CURRENT ISSUES IN ADVISING TAX-EXEMPT ORGANIZATIONS

THE NEW OVERTIME RULES

THE LEGAL, TAX & IMPLEMENTATION ISSUES FACING NONPROFITS

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Fair Labor Standards Act
Nonprofits

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Outline:

- FLSA Coverage
- Employment Relationship
- Minimum Wage and Overtime Basics
  - Minimum Wage
  - Overtime Pay
  - Exemptions
- 541 Updates (Overtime Rule)
- Recordkeeping and Posting
- Q's & A's Segment

FLSA Coverage

Two types of coverage:

- **Enterprise coverage**: If an enterprise is covered, all employees of the enterprise are entitled to FLSA protections; and

- **Individual coverage**: Even if the enterprise is not covered, individual employees may be covered and entitled to FLSA protections
Enterprise Coverage

A nonprofit may operate a covered enterprise under the FLSA if:

- It engages in ordinary commercial activities—performed for a business purpose—that result in sales made or business done of no less than $500,000 (the Annual Dollar Volume or "ADV" threshold).
- It has two or more employees engaged in commerce or in the production of goods for commerce.

Note: §3(i)(1)(A) – Enterprise Coverage

Enterprise Coverage – nonprofit

- A nonprofit’s charitable activities are not ordinary commercial activities and are not part of a covered enterprise.
- The "ADV" threshold:
  - Includes only activities performed for a business purpose.
  - Does not include income—from donations, membership fees, etc.—used for charitable activities.

Note: 29 C.F.R. §779.214 – Business Purpose

Enterprise Coverage – nonprofit

Nonprofit organizations may also be “named enterprises.”

- Named enterprises include hospitals, organizations providing medical or nursing care for residents, schools, preschools, and government agencies (federal, state, and local).
- Named enterprises are covered regardless of their ADV.
- Every employee of a named enterprise is entitled to minimum wage and overtime protections, unless the employee is exempt.
Test Your Knowledge

Question #1

**Enterprise Coverage for nonprofits**

**Scenario #1** –
A nonprofit provides mental health and counseling services to the local community, charging clients a fee on a sliding scale.

*Are the nonprofit’s employees protected by the FLSA on an enterprise basis?*

Question #2

**Enterprise Coverage** for nonprofits

**Scenario #2** –
A private nonprofit museum that primarily engages in charitable activities also has a gift shop that employees take turns staffing.

*Are the employees who staff the gift shop protected by the FLSA on an enterprise basis?*

*BONUS: What if volunteers also helped to staff the gift shop?*
**Question #3**

**Enterprise Coverage** for nonprofits

**Scenario #3** –

A homeless services organization manages a job training program. Their culinary training program includes a catering business that teaches the clients various skills.

*Are the nonprofit’s employees protected by the FLSA on an enterprise basis?*

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**Individual Coverage**

Employees of nonprofits who are not covered on an enterprise basis may still be covered individually.

- The employee’s (not the establishment’s) activities determine coverage.
- Individual coverage applies on a workweek basis.

*Note:* 29 C.F.R. §776.0 – Individual Coverage

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**Individual Coverage**

Includes workers who are engaged in:

- Interstate commerce or the production of goods for interstate commerce
- Domestic service—including home care.

*Note:* 29 C.F.R. §776.11 – Individual Coverage
Individual Coverage

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

Test Your Knowledge

Question #1

**Individual Coverage** for nonprofits

*Scenario #1 –*

A food bank receives food donations from corporations in other states. Staff members are involved in the unloading, stocking and accounting of the food donations.

*Are these employees individually covered by the FLSA?*
**Question #2**

*Individual Coverage for nonprofits*

**Scenario #2—**

A nonprofit often receives cash and check donations from individuals from other states. Accounting, marketing, technology staff and others are involved in soliciting or processing the donations.

