Staffing Strategies in Light of the New Overtime Rules

You can satisfy the new rules and still keep costs low. Here are some ways.

By Michelle Johnson

New rules on overtime will likely affect many nonprofits. When these regulations take effect on December 1, 2016, many employees who are classified as salaried exempt will no longer pass the test and will become non-exempt under the Fair Labor Standards Act (FLSA). As exempt employees, they aren't entitled to overtime pay, no matter how many hours they work. But when they become non-exempt, they will be entitled to overtime pay. Employers will have to pay them one-and-a-half times their regular rate of pay when they work more than 40 hours in a week.

This change will affect an estimated five million employees who earn more than $23,600 but less than $47,476 per year – a common salary range in the nonprofit sector. With the new rules, the salary threshold for executive, administrative, and professional employees will increase from $455 per week ($23,600 per year) to $913 per week ($47,476 per year). The minimum salary threshold for "highly compensated employees" will increase from $100,000 to $134,004 per year.[1] The minimum thresholds are set at the 40th and 90th percentile of weekly earnings for full-time salaried workers, and will be updated every three years with the first increase to occur on January 1, 2020. For the first time, employers may receive credit for up to 10% of non-discretionary bonuses, commissions, and incentive payments towards the minimum salary amount.[2]

During the proposal comment period, many nonprofits objected to these salary changes. Paying overtime to workers who were previously exempt from the overtime rules, they argued, would strain their budgets and force them to cut back on their work.

Fortunately, there are a number of strategies that nonprofit employers may use to satisfy the new guidelines while keeping costs within budget. Here are four ways to do so:

1 Increase Salaries to the New Minimum.

If an exempt employee who works more than 40 hours per week already earns around $45,000, an easy fix would be to raise her salary to the new annual minimum ($47,476). The salary increase may be offset by a decreased bonus or reduction in benefits so that the employee still earns roughly the same amount. She will remain free from timekeeping requirements and will collect the same salary each week, regardless of hours worked.

Nonprofit executives such as program directors, marketing directors, and development directors may work long hours, including some nights and weekends. Increasing such employees' wages by a few thousand dollars a year may be the simplest way to meet the new FLSA requirements while maintaining flexibility as to hours worked.

Salaried employees who no longer meet the salary test for exemption must keep track of their time.

Newly non-exempt salaried employees will be required to record their hours worked. They may punch time clocks, fill out time sheets, use a computer program, or any other method that accurately tracks hours worked. While this may initially seem inconvenient or awkward, requiring non-exempt employees to keep track of their time will be essential in protecting against overtime claims.

Formerly salaried employees may be paid an hourly rate.

Employers may convert some formerly salaried exempt employees to hourly workers. They will earn an hourly rate for up to 40 hours each week, and time-and-a-half for hours worked over 40. To manage costs, employees should be required to obtain prior approval for overtime hours.

If a job consistently requires more than 40 hours per week, the duties may be split between two part-time hourly employees. Fifty or 60 hours divided between two people will be far less costly than 10 to 20 hours of weekly overtime.

2 Limit Overtime by Reorganizing Workloads.

Employers aren't required to pay non-exempt employees by the hour. There are several options for salaried non-exempt employees, depending on the employee's weekly schedule and the amount of overtime that is anticipated.

The first option is to pay a salary that covers 40 hours per week with the understanding that overtime will rarely if ever be needed. If the job can be performed in a 40-hour week, the salaried non-exempt employee will continue to receive the same salary and won't work overtime (as proven by time records). If overtime is needed on occasion, the employee's salary will cover the first 40 hours, and the employee will be paid time-and-a-half for overtime hours.

[1] Highly compensated employees who meet the new salary threshold will be exempt if their primary duty includes performing office or non-manual work, and the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee. As a practical matter, employees who are paid as much as $134,004 per year will rarely if ever fail this minimal duties test.

[2] Nondiscretionary bonuses and incentive payments may be tied to productivity and profitability, and must be paid at least quarterly.

A second option is to pay salary for a set number of hours that may be more than 40 per week, and overtime on top of the salary. For example, an employee may receive a salary with the expectation that he will work 50 hours per week. The salary will cover straight time for the first 50 hours, and he will be entitled to an additional "half time" overtime for the hours over 40. Overtime is "half time" instead of "time-and-a-half" because the employee's salary has already paid his regular rate for all hours worked.

A third option for salaried non-exempt employees whose hours vary from week to week is a "flexible work week" (FWW) schedule. Employees who work FWW receive the same base salary each week, whether they work 30, 40, 50, or more hours. Their *hourly rate*, however, varies each week depending on the number of hours worked. Their salary covers straight time pay for all hours. If they work more than 40 hours, they receive another half times their hourly rate as overtime compensation. For example, an employee earning $400 per week who worked 40 hours would receive $10 per hour straight time. If she worked 50 hours, she would receive $8 per hour straight time. She would also earn an additional $4 per hour for 10 hours of overtime, for a total of $440. If this same employee were paid time-and-a-half after 40 hours, she would be due $150 in overtime, for a total of $550. The disadvantage of the FWW method is that it requires that an employee's hourly rate be calculated every week she works overtime, and can be inconvenient to administer.

3 Decrease Wages to Account for Overtime.

While reductions in wages may negatively impact employee morale, recruiting, and retention, it is permissible to reduce an employee's base salary to account for anticipated overtime payments. For example, if a formerly exempt employee works 50 hours per week for $39,000 per year, she earns $750 per week and $15 per hour straight time. If she must be paid overtime for 10 hours per week, her employer could reduce her salary to $660 per week, with the understanding that the $660 is intended as straight time for all 50 hours, or $13.20 per hour. The employer could then pay an extra half time of $66 for the 10 overtime hours, for a total of $726 per week. While the employee would be working the same number of hours and being paid overtime, she would actually earn less due to the reduction in her regular hourly rate.

Note the limits on "compensatory time."

Private employers (including nonprofits) aren't permitted to avoid paying overtime by "banking" hours for time off in a subsequent pay period. But there are two limited exceptions to this rule against "compensatory time." First, employees who take time off in the same workweek will avoid overtime. If an employee has already worked 40 hours by Thursday, she may be given Friday off. This is the easiest way to prevent overtime costs—simply ask employees who have worked 40 hours to go home for the week. Any remaining tasks may be performed by other employees who haven't worked as many hours that week, or by exempt employees who aren't entitled to overtime.

One other option is a "time off" plan where an employee who works overtime hours in the first week of a pay period may take time off the next week (calculated at time-and-a-half) so that her total compensation doesn't change. For example, an employee who earns $10 per hour and works five overtime hours in week one of the pay period would be entitled to $75 in overtime compensation. If he is given 7.5 hours off in week two (1.5 times five hours), he would still earn $800 for the two-week pay period ($475 plus $325).

4 Use Volunteers.

Finally, nonprofits may use volunteers as long as they meet FLSA's volunteer requirements. These requirements state that volunteers must serve on a part-time basis and mustn't displace employees or perform work that would otherwise be performed by employees. The types of work that may be performed by volunteers include driving vehicles, collecting donations, soliciting contributions, providing child care assistance, acting as camp counselors, planning and working at special events, and other tasks that are done freely and without compensation.

A nonprofit's employees may also provide volunteer services so long as they are truly voluntary, are provided outside the employee's normal work hours, and are different from the employee's regular duties. It is *not* permissible for employees to "volunteer" overtime hours in order to finish their regular work.

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