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Equipping local churches for ministry and providing a connection for ministry beyond the local church

DATE: September 20, 2016
TO: Churches of the Virginia United Methodist Conference
SUBJECT: **DEPARTMENT OF LABOR FEDERAL LAW CHANGE**

Encl: (1) Summary of Federal Law Changes
(2) US Department of Labor Guidance for Non-Profit Organizations

In consultation with the Conference Chancellor, enclosures (1) and (2) are provided to facilitate your understanding of the recent Department of Labor federal law changes effective December 1, 2016.

We hope you find this useful and encourage you to work with your Staff Parrish Committees to properly classify your employees. Please feel free to call our office with any questions.

In His service and yours,

A handwritten signature in black ink that reads "David D. Domnisse".

David D. Domnisse
Conference Treasurer

DD/kp

Summary of Federal Law Changes Affecting Exempt/Non-Exempt Worker Status

On May 18, 2016, the United States Department of Labor (“DOL”) announced changes to the Fair Labor Standards Act (“FLSA”) overtime exemption rules. The Final Rule strengthens overtime protections for workers. This change raises the salary level from its previous amount of \$23,660 per year to \$47,476 per year for exempt (salaried) employees. These changes take effect on December 1, 2016. Churches should begin reviewing their employee’s duties and job responsibilities to make proper classifications to be compliant with the FLSA.

Here are some steps to properly classify your employees.

Step 1: Determine if your employee is covered under the FLSA. There are two ways employees can be covered by the law: enterprise coverage and individual coverage. Employers that employ at least two employees and have an annual dollar volume of sales or business done of at least \$500,000 are covered under the enterprise theory. Even if there is no enterprise coverage, employees are protected by the FLSA if their work regularly involves them in commerce between states (“interstate commerce”). Examples of employees who are involved in interstate commerce include those that send letters out of state, make telephone calls to people in other states, handle records of interstate transactions, travel to other states as part of their job, etc. Most employees working for the churches in the Conference will meet either the enterprise or individual coverage jurisdiction as set forth above.

Step 2: Determine if the church staff may meet the ministerial exception to the FLSA. In other words, the FLSA will not apply to ministerial staff even if the requirements are met in Step 1. The Fourth Circuit Court of Appeals has recognized that Ministers are not covered under the FLSA. "The general rule is that 'if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy'" and, thus, subject to the ministerial exception. *Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)). Regardless of an employee’s title, this determination is based upon the primary duties test. "In summary, the ministerial exception to the FLSA applies only where the employer is a religious institution and the employee's primary duties are ministerial in nature. The exception does not apply to the religious employees of secular employers or to the secular employees of religious employers." *Shaliesabou*, 363 F.3d at 307.

All of the members of the local church's pastoral staff (Senior Pastor, Pastor, Associate Pastor, Minister of Adult Ministries, and Minister of Visitation) are covered by the ministerial

exception because their "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." This exception is likely to include Director of Youth Ministries, Director of Music Ministries, Contemporary Worship Leaders, and other ministers that meet the primary duties listed above. For employees that meet the ministerial exception, no further analysis needs to be done. If your employee does not meet the ministerial exception, they are covered under the FLSA and proceed to Step #3.

Step 3: For employees covered under FLSA (see Step 1), classify each employee as either exempt (salaried) or non-exempt (hourly).

Question #1:

- (a) Is the employee paid on a salary basis (paid a predetermined and fixed salary that is not subject to reduction because of variation in the quality or quantity of work performed) and**

- (b) The amount of salary paid must meet the minimum of \$913 per week (\$47,476 per year)?**

If the answer to either 1(a) or (b) is no, then the employee must be classified as non-exempt. If the answer to both 1(a) and (b) is yes, then go to Question #2.

Question #2: Does the employee have job duties that primarily involve one of the below categories?

- (a) Executive** – Employee whose primary duty is to manage the business or a recognized department/entity and who customarily directs the work of two or more full time equivalent employees. Also includes individuals who hire, fire or make recommendations that carry particular weight regarding employment status. Examples: executive, director, owner, manager, supervisor.

- (b) Administrative** – Employee whose primary activities are performing office work or non-manual work on matters of significance relating to the management or business operations of the firm or its customers and which require the exercise of discretion and independent judgment. Examples: coordinator, administrator, analyst, accountant.

