



**The U.S. Department of Labor's
Revised White Collar Regulations:
Considerations and Strategies for Compliance by
New Jersey's Grantmakers and Grantees**

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November 3, 2016 Webinar

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Pro Bono Partnership's Mission

Our Mission

- Pro Bono Partnership provides free business and transactional legal services to nonprofits serving the disadvantaged or enhancing the quality of life in Connecticut, New Jersey, and New York
- Substantially leveraging the impact of its legal staff, the Partnership annually recruits and mobilizes hundreds of lawyers from corporations and law firms to donate their time and expertise on behalf of its nonprofit clients, enhancing their ability to improve conditions in their communities

Pro Bono Partnership's Clients & Volunteers

Our Clients

- Serve the poor or disadvantaged, or enhance their communities through arts, educational, or environmental programs
- Offer programs that have a demonstrable impact on the community
- Are located Connecticut, New Jersey, and New York
- Are unable to pay for legal services without significantly impairing their program services

Our Volunteers

- Work for corporate legal departments and law firms
- Utilize their existing legal skills to address our clients' legal needs
- Partner with colleagues for more involved matters

Pro Bono Partnership's Services

Our Work

We provide pro bono services on a wide variety of nonlitigation business law and transactional legal matters, in areas such as:

- Nonprofit law and corporate governance
- Employment law
- Volunteer management
- Intellectual property (e.g., copyrights, patents, and trademarks)
- E-commerce, websites, and technology
- Privacy and confidentiality
- Real estate (including lease reviews)
- Contracts
- Incorporation and tax exemption
- Corporate transactions (e.g., mergers, consolidations, affiliations, and dissolutions)

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What Is The FLSA?

- The Fair Labor Standards Act (FLSA) is the primary federal law that sets forth wage and hour requirements for most employers in the United States
- For many employers, the most important aspects of the FLSA are the rules governing:
 - **Paying overtime** (OT), for all hours worked in excess of 40 hours in a “workweek”, at time-and-one-half
 - Which employees can be treated as “**exempt**” from OT pay – *all employees are presumed to be nonexempt*
 - What constitutes “**compensable hours worked**”

What Changes On 12/1/2016?



What Changes On 12/1/2016? (continued)

- The minimum required salary level for **the white collar exemptions** increases from \$455/week to **\$913/week**
 - Nondiscretionary bonuses, commissions, and other incentive pay can account for up to 10% of the \$913, provided such payments are made at least quarterly
- The minimum required salary level for **the highly-compensated employee exemption** increases from \$100,000/year to **\$134,004/year**
 - These employees must also meet the \$913/week test without reliance on the above-mentioned 10% incentive pay rule
- The salary level for all of these exemptions **will increase automatically every three years**, starting 1/1/2020

What Isn't Changing?

- **Everything else** pertaining to the white collar exemptions will not change
 - The duties required in order to be deemed an exempt employee will not change
 - The reality is that the changes made by the federal Department of Labor (DOL) were minimal
 - ***However, the impact will be dramatic, especially for nonprofits that are operating under razor-thin profit margins or already are losing money because the government has been asking them to provide more services without an increase in funding***

Executive White Collar Exemption

Executive Exemption – The executive employee:

- Must be paid at least the required minimum **weekly salary level**;
- Must be paid on a **salary basis**;
- Must have the primary duty of **managing an enterprise or a customarily recognized department or subdivision** of the enterprise;
- Must **customarily and regularly direct the work of at least two full-time employees or their equivalent**; ***and***
- Must have the **authority to hire or fire other employees or the executive's suggestions and recommendations** as to the hiring, firing, advancement, promotion, or any other change of status of other employees **are given particular weight**

Administrative White Collar Exemption

Administrative Exemption – The administrative employee:

- Must be paid at least the required minimum [weekly salary level](#);
- Must be paid on a [salary basis](#); *and*
- Must have the [primary duty](#):
 - Of performing [office or non-manual work](#) that is directly related to the [management or general business operations](#) of the employer or the employer's customers, and
 - That include the [exercise of discretion and independent judgment](#) with respect to [matters of significance](#).

