

An Expanded Look at the New Overtime Rule: What North Dakota Nonprofits Need to Know

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Co-Hosted by



The presentation will begin shortly. Please note that all lines are muted to minimize background noise. Please submit questions via the chat feature.

Welcome

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PART I: THE NEW OVERTIME RULE

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DO NONPROFITS HAVE TO PAY OVERTIME?

- ✘ State and federal laws
- ✘ Fair Labor Standards Act (FLSA)
- ✘ State overtime rules

ARE NONPROFITS COVERED BY THE FLSA?

✘ “Enterprise Coverage”

- Earned income via interstate commerce resulting in gross revenues of \$500,000 or more
- Income from charitable activities (contributions, membership dues, in-kind donations, and proceeds from fundraising events) are *not* included
- Certain nonprofits included regardless: schools, pre-schools, hospitals, mental health centers, and residential care facilities

ARE NONPROFITS COVERED BY THE FLSA?

✘ “Individual Coverage”

- Even if your organization is not covered under the “enterprise coverage” rule, individual employees may still be covered

- Any employee who is “engaged in interstate commerce”

- CAUTION!! USDOL takes a very broad view of the term “engaged in interstate commerce”

- Sending and receiving emails or calls, counting supplies that come from out of state

ARE NONPROFITS COVERED BY STATE LAW?

- ✘ YES!!
- ✘ North Dakota's overtime rules apply to all employers in the state, regardless if they are for-profit or not

SO, WHO IS ENTITLED TO OVERTIME?

- ✘ All non-exempt employees
- ✘ Exempt employees are those that meet the “duties test” and, if FLSA applies, the “salary basis test”

OVERTIME

- ✘ What is the “duties test”?
 - 4 primary exemptions
 - “Administrative” employees
 - “Executive” employees
 - “Professional” employees
 - “Highly compensated” employees

Additional exemptions can be found in N.D.A.C. § 46-02-07-02(4)

OVERTIME (CONT.)

- ✘ “Administrative” employees are those whose primary duties consist of:
 - Performance of office or non-manual work directly related to management policies or general business operations of the employer, AND
 - Customarily and regularly exercise discretion and independent judgment

Possible examples include: a project manager, finance manager, marketing manager, etc.

N.D.A.C. § 46-02-07-01(1)

OVERTIME (CONT.)

- ✘ “Executive” employees are those whose primary duties consist of:
 - Management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision,
 - Directs the work of two or more employees, AND
 - Authority to hire, fire, promote other employees (or ability to influence those decisions)

Possible examples include president, CEO, vice president of international affairs, etc.

N.D.A.C. § 46-02-07-01(6)

OVERTIME (CONT.)

- ✘ “Professional” employees are those whose primary duties consist of:
 - Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study,
 - Work requiring consistent exercise of discretion and judgment, AND
 - Work that is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time

Possible examples include attorneys, physicians, etc.

N.D.A.C. § 46-02-07-01(10)

OVERTIME (CONT.)

- ✘ A “highly compensated” employee is one who:
 - Paid total annualized compensation of \$100,000 or more,
 - Receives at least \$455/week, AND
 - Primary duties consist of office or non-manual work

N.D.A.C. § 46-02-07-01(7)

OVERTIME (CONT.)

- ✘ What is the “salary basis test”?
- ✘ If covered by the FLSA, the “salary basis test” must also be met
- ✘ New overtime rule issued by USDOL
 - Current federal regulations require “administrative”, “executive”, and “professional” employees receive at least \$455 per week (\$23,660 per year)
 - New rule increases this floor to \$913 per week (\$47,476 per year)
 - Effective December 1, 2016

WHAT ABOUT VOLUNTEERS?

- ✘ “Volunteers” are:
- ✘ Individuals who donate their time and services, usually on a part-time basis, including public service, humanitarian objectives, religious, fraternal, nonprofit, and charitable organizations, not as employees and without contemplation of pay.
- ✘ Individuals who provide services to hospitals or nursing homes to provide support and assistance to families and patients.
- ✘ Regular employees of religious, nonprofit, or charitable organizations may volunteer their services for activities outside of their normal work duties.
- ✘ Residents or patients of shelters, foster care, or other such related establishments may volunteer their services as long as regular employees are not displaced.

COMPENSATORY TIME

- ✘ May nonprofits award compensatory time in-lieu of overtime pay?
- ✘ NO!!
- ✘ Only the state and its political subdivisions may award compensatory time in-lieu of overtime pay
- ✘ Any compensatory time must be paid in cash

TRAVEL

- ✘ Travel time that is *not* compensable:
 - 1) Ordinary travel from home to work
 - 2) Time spent as a passenger on an airplane, train, bus, or automobile outside of regular working hours
 - 3) Activities merely incidental use of an employer-provided vehicle for commuting home to work

TRAVEL (CONT.)

- ✦ Travel time that *is* compensable:
 - 1) Travel during regular work hours
 - 2) Travel on non-work days during regular working hours (regular working hours are those the employee typically works on work days)
 - 3) Travel time from job site to job site or from office to job site
 - 4) The driver of a vehicle is working any time when travel is required by the employer
 - 5) One-day assignments performed at the employer's request (regardless of driver or passenger status)

QUESTIONS? CONTACT US:

- ✘ Phone: (701) 328-2660
- ✘ Toll-Free: (800) 582-8032
- ✘ Web: www.nd.gov/labor
- ✘ Email: labor@nd.gov



Part II: Implementation Options

Are You Ready?

**Updates to FLSA Will Take Effect
December 1, 2016**

Wold Johnson, P.C.
Complimentary Seminar/Webinar
October 2016

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Ben currently serves as President and Managing Partner of Wold Johnson, P.C. in Fargo, North Dakota. He has served as President of the Cass County (North Dakota) Bar Association.

