

Changes to Overtime Eligibility

What Museums Need to Know about Department of Labor's Proposed Rules

By Andrew I. Bart

The US Department of Labor has proposed new rules on overtime eligibility that would significantly impact all businesses—including museums. If the current version of the proposed regulations goes into effect, the department estimates that 4.6 million additional Americans will become eligible for overtime.

What will such an increase in the overtime threshold mean to cultural institutions and their employees, and how should they plan for such a drastic change to their balance sheets and staffing needs? If you have employees who work more than 40 hours per week, here are some things you need to know.

A Brief Primer

The Fair Labor Standards Act (FLSA), originally passed in 1938, introduced minimum wage and overtime pay protections. The law included an exemption of certain employees premised on the belief that the exempted workers earned salaries well above the minimum wage and enjoyed above-average fringe benefits, greater job security and better opportunities for advancement, setting them apart from workers entitled to overtime pay. In general, institutions that employ two or more employees and have annual gross sales of \$500,000 or more are subject to the FLSA.



Unless an employee is considered “exempt” from the FLSA, an employer must pay him or her overtime pay for all time worked beyond 40 hours in a workweek, at a rate not less than 1.5 times the employee’s regular rate of pay. Under the current regulations, employees are considered exempt if they meet all three of these criteria: The employee must:

- Receive a predetermined and fixed salary on a weekly basis that cannot be reduced due to the quality or quantity of the employee’s work;
- Receive a salary of at least \$455 per week or \$23,660 annually; and

- Have job functions that primarily involve executive, administrative or professional duties (as defined by the regulations).

Last year, President Obama directed the Department of Labor to update the regulations defining which “white collar”—or exempt—workers should be protected by the FLSA’s minimum wage and overtime standards.

Salary Test

Last updated in 2004, the salary level test has long been recognized by the department as “the best single test” of exempt status. If left at the same

amount over time, however, the salary level becomes less effective as wages increase and fewer workers meet the threshold. In order to maintain the effectiveness of the salary level test, the department proposes to set the standard salary level equal to the 40th percentile of earnings for full-time salaried workers (\$921 per week, or \$47,892 annually for a full-year worker, in 2013). The department believes this new level will accomplish the goal to set a salary threshold that more clearly indicates an employee's status rather than relying on a complex analysis of an employee's duties.

In order to come within the exemption for highly compensated employees (HCE), such an employee currently must earn at least \$100,000 in total annual compensation. The department

is proposing to set the HCE annual compensation level equal to the 90th percentile of earnings for full-time salaried workers (\$122,148 annually).

Duties

Depending on the specific exemption applicable to a given employee, duties that exempt an employee from overtime eligibility currently include, but are not limited to, the following:

- Managing the organization or a department or subdivision;
- Directing the work of at least two or more full-time employees;
- Having the authority to hire or fire other employees or having the power to weigh in on the hiring and firing of other employees;
- Exercising discretion and independent judgment regarding

significant matters; and

- Performing tasks requiring advanced knowledge in a field of science or learning.

The proposed rules would allow employees who earn between \$455 and \$970 per week to become eligible for overtime, even if they perform professional, administrative or executive duties.

For example: say a museum employs a gift shop manager and pays an annual salary of \$36,400 (\$700 per week). The manager exercises his/her own judgment when ordering and re-supplying stock, supervises a staff of two and, while he/she cannot hire and fire staff, upper management values and weighs the manager's judgment when it comes to staffing decisions in the museum shop.

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Currently, this person would not be eligible for overtime if he/she worked 40 or more hours in a given workweek because he/she earn more than \$455 per week and has the duties of a manager. However, if the new rules go into effect and the new salary threshold is \$970 a week, the manager would be eligible for overtime.

How Should Museums Prepare?

What are the options available for cultural institutions tackling these changes? An institution should start planning now before the rules are finalized and put into effect. One option is to hold non-exempt workers to no more than 40 hours per week and thus not pay overtime. Alternatively, an institution could increase employees'



salary so they are above the threshold, thereby making them ineligible for overtime. It could also adjust the staffing and scheduling plan to avoid the need for overtime.

It is up to the institution to develop a plan that is efficient and satisfies budgetary needs. However, institutions should carefully evaluate the classification status of their workers



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to determine who will, and will not be exempt from overtime eligibility if the final regulations go into effect. A company should not classify a worker as exempt to avoid paying overtime.

A cultural institution should tread carefully in this area. Along with government enforcement of the FLSA, a successful private litigant can recover the following from an employer in an overtime case:

- Payment of the earned overtime going back up to two years or, if the employer's violation was willful, up to three years;
- Liquidated damages of up to 100 percent of the earned overtime for a willful violation; and
- Reasonable attorney's fees and costs.

Still Time to Plan

The proposed amendments are published in the Federal Register and the department is now reviewing the 270,000 public comments it received as part of the rulemaking process. Changes could be made to the proposed regulations based on the public comments. As a result, the final amended regulations likely will not go into effect until late 2016.

The department is also proposing that the salary and compensation thresholds be adjusted on an annual basis so that they do not become outdated between updates to the regulations.

These changes could have a huge financial effect on all businesses.

However, by understanding the law and its impact, cultural institutions should be able to determine the best course of action for their organization. <<

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