



Don't Panic (Yet): What Your Nonprofit Needs to Know About the (Latest) New FLSA Overtime Rule

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On August 30, the U.S. Labor Department (DOL) published its [proposed overtime regulations](#) (warning: the linked regulation is 267 pages!) that specify that most employees earning less than \$55,068 per year would be entitled to overtime compensation, regardless of whether they are currently classified as executive, administrative, or professional (white-collar) workers. DOL will be accepting public comments on the proposed regulations through November 7, 2023.

Countless nonprofits are likely to be affected by the new rules, so the Providers' Council and the North Carolina Center for Nonprofits are providing this article to highlight key details about the DOL overtime rules and how they will apply to nonprofits.

What is the current law?

The Fair Labor Standards Act (FLSA) is a federal law that states that employees – except for those who are specifically exempt – are required to be paid at least the minimum wage and receive overtime pay for time worked in excess of 40 hours in a work week.

Many nonprofit employees are exempt from FLSA's overtime pay requirement if they:

1. Are paid at least the **minimum salary level** under the DOL regulations;
2. Are paid on a **salary basis**; and
3. Exercise **job duties** that are classified as exempt under FLSA.

Exempt employees include:

- **Executive** employees who are paid a salary of at least \$684 per week (\$35,568 per year), whose main duty is management of a large part of the nonprofit's operations and who regularly supervise at least two other employees. Check out the [DOL fact sheet](#) for more details about the executive employee duties test.
- **Professional** employees who are paid a salary of at least \$684 per week (\$35,568 per year) and whose jobs are based on recognized professional knowledge (such as attorneys, CPAs, doctors, registered nurses, and some social workers). Check out the [DOL fact sheet](#) for more details about the professional employee duties test.
- **Administrative** employees who are paid a salary of at least \$684 per week (\$35,568 per year) and whose primary duties are non-manual work that include the exercise of discretion and independent judgment. Check out the [DOL fact sheet](#) for more details about the administrative employee duties test.

- **Highly compensated** employees with salaries of at least \$107,432 per year, who regularly perform at least some of the job duties of an executive, professional, or administrative employee.

How do the new DOL regulations affect these exemptions?

The DOL regulations make several major changes to these rules. These include:

- **Salary level threshold:** The new regulations raise the standard minimum level for salaried, exempt workers from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year). The final rule also raises the compensation level for highly compensated employees (subject to less-detailed duties tests) from its previous amount of \$107,432 to \$143,988 annually. *Note that the salary threshold doesn't apply to teachers, lawyers, and doctors who are exempt as professional employees.*
- **Duties test:** It is important to remember that white-collar employees can be exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) only if their jobs meet the duties tests for executive, administrative, or professional employees. In addition to receiving a salary at or above the new thresholds, each exempted employee must still also exercise the job duties of those categories and be paid on a salaried basis. *The final DOL regulations make no changes to the duties test.*
- **Future increases:** The final rule creates a process where DOL will automatically update the salary threshold every three years using the same methodology that DOL used to set the \$55,068 per year salary threshold. Practically, this means that nonprofits will need to continue to increase salaries of exempt employees to keep pace with the ever-increasing salary threshold.

Does federal or state law apply to your nonprofit's employees?

Generally, nonprofit employees are only covered by FLSA if they meet one of two coverage tests:

1. Through **enterprise coverage**, which applies to every employee of a nonprofit hospital, an organization that provides medical or nursing care for residents, a school, or a preschool (all of these are specifically mentioned in the statute), or any other nonprofit with annual commercial sales of \$500,000 or more. Most nonprofit activities probably wouldn't be considered "commercial sales", meaning that many nonprofits don't have enough commercial sales to be enterprises whose employees are all covered by FLSA.
2. Through **individual coverage**, which applies to any individual employee whose regular job functions include transactions in interstate commerce. The term "interstate commerce" is very broad, and includes things like sending and receiving mail, making out-of-state phone calls, and processing credit cards.

Still, the provisions of FLSA apply to virtually all Massachusetts nonprofits since the state's overtime laws are in keeping with the FLSA requirements.

