



Lawyers Alliance *for New York*

Connecting lawyers, nonprofits, and communities

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THE NEW OVERTIME RULES: A PRACTICAL GUIDE FOR NONPROFITS

The U.S. Department of Labor (“DOL”) has recently announced a discrete regulatory change that is expected to have major impact. DOL estimates that millions of workers will be newly eligible to receive overtime pay. The change becomes effective on December 1, 2016. Wise employers are already trying to determine what, if anything, they need to do to comply.

Lawyers Alliance has prepared this overview to help the nonprofit community understand the legal landscape, and what has changed.

WHAT IS COVERED IN THIS LEGAL ALERT:

Current Law

- The Duties Test
- The Salary Basis Test
- The Salary Threshold
- How The Tests Work Together

What is Changing?

- Increased Salary Threshold
- Special Rule for Highly Compensated Employees

Are Nonprofit Employees Covered by the FLSA?

- Enterprise Coverage Under the FLSA
- Named Enterprises Covered by FLSA Regardless of Revenue
- Individual Coverage Under the FLSA

State Law

- New York State

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CURRENT LAW

Eligible employees must be paid overtime whenever they work more than 40 hours in one workweek.

- If the employee has a normal workweek of 35 hours, and works more than 35 hours but less than 40, the employee is not entitled to overtime under the federal Fair Labor Standards Act (the “FLSA”).
- Only time spent actually working¹ must be counted toward the 40 hours after which the employee must receive overtime pay. If the employee is relieved of all duties during the lunch break, then that time does not count toward the 40 hours after which the employee is entitled to overtime pay.

Work during this “overtime” must be paid at one and one-half times the employee’s regular rate of pay.² All employees (including temporary and some seasonal employees) in the United States are eligible for overtime if their employment is covered by the FLSA, unless their job falls within one of several exemptions. Employees who must receive overtime pay under the law are referred to as “non-exempt.” Employees whose jobs fall into one of the law’s exemptions, and therefore are not legally entitled to receive overtime pay, are referred to as “exempt.”

If an employee is exempt from overtime, the employer does not have to pay overtime regardless of how many hours the employee works. In order for an employee to be exempt, ALL THREE of the following conditions (or “tests”) must be met:³

- The employee must perform certain types of work (the “duties test”); AND
- The employee must receive the same predetermined amount of salary each pay period (the “salary basis test”); AND
- The employee’s regular pay must exceed a certain amount (the “salary threshold”).

THE DUTIES TEST

Employees who primarily perform executive, administrative, or professional work are exempt from overtime as long as they meet the salary basis test and the salary threshold.

- Exempt executive employees primarily manage the organization or a department, regularly supervise at least 2 full-time employees (or their equivalent), and have the authority to hire or fire other employees.⁴

¹ Brief break periods are counted as working time.

² Note that eligible employees must receive overtime PAY, not compensatory time off. “Comp time” is available only to government employees.

³ 29 U.S.C. §213; 29 C.F.R §541

⁴ 29 C.F.R §541.100

- For more information, see USDOL Fact Sheet 17B:
https://www.dol.gov/whd/overtime/fs17b_executive.pdf
- Exempt administrative employees primarily perform work directly related to general business operations of the organization involving consistent exercise of discretion and independent judgment in matters of significance.⁵
 - For more information, see USDOL Fact Sheet 17C:
https://www.dol.gov/whd/overtime/fs17c_administrative.pdf
- Exempt professional employees primarily perform work requiring advanced knowledge or artistic skill and consistent exercise of discretion and independent judgment.⁶
 - For more information, see USDOL Fact Sheet 17D:
https://www.dol.gov/whd/overtime/fs17d_professional.pdf
- Exempt computer professionals primarily use skills of computer systems analyst, computer programmer, software engineer, or other similarly skilled workers.⁷
 - For more information, see USDOL Fact Sheet 17E
https://www.dol.gov/whd/overtime/fs17e_computer.pdf

THE SALARY BASIS TEST

Exempt employees must be paid the same predetermined amount of salary each pay period (on a weekly, or less frequent, basis), for any week in which they perform any work, regardless of variations in the number of hours, quantity, or quality of work.⁸

An exempt employee who has used up all vacation time and is given a one-week unpaid leave of absence must be paid an entire weeks' salary if the employee spends twenty minutes, (or any amount of time) reading work-related emails during that week.