Professional White Collar Exemption

Professional Exemption – The professional employee:

- Must be paid at least the required minimum **weekly salary level**;
- Must be paid on a **salary basis**; **and**
- Must have the **primary duty** of performing work that requires either:
 - Advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or
 - Invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- Note: the salary level and salary basis requirements do not apply to doctors, lawyers, and teachers

Does The FLSA Apply To Nonprofit Employers?

- **Yes**, unless the nonprofit itself is not covered by the FLSA **and** each of its employees is not individually covered by the FLSA
 - The FLSA “**enterprise coverage**” and “**individual coverage**” tests
 - The federal **DOL has created a lot of confusion** by repeatedly and erroneously stating that the higher required minimum weekly salary will have minimal impact of nonprofits
- ***These two escape hatches are of no practical value to New Jersey employers because . . .***

State Wage-Hour Law

- Nonprofits must comply with both the FLSA and state wage-hour laws
- Employees get the “best of” federal and state laws – e.g., if state law is more beneficial to employees, then the **employees are entitled to the better benefits of state law**

State Wage-Hour Law: **New Jersey**

- New Jersey directly incorporates the federal FLSA white collar exemption regulations – including the required minimum weekly salary level – into New Jersey’s wage-hour regulations
 - Therefore, **the new \$913/week minimum applies under New Jersey law**
- **New Jersey does not have the enterprise coverage and individual coverage tests**
 - Therefore, all New Jersey nonprofits must pay at least \$913/week in order for white collar employees to remain exempt from OT

What To Do Now – Step No. 1

Step No. 1: Identify Employees Who Might Need To Be Reclassified

- Identify and evaluate **all positions** that are currently classified as exempt and **compensated below the new \$913/week** (\$47,476 annualized) minimum salary level
 - Then decide whether to raise their salaries to at least \$913/week or reclassify them as nonexempt
 - This also is a good time to review the actual duties of the employees who are paid at or above \$913/week to make sure those duties are still sufficient to qualify these employees as exempt from OT under one of the EAP exemptions
 - EAP = Executive, Administrative, and Professional

What To Do Now – Step No. 1 (continued)

Step No. 1: Identify Employees Who Might Need To Be Reclassified (continued)

- A similar analysis needs to be conducted with respect to any **highly-compensated exempt employees** who are currently compensated **below the new \$134,004** minimum salary level
 - Then decide whether to raise their salaries to at least \$134,004 or make sure they meet one or more of the more demanding standard EAP duties tests
 - This also is a good time to review the actual duties of the employees who are paid at or above \$134,004 to make sure those duties are still sufficient to qualify these employees as highly-compensated exempt employees

What To Do Now – Step No. 2

Step No. 2: Dealing With Employees To Be Reclassified As Nonexempt

- If a newly-nonexempt **employee never works more than 40 hours** in a week (including from home or the beach), the issue is somewhat academic, because the employee would not be entitled to overtime – whether paid on a salaried basis or an equivalent hourly basis, the annualized compensation will be the same
 - **Caution:** With exempt employees always connected to e-mail and office servers, it may be difficult for employers to accurately measure the true number of hours an exempt (or soon-to-be-nonexempt) employee has been regularly working
 - Employers will need to **carefully monitor the hours** worked, because if the hours worked by a nonexempt employee in a week exceeds 40, then the employee would be entitled to OT at time-and-one-half for the hours over 40

What To Do Now – Step No. 2 (continued)

Step No. 2: Dealing With Employees To Be Reclassified As Nonexempt (continued)

- For newly-nonexempt **employees who work more than 40 hours** in a week, there are some options for controlling payroll costs
- **Option No. 1:** Keep the same total annual wages by **backing into an hourly rate** that would allow the newly-nonexempt employee to earn the same amount when OT pay is factored in
 - **Example:** If an employee typically works 50 hours and is paid \$605 a week (\$31,460 annually), then in order not to incur higher compensation costs, the employee would need to be paid \$11 per hour:

$40 + (10 \times 1.5) = 55$ effective hours per week with the OT hours multiplier of 1.5 factored in

$\$605 \div 55 = \11 an hour [Note: NJ's minimum wage will increase six cents on January 1, 2017, to **\$8.44** per hour. The federal minimum wage will remain at **\$7.25** per hour.]

