



TAKING CARE OF BUSINESS

...and Working Overtime



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CAPLAW

Agenda

- **FLSA Overview**
- **The New Overtime Rule**
- **White Collar Exemptions**
- **Options for Compliance with the New Rule**
- **Head Start Teachers**
- **What Has Not Changed**
- **FLSA Coverage**

DISCLAIMER

- This presentation only addresses the **federal Fair Labor Standards Act**
 - It does not address state law
- **State law** will govern where:
 - It is more protective of employees than the FLSA
 - The FLSA does not apply to an enterprise or individual employee

Fair Labor Standards Act – Overview

- Requires **minimum wage** & **overtime pay** for covered employees, unless **exempt**
- **“White collar” exemptions** (*29 C.F.R. Part 541*)
 - Most commonly used exemptions
 - Cover certain executive, administrative, professional (EAP), outside sales, and computer employees
 - Three tests to determine if employee is exempt:
 - Salary basis test, salary level test, duties test
- A CAA **may** treat an employee who meets all 3 tests as **non-exempt** (and pay overtime for work > 40 hours)
 - However, a CAA and an employee **cannot** agree to waive overtime pay if the employee is non-exempt

The New Overtime Rule

Increased Standard Salary Level Test

CURRENT Overtime Rule	NEW Overtime Rule
<p>Currently, salaried employees who meet one of the duties tests must earn at least</p> <p>\$455/week (\$23,660/year)</p> <p>in order to be classified as exempt from the FLSA's minimum wage and overtime protections</p>	<p>Beginning 12/1/2016, salaried employees who meet one of the duties tests must earn at least</p> <p>\$913/week (\$47,476/year)</p> <p>in order to remain exempt from the FLSA's minimum wage and overtime protections</p>

29 C.F.R. § 541.607

The New Overtime Rule

Increased Highly Compensated Employee Compensation Level

CURRENT Overtime Rule	NEW Overtime Rule
<p>Currently, HCEs who meet a minimal duties test must earn at least</p> <p>\$100,000/year <u>and</u> at least \$455/week</p> <p>in order to be classified as exempt from the FLSA's minimum wage and overtime protections</p>	<p>Beginning 12/1/2016, HCEs who meet a minimal duties test must earn at least</p> <p>\$134,004/year <u>and</u> at least \$913/week</p> <p>in order to be classified as exempt from the FLSA's minimum wage and overtime protections</p>

29 C.F.R. § 541.607

The New Overtime Rule

Other Provisions

- **No change to standard duties tests**
- Includes **automatic updates** to standard salary level and HCE compensation level every 3 years
 - DOL to publish updated salary levels at least 150 days prior to effective date in Federal Register
- **Bonuses and catch-up payments** may be used to satisfy up to 10% of standard salary level (except for HCEs)
- DOL info/guidance on the new rule:
 - <https://www.dol.gov/whd/overtime/final2016/>
- 81 Federal Register 32391 (May 23, 2016); codified at 29 C.F.R. § 541.607

White Collar Exemptions

Requirements for EAP White Collar Exemptions (29 C.F.R. Part 541)

	Executive	Administrative	Professional
Salary Basis Test	Must be paid on salary basis	Must be paid on salary or fee basis	Must be paid on salary or fee basis <i>(except for doctors, lawyers & teachers)</i>
Salary Level Test	\$913 per week (\$47,476 per year)	\$913 per week (\$47,476 per year)	\$913 per week (\$47,476 per year) <i>(except for doctors, lawyers & teachers)</i>
Duties Test	(1) "Primary duty" must be managing org. or a dep't or subdivision; (2) must customarily & regularly manage 2+ other employees; and (3) must have authority to hire or fire other employees, or have significant input into hiring/firing/promotion decisions	"Primary duty" must: (1) involve office or non-manual work directly related to management or general business operations of the employer or customers; and (2) include exercise of discretion & independent judgment with respect to matters of significance	"Primary duty" must be to perform work that either: (1) requires advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (2) requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

Professional Exemptions

- Learned professionals
- Creative professionals
- Teachers (no salary basis or salary level)
- Doctors (no salary basis or salary level)
- Lawyers (no salary basis or salary level)

