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# COMPLYING WITH USDOL OVERTIME REGULATIONS

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# TOPICS FOR THE SEMINAR

1. FLSA Introduction
2. FLSA coverage (enterprise v. individual coverage)
3. Employment relationships – volunteer issue
4. MW/OT basics required by FLSA; exemptions
5. The new rule – overview – overview and key features
6. Implication for nonprofit employers/compliance strategies
7. Q & A Session

# FLSA Introduction

## Federal Law

Signed on June 25, 1938 by FDR

## Basic Provisions

- Minimum Wage
- Overtime
- Prohibition of use of oppressive child labor
- Each workweek stands on its own

USDOL administers and enforces the FLSA; adopts regulations to achieve enforcement. USDOL passed a new rule updating the overtime regulations on May 18, 2016, which is the focus of this seminar.

# FLSA Introduction

- New Hampshire has its own wage and hour laws found at RSA 275 and Lab. Reg. 800. See NH Department of Labor Website. [www.nh.gov/labor](http://www.nh.gov/labor)
- FLSA does not preempt state laws
- IMPORTANT because employees are entitled to most favorable treatment – federal or state

# FLSA COVERAGE

## Does this new regulation apply to my nonprofit?

Neither the FLSA nor the Department's regulations provide an exemption from overtime requirements for non-profit organizations. While some non-profits may not be covered under the FLSA, it is likely that many employees of non-profits are entitled to FLSA protections.

# FLSA COVERAGE

There are two types of coverage under the FLSA:

- Enterprise Coverage – If the business is covered under the FLSA as an “enterprise,” then all employees are entitled to protections of FLSA;
- Individual Coverage - Even if the business is not covered as an “enterprise,” the INDIVIDUAL EMPLOYEES may still be covered and entitled to protections of FLSA.

# ENTERPRISE COVERAGE

- Enterprise Coverage – To qualify for enterprise coverage, the “enterprise” must have at least two employees and must be involved in ordinary commerce with gross annual dollar volume (“ADV”) of sales made or business done of at least \$500,000.
  - Coverage is automatic for schools, hospitals, nursing homes, or other residential care facilities - regardless of their ADV.
  - Coverage is also automatic for all governmental entities at whatever level of government, no matter how big or small.

# ENTERPRISE COVERAGE

*Enterprise coverage* applies only to activities performed for a business purpose. It typically does not extend to the eleemosynary, religious, educational, or similar activities of organizations operated on a nonprofit basis where such activities are not in substantial competition with other businesses.

The ADV threshold only includes activities performed for a business purpose and does not include income derived from eleemosynary activity such as contributions, membership fees, or dues, or donations (cash or non-cash) used in the furtherance of charitable activities.

See 29 C.F.R. § 779.214; see also Wage and Hour Opinion Letters May 3, 1994; and December 16, 1968; September 29, 2008.



# INDIVIDUAL COVERAGE

If enterprise coverage doesn't apply – FLSA still might apply to the individuals working for the non-profit. Individual coverage is based on the individual's activities within the enterprise, and not on the enterprise itself.

# INDIVIDUAL COVERAGE

An individual whose work affects interstate commerce is covered as an individual - "interstate commerce" is defined so broadly that practically anything fits, such as ordering, loading, or using supplies from out of state, accepting payments from customers based on credit cards issued by out-of-state banks, making phone calls to other states, typing letters to other states and so on.

Domestic Service employees are covered on an individual coverage basis.

# FLSA COVERAGE

As a general rule, start with the assumption that almost every employee in the U.S. is covered by the FLSA.

# FLSA COVERAGE - EXAMPLES

A non-profit museum operates a gift shop that employs staff?

Enterprise?

Individual?

# FLSA COVERAGE – EXAMPLES

A non-profit animal shelter provides services for a fee to customers, such as for spaying/neutering, are provided for a business purpose to the general public in competition with other businesses (pet stores, kennels, etc.).

Enterprise?  
Individual?

# FLSA COVERAGE – EXAMPLES

A non-profit in Keene, NH often receives cash and check donations from individuals in Massachusetts, and employees are involved with soliciting or processing these donations.

Enterprise?  
Individual?

# EMPLOYMENT RELATIONSHIPS

## Employee or Volunteer?

# VOLUNTEERS STATUS UNDER THE FLSA

To qualify as a volunteer, rather than an employee under the FLSA, an individual must satisfy the following three criteria:

1. The individual must provide services for civic, charitable or humanitarian reasons without promise, expectation or receipt of compensation for the services rendered.
2. The employer must not coerce the employee to volunteer his/her services.
3. The employee may not volunteer to do the same job he/she is paid to do as an employee for the same employer.