Translation: *All Massachusetts nonprofits need to be preparing for the changes in overtime rules when they eventually take effect.*

How will the new law affect nonprofits and their employees?

DOL estimates that the final rule will result in about 3.65 million currently exempt employees becoming non-exempt. Of these workers, DOL estimates that more than 380,000 work in the nonprofit sector. DOL also estimates that nonprofits are more likely than for-profit businesses to feel the impact of the overtime rule, with about 16.8% of nonprofit employees being reclassified as non-exempt (as opposed to 12.0% of for-profit employees). Since wages at human services nonprofits in Massachusetts are below the national average, it is likely a higher percentage of human services workers in Massachusetts will be reclassified as non-exempt. The Council is in the process of analyzing Massachusetts nonprofit employment and compensation data to get a better sense of the potential impacts of the proposed regulations on Massachusetts nonprofits. *Unless private and governmental funders will provide immediate support for these new labor costs, many nonprofits will need to make some hard operational choices in the next year or so.*

Can you give a short synopsis of the recent history of the salary threshold?

Yes. For more than a decade, the salary threshold remained at \$455 per week (\$23,660 per year), which was the level set by DOL in 2004. During the Obama administration, DOL sought to raise the threshold significantly. In May of 2016, DOL published a final rule that would have more than doubled the FLSA salary threshold to \$47,476 per year, effective December 1, 2016. At that time, DOL used the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (that would be us in the South!) as the amount of the threshold. Shortly before the rule was scheduled to take effect, several business associations filed a lawsuit challenging the rule in federal court. Unexpectedly, a federal court [issued an injunction](#) days before the 2016 FLSA overtime rule would have taken effect. As a result, the FLSA salary threshold remained unchanged in 2016.

In 2019, the Trump administration issued regulations updating the salary threshold to its current levels, marking the first time it had been increased in 15 years. Because the 2019 increase was much smaller than the 2016 proposal, it wasn't challenged in court by business groups, and it ultimately took effect on January 1, 2020.

For the current proposal, DOL used the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region as the amount of the threshold. Many of the 267 pages of the text of the proposed language describe DOL's rationale for settling on this methodology for setting the salary threshold at 1,059 per week (\$55,068 per year) and for proposing a process where DOL would automatically update the salary threshold every three years after it takes effect.

Will the latest rule be challenged in court?

Many of the business associations that brought lawsuits challenging the 2016 overtime rule are likely to have the same concerns about the new proposed rule, namely that the increased salary threshold would drive up labor costs. It is quite possible that one of these entities will file litigation seeking to stop the latest change in the FLSA salary threshold. If a lawsuit is filed, it is almost impossible to predict how a court will rule. In the current rulemaking, DOL makes clear how its methodology is different from the 2016 DOL methodology to make the case that the court rulings that stopped the 2016 rule from taking effect are not relevant to the new proposal. In the meantime, nonprofits should proceed under the assumption that the salary threshold will indeed go up when a final rule is issued and takes effect.

Should nonprofits submit public comments to DOL?

Yes. DOL is [accepting public comments](#) through November 7. When DOL issued its proposed regulations on the overtime rule in 2016, it received nearly 300,000 public comments from nonprofits, businesses, and individuals. It is likely that DOL will receive a similar volume of public comments this time, and it is important for nonprofits' input to be included in this feedback. Your nonprofit should consider filing public comments if your organization's operations would be affected by the proposed rule (i.e., if some of your exempt staff have salaries below the proposed \$55,068 threshold) or if your organization serves people who are currently exempt employees and might be in line to be converted to non-exempt status under the proposed rules. If your nonprofit is considering responding to DOL, our national partner – the National Council of Nonprofits – has some [helpful tips](#) in preparing your comments.

What are some options for nonprofits to comply with the overtime rules without going (too far) over budget?

While the proposed rules could change a bit before they are finalized and likely won't take effect until sometime in 2024, it is not too early for nonprofits to start planning for compliance with a much higher salary threshold under FLSA.

