

## **Wage and Hour Division (WHD)**

### **Compliance Assistance - Wages and the Fair Labor Standards Act (FLSA)**

#### **An Overview of the Law Governing Overtime Pay Claims**

One of the most important rights afforded by federal and state employment laws is the right to overtime pay. Generally speaking, overtime pay means the extra pay that an employee is owed for working more than 40 hours in a workweek.

#### **When is an employee entitled to overtime pay?**

Assuming an employee is eligible for overtime pay; the law normally requires the payment of overtime whenever the employee works more than 40 hours in a workweek (defined as seven consecutive 24-hour periods). Importantly, overtime pay is not owed for working more than 8 hours in a day or for working on weekends or holidays; it only applies when the employee works more than 40 hours in a workweek.

#### **How much overtime pay is required?**

Many employers make the mistake of paying overtime based on an employee's base rate rather than the regular rate. If other forms of pay, such as nondiscretionary bonuses and shift differentials, raise the employee's regular rate, the overtime rate must be raised. There are forms of compensation that do not increase the regular rate. These include vacation pay, sick pay, holiday pay, entirely discretionary bonuses, and health and welfare benefits.

#### **Are all employees entitled to overtime?**

No. Many categories of workers are exempted from the overtime requirement, meaning they do not receive any extra pay for working more than 40 hours in a workweek.

The most common categories of exempt workers include:

- a) Executive employees (who manage business operations and supervise at least two other employees);
- b) Professional employees (who perform intellectual work requiring advanced knowledge and specialized training);
- c) Administrative employees (who exercise responsibility and discretion related to the business operations of the company); and
- d) Computer professionals (who perform high-level work involving computer systems and programs).
- e) However, to qualify for the administrative exemption, an employee's "primary duty" must be the performance of office work "directly related to the management or general business operations"
- f) To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. Exempt computer employees may be paid at least \$455 on a salary basis **or** on an hourly basis at a rate not less than \$27.63 an hour.
- g) Administrative, professional and computer employees may be paid on a "fee basis" rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis." To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours

#### **How is Overtime Defined?**

- Overtime must be calculated on a workweek basis. Many employers pay employees biweekly, semimonthly or monthly. Consequently, employers often calculate overtime based upon hours worked in a pay period. Some employers, for example, pay employees overtime only if they work in excess of 80 hours in a two-week pay period. This practice is illegal under the FLSA, regardless of whether an employee requests it or signs a waiver.

#### **Employees must be paid overtime on their regular rate, not their base rate.**

- Many employers make the mistake of paying overtime based on an employee's base rate rather than the regular rate. If other forms of pay, such as nondiscretionary bonuses and shift differentials, raise the employee's regular rate, the overtime rate must be raised. There are forms of compensation that do not

increase the regular rate. These include vacation pay, sick pay, holiday pay, entirely discretionary bonuses, and health and welfare benefits.

### **“Comp Time” cannot offset overtime pay requirements**

- Compensatory time or “comp time” generally is not permitted for non-exempt/hourly employees – even if they request it

### **Unauthorized overtime is still overtime**

- Make sure your employee attendance policy states that all overtime must be pre-approved by management. However, if an employee works overtime without approval, you are still required to pay him or her for the work performed. You may discipline an employee for unauthorized overtime, but you may not adjust his/her time records or refuse to pay for the hours.

### **Off-the-Clock Work is still work**

- Many employers mistakenly believe that an hourly employee may volunteer to work “off the clock,” or that work taken home is not compensable. Although it may defy logic, employers are obligated to pay non-exempt employees for all time worked, even under these circumstances. As a general rule, if a non-exempt employee performs any work on the employer’s behalf, the employee must be compensated for his/her time

## **Why Nonprofits Shouldn’t Fret Over the New Overtime Rule**

The Fair Labor Standards Act (FLSA), the law that governs who is eligible for overtime (and the minimum wage), does not extend to all employees or all employers. Unless coverage is established for the employer or employees, FLSA protections, including the new overtime rule change, do not apply.

### **FLSA coverage is determined in one of two ways:**

- First, employers who are engaged in business that generates annual business or sales revenues of at least \$500,000 per year are covered by the FLSA and must pay overtime and the minimum wage,
- Most nonprofits—including the charitable organizations are not engaged in business; they are providing charitable services. Therefore, their employees are not typically covered by the FLSA. There are certainly some nonprofits that, in addition to their core charitable activities, also manage revenue-producing activities that may bring that part of the organization, and only that part, within the scope of the FLSA. If this side business produces revenues of at least \$500,000 annually, those employees engaged in that covered commercial business are entitled to FLSA protection,
- The second way the FLSA could extend to employees of nonprofits involves only those employees whose work regularly involves them in commerce between states (“interstate commerce”), which for our purposes means individual workers who are “engaged in commerce or in the production of goods for commerce.” These employees include those who, on a regular basis, write letters that will be sent out of state, make telephone calls to persons located in other states, handle records of interstate transactions,

## **Overtime and Contracting Issues**

If your nonprofit has grants or contracts with local, state, tribal, or federal government, Policy changes coming out of Washington, DC this spring and summer have the potential to affect the costs and operations of nonprofit organizations that provide services to the public pursuant to grants and contracts with any local, state, tribal, or federal governments. The Department of Labor may soon put into place new overtime regulations that will require most employees (including nonprofits) to pay overtime to all employees earning less than approximately \$50,000 regardless of whether they are considered salaried or hourly employees.