- Federal law allows a limited number of pay deductions, in **full day** increments, without loss of exemption.⁹
 - Permissible full day deductions include unpaid absences for personal reasons and absences after paid sick time has been exhausted according to a written, consistently enforced policy, among several others.

⁵ 29 C.F.R §541.200

⁶ 29 C.F.R §541.300

⁷ 29 C.F.R §541.400

⁸ 29 C.F.R §541.602

⁹ 29 C.F.R §541.602(b)

- Deductions for partial-week absences are allowed for absences in the first or final week of employment or for unpaid medical leave under The Family and Medical Leave Act (“FMLA”).
- Any other pay deductions (e.g., docking an exempt employee for a half-day’s absence) violate the “salary basis” requirement and cause loss of the exemption, not only for that employee but for any other employees in the same job classification.

For more information, see US DOL Fact Sheet 17G¹⁰:
https://www.dol.gov/whd/overtime/fs17g_salary.pdf

THE SALARY THRESHOLD

Until December 1 of this year, the salary threshold is \$455/week (\$23,600/year).¹¹ A significant change in the salary threshold is the focus of the new regulations. For these purposes, “salary” is the gross amount of the weekly salary.

The salary threshold applies to the employee’s actual weekly salary; if a part-time salary is pro-rated from a full-time salary, the pro-rated part time salary must still meet the salary threshold. If the full time salary is over the threshold but the pro-rated part-time salary is not, the individual does not meet the salary threshold test.

- NOTE: There is no salary threshold for the following professional employees: doctors, lawyers, and teachers.¹² This will continue to be true under the new regulations. All other professional employees, such as social workers, are subject to the salary threshold. Computer professionals must meet the salary threshold if they are paid a salary. Computer professionals are the only exempt employees that may be paid an hourly rate, which must be at least \$27.63/hour.¹³

HOW THE TESTS WORK TOGETHER

Even if an employee’s pay exceeds the salary threshold, the employee is still eligible for overtime pay if the person does not perform exempt duties.

- Example: A bookkeeper earning \$50,000 is non-exempt because typical bookkeeping duties are neither managerial, professional, or administrative.

Even if an employee performs exempt duties, the employee is still eligible for overtime pay if the person does not meet the salary threshold.

¹⁰ Note that the fact sheet reflects the current salary threshold, which will be raised on December 1, 2016.

¹¹ 29 C.F.R §541.600(a)

¹² 29 C.F.R §541.600(e)

¹³ 29 C.F.R §541.600(d)

- Example: An Executive Director earning \$45,000 a year will be non-exempt on or after December 1 of this year.

Even if an employee is paid a salary, the employee is still eligible for overtime pay if the person does not perform exempt duties.

- Example: A receptionist is paid a salary, but is non-exempt because the person does not perform exempt duties. An employee who receives a salary is non-exempt, unless the employee both performs exempt duties and meets the salary threshold.

Even if an employee performs exempt duties and the person's pay exceeds the salary threshold, that employee will lose his or her exempt status if the employee is not paid on a salary basis.

To sum up:

IF EMPLOYEE			THEN EMPLOYEE IS
Performs Exempt Duties	Is paid on a salary basis	Is paid \$455/week or \$23,600/year; \$913/week or \$47,476/year on or after 12/1/2016	
YES	YES	YES	EXEMPT
NO	YES	YES	NON-EXEMPT
YES	YES	NO	NON-EXEMPT
NO	YES	NO	NON-EXEMPT

WHAT IS CHANGING?

INCREASED SALARY THRESHOLD

On December 1, 2016, the salary threshold will be raised from the current \$455/week (\$23,600/year) to \$913/week (\$47,476/year)¹⁴. All of the other rules discussed above remain the same.¹⁵

- Note that non-discretionary bonus or incentive pay may be counted toward up to 10% of the salary threshold, as long as the bonus or incentive pay is paid out at least quarterly. This means that at least \$42,728.40/year must be regular base pay.

The salary threshold is set at the 40th percentile of all full-time salaried workers in the lowest-wage Census Region (currently, the South). The salary threshold will be readjusted every

¹⁴ The DOL has stated that it will not enforce the new regulations against Medicaid-funded residential facilities for the intellectually or developmentally disabled with fewer than 15 beds until March 17, 2019.

¹⁵ 80 F.R. 38515

three years, beginning on January 1, 2020. DOL will post the new threshold at least 150 days in advance.

