

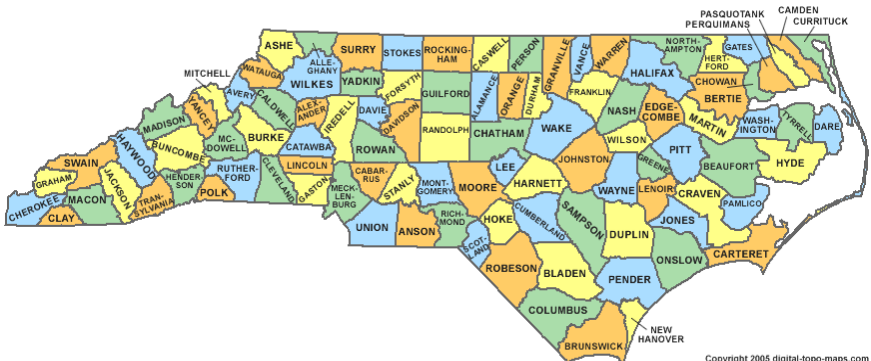
# Hot Topics in Employment Law for Nonprofits

David Heinen

North Carolina Center *for* Nonprofits



# Connect Learn Advocate



# Important Disclaimers

*If you can read this fine print, you are sitting too close to your screen!*







Dad's  
boring  
presentation



Dad's  
boring presentation  
+ memes



# *Initial question:*

**Are your nonprofit's  
workers employees or  
independent contractors?**

# Worker Misclassification

# Employees vs. independent contractors



# Employees vs. independent contractors



Behavioral control

Financial control

Relationship of the parties

# Why it matters



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# DOL Regulations– Recent Changes



**AN INSIDE LOOK AT  
THE DOL REGULATORY  
STAFF FROM 2017-2022**



# Department of Labor regulations (2021)

1. Nature and degree of worker's control over work
2. Worker's opportunity for profit or loss based on worker's initiative or investment in resources

# Department of Labor regulations (2021)

Lesser factors:

3. Amount of skill required for work
4. Degree of permanence of working relationship
5. Whether work is part of integrated unit of production of employer's business

# Proposed DOL regulations (2022)

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the employer

# Proposed DOL regulations (2022)

3. Degree of permanence of the work relationship
4. Nature and degree of control by the employer

# Proposed DOL regulations (2022)

5. Extent to which the work performed is an integral part of the employer's business
6. The worker's skill and initiative

# DOL regulations – next steps



# DOL regulations – likely next next steps



# Worker Misclassification – NC Law

- Mostly decided by case law rather than statute
- Similar “economic realities” test as proposed “new” DOL regulations

# Fair Labor Standards Act

# Fair Labor Standards Act

- Minimum wage
- Overtime pay for non-exempt employees
- Equal pay for equal work

# Fair Labor Standards Act

- Exemptions for executive, professional, and administrative staff
  1. Paid on salary basis
  2. Must be paid \$684/week or more (\$35,568 per year)
  3. Must meet duties test
- Exemption for highly-compensated employees

# FLSA Exemption – Duties Tests

- Duties tests have not changed recently ...
  - ... but be certain that exempt employees meet one of these tests
  - **Warning: It appears that the regulations and fact sheets about the duties tests were written by lawyers!**
  - Further clarification on how these apply to nonprofit employees would be welcome

# FLSA Exemption

- Administrative employees
  - Primary duty is non-manual work
  - Exercise discretion over work
  - Salary of \$684/week or more (\$35,568 per year)

# FLSA Exemption

- Administrative employees – some key quotes:
  - “Directly related to management or general business operations”
  - “Exercise of discretion and independent judgment with respect to matters of significance”

# FLSA Exemption

- Executive employees
  - Primary duties are managerial duties of organization
  - Supervision of 2+ FTE
  - Authority to hire/fire
  - Salary of \$684/week or more (\$35,568 per year)

# FLSA Exemption

- Professional employees
  - Primary duty is related to a learned profession or creative profession
  - Salary of \$684/week or more (\$35,568 per year)
    - With a few important exceptions, including teachers, doctors, and lawyers

