



**Overtime Changes and the Effects on Nonprofits
Webinar Q&A
June 11, 2024**

What if the ED/CEO is the highest compensated in the org but does not make the minimum amount?

Even if the ED/CEO meets the exemption by duties, if they do not also meet the exemption by salary basis (\$844 per week beginning on July 1), they will need to be compensated for overtime.

Does grant income qualify for the \$500K commercial sales? What about if it is a government grant, or a grant with deliverables, more similar to a contract?

Generally, grants are not considered when evaluating whether non-profits meet the \$500,000 threshold. Enterprise coverage applies to the business activities of nonprofits, such as operating a gift shop or veterinary services for a fee. While there is limited precedent or guidance regarding grants paid in exchange for deliverables, it appears that income generated in furtherance of charitable activities is not considered.

Courts have observed that “unless [a nonprofit] engages in commercial activities in competition with private entrepreneurs or qualifies as one of the organization [sic] listed in 29 U.S.C. § 203(r)(2), a non-profit charitable organization is not an ‘enterprise’ under § 203(r) because it is not conducted for a ‘business purpose.’” See *Jacobs v. New York Foundling Hosp.*, 483 F.Supp.2d 251, 262 (E.D. NY 2007). The non-profit in *Jacobs* received funding from municipal sources, including funding almost exclusively derived from federal, state, and local reimbursement grants and charitable donations. Court have also observed that non-profit organizations that provide educational, support, counseling, and similar services “do not compete in the marketplace with ordinary commercial enterprises [for the purposes of the FLSA].” *Locke v. St. Augustine's Episcopal Church*, 690 F. Supp. 2d 77, 86 (E.D.N.Y. 2010). Thus, unless a nonprofit engages in public competition, it would not be covered by the FLSA. See *Malloy v. Ass'n of State & Terr. Solid Waste Mgmt. Officials*, 955 F. Supp. 2d 50, 55 (D. D.C. 2013).

Ultimately, based on the limited legal authority available it to us, it appears that unless funds are generated from business activities, they would not apply. See *Briggs v. Chesapeake Volunteers in Youth Services, Inc.*, 68 F.Supp.2d 711 (E.D. Va. 1999) (Nonprofit was not operated for a “business purpose” and, therefore, was not an “enterprise” as defined by the FLSA; there was no evidence that corporation in any way competed with other commercial ventures or charged its clients for services, and instead, corporation received funding through grants and local fund-raising).

We suspect the dearth of legal authority on this question relates to the fact that it is an academic question. Many states have wage and hour laws that match the FLSA. For states like Florida, which does not, the broadly individual coverage element brings many (if not all) non-profit employees within the protection of the FLSA.

This flow chart by the National Council of Nonprofits lays out the analysis. [Nonprofit Overtime Coverage Flowchart.pdf \(councilofnonprofits.org\)](https://www.councilofnonprofits.org/files/Nonprofit_Overtime_Coverage_Flowchart.pdf).

Is there a problem with employees tracking and recording their time through an app?

No.

If an employee works 35 hours in week one and 45 hours in week two, is overtime paid for week two, or is it banked from week one?

Overtime is calculated per work week, so even if they worked less than 40 hours in one week, they will still need to be compensated for overtime in any week they work more than 40 hours. Your organization's employee handbook should define your work week. Often companies define a week as beginning at 12:00 am on Sunday and ending at midnight on Saturday. How you set your work week does not matter as long as it captures 7 days and you apply the measure consistently among all employees. If a non-exempt employee works over 40 hours within a workweek (however you chose to define it) they are entitled to overtime.

Is there a break/lunch requirement per hours worked, and is it always unpaid?

Both federal and state law do not require meal periods or rest breaks for employees 18 and older. However, when employers do offer short breaks (usually lasting about 5-20 minutes), federal law considers the breaks as compensable work hours that would be included in the sum of hours worked during the workweek and considered in determining if overtime was worked. If the employer offers a meal period of at least 30 minutes during which the employee is relieved of all job duties, then the employer does not have to compensate during that meal break. However, if work is being done, even if not required, then the employee must be paid. Employers with more than 50 employees are required to give nursing mothers breaks to express milk whenever necessary for one year after their child's birth. If this applies to your employees, be sure you are following the guidelines set out in federal law.

Your policy on rest periods and meal breaks should follow federal and state law, should be defined in your employee handbook and should be applied consistently among all employees. The laws for employees under the age of 18 are different.

Can employees "flex" time worked to avoid overtime compensation?

Employees can "flex" time within a work week to stay within the 40 hour limit— e.g. work fewer hours one day in anticipation of working more hours on a different day.

Employers cannot, however, offer “comp” time in lieu of overtime pay – e.g. employee works 45 hours in one week, then is offered 5 hours “off” the following week. That would not remove the employer’s obligation to pay overtime.

For more information, visit <https://www.flnonprofits.org/overtime-rules>.

This document does 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. To ensure FLSA compliance for your organization, we strongly encourage you to consult legal counsel and appropriate human resources and payroll professionals.