What To Do Now – Step No. 2 (continued)

Step No. 2: Dealing With Employees To Be Reclassified As Nonexempt (continued)

- For newly-nonexempt **employees who work more than 40 hours** in a week (continued)
- **Option No. 2:** Approximate the same total annual wages by treating the employee as a **salaried nonexempt employee**
 - The DOL has special rules relating to paying nonexempt employees on a salaried basis at 29 C.F.R. Part 778
 - OT premium pay will still be required but the amount might be less than it otherwise would have been
 - **Caution:** Employers should not adopt the “fluctuating workweek” option for paying a salary without first consulting with legal counsel, as it can be difficult to implement and is not permissible under some state laws

What To Do Now – Step No. 2 (continued)

Step No. 2: Dealing With Employees To Be Reclassified As Nonexempt (continued)

- For newly-nonexempt **employees who work more than 40 hours** in a week (continued)
- **Option No. 3: Reduce the newly-nonexempt employee's workload** so that the employee will not work over 40 hours and, if necessary, either distribute the extra work to employees who are not at risk of going over 40 hours a week or, possibly, hire a second employee to pick up some or all of the extra work
 - **Example:** An employee who works, on average, 50 hours a week could have hours reduced by 50%, with a new employee working 25 hours as well

In addition, with some creative thinking, the employer potentially could manage the total hours so that one or both of the **employees would not qualify for some or all of the employee benefits** that full-time employees would otherwise qualify for

What To Do Now – Step No. 2 (continued)

Step No. 2: Dealing With Employees To Be Reclassified As Nonexempt (continued)

- For newly-nonexempt **employees who work more than 40 hours** in a week (continued)
- **Option No. 4:** Determine the overall fiscal impact of having to pay additional compensation as OT and **possibly change fringe benefits**, such as reducing the size of the employer’s matching contributions to its 401(k)/403(b) plan; eliminating a vacation day for all employees; and/or eliminating or delaying pay increases, discretionary bonuses, and promotions that otherwise had been planned for
 - Some benefit cost savings will be inherent when employees are reclassified if the employer already provides a lesser set of benefits to nonexempt employees
 - **Caution:** However, to the extent that newly-nonexempt employees previously were receiving **bonuses, commissions, or other incentive compensation**, some of those payments, if continued, might need to be included in the employees’ **“regular hourly rate”** for purposes of calculating any OT premium pay due

What To Do Now – Step No. 2 (continued)

Step No. 2: Dealing With Employees To Be Reclassified As Nonexempt (continued)

- For newly-nonexempt **employees who work more than 40 hours** in a week (continued)
- **Option No. 4: Possibly change fringe benefits** (continued)
 - **Caution:** Reduced benefits for the newly-nonexempt employees could have **unintended consequences** with respect:
 - Applicable **ERISA non-discrimination tests** that are designed to ensure that the contributions and benefits for rank-and-file employees (nonhighly compensated employees) are proportional to contributions and benefits for owners and managers (highly compensated employees)
 - Whether health care costs are “unaffordable” under the **Affordable Care Act**

What To Do Now – Step No. 3

Step No. 3: Preparing For The Potential Collateral Fallout

- Some employees will be **demoralized** by being reclassified – actual or perceived **loss in status** (and access to meetings), **loss in promotion opportunities**, **loss of scheduling flexibility**, etc.
 - However, some employees might be **very happy** now that they can't be forced to work excessive hours without additional pay
- Potentially **distorted salary bands** resulting from increasing salaries in order to keep employees exempt
 - The **higher** (potentially significantly higher) **salaries may cause salary compression** with respect to higher-paid employees, whose salaries might be higher due to, e.g., supervisory duties, skill level, and/or seniority
 - The higher salaries might **further widen the pay gap** between lower-level employees and white collar employees

What To Do Now – Step No. 3 (continued)

Step No. 3: Preparing For The Potential Collateral Fallout (continued)

- Potentially **two employees doing the same job**, one of whom is classified as exempt and the other as nonexempt
 - A potential **wage-hour red flag** during an audit by the federal or state DOL
 - Could raise **employment discrimination** issues (e.g., one employee is a man and the other employee is a woman)
 - Managers might have a hard time remembering that the two employees are classified differently, which could lead to **problematic mistakes**, such as impermissible pay-docking with respect to the exempt employee
 - The **nonexempt employee might end up with higher total compensation** due to OT pay
 - To avoid the situation described immediately above, a manager might decide to **give more work to the OT-ineligible exempt employee**

