



Non-Profits & the New Overtime Rule

A Survival Guide

ABOUT ME

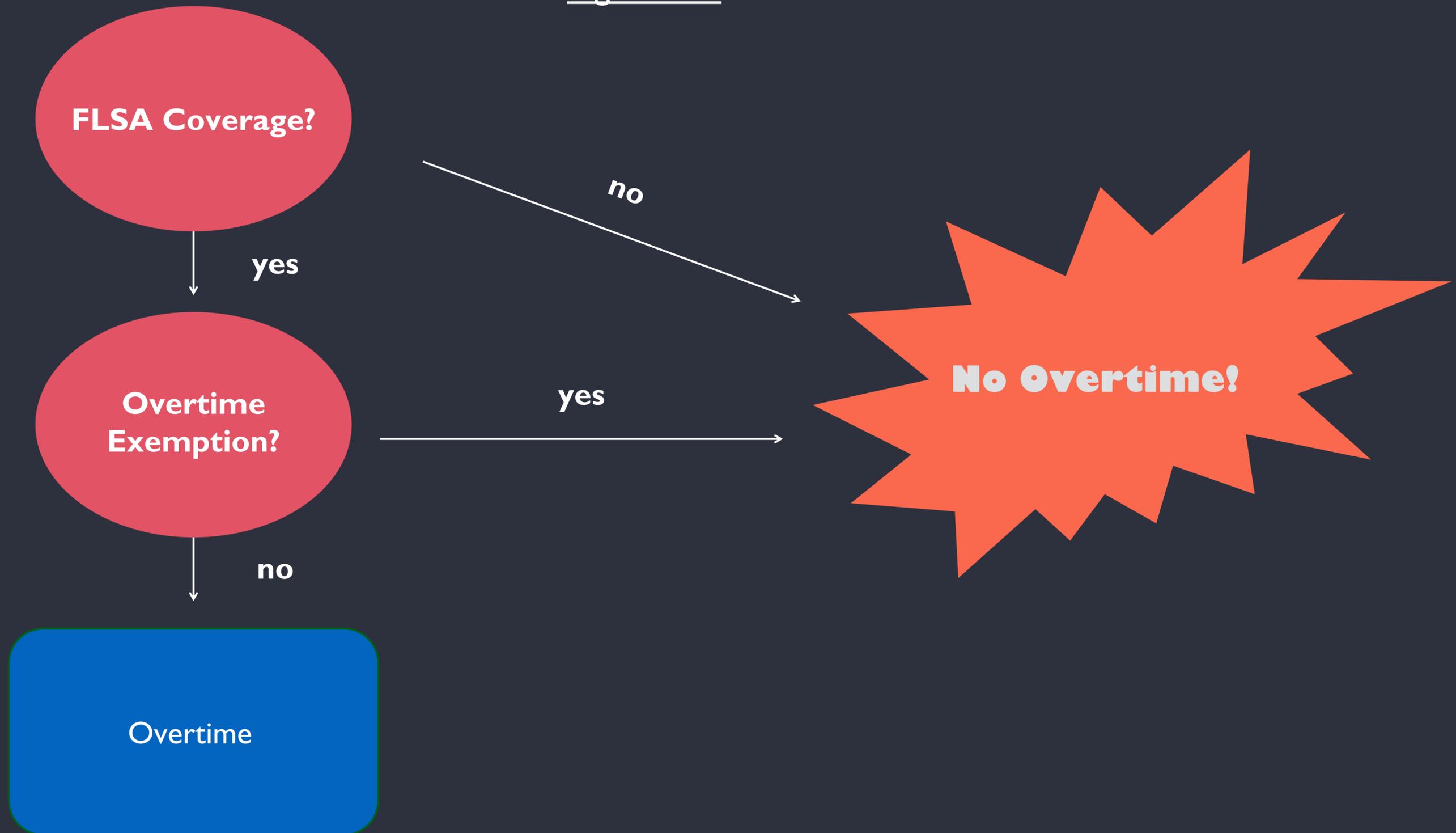


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OVERVIEW

- The FLSA
- When Non-Profits are Covered
- New Overtime Rule
- Applying White Collar Exemption
- Decision Tree
- Overtime Strategies
- Volunteering
- Case Study
- Questions
- Resources