# FLSA Exemption

- Professional employees – some key quotes:
  - “**Learned professional**”
    1. Advanced knowledge that is predominantly intellectual in character ...
    2. ... in a field of science or learning
    3. ... customarily acquired by a prolonged course of specialized intellectual instruction

# FLSA Exemption

- Professional employees – some key quotes:
  - “Creative professional”
    1. Performance of work requiring invention, imagination, originality, or talent
    2. In a recognized field of artistic or creative endeavor

# FLSA Exemption

- Professional employees – some key quotes:
  - “Teacher”
    - Regular classroom teachers
    - Pre-K teachers
    - Some specialized instructors
    - Some academic administrative personnel

# DOL regulations – recent history



# DOL regulations – likely next steps



# DOL regulations – likely next next steps



# DOL regulations –nonprofit reaction



# DOL regulations –tip for nonprofits



# Nonprofit-specific FLSA questions (and answers!)

# *Answers to some common nonprofit questions*

- If staff are non-exempt, do they need to be paid on an hourly basis?
- *No, it is permissible to pay salary to non-exempt staff (but you still need to track hours to pay overtime for hours worked over 40 per week)*

# *Answers to some common nonprofit questions*

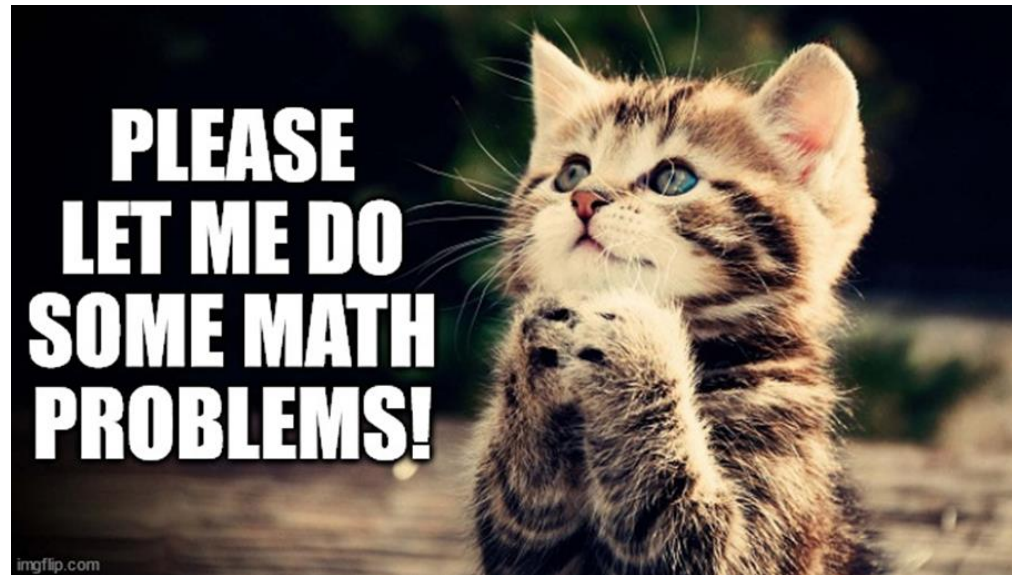
- If our nonprofit's work week is 35 hours per week, do we need to pay overtime when non-exempt staff work 36+ hours in a week?
- *No, regardless of how you define your work week, you don't need to pay overtime until workers have exceeded 40 hours in a work week*

# *Answers to some common nonprofit questions*

- Does our nonprofit's work week need to be Sunday through Saturday?
- *No, you can define your work week as any period of seven consecutive days.*
- *You just need to be consistent for all staff and all times of the year.*

# *Answers to some common nonprofit questions*

- Some of our nonprofits employees work two different jobs with two different rates of pay. How do we calculate overtime?



