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EMPLOYMENT • BUSINESS • HEALTH LAW

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The 2016 Revisions to the Fair Labor Standards Act Regulations: *What Nonprofits Need to Know*

The Ezold Law Firm answers the 11 key questions you've been asking about how new federal regulations expanding overtime benefits will impact nonprofits.*

Q: What is the “white collar exemption?”

A: Employees whose job duties fall within an executive, administrative or professional capacity under the definition set out in 29 CFR 541 may be exempt from requirements under FLSA for the payment of overtime.

Q: What requirements must be met for an employee to fall within a white-collar exemption?

A: 1) the employee must be paid on a salaried basis;
2) the employee must be paid more than \$913/ week; and
3) the employee must primarily perform executive, administrative or professional duties as defined in the federal regulations (“the duties test”).

In addition, teachers, lawyers and doctors are exempt, regardless of how, or how much, they are paid.

Q: How has the Final Rule, issued on May 18, 2016, modified the requirements for the white-collar exemption:

A: The Final Rule changed the minimum salary level requirement from \$455/week to \$913/week and established a mechanism for automatically updating this salary level every three years, beginning in 2020. The Final Rule did not make any changes to the definitions of the duties test for white-collar employees.

Q: Did the Final Rule contain any other changes to the regulations concerning FLSA?

A: Yes. The Final Rule also raised the minimum compensation level required to qualify as a “highly compensated employee,” a category which is subject to a less stringent duties test. The compensation level changed from a minimum of \$100,000 per year to \$134,000 per year, and it too will be subject to automatic updating every three years.

Q: When do the changes contained in the Final Rule become effective?

A: The changes take effect on December 1, 2016. However, the Department of Labor has announced that it will delay enforcement until March, 17, 2019 of the revised salary level of \$913 for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds.

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Q: Is every employee covered by the protections of FLSA?

A: No. Coverage of employees under FLSA can occur in one of two ways:

- 1) the organization is a covered enterprise, in which case every employee in the organization is eligible for coverage; or
- 2) the employee is individually covered even though the organization is not covered.

Q. Are employees of non-profits covered by FLSA?

A: That depends. There is no special exemption for employees of non-profit institutions. Just as in the case of for-profit organizations, coverage of an employee will depend on whether the organization meets the requirements of being a “covered enterprise” or whether the employee meets the requirements of being individually covered.

Q: When is an organization deemed a “covered enterprise” under FLSA?

A: The enterprise must have minimum annual revenues of \$500,000. In such cases, all employees of the enterprise are covered under FLSA.

In addition, regardless of revenue income, FLSA applies to all hospitals, institutions caring for the disabled or the elderly who reside on the premises, schools for mentally or physically disabled children, federal, state and local governments, and all schools, regardless of level, whether preschool, elementary, secondary or higher education. (however, as noted above in Question 2, teachers, doctors and lawyers are exempt.)

Q: Are membership dues or donations to a non-profit organization counted towards the \$500,000 threshold?

A: No. Only ordinary commercial activities which generate income from sales made or business done are counted in meeting the threshold. For example, if a non-profit is engaged in the job training of former addicts as kitchen workers, and it also operates a catering business which employs these workers, the revenues generated by the catering business would be counted towards the \$500,000 threshold. Even though the operation of the catering business includes charitable purposes, it is competing with other catering businesses and is therefore engaged in ordinary commercial activities. If the \$500,000 threshold is met, the employees would be protected by FLSA.

Q: Even if an organization is not covered on an enterprise level, is it possible that some of its employees may still be protected by FLSA?

A: Yes, it is possible and even likely that some employees are individually protected even when the entire organization is not covered. Specifically, an employee whose duties regularly involve interstate commerce is protected by FLSA. That includes employees who often communicate across state boundaries by phone or email, or who frequently order goods from out-of-state, or whose work is related to handling credit card transactions, including the accounting of such transactions. For example, an employee working at a non-profit whose job is to solicit and receive donations from out-of-state corporations would be covered by FLSA.

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Q: What options does an employer have for responding to the Final Rule to ensure compliance for affected employees?

A: Employers have several choices:

- 1) they can continue to pay the same salary and pay overtime for hours worked over 40 per week to the affected employees;
- 2) they can raise the salary of affected workers to the new minimum so that they remain exempt and therefore no overtime pay is required; or
- 3) they can avoid paying overtime by reducing the number of hours worked by affected employees to no more than 40 hrs/week.

*** On May 18, 2016, the Department of Labor issued a Final Rule revising the regulations for determining whether white collar salaried employees are exempt from the Fair Labor Standards Act's ("FLSA") protections regarding the payment of overtime.**



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