(c) Professional/creative – Employee who primarily performs work requiring advanced knowledge/education and which includes consistent exercise of discretion and independent judgment. The advanced knowledge must be in a field of science or learning acquired in a prolonged course of specialized intellectual instruction. Creative professionals perform work requiring invention, imagination, originality and/or talent in a field of artistic endeavor. Examples: attorney, physician, statistician, architect, biologist, pharmacist, engineer, teacher, author, editor, composer, musician, artist.

(d) Computer professional – Employee who primarily performs work as a computer systems analyst, programmer, software engineer or similarly skilled work in the computer field performing a) application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications; or b) design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specification; or c) design, documentation, testing, creation or modification of computer programs based on and related to user or system design specifications; or a combination of the duties described above, the performance of which requires the same level of skills. Examples: system analyst, database analyst, network architect, software engineer, programmer.

If the answer to 2(a), (b), (c) or (d) is no, then the employee must be classified as non-exempt.

Payroll guidelines for non-exempt employees

- Must be paid on an hourly basis for actual hours worked in a week. Holiday, vacation, sick, and personal days do not count as hours worked.
- Must be paid 1 ½ times their regular rate of pay for all hours worked over 40 hours in a work week.
- Must maintain records for all hours worked (i.e.--time clock, timesheet, etc.).

Payroll guidelines for exempt employees

- Must be paid their salary regardless of hours worked.
- Must be paid a predetermined and fixed salary that is not subject to reduction because of variation in the quality or quantity of work performed.
- Must be paid a minimum of \$913 per week or \$47,476 annually beginning December 1, 2016.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act

May 18, 2016

Introduction

The Department of Labor (“Department”) recognizes and values the enormous contributions that non-profit organizations make to the country. Non-profit organizations provide services and programs that benefit vulnerable individuals in a variety of facets of life, including services that benefit those who the Department also works to protect by ensuring that their workplaces are fair, safe, and secure. The wide variety of non-profit organizations, from neighborhood activity organizations and small social service providers, to large health care providers and cultural institutions, also play an important role in the U.S. economy, employing millions of workers who provide these critical services and opportunities nationwide.

The Department’s Final Rule on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act (FLSA) (the “Overtime Rule” or “Final Rule”) updates the salary level required for the executive, administrative, and professional (“white collar”) exemption to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of overtime-exempt employees. The Final Rule strengthens overtime protections and provides greater clarity for

workers and employers across a wide range of sectors, including non-profit organizations. As with most employees, the minimum wage and overtime provisions of the FLSA generally apply to employees at non-profits. This is not a change from the longstanding requirements of the FLSA. Non-profit employers, however, like other employers, are not required to pay minimum wages or overtime to executive, administrative, and professional employees who satisfy the salary level and other requirements to meet one of the white collar exemptions.

In the Final Rule, the Department updated the salary level above which certain “white collar” workers may be exempt from overtime pay requirements to equal the 40th percentile of earnings of full-time salaried workers from the lowest wage Census Region. This change raises the salary level from its previous amount of \$455 per week (the equivalent of \$23,660 per year) to a new level of \$913 per week (the equivalent of \$47,476 per year). Salaried white collar employees paid below the updated salary level are generally entitled to overtime pay, while employees paid at or above the salary level may be exempt from overtime pay if they primarily perform certain duties. The Final Rule also raises the compensation level for highly compensated employees subject to a more minimal duties test from its previous amount of \$100,000 to \$134,004 annually. These

2. Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act

changes take effect on December 1, 2016. The Final 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. The Final Rule does not include any changes to the duties tests, which also affect the determination of who is exempt from overtime.

The Department is issuing this guidance because during the development of the Final Rule, numerous organizations asked for clarification regarding how the FLSA generally, and the white collar exemptions specifically, apply to the non-profit sector. Additionally, the rulemaking process has brought into focus several issues and misunderstandings about the FLSA's decades-long applicability to non-profits. Finally, because many non-profit organizations also engage in activities such as charitable functions and utilizing volunteers, both of which distinguish them from for-profit entities, this additional guidance may provide greater clarity about options and obligations under the FLSA. Part I of this guidance explains enterprise and individual coverage under the FLSA. Part II summarizes the white collar exemptions, and Part III details some of the options employers may exercise to ensure they comply with the Final Rule.

