



FLORIDA  
nonprofit  
alliance

# Overtime Changes and the Effects on Nonprofits

June 11, 2024



## Mission:

Florida Nonprofit Alliance is the state's collective voice, respected advocate, effective connector, and powerful mobilizer for the nonprofit sector.

## Website:

[www.flnonprofits.org](http://www.flnonprofits.org)



# The FNA Team



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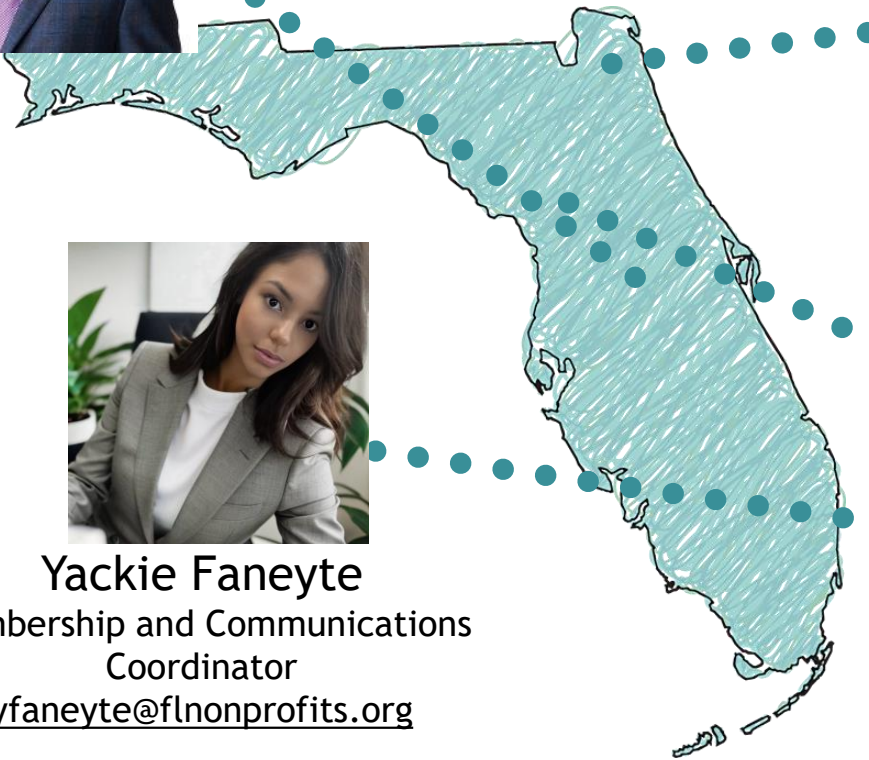
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# FNA Members

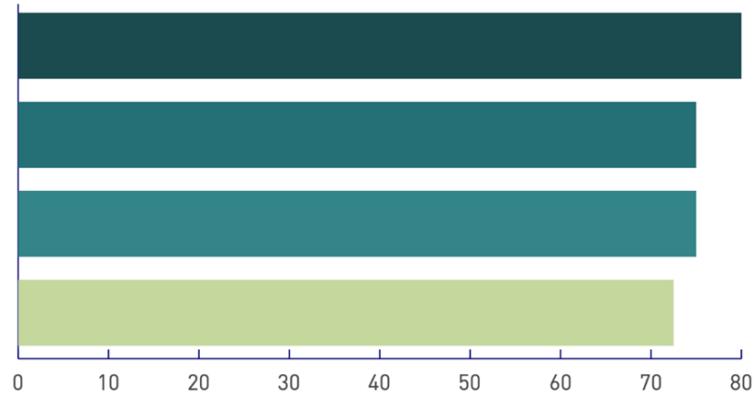
## Our members join FNA:

To show support for FNA or the Florida nonprofit sector overall

To get access to other member benefits, besides advocacy and lobbying information

To receive information about legislative activities at the state and local levels

To network with other nonprofits around the state



"FNA provides critical support to all Florida nonprofits. A must join!"

"Great way to leverage a small organization's impact at the state level."

"The information provided is always timely and relevant. Appreciate the services we get for our membership."