SPECIAL RULE FOR HIGHLY COMPENSATED EMPLOYEES

The FLSA contains a special rule for highly compensated employees (“HCEs”). While the same salary basis test applies to HCEs, they are subject to a relatively minimal duties test and a higher compensation standard: HCEs only need to perform *any one* of the exempt duties of an exempt executive, administrative, or professional employee on a regular basis.¹⁶

Total annual compensation, including nondiscretionary bonus and other nondiscretionary payments, for HCEs will be raised from the current \$100,000/year to \$134,004/year. They must also receive at least the new salary threshold of \$913/week on a salary or fee basis.¹⁷

ARE NONPROFIT EMPLOYEES COVERED BY THE FLSA?

It is possible that employees of very small, locally-focused community-based organizations are not covered by the FLSA, but it is important for all nonprofits to determine whether or not their employees are covered.

Nonprofit employees can be covered by the FLSA in one of two ways:

- the nonprofit employer is a covered enterprise (“[enterprise coverage](#)”); **or**
- the nonprofit’s employees are individually covered (“[individual coverage](#)”).

Therefore, some individual employees may be covered by the FLSA even though the nonprofit employer is not covered as a whole.

IMPORTANT: Many states have their own wage and hour laws which may cover nonprofit employees even if they are not covered under the FLSA. New York’s wage and hour law covers nonprofits and will be discussed below. If you have employees in other states, it is important to check coverage of nonprofits with the applicable state department of labor.

ENTERPRISE COVERAGE UNDER THE FLSA

Under “traditional” or “individual” coverage, the FLSA applies to individuals engaged either in interstate commerce or in the production of goods for commerce (see “Individual Coverage” [below](#)). In some cases, all of an organization’s employees may be covered by the FLSA, without an individual assessment of whether particular employees are covered. This is called “enterprise coverage.” **An entity is subject to enterprise coverage if its annual revenue is at least \$500,000.**¹⁸

¹⁶ 29 C.F.R §541.601(a)

¹⁷ 29 C.F.R §541.601(a); 80 F.R 38515

¹⁸ 29 U.S.C. §203(r)-(s)

Certain “named enterprises” are covered regardless of annual revenue, see [below](#).

The \$500,000 annual revenue test applies to all employers. In that sense, there is no distinction between nonprofit and for-profit employers. However, **some types of nonprofit revenue do not count toward the \$500,000 coverage threshold**, because the revenue is purely charitable in nature.¹⁹ Examples of such revenue include:

- charitable contributions
- monetary and in-kind donations
- dues that do not confer a valuable benefit
- foundation or government grants which fund charitable activity

Revenue generated from what the DOL regards as “commercial activity” DOES count toward the \$500,000 coverage threshold.²⁰ (Note that the DOL has stated that it is not taking a position on whether revenue from such activity would be considered taxable unrelated business income (“UBIT”) under the Internal Revenue Code.) Examples of such revenue include:

- fee for service, even if provided on a sliding scale basis
- revenue from a thrift shop or gift store
- revenue from sale of goods or services even if generated by a workforce development program
- grant for providing services **to** a public entity

Therefore, if a nonprofit’s annual revenue is derived entirely from contributions, it is not covered by the FLSA even if the annual revenue far exceeds \$500,000. (However, individual employees may be covered.)

*Nonprofits may run a variety of programs: some may be named enterprises, such as daycare, others may generate significant fee for service revenue, and yet others may be supported entirely by charitable contributions. In such situations, a separate analysis is required to determine coverage of each program. If the program is a named or covered enterprise, all of its employees are covered by the FLSA, but employees of the other programs are not subject to the FLSA unless they are individually covered.*²¹

NAMED ENTERPRISES COVERED BY FLSA REGARDLESS OF REVENUE

The FLSA covers all employees working for the following types of organizations, regardless of annual revenue and regardless of nonprofit or for-profit status:²²

¹⁹ Id.

²⁰ Id.

²¹ 29 C.F.R. §779.214

²² 29 U.S.C. §203(r)-(s)

- hospitals
- residential institutions caring for seniors or the disabled
- schools for disabled or gifted children
- preschools, Head Start programs, daycare programs, elementary or secondary schools
- institutions of higher education

INDIVIDUAL COVERAGE UNDER THE FLSA

Individual employees may be covered by the FLSA even if the nonprofit employer is not a covered enterprise. Individual employees are covered if they engage in interstate commerce or in the production of goods for interstate commerce.²³ The employee is covered if he or she regularly engages in interstate commerce, even if the employee does not spend a great deal of time doing so.²⁴

In the nonprofit context, some examples of such activity are:

- making out-of-state phone calls
- receiving interstate mail or email
- ordering or receiving goods, including donated goods, from out of state
- handling or accounting for credit card transactions, including donations

An employee engaged in interstate commerce is eligible to receive overtime pay, unless he or she falls within one of the exemptions discussed above, even if other employees are not covered because the nonprofit employer's annual revenue is below \$500,000.