I. Coverage under the FLSA

In order to be subject to minimum wage and overtime requirements and thus qualify for the Act's protections, employees must be "covered" by the FLSA. Coverage under the FLSA is usually achieved in one of two ways: (1) the organization is a covered enterprise; or (2) a particular worker is individually covered. While many non-profit organizations may not be covered enterprises under the FLSA, most non-profits are likely to have some employees who are covered individually and are therefore entitled to the minimum wage and overtime protections guaranteed by the FLSA. The Final Rule updating the overtime regulations for white collar employees did nothing to change this. However, in view of this rulemaking, non-profit organizations may be re-examining the rules governing FLSA coverage, and so the Department believes it is helpful to restate these longstanding coverage concepts. This guidance, however, is not a comprehensive guide to coverage and compliance under the FLSA. For additional detailed guidance documents, please visit the Wage and Hour Division's website at dol.gov/whd.

A. Enterprise Coverage

To meet the enterprise coverage test, meaning that all employees working for that enterprise are covered by the FLSA's protections unless an exemption applies, an entity must have annual revenues, that is, volume of sales made or business done, of at least \$500,000.

As a general matter, non-profit organizations are **not** covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in sales made or business done that meet the \$500,000 threshold. Ordinary commercial activities are activities such as operating a business, like a gift shop. Activities that are charitable in nature, however, are not considered ordinary commercial activities, and do not establish enterprise coverage. Examples of activities that are charitable in nature and normally provided free of charge include the following:

- providing temporary shelter;
- providing clothing or food to homeless persons;
- providing sexual assault, domestic violence, or other hotline counseling services; and
- providing disaster relief provisions.

In determining whether a non-profit organization is a covered enterprise, the Wage and Hour Division (WHD) considers only activities performed for a business purpose. Additionally, income that a non-profit organization uses in furtherance of charitable activities is not factored into the \$500,000 threshold. Such income might include contributions, membership fees, monetary and non-monetary donations, and dues (except for any portion for which the payer receives a benefit of more than token value in return).

Some non-profit organizations engaged in charitable activities may also manage revenue-producing activities that may bring the organization within the scope of the FLSA. If this side business produces revenue of at least \$500,000 annually, the non-profit organization's employees are entitled to the protections of the FLSA and the Department's Overtime rule. See [WHD Fact Sheet 14A](#).

Example¹: A non-profit animal shelter provides free veterinary care, animal adoption services, and shelter for homeless animals. Even if the shelter takes in over \$500,000 in donations in a given year, because the shelter engages only in charitable activities that do not have a business purpose,

1. All examples in this guidance are for purposes of illustration alone. Alteration of any of the facts in any of the examples could change the resulting analysis.

employees of the animal shelter are not covered on an enterprise basis.

Example: A non-profit organization operates a thrift store in which its employees sell donated items. The thrift store is engaged in commercial activity by selling goods. If the thrift store on its own generates revenue of at least \$500,000 in a year, the non-profit's employees are protected by the FLSA on an enterprise basis and are entitled to minimum wage and overtime protection unless a specific exemption applies.

Example: A non-profit organization operates a sandwich shop. Many of the employees that work in the restaurant, including cooks and wait staff, are individuals who were recently homeless. Even though the restaurant's operation includes charitable purposes, the restaurant is engaged in ordinary commercial activities as it competes with other restaurants. If it generates revenue of at least \$500,000 a year, the restaurant employees are protected by the FLSA on an enterprise basis and are entitled to minimum wage and overtime unless a specific exemption applies.

Regardless of the dollar volume of business, the FLSA applies to hospitals; institutions primarily engaged in the care of older adults and people with disabilities who reside on the premises; schools for children who are mentally or physically disabled or gifted; federal, state, and local governments; and preschools, elementary and secondary schools, and institutions of higher education. Accordingly, employees at these types of institutions (commonly referred to as "named enterprises") are entitled to minimum wage and overtime protections unless a specific exemption applies.

B. Individual Coverage

Organizations that are not covered on an enterprise basis likely still have some employees who are covered individually and are therefore entitled to the FLSA's protections.

Individual employee coverage is based on the nature of the particular employee's work activities. An employee who engages in interstate commerce or in the production of goods for interstate commerce is covered by the FLSA. Employees whose work involves or relates to the movement of persons or things across state lines are also considered engaged in interstate commerce. Such activities include:

- making out-of-state phone calls;
- receiving/sending interstate mail or electronic communications;
- ordering or receiving goods from an out-of-state supplier; and
- handling credit card transactions or performing the accounting or bookkeeping for such activities.