# FNA Resources

## ▶ General Advocacy

- ▶ FNA Policy Agenda
- ▶ Elections and Voter Engagement
- ▶ Lobbying Guidelines
- ▶ Core Advocacy Curriculum

## ▶ Research

- ▶ Statewide Compensation Research
- ▶ Nonprofits Survey - annual
- ▶ Florida Nonprofit Economic Impact
- ▶ Individual Giving

## ▶ Events

- ▶ **Member Orientation**  
July 17, 10-11AM ET
- ▶ **Advocacy 101**  
July 25, 2-3:30PM ET

## ▶ Tools

- ▶ Legal Compliance Checklist
- ▶ Adhering to State Laws
- ▶ Disaster Planning
- ▶ Diversity and Equity resources



## Voice of the Sector

ings!

be you are all healthy and safe. Florida has been in phase 1 of re-opening since April 4th. Many nonprofits never closed their doors during quarantine but are still exploring what re-engagement looks like for their clients and their staff.

FLA, in partnership with the Oklahoma Center Center for Nonprofits, has created a [re-engagement guide](#) to help you make the best decision for your agency and your team. We hope this tool is a useful guide for you.

Our team has been hard at work gearing up for our economic impact report and keeping you updated on the latest from Tallahassee and Washington D.C. Remember to visit our COVID-19 [resources](#) page to keep up with the latest.

In addition, we have a full calendar of events scheduled over the next month. Check out the full list [here](#).

If there is anything else that you feel would help, please do not hesitate to reach out. Thank you for all you do for Florida nonprofits.

Sincerely,  
Sabeen Perwaiz

## HEROES ACT

Speaker Pelosi has released the [Health and Economic Recovery Omnibus and Emergency Solutions Act](#) (HEROES Act). See also this [one-Pager](#) and

## Newsletters

- ▶ [Sample newsletter](#)
- ▶ Sign up at <https://flnonprofits.org/>

# Housekeeping

- ▶ All participants today are starting on mute - please remain on mute
- ▶ Type your questions in the chat box - we will be monitoring them
- ▶ Questions will be shared by the moderators at the end
- ▶ Captioning is available on your Zoom menu bar
- ▶ This training is not being recorded, but slides and information will be sent out after.





**GUNSTER**  
FLORIDA'S LAW FIRM FOR BUSINESS



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nonprofit  
alliance

# **Webinar: Fair Labor Standards Act (FLSA)**

## **June 11, 2024**

# Presenters



**Asghar Syed** is a litigator and trusted advisor to businesses including those in the healthcare, transportation, education, and franchise sectors. Asghar's practice focuses on complex business and employment litigation. Asghar represents employers in restrictive covenant, compensation, discrimination, accommodation, and retaliation disputes.



**Mark Fereg** represents clients in management-side labor and employment matters including issues related discrimination, retaliation, harassment, wage and hour, restrictive covenants, and employee leave. Mark also counsels and advises clients on a wide range of day-to-day employment and labor issues, including policy review, workplace investigations, and planning.

# Disclaimer

Today's presentation and the following slides are intended to provide a high-level overview of the FLSA, and specific anticipated changes. They do not constitute legal advice.

Because the facts and circumstances of your workplace are unique, your organization's rights and obligations under the FLSA may not be obvious and they are not covered herein. To ensure FLSA compliance for your organization, we strongly encourage you to consult competent legal counsel and appropriate human resources and payroll professionals.



# Agenda

- Introduction to the FLSA.
- Impending changes.
- Is your organization impacted?
- What are the implications of:
  - increasing salaries?
  - switching to overtime?
- Specific considerations for non-profits.

# Federal Law

The FLSA is administered by the Wage and Hour Division (WHD) of the US Department of Labor (DOL).

Under the FLSA an employee may assert a private cause of action against his or her employer.

If an employer is found to violate the statute, the employer may be required to pay:

- Back pay for two years, or three years if the employer's violation was willful.
- Liquidated damages, unless the employer can show it acted in good faith.
- The prevailing employee's attorneys' fees and costs.

# Wage and Hour Laws

Wage and hour laws govern (among other things):

- Minimum wages.
- Maximum hours.
- Overtime compensation.
- Payroll requirements.
- Recordkeeping.
- Equal pay for equal work.