Big Picture





**The Fair Labor Standard Act
(FLSA)**

Federal Minimum Wage

- ❖ \$7.25 an hour

Overtime

- ❖ 1.5 times pay for 40 hour workweek

Recordkeeping

- ❖ Employers must keep employee time & pay records

Defines Hours Worked

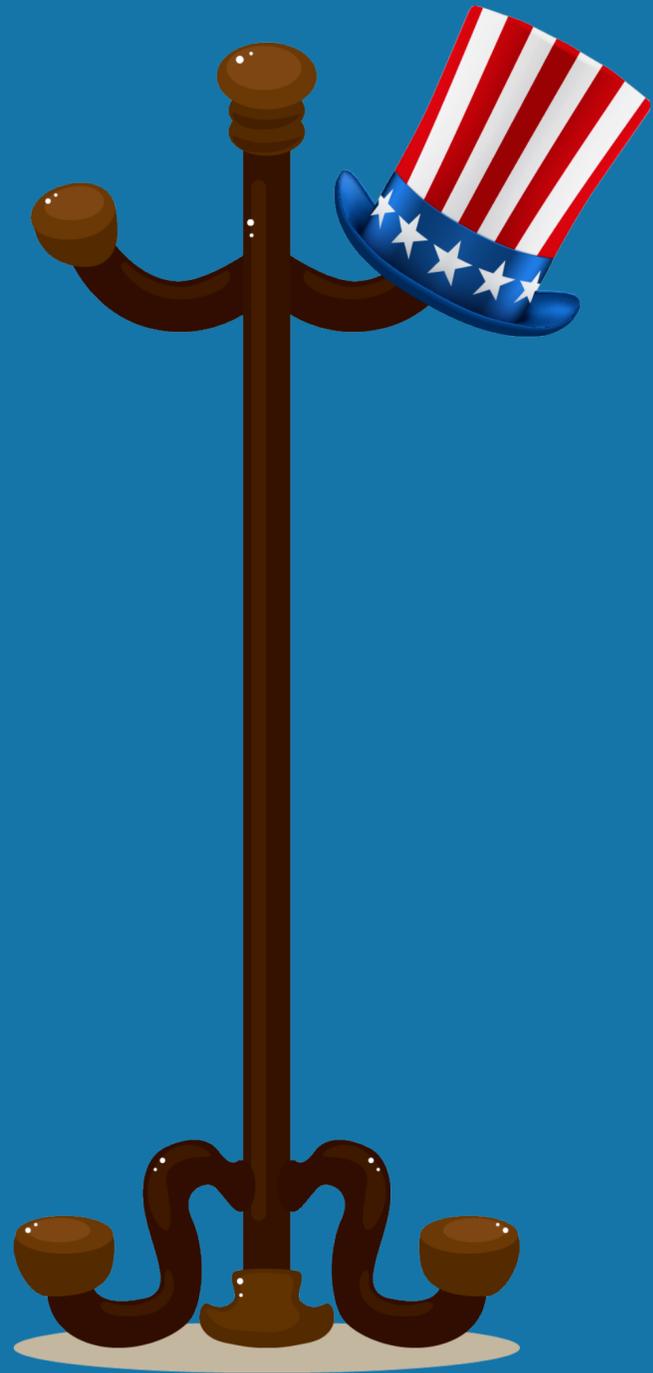
- ❖ Ordinarily includes all hours on premises or on duty

Child Labor

- ❖ Educational opportunities vs. health & well-being

Nursing Mothers

- ❖ Reasonable break to express milk for 1 year after birth



A Hat Rack Named “Interstate Commerce”

3 Ways a Non-Profit is Covered by FLSA

1 Named Enterprises

- a) Hospitals;
- b) Schools & preschools;
- c) Governmental agencies;
- d) Businesses providing medical or nursing care for residents.

(However, providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds have until 3/17/19)

3 Ways a Non-Profit is Covered by FLSA

2 Enterprise Coverage

- Employees are non-exempt if:
 - a) Non-profit engages in ordinary commercial activities and
 - b) Volume of sales made or business done is at least \$500,000 year

- What is commercial activity?
 - a) Non-charitable purpose, or
 - b) Competition with for-profits

- What counts towards \$500K threshold?
 - a) Only revenue from commercial activities
 - b) If side business hits threshold, employees engaged in commercial activity are covered

A non-profit animal shelter provides animal adoption services and shelter for homeless animals. The shelter takes in over \$500,000 in donations in a given year.
Because the shelter engages only in charitable activities that do not have a business purpose, it is not covered under enterprise coverage.

