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## **Breaking down your nonprofit's obligation to pay overtime**

Federal [rules on overtime](#) took effect on Jan. 1, 2020. Nonprofits must understand and comply with all federal Fair Labor Standards Act regulations (as well as state wage and hour laws) governing overtime compensation. To help your nonprofit comply, we scoured available resources from proven experts to develop the following three-step analysis – with useful flowcharts, straightforward worksheets, and other tips.

The U.S. Department of Labor [announced proposed new regulations](#) on Sept. 8, 2023 that would increase the minimum salary level that executive, administrative, and professional employees must be paid from \$35,568/year to \$55,068/year or higher, and proposes raising the minimum salary level for “highly compensated employees” from \$107,432/year to nearly \$144,000/year plus establishing a mechanism for automatically raising these salary levels in the future. The Department is not proposing changes to the duties tests for white collar employees.

See the National Council of Nonprofits’ analysis, [DOL Proposed Overtime Reforms and the Impact on Nonprofits](#) and the [public comments submitted by NCN](#) in response to the proposed rule. A Final Rule from DOL is expected by April 2024.

## **Step #1: Is our nonprofit, or are any employees, covered by the FLSA?**

The first step in the analysis is to see whether the federal Fair Labor Standards Act (FLSA) applies to (a) your nonprofit or (b) any of its employees.

Does the FLSA cover our nonprofit? (“Enterprise coverage.”) First, determine whether your nonprofit is an [enterprise covered](#) by the FLSA. Certain nonprofit workplaces are automatically covered as “named enterprises,” such as schools, pre-schools, hospitals, mental health centers, and residential care facilities. Other covered enterprises are those that have earned income via interstate commerce resulting in gross revenues over \$500,000. Income from charitable activities does *not* count towards the \$500,000 – so contributions, membership dues, in-kind donations, and proceeds from fundraising special events are not counted.

Does the FLSA cover any of *our employees*? (“Individual Coverage.”) Caution: Even if *your organization* is not a covered enterprise under the FLSA, the law still covers many *individual employees* whose job responsibilities put them under the protection of the law because they are considered to be “engaged in interstate commerce.” The federal Department of Labor (DOL) tends to think that just about everything employees do these days involves interstate commerce – ranging from sending and receiving emails to counting supplies that come in from out of state. Therefore, a nonprofit employer could easily be responsible for paying overtime for some individual employees, even if the organization itself is not covered as an “enterprise.”

If you believe that the FLSA applies to your nonprofit and/or at least one employee, then move on to Steps #2 and #3 to determine which employees may be eligible for overtime pay under the FLSA if they work more than 40 hours in a single work week.

After going through Step #1, even if you believe that the FLSA doesn’t apply to your organization or any of your employees, then – before you completely relax – see whether your state or local laws provide even greater protection to employees than does federal law. If so, follow state law.

## Step #2: Have we classified our employees correctly?

Workers are either volunteers, employees, or independent contractors. If employees, they can be exempt from overtime or non-exempt. Only non-exempt employees are entitled to be paid for overtime. Each position needs to be evaluated.

How many and which employees will be classified as “non-exempt” from overtime under the new FLSA definitions? The default should be that every position is non-exempt unless it falls into one of three “white collar” exemptions: [executive](#), [administrative](#), or [professional](#). You may want to start by eliminating those positions that are definitely exempt from overtime.

Remember that state law may require you to include more employees in the “non-exempt” category than would be required under federal law.

[These three worksheets](#) can help you determine whether your workers qualify for a bona fide “white collar” exemption from overtime. If you determine that an employee doesn’t qualify for a white-collar exemption from overtime, they are non-exempt.