# Impending Changes

On April 23, 2024, the DOL announced a final rule to increase the required salary thresholds for certain exemptions.

The first increase (roughly 20%) will go into effect on July 1, 2024.

The thresholds will increase again (another roughly 20%) on January 1, 2025, and thereafter update at three-year intervals.



# Impending Changes

	<b>Before 2020</b>	<b>January 1, 2020</b>	<b>July 1, 2024</b>	<b>January 1, 2025</b>
Salary threshold	\$455 weekly or \$23,660 yearly	\$684 weekly or \$35,568 yearly	\$844 weekly or \$43,888 yearly	\$1,128 weekly or \$58,656 yearly
Highly Compensated Employee	\$100,000 yearly	\$107,432 yearly	\$132,964 yearly	\$151,164 yearly

Beginning July 1, 2027, the salary threshold and minimum annual compensation are scheduled to update every three years, based on current wage data.

# Challenge to the 2019 final rule

In *Mayfield v. DOL*, 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023), a federal district court upheld the DOL's 2019 final rule, finding that the agency had statutory authority to impose a minimum salary requirement for exemption.

This decision is on appeal before the Fifth Circuit, which on June 3, 2024, tentatively scheduled oral argument for August 5, 2024.

# Challenges to the 2024 final rule

In *Flint Avenue, LLC v. Su, et al.*, 5:24-CV-130 (N.D. Tex., filed June 3, 2024), a software company seeks to enjoin the DOL's 2024 final rule, arguing that the agency exceeded its authority.

In *State of Texas v. DOL, et al.*, 4:24-CV-499 (E.D. Tex., filed June 3, 2024), Texas seeks to enjoin enforcement of the DOL's 2024 final rule, arguing that the rule is improper for the same reasons the court struck down the agency's 2016 rule.

In *Plano Chamber of Commerce, et al. v. Su*, 4:24-CV-468 (E.D. Tex., filed May 22, 2024), a group of businesses and business associations assert that the DOL's 2024 final rule "largely repeats" the errors of the agency's 2016 rule.

# Is your non-profit implicated?

## Enterprise coverage.

- Nonprofit hospital, school, preschool, or residential medical or nursing care facility.
- Any nonprofit with \$500,000 or more in annual commercial sales.
- Income from contributions, membership fees, dues (except any part which represents the value of a benefit, other than of token value, received by the payer), and donations (cash or non-cash), used in the furtherance of charitable activities, are **not** considered in determining whether an organization has met the dollar threshold required for FLSA enterprise coverage.

## Individual coverage.

- Individuals who regularly engage in interstate commerce.
- Interstate commerce is a **broad term**. It encompasses, for example making/receiving interstate telephone calls, shipping materials to another state, and transporting persons or property to another state.

# Workers not Covered

Workers who are not **employees** are not subject to the FLSA, including:

- Independent contractors.
- Volunteers.
- Interns.
- Trainees.

# Independent Contractors

On January 10, 2024, the DOL published a final rule, effective March 11, 2024, revising the guidance on how to analyze who is an employee or independent contractor under the FLSA.

<https://gunster.com/podcasts/> - Episode 7



Defining the Classification of Independent Contractors

Gunster On The Go



00:03 | 19:44



1x More Info Share

# Minimum Wage

Under Federal Law, employers must pay a minimum wage of \$7.25 per hour for all hours worked.

Under Florida Law, employers must pay a minimum wage of \$12.00 per hour (increasing by \$1.00 annually to \$15.00 per hour effective September 30, 2026).

# Exempt vs. Nonexempt Status

Generally, to be classified as exempt from the FLSA's minimum wage and overtime compensation requirements, an employee's job duties and responsibilities and their compensation must satisfy both:

- The salary basis test.
- The duties test.



# Exempt Employees

Exempt employees include individuals employed as *bona fide*:

- Executive employees.
- Administrative employees.
- Professional (learned and creative) employees.
- Highly compensated employees.
- Computer professionals.
- Outside sales employees.
- Commissioned retail sales employees (overtime pay only exemption).

# Salary Basis Test

The salary basis test generally involves two components.