Other Exemptions

- Outside sales employees
- Computer employees

Highly Compensated Employee (HCE) Exemption

- Employees who earn at least the minimum HCE compensation threshold only need to satisfy a **more lenient white collar duties test** to qualify for the HCE exemption
- **HCE compensation threshold:**
 - \$134,004 per year and \$913 per week (as of 12/1/2016)
 - Nondiscretionary bonuses do **not** count towards \$913 per week requirement, but **do** count towards the remainder of the HCE compensation threshold

29 C.F.R. § 541.601

Part-Time or Seasonal Employees

- **Exempt status is determined on a workweek basis**
 - An employee who meets one of the white collar exemption duties tests and is paid at least \$913 per week on a salary basis in any week in which he/she performs any work (less any permissible deductions under the salary basis test) ***will be considered exempt that week***

Options for Compliance with the New Overtime Rule

Poll #1: Compliance Concerns

- **Other than increased costs**, which **one** of the following is your CAA's **main** concern about compliance with the new overtime rule?
 - a. Tracking and monitoring hours worked
 - b. Effect on pay scales
 - c. Employee morale and communicating to staff
 - d. Unionized staff/collective bargaining agreement
 - e. Other (*please type in chat panel*)

Steps for Compliance

- **Step 1: Evaluate duties of current exempt employees**
 - Those who do not meet one of the standard duties tests are not eligible for a white collar exemption

Steps for Compliance

- **Step 2:** If an employee meets one of the standard duties tests, determine whether:
 - S/he makes less than \$913/week; and
 - If so, how many hours s/he generally works, including overtime hours
 - Have employees track all of their hours (if they don't already)

Steps for Compliance

- **Step 3:** Determine **the best and most efficient way to comply** with the new overtime regulations for affected positions
 - Determine effect on program budgets

Steps for Compliance

- **Step 4:** Generally, current exempt employees who make less than \$913 per week will need to be reclassified as non-exempt as of **December 1, 2016**
 - Non-exempt employees will need to track *all* hours worked
 - But if they don't work over 40 hours per week, their pay will not be affected

Note: Employees who meet the requirements of the teacher exemption and earn less than \$913 per week do not need reclassified as non-exempt

Options for Compliance

1. **Raise salaries** to maintain exempt status
2. **Convert to hourly employee** and pay for all hours worked, including OT for hours worked over 40
3. **Continue to pay a fixed salary** and pay OT above salary for hours worked over 40
 - **OPTION 3A:** Pay salary for first 40 hours, plus 1.5x OT
 - **OPTION 3B:** Pay salary for a predetermined workweek longer than 40 hours, plus 0.5x OT for OT hours included in the predetermined workweek, plus 1.5x OT for all additional hours
 - **OPTION 3C:** Fluctuating workweek (pay fixed salary for all hours worked, plus 0.5x OT)
4. **Reallocate earnings between regular wages and overtime** to approximate same overall compensation
5. **Restructure job duties**

Option #1

Raise Salaries to Maintain Exempt Status

- **Example #1:** Ashley, a center director of a CAA's Head Start program, is paid a salary of \$45,000 per year. Her job duties qualify her for the executive exemption. Ashley's job requires regularly working overtime to direct center operations during the full day that the Head Start center is open. The CAA may choose to raise Ashley's salary to \$47,476 or more per year to maintain her administrative exemption.
- **Best for employees who:**

Meet a
standard
duties
test

Work
over 40
hours
per week

Earn
close to
the new
salary
level

Option #2

Convert to Hourly Employee and Pay for All Hours Worked

- Example #2:** Brian, the director of a CAA's homeless shelter, is currently paid a salary of \$31,200 per year. Although he works a few OT hours from time to time, Brian typically works no more than 40 hours a week. The CAA may choose to treat Brian as an *hourly* non-exempt employee and pay him an hourly rate of \$15. For typical workweeks where Brian works 40 hours, the CAA would pay him \$600 (40 hours at \$15 per hour), and if Brian works any OT hours, the CAA must pay an additional OT premium at time and a half ($\$15 \times 1.5$). If Brian works fewer than 40 hours, the CAA would pay him for the actual number of hours he worked at his regular rate of \$15 per hour.
- Best for employees who:**