The animal shelter hires two vets and an assistant to start providing spay and neutering services for a fee. The shelter takes in an additional \$600,000 in fees for these services in a given year.
Because the new services compete with for-profit vets, the enterprise is covered for the three employees involved in the commercial activity.

A nonprofit designs and sells handbags made by employees who are recovering from drug addiction. Its annual revenue is \$550,000 a year and it uses these proceeds to fund its recovery program.
Because the sole activity of the nonprofit constitutes commercial activity, the enterprise is covered in regards to all employees.

3 Ways a Non-Profit is Covered by FLSA

3 Individual Coverage

- Individual employees are non-exempt if they regularly:
 - a) Engage in interstate commerce, transactions or communications, or
 - b) Perform work related to moving people or things across state lines
- Examples
 - a) Phone calls, letters or emails
 - b) Processing or recording credit cards transactions
 - c) Ordering or receiving goods from out of state
- BUT – “[E]ven where an employee regularly engages in interstate commerce and is individually covered, the Department focuses its enforcement efforts on circumstances where it can have significant impact on compliance, generally where there is enterprise coverage.”

The office manager at the nonprofit animal shelter regularly orders office and animal care supplies through Staples and Amazon, which come from out-of-state. Because the office manager is regularly engaged in these interstate purchases, she is covered under individual coverage.

The animal care technicians must receive re-accreditation by attending conferences once a year, usually in other states. On this basis alone, attending the conferences would probably not constitute regular activity that would trigger individual coverage.

One of the shelter’s employee’s primary duties is fundraising from local donors and foundations within the shelter’s home city. She also takes turns answering calls when the receptionist is taking a break. Because her primary activity is confined within the state, and her answering out of state calls is not regular, she would not be covered.

New Overtime Rule

- 1 Highly Compensated Employees
 - ❖ Minimum salary \$100,000 > \$134,004
- 2 White Collar Exemption
 - ❖ Minimum “salary level” \$23,660 > \$47,476
- 3 Auto Adjustment Mechanism
 - ❖ Salary levels increase automatically every 3 years starting 2020

The 3 Criteria of the White Collar Exemption



1. Employee Compensated on a ***Salary Basis***

2. ***Salary Level*** is at least \$913 per week (\$47,476 per year)

Does not apply to doctors, lawyers or teachers

Bonuses & incentive payment can account for up to 10% if paid at least quarterly

3. Perform Administrative, Executive or Professional ***Duties***

Duties Test

ADMINISTRATIVE

- ❖ Non-manual work, and
- ❖ Must include the exercise of discretion and independent judgment with respect to matters of significance

PROFESSIONAL

- ❖ Perform work that either requires advanced knowledge in a field of science or learning that requires invention, imagination, originality, or
- ❖ Talent in a field recognized of artistic or creative endeavor

