

OVERTIME PAY AND CHILD CARE OR PRESCHOOL PROGRAMS 2016

Note: this article has been written to provide a summary of the current law and its impact on child care, preschool and early childhood programs. You will notice that the issue is quite complicated. As such programs may want to consult the State Office of the Federal Department of Labor 201 E Washington Ave, Madison, WI 53703 Phone: (608) 266-3110 or an attorney or CPA with a background in labor law regarding specific questions related to their program.

4-C has data on a wide range of economic factors in the child care/preschool arena. How programs handle overtime is not included. However the recent changes in rules governing overtime (which will take effect December 1st 2016) have the potential to affect any child care business that has paid staff. As such it seemed important to research the issue and provide a summary of the changes and how they may affect early childhood and after school programs.

If you currently have overtime policies that pay at least time and a half for hourly staff who work more than 40 hours in any defined 7 day week, you probably will not be affected by the new regulations. On the other hand if you have salaried employees currently exempt from overtime you need to look at the new regulations very carefully and consider their effect on your budget, personnel policies and work schedules.

It is better to be prepared than to face penalties or the need to later pay back overtime pay.

One critical factor in determining who needs to be paid overtime is how much the worker earns. The federal government sets a salary threshold (sometimes called salary test) above which it is easier to grant exemptions for over time. The current threshold rate, set over a decade ago, was \$23,660 per year (about \$11.37 an hour). Most workers under that level were eligible for overtime pay. To qualify for exemption, a white collar employee generally must be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"). They must primarily perform executive, administrative, or professional duties, as provided in the Department's regulations (the "duties test"). They also must be paid at least at or above a specific salary threshold (the salary test). For an exemption to apply, an employee's specific job duties **and** salary must meet all of the applicable requirements provided in the Department's regulations.

As such, how much the employee is paid is important. The new salary threshold rate which goes into effect Dec 1st, 2016 is \$47,892 (about \$22.83 an hour). **This is actually determined by a weekly amount which is \$913.** This is double the old rate and based on the 40th percentile of weekly earnings for full-time salaried workers in a grouping of the lower wage states in the union. It will also increase every 3 years to reduce the size of threshold increases in the future.

At \$11.37 an hour, the old rate was so low that a large percentage of Lead Teachers, Program Coordinators and Directors in Dane County were earning a higher amount and thus may have been able to be exempted from overtime requirements. As a result over-time pay (set at a minimum of time and a half) might not have been a major legal concern.

At the new \$913 a week rate, 68% of the Directors, 98% of the Middle Management (assistant Directors, Site Coordinators etc.) and 99% of the lead teachers are under the salary threshold making them eligible for overtime pay. There are many positions that to remain exempt from overtime will require \$10 or more an hour raises! As such programs that have not had to deal with overtime issues before may need to consider them later this year.

There are a number of areas that may affect a program's or business's requirement to pay overtime. **Note that many of the DOL descriptions below are prefaced by words like "generally" suggesting it is good to check with a lawyer or the department before assuming you are exempt.** One rule that needs to be noted is **Preschools are "named enterprises" subject to the new overtime rules regardless of annual sales, business done or nonprofit status.** As such whether your program is considered a preschool will have a major impact on your overtime situation.

The first is the size of a business. Generally, employees of enterprises that have an annual gross (note not net) volume of sales made or business done of \$500,000 or more are covered by the FLSA related to overtime pay and other rules. In addition, employees of certain businesses are covered by the FLSA regardless of the amount of gross volume of sales or business done. These businesses include: hospitals, businesses providing medical or nursing care for residents; schools (whether operated for profit or not for profit); preschools, and public agencies. (Note the definition of a school will be discussed later in this paper.) **Note this rule may exempt family child care programs who hire staff from the overtime requirement due to their low gross income.**

Second is non-profit status. There is no exemption for non-profit organizations under the FLSA or in the proposed rule. Thus, the proposed rule may impact non-profit organizations having an annual gross dollar volume of sales or business done of at least \$500,000. In determining non-profit gross income related to coverage requirements, only activities performed for

a business purpose are considered and not charitable, religious, educational, or similar activities of organizations operated on a non-profit basis where such activities are not in substantial competition with other businesses. One way this is determined is by excluding charitable contributions and membership fees from the total gross income of the non-profit. Note it is not clear if child care, and after school care programs fee income is exempt as charitable/educational under this rule given the high percentage of programs that are for profit in the field which may invoke the “competition” clause.

Third Teachers are exempt but probably not child care or preschool teachers in Wisconsin. Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in this activity as a teacher in an educational establishment. It should be noted that, although a preschools may engage in some educational activities, preschool employees whose primary duty is to care for the physical needs for the facility’s children would ordinarily not meet the requirements for exception as teachers under the applicable regulations. Discussions with the Federal Department of Labor in Madison, however, indicate that preschools, nursery schools and child care programs are not defined as “educational establishments” for the purposes of overtime pay in Wisconsin. This is an area that may not have been sufficiently explored in the past due to the very low exemption threshold for wages. It is unlikely that up to now a preschool paying \$14 an hour for lead teachers would explore their educational status under the law when they were already exempt under the salary threshold. With the advent of 4K there have also been blurring the lines between “schools” and preschools. With the increase in the salary threshold, school and teacher definitions may be an area that some programs may want to explore with the State Department of Labor.

A general guidelines related to child care and preschools is up on the DOL website:

<https://www.dol.gov/whd/regs/compliance/whdfs46.pdf>

A good overview article for all businesses is at

<http://www.accountingweb.com/practice/clients/new-dol-overtime-rule-changes-8-key-questions>

though it pushes you towards using their payroll system.

Note that educational institution is not well defined here and seems to vary by state. The article however does cover a number of other wage and hours issues somewhat unique to child care/preschools (like paying for meal time spent eating with children).

A very good and detailed article on how the new overtime rules affect non-profits is also up on the DOL website>

<https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf>

Another useful article for non-profits (and some of the questions apply to for profits as well) is

<https://philanthropy.com/article/Answers-to-Nonprofits-/236743>

One more test is whether or not an employee is involved in interstate commerce as in some cases that employee may be covered by federal overtime pay rules even if the business is exempt through other means . While this seems unlikely given child care and preschool services mainly being on site, in today’s online world “interstate commerce” can be defined as spending time ordering supplies from out of state on the phone or computer.

What you need to do by December 1st is to review your personnel policies and budget to make sure you conform to the new rules regarding overtime and who is exempt. One thing to keep in mind is the tight labor market especially in Dane County is making it difficult for programs to hire teachers. **The new rules affect all businesses not just child care.** As a result, programs and businesses with staff in exempt positions will be competing with other businesses that pay overtime thus offering employees an opportunity for higher earnings. So there are market factors as well as legal ones to consider when deciding how your program will handle overtime under the new regulations.