Do not
regularly
work
overtime

Do not
work a
consistent
of hours
each week

Salaries
are not
close to
new salary
level

Option #3

Treat as Salaried, Non-Exempt and Pay OT Above Salary

- **CAAs may continue to pay non-exempt employees a salary**
 - FLSA does not require non-exempt employees to be hourly employees
 - However, CAAs must track and record actual number of hours worked by employee and pay OT compensation for hours worked over 40
 - CAAs must pay OT at one and one half times the employee's regular rate of pay (salary divided by # of hours the salary is intended to compensate) (29 C.F.R. § 778.113)
- **Best for employees who:**

CAA
wants to
pay on a
salary
basis

May work
over 40
hours per
week

Salaries
are not
close to
new level

Option #3A

Pay Fixed Salary for 40 Hours and Pay OT Above Salary

- **Example #3A:** A CAA pays Alexa, a development manager at a CAA (non-exempt), a fixed salary of \$44,200 per year (\$850 per week) for a 40 hour workweek. Her regular rate of pay is \$21.25 per hour (\$850 divided by 40 hours). If Alexa works 45 hours one week, the CAA would pay her 1.5x OT for the additional five hours at a rate of \$31.88 per hour. Thus, for that week, Alexa should be paid \$1,009.40, consisting of her \$850 per week fixed salary plus \$159.40 in overtime compensation.
- **Best for employees who:**

CAA
wants to
pay on a
salary
basis

Typically
work 40
hours per
week

Work
limited OT

Option #3B

Pay Fixed Salary for a Workweek > 40 Hours,
Pay 0.5x OT for OT Hours Included in Workweek, and
Pay 1.5x OT for Additional Hours

- **Example #3B:** A CAA wants to treat Jamie, its HR manager, as a salaried, non-exempt employee. Jamie usually works between 42 and 45 hours per week, and occasionally works up to 50 hours per week. The CAA tells Jamie she will earn a fixed salary of \$44,200 per year (\$850 per week) that covers *up to* 50 hours per week (not including overtime payments), but Jamie is *not* expected to work 50 hours *every* week. Because the \$850 per week salary is intended to compensate Jamie for 50 hours of work, Jamie's regular rate of pay is \$17 (\$850 divided by 50), *regardless* of the number of hours she actually works.

Option #3B

Pay Fixed Salary for a Workweek > 40 Hours,
Pay 0.5x OT for OT Hours Included in Workweek, and
Pay 1.5x OT for Additional Hours

If Jamie works < 50 hours

The CAA would pay Jamie
\$850 + 0.5x OT:

\$850 (salary for up to 50 hours)
\$OT (0.5x OT for hours > 40)

Paying less (except deductions made pursuant to personnel policies) would be treating Jamie as an hourly, rather than salaried, employee

If Jamie works 50 hours

The CAA would pay Jamie a total of \$935:

\$850 (salary for 50 hours)
\$85 (0.5x OT for hours 41-50)

OT hours included in workweek (hours 41-50) are already paid for at straight time (1x) in Jamie's salary. Thus, the CAA only owes an additional 0.5x premium for these OT hours

If Jamie works > 50 hours

The CAA would pay Jamie a total of \$986:

\$850 (salary for 50 hours)
\$85 (0.5x OT for hours 41-50)
\$51 (1.5x OT for hours 51-52)

OT hours 51-52 are not included in Jamie's salary. Thus, the CAA must pay a 1.5x premium for these OT hours

Option #3B

Pay Fixed Salary for a Workweek > 40 Hours,
Pay 0.5x OT for OT Hours Included in Workweek, and
Pay 1.5x OT for Additional Hours

- **Best for employees who:**

Regularly work
more than 40
hours per week

May not work
same amount of
OT each week

CAA wants to
preserve
flexibility to
work some OT
without need to
get approval
each week

Option #3B

Pay Fixed Salary for a Workweek > 40 Hours,
Pay 0.5x OT for OT Hours Included in Workweek, and
Pay 1.5x OT for Additional Hours

- **CAAs electing to use this option** should communicate to their employees:
 - Straight time salary covers *up to* a number of hours (exceeding 40)
 - However, CAA may not expect employee to work that number of hours *every week*
 - CAA will pay for any hours worked over 40 (at applicable OT rates)