The Department, however, will not assert that an employee, who on isolated occasions spends an insubstantial amount of time performing such work, is individually covered by the FLSA. Additionally, even where an employee regularly engages in interstate commerce and is individually covered, the Department focuses its enforcement efforts on circumstances where it can have significant impact on compliance, generally where there is enterprise coverage.

Example: An office manager at a non-profit organization regularly sends e-mails to out-of-state suppliers to purchase office materials and equipment. The employee is individually covered by the FLSA and entitled to its protections, including receiving minimum wage and overtime unless a specific exemption applies.

Example: An employee works at a homeless shelter that regularly receives food and clothing donations from corporations located across state borders. The employee's job duties consist of receiving and logging these donations. The employee is individually covered by the FLSA and entitled to its protections, including receiving minimum wage and overtime unless a specific exemption applies.

Example: An employee works at a shelter for domestic violence victims. The employee does not regularly use the telephone or computer for interstate communications and works only with clients from within the state. Because the employee is not engaged in substantial levels of activities involving interstate commerce, the employee is not covered by the FLSA on an individual basis.

II. Considerations for Non-Profit Organizations in Applying the White Collar Exemptions

The Overtime Rule does not change how the white collar exemptions' duties tests apply to non-profit organizations. Nevertheless, a review of the baseline white collar exemption requirements will help clarify what has changed as a result of the Final Rule.

4. Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act

In the Final Rule, among other things, the Department updated the salary level from its previous amount of \$455 per week (the equivalent of \$23,660 per year) to \$913 per week (the equivalent of \$47,476 per year). The salary level is one of three tests for determining whether employees employed as executive, administrative, or professional employees are exempt from the FLSA's minimum wage and overtime requirements. *See* 29 U.S.C. 213(a)(1); 29 CFR Part 541. These exemptions are sometimes referred to collectively as the "white collar" exemptions. The Final Rule also made changes to the highly compensated employee exemption and how bonuses are treated for purposes of determining an employee's exempt status; those issues are not addressed in this guidance. For additional information on the Final Rule visit [dol.gov/whd/overtime/final2016/](https://www.dol.gov/whd/overtime/final2016/).

Establishing that a white collar employee is exempt from the FLSA's minimum wage and overtime requirements involves assessing how the employee is paid (salary basis test), how much the employee earns (salary level test), and whether the employee primarily performs the kind of job duties that Congress meant to exclude from the law's overtime protections (duties test). Job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not indicate that an employee is exempt from overtime and minimum wage protections. Rather, in order for a white collar exemption to apply, an employee's specific

Job titles never determine exempt status under the FLSA. Additionally, receiving a particular salary, alone, does not indicate that an employee is exempt from overtime and minimum wage protections.

job duties and earnings must meet all of the applicable requirements provided in the regulations. Not all salaried white collar employees qualify for the white collar exemptions; in fact, many salaried white collar employees are entitled to minimum wage and overtime.

Professional Exemption. There are several different kinds of exempt "professional" employees. These include "learned professionals," "creative professionals," teachers, and employees practicing law or medicine. Under the Final Rule, exempt professional employees must receive at least \$913 a week (the equivalent of \$47,476 a year) on a salary or fee basis (compared to \$455 a week under the old rule), and must primarily perform work that either requires advanced knowledge in a field of science or learning, usually obtained through a degree, or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Many non-profits may employ certain professionals who will be unaffected by the new salary level. Specifically, the salary level and salary basis requirements do not apply to teachers, lawyers, or doctors ("bona fide practitioners of law or medicine"). *See* [WHD Fact Sheet 17D](#).

Example: A non-profit legal clinic hires an attorney with a law degree. The attorney performs legal work for the clinic. The attorney is a bona fide professional, exempt from the FLSA's provisions, regardless of whether she is paid on a salary basis or meets the salary level.

Administrative Exemption. To qualify for the administrative exemption, an employee must receive at least \$913 a week (the equivalent of \$47,476 a year) on a salary or fee basis, and the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. Additionally, the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. *See* [WHD Fact Sheet 17C](#).