STATE LAW

As noted earlier, state law on overtime may cover nonprofit employees even if the federal FLSA does not. States may enact their own wage and hour laws as long as the state law is at least as favorable to employees as the federal law. Many states have enacted a minimum wage that is higher than the federal minimum wage. Some, but not all, state wage and hour laws cover nonprofit employers.

NEW YORK STATE

Nonprofit employers in New York State are subject to the state's wage and hour laws. New York State's tests for exempt duties and salary basis are nearly identical to the FLSA's tests. However, New York State's salary threshold for exemption has historically been higher than the federal salary threshold, and is currently \$675/week (\$35,100/year).²⁵

²³ 29 U.S.C. §207(a)(1)

²⁴ 29 C.F.R. §776.3

²⁵ 12 NYCRR §142-3

When the new federal salary threshold becomes effective on December 1, 2016, employees who were exempt under both federal and state law will no longer be exempt under federal law if their salary is below \$913/week or \$47,476/year.

It is therefore critical for New York nonprofits to determine whether they are a covered enterprise under federal law. Even if not a covered enterprise, they need to understand whether any of their employees are individually covered by the FLSA. If so, each nonprofit then needs to determine whether to raise the salary of currently exempt employees earning less than \$913/week (or \$47,476/year) in order to maintain their exempt status.

WHAT YOUR NONPROFIT NEEDS TO DO NOW

DECIDE IF FEDERAL LAW APPLIES:

- Determine whether the nonprofit is a named or covered enterprise under the FLSA
 - If so, determine whether your currently exempt employees will continue to be exempt under the new federal salary threshold
- If the nonprofit is not a named or covered enterprise, determine whether any employees are individually covered under the FLSA
 - If so, determine whether your currently exempt employees will continue to be exempt under the new federal salary threshold

DECIDE IF ANY STATE LAW APPLIES:

- Determine whether currently exempt employees will also continue to be exempt under any applicable state law

FOR A VISUAL DEMONSTRATION OF THE PROCESS, SEE THE LAST PAGE OF THIS DOCUMENT.

REVIEW ALL EXEMPT POSITIONS AFFECTED BY THE NEW REGULATIONS OR ABOUT WHICH YOU ARE UNSURE

- Determine whether the positions meet all three tests discussed above
- **IF CURRENTLY EXEMPT EMPLOYEES WILL NO LONGER BE EXEMPT UNDER THE NEW SALARY THRESHOLD, DECIDE WHETHER TO MAINTAIN THE EXEMPTION OR RECLASSIFY SOME OR ALL OF THEM AS NON-EXEMPT**
 - If the decision is to maintain the exemption, then the compensation must be raised to meet or exceed the salary threshold
 - If the decision is to reclassify as non-exempt, consider the following cost-saving options:
 - Limit hours to forty in one workweek

- Lower base salary to maintain overall compensation, including anticipated overtime
 - *Note: You may continue to pay salary, but determine what hours are covered in order to determine hourly rate on which to calculate overtime pay*
 - *Note: You may (but need not) convert salary to hourly wage*
- Create a process for implementing the decision:
 - Advance notice
 - NYS Employers must give 7 days' written notice, signed by employee
 - Communicate with affected employees
 - Make general announcement to all employees
 - Adopt policy requiring prior written approval for overtime work
 - Educate line supervisors
 - Negotiate effects of reclassification with union, if there is one
 - Avoid inappropriate use of “independent contractors” and volunteers

RESOURCES

The DOL has prepared a helpful guidance specifically for nonprofits, which can be found here: <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>