Although a volunteer cannot be “compensated,” he/she can be paid expenses, reasonable benefits, or a nominal fee.

- These payments cannot be a substitute for compensation or tied to productivity.
- Amount paid cannot be based on number of hours worked (substitute for compensation) or amount of work completed.
- “20 percent test” – The fee paid (separate from expenses) is generally considered “nominal” if it does not exceed 20 percent of the amount that would otherwise be required to hire a permanent employee for the same services.

# VOLUNTEERS STATUS UNDER NEW HAMPSHIRE LAW

New Hampshire has slightly different (and more stringent) criteria to qualify as a volunteer.

To qualify as a “bonafide volunteer” under New Hampshire law (NH Lab 803.05), an individual must satisfy the following criteria:

1. The individual must perform work for public, charitable, or religious facilities;
2. The individual must satisfy the requirements of a volunteer under the FLSA;
3. The individual cannot displace a paid employee; and
4. The individual’s duties cannot be of a type that necessarily or traditionally leads to paid employment.

# VOLUNTEER IMMUNITY (RSA 508:17)

RSA 508:17 makes volunteers for non-profit organizations immune from liability if three criteria are satisfied.

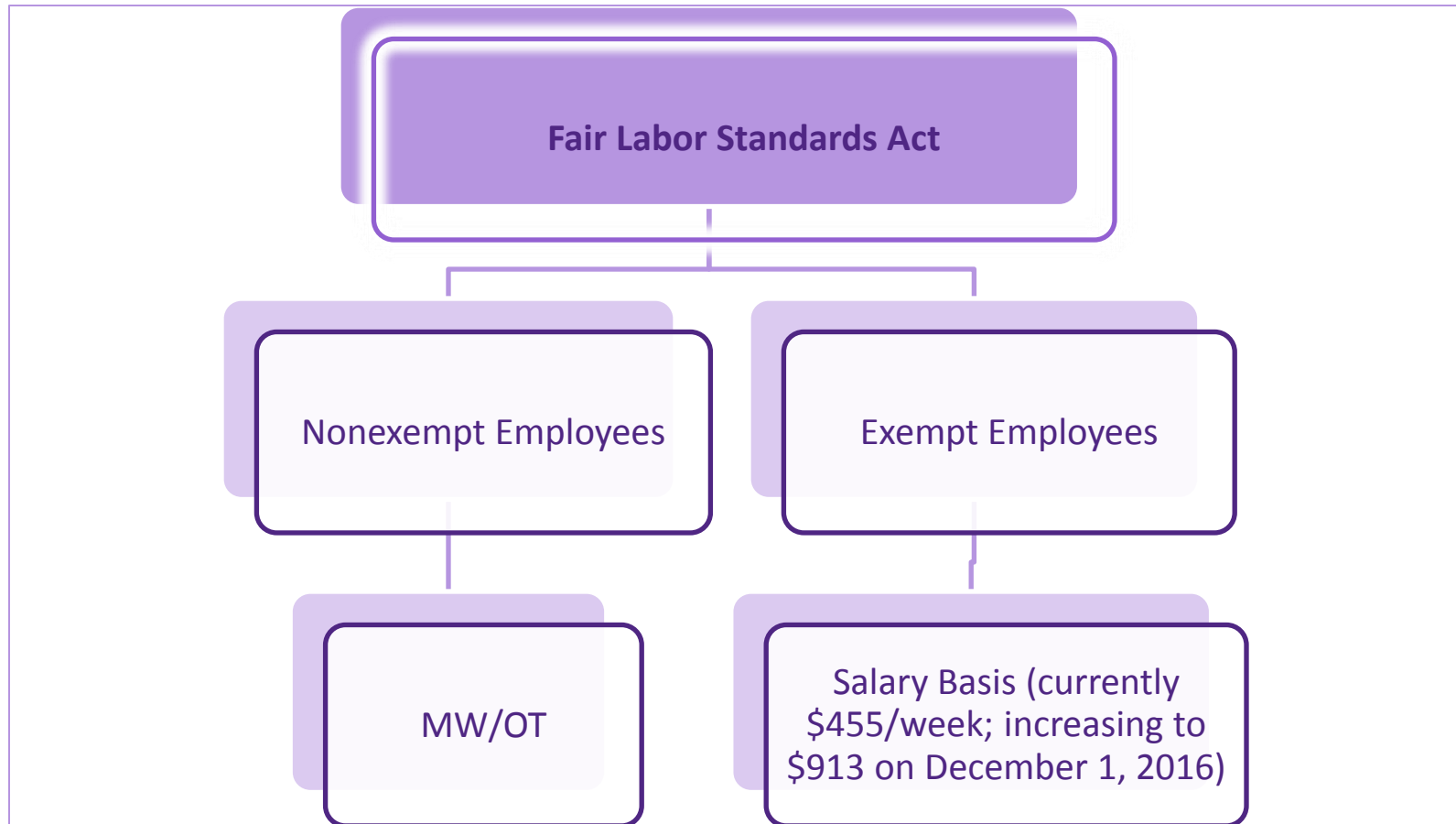
1. The non-profit organization must have a record indicating that the person claiming to be a volunteer for the organization is a volunteer for such organization;
2. The volunteer must be acting in good faith and within the scope of his/her official functions and duties with the organization; and
3. The damage or injury caused by the volunteer cannot be caused by willful, wanton, or grossly negligent misconduct by the volunteer.

