



This article presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

WAGE AND HOUR LAW FOR THE NONPROFIT ORGANIZATION

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Wage and hour is an area of the law that affects every employee and employer in the United States, including nonprofits, yet is widely misunderstood. However, understanding a few key concepts can make compliance easier. Every employer generally must comply with the Fair Labor Standards Act (“FLSA”). The FLSA is a federal law that applies to all states. Each state may also enact their own wage and hour statute and those statutes may offer more protection for employees than the FLSA. Georgia does not have such a wage and hour statute. If you have employees in states other than Georgia, you should review that state’s wage and hour statute, if one exists, to determine if there are other requirements in addition to the requirements of the FLSA. For the purposes of this article, we’ll analyze the requirements of the FLSA only. The U.S. Department of Labor (“DOL”) enforces the FLSA.

Under the FLSA, virtually every employee in the United States is guaranteed a certain minimum wage and overtime pay for any hours worked over 40 hours in a 7 day period. To this foundational protection, various exemptions are applied. Because exemptions to the basic foundation are used, employees are deemed either “exempt” or “non-exempt.” Many employers improperly classify employees as either “salaried” or “hourly” and make decisions related to overtime based on these classifications. For purposes of the FLSA, the “salaried” and “hourly” classifications are essentially meaningless. A salaried employee may be non-exempt and therefore entitled to overtime. Likewise, an hourly employee, in certain circumstances, may be exempt from being entitled to overtime. Under the FLSA, the important distinction is whether an employee is exempt or non-exempt, and not how he or she is paid or what their job title is.

The most common exemptions are known as the white collar exemptions. There are four main white collar exemptions: executive, administrative, professional, and outside sales. There are also white collar exemptions related to highly-compensated employees and those employees who work with computers. Nonprofit organizations will typically take advantage of the executive and the administrative exemptions. If you believe you have employees who may be eligible for the outside sales, highly-compensated employee, or computers exemptions, you should consult an attorney.

The Executive Exemption

Utilizing the Executive Exemption involves meeting the following requirements:

- The employee must be paid on a salary basis of at least \$455 per week. “Salary basis” means that the employee is paid his or her salary consistently each week regardless of the amount of hours that are worked. In other words, if the employee works 35 hours one week and 45 hours the next week, the employee will receive the same amount of pay

for both weeks. While some deductions from the salary may be permitted, generally, the salary amount should be the same for each pay period. The \$455 salary amount is a pre-tax amount and is a minimum.

- The employee's primary duty must be the management of the business or a department of the business.
- The employee must customarily and regularly direct the work of at least two or more full-time employees.
- The employee must have the authority to hire and fire employees, or the employee's recommendations about hiring, firing, and promotion must be given particular weight by those who do have the authority to hire and fire employees.

This exemption will typically cover executives and supervisors of an organization. It is important that the employee directs the work of at least two other employees. If your organization is small, this requirement may be problematic. Another significant requirement is the requirement that the employee have the authority to hire and fire employees or their recommendations regarding hiring and firing are given particular weight by those who do the actual hiring and firing. Some employees may not have the authority to hire and fire employees but because they supervise a specific department, they make recommendation about their subordinate employees. If these recommendations are relied on by senior executives, the employee should be eligible for the executive exemption provided the other requirements are met.

The Administrative Exemption

Utilizing the Administrative Exemption involves meeting the following requirements:

- The employee must be paid on a salary basis of at least \$455 per week.
- The employee's primary duty must be the performance of office work directly related to the general business operations of the employer.
- The employee's primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance.

The Administrative Exemption is an exemption geared towards employees who work on running the business rather than the more manual work of operating the business or selling a product line. The administratively exempt employee will work on and support the organization itself as opposed to performing the actual duties of a organization's mission.