What To Do Now – Step No. 3 (continued)

Step No. 3: Preparing For The Potential Collateral Fallout (continued)

- Employees seeking **union representation**
- Employers will need to **train the newly-nonexempt employees** about the nonprofit's timesheet policies
- Among other things, **hours spent in training sessions, certain travel time, and “after hours” work** will now need to be recorded and compensated
- Employers should be prepared **audit the timekeeping practices** of newly-nonexempt employees to ensure that they are following proper processes and procedures
 - **Example:** Check e-mail systems to see if employees have been working off-hours but not recording those hours on their timesheets

What To Do Now – Step No. 4

Step No. 4: Train Managers About These Collateral Consequences

- If managers are aware that newly-classified nonexempt employees (as well as currently-classified nonexempt employees) working off the clock, they need to:
 - **Stop that practice immediately**
 - **Pay the employees for any hours actually worked, even if those hours were unauthorized**
 - Issue firm warnings to employees who fall to follow proper timekeeping practices and impose more significant discipline for repeat violators
 - Provide additional training regarding the nonprofit's timekeeping practices

What To Do Now – Step No. 4 (continued)

Step No. 4: Train Managers About These Collateral Consequences (continued)

- Failure to take appropriate corrective action could lead to **significant back pay liability, penalties, and interest**
- Federal and state departments of labor and taxation can – and do – seek to hold **supervisors and managers (including board members) personally liable** for knowingly:
 - Allowing off-the-clock work to occur
 - Failing to pay time-and-one-half.
 - Failing to withhold income taxes on wages owed employees

The DOL's Buried Landmine

- In its ***Guidance for Non-Profit Organizations*** publication, the DOL notes, at page 10:

A volunteer generally will not be considered an employee for purposes of the FLSA if the individual volunteers freely for public service, religious, or humanitarian objectives, and without contemplation or receipt of compensation. * * * Also, **individuals generally may not volunteer in commercial activities run by a non-profit organization (such as a gift shop).**

- The DOL says the same thing in its 2015 ***Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act***

The DOL's Buried Landmine (continued)

- In contrast, **IRS Publication 598 (*Tax on Unrelated Business Income of Exempt Organizations*)** provides that:

Volunteer workforce. Any trade or business in which substantially all the work is performed for the organization without compensation is not an unrelated trade or business [and, therefore, is not subject to federal income tax].

Example 1. A retail store operated by an exempt orphanage where **unpaid volunteers** perform substantially all the work in carrying on the business is not an unrelated trade or business.

Example 2. A volunteer fire company conducts weekly public dances. Holding public dances and charging admission on a regular basis may, given the facts and circumstances of a particular case, be considered an unrelated trade or business. However, because the work at the dances is performed by **unpaid volunteers**, the activity is not an unrelated trade or business.

The DOL's Buried Landmine (continued)

- In contrast, the **New Jersey Division of Taxation's *Sales Tax Information for Exempt Organizations*** provides that:

Exemption for Qualifying Thrift Store Sales

Effective as of February 1, 1999, if an exempt organization has a store, it is not required to collect sales tax on sales of donated merchandise if:

- at least 75% of the store merchandise consists of donated items, and
- **at least 75% of the work to operate the store is performed by volunteers.**

The DOL's Buried Landmine (continued)

- The FLSA **enterprise coverage test**, which provides that nonprofits as a whole are not covered by the FLSA if they engage in ordinary commercial activities that result in annual revenues (volume of sales made or business done) of less than \$500,000, might be of use for small nonprofits to avoid having gift/thrift shop volunteers being deemed “employees”
 - However, under the FLSA **individual coverage test**, individual volunteers might still be deemed FLSA-covered employees if they **engage in interstate commerce** or in the production of goods for interstate commerce
 - **Examples:** Ordering or receiving goods from an out-of-state supplier, handling credit card transactions, or performing the accounting or bookkeeping for those activities