Ben previously served as Chair of the Inquiry Committee Southeast for the North Dakota Disciplinary Board. Ben also serves on the Board of Directors of the North Dakota Bar Foundation. He is a frequent lecturer on topics relating to employment law.

Since 1996, Ben has served as a Temporary Administrative Law Judge, presiding over contested Worker's Compensation hearings involving the North Dakota Worker's Compensation Bureau.

In 2000, Ben was named "Boss of the Year" by the Fargo Chapter of the National Association of Legal Secretaries.





Compliance Steps and Recommendations

Wold Johnson, P.C.
Complimentary Seminar/Webinar
October 2016

Take Stock and Review Classifications

- Any exempt employee who earns greater than the threshold amount (\$47,476 under the new rules) may remain exempt from overtime pay if that person primarily performs executive duties as described in the regulations
- Keep in mind that each state may enact regulations that differ from federal guidelines
 - Employers will be subject to whichever set of directives is more generous to employees



Closely Manage and Monitor Employee Hours

- To better understand the amount of overtime that is currently being worked, monitor employee hours and use appropriate tools to help make educated scheduling decisions
- One effective method is to implement an automated time and labor management system that continuously tracks hours worked
 - Helps companies monitor when employee nears the overtime threshold and makes it easier to create more cost effective schedules



Compare the Costs of Various Pay Options

- Weigh the costs of raising employees' salaries to meet the exemption criteria against what it would cost to reclassify them as nonexempt and pay them overtime when they work more than 40 hours per week



Consider the Impact on Internal Pay Equity

- Beyond the costs of raising exempt employees' salaries, consider the impact on internal pay equity so that employees are paid fairly when compared with other employees within your organization
- If you substantially increase some employees' pay, other employees may have questions about why their pay isn't increasing



Proactively Control Costs

- Develop alternative labor strategies that make it possible to shift expensive overtime hours to other workers who can be paid at a regular or lower rate
- Monitor fluctuations and patterns in the volume of work, and align employee schedules accordingly
 - That way work can get done without creating overtime situations



Recognize Your Options

- Employers may adjust a newly nonexempt worker's hourly rate of pay downward so that their compensation from both regular and overtime hours adds up to their previously earned weekly pay rate



Recognize Your Options (cont.)

- Encourage and incentivize employees that will be above the newly set \$47,476 salary floor to pick up the extra work of those newly nonexempt employees will not be able to do without paying them the required overtime



Recognize Your Options (cont.)

- Increase the salary of employees to at least \$47,476 a year



Recognize Your Options (cont.)

- Switch salaried positions to hourly
 - However, switching some previously salaried positions to hourly may be received by your employees as a demotion, which can lead to high turnover



Recognize Your Options (cont.)

- Minimize the newly nonexempt workers' hours to 40 hours per week to avoid paying overtime



Steps

- Communicate possible changes to employees
 - Designate a person to communicate the plan to employees
 - Plan out the communication/reasoning:
 - “This is required by law”
 - “This is not a demotion”
 - “This is the company’s effort to maintain the employees’ pay”



Steps (cont.)

- Review, edit, and disseminate employee handbooks and policies
 - Overtime
 - Off-the-clock work
 - Meal and rest breaks
 - Travel time
 - Mobile devices
 - Pre/post-shift activities
 - On-call policies
- Ensure your timekeeping methods are up to date and you are accurately tracking hours



Examples

- Mark is an exempt administrator who is paid an annual salary of \$30,000 per year (\$576.92 per week).
- On average, Mark works 45 hours a week (2340/year).



Examples

- Mark's Calculation:
 - If Mark's salary is raised to meet the minimum threshold of \$913 per week (\$47,476/year) the employer will have an additional cost of \$336.08/week, \$17,476/year.



Examples

- If Mark is converted to hourly:
 - Mark's employer will be required to pay 260 OT hours
 - If Mark is converted to hourly rate of \$13.00, employer will pay:
 - \$5,070 in overtime wages per year
 - $((5 \text{ hr} \times 19.50) \times 52 \text{ weeks})$
 - \$27,040 in regular wages
 - $((40 \text{ hr} \times \$13.00) \times 52 \text{ weeks})$
 - Total wages = \$32,110/year (\$617.50/week)
 - Additional cost to employer: \$2,110/year (\$40.58/week)



Examples

- John is an exempt professional who is paid an annual salary of \$45,000 per year (\$865.38 per week).
- On average, John works 50 hours a week.



Examples

- John's Calculation:
 - If John's salary is raised to meet the minimum threshold to \$913 per week (\$47,476/year) the employer will have an additional cost of \$47.62/week, \$2,476/year



Examples

- John's Calculation:
 - If John is converted to hourly at \$17.00:
 - \$35,360 in regular wages
 - ((40 hrs x \$17.00) x 52 weeks)
 - \$13,260 in overtime wages per year
 - ((10 hrs x \$25.50) x 52 weeks)
 - Total wages = \$48,620/year (\$69.62/week)



Audit Employee Duties

- Consider using this as an opportunity to review the standard duties of affected employees



Act Now

- The Final Rule will become effective December 1, 2016 – less than 5 weeks away!
- Employers should analyze classifications, plan, and communicate to employees



Questions?



NDANO Convenings

- Nonprofits Matter: Sharing Our Story
 - Oct. 31 – Grand Forks
 - Nov. 1 – Fargo
 - Nov. 2 – Minot
 - Nov. 3 – Dickinson and Bismarck

**Check out Training Calendar
on NDANO website**

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Thank you for joining us!