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Viewpoint

Why Nonprofits Cannot Afford to Violate the FLSA

By Michael Santocki

For the past year, a major proposed change by the Department of Labor (DOL) to the Fair Labor Standards Act's (FLSA) exemptions from overtime has been making its way through the judicial system. The new rule, which deals with overtime exemption salary thresholds (the "salary level"), is currently under injunction per a Texas federal court. Regardless of if or when it goes into effect, however, this rule and other wage/hour issues are critical areas of risk, and nonprofit leaders should be paying close attention to changes at the national, state and even county and municipal levels.

First, some background: The new FLSA rule, which proposes to raise the qualifying weekly salary for overtime exemption as a "white collar" employee from $455 to $913, could impact some 4.5 million American workers—who still have to meet several other unchanged requirements to be considered exempt—and the organizations that employ them. Just before the rule was set to take effect on December 1, 2016, however, a federal judge granted the injunction. It is unclear at this point if or when the rule will go into effect, or if it will be modified (or struck down entirely) by the Trump administration, either through the Trump-administered Department of Labor or separate rulemaking activity.

As media outlets and industry blogs have scrambled to explain the new regulation and its implications, an interesting statistic from the DOL itself has cropped up in various posts: An estimated 70 percent of American businesses are **already** in violation of some aspects of the Fair Labor Standards Act as it exists today.

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It's not hard to understand why. First and foremost, the FLSA has a complicated and, in places, illogical series of implementing regulations. "Exemption" from overtime alone is complex, as "exempt" status is based on a series of exceptions and distinct tests against which employers must measure each of their workers—hence the flurry of activity on blogs and in publications since the announcement of the DOL's proposed changes. Briefly, and prior to the new proposals, in order to qualify as exempt from overtime under one of the "white collar" exemptions (there are numerous others, including exemptions for outside sales employees and computer professionals), an employee must:

1. Be paid on a "salary basis," as opposed to hourly wages;
2. Make a salary of at least $455 per week (the "salary level"); and
3. Perform a "primary duty" of a qualifying professional, executive, or administrative nature (as those terms are defined in DOL regulations).

This analysis doesn't take into account changing regulations like the ones the DOL has recently proposed, or the fact that some states—and even counties—maintain their own overtime exemption thresholds, which often change with minimum wage increases.

For example, in New York state alone, the new overtime exemption threshold, which went into effect on December 31, 2016 in conjunction with new Wage Orders implementing New York's rise to a $15/hour minimum wage, will start at $825/week for in New York City for "large" employers (more than 10 employees), $787/week in New York City for businesses with 10 or fewer employees, $750 for all businesses in Nassau, Suffolk and Westchester counties and $727.50 per week for all other New York counties. And these thresholds will increase at different rates each year through 2021. By December 31, 2018, the salary level in New York City for "large" employers will be $1125/week.

The point is, to stay in compliance and ahead of changes, organizations must (a) spend adequate time classifying employees and ensuring they are paid correctly and (b) man the periscope as changes continue to roll in. Unfortunately, many if not most nonprofits do not have the budgetary ability or bandwidth to accommodate this reality. FLSA and/or state labor laws apply to many nonprofits; in some instances, coverage will not be clear. DOL rules like the salary level increase do not bend to accommodate nonprofit budgets. With human resources and legal compliance duties often rolled up into one or two individuals, risk falls by the wayside. But that doesn't let nonprofits off the hook.

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Nor does insurance. I am often asked questions about employee wage and overtime issues from nonprofit clients, who assume that any such violations, and the lawsuits they create, will be covered under their existing policy. But that's rarely the case. In fact, wage hour exposure is generally not an insurable matter. If you're concerned about staying on the right side of FLSA and state regulations—as any nonprofit with

employees should be—you need to hire a labor law firm to run an audit on your organization. (Or have a labor lawyer on your board of directors whose firm might provide such an audit *pro bono*.)

What happens if a nonprofit does misclassify its employees? A lawsuit for back wages from even one staff member is a headache for most resource-strapped nonprofits. But in the past 15 years or so, the plaintiffs' bar has become far more attuned to the implications of changing wage regulation. Between 2000 and 2015, the number of federal wage hour cases jumped nearly 360%, possibly due to the decline of unions and their attendant labor-management style litigation. (It's not uncommon to see seminars on FLSA regulation for plaintiff lawyers interested in growing this line of business.) Most cases are brought on a "collective action" (a type of class action) basis, where the claimant seeks to represent a broad cross-section of allegedly "similarly situated" individuals.

But regardless of why, FLSA lawsuits are on the rise, which means nonprofits must be extra vigilant, especially as regulations change. Don't rely on transferring risk to a third party (i.e., your insurance company). Rather, secure an outside firm to audit your wage hour compliance and, even more importantly, designate an individual to monitor changes to local, state and federal law so that your organization is not among the majority of nonprofits already in violation of these complex regulations—and needlessly exposed to risk that can, with renewed focus, be professionally managed away.

About the Author

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