RSA 508:17 also limits a non-profit organization's liability for negligent acts by a volunteer to \$250,000 per person or \$1,000,000 per incident.

**The definition of a volunteer for purposes of RSA 508:17 is different than in the wage and hour context:**

**Volunteer means an individual performing services for a non-profit organization or government entity who does not receive compensation, other than reimbursement for expenses actually incurred for such services.**

# MW/OT BASICS REQUIRED BY FLSA; EXEMPTIONS



# MW/OT BASICS REQUIRED BY FLSA; EXEMPTIONS

- The FLSA generally requires employers to pay nonexempt employees a minimum wage at a rate of \$7.25 per hour.
- The Act also imposes overtime pay requirements which compel employers to pay their employees at least one and one-half times their regular rates for all time worked in excess of 40 hours in any one workweek.
- However, specific provisions of the FLSA provide exceptions to these general rules for “white collar” exempt employees.

# MW/OT BASICS REQUIRED BY FLSA; EXEMPTIONS

Overtime is based on the regular rate  
– which is calculated based on total  
earnings for the workweek divided  
by number of hours worked.

# MW/OT BASICS REQUIRED BY FLSA; EXEMPTIONS

## White Collar Exemptions:

- Under Section 13(a) of the FLSA, employees who work in a bona fide executive, administrative, or professional capacity or as outside salespeople are exempt from the overtime provisions of the Act.
- All exempt employees in these categories must be paid on a salaried basis, and at a minimum rate of compensation. In examining an employee's classification, it is the employee's actual duties, not the job title or job description, which determines whether the employee qualifies for the exemption.



# WHITE COLLAR EXEMPTIONS

Three Part Test:

- (1) Salary Basis;
- (2) Salary Level;
- (3) Performs specific White Collar duties

# WHITE COLLAR EXEMPTIONS

## (1) Salary Basis

- With limited exceptions, to qualify for any of the white collar exemptions, an employee must be paid “on a salary basis” of not less than \$455 per week.
- To be paid “on a salary basis,” each pay period an employee must receive “a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”
- A salaried employee must receive his or her full salary for any work week in which he or she performs any work, without regard for the number of days or hours worked.
- New Hampshire law expands on the FLSA as it requires that a salaried employee be paid in full for every “pay period” in which the employee performs any work.
- In accordance with the FLSA, exempt employees need not be paid for any workweek in which they perform no work.

# WHITE COLLAR EXEMPTIONS

## (2) Salary Level

Focus of the New Rule

Currently set at \$455 per week;

Increasing to \$913 per week as of  
December 1, 2016

# WHITE COLLAR EXEMPTIONS

## (3) Duties Test

An employee's primary duty must involve the kind of work associated with exempt, administrative or professional employees.

See Fact Sheet 17A (provided)

# POP QUIZ

Are these positions exempt or nonexempt?

1. Executive Director
2. Chief Financial Officer
3. Clerk paid on a salary basis

# OVERVIEW OF NEW RULES

# EXEMPTION TESTS

- **Salary Base Test (How the employee is paid)**
- **Salary Level Test (How much the employee earns)**
- **Duties Test (Type of work the employee performs – Professional, Administrative, or Executive)**

**The new rules only change the Salary Level Test. They do not change the Salary Basis Test or Duties Test.**

# CHANGES TO SALARLY LEVEL TEST

## Minimum Salary

- **Old Rule - \$455/week; \$23,660/year**
- **New Rule - \$913/week; \$47,476/year**



# Highly Compensated Employees

- **Old Rule - \$100,000/year**
- **New Rule - \$134,400/year**
- **Still have to satisfy the following criteria:**
  - The employee's primary duty must include performing office or non-manual work; and
  - The employee must customarily and regularly perform at least one of the exempt duties of an exempt professional, administrative or executive employee (even if the employee does not meet the other requirements)

## Automatic Increases

- The minimum salary and compensation levels will be automatically updated every three years starting in 2020.