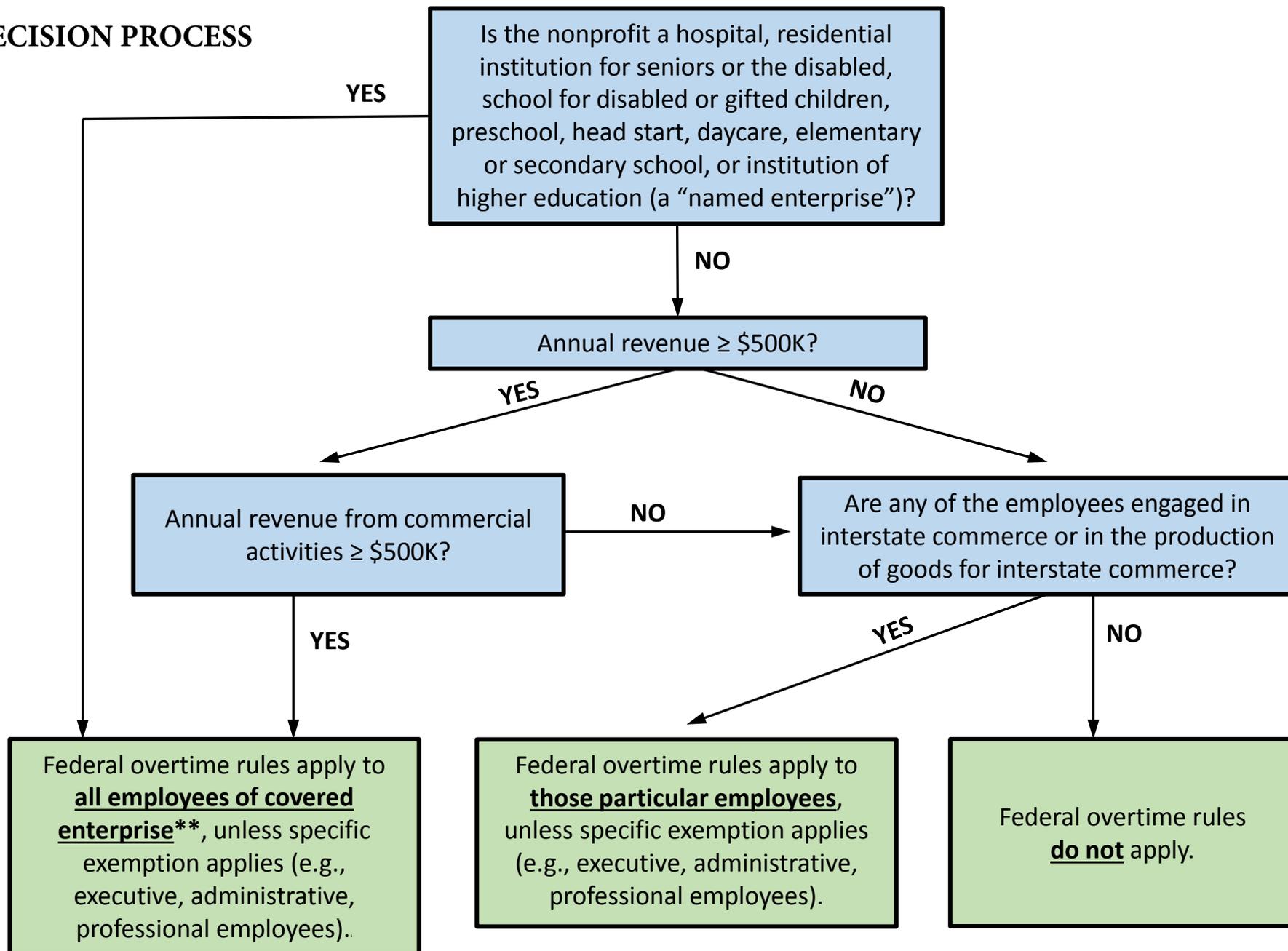
The DOL has posted FAQ's specifically for nonprofits, which can be found here: https://www.dol.gov/whd/overtime/final2016/webinarfaq_np.htm

The DOL maintains a self-assessment tool to help determine whether a specific position is exempt, which can be found here: <http://webapps.dol.gov/elaws/overtime.htm>

This alert is meant to provide general information only, not legal advice. Periodically Lawyers Alliance offers workshops and webinars on employment law issues. To see the current schedule, visit our website at www.lawyersalliance.org/workshops.php.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.

DECISION PROCESS



**Covered enterprise means only those commercial activities generating \$500K+ in annual revenue (unless the nonprofit is a named enterprise, in which case all employees are covered regardless of the annual revenue). Other charitable programs of the same nonprofit are not covered. Please see main text.

NOTE: NY overtime rules apply regardless of whether the federal rules apply or not.