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The U.S. Department of Labor's 2024 Revised White Collar Regulations

Part I: Overview of the Revised Regulations and Their Impact on Nonprofits

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Introduction

In 2016, during President Obama's administration, the United States Department of Labor ("DOL") published its 2016 Final Rule that would have updated regulations under the Fair Labor Standards Act ("FLSA") governing the overtime exemptions for executive, administrative, and professional employees (commonly known as the "white collar exemptions" or "EAP exemptions"). However, as a result of litigation, implementation of the 2016 Final Rule was blocked and, thus, the 2016 amendments to the EAP exemptions never went into effect.

In 2019, during President Trump's administration, the DOL published a 2019 Final Rule that updated the EAP exemptions. The revised regulations went into effect on January 1, 2020. Litigation was filed to block implementation of the 2019 Final Rule. The trial court ruled in favor of the DOL and, as of May 31, 2024, an appeal is still pending in the U.S. Court of Appeals for the Fifth Circuit.[1]

On April 26, 2024, during President Biden's administration, the DOL published a 2024 Final Rule updating the EAP exemptions.[2] As will be explained below, some provisions of the 2024 Final Rule are effective **July 1, 2024**, and other provisions are effective

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[1] To learn about the trial court's decision, see Jackson Lewis' article, *Federal Court Upholds DOL's Authority to Set Minimum-Salary Test for White-Collar Exemption* (Sept. 28, 2023), at https://www.jacksonlewis.com/insights/federal-court-upholds-dols-authority-set-minimum-salary-test-white-collar-exemption.

[2] The DOL has a section of its website dedicated to the 2024 Final Rule. One publication of special note is the DOL's *Small Entity Compliance Guide to the Fair Labor Standards Act's Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees* (Apr. 24, 2024).

January 1, 2025. At least one lawsuit has already been filed to block implementation of the 2024 Final Rule.[3]

Part I of this two-part article explains in detail the major changes made by the DOL and how those changes will impact the nonprofit community. Part I also (1) discusses the obligation of nonprofits to simultaneously comply with both the federal FLSA and applicable state wage and hour laws in Connecticut, New Jersey, and New York; and (2) provides a brief reminder to nonprofits about some of the limits on the use of volunteers.

Part II provides nonprofit employers an overview of some considerations and strategies for addressing the changes discussed below. Part II will (1) help nonprofits navigate decisions relating to whether to reclassify exempt employees as nonexempt, (2) alert nonprofits to some hidden landmines, and (3) provide nonprofits tips for complying with the revised regulations.

Overview of the 2024 Final Rule

Effective July 1, 2024, the 2024 Final Rule updates the FLSA regulations as follows:

- The required minimum weekly salary level for the EAP exemptions increases from $684 ($35,568 per year) to $844 ($43,888 per year).[4]

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[3] See Daily Labor Report, *Business Groups First to Sue Over Biden DOL Overtime Expansion* (May 22, 2024), at https://news.bloomberglaw.com/daily-labor-report/business-groups-first-to-sue-over-biden-dol-overtime-expansion.

[4] To learn about the higher New York minimum weekly salary levels that are in effect for 2024, see Pro Bono Partnership's e-alert, *New York Salary Threshold Increase* (Jan. 2, 2024), and Jackson Lewis' e-alert, *New York Department of Labor Approves Proposed Modified Wage Orders* (Dec. 28, 2023).

The DOL did not increase the hourly rate in the regulation that permits certain computer employees to be paid $27.63 an hour (in lieu of being paid a weekly salary) and still be treated as exempt employees. However, effective July 1, 2024, the DOL did increase the required minimum weekly salary level to $844 for computer employees who are paid on a salary basis.

Note that Connecticut and New York do not recognize an overtime exemption for hourly-paid computer employees. In order to comply with wage and hour laws in those states, employers cannot rely on the FLSA hourly-paid-computer-employees exemption.

- The required minimum annual salary level for exempt highly compensated employees ("HCEs") increases from $107,432 to $132,964. HCEs must receive at least $844 weekly.[5]

- Employers will be permitted to use *non*discretionary bonuses, commissions, and incentive pay to satisfy up to 10% of the EAP minimum weekly salary level requirement. The employee would still need to be paid a weekly salary of at least $759.60 (90% of $844). Such payments must be made on an annual or more frequent basis and employers. Employers are permitted to make a "catch up" payment—*i.e.*, if an employee has not earned sufficient commissions to satisfy the minimum weekly salary level requirement on an annual basis, the employer can make up the difference without losing the exemption. The catch-up payment must be made by no later than the first pay period after the end of the year.[6]

  Employers are not permitted to use catch-up payments for purposes of meeting the $844 minimum weekly salary requirement for the HCEs exemption. However, with respect to meeting the $132,964 minimum annual salary requirement, a catch-up payment can be made within one month after the end of the pay year.[7]

Effective January 1, 2025, the 2024 Final Rule updates the FLSA regulations as follows:

- The required minimum weekly salary level for the EAP exemptions increases from $844 ($43,888 per year) to $1,128 ($58,656 per year).[8]

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[5] Note: Connecticut and New York do not recognize the HCE exemption. Accordingly, employers in these states should ensure that employees they designate as exempt meet another exemption that is recognized in the applicable states.