What a nonprofit can do and what it should do are two separate questions to be weighed based on the organization's finances, mission, contractual obligations, and other factors. Here are some of the solutions (many of them far less than ideal) that nonprofits identified in 2016 and 2019 (modified slightly to update the numbers and outdated 2016 and 2019 cultural references):

1. **Raise employees' salaries so they remain exempt.** One solution for some nonprofits is to raise (currently) exempt employees' wages so their salaries are higher than the new threshold. This makes the most sense for employees whose current salaries are only slightly lower than the new threshold (e.g. employees with salaries of \$55,000 per year). Nonprofits should note, however, that, under the proposed rule, DOL would automatically adjust the salary threshold every three years in the future, so nonprofits will need to continue to raise their employees' wages, or they will face the same issues again the next time DOL increases the salary threshold around 2027. This option may not be feasible (at least in the short-term) for nonprofits with workers whose salaries are significantly lower than the proposed new threshold of \$55,068 per year.
2. **Pay overtime to employees above a salary.** Non-exempt workers can still be paid on a salary basis rather than an hourly basis. This means that these employees would be paid the same amount whether they work a full 40 hours or less in a workweek. However, if salaried, non-exempt employees work more than 40 hours in a workweek, they are still entitled to time-and-half pay for all hours worked in excess of 40 hours in the week. One advantage of this option is that workers may be less likely to feel like their reclassification to non-exempt is a "demotion" if they are still paid on a salary basis and don't have to track hours worked unless they are eligible for overtime.
3. **Reorganize workloads or adjust schedules.** One way that some nonprofits can mitigate the costs of complying with the new rules is by shifting job functions among employees. For example, if one member of your administrative staff typically works 50 hours in a week, whereas a development staffer typically needs about 30 hours in a week to complete their job, it might make sense to shift some job responsibilities from the administrative employee to the development staffer so that they both have about 40 hours of work to do in a week. (Note: We realize that real-world situations are rarely as clean and simple as this hypothetical example.)

4. **Adjust employees' wages so you are paying approximately the same total compensation after the rule changes.** Yes, this means reducing the salaries of employees who will be reclassified as non-exempt, but paying them time-and-a-half their salary for the hours they work in excess of 40 hours per week. One way this can be done is to set a lower base hourly wage rate that take into account a certain number of time-and-a-half hours each week for individuals who typically work overtime; the result is that they can receive the same pay based on a lower official wage rate. The upside of this is that it maintains labor costs at close to their current level. The downside of this option is that salary decreases tend to have a negative effect on employee morale.
5. **Limit the number of hours non-exempt staff can work.** For some nonprofits, it may make sense to establish policies that non-exempt staff may only work 40 hours per week or must receive approval from their supervisors to regularly work overtime. This option may help improve employees' awareness of how they spend their time and can lead to increases in efficiency and productivity. However, it may not be appropriate for some types of program staff, such as emergency service providers, residential care providers, and case workers working with nonprofit clients such as adoptive families or victims of domestic violence.
6. **Consider changing how you define your work week.** Under state and federal law, nonprofits can define their work week as any period of seven consecutive days. For some nonprofits with programs and events on Fridays and weekends, it may make sense to adopt a Wednesday through Tuesday work week so non-exempt employees can take extra time off on Mondays and Tuesdays to avoid working more than 40 hours in a work week.
7. **Recognize that overtime is only required when non-exempt employees work more than 40 hours in a week.** Some nonprofits have 35-hour or 37.5-hour work weeks. These nonprofits are not required to pay time-and-a-half for employees who are working "overtime" (e.g. 36+ or 38+ hours per week) but who have not exceeded 40 hours in a work week.
8. **Make lunch breaks unpaid.** Some nonprofits allow non-exempt staff to count their lunch breaks as working hours. By making lunch breaks uncompensated time, nonprofits may be able to increase the total productive working time that employees can provide within a 40-hour workweek.
9. **Expect exempt staff to work more.** The reality is that the most cost-efficient short-term solution for some nonprofits may be to shift some additional job functions to the executive director or other exempt staff who are paid \$55,068 per year or more. If nonprofits are considering this option, it is important to be certain that these staff members still meet one of the duties tests to qualify as exempt employees.
10. **Replace some full-time workers with part-time staff or contractors.** Typically, part-time employees don't receive overtime pay since they rarely work more than 40 hours in a week. By shifting more work to part-time employees, nonprofits may be able to reduce overall labor costs. Also, the FLSA does not apply to independent contractors, so nonprofits may want to consider outsourcing some of their work to contractors. Note, however, that it is important for nonprofits to be careful not to misclassify true employees as independent contractors, since DOL and the Internal Revenue Services actively enforce worker misclassification claims.
11. **Limit telecommuting.** **Note: This recommendation from 2016 and 2019 is still valid today but may be more challenging for many organizations in a post-COVID-19 world where remote and hybrid work have become far more prevalent than they were four years ago.** Employees often work longer hours (often without realizing it) when they work from home or use their mobile devices for work-related email, phone calls, social media, and texting. Some nonprofits may wish to revisit their telecommuting policies if more of their employees will be non-exempt under the new overtime rules. Limiting the ability of employees to work remotely can help minimize inadvertent overtime, but can also have negative consequences for employee morale (more time away from home), employee productivity (more distractions in the office), and the environment (more time commuting). *Tip on after-hours emails:* Stop sending emails after hours