- Satisfies a minimum threshold.
  - The employee must receive a predetermined amount at least equal to \$684 a week (increasing to \$844 per week on July 1, 2024), paid on a salary or fee basis.
- Is paid on a “salary or fee basis.”
  - The predetermined amount cannot be subject to reduction because of the quality or quantity of the employee’s work.
  - The employer cannot take any improper deductions from the predetermined amount.

# Duties Test

The duties test typically:

- Refers to an employee's "primary duty."
- Differs for each exemption.

An employee's **primary duty** is generally:

- Their principal, main, major, or most important duty.
- Based on all the facts, with a major emphasis on the employee's job as a whole.
- Not determined by job titles or descriptions.
- Not determined by the amount of time an employee spends performing certain work, though time can be a useful guide.

# Duties Test: Executive Employees

Employees working in a *bona fide* executive capacity are exempt if they either qualify as a business owner or meet each of these criteria:

- Have as their primary duty the management of either:
  - The enterprise in which the employee is employed.
  - A customarily recognized department or subdivision of the enterprise.
- Customarily and regularly direct the work of two or more other full-time employees (or the equivalent).
- Have the authority to hire or fire other employees or provide recommendations on the hiring, firing, advancement, promotion, or other change in the employment status of other employees that is given particular weight.

# Duties Test: Administrative Employee

To qualify for the administrative exemption, the employee's primary duty must both:

- Be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.
- Include the exercise of discretion and independent judgment for **matters of significance**.

The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

# Duties Test: Administrative Employee

As used in the regulations, the term “matters of significance” refers to the level of importance or consequence of the work performed. 29 CFR § 541.202(a).

An employee does not exercise discretion and independent judgment with respect to matters of significance just because the employer will experience financial losses if the employee fails to perform the job properly. 29 CFR § 541.202(f). For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee’s neglect. *Id.*

# Duties Test: Learned Professional

- To qualify for the learned professional exemption, the employee's:
  - Primary duty must be the performance of work requiring advanced knowledge.
  - Advanced knowledge must be in a field of science or learning.
  - Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- Generally, the employee must have an education beyond a bachelor's degree to do the job.

# Duties Test: Learned Professionals

A field of science or learning generally includes:

- Law.
- Medicine.
- Theology.
- Accounting (CPAs).
- Actuarial computation.
- Engineering.
- Architecture.
- Teaching.
- Various types of physical, chemical, and biological sciences.
- Pharmacy.
- Other occupations that have a recognized professional status.



# Duties Test: Creative Professionals

To qualify for this exemption, a creative professional employee's primary duty must involve work requiring **invention, imagination, originality, or talent**, in a recognized field of artistic or creative endeavor. This generally includes:

- Actors.
- Musicians, composers, conductors, and soloists.
- Painters who are given, at most, the subject matter of the painting.
- Cartoonists who are only told the title or underlying concept of a cartoon.
- Essayists, novelists, short story writers, and screenplay writers who chose their own subjects.
- Certain writers within advertising agencies.

# Duties Test: Computer Professionals

Computer professional employees may be exempt if they are employed as a computer systems analyst, programmer, software engineer, or other similarly skilled worker in the computer field and their primary duty includes any of the following:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, based on and related to user or system design specifications.
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems.
- A combination of these duties.

# Duties Test: Highly Compensated

Employees with a total annual compensation of at least \$107,432 (going up to \$132,964 on July 1, 2024), including at least \$684 a week paid on a salary or fee basis, are exempt from FLSA minimum wage and overtime requirements, if they both:

- Perform office or nonmanual work.
- Customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

# Duties Test: Outside Sales Employee

The salary basis test does not apply to the outside sales exemption.

To qualify for the outside sales exemption, employees must:

- Have as their primary duty either:
  - Making sales within the meaning of FLSA Section 3(k).
  - Obtaining purchase orders or contracts from customers paying for services or for the use of facilities.
- Be customarily and regularly **engaged away** from the employer's place of business.

# Duties Test: Commissioned Retail Employees

The salary basis test does not apply to the commissioned retail sales exemption.

To qualify for this exemption:

- The employee must be employed by a retail or service establishment.
- The employee's regular rate must be at least 1.5 times the federal minimum wage during each workweek the employee works overtime hours.
- More than half of the employee's total compensation in a representative period must represent commissions on goods or services.

