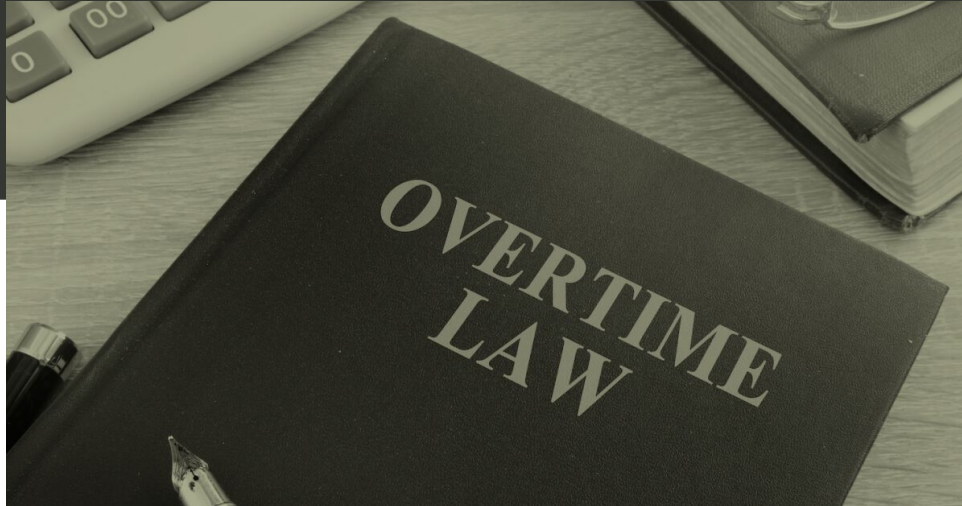


# Time for Nonprofits to Engage on Overtime Proposals

04.12.19 | Linda J. Rosenthal, JD



For several years, we've followed and reported on the saga of significant changes in federal labor-law rules that were put in place in the last year of the Obama Administration only to be tied up following the presidential election that year.

The Obama rules were designed to give a huge “raise” to many workers around the United States by changing the mathematical formula that employers – for-profit and nonprofit alike – use to determine which employees are eligible for overtime pay for putting in more than a set number of hours in a day or week. Under those final U.S. Department of Labor (DOL) regulations, the overtime income-cap limit for workers was raised from \$23,660 to over \$41,000.

At last, the new Administration has settled on a compromise figure of \$35,308 and issued **formal, proposed regulations** to that effect on March 7, 2019. Following the usual administrative procedure, there will be a 60-day public-comment period. Depending on the responses, as well as on all of the usual pressures surrounding any legislation, the DOL will issue final regulations using that \$35,308 figure.

Or not.

## ***History of Overtime Regulations***

The federal overtime laws are included in the Fair Labor Standards Act, first enacted in 1938. From time to time, a key element of that law – namely, the income-cap limit – is adjusted.

The current cut-off of \$23,660 was established in 2004. Support has been growing to change the income-cap limits that had become so artificially low in today's economic reality that too many workers were being unfairly excluded from otherwise statutorily required overtime pay.

The Obama Labor Department issued final overtime regulations in May 2016 with a delayed effective date of December 1, 2016, to give employers time to plan and adjust to the new rules. As expected, some opposition emerged in the summer and fall of 2016 in the form of lawsuits and calls on Congress to reject the changes.

Of course, on November 8, 2016, the unexpected happened: a change of Administration, with a dramatically different political philosophy and policy goals. The **lawsuits continued and the lame-duck White House proceeded** as if the overtime rules would go into effect – and stay in effect – as planned.

A funny thing happened, though, in the early months of the new Administration. Unlike the fate of many other Obama-era laws, regulations, and rules which were summarily reversed or severely restricted, the proposed overtime changes were not tossed out. The Secretary of Labor, Alexander Acosta, installed after a disastrous first Cabinet pick did not work out, announced that he is in favor of **some upward revision** to the income-cap limits for overtime eligibility – though not in the significant amount adopted by the Obama DOL final regulations. (Of course, Secretary Acosta may be in some hot water himself on an entirely unrelated matter, so....who knows.)

#### ***Overtime Input Solicited***

On June 7, 2017, the new Labor Secretary told House Appropriations hearing members that the DOL will “submit a request for information” (RFI) on this issue within a few weeks. As explained on the DOL’s own website: “Agencies generally use RFIs when they want public input on whether a new rule or changes to an existing rule are needed and comments on what course the agency should take should it decide to move forward.”

Officially, on July 26, 2017, the Labor Department issued a formal request for public comment with a 60-day comment deadline. There was some activity back and forth on the matter, but there was no real movement one way or another. Employers were left with the nagging uncertainty about what the final changes will include.

Fast forward to August 2018: some renewed movement on this issue. The Department of Labor asked for input from all interested parties in crafting a compromise to this important employment matter.

On August 27, 2018, the Department of Labor’s Wage and Hour Division announced it will hold **public “listening sessions”** to gather comments on **proposed changes to the Part 541 white-collar exemption regulations**, known as the “**Overtime Rule**.” Issued under the Fair Labor Standards Act, the regulations “implement exemptions from the overtime pay requirements for executive, administrative, professional, and certain other employees.”

DOL’s news release did not give specifics, noting only that DOL “**plans to update the Overtime Rule**, and is interested in hearing the views and ideas of participants on possible revisions to the regulations.”

**Listening sessions** were held in four cities during September. Attendees were required to **register to attend**. Reportedly, the listening sessions **provided limited clues only** about what the Department has in mind for the proposed changes. At that time, there were news reports that “USDOL **remains**

**tight lipped** about when exactly the regulations will be released, and what they may look like.”

In the following months, there were rumors that DOL would soon make a decision and issue proposed regulations with a new eligibility figure. So now, about six months later, we citizens are asked to tackle this issue directly, and promptly. According to the currently issued proposed ruling, the DOL has taken into account “...**broad-based input**” from this earlier listening tour.

The DOL’s proposed rule issued March 7, 2019 is **here**: [press release](#) along with links to all relevant documents.

### ***Nonprofit Sector & Overtime Rules***

The overtime rules apply to all workers and all employers, but the impact on the nonprofit sector is necessarily different than in the for-profit arena. Businesses may be able to pass on the workers’ pay increases to customers of their goods or services. Nonprofits don’t have that option.

While nonprofit organizations in the United States generally take a pro-worker position on social welfare and economic issues, they feel a tug between these typical sympathies and the substantial financial burden that these groups will struggle to pay.

In a **2016 survey** conducted by the National Council of Nonprofits – taken in connection with adoption of the original Obama-era regulations changes – a frequently mentioned concern is the matter of nonprofits being subject to contracts and grants negotiated and awarded without regard to additional costs that will result even with a much more modest jump in the overtime formula.

There are two important caveats. First, the federal overtime rules are **more complicated** than the use of a single “income limit” test. Two other factors considered are whether the worker performs “executive, administrative, or professional duties” and if the worker is salaried instead of paid on an hourly basis. (That’s quite a bit of wiggle room if an employer is determined to pay as little overtime as possible.)

Second, the income-limit cap is already higher in many states, including California, than the current federal figure of \$23,660. In California, for instance, the state salary threshold is \$41,600. Also, that amount is “increasing each year along with the minimum wage” until 2022. In these states, any new federal rules would only have a minimal impact. Of course, many employers – including nonprofits – work in multiple jurisdictions, subject to these varying figures.

### **Conclusion**

Members of the philanthropic community as well as academics and professional advisors are strongly encouraged to take advantage of this possibly limited opening to make their views known.

Comments are due on or before May 21, 2019. Instructions are included in the **Federal Register notice**.