An important requirement of the Administrative Exemption is the primary duty of the employee. The employee's primary duty must include the "exercise of discretion and independent judgment" in "matters of significance." These two phrases are explicitly used in the FLSA and carry specific meaning. The exercise of discretion and independent judgment means that the employee makes decisions on their own with little or no oversight. The employee can create, interpret, change or deviate from company policies. Matters of significance include those matters which are important to the business not basic administrative matters. In the nonprofit sector, such matters might include grant-writing, curriculum development, or developing and implementing the programs of the organization.

The Professional Exemption

The Professional Exemption may apply to a small number of employees in the nonprofit sector.

The Learned Professional

- To qualify for the learned professional employee exemption, all of the following tests must be met:
- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The Creative Professional

- To qualify for the creative professional employee exemption, all of the following tests must be met:
- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week; and
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Non-Exempt Employees

Some employees of your organization may be non-exempt. As non-exempt employees they are required to be paid minimum wage and for any overtime they work over 40 hours in a 7 day period. The current federal minimum wage is \$7.25 per hour. If your non-exempt employees do not work over 40 hours in one week, then your main concern is that they receive minimum wage. If they do work over 40 hours a week, they are entitled to receive 1.5 times their hourly rate for each hour over 40 hours. Your non-exempt employees may be paid by a salary by which they receive a certain amount each pay period. This is permissible although the salary rate will be divided by the hours worked to determine the hourly rate. This rate will be used in any overtime pay analysis.

Employers are required to track non-exempt employees' hours. These records are used to determine compliance with the FLSA. There is no penalty if you fail to track the employee hours although in such a situation, the employee's testimony will be used to determine how many hours they work each week. As a result, it is advisable that you track employee hours if any employee may be close to working over 40 hours each week in order to insure that the hours worked are accurate.

What to Expect in an Audit or a Lawsuit

The question of whether or not your employees are properly classified typically arises in two ways: 1) an employee brings a lawsuit alleging violations of the FLSA and that they were not paid properly, or 2) the Department of Labor performs an audit or investigation

of your workplace practices. The DOL audit can occur because the DOL simply decides to audit your organization or because an employee notifies the DOL that violations may have occurred. The analysis will generally look back over two years, although in certain circumstances the look-back period will cover the three previous years. The analysis will review every employee's status and what that employee was paid during the look-back period for the hours that employee worked. If there is a shortfall, you will be required to pay it to the employee. In a DOL audit, the DOL may allow you to only pay the shortfall and nothing more. However, they may also impose a fine. In a lawsuit, the FLSA allows for damages in the amount of the shortfall, in addition to the shortfall itself. In other words if it is determined that there is a \$10,000 shortfall, the FLSA imposes an additional penalty of \$10,000, resulting in a damages award of at least \$20,000, not including attorney's fees, which may also be awarded.

What to Do Now

With the assistance of an attorney, you should review each of your employee positions and determine whether they are exempt or non-exempt. You should also create or review job descriptions for each position. The job descriptions can be helpful in establishing both in your mind and the employee's mind what exactly the duties of the position are. If the position is an exempt position, the written duties should meet the requirements for the applicable exemption. It should be noted however, that during a DOL audit or lawsuit, the actual duties performed by the employee will be analyzed to determine whether the employee is exempt and not the duties identified by the job description.

You should also determine if and how you will record non-exempt employees' hours. This may result in a change from "the way things are done," but you should make a concerted effort to make sure any transition goes smoothly. You should remind the employees that the changes are for their benefit to make sure they are paid how they are required to be paid. Any changes also insure that the organization is compliant with the applicable law and can avoid monetary penalties in the future. With any changes that are made, the employees should continue to receive the same amount of pay; the recordkeeping may just be adjusted slightly. If you determine that you have been paying employees improperly and you believe you owe back wages, you should consult an attorney about how best to address that situation and make corrections.

Other Resources

You may wish to visit the website of the Wage and Hour Division of the DOL for additional information. The Division provides a number of resources regarding FLSA compliance that may be helpful. The website is at <http://www.dol.gov/whd/>. The DOL also has a specific website that addresses the white-collar exemptions at <http://www.dol.gov/whd/regs/compliance/fairpay/main.htm>