Executive Exemption. To qualify for the executive exemption, an employee must receive compensation on a salary basis of not less than \$913 per week (the equivalent of \$47,476 a year), and have the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. Additionally, the employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent (for example, one full-time and two half-time employees

Basic Requirements for Claiming a White Collar Exemption under the Standard Duties Test

	EXECUTIVE	ADMINISTRATIVE	PROFESSIONAL
Salary Basis Test	<ul style="list-style-type: none"> Employee must be paid on a salary basis 	<ul style="list-style-type: none"> Employee must be paid on a salary or fee basis 	<ul style="list-style-type: none"> Employee must be paid on a salary or fee basis
Standard Salary Level Test	<ul style="list-style-type: none"> \$913 per week (\$47,476 per year for a full-year worker) 	<ul style="list-style-type: none"> \$913 per week (\$47,476 per year for a full-year worker) Special salary level for certain academic administrative personnel 	<ul style="list-style-type: none"> \$913 per week (\$47,476 per year for a full-year worker) Salary level test does not apply to doctors, lawyers, or teachers
Standard Duties Test	<ul style="list-style-type: none"> The employee’s “primary duty” must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well). Additional requirements provided in 29 CFR 541 Subpart B 	<ul style="list-style-type: none"> The employee’s “primary duty” must include the exercise of discretion and independent judgment with respect to matters of significance. Additional requirements provided in 29 CFR 541 Subpart C 	<ul style="list-style-type: none"> The employee’s “primary duty” must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Additional requirements provided in 29 CFR 541 Subpart D

are equivalent to two full-time employees), and have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. *See [WHD Fact Sheet 17B](#).*

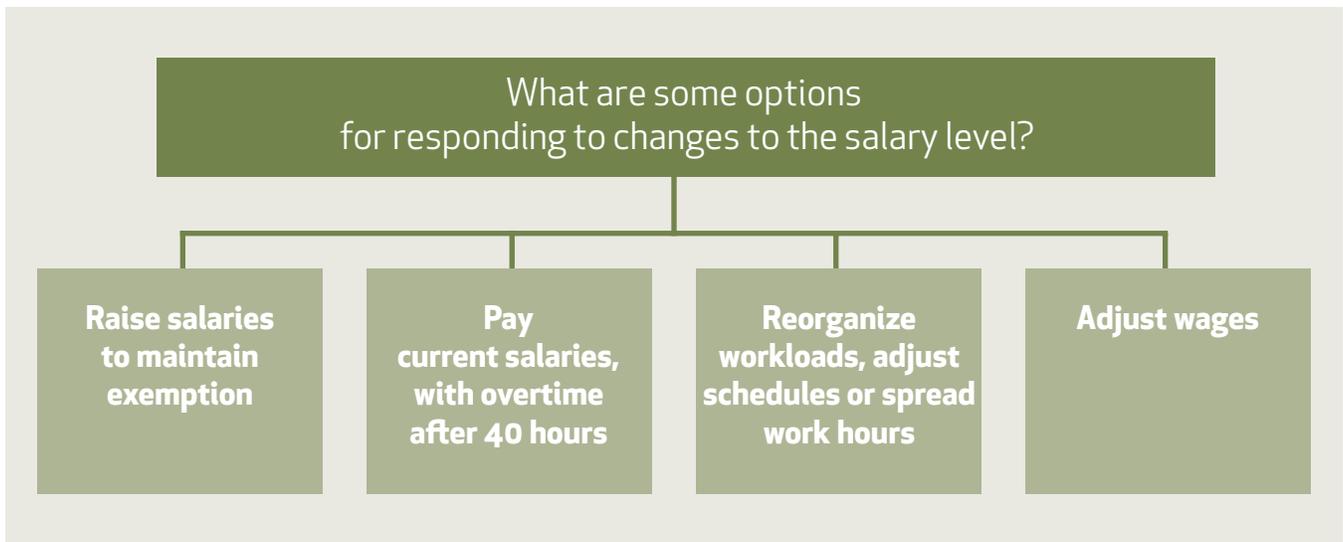
For more information on all of the white collar exemptions, *see [WHD Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act \(FLSA\)](#).*

III. Options for Compliance for Employers Who Might be Impacted by the Final Rule

Like other employers, non-profit organizations have a wide range of options for responding to the changes to the salary level, and the Department does not dictate or recommend any method. Non-profit organizations may ensure compliance for those employees affected by the Final Rule in a number of ways, including providing pay raises that increase workers’ salaries to the new threshold, spreading employment by reducing or eliminating work hours of individual employees working