- **Number of hours included in workweek** should approximate the number of OT hours the employee generally works

Option #3C

Pay Fixed Salary for Fluctuating Workweek,
Calculate Regular Rate Based on Actual # of Hours Worked,
Pay 0.5x OT for Hours Worked Over 40

- **Fluctuating workweek method:** (29 C.F.R. § 778.114)
 - Employee's work hours must *fluctuate from week to week*
 - CAA pays a *fixed salary* regardless of actual number of hours worked
 - CAA pays *overtime* at 0.5x the employee's regular rate of pay for hours worked over 40
 - *Employee's regular rate of pay changes, depending on the actual number of hours worked that week*
 - This rate drops as the employee works more hours in a week
 - But rate cannot drop below minimum wage
 - CAA and employee must have a *clear mutual agreement* that the fixed weekly salary is total compensation for all work performed each workweek (apart from any OT compensation)

Option #3C

Pay Fixed Salary for Fluctuating Workweek,
Calculate Regular Rate Based on Actual # of Hours Worked,
Pay 0.5x OT for Hours Worked Over 40

- **Example #3C:** Randy, a licensed clinical social worker in a CAA's health care program, is responsible for conducting home visits. His hours fluctuate from week to week, depending on his schedule of home visits for that week, but he typically works no more than 50 hours each week (and sometimes he works fewer than 40 hours). To use the fluctuating workweek method, the CAA must have a clear agreement with Randy that his fixed salary of \$44,200 (\$850 per week) represents total compensation (excluding OT premium payments) for all work performed in a workweek. The CAA **must** pay Randy \$850 regardless of the number of hours he actually works. If Randy works more than 40 hours, the CAA would pay him OT at 0.5x his regular rate of pay. *Randy's regular rate of pay fluctuates each week and depends on the number of hours he actually worked that week.*

Salaried, Non-Exempt Options

	Total Hours Worked	OPTION #3A: Salary for 40 Hrs + 1.5x OT (Example #3A: Alexa)			OPTION #3B: Salary for 50 Hrs + 0.5x OT (Hrs 41-50) + 1.5x OT (Hrs > 50) (Example #3B: Jamie)			OPTION #3C: Fluctuating Workweek: Salary for 50 Hrs + 0.5x OT (Hrs > 40) (Example #3C: Randy)		
		Regular Rate	OT Premium	Total Pay	Regular Rate	OT Premium	Total Pay	Regular Rate	OT Premium	Total Pay
WEEK 1	40.0	\$21.25	N/A	\$850	\$17	N/A	\$850	\$21.25 (40 hrs)	N/A	\$850
WEEK 2	37.5	\$21.25	N/A	\$850	\$17	N/A	\$850	\$22.67 (37.5 hrs)	N/A	\$850
WEEK 3	50.0	\$21.25	\$31.88 (1.5x)	\$1,168.80 (\$850 plus 10 hrs at \$31.88)	\$17	\$8.50 (0.5x)	\$935 (\$850 plus 10 hrs at \$8.50)	\$17 (50 hrs)	\$8.50 (0.5x)	\$935 (\$850 plus 10 hrs at \$8.50)
WEEK 4	48.0	\$21.25	\$31.88 (1.5x)	\$1,105.04 (\$850 plus 8 hrs at \$31.88)	\$17	\$8.50 (0.5x)	\$918 (\$850 plus 8 hrs at \$8.50)	\$17.71 (48 hrs)	\$8.86 (0.5x)	\$920.88 (\$850 plus 8 hrs at \$8.50)
WEEK 5	52.0	\$21.25	\$31.88 (\$1.5x)	\$1,232.56 (\$850 plus 12 hrs at \$31.88)	\$17	\$8.50 (0.5x for hrs 41-50) \$25.50 (1.5x for hrs 51-52)	\$986 (\$850 plus 10 hrs at \$8.50, plus 2 hrs at \$25.50)	\$16.35 (52 hrs)	\$8.18 (0.5x)	\$948.16 (\$850 plus 12 hrs at \$8.18)
TOTAL				\$5,206.40			\$4,539.00			\$4,504.04

