



MEMO

To: Local Arts Agencies
From: Kate McClanahan
Date: Americans for the Arts, Government Affairs Department
Re: September 14, 2016
Preparing for the Federal Overtime Rule Change

As follow up to several *Monthly Wire* news items on the topic, this memo to interested local arts organizations will provide information on the federal overtime pay changes impacting **every employer** on **December 1**. This memo has three parts: Background, Current Status, and FAQs & Helpful Resources. ***It is not intended as legal advice.***

Background

Overtime pay provides certain employees with one and one half times their usual hourly wage for hours worked in excess of 40 hours in a single work week. These labor protections date to the Fair Labor Standards Act (FLSA) of 1938.

Prior to the change now scheduled to go into effect on December 1, 2016, the standard salary level required for exemption to overtime eligibility was \$455 a week (or \$23,660 for a full-year worker). This is a pretty low threshold. Many U.S. workers are already paid above this threshold. According to the White House, just 7 percent of workers currently qualify for overtime pay based on their salaries, compared to 1975, when more than 60 percent of workers qualified for overtime pay based on their salaries.

The new threshold is \$913 a week (or \$47,476 a year). **This more than doubling of the current threshold will bring many more workers under overtime protections.** In fact, the White House predicts that the new rule will extend overtime protections to 4.2 million more Americans who are not currently eligible under federal law, while boosting wages for workers by \$12 billion over the next 10 years. They've also put together a map projecting state-by-state increased coverage:



Timeline:

- In March 2014, President Obama signed a memorandum directing the Department of Labor to modernize overtime rules.
- On June 30, 2015, the Department of Labor put forward proposed regulations to update overtime rules. When these rules were open for public comment, the Department received over 293,000 comments, including many by nonprofit organizations in support of a living wage, but raising concerns about the potential impact to the services they can offer that this substantial change would cause. Many of these organizations requested modifications including a phase-in period and regional cost-of-living consideration – neither of these modifications were granted in the final rule.
- The rule was finalized on May 23, 2016.
- It goes into effect on December 1, 2016.

Legislative response: Since the final rule was issued, the U.S. House Education & Workforce Committee has held hearings on the proposal, and the Republican majority has produced a number of [materials](#) opposing the change. Democratic Ranking Members on both the House and Senate labor committees issued [statements](#) in support. Partisan legislation is also pending in both the [House](#) and [Senate](#) designed to block the rule, and policy “riders” have also been proposed on appropriations bills in an attempt to block funding to implement the rule. **None of these bills or riders have advanced to date.** Even in a scenario that they did pass Congress this year, it is likely to see a presidential veto that would be difficult to override. A future Administration could also undo the rule, but that process would still take time.

In terms of other legislative options, there is another “middle-ground” proposal, the *Overtime Reform and Enhancement Act* (H.R. 5813), which would phase-in the new salary threshold and eliminate future automatic salary threshold updates that are currently scheduled to occur every three years. This proposal is sponsored by 5 House Democrats, but has not advanced further.

Current Status

The rule is finalized. It is scheduled to go into effect on December 1, 2016. Legislation is pending in Congress to try to prevent (or delay) it from going into effect, but those legislative efforts are unlikely to be successful.

FAQs & Helpful Resources

The U.S. Department of Labor issued **fact sheets for non-profits**: A [3-pager](#) and a [10-pager](#).

FAQs:

- *How strict is enforcement expected to be?*
 - It is more likely that federal enforcement will not increase soon. However, non-compliance is always a concern, and even where non-compliance is not enforced, the organization is still at risk for costly lawsuits for non-compliance.
- *What is “work?”*
 - There is some legal “gray-area” here, potentially, but the Department also has a clear [fact sheet](#). For example, is answering emails from home work? Most would say yes. Some lawyers will say that if the employer expects immediate or even timely response to an email, employee time waiting or monitoring for an email is work, and the Department agrees that “on call” time is work, even if no “work” is occurring. Many labor lawyers would advise work rules to minimize employer

exposure, since even overtime work that is not requested but is permitted can also be viewed as compensable overtime.