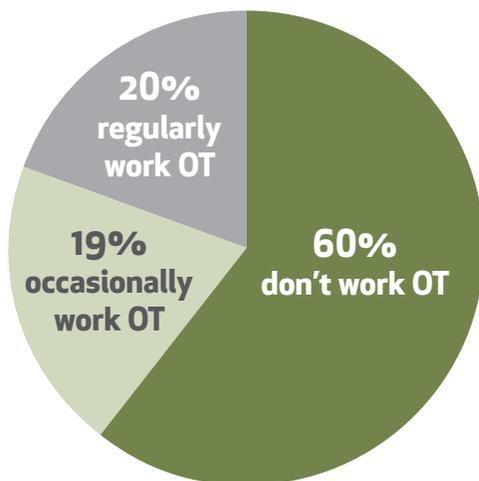
over 40 hours per week for which no overtime is being paid, or paying overtime. This rule does not require employers to convert a salaried worker making less than the new salary threshold to hourly

Overtime-eligible employees may be paid a salary and do not need to be paid on an hourly basis. That is, **salaried workers may be eligible for overtime.**



status: employers can pay non-exempt employees on a salary basis and pay overtime for hours worked beyond 40 in a week. As long as they are complete and accurate, employers may use any method they choose for tracking and recording hours. The method for compliance, which is entirely within each employer’s discretion, will likely depend on the circumstances of that institution’s workforce, including how much employees currently earn and how often employees work overtime, and may include a combination of responses, such as paying overtime and adjusting employees’ hours and schedules. Some potential responses for non-profit organizations are discussed below.

Most affected employees do not work overtime (OT)



**Totals don't sum to 100 due to rounding. For more information, please see Section VI of the Final Rule.*

A. Numerous Options for Compliance

- i. After evaluation, no changes to pay or hours necessary

Many non-profit organizations may have white collar employees who satisfy one of the duties tests for exemption and earn between the old salary level (\$455 per week) and the new salary level (\$913 per week). Employers should evaluate all such categories of white collar employees to determine which employees do not work more than 40 hours per workweek. The Final Rule will have no effect on these employees’ pay because they do not work any overtime even though they will become overtime-protected. They can continue to be paid a salary as before.

Example: The manager of an out-patient clinic performs the duties of a bona fide administrator and is paid a fixed salary of \$42,000 a year. The clinic is open from 10am-4pm, Tuesday through Saturday. The manager regularly works from 9am-5pm, Tuesday through Saturday. Because of the change in the salary level, the manager is no longer an exempt employee. Nevertheless, the Final Rule has no impact on the manager’s pay, because the manager does not work more than 40 hours in a given week. The clinic can continue to pay the manager a fixed salary of \$42,000 a year.

- ii. Raise salaries

Employers may choose to raise the salaries of employees who meet the duties tests, whose salaries are close to the new salary level, and who regularly work

overtime, to at or above the salary level to maintain their exempt status.

Example: An operations manager at an international human rights non-profit organization is paid a salary of \$45,000 a year. Her job duties qualify her for the administrative exemption. The manager's job requires regularly working overtime to direct business operations in multiple time zones. The employer may choose to raise the manager's salary to at or above \$47,476 a year to maintain the manager's administrative exemption.

iii. Pay overtime above a salary

Employers also can continue to pay employees a salary and pay overtime for hours in excess of 40 per week. Although the FLSA requires employers to keep records of how many hours overtime-eligible employees work, the law does not require that overtime-eligible workers be paid on an hourly basis. Rather, non-profit organizations may continue to pay employees a salary covering a fixed number of hours, which could include hours above 40. There are several ways to pay a salary and pay overtime.

An employer might pay employees a salary for the first 40 hours of work per week, and then pay overtime for any hours over 40. Employers may choose to do this, for example, for employees who work 40 hours per week and do not frequently work overtime, or who do not consistently work the same amount of overtime.

Example: Alexa, a development manager for a cultural institution, earns a fixed salary of \$41,600 per year (\$800 per week) for a 40 hour workweek. Because her salary is for 40 hours per week, Alexa's regular rate is \$20 per hour. If Alexa works 45 hours one particular week, the employer would pay time and one-half (overtime premium) for five hours at a rate of \$30 per hour. Thus, for that week, Alexa should be paid \$950, consisting of her \$800 per week salary and \$150 overtime compensation.