Option #4

Reallocate Earnings Between Regular Wages and Overtime to Approximate Same Overall Compensation

- Can adjust the amount of an employee's earnings to **reallocate it between regular (straight-time) wages and OT** so that the total amount paid to the employee remains largely the **same**
- Best for employees who:**

Regularly
work > 40
hours per
week

Generally
work the
same # of
OT hours
each week

Are paid
below the
new salary
level
threshold

Option #4

Reallocate Earnings Between Regular Wages and Overtime

- Hourly wage must still be **at least highest applicable minimum wage** (federal, state, or local)
- Employees' hours worked must still be **recorded**
- **OT must be paid** according to the actual number of hours worked each week
- Wages must not be continually adjusted each workweek in order to manipulate the regular rate

Option #4

Reallocate Earnings Between Regular Wages and Overtime

- **Example #4:** Roger, a program director at a nonprofit CAA who satisfies the duties test for the executive exemption, is currently paid a fixed salary of \$39,520 per year (\$760 per week) and regularly works 45 hours per week.

Hourly Plus Overtime

CAA may choose to convert Roger to an hourly employee and pay him at an hourly rate of \$16 and pay time-and-a-half for the 5 overtime hours

\$640.00 (40 hours x \$16/hour)
 + \$120.00 (5 OT hours x \$16 x 1.5)

\$760.00 per week (\$39,520 per year)

Salary Plus Overtime

Alternatively, CAA may pay Roger a salary of \$33,280/year (\$640/week) for 40 hours per week and pay time-and-a-half for the 5 overtime hours

\$640.00 (salary for 40 hours/week,
 equivalent to \$16/hour)
 + \$120.00 (5 OT hours x \$16 x 1.5)

\$760.00 per week (\$39,520 per year)

Option #5

Restructure Job Duties

- Can **redistribute or eliminate job duties** to enable employees reclassified as non-exempt to complete their work within 40 hours each week
 - Hire additional employees
 - Shift to exempt employees
- **Best for employees who:**

Regularly
perform
duties
outside
workday

Duties can
be done
by 2+
employees

Duties can
be shifted
to exempt
employees

How Does the New Overtime Rule Affect Head Start Teachers?

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Options for Classifying HS Teachers

If a CAA currently treats its Head Start teachers as

**EXEMPT
under the teacher
exemption**

The new overtime rule will not affect these teachers, as the salary level test does not apply to the teacher exemption. However, CAAs should ensure that their Head Start teachers meet all of the requirements of the teacher exemption, including the requirement that the CAA's Head Start program be considered an "educational establishment."

**EXEMPT
under the learned
professional
exemption**

The teachers must meet the new salary level test (\$913 per week) to maintain their exempt status. CAAs must evaluate each individual teacher's credentials to ensure the teacher satisfies the requirements of the learned professional exemption.

NON-EXEMPT

CAAs do not need to make any changes based on the new overtime rule and can continue to treat the Head Start teachers as non-exempt.

Poll #2: Head Start Teachers

- How does your CAA currently classify its Head Start teachers?
 - a. **EXEMPT** under the teacher exemption
 - b. **EXEMPT** under the learned professional exemption
 - c. **NON-EXEMPT**
 - d. Some **EXEMPT** and some **NON-EXEMPT**, depending on educational credentials

Teacher Exemption

- A subcategory of the professional exemption
- **Salary basis and salary level tests do NOT apply**
 - New overtime rule does **NOT** affect Head Start teachers classified as exempt under the teacher exemption
- **Primary Duty:**
 - Employee's primary duty must be "teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge"
 - Employed and engaged in this activity as a teacher in **a school system or educational establishment or institution**

29 C.F.R. § 541.303

Teacher Exemption

- **Educational Establishment:** An elementary or secondary school system, an institution of higher education or other educational institution (29 C.F.R. § 541.204(b))
 - **Elementary and secondary schools** defined as those day or residential schools that provide elementary or secondary education, **as determined under State law**
 - **2008 DOL Opinion Letter** (FLSA2008-13NA)
 - Do state's laws include nursery school or kindergarten programs within the scope of elementary education?
 - Is the child care center licensed by the state agency responsible for elementary education?
- **Note possible effect on unemployment eligibility** if CAA is determined to be an "educational establishment"

