

## New Overtime Rules May Affect Nonprofits

10.02.23 | Linda J. Rosenthal, JD



On the table right now in Washington, D.C., is an administrative action that could dramatically affect American employers across the board (both for-profit and nonprofit) and their workers. It proposes a significant upward adjustment in the salary cut-off below which workers must be paid overtime.

While not unexpected – it’s been in the works for quite a while – this is a big deal.

### ***Proposed Regulations Issued***

On September 7, 2023, the Department of Labor published proposed regulations in the Federal Register under the Fair Labor Standards Act of 1938 (FLSA). It restores and extends overtime pay to millions of Americans who have been improperly and unfairly mischaracterized as salaried (“exempt”) employees, purportedly employed in a “bona fide executive, administrative, or professional capacity.”

The September 7th publication triggers a 60-day public-comment period. “... Public input is essential as we consider the needs of today’s workforce and industry demands, and we encourage continued stakeholder input during the public comment period,” explains Principal Deputy Wage and Hour Division Administrator Jessica Looman. “We are committed to ensuring that all workers are paid fairly for their hard work. For too long, many low-paid salaried workers have been denied overtime pay, even though they often work long hours and perform much of the same work as their hourly counterparts. This proposed rule would ensure that more workers receive extra pay when they work long hours.”

The National Council of Nonprofits is also encouraging – more accurately, pleading with – the nonprofit community to make their voices heard in this important discussion and debate. See [DOL Proposed Overtime Reforms and the Impact on Nonprofits](#), updated September 8, 2023, NCN Website.

“The questions over the appropriateness of the proposed changes to designated percentiles ... will be the subjects of economic and political debates for many months to come.” However, “[t]hat broad debate will not include an analysis of how nonprofit wages and salaries compare to the sets of data currently under consideration unless charitable employers and employees weigh in by providing data, examples, and other information.”

### ***Setting the Stage***

“For over 80 years, a cornerstone of workers’ rights in this country is the right to a 40-hour workweek, the promise that you get to go home after 40 hours or you get higher pay for each extra hour that you spend laboring away from your loved ones.”

Under the Fair Labor Standards Act of 1938 (FLSA), one of the landmark elements of the New Deal, employees are entitled to wages at or above the federal minimum wage and must be paid time and a half overtime for work after 40 hours in any work week. But within that statute, Congress exempted from these standards individuals employed in a “bona fide executive, administrative, or professional capacity.” This is commonly referred to as the “white collar” or executive, administrative, or professional (EAP) exemption.

While federal lawmakers in 1938 set out the general terms and conditions, they expressly gave the Secretary of Labor the authority to define and delineate with particularity the specific parameters; that is, which employees are “exempt” (from the overtime rules) and which are “non-exempt” and must be paid minimum wage and overtime. See *The Fair Labor Standards Act (FLSA): An Overview* (Updated March 8, 2023), Congressional Research Service, Report R-42713.

This system worked reasonably well for the first 60 years or so. But since about 2004, it has become increasingly unfair and “out of sync” with the legislative purpose of protecting workers. “I’ve heard from workers again and again,” explains Acting Secretary of Labor Julie Su, “about working long hours, for no extra pay, all while earning low salaries that don’t come anywhere close to compensating them for their sacrifices.” See *Department of Labor Announces Proposal to Restore, Extend Overtime Protections for 3.6 Million Low-Paid Salaried Workers* (August 30, 2023). *News Release*, U.S. Department of Labor.

See also: *Overtime pay would cover millions more workers under proposed Biden rule* (August 30, 2023) Lauren Kaori Gurley, *The Washington Post* [“The Labor Department’s proposed rule would guarantee overtime pay for far more non-hourly workers, raising the threshold to benefit such workers earning less than \$55,000 a year.”]; and *Labor Dept. Proposes Vast Expansion of Overtime Eligibility* (August 30, 2023) Noam Scheiber, *The New York Times* [“The Biden administration seeks a threshold of about \$55,000 in annual pay under which salaried workers must receive, up from \$35,500.”]

While that jump sounds steep, it’s not the first time in the past few years that attempts have been made to adjust the salary threshold. In 2016, for example, the Obama Administration had gotten through the administrative pipeline a significant upward change – to \$47,476 from the amount set in 2004 at \$23,360. See *White House Increases Overtime Eligibility by Millions* (May 17, 2016) Noam Scheiber, *The New York Times*

But opponents filed suit, and in the midst of those proceedings, the change of administration put a stop to it. Indeed, by 2019, the new administration had dropped the salary cutoff to the \$35,500 amount currently in place. See [Overtime Pay Eligibility Is Widened in New Federal Rule](#) (September 24, 2019) Noam Scheiber, *The New York Times*; and [You're Now a 'Manager.' Forget About Overtime Pay](#) (March 6, 2023) Noam Scheiber, *The New York Times*. So the large percentage jump in the current proposed regulation from \$35,500 to \$55,000 is misleading, taken out of context.

We'll continue in the next post with a bit more background about the law in question and the proposed change, as well as the thoughts and advice from the National Council of Nonprofits about suggested input from the nonprofit community into this critical public-policy discussion.

### ***Conclusion***

In its September 8, 2023, [website comments and guidance](#), the National Council of Nonprofits includes an observation “from a nonprofit leader.” “[O]n workforce standard issues,” they quote her as saying, “... charitable organizations tend to take a different perspective than groups representing workers or individual employers.” They “... tend to experience ‘moral support and operational anxiety,’ as in wanting to help individuals earn enough to dispense with the need for nonprofit services but feeling anxiety over how the nonprofit will pay for government-mandated increased costs.”

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