- *Is a contracted performer an “employee” subject to these rules?*
 - It is a long-standing custom and often practice, especially in the performing arts, that contractors aren’t organizational employees, but rather subject to the terms of their signed contract. Some lawyers would argue differently and advise that this arrangement is a risk in the long-standing model.
- *I heard teachers are in a “special” category. Do arts teachers have overtime protection?*
 - No. Certain professional employees – including doctors, lawyers, and teachers – are automatically exempt from overtime eligibility regardless of pay. To be exempt, the employee must be employed in an educational establishment and have a primary duty of teaching.
- *I heard there is a creative professional exemption. Is this true?*
 - Yes, but it is still tied to a salary threshold; i.e., you still need to make a certain level of salary to be exempt, \$913 per week. But you don’t need to meet the standard duties test. In addition to pay level, you only need to also meet the following:
 - “The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”
- *If an employee’s salary is over the new threshold, can they still be eligible for overtime?*
 - Yes. It is an “and” test, meaning the employee needs to satisfy both the pay level AND meet the “duties test” to be exempt. Even “highly compensated employees” must still meet a minimal duties test. Read more about the standard duties test and the executive, administrative, and professional exemptions [here](#).
- *Are ticket sales “business revenue” for the purposes of determining “enterprise coverage?”*
 - Some lawyers will say yes and argue that ticket sales are as commercial as it gets; i.e., it is in direct competition to other options for how spend evening; e.g., going to the movies. Others may say it is a charitable activity not subject to business revenue classification, because the organization is advancing its mission by providing a cultural experience.
- *What about work done overseas for a U.S. employer; e.g., a traveling arts group performing overseas?*
 - Only work done domestically in a defined work week is subject to the requirements.
- *Can work weeks change?*
 - Employers must have a designated work week. Work weeks can change, but recalculations of work hours have to occur for previous work as well.
- *Does seasonal work factor differently?*
 - In some cases, including seasonal amusement, [if certain factors are met](#). However, in general, an employer’s overtime pay obligation is determined on a week-by-week basis. Employers need pay at least \$913 per week for an employee to be exempt from overtime pay.
- *Can comp time be a strategy, meaning that any hours over 40 hours can be “banked” to use later to either take time off, or be paid out year-end at “straight” time?*

- No, not for nonprofits. Only employers that are public agencies under the FLSA (e.g. a state government) can provide comp time in lieu of overtime payments.
- *Can fluctuating hours be a strategy, meaning that "straight time" pay could be agreed to when hours vary?*
 - In some states, yes. It is not legal in California. But note, even though this pay arrangement allows non-exempt employees to receive a fixed salary that covers a fluctuating number of hours at straight time, it requires overtime to be essentially built-in. According to the Department, such a salary arrangement is permitted "if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours worked is greatest **and if the employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half the employee's regular rate of pay.**" The pay arrangement simply evens-out pay.

Steps & Strategy:

Nonprofit performing arts organizations are an oft-cited example of substantial impact, with show weeks, for example, being part of the work that can't easily be put into a 40-hour week, given space constraints and even safety measures necessary to make sure everything is ready. Unfortunately, there are not unique adjustments to these rules. According to the Department, available compliance options are:

- 1) Pay time-and-a-half for overtime work;
- 2) For employees who meet the duties test for exemption but not the pay test, raise workers' salaries above the new threshold; or
- 3) Limit workers' hours to 40 per week.

**IN RESPONSE TO THE NEW OVERTIME RULE,
EMPLOYERS CAN:**

- A) Pay time-and-a-half for overtime work.
- B) Raise workers' salaries above the new threshold.
- C) Limit workers' hours to 40 per week.
- D) Some combination of the above.

<https://www.dol.gov/featured/overtime/>

- 4) There is also a fourth option, that -- although arguably outside the intent of the change but is fully legal -- is to cut the base pay of affected employees to offset the new overtime payments, effectively keeping weekly paychecks unchanged.

Where to start:

One recommendation is to crunch data to see if your organization would be impacted, and who in your organization would be impacted.

For nonprofits, there are two relevant standards for when FLSA applies. Nonprofit organizations or their individual employees must comply with FLSA rules if they meet one of these two standards:

1. **Enterprise Coverage**—Employees that work for nonprofits that have “business” revenue of at least \$500,000 annually are protected under FLSA. Business revenue is the dollar amount that applies *only* to the activities performed for a business purpose and does not extend to the organization’s charitable activities. Examples of charitable activities that aren’t included are income from contributions, membership fees, dues (except any part which represents the value of a benefit, other than of token value, received by the payer), and donations (cash or non-cash), used in the furtherance of charitable activities; i.e., exclude from the calculation “charitable, religious, educational, or similar activities of organizations operated on a non-profit basis where such activities are not in substantial competition with other businesses.” These activities are excluded.
2. **Individual Coverage**—For nonprofits that do not meet the threshold for enterprise coverage, their employees may be protected by the FLSA if their work regularly involved commerce between states. Examples of activities that may qualify an employee for individual protection include sending mail to persons located in other states or receiving donations from other states.

In sum, even if your revenue is small and the “enterprise” coverage doesn’t apply, **it is likely that most employees are still covered because they engage in interstate commerce**; i.e., things as simple as sending and receiving emails or phone calls from other states. So, even if your organization doesn’t have enterprise coverage, your employees can still be eligible for overtime, and many (if not most!) may be.