Learned Professional Exemption

- A subcategory of the professional exemption
- **Salary basis and salary level tests DO apply**
- **Primary Duty:** Performing work that requires advanced knowledge that is “customarily acquired by a prolonged course of specialized intellectual instruction”
 - Professions where specialized academic training is a standard prerequisite for entrance into the profession
 - Best evidence that an employee meets this requirement is possession of the appropriate academic degree
 - But **exemption not available for occupations that require only a 4-year degree in any field or a 2-year degree** as a prerequisite for entrance into the field

29 C.F.R. § 541.301

What Has Not Changed

What Has Not Changed

- **Standard duties tests**
 - Executive, administrative, professional, outside sales, computer-related
- **Salary basis test**
 - Does not apply to doctors, lawyers, or teachers
- **Recordkeeping requirements**
 - CAAs do not have to convert all salaried employees to hourly employees

Non-Exempt Employee Scheduling Myths

- Non-exempt employees need to **punch a clock**
- Non-exempt employees must **sign in and out** each time he/she starts and stops work
- Non-exempt employees must have a **predetermined work schedule**
- Non-exempt employees may not **telecommute** or **work a flexible schedule**

FLSA Recordkeeping Requirements

- **Employers may use any timekeeping method**, as long as it is complete and accurate
- **Employees with relatively fixed schedules:**
 - CAA can keep a record of schedule (e.g., 8 hours per day) and merely note that the employee followed the schedule
 - Note any exceptions to schedule and report actual hours worked
- **Employees with flexible/varying schedules:**
 - Employee doesn't need to sign in/out or punch a clock
 - Employee should keep and record the total number of daily hours worked

FLSA Recordkeeping Requirements

- **Employers must maintain certain records for non-exempt employees:** (29 C.F.R. § 516.2)
 - Time and day of week when workweek begins
 - # of hours worked each day
 - Total hours worked each workweek
 - Basis on which employee's wages are paid (e.g., "\$12 per hour" or "\$640 per week")
 - Regular hourly pay rate
 - Total daily or weekly straight-time earnings
 - Total OT earnings for the workweek
 - All additions to or deductions from employee's wages
 - Total wages paid each pay period

Public CAA Employees: Comp Time

- **State or local gov't agencies** may still arrange for employees to earn compensatory time off ("comp time") instead of cash payment for overtime hours
 - Provide notice to employee that comp time will be given in lieu of overtime pay (e.g., by providing employees a copy of CAA's personnel policies)
- **Comp time must be provided at a rate of 1.5 hours for each overtime hour worked**
 - **Example:** If an employee works 44 hours in a single workweek (4 hours of overtime), he would be entitled to 6 hours (1.5 times 4 hours) of comp time

29 C.F.R. § 553.23

29 C.F.R. § 553.22

Public CAA Employees: Comp Time

- When used, comp time paid at regular rate of pay
- Most state and local government employees may accrue up to 240 hours of comp time
- Employee must be permitted to use comp time on date requested unless doing so would “unduly disrupt” operations of the agency
- **Only applies to state/local gov’t agencies, not nonprofits**
- Consult with state employment attorney re: state law

29 C.F.R. §§ 553.20-553.23

Who's Covered Under the FLSA?

FLSA Coverage

Enterprise Coverage

- **All employees** of enterprise are covered if enterprise generates at least \$500,000 in revenue annually from ordinary business activities
- Potentially competitive business practices

29 U.S.C. §§ 203(s)(1); 207(a)

Individual Coverage

- **Employees individually** covered if they engage in interstate commerce or the production of interstate commerce
- May apply when enterprise coverage does not

29 U.S.C. § 207(a)

Enterprise Coverage: Commercial Activities

- Charitable activities provided free of charge do not count as ordinary commercial activities
- Certain types of revenue **do not count** towards the \$500,000 annual threshold
 - Donations, member dues, contributions, etc.
- **Fee-generating** services are likely to be commercial activities
 - **Example:** Income from a CAA's fee-for-service weatherization business would count towards the \$500,000 annual threshold

“Named Enterprises”

- Certain “named enterprises” are **automatically** subject to FLSA (29 U.S.C. § 203(s)(1)(B))

