee exemption applies to employees who have a total annual compensation of at least \$100,000 and who "customarily and regularly" perform **one** of the exempt duties of an administrative, executive or professional employee. The total annual compensation must include at least \$455 per week paid on a salary or fee basis, and may also include commission payments, nondiscretionary bonuses, and other nondiscretionary compensation. If an employee earns at least \$100,000 of annual compensation, the DOL then looks to whether the employee "customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee."

The duties requirement is relaxed because a high level of compensation is a strong indicator that an employee is exempt. Therefore, the highly compensated employee does not need to satisfy each prong of

the exemption (e.g., a highly compensated administrative employee who customarily and regularly performed at least one administrative duty does not need to exercise discretion or independent judgment).

As to whether or not you need to raise the salary of a HCE to \$134,000 annually, it all depends. If that is your CEO, they typically qualify as exempt under the executive or administrative exemption. If **they** don't satisfy all the requirements under the duties tests for either of those, you may need to raise their salary in order to keep them exempt rather than transitioning your leader to a nonexempt, hourly paid basis.

Question: Does the new salary level apply to private school teachers?

Answer: No. Under the FLSA, the minimum salary level doesn't apply to outside sales positions, teachers (except in California) and practicing doctors and lawyers.

The FLSA does not require teachers to meet a minimum salary to be exempt, therefore the updated FLSA regulation has no impact on private school teachers in California. However, under the California Labor Code, private school teachers, still must earn at least twice the California minimum wage to be exempt (currently \$41,600 annually). On January 1, 2017, the California minimum wage increases (there is a one-year delay for California organizations with fewer than 26 employees) to \$10.50 per hour. And it increases annually each year through 2022. Therefore, as of January 1, 2017, the minimum salary to be exempt under California law will increase to \$840 per week; \$3,640 per month; or \$43,680 annually.

Question: If an employee is currently exempt based on their job duties, can they be paid hourly/get overtime instead of giving them a raise to \$47,476 annually?

Answer: Yes! That is a viable option and one that many nonprofit organizations will be doing with their current exempt staff that are paid less than the updated minimum. How it is communicated will be critical. Clearly explain the change in the salary threshold. Let employees know that these standards are set by the federal government and NOT by your organization. Emphasize that the changes are not personal.

Question: If an employee is currently exempt but earns less than the new threshold, did I understand that the reason for reclassification of the position/employee from exempt to non-exempt status can be based solely on the new legislation salary threshold? Or must there also be position responsibility/duty changes to justify the change to non-exempt?

Answer: Yes. There does not need to be any change in their job duties or responsibilities. However, you should clearly explain the dramatic increase in the salary threshold for exempt employees is due to the new FLSA rule.

Question: Is work done at home counted in total hours? What about on-call?

Answer: Nonexempt employees should track **all** time worked, it is required under the FLSA. You must pay them for travel time (not commuting to/from work), waiting time and controlled on-call time. Controlled on-call means your employee would be limited geographically; respond quickly to a call (response time is key); must remain on the employer's premises; or wear a uniform.

Question: If an employee works nine hours one day and seven the next do you still pay overtime for the one hour? Do different states have different rules concerning hours worked per day or per week that determine overtime?

Answer: You are correct. It depends on what state in which the employee works. If your state has daily overtime (over 8 hours in a day) then in your example, you would be required to pay one hour of overtime for any time worked over eight hours in a day. If your state does not have daily overtime, then there would be no overtime owed for that week assuming the other days worked did not exceed a total of 40 hours.

Question: If we have an employee that works one hour of overtime in one week, can we require them to shorten the following week by 1.5 hours to maintain our budget?

Answer: Yes. It's best to contain these fluctuations within the same work week and pay period.

Question: Can we substitute Compensatory Time (Comp time) for overtime?

Answer: No. Comp time is only an option if you are a government employee employed by your state, city, county or the federal government.

Question: Is there any chance that the legislation will be repealed prior to December or shortly thereafter? By when would I need to comply? We are concerned that if we have change discussions and then those changes are no longer legislatively required.

Answer: Don't count on it. If such legislation passes in both the House and the Senate, it can still be vetoed by the President. Plan on being in compliance with the updated salary threshold prior to December 1, 2016.

This list of questions was compiled from questions frequently forwarded to [501\(c\) Agencies Trust](http://501(c)AgenciesTrust.org) through its [Nonprofit HR Hotline](http://NonprofitHRHotline.org) concerning the new overtime rule. The list also includes questions submitted during the recent webcast *Nonprofit Options to the New Overtime Rule*. Watch that webcast on-demand by [clicking here](#).

About Us

501(c) Agencies Trust is a national organization created by a dozen nonprofits in 1982 that helps nonprofits leave the state unemployment tax system and become reimbursing employers.

Under federal law, 501(c)(3)s can opt out of the state unemployment insurance tax system and simply reimburse the state for any paid benefits. Instead of paying a flat state tax rate, 501(c) Agencies Trust can help them build a reserve account that they own and that earns interest through sound conservative investing. 501(c) Agencies Trust monitors and handles all unemployment claims and reimburses the state for any paid claims.

The program currently has almost 1,500 participants and saves those nonprofits an estimated \$20 million annually. We are the oldest and largest such organization in the nation.

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