Resources:

1. Independent Sector, an organization of which Americans for the Arts is a member and our President & CEO Bob Lynch is on their board, hosted a 2-part webinar to help prepare for the changes. The first webinar was with the U.S. Department of Labor to clarify overtime rules. The second webinar was with other nonprofits to share tips for compliance. Free recordings are available here: https://www.independentsector.org/overtime_rules
2. The National Council on Nonprofits also has developed a list of tips, including these below, which are available on their website: <https://www.councilofnonprofits.org/thought-leadership/known-unknowns-and-options-nonprofits-the-overtime-final-rule#sthash.cFwQGdWd.dpuf>:
 - ✓ Consider your internal deadlines immediately rather than waiting for December 1. Nonprofits with budget years ending on June 30 will need to develop new budgets for the fiscal year that take these new changes into account. Nonprofits with budget years ending on December 31 have more time to adjust and plan for 2017.
 - ✓ Determine whether your nonprofit is covered. A good place to start for general answers is your [state associations of nonprofits](#). But in many cases, your nonprofit may need to consult local legal counsel in every state where it has employees. Be sure counsel is well versed not only in wage and hour law, but also in nonprofit law, culture, and operations.
 - ✓ The higher salary threshold in the Final Rule means that employers must decide whether to raise an individual’s pay at least to the new minimum salary or pay her

or him overtime for hours in excess of 40 each week. Other options include reassigning job duties, reducing staffing, limiting services, altering benefits packages, and more. The [DOL compliance guidance](#) offers some suggestions.

- ✓ Every labor lawyer will tell you that compliance will require a review of all or most job descriptions and duties. The changing circumstances raised by the new regulations is an excellent reason to conduct an employment audit and get rid of old job duties and restrictions, and craft new ways of doing things that are efficient, compliant, and mission oriented.
- ✓ Finally, there is the option of raising new money to cover the new costs. It is possible to attract transition grants from foundations and other sources, as [CalNonprofits](#) promoted in 2015 after California adopted hikes in the state minimum wage. More directly, nonprofits performing services on behalf of governments pursuant to grants and contracts should explore the possibility of negotiating an equitable adjustment to existing grants and contracts to accommodate the increased costs mandated by the new overtime regulations. That may entail tough choices about limiting services, but negotiations could also result in receipt of increased payments. This certainly is not a time for nonprofits to be shy about going to government partners and presenting the case for appropriate adjustments. In preparation, we urge all nonprofits with government grants and contracts to learn more about the grants reforms known as the [OMB Uniform Guidance](#) – there's more money for your indirect costs than in the past.
- ✓ *Bottom Line:* A nonprofit's mission and bottom line may collide as the DOL Overtime Final Rule takes effect, but all stakeholders are best served by dealing with the transition sooner than later.

3. Americans for the Arts posted the following blurbs in our *Monthly Wire* to members:

July 2015

NONPROFITS MAY BE IMPACTED BY FEDERAL OVERTIME RULE CHANGES

[Read More](#)

On June 30, the U.S. Department of Labor released a proposed rule revising regulations governing overtime compensation. The rule would increase the salary threshold for employees to qualify for overtime compensation. The Department estimates it could impact 4.5 million workers. Americans for the Arts is reviewing the proposal and seeking your feedback. You can also [write to the Department directly](#) during the ongoing 60-day comment period, which ends September 4. For further information, please contact Director of Federal Affairs Kate McClanahan at kmclanahan@artsusa.org.

September 2015

DEPARTMENT OF LABOR REVIEWING CHANGES TO OVERTIME RULES

[Read public comments here](#)

The period for comments on a new, proposed federal rule that would significantly raise the salary level under which employees can receive overtime pay, from \$23,660 to \$50,440, closed on September 4. The new proposed rule could potentially enable many more workers to be compensated for working hours beyond the traditional 40-hour work week. The Department of Labor received almost 290,000 comments! Many of these comments were submitted by nonprofit organizations that support a living wage, but are raising concerns about the potential impact to the services they can offer. Americans for the Arts is closely tracking this regulatory review and its impact to nonprofit arts

organizations and employees. [Read an earlier statement](#) from Americans for the Arts President & CEO Robert L. Lynch, as a member of Independent Sector's board, supporting an increase in the federal minimum wage. The Department is currently expected to work toward a final rule for implementation by the end of the current administration ending in January 2017. For further information, please contact Director of Federal Affairs Kate McClanahan at kmcclanahan@artsusa.org.

May 2016

LABOR DEPARTMENT FINALIZED CHANGES TO OVERTIME RULES – ARTS NONPROFITS IMPACTED

Almost a year ago, the U.S. Department of Labor proposed changes to federal overtime rules. The change would raise the salary level that otherwise triggers eligibility for overtime compensation. The new rule would increase that annual salary threshold from \$23,600 to \$47,476, effective December 1. Americans for the Arts previously reported on the public comment period, during which the Department received almost 290,000 comments. Many of these comments were submitted by nonprofit organizations that support a living wage, but raised concerns about the potential impact to the services they can offer and requested modifications including a phase-in period and regional cost-of-living consideration. To help prepare, Independent Sector, of which Americans for the Arts is a member, is hosting two free webinars open to all. To register for these upcoming webinars, please go to this [link](#). For more information, contact Director of Federal Affairs Kate McClanahan at kmcclanahan@artsusa.org.



Kate McClanahan
Director of Federal
Affairs

 [Email](#)