Employers also have the option of paying a straight time salary for more than 40 hours in a week for employees who regularly work more than 40 hours, and paying overtime in addition to the salary. Using this method, the employer will only be required to pay an additional half time overtime premium for overtime hours already included within the salary, and time and a half for hours beyond those included in the salary.

Employers can also pay non-exempt employees on a salary basis and pay overtime for hours worked beyond 40 in a week.

As long as they are complete and accurate, employers may use any method they choose for tracking and recording hours.

Non-profit organizations may already have systems in place for tracking non-exempt employees' hours. **These existing systems can be used** for newly overtime-protected employees impacted by the Overtime Rule.

Example: Jamie, an HR manager at a community loan fund, earns a fixed salary of \$44,200 per year (\$850 per week) for a 50 hour workweek. The salary does not include the overtime premium. Because the salary is for 50 hours per week, Jamie's regular rate is \$17 (\$850/50). In a normal 50 hour week, the employer would pay Jamie the additional half time overtime premium for the 10 hours of overtime (\$8.50 per hour). If Jamie worked more than 50 hours in a week, the employer would also owe overtime compensation at time and a half the regular rate (\$17 x 1.5) for hours beyond 50 (because the salary does not cover any payment for those hours).

It is also possible for an employer and employee to agree to a fixed salary for a workweek of more than 40 hours, in which the salary includes overtime compensation under certain conditions. If, however, the employee's schedule changes in any way during any week (either by working more or fewer hours), the employer must adjust the salary for that week. Employees must be paid based on the hours actually worked during the workweek. This method of paying for overtime, therefore, might be most helpful for employees who consistently work the same amount of overtime every week.

Example: Andre, a program manager at a non-profit organization, has an agreement with his organization where he is paid a fixed salary of \$39,520 per year (\$760 per week) for a 45 hour workweek. The fixed salary includes both straight time for the first 40 hours (\$16 regular rate x 40 hours) and overtime compensation for hours 41-45 (\$24 overtime rate x 5 hours). If Andre's schedule changes in any way for any week, his salary needs to be adjusted to reflect the hours actually worked for that week.

Finally, where employees have hours of work that fluctuate from week to week, employers can pay a fixed salary that covers a fluctuating number of hours at straight time if certain conditions are met, including a clear mutual understanding between the employer and employee. *See* 29 CFR 778.114 for additional information and criteria for this payment method.

Any overtime-eligible employee may continue to be paid a salary, provided that overtime compensation is also paid and appropriately documented in the employer's record. Non-profit organizations may already have systems in place for tracking non-exempt employees' hours. These existing systems can be used for newly overtime-protected employees impacted by the Overtime Rule. As long as they are complete and

accurate, employers may use any method they choose for recording hours. Employers may use their own system to keep track of employees' work hours or require employees to enter their own time into payroll programs. See [WHD Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

There is no requirement that employees "punch in" and "punch out." An employer does not need to require an employee to sign in each time she starts and stops work. The employer must, however, keep an accurate record of the number of daily hours worked by the employee. To do so, an employer could allow an employee to just provide the total number of hours worked each day, including the number of overtime hours, by the end of each pay period. For employees who work a fixed schedule, a non-profit organization need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule, if that is true. Only when the employee deviates from the schedule is the employer required to record the number of hours worked each day. Many employees, both exempt and non-exempt, track their daily and weekly hours by simply recording their hours worked for the employer.

iv. Reorganize Workloads, Adjust Schedules or Spread Work Hours

Employers may wish to reorganize workload distributions or adjust employee schedules in order to comply with the Final Rule. For example, work assignments that are predictable could be assigned at the beginning of the workweek (rather than, for instance, late in the day on Friday for an employee who typically works Monday–Friday) in order to manage overtime hours. Or, when employees regularly perform duties outside of a 9 to 5 workday, non-profit organizations may consider adjusting those employees' schedules to encompass when most of the work takes place, so that they will not work more than 40 hours each workweek. (The FLSA does not specify days or schedules, such as a Monday–Friday workweek or a 9 to 5 workday; this is provided only as an example of a schedule that many workers follow.)

Example: John, a manager at a charity consignment shop (subject to FLSA coverage) who satisfies the duties test, currently begins work at 8am Monday–Friday. Under the Final Rule's new salary level, he would be newly entitled to overtime compensation. Among other duties, John accepts donations to the shop from donors, and the busiest time for drop-offs is always between 4pm–6pm,

so John routinely works until 6:30pm. The shop may wish to adjust John's schedule such that he doesn't need to begin work until 10am, thus limiting the number of overtime hours he works.

