

How to Implement the New Overtime Rule

12.05.19 | Linda J. Rosenthal, JD



On January 1, 2020, the new federal overtime regulations that affect employers around the nation – including nonprofits – go into effect.

We've followed the tumultuous progress of these significant changes in federal labor from the time they were first proposed during the Obama Administration through to the official adoption and publication on September 24, 2019. See Overtime Rules – Final ... At Last! (October 8, 2019). These are complex provisions that necessarily raise questions and concerns for the affected employers around the United States.

The U.S. Department of Lab, Wage and Hour Division, has since published additional information and resource materials including helpful general guidance, fact sheets, and e-tools.

The National Council of Nonprofits (NCN) has also published extensive guidance and perspective on the new overtime rules particularly from the perspective of the nonprofit sector. See Understanding the New Overtime Final Rule, National Council of Nonprofits, September 24, 2019. Also, on November 5, 2019, NCN sponsored a webinar titled "Nonprofit Overtime Webinar: What Nonprofits Need to Know and Do about the Overtime Final Rule." The 64-page slide presentation is posted online.

Overtime Rules and the Nonprofit Sector

The nonprofit sector has been steadily growing in recent years, cementing its role as an important part of the United States workforce. In certain areas – particularly urban centers – one or more nonprofits including a college and medical center are the primary employers in the region.

As we'll explain briefly in a later section, not all entities and not all of their employees are automatically subject to the federal overtime rules (or to similar, though not identical, state rules).



According to estimates by the U.S. Department of Labor, some seven percent of nonprofit and government employees nationally will be affected by the higher salary threshold. By way of reference, this estimate is a few points higher than the five percent estimate applicable to *for-profit* employees. When the Obama Administration first raised the prospect of readjusting upward the overtime eligibility cutoffs, “... many nonprofits were surprised to learn that there is not an exemption in the law for charitable organizations and that there isn’t a coverage threshold based on the number of employees.” See NCN’s *The Nonprofit Overtime Implementation Conundrum* (2016). As events unfolded, the 2016 rules were thrown out by the current Administration, but – in a somewhat surprise move – a compromise eligibility rate suggested by then-Secretary of Labor Acosta was accepted and retained in the final regulations issued in September 2019. So the effect will not be as drastic as some in the sector originally worried; nevertheless, some nonprofits will face additional payment requirements for their employees. Many states have their own labor laws including overtime protections. The federal rule is a *minimum* standard; states are free to enact laws that extend overtime coverage to more workers than the new DOL regulations. Certain states, including California and New York, already have rates higher than the new federal regulation. In other jurisdictions, there are legislative proposals pending that could have the same effect.

Government Grants and Contracts

At the time that the Obama Administration first proposed raising the eligibility cutoff for overtime pay, many in the nonprofit sector worried that these proposed regulations rules would have a negative effect on their budgets by suddenly adding new payroll costs. At the same time, they and “...other nonprofits appreciated that the DOL’s 2016 overtime rule would have raised pay and reduced working hours for many nonprofit employees, and helped lift out of poverty many individuals that the nonprofits served.” These mixed feelings continue within the nonprofit sector, exacerbated – for many organizations – over concerns about how the new overtime rules will affect pre-existing grants and contracts that were negotiated with lower worker costs in mind. “Unlike businesses that can raise prices, or governments that can raise taxes or curtail public services, nonprofits with government grants and contracts may find themselves contractually bound to maintain services at increased costs that may not be expressly covered by existing written agreements.”

There is another disparity between the nonprofit and for-profit sectors. “Federal for-profit contractors are entitled to seek ‘labor standards adjustments’ or ‘equitable adjustments’ to protect them from government-mandated labor cost increases, but that right is not currently available to



nonprofits performing work under government grants.”

The National Council of Nonprofits – along with EasterSeals, National Human Services Assembly, YMCA, and YWCA – raised these concerns in the public-comment period; see [Nonprofit Joint Comments to Overtime Proposed Rule](#), May 15, 2019.

NCN strongly urges nonprofit organizations and others interested in the sector to continue “advocating for a change in federal treatment of grants with nonprofits.”

Identifying an Obligation to Pay Overtime

In less than a month, the [federal rules on overtime](#) go into effect. Time’s up: “Nonprofits must [understand and comply with](#) existing Fair Labor Standards Act regulations (and state wage and hour laws) governing overtime compensation.”

The National Council of Nonprofits has provided helpful information “to help your nonprofit comply” in [Breaking down your nonprofit’s obligation to pay overtime](#). They’ve scoured available resources from proven experts to develop the following multi-step analysis and detailed information.

- Step #1: Is our nonprofit, or are any employees, covered by the FLSA?
- Step #2: Have we classified our employees correctly?
- Step #3: Will we need to pay any of our employees overtime?

In particular, [this flowchart](#) created by an expert is a must-see in connection with determining the initial Fair Labor Standards Act coverage for your organization and your employees.

This is critical information that we’ll follow-up on in a later post. It includes admonitions from the U.S. Department of Labor about how not to “get around” these new rules by playing around with employee vs. independent contractor classifications or other misclassifications including employee vs. volunteer. See also NCN’s [Classifying Employees Correctly](#).

Note also that, in California, there are new independent contractor rules that go into effect on January 1, 2020.

Conclusion

The National Council of Nonprofits offers the important advice to “[document your analysis](#)” of determining whether your organization or employees are covered by the new FLSA regulations – “just in case your nonprofit’s classification determination is challenged, such as by a disgruntled or former employee who complains to an attorney or the state or federal DOL that he/she should have received overtime pay.”