Reading Assignment

Pro Bono Partnership's *Learning Center* Resources

- *The U.S. Department of Labor's Revised White Collar Regulations*

- **Part I: Overview of the DOL's Final Rule and Its Impact on Nonprofits**

www.probonopartner.org/publications/u-s-department-labors-revised-white-collar-regulations-overview-dols-final-rule-impact-nonprofits

- **Part II: Considerations and Strategies for Nonprofit Compliance**

www.probonopartner.org/publications/the-u-s-department-of-labors-revised-white-collar-regulations-considerations-and-strategies-for-nonprofit-compliance

Reading Assignment (continued)

Federal DOL Resources

- DOL's 2016 White Collar Rule Revisions Home Page:
www.dol.gov/whd/overtime/final2016
- ***Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act***
www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf
- ***Fact Sheet: Overtime Final Rule and the Non-Profit Sector***
www.dol.gov/sites/default/files/overtime-nonprofit.pdf
- ***Small Entity Compliance Guide***
www.dol.gov/WHD/overtime/final2016/SmallBusinessGuide.pdf

Questions?



Note: Be sure to read through the additional slides that follow this slide if you want to learn more about the enterprise coverage and individual coverage tests and the impact of the white collar rule revisions on CT and NY nonprofits.

FLSA Coverage

- Coverage under the FLSA is generally achieved in one of two ways:
 - ***Enterprise Coverage:*** the organization is a covered enterprise
 - ***Individual Coverage:*** a particular employee is individually covered

Enterprise Coverage

- Under the enterprise coverage test, nonprofits are covered by the FLSA if they engage in **ordinary commercial activities** that result in annual revenues (volume of sales made or business done) of at least \$500,000
- If the employer is covered by the FLSA, then ALL of its employees are covered by the FLSA (unless a specific exemption applies)

Enterprise Coverage (continued)

- **Non-commercial activities** are activities that are charitable in nature and normally provided free of charge, such as providing temporary shelter, providing food and clothing to the homeless, and providing disaster relief provisions
- Note: This standard for coverage under the FLSA is not the same standard the IRS applies to commercial activity
- If a nonprofit engages in **fee-based competitive activities** with a for-profit entity, then those activities likely will be considered commercial under the FLSA even if the activities are in furtherance of the nonprofit's charitable mission
 - **Examples:** Mental health services, catering businesses, and thrift stores

Enterprise Coverage (continued)

- Some nonprofits – regardless of the dollar volume of their business – are **always subject to the FLSA**:
 - Hospitals
 - Institutions primarily engaged in the care of older adults and people with disabilities who reside on the premises
 - Schools for children who are mentally or physically disabled or gifted
 - Federal, state, and local governments
 - Preschools, elementary and secondary schools, and institutions of higher education

Individual Coverage

- The individual coverage test is applied to each employee and is determined by the employee's specific work duties
- An **employee who engages in interstate commerce** or in the production of goods for interstate commerce is covered by the FLSA
- ***Examples:***
 - Making out-of-state phone calls
 - Receiving and sending interstate mail or e-mail
 - Ordering or receiving goods from an out-of-state supplier, handling credit card transactions, or performing the accounting or bookkeeping for those activities

State Wage-Hour Law: **Connecticut**

- The Connecticut Minimum Wage Act requires employers to compensate nonexempt employees who work more than 40 hours per week at a rate not less than one-and-one-half times the employee's regular rate of pay for all hours worked in excess of 40 hours
- The Connecticut Department of Labor has promulgated regulations specifying the salary requirements and duties that executive, administrative, and professional employees must perform in order to be exempt from these overtime requirements

State Wage-Hour Law: **New York**

- The New York Labor Law provides a nonprofit employer with the ability to opt out of New York's overtime requirements within six months after the nonprofit is organized as long as the nonprofit certifies under oath that it pays all employees the applicable minimum wage
- All other nonprofits must compensate nonexempt employees who work more than 40 hours per week at a rate not less than one and one-half times the employee's regular rate of pay for all hours worked in excess of 40 hours
- The New York Department of Labor has promulgated regulations specifying the salary requirements and duties that executive, administrative, and professional employees must perform in order to be exempt from these overtime requirements
- Executive and administrative employees must currently be paid a salary of at least \$675 per week to qualify for the exemption
- There is no salary requirement for professional employees