## Bonuses/Incentives/Commissions

- The new rule allows up to 10% of the salary threshold for non-highly compensated employees to be met by non-discretionary bonuses, incentive pay, or commissions, provided these payments are made on at least a quarterly basis.

As part of the announcement of the Final Rule, the USDOL stated that it would be publishing a time-limited non-enforcement policy for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. More specifically, the USDOL stated that “[f]rom December 1, 2016, to March 17, 2019, the Department will not enforce the updated salary threshold of \$913 per week for the subset of employers covered by this non-enforcement policy.”

# IMPLICATION FOR EMPLOYERS/COMPLIANCE STRATEGIES

New regulations apply to for-profit and non-profit businesses alike;

Disproportionate impact on budget of non-profits – no easy way to “raise prices”;  
no quick fixes for budget gaps for management non-profits.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

Keep in mind -- many employees of non-profits will not be impacted;

Nonexempt hourly employees are not impacted;

Highly compensated who earn more than minimum are not impacted.

For those employees that will be impacted – three primary approaches to achieve compliance.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

#1 - Raise salaries: For workers whose salaries are close to the new threshold and who meet the duties test, employers may choose to raise these workers' salaries to meet the new threshold and maintain their exempt status.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

#2 – Reclassify the Employee to Nonexempt Salaried and pay overtime.

The law does not require that newly overtime-eligible workers be converted to hourly pay status.

**Note:** This approach might work well for employees who usually work 40 hours or fewer (therefore no overtime owed), but have occasional needs that require overtime for which employers can plan and budget the extra pay during those periods.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

Example: Currently have an exempt manager paid \$35,000 per year. Don't have funds to increase to \$47,476 per year. Reclassify as salaried exempt at \$35,000 per year, and pay overtime for time worked in excess of 40 hours in given workweek. To figure out OT rate, convert salary to hourly rate (will need to know how many hours per week salary is designed to cover, which should be documented in writing with the employee).



# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

#3 – Reclassify the Employee to Nonexempt Hourly and  
pay overtime

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

## Two other compliance issues:

1. Any changes to rate of pay, or terms and conditions of pay, must be documented in writing and signed by the employee and kept in personnel file. See N.H. Lab 803.03.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

2. If you reclassify to nonexempt, then need to keep track of hours worked.  
See N.H. Lab 803.03(f) (next slide).

**N.H. Lab 803.03(f)** Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:

- (1) Record payroll information so that time records, showing the time work began and ended including any bonafide meal periods, shall support individual pay sheets and that payroll sheets, in turn, shall support canceled checks or cash receipts;
- (2) Require that time records with entries that are altered shall be signed or initialed by the employee whose record was altered;
- (3) Not make use of automated time keeping devices or software programs that can be altered by an employer without the knowledge of the employee, or that do not clearly indicate that a change was made to the record;
- (4) Make such good records as shall show the exact basis of remuneration of an employee's compensation;
- (5) Make any such records available if requested, to show other than an employer-employee relationship; and
- (6) Maintain on file a signed copy of the written notifications, signed by the employee and provided to each employee as required by Lab 803.03.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

For now, what is important in terms of management as we approach the December 1, 2016 deadline –

1. Review salaries and classifications of current staff – Review FLSA exempt v. nonexempt classification of staff and determine who may be affected by the USDOL-mandated salary increase. Are the classifications correct under the duties test? If so, then, calculate the financial impact if implement USDOL increase in order to maintain the exemption compared with what nonprofit might pay in overtime costs if these employees were reclassified as nonexempt. If the classification is incorrect upon review, then you know you need to reclassify.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

2. Put systems in place to monitor work hours and the use of overtime –Track hours employees work, their tasks and how much of their time is spent on each, and how much overtime they tend to work. Tighten up processes and policies for approval of overtime; train supervisors on overtime management.

# IMPLICATION FOR EMPLOYERS/ COMPLIANCE STRATEGIES

3. Assess staffing models – In order to avoid/manage overtime costs for those that will need to be classified as nonexempt, assess what options are available for creating new positions, temporary positions, job-sharing, outsourcing jobs for special projects or events.

# Thank you!

Please do not hesitate to contact us if you have any questions.

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