# Compensable Time

Under the DOL's “**continuous workday**” principle, all activities that occur between the beginning and end of a workday may constitute compensable working time.

When a workday begins and ends can be more complicated than simply clocking in and out. Employers must consider:

- Activities occurring before or after an employee's principal work activities. If preliminary or postliminary activities are sufficiently related (integral and indispensable) to the employee's principal activities, they may be compensable.
- Off-hour emails or texts regarding work.

# Compensable Time (cont'd)

Commonly litigated issues include:

- Travel time to and from work and travel for work.
- Security or bag checks.
- Donning and doffing (time spent putting on and taking off clothing, safety equipment, and work-related gear).
- Walking time (from locker to time clock, from time clock to front door).
- Pre-shift activities (booting up a computer, pre-shift meetings).
- Waiting or on-call time.
- Training, onboarding, and seminars.
- Testing.
- Volunteer work.

# Calculating Overtime

- Generally, overtime pay = 1.5 x regular rate of pay.
- Regular rate of pay includes all remuneration paid to, or on behalf of, the employee for work performed during the week, including:
  - Wages.
  - Salary.
  - Commissions.
  - Non-discretionary bonuses.



# Calculating Overtime (cont'd)

An employee's regular rate of pay **excludes**:

- Gifts.
- Pay for occasional periods of no work, such as paid vacation and sick leave.
- Reimbursements for work-related expenses.
- Discretionary bonuses.
- Benefit plan contributions and payments to certain profit-sharing plans.
- Certain premium payments.
- Certain stock-related income.
- Talent fees.

# Calculating Overtime (cont'd)

- Overtime pay is calculated on a **workweek basis** and averaging hours over two or more weeks is not permitted.
- An employee can be paid on a piece-rate, salary, commission, or some other basis, but all earnings (except the statutory exclusions) must be totaled and converted to an hourly rate (the regular rate).
- The regular rate is typically calculated by dividing the total pay in a given workweek by the total number of hours actually worked that week.

# Hypothetical 1

John earns \$12 an hour. John receives no other compensation includable in the regular rate.

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This week, John worked 45 hours. How much is John entitled to for the week?

# Answer to Hypothetical 1

John is entitled to \$570.

- John's total straight-time earnings are \$540 (\$12 an hour x 45 hours).
- Because John has no other compensation includable in the regular rate, his hourly rate is the same as his regular rate (\$540 total straight-time earnings ÷ 45 total hours worked = \$12 an hour regular rate).

# Answer to Hypothetical 1 (cont'd)

- John's overtime compensation is \$30 ( $\$12 \text{ an hour regular rate} \times 0.5 \times 5 \text{ overtime hours}$ ).
- Remember that the straight-time earnings have already been calculated for all hours worked (45), so the additional amount for each overtime hour worked (the overtime premium) is  $1/2$  the regular rate of pay.
- John's total pay for the week is \$570 or:
  - \$540 total straight-time earnings; plus
  - \$30 additional half-time earnings (overtime premium).

# Hypothetical 2

Ashley is a nonexempt sales clerk employed by Ruby Jewelry. She is paid \$20 an hour, plus commissions. This week, Ashley worked 50 hours and earned \$500 in commissions. She also received an annual gift from Ruby Jewelry worth \$500.

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How much is Ashley entitled to?

# Answer to Hypothetical 2

Ashley's total compensation for the week is \$2,150.

- Ashley's hourly rate and commissions are included in her regular rate, but the annual gift is not.
- Ashley's total straight-time earnings are \$1,500 or:
  - \$1,000 weekly salary ( $\$20 \text{ an hour} \times 50 \text{ total hours worked}$ ); plus
  - \$500 commissions for the week.

# Answer to Hypothetical 2 (cont'd)

- Ashley's regular rate of pay is \$30 an hour (\$1,500 total straight-time earnings  $\div$  50 total hours worked).
- Ashley's overtime compensation is \$150 (\$30 an hour regular rate  $\times$  0.5  $\times$  10 overtime hours).
- Ashley's total compensation for the week is \$2,150 or:
  - \$1,000 straight-time earnings (\$20 an hour  $\times$  50 hours worked);
  - \$150 additional half-time earnings (overtime premium);
  - \$500 weekly commissions; plus
  - \$500 gift.



