Do the New Overtime Rules Apply To You?

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The Department of Labor's recent revision of the overtime rules promises big – and expensive – changes for employers. However, for some in the non-profit world, the overtime requirements of the Fair Labor Standards Act (the FLSA) simply don't apply at all, or apply only to specific employees. Sorting out whether these requirements apply to your organization is a very fact-specific exercise, but considering some of the general rules might help you decide whether to call your employment lawyer for a more detailed analysis.

The FLSA does not have any sort of blanket exemption for non-profit organizations or their employees. Rather, the FLSA uses two tests to determine whether employers and employees are covered by the overtime and minimum wage requirements, regardless of whether the entity is operated as non-profit or for-profit. First, the "enterprise" test determines if the organization and all its employees are covered by the FLSA. Second, even if the organization is not covered under the enterprise test, individual employees of the organization might be covered if their job duties involve interstate commerce.

Is My Non-Profit a Covered Enterprise?

Let's start with the easy stuff. The FLSA directs that some kinds of entities are always covered, regardless of non-profit status:

- Hospitals
- Institutions engaged in the care of the sick, aged or mentally ill who reside on the premises
- Preschools, schools, secondary schools or institutions of higher education

If your organization falls within that list, the FLSA requires payment of overtime and minimum wages for all your employees, unless specific employees are exempt under one of the various exemptions under the Act.

Other kinds of non-profit entities are covered enterprises if the organization meets two requirements. First, the FLSA covers only employers with two or more employees directly "engaged in commerce or in the production of goods for commerce." Commerce, under the FLSA, consists of interstate activities, including trade, transportation, transmission or communication by an organization in one state with an entity or individual in any other state. Employees can engage in interstate commerce without leaving town through activities such as soliciting donations in another state, purchasing supplies and equipment from out-of-state suppliers, or through the use of the mail or Internet. Even in small organizations, much of the day-to-day business may involve interstate commerce.

Second, before an organization will be covered by the FLSA it must also, 1) engage in ordinary commercial activities; and, 2) those activities result in sales or business in excess of $500,000 annually. Courts and the DOL have issued opinions which explain that charitable activities are

not commercial activities within the covered enterprise test, unless those activities are in substantial competition with other for-profit businesses. The DOL regulations direct that when a non-profit entity engages in ordinary commercial activities, the business activities are treated as if they were performed by a for-profit business. For example, one court held that a non-profit entity that operated employment training programs for developmentally disabled adults was a covered entity because the organization provided fee-based security and recycling services to private businesses as part of its training programs.

If your organization engages in some commercial activities, you must then consider whether your revenue from those activities reaches the $500,000 annual threshold. Donations, membership fees or other forms of revenue which are generated completely in support of an organization's non-commercial efforts are not counted toward the threshold. Only the revenue generated through the commercial activities is considered. To illustrate, one DOL guidance document explained that a charity was a covered enterprise because its thrift store was a commercial activity, and the store's annual revenue exceeded $500,000. Also, setting up sister companies for the organization's business activities may not protect the charitable entity from enterprise coverage. Commercial activities of a related entity might be included in the threshold calculation if the two entities have unified operations or are operated under common control.

Before you breathe a sigh of relief because your organization's activities are purely non-commercial, there is one more test to consider.

Are Any of My Employees Subject to FLSA Individual Coverage?

Even if an organization is not a covered enterprise, some of the individual employees may still be covered by the FLSA if the employees are engaged in interstate commerce. Individual coverage is based on the employee's work duties, regardless of the nature of the organization's business. If an individual employee's work is regularly connected with the movement of money, goods, or information across state lines, the employee is likely a covered individual under the FLSA. For example, one court held that an employee's regular use of the Internet to process credit card charges was evidence of engagement in interstate commerce. Some courts have held that janitorial employees who clean airports, bus terminals or other commercial buildings are engaged in interstate commerce because those employees' work is closely related to the flow of interstate commerce. And, individual employees who perform any step in the production of goods which are later moved or sold in interstate commerce are covered by the FLSA. Finally, the DOL has issued an opinion letter stating that employees of a non-profit group who regularly worked on mailings sent out of state were engaged in interstate commerce.

These examples help demonstrate the breadth of individual coverage under the FLSA, but do little more than scratch the surface of the fact-specific analysis necessary to determine whether an individual employee is covered by the FLSA. Keep in mind that the employer will always bear the burden of proof when it argues that its employees are not covered by the FLSA. Incorrect assumptions can be costly!

If We Are Covered by the FLSA, What Do The Revised Rules Mean For Our Non-Profit?

If you have decided that your or some of your employees are covered by the FLSA – and many non-profits will be – you need to consider which of your employees are impacted by the revised rules. The rules only affect those employees who the employer has designated as exempt from overtime, usually because those employees' primary duties meet the requirements for the administrative, executive or professional exemptions, as defined by the FLSA.

Employers are required to pay a guaranteed base salary to employees who are exempt. Currently, employees who fit within those exemptions must be paid a guaranteed weekly salary of $455, or $23,660 yearly. But, effective December 1, 2016, those exempt employees must be paid a weekly salary of $916, or $47,476 yearly. If the employer does not meet this salary requirement, the employee is not exempt from overtime even if the employee meets the duties requirements for the exemption.

Covered employers have two choices for exempt covered employees whose current salary is below the new threshold: the employer can increase the base salary, or reclassify the employee as non-exempt and begin paying overtime when the employee works more than forty hours in a workweek.

The new salary requirements will definitely be a budget-buster for many non-profits. The DOL recently issued a guidance document for non-profits, which you can find at www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf. Unfortunately, while the DOL recognizes the "enormous contribution" of non-profits, the agency is not particularly sympathetic to the challenges many non-profits will encounter in complying with these new rules.

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