

## FAQ re New Department of Labor Overtime Rule

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### The Bare Basics

On May 18, 2016, under the Fair Labor Standards Act (FLSA), the Department of Labor (DoL) released new regulations on overtime pay, doubling the minimum salary threshold for exempt employees to \$47,476 and requiring employees making under that threshold to be classified as non-exempt and paid overtime. DoL maintained the existing “duties” tests for evaluating the exempt status those who earn over that amount. These regulations take effect on December 1.

Note that an employee who is paid more than \$47,476 may still be eligible for overtime, unless they fall into one of the FLSA exemptions (i.e., executive exemption, administrative exemption, professional exemption, etc.). This change is likely to have the most significant impact on coalitions and programs situated in low-cost-of-living areas, since there is no provision to take cost of living into consideration.

### But I Thought Nonprofit Organizations Were Exempt From FLSA!

Nope. The Fair Labor Standards Act, which requires payment of the minimum wage and overtime, doesn't apply to most small nonprofit organizations *as an enterprise* – but as currently interpreted, the *FLSA does apply to nearly all of your staff members individually*. That is because most employees in the 21st century engage in interstate commerce every day (making/receiving interstate telephone calls, sending U.S. mail or packages out of state, sending or receiving electronic communications, ordering or receiving supplies from out of state, etc. etc.) It seems possible that some individual employees could be shielded from coverage by prohibiting all of most of these activities, or making those activities very rare, but that would be a pretty difficult way for most employees to operate.

### Why Are Overtime Rules Being Changed?

The new rule is the Obama Administration's response to Congress' failure to enact a minimum wage hike, and a response to widely reported employer abuses of the exempt category – e.g. paying “managers” who worked long hours for salaries as low as \$23,660, without any overtime pay. That low pay threshold created an incentive to pile work onto these employees, since their “extra time” came for free. It is estimated that this change will bring overtime rights to 4.2 million workers who are currently excluded and may also clarify eligibility for another 8.9 million workers who may or may not have overtime protections under the current rules.

## What Is The Rule In A Nutshell?

The new rule doubles the minimum salary threshold for exempt employees, guaranteeing overtime pay (generally time-and-a-half for hours worked over 40 hours in a single work week) to *any employee earning less than \$47,476 per year*. That threshold will be updated every three years, with the next update to occur in 2020.

## Wait, What? Aren't There Exemptions For Lawyers/Managers/CEOs?

Not for those who make under \$47,476 per year there aren't. No exceptions. Example: If the Deputy Director or Legal Director of a DV shelter is being paid \$45,000, she MUST be reclassified as non-exempt and paid overtime for hours worked beyond 40 hours in a week. No wiggle room. If the salary is under \$47,476, overtime is owed, no exceptions.

That's not to say that there are no options – there *are* some options (though not really great ones), such as reducing the employee's base pay, so that there will be funds left in the budget to cover her expected overtime. The employee would end up with the same pay at the end of the year, but it wouldn't be great for morale. Included in the links at the end of this document are some examples from the DoL, showing a variety of acceptable ways of calculating pay for non-exempt employees.

## No Problem, My Staff Will Just “Volunteer” To Work Extra Hours As Needed

Um, no again. “Volunteering” to work extra hours won't cut it, except in very limited circumstances. As of December 1, when a non-exempt employee (including *everyone* earning less than \$47,476 per year) works extra hours doing work for the agency, that work would *not* be seen as volunteering, and the agency could be liable for an extensive back pay award, as it would with any violation of the FLSA.

However, NNEDV's lawyers tell us that volunteering is possible, if it is *truly* volunteer and is not your usual kind of work. An example might be someone who isn't on the fundraising team, but loves to run, and genuinely volunteers (i.e. not “recruited” by their supervisor) to run alongside the annual Fun Run to keep an eye on things and help as needed. This is fine, but there should be a serious paper trail that it is truly optional and that participation is never pressured/urged or rewarded (in annual evaluations, for example).

*“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.”* (excerpted from the DoL guidance to nonprofits, which is linked at the end of this document). This is one of several areas where you may want to consult pro bono employment counsel.

## So If We Pay \$47,476 Per Year, We Never Have To Pay Overtime?

Wrong. Everyone on your staff is entitled to overtime pay unless they fall into a short list of categories that are “exempt” from coverage. Here are the exemptions likely to apply to DV/SA/Dual programs:

- ★ *Highly compensated employee exemption:* If you have an employee earning \$134,004 or more per year, and performing at least one of the duties of an exempt **executive, administrative, or professional** employee noted below, they are exempt. This is a very minimal test, so most agency employees at this level would not be eligible for overtime.
- ★ *Bona fide executive, administrative, or professional staff exemptions:* Here it is from the horse's mouth—according to DoL guidance reproduced below, the employee's job must meet each of these tests:

### **Executive Exemption**

To qualify for the **executive** employee exemption, all of the following tests must be met:

- *The employee must be compensated on a salary basis at a rate not less than \$913 per week;*
- *The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;*
- *The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and*
- *The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.*

### **Administrative Exemption**

To qualify for the **administrative** employee exemption, all of the following tests must be met:

- *The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$913 per week;*
- *The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and*
- *The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.*

### **Professional Exemption**

To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- *The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$913 per week;*
- *The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;*
- *The advanced knowledge must be in a field of science or learning; and*
- *The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.*

Remember, these exempt categories are ONLY relevant if you are paying at least \$47,476 per year. When you are paying more than that amount, only then do you start looking at whether the employee might satisfy the additional requirements to be exempt from overtime pay.