Once you've conducted this analysis, it’s a good idea to list the classification (exempt or non-exempt) of every employee right on the position description. This disclosure helps to manage employees’ expectations about whether they are entitled to overtime pay, and is a good reminder for management, too. Remember, only **employees** are entitled to overtime. Your nonprofit may have other types of workers:

- [Volunteers](#) are workers who do not anticipate being paid, and in fact are not compensated for their labor. However, be careful: Some employees are so enthusiastic (and community needs are so great) that they offer to “volunteer” beyond their regularly scheduled work hours. If so, make sure their volunteer responsibilities are completely different from their responsibilities as an employee – otherwise their volunteer hours, when added to their regular work hours, may push them over 40 hours in a single week. It’s a good idea to document in writing the nature of their volunteer work, AND that they voluntarily agreed to provide services for the nonprofit with no expectation of being paid for their volunteer service. Have them sign the documentation in

order to protect the nonprofit from overtime liability.

- **Interns** may be either volunteers (unpaid) or employees (paid), so document each intern's classification. Interns can sign a memo or letter acknowledging their status. Do your volunteer interns receive a stipend? If so, a stipend is inconsistent with “volunteer” status. Know the rules about ["trainees" and unpaid interns](#); otherwise, the state or federal DOL may decide that your “volunteer” intern is actually an employee.
- **Americorps and VISTA** workers are neither employees nor volunteers. They are "participants" and [special rules apply](#).
- **Independent contractors** are workers whose hours and work responsibilities your nonprofit does not control. Think plumber: when a repair is needed, you hire a plumber to provide expertise. Plumbers bring their own tools and schedule the work at their convenience. You don't supervise the plumber or put the plumber on your payroll. You also don't pay the plumber's insurance, withhold taxes, or provide benefits. Instead, the plumber completes the repair and sends you an invoice. This is analogous to when you hire a contractor to provide services to your nonprofit such as strategic analysis, diversity consulting, or fundraising services. Use a written agreement to underscore independent contractor status. Remember that independent contractors don't receive overtime - instead they are paid whatever the written agreement obligates the nonprofit to pay. Be sure to note whether your state's law follows [federal definitions](#) or treats independent contractors differently. Remember that when paying an independent contractor more than \$600 annually, your nonprofit must file an IRS Form 1099 to report payments to the independent contractor.
- **Employees:** The IRS defines [employees](#) as “anyone who performs services for you if you can control what will be done and how it will be done.” Unless they are exempt, employees who work over 40 hours in a single work week are entitled to overtime.

[IRS Publication 1779](#) can help you distinguish between [employees](#) and [independent contractors](#) and understand your nonprofit's [tax obligations for employees](#). See our [classifying employees correctly](#) page to learn more about the risks of misclassification and to find tips for working with consultants and independent contractors.

## **Step #3: Will we need to pay any of our employees overtime?**

In Step #1, you identified which of your nonprofit's workers are covered by the FLSA, and in Step #2 you identified which positions are non-exempt and thus entitled to overtime pay for working over 40 hours in a single work week. In Step #3, identify which of the non-exempt positions are likely to require the nonprofit to pay overtime, considering work patterns throughout the year. Get as full a picture as possible of what it will cost to pay those employees overtime. Now you have a picture of whether your nonprofit is likely to owe overtime payments and to which employees/job positions.

### **Practice Pointer**

It's prudent to document your analysis, just in case your nonprofit's classification determination is challenged, such as by a disgruntled or former employee who complains to an attorney or the state or federal DOL that s/he/they should have received overtime pay.

### **Compliance is not optional**

The National Council of Nonprofits urges nonprofits to understand and comply with the law of the land, in all matters. Nonprofit leaders – board and staff – need to recognize that the DOL has offices across the country, as does the IRS, which has highlighted this area as an enforcement priority in the nonprofit sector for the last several years. State attorneys general also have been active in enforcement of wage and hour laws. And of course, individual workers can seek representation by private attorneys. Just because your nonprofit has a charitable mission will not insulate it from enforcement or exposure in the media for failing to follow the law.

### **Related Insights and Analysis**

- [Classifying Employees Correctly](#) (National Council of Nonprofits).
- [Compensation for Nonprofit Employees](#) (National Council of Nonprofits).
- [Important Updates on Classifying Employees Correctly](#) (National Council of Nonprofits).

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