



# The Status (and Future) of the Overtime Rule

## What Nonprofits Need to Know

Updated: December 2, 2016

On November 22, a judge from a federal court in Texas [issued a temporary injunction](#) that delayed the December 1 effective date for the new overtime rule from the U.S. Department of Labor (DOL). On December 1, DOL and the U.S. Department of Justice (DOJ) [filed a notice](#) that they will appeal the judge's ruling.

The North Carolina Center for Nonprofits is providing this update on what this decision means for nonprofits.

### As of today, which nonprofit employees are entitled to overtime pay?

The recent court ruling makes no changes to the Fair Labor Standards Act (FLSA) or the existing DOL regulations on overtime pay. **For now, the court ruling means that your nonprofit should not need to make immediate changes to comply with the overtime rule.**

FLSA is a federal law that provides that employees – except for those who are specifically exempt – are required to:

1. Be paid at least the minimum wage (currently \$7.25 per hour); and
2. **Receive overtime pay at one-and-one-half times their regular rate of pay for all time worked in excess of 40 hours in any work week.**

Many nonprofit employees are exempt from FLSA's overtime pay requirement if they:

1. Are paid at least the **minimum salary level** under the DOL regulations;
2. Are paid on a **salary basis**; and
3. Exercise **job duties** that are classified as exempt under FLSA.

Exempt employees include:

- **Executive** employees who are paid a salary of at least \$455 per week (\$23,660 per year), whose main duty is management of a large part of the nonprofit's operations and who regularly supervise at least two other employees. For more on the executive exemption, see this [DOL fact sheet](#).
- **Professional** employees who are paid a salary of at least \$455 per week (\$23,660 per year) and whose jobs are based on recognized professional knowledge (such as attorneys, CPAs, doctors, registered nurses, some social workers, and creative professionals). For more on the professional exemption, see this [DOL fact sheet](#).

- **Administrative** employees who are paid a salary of at least \$455 per week (\$23,660 per year) and whose primary duties are non-manual work that include the exercise of discretion and independent judgment. For more on the administrative exemption, see this [DOL fact sheet](#).
- **Highly compensated** employees with salaries of at least \$100,000 per year, who regularly perform at least some of the job duties of an executive, professional, or administrative employee.

All non-exempt employees are entitled to time-and-a-half pay when they work more than 40 hours in a week. Nonprofits are not required to provide additional overtime pay to exempt employees.

## What would the overtime rule do?

If the overtime rule is eventually enacted, it would **raise the standard minimum level for salaried, exempt workers** from \$455 per week (\$23,660 per year) to **\$913 per week (\$47,476 per year)**. The new level is pegged to the 40th percentile of weekly earnings for full-time salaried workers from the lowest wage Census Region in the country (currently the South). The rule also establishes a mechanism for automatically updating the salary and compensation levels every three years, with the first update to take place in 2020.

Earlier this year, the Center developed a [guide to the overtime rules for North Carolina nonprofits](#) with more details about the rule, how it interacts with state law, and a variety of compliance options and considerations for nonprofits.

## What does the injunction mean?

In the November 22 ruling, the judge issued a **preliminary injunction** because he found that the DOL exceeded its authority under the Fair Labor Standards Act by raising the salary threshold so significantly and by having a mechanism to automatically increase it every three years. The preliminary injunction temporarily pauses DOL's authority to enforce the overtime rule. The judge's decision came as a surprise to many employment law attorneys.

## What comes next?

At this point, it is unclear whether the overtime rule will be implemented, and, if so, when that might happen. Here are three likely next steps:

1. The federal judge who issued the preliminary injunction is likely to schedule another hearing to determine whether to issue a permanent injunction, which would permanently bar DOL from enforcing the rule.
2. DOL and DOJ are appealing the judge's decision. An appellate court could lift the preliminary injunction, causing the overtime rule to go into effect at some future date.
3. Once President-elect Donald Trump takes office on January 20, 2017, it is unclear whether DOL continue to pursue the overtime rule if the courts have not issued a final decision. However, if the injunction is lifted and the rule takes effect while President Barack Obama is still in office, it would be difficult for the next administration to repeal the overtime rule immediately.

For more analysis and predictions on next steps, we encourage you to read analysis from the [National Council of Nonprofits](#) and the [Society for Human Resource Management](#).

## What if your nonprofit has already made changes to comply with the overtime rule?

Nonprofits have taken a variety of actions to prepare for compliance with the overtime rule. These include:

1. Increasing salaries for some workers (typically those whose salaries were just under the \$47,476 threshold);
2. Asking staff to more carefully track the number of hours they work;
3. Reclassifying staff whose salaries are below the \$47,476 threshold as non-exempt and paying them overtime when they work more than 40 hours per week;
4. Shifting workloads among staff to minimize the amount of overtime that non-exempt employees are working;
5. Redefining their workweeks to Wednesday through Tuesday so non-exempt staff who work on weekends can take extra time off on Mondays and Tuesdays without accruing overtime; and
6. Being more cognizant about sending after-hours emails to non-exempt staff.

Depending on which of these (or other) actions your nonprofit has taken and whether the changes have already taken effect, you have options for what to do next. Even though it is legally permissible, it may be difficult to roll back some payroll changes that your nonprofit has already implemented. For example, it may be bad for morale to give a pay cut to an employee whose salary was recently increased. On the other hand, your nonprofit may not need to immediately reclassify workers as non-exempt if their annual salary is below the \$47,476 threshold (as long as they meet one of the duties tests and are paid an annual salary of at least \$23,660). The Society for Human Resource Management has some additional [tips on how to proceed](#) and thoughts on [ways nonprofits can roll back changes they have already made](#).

## Are there any positives that nonprofits can take away from the uncertainty around the overtime rule?

Absolutely! At the North Carolina Center *for* Nonprofits, we always look for a silver lining, so we will end with a few pieces of good news from our conversations with hundreds of nonprofits that have wrestled with the overtime rule in recent months:

- In thinking about the overtime rule, nonprofits have become much more attuned to how many hours their employees are currently working. Many organizations have learned that their staff often work through lunch and spend more time than they expected working remotely on weekends and in the evening. As a result, nonprofits have made changes to their personnel policies and practices to avoid overworking their staffs. Such changes include: ensuring that non-exempt staff have the opportunity to take a (non-working) lunch break; changing workloads of staff who are regularly working longer hours than what they are paid to work; and avoiding sending after-hours emails to non-exempt staff.
- By preparing for the overtime rule that was scheduled to take effect on December 1, many nonprofits have made necessary changes so they will be ready to comply with the overtime rule if it does eventually take effect.

- Some nonprofits have redefined their workweeks. Under state and federal law, nonprofits can define their workweek as any period of seven consecutive days. For some nonprofits with programs and events on Fridays and weekends, it may make sense to adopt a Wednesday through Tuesday workweek so non-exempt employees can take extra time off on Mondays and Tuesdays to avoid working more than 40 hours in a workweek.
- The overtime rule has given nonprofits a good excuse to ensure that they have properly classified their employees as exempt or non-exempt. Some organizations have realized that staff who have long been treated as exempt do not meet the duties tests as administrative, executive, or professional employees, so they have been reclassified as non-exempt, regardless of their salaries.
- Preparation for the overtime rule has given many nonprofits a greater appreciation of the quality and quantity of work that their employees do every day. It has also raised awareness that many nonprofit employees are underpaid for the work that they do. As more nonprofits have conversations about fair compensation practices with their boards and funders, this may ultimately lead to more reasonable pay for nonprofit workers – regardless of whether it is mandated by federal law.

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