Note that these classifications are very dependent on *actual duties* – so make sure your job descriptions fully and accurately reflect the responsibilities of the position. And if an *advanced degree* is required for the position (professional exemption), you should include that in the job description. This is another area where your pro bono employment attorney can assist, by reviewing your job descriptions and helping you evaluate where you may need additional clarity.

### **How Will This Affect Shelter Staff Who Are Occasionally On Call?**

Full disclosure, the actual question was “If an employee sleeps through the night without receiving any hotline calls, do they still need to be paid overtime?” But the answer applies more broadly. The key question in any “on call” situation is whether the employee is free to engage in other activities at will, while they are on call. If the employee is required to be present at the shelter, or nearby, and can't (for example) go to a play or a movie, then those would be treated as work hours and are subject to overtime after 40 hours. This could also be true if there are serious restrictions on the employee's activities (e.g. you cannot drink alcohol while you are on call). NNEDV has requested more clarification on these kinds of situations, but recommends that you consult with your pro bono employment lawyer to ascertain how this would apply in your particular situations. Putting this in writing will help clarify obligations and expectations.

### **Can We Offer Compensatory Time Off Instead of Money For Overtime?**

That would be a no. For a non-exempt employee, compensatory time can never substitute for overtime pay, even if requested by the employee.

### **Can Overtime Be Calculated Over A Two Week Period?**

Nope. Overtime is calculated on a workweek basis (e.g., Monday to Sunday, Sunday to Saturday). If a non-exempt salaried employee works 50 hours in one week and 30 hours in the next week, it doesn't just “balance out.” The FLSA requires that you pay time-and-a-half overtime for the extra 10 hours worked in the first week, but you can't dock the employee for the time taken off in the second week because they are on salary. You can require that they take leave, but *you don't have the option* to agree to an employee request that she be allowed to work extra hours this week in order to take off an extra day next week. Well you can, but you'd still owe her overtime for the extra hours in the first week.

### **What About Optional Training/Conferences/Professional Development?**

This question was of great interest to NNEDV, so we passed it along to our lawyers:

*We're concerned about staff travel and ability to participate in national trainings/conferences for professional development. For example, our agency has a staffer who makes less than the threshold who traveled to attend a Women of Color Leadership conference at her request. Participation isn't required for her job, though we were pleased that she was interested and supported her participation.*

*Would the new rule mean that we would be paying 1.5 salary for overtime hours for all travel etc. If an employee requests to participate or attend a national training or conference that is not a required part of their job, does their travel and participation need to be counted as hours worked?*

The answer depends on whether participation is *truly* voluntary, not something that is needed/required for the person's regular duties, not requested by a supervisor or manager -- and also that it is not going to be used in any way as a benchmark, or for promotion consideration, or otherwise for “brownie points” (that's a legal term of art ☺). Caution: Be certain that you are fairly permitting these opportunities across your staff and not playing favorites. NNEDV has requested more clarification on these kinds of situations and also will be preparing a template for volunteer/professional development policies and documenting such situations to share with the coalitions.

### **Does This Have Any Impact On Our Interns or Community Volunteers?**

These new overtime regulations shouldn't impact your work with community volunteers or interns, however make sure you are following older rules about interns since unpaid internships are intended to be educational and should not displace regular employees. See this information from the National Council of Nonprofits: <https://www.councilofnonprofits.org/tools-resources/interns-employee-or-volunteer>.

### **Can We Redefine Our Week Around Our Busy Times?**

Yes, the employer can set the 7-day week to begin or end on any day of the week. Your work week could be Sunday to Saturday, Wednesday to Tuesday, whatever you choose. But once set, you can't keep changing it willy-nilly.

### **Could It Be Overturned By Congress?**

There is a possibility that it could be rejected by Congress (they have 60 “session days” in which they can reject a regulation – i.e. counting only days they are actually in session, so it is more than 60 calendar days). But in the event of a rejection, the president would then likely veto. That veto would cause the regulations to take effect unless Congress were to override the veto, which is possible but seems unlikely.

### **Additional Resources**

The US Department of Labor has published some documents regarding the rule, and specifically about the applicability to nonprofit organizations. We particularly encourage you to read the two documents linked below, as they contain additional information and examples:

- ★ <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>
- ★ <https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf>