

# 2016 LEGAL REVIEW

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## **U.S. Department of Labor proposes sweeping changes to FLSA overtime exemption criteria: The implications for nonprofit employers**

By Brian J. Turoff, David A. Katz, Douglas B. Mishkin and Jeffrey S. Tenenbaum

On June 30, 2015, the U.S. Department of Labor made public its much-anticipated proposed changes to the executive, administrative, professional, computer and outside sales employee exemptions under the Fair Labor Standards Act, commonly referred to as the "white collar" exemptions. These proposals stem from President Obama's March 2014 memorandum to the U.S. Secretary of Labor, characterizing the current white collar exemptions as "outdated" and out of step with "our modern economy." If adopted, the proposals (described below) will have a profound impact on nonprofit employers' ability to treat certain employees as exempt from receiving overtime compensation.

Below are five key legal developments over the past year for association executives to keep in mind when evaluating legal and tax compliance efforts in the months ahead:

### **The current framework**

In general, the FLSA requires nonprofits to pay their nonexempt employees an hourly rate at least one-and-a-half times their regular hourly rate for time worked in excess of 40 hours in a workweek. Certain "white collar" workers, namely those employed in a "bona fide executive, administrative, or professional capacity," may, under certain circumstances, be considered to be exempt from this overtime requirement. This exemption also can extend to individuals employed in "outside sales" positions, and in certain computer-related occupations. The FLSA also features additional exemptions not discussed in this article.

At present, to properly treat an employee as exempt under one of the FLSA's white collar exemptions, (i) the employee must be compensated on a salary basis at a rate of at least \$455 per week, and (ii) the employee's primary job duties must fall within the substantive parameters of one of the above-noted exemption categories. This latter criterion requires a fact-intensive assessment

regarding the nature of the employee's work and specific job responsibilities. An employee's job title does not determine whether the employee falls within a given white collar exemption.

It is important to note that the FLSA's current \$455 salary threshold merely sets a floor that states are free to – and, in some cases, do – exceed. For example, the minimum weekly salary threshold required to treat an employee as exempt is \$720 in California (rising to \$800 in 2016), \$475 in Connecticut, and \$656.25 in New York (rising to \$675 in 2016).

### **The proposed regulations**

The DOL's proposed revisions dramatically increase the FLSA's minimum salary threshold. Specifically, under the proposal, the current \$455 per week threshold – which translates to an annual salary of \$23,660 – will more than double, rising to \$970 per week, for a minimum annual salary of at least \$50,440 for an exempt white collar employee. This materially exceeds the current state-level minimum salary thresholds for every state.

Importantly, under the proposed regulations, the \$970 salary threshold would automatically update based on inflation and wage growth over time, though the DOL will solicit comments regarding the precise methodology to be used. The DOL estimates that, in the first year of implementa-

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# **Top-10 (actually 11) copyright and trademark tips for nonprofits**

By Jeffrey S.Tenenbaum and Armand J. (A.J.) Zottola

Whether it is protecting your own intellectual property or avoiding the infringing of others', copyright and trademark law should play an important role in the typical activities of every nonprofit. The following (brief and non-exhaustive) guidelines provide the basic thinking and framework for such steps and, in particular, the implementation of effective policies and practices to manage copyright and trademark rights and avoid the infringement of others' rights.

**1. Use copyright and trademark notices.** Use copyright notices on and in connection with all creative works published by your nonprofit and trademark notices on all trademarks, service marks, and certification marks owned and used by your nonprofit.

**2. Register your trademarks (both domestically and overseas) and domain names.** Register your nonprofit's name and important logos, slogans, certification marks, and other trademarks and service marks with the U.S. Patent & Trademark Office.

**3. Register your copyrights.** Register your nonprofit's website, publications, and all other important, original, creative works (that are fixed in any print, electronic, audio-visual, or other tangible medium) with the U.S. Copyright Office.

**4. Police use of your intellectual property.** Monitor and police the use of your copyrights and trademarks by others and enforce your rights where necessary. Use periodic web searches and outside monitoring services, among other means, to identify potential infringement of your copyrights and trademarks.

**5. Codify all licenses from your nonprofit to others in writing.** Whenever your nonprofit lets others use your nonprofit's name, logos, copyrighted works, and other intellectual property, put the terms and conditions of the license in writing.

**6. Make sure you own or have permission to use all intellectual property.** Ensure that your nonprofit owns or has appropriate permission to use all intellectual property that it uses in its publications, on its website, on social media, and in all other media.

Most common copyright problems arise from the issue of sufficient rights or permission.

**7. Agreements with independent contractors.** Maintain written contracts for development or creation with all independent contractors working with your nonprofit to ensure that your nonprofit is assigned the ownership rights (or at least sufficiently broad license rights) to all intellectual property developed or created by the contractor under the agreement.

**8. Agreements with authors and speakers.** Obtain a written and sufficiently broad license or assignment from all (non-employed) writers and speakers for your nonprofit, including members.

**9. Agreements with officers, directors, committee members, and (sometimes) other volunteers.** Obtain a written statement from all nonprofit officers, directors, and committee members (and any other volunteers helping to create copyrightable content) assigning ownership of all intellectual property that they create (within the scope of their service to the nonprofit) to your organization.

**10. Protect your membership database.** For membership associations, because the name, addresses and other contact information contained in your membership directory/list are generally not protected by copyright law – as they usually do not possess the minimum level of originality required – if your organization publishes the directory or permits others to use the list, it is imperative to use a “shrinkwrap” license, click-and-accept feature, or other form of contractual commitment to place explicit, binding limits and conditions on the use of that information by members, vendors, chapters, affiliates, and others.

**11. Rules for interactive online services.** It is important to regularly distribute rules that prohibit the posting of any copyright- and trademark-infringing information or marks (along with other rules, such as prohibiting negative comments about individuals and companies, and prohibiting the advertising or marketing of products or services). In addition, be sure to maintain a compliant “take-down” policy and to immediately remove (or have removed) any material that violates these rules if it comes to your nonprofit’s attention.

## **Charitable solicitation and associations**

By George E. Constantine and Atitaya C. Rok

At a recent annual gathering of state regulators who focus on charitable organizations, participants shared tips with one another on effective enforcement of consumer protection laws and offered insights to nonprofit executives and advisors into how these laws operate. One of the major takeaways from this conference was that state charity regulators have concerns about nonprofits' compliance with applicable state laws governing charity activity.

Association executives are often surprised to learn that their organizations and affiliated foundations may be covered by both state charitable solicitation laws and rules governing promotions that involve a charitable giving component. These laws do not limit their reach to traditional charities; rather, most of the applicable states' laws regulate solicitation activities that many associations engage in.

### **Charitable solicitation registration and reporting**

Charitable solicitation activities are regulated at the state level. States generally define “charitable solicitation” to mean a direct or indirect request for contributions for a charitable organization or for a charitable purpose. Currently, 40 states and the District of Columbia require charitable organizations to register with the state charity agency prior to soliciting contributions, unless they are otherwise

exempt. Charitable solicitation laws, and registration and reporting requirements vary from state to state.

Many states exempt organizations that solicit contributions only from their members from registration requirements. For example, District of Columbia regulations provide an exemption from registration and reporting requirements for a solicitation of the members of a society where the governing body “by official action” has approved that solicitation and has made provisions to supervise the solicitation. Of course, such exemptions do not normally apply when an association’s related foundation (usually a separate nonprofit corporation with separate tax-exempt status from the parent) is doing the soliciting.

### **Conclusion**

While high-profile examples of enforcement do exist, practitioners familiar with this area generally agree that state enforcement of solicitation and commercial co-venturer rules is not aggressive and compliance among charitable organizations and other entities is inconsistent at best. Further, it is possible that states may view this area as a potential source of income through the collection of fines. As such, associations and their related foundations should review whether they are in compliance with the applicable registration and reporting requirements and, if they are not, should take steps to address the matter.

# The 15 most common nonprofit bylaw pitfalls: How to avoid the traps

By Jeffrey S. Tenenbaum

**1. Understand your state's nonprofit corporation law.** A state's nonprofit corporation statute – a nonprofit is governed by the statute in place in its state of incorporation, regardless of where the organization is located – supersedes any provision of the organization's bylaws. The nonprofit corporation act will contain default rules for areas that the bylaws might not address, such as specifying the minimum number needed for a quorum for a director or member vote; it will also contain prohibitions, such as not permitting directors to vote by proxy, among other provisions.