[6] An employer is permitted to use any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary-of-hire year. If the employer does not identify in advance the year it wants to use, then the calendar year will apply.

[7] The DOL has a fact sheet that provides examples of how the rules relating to nondiscretionary bonuses, commissions, and incentive pay apply in practice. *See* U.S. Department of Labor, Fact Sheet #17U: *Nondiscretionary Bonuses and Incentive Payments (Including Commissions) and Part 541 Exempt Employees* (Oct. 2019). The DOL is expected to update this fact sheet for the changes that go into effect on July 1, 2024.

Note that for purposes of satisfying the EAP exemptions under Connecticut and New York's state wage and hour laws, the rules discussed in this article relating to (1) nondiscretionary bonuses, commissions, and incentive pay and (2) catch-up payments do not apply.

[8] To learn about the higher New York minimum weekly salary levels that will be in effect in 2025 and 2026, see Pro Bono Partnership's e-alert, *New York Salary Threshold Increase*

- The required minimum annual salary level for exempt highly compensated employees (HCEs) increases from $132,964 to $151,164. HCEs must receive at least $1,128 weekly.[9]

- Employers will be permitted to use *non*discretionary bonuses, commissions, and incentive pay to satisfy up to 10% of the EAP minimum weekly salary level requirement. The employee would still need to be paid a weekly salary of at least $1,015.20 (90% of $1,128). Such payments must be made on an annual or more frequent basis and employers. Employers are permitted to make a "catch up" payment—*i.e.*, if an employee has not earned sufficient commissions to satisfy the minimum weekly salary level requirement on an annual basis, the employer can make up the difference without losing the exemption. The catch-up payment must be made by no later than the first pay period after the end of the year.[10]

- Employers are not permitted to use catch-up payments for purposes of meeting the $1,128 minimum weekly salary requirement for the HCEs exemption. However, with respect to meeting the $151,164 minimum annual salary requirement, a catch-up payment can be made within one month after the end of the pay year.[11]

(Jan. 2, 2024), and Jackson Lewis' e-alert, *New York Department of Labor Approves Proposed Modified Wage Orders* (Dec. 28, 2023).

The DOL did not increase the hourly rate in the regulation that permits certain computer employees to be paid $27.63 an hour (in lieu of being paid a weekly salary) and still be treated as exempt employees. However, effective January 1, 2025, the DOL did increase the required minimum weekly salary level to $1,128 for computer employees who are paid on a salary basis.

Note that Connecticut and New York do not recognize an overtime exemption for hourly-paid computer employees. In order to comply with wage and hour laws in those states, employers cannot rely on the FLSA hourly-paid-computer-employees exemption.

[9] Note: Connecticut and New York do not recognize the HCE exemption. Accordingly, employers in these states should ensure that employees they designate as exempt meet another exemption that is recognized by in the applicable states.

[10] An employer is permitted to use any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary-of-hire year. If the employer does not identify in advance the year it wants to use, then the calendar year will apply.

[11] The DOL has a fact sheet that provides examples of how the rules relating to nondiscretionary bonuses, commissions, and incentive pay apply in practice. *See* U.S. Department of Labor, Fact Sheet #17U: *Nondiscretionary Bonuses and Incentive Payments (Including Commissions) and Part 541 Exempt Employees* (Oct. 2019). The DOL is expected to update this fact sheet for the changes that go into effect on January 1, 2025.

The 2024 Final Rule sets forth a mechanism for the Secretary of Labor to increase the required minimum weekly and annual salary levels to be effective on **July 1, 2027**, and every three years thereafter.

In its April 2024 *Small Entity Compliance Guide to the Fair Labor Standards Act's Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, the DOL summarizes the salary level changes in chart format:

DATE	**STANDARD SALARY LEVEL**	**HCE TOTAL ANNUAL COMPENSATION THRESHOLD**
Before July 1, 2024	$684 per week (equivalent to $35,568 per year)	$107,432 per year, including at least $684 per week paid on a salary or fee basis.
July 1, 2024	$844 per week (equivalent to $43,888 per year)	$132,964 per year, including at least $844 per week paid on a salary or fee basis.
January 1, 2025	$1,128 per week (equivalent to $58,656 per year)	$151,164 per year, including at least $1,128 per week paid on a salary or fee basis.
July 1, 2027, and every three years thereafter	To be set using the methodology in effect at the time of the update based on current earnings data.	To be set using the methodology in effect at the time of the update based on current earnings data.