*Are these employees individually covered by the FLSA?*

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**Question #3**

*Individual Coverage for nonprofits*

**Scenario #2—**

The advocacy staff for a nonprofit environmental group send alerts to members across the country encouraging them to contact members of congress. They also communicate directly with the federal administration and members of congress from their and other states.

*Are these employees individually covered by the FLSA?*

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**Employment Relationship**
Employment Relationship

In order for the FLSA's minimum wage and overtime provisions to apply, there must be an employment relationship between the “employer” and the “employee.”

Note: Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)

Employment Relationship

• Section 3(d) of the FLSA defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.”

• Section 3(e) defines “employee” as “any individual employed by an employer.”

• Section 3(g) further defines “employ” to include “to suffer or permit to work.”

Note: http://www.dol.gov/whd/flsa/employmentrelationship.ppt

Volunteers

• The Department of Labor recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes.

  – Volunteers may provide services to charitable, civic, humanitarian and other nonprofit organizations.

  – Volunteers may not perform commercial activities in businesses that are run by nonprofit organizations, such as gift shops.
Volunteers

Who is a volunteer:

• Volunteers provide their time freely for public service, religious, or humanitarian objectives.

• They do not receive compensation other than expenses, reasonable benefits or nominal fees.

• They do not displace or perform the work that is ordinarily performed by regular employees.

Minimum Wage and Overtime Basics

Minimum Wage: Basics

• Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked

• The minimum wage is $7.25 per hour

• Cash or equivalent – free and clear
Overtime Pay: Basics

• Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek.

Workweek

• Compliance is determined by workweek, and each workweek stands by itself.
• Workweek is 7 consecutive 24 hour periods (168 hours).

Regular Rate

• Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek.
• May not be less than the applicable federal minimum wage.
Exemptions and Exceptions

- There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA

“White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption -- often called the “EAP” or “white collar” exemption -- applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees
Three Tests for Exemption

Salary Basis

Salary Level

Job Duties

Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)

- The compensation cannot be reduced because of variations in the quality or quantity of the work performed

- Need not be paid for any workweek when no work is performed

No Salary Requirements

- The salary level and salary basis tests do not apply to:
  - Outside Sales Employees
  - Doctors
  - Lawyers
  - Teachers
  - Employees in certain computer-related occupations paid at least $27.63 per hour
Duties Tests

- An employee’s primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees.

New Overtime Rule Overview

- March 2014 - Presidential Memorandum
- July 2015 – Notice of Proposed Rulemaking
- May 23, 2016 – Final Rule Published
- December 1, 2016 – Final Rule Effective Date
New Overtime Rule
Changes

• Salary Level Increases

• Nondiscretionary Bonuses

• Automatic Updates

New Overtime Rule
Standard Salary Level and Highly Compensated Employees

• Standard salary level - pursuant to 29 CFR 541.600

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• Highly Compensated Employee (HCE) - pursuant to 29 CFR 541.601

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New Overtime Rule
Nondiscretionary Bonuses

• Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised in advance to employees (e.g., bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula).

• May be used to satisfy up to 10% of the standard salary level.
  - Minimum of 90% (approx. $822) of standard salary level must be paid as a weekly salary.

• Payments must be paid on a quarterly or more frequent basis.
New Overtime Rule

Catch-up Payments

• If an employee does not earn enough from the nondiscretionary bonus, commission, or incentive payment in a given quarter to meet the standard salary level—an employer may make a “catch-up” payment within one pay period of the end of the quarter.

• Any such “catch-up” payment will count only toward the prior quarter’s salary amount and not toward the salary amount in the quarter in which it is paid.

New Overtime Rule

Highly Compensated Employees (HCE)

• HCEs must continue to receive at least the full standard salary level amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. *(No Change to this principle)*

• Nondiscretionary bonuses and incentive payments (including commissions) may be counted towards the highly compensated employees’ total annual compensation requirement. *(No Change to this principle)*

• The HCE test does not allow employers to credit nondiscretionary bonuses or incentive payments (including commissions) towards the standard salary level weekly requirement.