**2. Make sure your bylaws are consistent with other regulatory documents.** Be sure to double-check your bylaws for both internal and external consistency (including keeping in line with the articles of incorporation, the state's nonprofit corporation act, and any policy or governance manual). Note that if your organization is governed or licensed by another state agency, such as a state department of education or department of banking, other state laws might provide additional mandatory bylaw provisions for your organization.

**3. Be sure to address all foreseeable scenarios.** Sometimes, for example, bylaws will contain a provision about removing a board member, but leave out any provision covering how that position gets filled upon removal. It is important to take the time to carefully walk through all of the "what if" scenarios to avoid holes in the bylaws.

**4. Populate your bylaw committee with an accurate cross-section of your organization.** Use of a bylaw committee is one of the most common ways nonprofit organizations go about the bylaw review and amendment process. If the bylaw committee comprises individuals who do not represent a full cross section of your organization's membership or constituency, they may find some opposition when sending bylaws to the full membership for approval (for nonprofits with voting members) or to the full board of directors.

**5. Coordinate the actions of your bylaw committee with legal advice.** When rewriting bylaws, almost inevitably, a legal adviser will be able to spot inconsistencies and potential problems. Try to coordinate with legal counsel from the beginning of your process, not after all of the committee's work has been done, when it can be very difficult to start over.

**6. Create bylaws that reflect the appropriate political climate of your organization.** Bylaws should reflect the appropriate balance of power among the members (if there are members), the board of directors, and the executive committee (or other bodies within the organization's governance structure, such as a house of delegates, key committees, or other structures).

**7. Keep your bylaws current.** Frequently, organizations inherit bylaws that have been patchworked together over time. Thus, nonprofits sometimes end up with antiquated bylaws that are not appropriate for how the organization functions today. Sometimes the best solution is to scrap the original bylaws and start over from scratch, using a good, proven model provided by legal counsel or others as a starting point.

**8. Keep your bylaws flexible.** How the organization functions today may not be exactly the same as it will need to function in the future. Building flexibility into the bylaws, such as including a range for the exact number of board members and allowing the board to designate additional officers not named in the bylaws, can help the organization moving forward.

**9. Reserve the details for policies, not bylaws.** Some details are more appropriately placed in board-approved policies rather than in the bylaws. These often include items such as membership criteria, mem-

bership dues determinations, and the operation of committees.

**10. Ensure that your purposes clause reflects your organization today.** This is actually a tax-exemption issue, first and foremost. The IRS generally will refer, among other things, to the purposes clause in a tax-exempt organization's articles of incorporation to determine what is a related versus an unrelated activity.

**11. Closely review the meeting and voting procedures for members and directors.** This is an area where we commonly see bylaw provisions that are inconsistent with the governing state law. Nonprofits should closely review how members (if there are voting members) and directors are permitted to meet and vote under the relevant state law.

**12. Look at committee composition.** Some state nonprofit corporation acts are very specific as to who can serve on a committee of the board and how such persons may be appointed. This requirement applies to those committees exercising the power of the board, such as an executive committee or an audit committee. In these jurisdictions, other committees not exercising the power of the board, such as fundraising committees or nominating committees, can have committee members who are not directors.

**13. Pay attention to the approval process.** For organizations with voting members, amendments to the bylaws will almost always require member approval (check the applicable nonprofit corporate statute for the specific requirements). Approval also may be required by the board of directors.

**14. Do not make your bylaws too difficult to amend.** Some bylaws may require that amendments be approved by a two-thirds vote of the membership (for organizations with voting members), or contain other super-majority or burdensome requirements for approval. Focus on creating a bylaw amendment provision and process that is not overly difficult to execute and that is appropriate for the history, culture, and politics of your organization.

**15. Keep a pulse on the bylaws.** After engaging in a bylaw amendment process, make sure that your bylaws do not become dusty. Some nonprofits maintain a standing bylaws committee comprising board members who can speak up at meetings when issues implicating the bylaws are discussed. Other organizations place the bylaws as an agenda item at each annual meeting of the board of directors, to prompt consideration.