The 2024 Final Rule does not contain (1) any changes to the duties tests to qualify for the white collar exemptions or (2) any special exemptions or concessions for nonprofit organizations.

Note that for purposes of satisfying the EAP exemptions under Connecticut and New York's state wage and hour laws, the rules discussed in this article relating to (1) nondiscretionary bonuses, commissions, and incentive pay and (2) catch-up payments do not apply.

Nonprofit Organizations and the FLSA

The FLSA and the 2024 Final Rule do not provide nonprofit organizations an exemption from the federal minimum wage and overtime requirements. The FLSA overtime provisions apply to nonprofits (and for-profits) if either one of two conditions are met: (1) the employer is an "enterprise" "engaged in commerce or in the production of goods for commerce," regardless of whether an individual employee was engaged in commerce ("enterprise coverage") or (2) if an employee individually was "engaged in commerce or in the production of goods for commerce" ("individual coverage"). Whether a nonprofit or its employees are subject to the provisions of the FLSA under an enterprise or individual coverage theory must be determined on a case-by-case basis.

To meet the enterprise coverage test, an entity must have annual revenues (volume of sales made or business done) of at least $500,000. However, regardless of the dollar volume of business, the FLSA automatically applies to schools, hospitals, nursing homes, other residential care facilities, and governmental entities.

Enterprise coverage focuses on the nature of the employer's business. In general, nonprofit organizations are subject to the overtime provisions of the FLSA if they engage in commercial activities resulting in sales made or business done of at least $500,000. An organization that performs religious, educational, or charitable activities does not perform these activities for a business purpose and generally will not constitute an enterprise under the FLSA unless the activities compete in the marketplace with commercial businesses. The DOL only considers activities performed for a business purpose in determining whether the $500,000 threshold is met. Income received by a nonprofit in furtherance of its charitable activities is not included in the $500,000 threshold. Such noncommercial income would include contributions, membership fees, donations, and dues as long as the payer receives no more than a nominal benefit in return.

The revenue that a nonprofit organization derives from ordinary commercial activities will be counted toward the $500,000 threshold. For example, in addition to their religious, educational, or charitable activities, nonprofits that operate gift shops, thrift stores, or food establishments will have the revenue from such activities count toward the $500,000 threshold because these activities compete with other commercial businesses. Indicia of competition with commercial enterprises include advertising and soliciting customers.[12]

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[12] In a guidance document for nonprofits that the DOL issued along with the **2016** Final Rule, the DOL provided the following three illustrations of how it will apply the enterprise coverage test to nonprofits:

> *Example*: 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, employees of the animal shelter are not covered on an enterprise basis. [footnote omitted]

Even if a nonprofit organization is not subject to enterprise coverage, individual employees at a nonprofit might still be subject to the protections of the FLSA if they are regularly "engaged in commerce or in the production of goods for commerce" between states unless an exemption applies. Examples of such activities include: (1) making out-of-state phone calls; (2) travel to other states; (3) receiving/sending interstate mail or electronic communications; (4) ordering or receiving goods from an out-of-state supplier; and (5) handling credit card transactions or performing the accounting or bookkeeping for those transactions. There is no particular percentage of activities to determine whether an employee is engaged in commerce. It is sufficient that the employee's activities in commerce are regular and recurring, even where they are a small part of the employee's regular job duties.

A nonprofit attempting to argue that a specific employee is not engaged in interstate commerce under the individual coverage test runs the risk that the DOL in an audit (or the employee in a court during litigation) might disagree with the nonprofit's conclusion that the employee's activities do not have a nexus to interstate commerce.

Whether a nonprofit organization or its employees are subject to the FLSA is a fact-specific determination. Nonprofits need to make sure they are complying with the minimum wage and overtime requirements of the FLSA or, if an organization intends to take the position that it and its employees are not covered by the FLSA, then the nonprofit needs to carefully consider whether the facts will support that position.

State Specific Overtime Laws and Nonprofits

The 2024 Final Rule does not eliminate nonprofit organizations' obligation to comply with both federal and state minimum wage and overtime laws. **The minimum wage and overtime laws in Connecticut, New Jersey, and New York do <u>not</u> contain the**

> *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.