# Hypothetical 3

Joe earns a weekly salary of \$1,000. Joe and his employer agree that his salary is intended to cover 40 hours a week, the employer's normal workweek. Joe is a nonexempt employee.

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This week, Joe worked 44 hours. How much is Joe entitled to for the week?

# Answer to Hypothetical 3

Joe's total compensation for the week is \$1,150.

- Joe's total straight-time earnings are \$1,100 or:
  - \$1,000 weekly salary.
  - $\$1,000 \text{ weekly salary} \div 40 \text{ hours salary is intended to cover} = \$25 \text{ hourly rate.}$
  - $44 \text{ total hours worked} \times \$25 \text{ hourly rate} = \$1,100 \text{ base salary plus additional straight-time earnings.}$

# Answer to Hypothetical 3 (cont'd)

- Joe's regular rate of pay is \$25 an hour (\$1,100 total straight-time earnings  $\div$  44 total hours worked).
- Joe's overtime compensation is \$50 (\$25 an hour regular rate  $\times$  0.5  $\times$  4 overtime hours).
- Joe's total compensation for the week is \$1,150 or:
  - \$1,100 total straight-time earnings; plus
  - \$50 additional half-time earnings (overtime premium).

# Common Questions

If staff are non-exempt, do they need to be paid on an hourly basis?

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If staff are non-exempt, do they need to be paid on an hourly basis?

No, it is permissible to pay salary to non-exempt staff (but you still need to track hours to pay overtime for hours worked over 40 per week).

# Common Questions

If our nonprofit's work week is 35 hours per week, do we need to pay overtime when non-exempt staff work 36+ hours in a week?

# Common Questions

If our nonprofit's work week is 35 hours per week, do we need to pay overtime when non-exempt staff work 36+ hours in a week?

No, regardless of how you define your work week, you don't need to pay overtime until workers have exceeded 40 hours in a work week.

# Common Questions

Some of our nonprofits employees work two different jobs with two different rates of pay. How do we calculate overtime?



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Some of our nonprofits employees work two different jobs with two different rates of pay. How do we calculate overtime?

The regular rate of pay for each week is the weighted average of the rate of pay for each position. Overtime is calculated as 1 ½ times that weighted average.

# Common Questions

Do we need to pay the minimum wage to our interns?

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It depends. Nonprofits can have unpaid, volunteer interns. Also, interns who qualify as trainees may receive stipends that are less than the minimum wage. Otherwise, nonprofits should pay interns at least the minimum wage for hours worked.

# Considerations

To ensure compliance with the FLSA, supervisors must pay close attention to wage and hour issues, including:

- Documents (missed punches, hours worked, posters).
- Off-hour work (do not request it, do not allow it).
- Overtime (even unauthorized overtime work must be paid).
- Meal periods and rest breaks (unpaid meal periods generally should be entirely free of work).
- Consistently and regularly enforcing policies and training.

# Contact us



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Thank you for all you do!

# Options to Consider

- ▶ Raise salaries so employees remain exempt
- ▶ Pay overtime to employees above a salary
- ▶ Reorganize workloads or adjust schedules
- ▶ Replace some full-time staff with part-time or contractors
- ▶ Making lunch breaks unpaid
- ▶ Change benefits (reduce or consider better/more affordable)
- ▶ Limit teleworking
- ▶ Eliminate or reduce programs and services
- ▶ Eliminate some fundraising events

# Planning Ahead for the Changes

- ▶ Discussion with your Board of Directors
- ▶ Transparent and clear communication with employees
- ▶ Tracking systems to monitor for overtime pay
- ▶ Update personnel policies
- ▶ Engage your funders about what these changes mean for your organizations
- ▶ Compensation research - new report out for Florida! Visit <https://www.flnonprofits.org/compensation-survey> to get a copy



# Things to Look Out For

- ▶ 1099 Contract Workers
- ▶ Comp time instead of overtime pay
- ▶ Employees working more than 40 hours even when instructed not to

# Questions?





# Thank you!

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