to non-exempt employees. The time they spend reading and responding counts as compensable time. And if you can't help it, at least encourage recipients to wait until work time to take action.

12. **Reduce employee benefits.** With diminishing revenue and rising costs, many nonprofits have already been forced to cut employee benefits like health insurance and retirement savings. Unfortunately, further reducing employee benefits may be a short-term way that nonprofits can comply with the overtime rules without adding to overall labor costs. Since shifting employees from exempt to non-exempt may impact the level of benefits they receive, consider re-evaluating all employee benefits to ensure fairness. Also, recognize that reducing employee benefits can also make it harder for your organization to recruit and retain staff. A recent [national report on the nonprofit workforce shortage crisis](#) has found that nearly three-fourths of nonprofits had job vacancies in spring of 2023.
13. **Eliminate or reduce some programs or services.** This is obviously one of the least desirable options for nonprofits. However, if a particular program or service requires staff to work long hours (and receive overtime pay for much of this work) without adequate compensation from private or governmental funders, your nonprofit may need to make hard choices about whether it makes sense to reduce service levels or eliminate the program altogether.
14. **Eliminate some fundraising events.** That's right, for some nonprofits, it might make (counterintuitive) financial sense to cut back on revenue-raising activities. If staff typically work long hours on fundraising events, nonprofits may want to consider whether these events will bring in sufficient revenue to justify the additional labor costs.

What should my nonprofit do now?

1. **Don't panic!** The proposed rule is still open for public comment, and DOL can make adjustments to the final rule based on those comments. Realistically, the new salary threshold won't take effect until well into 2024, so your nonprofit has some time to make any necessary adjustments to its operations.
2. **Do your math homework.** Determine which of your currently exempt employees are paid a salary below the \$55,068 threshold. Ask employees to track or estimate how many hours per week they are currently working. (To avoid singling out some employees with lower salaries, you may want to consider asking all employees to track or estimate their time.) Use this information to assess what your nonprofit's compliance costs will be.
3. **Determine the best option(s) for your nonprofit.** Figure out which of the compliance options described above (or which combination of these options) is the best path forward for your organization. Or come up with other creative solutions.
4. **Be transparent with your staff.** Explain to any affected employees the reasons for changes in their classification, pay, or work hours.
5. **Make any necessary changes to your personnel policies.** And don't forget to share your updated policies with all employees.
6. **Talk with your funders.** Investigate whether any government agencies that provide funding to your nonprofit through grants and contracts are willing to reopen these agreements to increase reimbursement rates or adjust performance expectations. See whether your private funders would be willing to provide temporary emergency support for the additional costs of maintaining your programs and services while staying in compliance with these new rules.
7. **Make the best of the situation.** If your nonprofit hasn't recently reviewed the classification of your workers, now is a great time to do it. The rule changes can be an opportunity to begin the good practice of regularly reviewing whether your workers are employees or independent contractors and whether they are exempt or non-exempt from FLSA.