EXECUTIVE

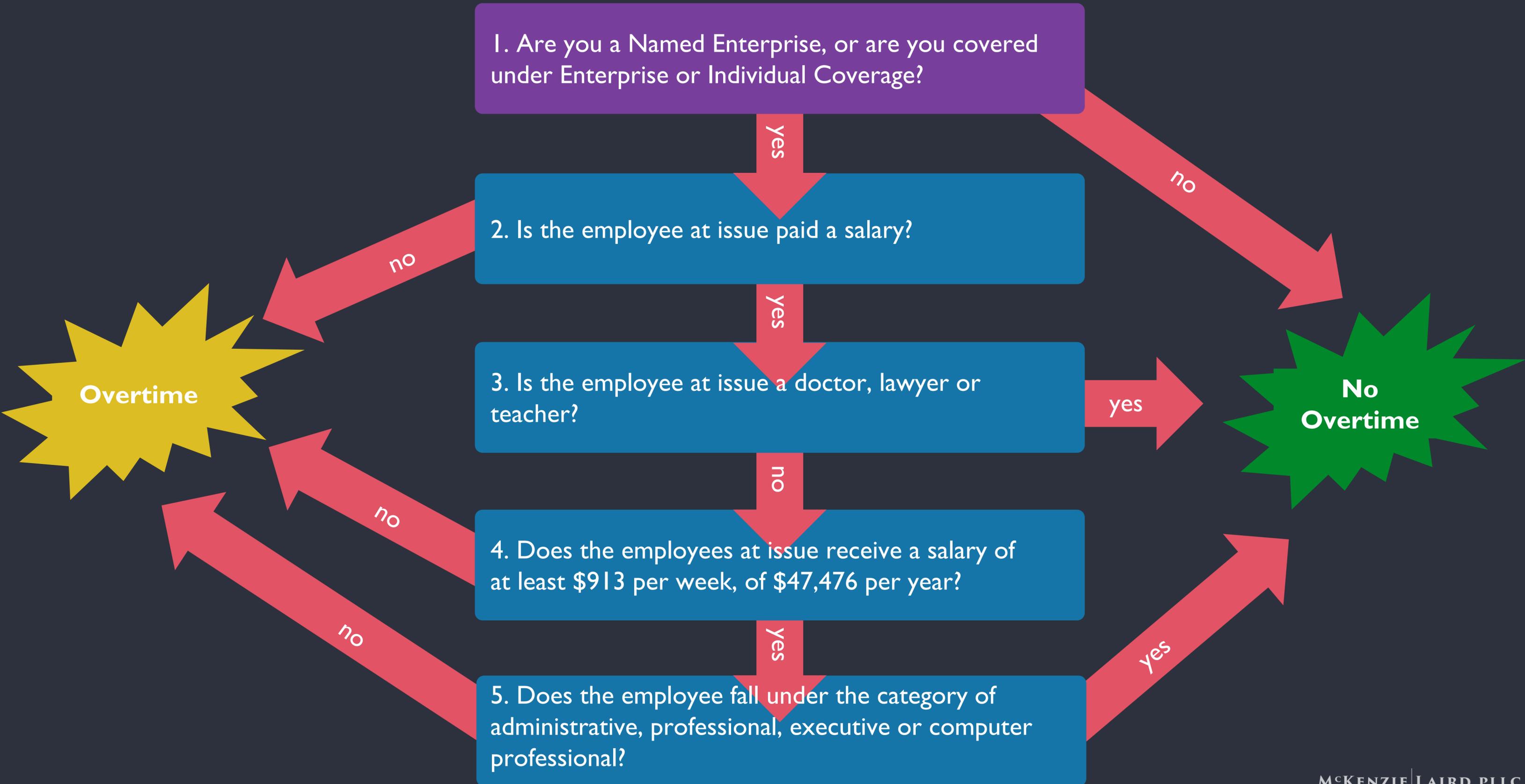
- ❖ Manage the enterprise, or
- ❖ Manage a customarily recognized department or subdivision of the enterprise, and
- ❖ Manage 2 FTEs, and
- ❖ Ability to hire and fire, or have significant input

COMPUTER PROFESSIONAL

- ❖ Application of systems analysis techniques and procedures,
- ❖ design, development, or testing of computer systems or programs

OUTSIDE SALES

- ❖ Making sales, or obtaining orders or contracts, and
- ❖ Customarily and regularly engaged away from place of business.
- ❖ No salary level requirement
- ❖ “Sales” does not include fundraising



3 Steps to Compliance

I. REVIEW COMP

- a) Review the compensation levels of salaried employees to determine who will fall below \$47,476 annually.
- b) Keep in mind that nondiscretionary bonuses can account for up to 10% of this amount if paid quarterly.

2. CHOOSE STRATEGY

- For those who fall below, determine if it makes more sense to:
- a) Pay under a fluctuating workweek;
 - b) Raise their salary above \$47,476;
 - c) Limit their hours to 40 hours a week;
 - d) Adjust workloads; or
 - e) Pay them overtime.

3. JOB DESCRIPTION

- For those above, review their job descriptions:
- a) Describe administrative, professional or executive functions, as defined by the FLSA?
 - b) Actual duties the same?

Volunteering

- ❖ Must be bona fide volunteer
- ❖ No coercion or undue influence
- ❖ No commercial activities (e.g., in gift shop)
- ❖ No volunteering for work they ordinarily perform
- ❖ Employees cannot waive compensation

Comp Time

- ❖ Only allowed for certain public employees
- ❖ Employees cannot waive compensation

Case Study

A nonprofit charity collects and distributes donated clothing around the world to people in need. Annual donations are around \$750,000. It has 5 employees on salary: a bookkeeper who makes \$45,000, two donor services employees who make \$35,000, an office manager who makes \$50,000, and an executive director who makes \$110,000. The office manager is responsible for ordering all supplies; but one donor services employee is in charge of the big annual 5K race and will order supplies for it. All employees are required to work the 5K race on the Saturday it occurs, either registering runners or handing out waters.