New Overtime Rule

Automatic Updates

• Every three years beginning January 1, 2020, the standard salary and annual compensation levels will be automatically updated.

• At least 150 days before the effective date, the Secretary will publish a notice in the Federal Register of the updated salary and total annual compensation amounts that will be required.
New Overtime Rule
Updating the Standard Salary Level

Standard salary level – updated to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region.

New Overtime Rule
Updating HCE Compensation Level

Highly compensated employees – updated to equal the 90th percentile of annualized earnings of full-time salaried workers nationally.

Recordkeeping and Posting
Recordkeeping

- The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records.
- Time clocks are not required and records need not be kept in any particular form.
- Nonetheless, every covered employer must keep certain records for each non-exempt worker.

Required Posting

- Covered employers must post a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in a conspicuous place such as a lunch room or employee lounge area.
- **Posting**: Available electronically for downloading and printing at www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm

Additional Information

*Other resources include:*
- New Overtime Rule
- Guidance Documents
- Fact Sheets
- Frequently Asked Questions
- Call or visit the nearest WHD Office
  - Visit the WHD homepages at:
    - www.dol.gov/whd
    - www.dol.gov/whd/overtime/final2016
  - Call the WHD toll-free information and helpline at: 1-866-4US-WAGE (1-866-487-9243)
Questions?

THE FAIR LABOR STANDARDS ACT

Basic requirements

- Most common “white collar” exemptions: executive, administrative, professional
  - Duties test
  - Salary basis
  - Minimum salary level

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THE NEW OVERTIME RULE

The minimum salary level for the executive, administrative and professional exemptions to the Fair Labor Standards Act is increasing from $455 per week to $913/week – or $23,660 per year to $47,476 per year.

OTHER ASPECTS OF THE NEW RULE

- Highly Compensated Employee exemption threshold is now $134,004
- Bonuses can count towards 10% of the new salary threshold in limited circumstances
- Automatic future increases in the minimum salary level

The new overtime rule presents some serious challenges to the existing culture of nonprofits.
POTENTIAL PAYROLL SOLUTIONS

- Raise salaries, maintain exemption
- Divide weekly salary by fixed hourly amount (using 37.5/40 hours a week)
- Divide weekly salary by fixed hourly amount (using time study to determine average hours worked)
- “Salaried Non-Exempt”
- Alternative/creative scheduling?

BE beware these “QUICK FIXES”

- Independent contractor “fix”
- Volunteer/intern “fix”
- Comp time “fix”
- Ignoring the problem

OPERATIONAL AND CULTURAL ISSUES

- All time worked must be recorded, including off-the clock time (travel, smartphones)
- Managers will be required to manage more closely
- New timeclock protocols, office rhythm
- New ways must be found to honor veteran employees, give hard workers a way to shine
WILL THIS ACTUALLY HAPPEN?

- Legal challenges
- Political challenges
- Be prepared

SUGGESTIONS

- Organization, good communication, and good advice are key
- Be thoughtful about “ripple effects” of changes
- Opportunity to make other changes (compliance, staffing, management)

Questions?
Human Resources and Accounting Implications

Jeff Ricketts, HR Consultant
Gina Whitis, AFO Manager

Accounting / Payroll

Payroll Implications

• Increase in Salary/Wages
  – Payroll Taxes – Employee and Employer

• Overtime Costs

• Additional Timekeeping Requirements
  – Software Cost
  – Administrative Cost
Payroll Structure/Philosophy

• Automatic Adjustment – Every 3 Years

• Bonus Programs

• Future Compensation Cycles

• Budgeting Processes

Human Resources

Non-Compensation Solutions

• Review Organization Structure
  – Job Descriptions
  – Job Sharing
  – Volunteer Programs

• Reassess Processes and Procedures
  – What can be eliminated?

• Get Creative!
Consider All Monetary Costs

- Employer Provided Benefits
- Additional Software
- Training

Additional Considerations

- Fair Pay / Internal Equity
- Policy Revisions
- Employee Morale
- Communication Plans

Questions?