



# Overtime Final Rule and the Non-Profit Sector

**Non-profit Sector:** Non-profit work is a complex and important sector in our economy and civil society. The Department recognizes and values the enormous contributions that non-profit organizations make to the country. Many non-profit organizations provide services and programs that benefit vulnerable individuals in a variety of facets of life, including those workers who the Department also works to protect by ensuring that their workplaces are fair, safe, and secure.

**Overtime Final Rule:** The Department of Labor's final overtime rule updates the salary level required for the executive, administrative, and professional ("white collar") exemption to ensure that the Fair Labor Standards Act's (FLSA) intended overtime protections are fully implemented, and it provides greater clarity for white collar workers and their employers, including non-profit organizations. The final rule will also lead to better work-life balance for many workers, and it can benefit employers by increasing productivity and reducing turnover.

The final rule updates the salary threshold under which most white collar workers are entitled to overtime to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census region, currently the South. The final rule raises the salary threshold from \$455 a week (\$23,660 for a full-year worker) to \$913 a week (\$47,476 for a full-year worker) effective December 1, 2016.

## Non-profits and the FLSA

Neither the FLSA nor the Department's regulations provide an exemption from overtime requirements for non-profit organizations. While some non-profits may not be covered under the FLSA, it is likely that many employees of non-profits are entitled to FLSA protections.

There are two types of coverage: The FLSA may apply to (1) businesses or similar entities ("enterprise coverage") or (2) individuals ("individual coverage"). Under enterprise coverage, the FLSA applies to businesses with annual sales or business of at least \$500,000. For a non-profit, enterprise coverage applies only to the activities performed for a business purpose (such as operating a gift shop or providing veterinary services for a fee)\*; it does not apply to the organization's charitable activities that are not in substantial competition with other businesses. Income from contributions, membership fees, many dues, and donations (cash or non-cash) used for charitable activities are not counted toward the \$500,000 threshold.

\*Note: The following types of entities are "named enterprises," meaning that they are covered by the FLSA **regardless of the total of their annual sales or business done or their non-profit status**. See WHD [Fact Sheet #14](#) for more information:

- Hospitals
- Schools and preschools
- Government agencies
- Businesses providing medical or nursing care for residents

Under individual coverage, employees may be entitled to FLSA protections if they themselves are engaged in interstate commerce or in the production of goods for interstate commerce. For example, an individual is covered if the employee makes or receives interstate telephone calls, ships materials to another state, or transports persons or property to another state. This individual coverage applies even if the employee is not engaging in such activities for a business purpose. For example, if an employee regularly calls an out-of-state store and uses a credit card to purchase food for a non-profit that provides free meals for the homeless, that employee is protected by the FLSA on an individual basis, even though the non-profit may not be covered

as an enterprise. The Department, however, will not assert that an employee who on isolated occasions spends an insubstantial amount of time performing such work is individually covered by the FLSA.

In addition, unlike for-profit employers, non-profit organizations may use volunteer services under certain circumstances. Individuals may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA. They may not, however, volunteer time to their own non-profit employer performing the same type of work for which they are employed.

#### **Impact Is Limited by Other Rules and Exemptions:**

Many employees of non-profit organizations will not be affected by the final rule:

- *Hourly workers:* The new threshold has no impact on the pay of workers paid hourly. Generally, hourly workers are entitled to overtime regardless of how much they make if they work more than 40 hours. Nothing in the new rule changes that.
- *Workers with regular workweeks of 40 or fewer hours:* To the extent that many salaried white collar employees at non-profits have office jobs where they work no more than 40 hours, the changes to the overtime rules will have no effect on their pay.
- *Workers who fail the duties test:* Salaried workers who do not primarily perform executive, administrative, or professional duties are not eligible for the white collar overtime exemption and therefore are not affected by the final rule. Those employees already should be getting paid overtime for any hours they work over 40 in one week.
- *Highly compensated workers:* White collar workers who fail the standard duties test but are “highly compensated”—earn more than \$134,004 in a year—are almost all ineligible for overtime under the highly compensated employee exemption, which has a minimal duties test. This exemption will cover many high level managers at non-profit organizations. (See more information on HCE duties in WHD [Fact Sheet #17H](#).)
- *Workers (at non-profits that don't meet the enterprise coverage threshold) who don't engage in interstate*

*commerce:* As discussed above, employees of non-profits that perform only charitable activities or that make less than \$500,000 a year from business-purpose revenues are only entitled to overtime if they engage in interstate commerce themselves in the course of their job duties.

## **Non-profit Employers Have Discretion to Choose Between Several Options**

Many options are available to employers for complying with the new salary threshold, and the Department does not dictate which options employers must use. Carefully considering these options will be especially important to non-profit organizations for which some or a significant amount of funding comes from government or private grants of set amounts. The Department is working to inform government and private funders of the Overtime Final Rule to encourage consideration of the changes effected by the rule and potential impact on non-profit grantees. These options include:

- *Raise salaries:* For workers whose salaries are close to the new threshold and who meet the duties test, employers may choose to raise these workers' salaries to meet the new threshold and maintain their exempt status.
- *Pay overtime above a salary:* Employers also can continue to pay newly overtime-eligible employees a salary and pay overtime for hours in excess of 40 per week. The law does **not** require that newly overtime-eligible workers be converted to hourly pay status. This approach works for employees who usually work 40 hours or fewer, but have seasonal or occasional spikes that require overtime for which employers can plan and budget the extra pay during those periods.
  - o For an employee who works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule.
  - o For an employee with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the

number of daily hours worked by the employee. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

- *Evaluate and realign employee workload:* Employers can limit the need for employees to work overtime by ensuring that workloads are distributed to minimize overtime and that staffing levels are appropriate for the workload.

- *Adjust employees' base pay and pay overtime:* Employers can adjust the amount of an employee's earnings to reallocate it between regular rate of pay and overtime compensation. This method works for employees who work a relatively small amount of predictable overtime. The revised pay may be on a salaried or hourly basis (there is no requirement to convert workers to hourly pay status), but it must include payment of overtime when the employee works more than 40 hours in a week.

For more detail on the FLSA and the non-profit sector, please see [here](#).