To reduce or eliminate overtime hours, employers may decide to hire new employees or redistribute work hours in excess of 40 across current staff, such as by increasing the work hours of staff who work less than 40 hours per week.

v. Adjust Wages

Employers can adjust the amount of an employee's earnings to reallocate it between regular wages and overtime so that the total amount paid to the employee remains largely the same. Employers may not, however, reduce an employee's hourly wage below the highest applicable minimum wage (federal, state, or local), or continually adjust wages each workweek in order to manipulate the regular rate. The employees' hours worked must still be recorded, and overtime must be paid according to the actual number of hours worked each week.

Example: Assume a fundraising supervisor at a non-profit who satisfies the duties test for the executive exemption earns \$37,000 per year (\$711.54 per week). The supervisor regularly works 45 hours per week. The employer may choose to instead pay the employee an hourly rate of \$15 and pay time and one-half for the 5 overtime hours worked each week.

\$600.00 (40 hours x \$15 / hour)

+ \$112.50 (5 OT hours x \$15 x 1.5)

\$712.50 per week

Alternatively, the employer may choose to pay that employee a salary for 40 hours of \$600 per week and pay the overtime for hours in excess of 40 per week.

\$600.00 (salary for 40 hours/week, equivalent to \$15/hour)

+ \$112.50 (5 OT hours x \$15 x 1.5)

\$712.50 per week

B. Use of Volunteers

Unlike most other employers, some non-profit organizations may use volunteer services if certain conditions are met. The Final Rule in no way changes the rules governing when non-profit organizations may use volunteers, but as non-profit organizations evaluate the classification of their employees in light of the Final Rule, they may have questions about the appropriate use of volunteers, which is briefly addressed here.

A volunteer generally will not be considered an employee for purposes of the FLSA if the individual volunteers freely for public service, religious, or humanitarian objectives, and without contemplation or receipt of compensation. Under the FLSA, employees may not volunteer services to for-profit private sector employers. Also, individuals generally may not volunteer in commercial activities run by a non-profit organization (such as a gift shop).

Under the FLSA, a person who works in a volunteer role must be a bona fide volunteer. Some examples of the many ways in which volunteers may contribute to an organization include:

- members of civic organizations may help out in a community rehabilitation program;
- men's or women's organizations may send members to adult day care centers to provide certain personal services for the sick or elderly;
- individuals may volunteer to perform such tasks as driving vehicles or assisting with disaster relief; and
- individuals may volunteer to work with children with disabilities or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working parents, soliciting contributions or participating in benefit programs for such organizations, and volunteering other services needed to carry out their charitable, educational, or religious programs.

Generally, volunteers serve on a part-time basis and should not displace employees or perform work that would otherwise typically be performed by employees. Additionally, paid employees of non-profit organizations

may not volunteer to provide the **same type** of services to the non-profit organization that they are otherwise typically employed to provide.

Example: A non-profit medical clinic has an office manager who handles office operations and procedures. The clinic hosts an annual 5K fun run in order to raise funds for its free services. In past years, the office manager also spent time on race day working by registering runners the morning of the run. Newly non-exempt under the Final Rule, the non-profit clinic may permissibly choose to utilize more volunteers this year to register runners instead of tasking the office manager with that assignment (provided all the conditions for bona fide volunteers are met), thus avoiding the accumulation of overtime hours in that week for the office manager.

Example: Using the same facts as above, many other individuals from the community volunteer on race day. The volunteer activities, such as packet pickups, course marshaling, water distribution, and staffing food tables at the finish line, are activities that are not typically performed by employees of the medical clinic. Based on these facts, the individuals are likely bona fide volunteers.

As noted, volunteer work is performed without the expectation of compensation.

IV. Conclusion

As with most employees, the minimum wage and overtime provisions of the FLSA generally apply to employees at non-profit agencies. This is not a change, as neither the FLSA nor the Department's regulations provide an exemption from the law's requirements for non-profit organizations. Given the potential impact of the Final Rule on non-profit organizations, the Department is issuing this guidance to clarify the longstanding application of the white collar exemptions in the non-profit context to assist non-profit organizations in understanding their options and obligations under the Final Rule.

For additional information, please visit www.dol.gov/whd.