THE IMPACT OF RECENT FLSA RULE CHANGES ON NON-PROFIT ORGANIZATIONS
by Cherie Velez, President, Liberty Consultants

Overview
The Department of Labor released updated rules governing the required salary level for executive, administrative, and professional exemption. This rule updates the salary threshold under which most of the employees in these categories must be paid overtime. The rule raises the salary threshold from $455 per week ($23,660 per year) to $913 per week ($47,476 per year) effective December 1, 2016.

Summary of Changes
- Salary Level Required to Quality for Exempt Level Status: $913 per week/$47,476 per year. Note: This level will be adjusted every three years, beginning on January 1, 2020.
- Definition of Highly Compensated Employee: $134,004 per year.
- Bonus Provision: Up to 10% of the base salary of $47,476 per year can be paid in the form of bonus or incentive payments, provided such payments are made at least quarterly. Annual bonus or incentive payments may not be considered.

What Stays the Same
The Standard Duties Test remains unchanged. There are three categories of employment that may be classified as exempt. These categories include executive, professional, and administrative. Each classification has strict qualifications that must be met for the employee to be categorized as exempt.

<u>Executive-level employees</u> must pass a three-pronged test, where **all three** provisions must be met in order for the employee to be classified as exempt. Exempt executive employees must:
1. Regularly supervise two or more other full-time employees.
2. Manage all or part of the non-profit organization as their primary duty.
3. Have definitive input into the job status of other employees. Examples include hiring, firing, promotions, or work assignments.

<u>Professional-level employees</u> are employees who must have “advanced knowledge” in order to perform their job. Professional exempt employees must have education that includes college, and in many instances, an advanced degree. Alternatively, they must have otherwise attained a similar level of advanced education through work experience. Examples includes attorneys, doctors, dentists, teachers, clergy, accountants, and engineers. “Creative professionals” can also be included in this category. Exempt-level creative employees can include writers, journalists, and cartoonists, or others whose work demands originality, imagination or talent.

<u>Exempt administrative employees</u> are office workers whose responsibilities are directly related to management or overall business operations, and require the administrative employee to

exercise independent judgement and discretion regarding “matters of significance.” Examples of exempt administrative employees include human resource professionals, marketing, advertising, public relations, and technical positions.

Do These Rules Apply to My Organization?
Determining whether this new regulation applies to your non-profit organization may be complicated. There are at least eleven states in which these rules will automatically apply. There are two additional tests that may be used to determine if your organization is subject to these rules. These tests are the enterprise test and the individual test. If any one of these tests pertain to your non-profit, you must comply with the revised FLSA rules. Almost every organization will fall under at least one of these rules.

State-Level Inclusion	Alaska, Washington, DC, Illinois, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Carolina, and Ohio. More states may be included as a result of pending court decisions.
Enterprise Coverage Test	Annual revenue in excess of $500,000 for activities categorized as “operating a business.” Revenue received by a non-profit to be used in furtherance of charitable activities is exempted from such revenue. Examples of revenue that would be excluded include donations, grants, and membership fees.
Individual Coverage Test	An individual is covered if engaged in interstate commerce or the production of goods and/or services for interstate commerce. Examples can include making out-of-state phone calls, sending or receiving mail or email, or ordering goods from out-of-state vendors.

What Are My Options for Implementing the Updated Salary Level Requirements?
For each employee who will be entitled to overtime as a result of these new rules, the employer may either increase the salary of employees who also meet the duties test to a level that is at least $47,476 per year, or convert the employee to an hourly (non-exempt) status, and begin paying overtime at a rate of one and one-half times the regular pay rate for all hours worked in excess of forty in a week.

What Do I Need to Do Now?

Although this rule does not go into effect until December 1, 2016, employers should immediately review the salary level and position description of each employee. It is important to recognize that many exempt-level employees view this classification as a status symbol or a perk. That said, it's important to convey any change in status from exempt to non-exempt in a way that ensures the employee that he/she is valued, and that the change has nothing to do with their performance.

Each organization should review the following policies to ensure both the organization and the employee are protected:

- Clarify the Work Week: Organizations must clarify in writing what makes up the standard work week. The standard work week is a seven-day period during which any hours worked by a non-exempt employee in excess of forty are compensated at one and one-half times the standard rate of pay. Remember that schedules can be adjusted to accommodate projects or meetings. If an employee must come in early or stay late, they can balance those extra hours by coming in late or leaving early on another day.

- Adopt a Time-Keeping System: If not already in place, each organization should research and adopt a time tracking system that makes it easy for employees to record time worked. Because time worked may be incurred outside the office, the best option will allow employees to record time on a mobile device or computer. Provide clear instructions to all non-exempt employees on when and how to record hours.

- Overtime: Each organization should review its overtime policy and, if not already in place, implement a policy that requires advance approval from a manager or supervisor. It's important to note that refusing to pay an employee for unauthorized time worked is not permissible.

- Meal and Other Breaks: Most states require that employers provide meal and/or break periods for non-exempt employees, depending upon the number of hours worked. Employees must be informed of these required break periods, and no work should be performed during these break periods. When no work is performed, these break periods are unpaid.

- Unpaid Work: Non-exempt employees must understand that they will be prohibited from taking calls, answering emails, or working on projects outside of normal work hours. These activities are all work related, and non-exempt employees would be required to record hours worked while performing these tasks.

- Travel Time: Non-exempt employees must be paid for travel time related to their position outside of normal morning and evening commutes.

- Evaluate Benefits Policies: Some organizations have different benefits for exempt and non-exempt employees including healthcare coverage, paid time off accrual, and bonuses. If this is the case, it will be important to either re-evaluate these policies, or clearly communicate the changes well in advance of the December 1, 2016 implementation date.

- Revise Company Budget: Most organizations will be affected by these rule changes. Calculate the impact on your budget and plan accordingly.

Conclusion

The labor law changes which were announced on May 17, 2016 will affect almost every non-profit organization. While it is true that these changes will not be implemented until December 1, 2016, it is imperative that organizations begin planning for and communicating changes now. While there will certainly be an effect on the organization's budget, the biggest impact may ultimately be on employee morale. Plan now for how to communicate these changes to your team.

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