

## Time for Nonprofits to Advocate for Themselves

09.22.17 | Linda J. Rosenthal, JD



From time to time, nonprofits and their advisors are invited to comment on proposed new regulations and rules proposed by government agencies.

Currently, there is an important “public comment” period that should be of interest to nonprofits along with other employers nationwide; that is, the final regulations issued in May 2016 that make substantial changes in eligibility for overtime pay. Specifically, these provisions give many workers nationwide a large increase in pay by expanding the range of employees that must be granted overtime pay for extra hours worked. The [rules changes](#) have been in the news for over a year; we’ve posted about them several times, most recently [here](#).

Originally set to go into effect on December 1, 2016, this controversial measure has been challenged and delayed by a lawsuit that is still pending and by the change of administration in Washington. While almost everyone predicted that the regulations would be tossed out entirely, they are still alive. The new Secretary of Labor, Alexander Acosta, is [not as hard-line](#) on this matter as others in the GOP. For example, at his confirmation hearing in March, Acosta said that the salary threshold for the overtime exemption “... should be raised from \$23,660 to ‘somewhere around \$33,000’ after figuring for inflation to the cost of living since 2004—the last time the regulation was successfully adjusted....” The Secretary-designee added that he [would decide](#) after his confirmation whether the department should continue to appeal the November 2016 federal court decision that temporarily halted the Obama-era rule on overtime pay.

Secretary Acosta has, indeed, chosen to consider reasonable modifications to the pre-May 2016 overtime rules. The DOL’s official filings in the ongoing federal court litigation reflect this position. As part of our continuing coverage of this issue, we mentioned last month that “[o]fficially, on July 26, 2016, the Labor Department [issued a formal request for public comment with a 60-day comment deadline](#)” about the future of the overtime rules.

*[Update: A federal court in Texas has now effectively ended the underlying lawsuit; as a result, the Obama Administration final regulations are now entirely moot. Nevertheless, the Labor Department has not withdrawn the July 26th formal request for comment about making some upward adjustments to overtime eligibility. Leaders in the nonprofit community continue to urge organizations and advocates to submit comments on this important issue before next week's deadline.]*

## *Do Officials Care What Nonprofits Think?*

By law, administrative agencies are required to seek feedback from the public on draft regulations. They must publish the proposed language in the Federal Register and give notice of the mandatory public-comment period.

Interested parties may wonder whether their responses are welcome and given fair consideration or if regulators treat this public-comment requirement as a nuisance. There's no way to generalize about this, but many officials appear to have a sincere interest in feedback and advice from citizens, especially those with training and experience in the field.

For instance, in "[Nonprofits Stop Bad Regulations](#)," we gave an example in late 2015 of an agency that backed down in the face of withering public criticism. "Even well-meaning legislators and regulators can get it wrong. They see a fly hovering over the apple pie on the Memorial Day picnic table and try to swat it with a sledgehammer."

In that case, the Treasury Department issued a draft regulation tweaking the substantiation requirements for charitable deductions of \$250 or more. The proposed change was unneeded, unworkable, and involved the collection and storing of social security numbers of donors. The Treasury Department got an earful – some 38,000 responses, most strongly opposed – and withdrew the proposed regulation entirely.

## *Nonprofits and the Overtime Issue*

The overtime rules affect a substantial portion of the workforce around the United States, and the decision here can materially affect the amount of take-home pay for many Americans. The thoughtful evaluation and comments by as many nonprofit board members, executives, and professional advisors as possible may have a meaningful effect on the well-being of many workers and their families.

It's unexpected to have this opportunity to at least seek a modified adjustment, so the opportunity should not be wasted by any employer, including nonprofits.

By way of summary and review, the controversial Fair Labor Standards Act ("FLSA") regulations on the "white collar" overtime exemptions dramatically raised the required salary threshold for the exemptions from \$455 per week to \$913 per week. These changes were set to go into effect on December 1, 2016; the delay from May to December was to give employers time to adjust to the likelihood of having to pay more of their employees for overtime work. One of the challenges, federal court litigation in Texas by some 20 state attorneys general, was successful to the extent that it resulted in temporary injunctive relief – with nationwide effect. Early in December 2016, the Obama Administration filed an appeal, notwithstanding the imminent change in administration from a Democratic one likely to fight hard for these changes to a GOP White House likely to nix it at the

earliest opportunity.

As the new DOL continues to respond to the Fifth Circuit appeal, the government has taken the unexpected position of asking the appellate court to reverse the district court's injunctive relief (and its reasoning) and reaffirm the DOL's ability to establish a salary level test. But the government asks the court *not* to address the validity of the \$913 weekly threshold, which the DOL "intends to revisit through new rulemaking."

And that's where we are.

The formal Request for Information (RFI) issued on July 26 was "regarding the regulations and, in particular, the salary level." Specifically, the public has 60 days to submit "information that will aid the DOL in formulating a proposal to revise the overtime regulations." In particular, the RFI "solicits feedback on [11 sets of] questions related to the salary level test, the duties test, varying cost-of-living across different parts of the U.S., inclusion of non-discretionary bonuses and incentive payments to satisfy a portion of the salary level, the salary test for highly compensated employees, and automatic updating of the salary levels."

## *Conclusion*

This is a difficult matter for the philanthropy community which generally favors expanding benefits to workers but has concerns that the added budgetary strain will be difficult for many organizations and agencies to absorb.

Please take the time to consider this issue and respond to the Department of Labor's Request for Information before the deadline on September 25, 2016.