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tion, more than 4.5 million white collar workers who are currently exempt could become newly entitled to FLSA overtime rights, absent any intervening action by their employers.

At present, the DOL has not proposed any specific regulatory changes to the existing "primary duty" test, but will continue to assess this possibility.

## What does this mean for nonprofit employers?

The proposed regulations obviously will have a significant impact on employers of all sizes, nonprofit and for-profit alike. While the final regulations likely will not formally become effective until 2016, nonprofits should not wait to begin taking proactive steps. For example, while employers may consider raising salaries for positions that fall below the new \$970 per week threshold, they also may consider implementing scheduling changes that would limit their overtime costs. Employers are also well advised to assess their time and recordkeeping procedures, given the likelihood that certain currently exempt employees may no longer be exempt upon implementation of the final regulations.

# Top 'must have' provisions for nonprofit meeting contracts

By Lisa M. Hix and Jeffrey S. Tenenbaum

For most nonprofits, meetings are the central function of the organization. What nonprofits often don't recognize, however, is that meetings are also a source of significant potential liability in the form of contract penalties, legal claims, and commitments that may go unfulfilled for reasons beyond the organization's control.

Below, we highlight several "must have" provisions for nonprofit meeting contracts; note that this list is partial and not comprehensive. We also stress the importance of leading any contract negotiations with your organization's own set of "model" provisions. Developing your own set of model provisions will provide a ready-made alternative to standard meeting contract forms, which never protect a nonprofit's interests fully.

**1. Indemnification.** Indemnification provisions determine your organization's liability in the event that something goes wrong, such as trip-and-fall at the meeting site, a case of food poisoning, or other injury occurring at or in connection with your event. We strongly recommend that all organizations push back on any indemnification provision which is one-sided (in which your organization is not indemnified), or which requires the organization to cover "losses" resulting from third-party actions beyond your control. For example, provisions requiring your organization to assume liability for the acts of your meeting attendees and/or vendors should be revised.

**2. Duty to mitigate (the resell clause).** Attrition and cancellation penalties apply when your organization is either unable to fully utilize a room block (or food and beverage commitment), or otherwise needs to cancel a contract entirely. Typically, meeting contracts will provide a scale of damages that apply irrespective of whether the hotel or meeting space is able to recoup its losses by reselling the applicable rooms/space. Inserting a "duty to mitigate" provision, under which your organization receives credit for resold rooms/space, offsetting any penalties owed, is one of the most important steps you can take to limit potential financial liability under meeting contracts. Mitigation clauses also should contain a provision stating that any penalties, if due, will be reduced by an agreed-upon rate, such as 30 percent of hotel room rates, to reflect costs the hotel did not have to expend in cleaning and maintaining an empty room.

**3. Force majeure.** Force majeure provisions outline the circumstances when a party may terminate the agreement, due to reasons set forth in the force majeure clause, without penalty. Although force majeure provisions vary, certain overarching themes apply. First, review the scope of enumerated "force majeure" examples and make sure the listed examples are directly applicable to your event. For example, if you are going to a location known for volatile weather, inserting "inclement weather preventing or delaying at least 25 percent of the meeting attendees from attending the event" as an excusable force majeure event could save your organization from significant penalties. Likewise, we recommend broadening the standard language beyond the narrow "illegal or impossible" standard with a more flexible standard, such as "any cause beyond the control of the parties making it illegal, impossible, or commercially impractical" to perform under the contract. Finally, force majeure clauses should both excuse cancellation of a contract and underperformance, such that attrition penalties would be waived in the event your organization is not able to fully meet its contract obligations.

**4. Warranty of condition.** Finally, a broad "warranty of condition" provision can greatly expand your nonprofit's ability to terminate a contract, without penalty, where the hotel, or its quality or services, significantly deteriorates between contract signing and the date of the event.

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Highly regarded by its nonprofit clients, Venable is steeped in the nuances, challenges and opportunities of nonprofit law – as well as the distinct culture, governance, and politics of nonprofit organizations. Here is a partial list of Venable's nonprofit team:



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