The DOL removed the publication from its website in 2019. Thus, caution must be exercised in relying upon some portions of the publication.

enterprise and interstate commerce provisions that are set forth in the FLSA. Therefore, nonprofits in these states will be subject to the following state minimum wage and overtime laws even if they are not subject to the requirements of the FLSA. In addition, employers covered by both the FLSA and state minimum wage and overtime laws must apply the provisions of the FLSA and state laws that are most beneficial to employees.

1. **Connecticut:** The Connecticut Minimum Wage Act requires employers to compensate nonexempt employees who work more than forty hours per week at a rate not less than one and one-half times the employee's regular rate of pay. The Connecticut Department of Labor ("CT DOL") has promulgated regulations specifying the weekly salary requirements and duties that executive, administrative, and professional employees must perform in order to be exempt from these overtime requirements. See Conn. Agencies Regs. 31-60-14(a), 31-60-15(a), and 31-60-16(a). As of April 30, 2024, all of the Connecticut minimum weekly salary levels are below $684. See the CT DOL's *What Is the Difference Between Exempt and Non-Exempt Employees for the Purposes of Wage and Hour Laws?*

2. **New Jersey:** With respect to executive, administrative, and professional employees, New Jersey follows the federal DOL's white collar regulations set forth in 29 C.F.R. Part 541, including both the duties tests and the required minimum weekly salary. *See* N.J. Admin. Code 12:56-7.1 to -7.2 (*Exemptions from Overtime*).

3. **New York:** New York Labor Law section 652(3) provides nonprofit employers with an ability to opt out of New York's overtime requirements within six months after an entity is organized as long as the organization certifies under oath that it pays all employees the applicable minimum wage. All other nonprofit organizations must compensate nonexempt employees who work more than forty hours per week at a rate not less than one and one-half times the employee's regular rate of pay.

   The New York Department of Labor has promulgated regulations specifying the weekly salary requirements and duties that executive, administrative, and professional employees must perform to be exempt from these overtime requirements. *See* 12 NYCRR §142-3.12. Executive and administrative employees must be paid a minimum weekly salary in order to qualify for the exemption. There are different required minimum weekly salary levels for executive and administrative employees in (1) New York City and Nassau, Suffolk, and Westchester counties and (2) the rest of New York State. All of the New York minimum weekly salary levels exceed the federal DOL's minimum weekly salary levels as of their effective date.[13] There is no salary requirement for professional employees in New York.

[13] To learn about the New York minimum weekly salary levels that are in effect for 2024, and will be in effect in 2025 and 2026, see Pro Bono Partnership's e-alert, *New York Salary*

Volunteers

Unlike for-profit businesses, nonprofits can use unpaid volunteers under certain circumstances. The 2024 Final Rule makes no changes to the rules governing nonprofits' use of volunteers. The DOL considers the following factors to determine whether particular activities are properly non-compensable volunteerism: (1) nature of the entity receiving services; (2) the receipt by the individual (or expectation thereof) of any benefits for performing the services; (3) the amount of time involved; (4) whether regular employees are displaced; (5) whether the services are offered freely and without coercion; and (6) whether the services are of the kind typically associated with volunteer work.[14]

Nonprofits should note that the DOL has stated that "[i]ndividuals generally may not … volunteer in commercial activities run by a non-profit organization such as a gift shop."[15] In other words, those workers would be covered by the FLSA and its minimum wage and overtime requirements.

Questions

If you have any questions regarding the content of this article, please contact one of the following Pro Bono Partnership lawyers:

- For Connecticut and New York nonprofits: Jennifer Grudnowski, Esq., at (914) 328-0674 x335.

- For New Jersey nonprofits: Christine Michelle Duffy, Esq., at (973) 240-6955 x303.

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Threshold Increase (Jan. 2, 2024), and Jackson Lewis' e-alert, *New York Department of Labor Approves Proposed Modified Wage Orders* (Dec. 28, 2023).

[14] U.S. Department of Labor, *Opinion Letter FLSA2001-18* (July 31, 2001).

[15] U.S. Department of Labor, Fact Sheet #14A: *Non-Profit Organizations and the Fair Labor Standards Act (FLSA)* (Aug. 2015). The DOL made the same point in the guidance document for nonprofits that the DOL issued along with the **2016** Final Rule, explaining that gift and thrift stores are commercial activities. As noted above, the DOL removed the publication from its website in 2019. Thus, caution must be exercised in relying upon some portions of the publication.

The Connecticut Community Nonprofit Alliance is the largest Connecticut statewide advocacy organization representing nonprofits, with a membership of more than 300 community organizations and associations across the state. Nonprofits deliver essential services to more than half a million people each year and employ almost 14% of Connecticut's workforce.

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