The charity has just hired an experienced clothing designer to design new clothing items to sell in a partnering department store. The clothing will raise awareness for the organization and the sales revenue – which is projected to be around \$500,000 annually – will support the charity. The designer will make \$45,000, plus receive performance bonuses based on sales.

The nonprofit has a strict “no overtime” policy. What issues can you see?

Case Study Analysis

1. Does the FLSA apply to the nonprofit or any of its individuals? Enterprise Coverage would apply to the nonprofit because of the new commercial activity of selling clothing in stores, but only the employees who engage in the commercial activity would be covered. In addition, under Individual Coverage, the bookkeeper is likely covered because the processing and recording of financial transactions probably involves interstate commerce. If the office supplies regularly ordered by the office manager cross state lines, she would be individually covered. If either of the donor services employees and executive director regularly engage in interstate communications, they would be individually covered.
 - a. Analysis
 - i. *Named Enterprise?* No.
 - ii. *Enterprise Coverage?* No for employees engaged in donations of clothing because it has a charitable purpose and it also does not compete with for-profit businesses. Yes for employees who are involved in the new clothing sales because, even though the purpose may be charitable, the fact that it directly competes with for-profit businesses outweighs the charitable purpose for determining commerciality.
 - iii. *Individual Coverage?* Probably yes. By the nature of their positions, each employee probably would be individually covered. For the bookkeeper, I would look at the transactions recorded and processed to see if any involved out of state donors, banks, credit card processing, etc. These days, it is safe to presume that some interstate activity is involved. For the office manager, I would see from whom she orders the office supplies. If they are from an in-state business and aren't shipped across state lines, it's not a problem. But I would then look at her other communication activities to see if they cross state lines. For the donor service reps and the executive director, I would do the same analysis of their communications, which, in all likelihood, cross state lines.
2. Under the new rules, will any exceptions apply to the covered employees? Yes, the White Collar Exemption (WCE) will apply to the executive director and office manager, and probably to the clothing designer. However, the Highly Compensated Employee exemption, although applicable to the executive director currently, will not exempt him when the rule's minimum increases from \$100,000 to \$134,004.
 - a. Analysis of WCE
 - i. *Salary Basis Test:* Each employee is paid by salary and therefore passes this first criterion.
 - ii. *Salary Level Test:* The donor service representatives make less than the new minimum of \$47,476 (\$913 per week), which excludes them from the exemption and makes them non-exempt (i.e., overtime eligible). The office manager and executive director's salaries exceed the minimum. The designer's salary will likely exceed the minimum if the bonus she receives is nondiscretionary, is paid at least quarterly, and, after paid, shows that she averaged \$913 per week. If she doesn't, then she is non-exempt.
 - iii. *Duties Test.* The office manager likely satisfies the Administrative criterion as long as her duties regularly involve discretion and independent judgment regarding significant matters. The executive director satisfies the Executive criterion because he manages the enterprise. The Designer would likely satisfy the Professional criterion because she has a "talent in a field of artistic or creative endeavor."
3. Is the employees' volunteering at the 5K race permissible under the FLSA? No. The executive director could only require the office manager to work at the race because she is exempt; the other employees are non-exempt and therefore must be paid for every hour they work. If the employer had not required the volunteering, the employees could have volunteered as long as the volunteering work was not the same type of work that they ordinarily performed.
 - a. Analysis: The FLSA allows non-exempt employees to volunteer for charitable causes if they are bona fide volunteers who were not subjected to coercion or undue influence by the employer. However, the employees cannot volunteer for commercial activities, nor can they volunteer for work that they ordinarily perform. The donor services rep who organized the 5K race, therefore, may not be allowed to volunteer if the work she performs at the race is too closely related to her work organizing the race. Even if she attempted to waive her compensation for her volunteering, the FLSA does not allow an employee to waive compensation.

THANK YOU



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RESOURCES

- https://www.dol.gov/whd/overtime/fs17a_overview.htm
- <https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>
- <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>
- <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>
- <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>
- <https://www.dol.gov/whd/opinion/flsa.htm>