Hospitals

Elementary,
secondary &
preschools

Institutions of
higher
education

Nursing
homes

Federal, state,
and local
governments

- **Head Start programs are considered “named enterprises” (preschools) and employees are covered by the FLSA under enterprise coverage** (HS Program Instruction PI-HS-HS-01)

Enterprise Coverage: Scenario One

A nonprofit CAA provides mental health and counseling services to the local community and charges clients a fee on a sliding scale, generating over \$500,000 in annual revenue

- Are the employees of the CAA's counseling program **protected by the FLSA on an enterprise basis**?
 - a. Yes
 - b. No

Scenario One: Answer

- **YES.** According to the DOL, charging a fee for a service is potentially competitive, and therefore commercial in nature
 - The revenue derived from the services *would* count towards the \$500,000 threshold
 - If revenue from the services meets or exceeds \$500,000, then employees of the counseling program would be covered by the FLSA



Enterprise Coverage: Scenario Two

A nonprofit CAA manages a culinary job training program, which includes a catering business that teaches clients various skills and generates over \$500,000 in annual revenue

- Are the culinary program's employees **covered by the FLSA on an enterprise basis?**
 - a. Yes
 - b. No



Scenario Two: Answer

- **YES.** The CAA is engaged in a commercial activity that may be in competition with other for-profit catering entities
 - The revenue derived from the catering business **would** count towards the \$500,000 threshold
 - If revenue meets or exceeds \$500,000, then the CAA's catering business employees would be covered by the FLSA
- **It doesn't matter how the CAA spends the income generated by the catering business.**



Individual Coverage

- Individual employees covered if they **engage substantially in interstate commerce** or the production of interstate commerce (29 U.S.C. § 207(a)(1))
- **Employees likely to be covered include those who:**
 - Order or receive supplies from out-of-state vendors (e.g., Amazon, other online/national retail stores)
 - Communicate with out-of-state individuals or entities via phone/e-mail (e.g., federal funding sources, CAPLAW, other regional/national Community Action partner organizations)
 - Handle credit card transactions/perform accounting & bookkeeping for such activities

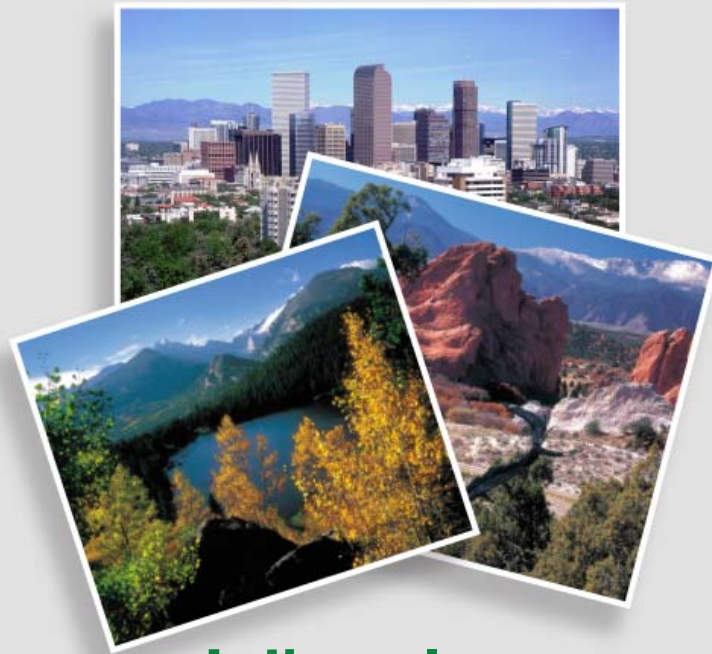
Individual Coverage

The safest approach for a nonprofit CAA is to assume that the FLSA applies to all of its employees

- Tests around enterprise coverage are not always clear about what counts towards the \$500,000 threshold
 - Courts have interpreted “interstate commerce” broadly
 - Easy for employees to communicate with people and engage in transactions that cross state lines
 - May not be administratively feasible to have some employees covered by the FLSA and others not covered
- Use lack of coverage as a **defense to a claim for FLSA violations**

Questions

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Let's explore.

COVER NEW GROUND at the

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