# *Answers to some common nonprofit questions*

- Some of our nonprofits employees work two different jobs with two different rates of pay. How do we calculate overtime?
- *The regular rate of pay for each week is the weighted average of the rate of pay for each position. Overtime is calculated as 1 ½ times that weighted average.*

# *Answers to some common nonprofit questions*

- Can we offer comp time instead of overtime to our non-exempt employees?
- **No.**

# *Answers to some common nonprofit questions*

- Do we need to pay the minimum wage to our interns?
- *It depends.*
- *Nonprofits can have unpaid, volunteer interns.*
- *Also, interns who qualify as trainees may receive stipends that are less than the minimum wage.*
- *Otherwise, nonprofits should pay interns at least the minimum wage for hours worked.*

# *Answers to some common nonprofit questions*

- Some of our staff are on call on evenings and weekends. Do we need to count their on-call time as hours worked?
- *It depends on whether the on-call staff are engaged to be waiting (which means they are working) or are waiting to be engaged (which means they are only working at certain times).*

# Healthcare coverage for nonprofit employees

# Large employer mandate

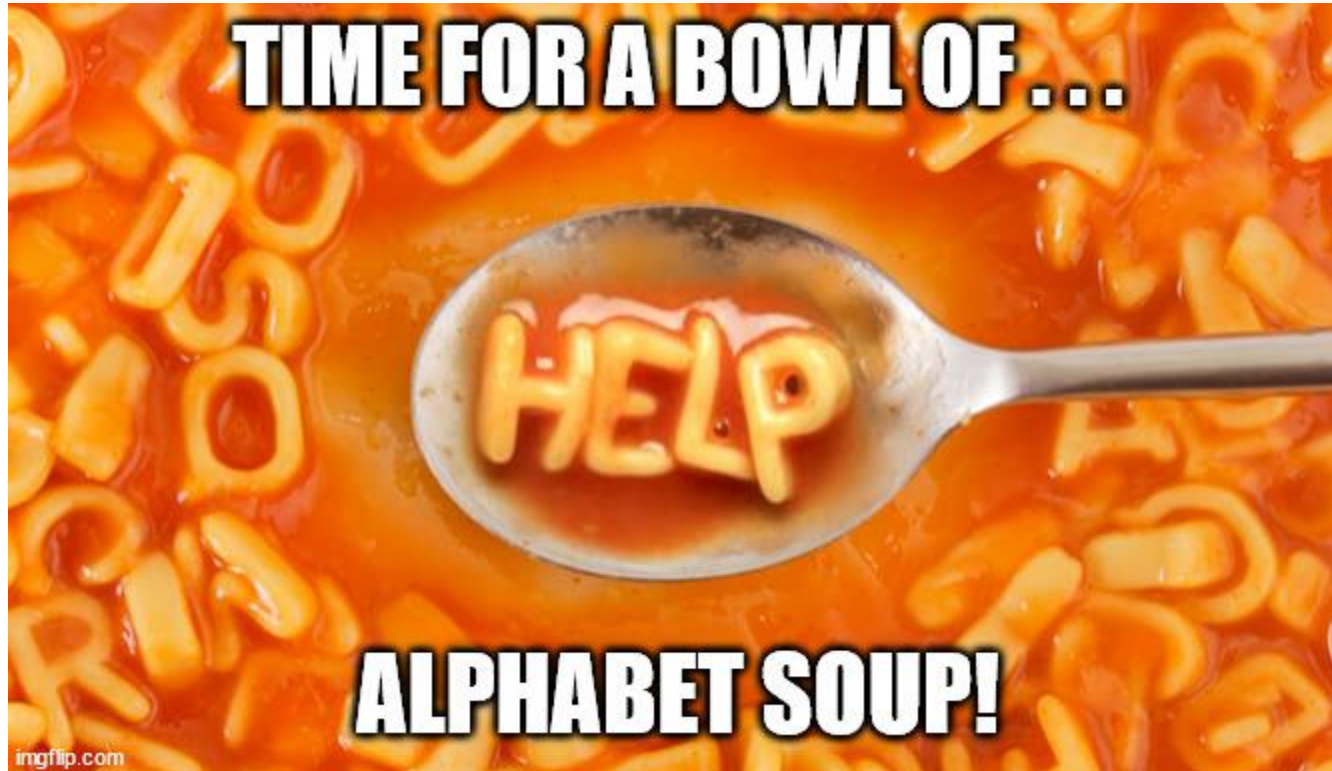
- Applies to nonprofits with 50 or more full-time employees or equivalents
  - Essential benefits
  - “Affordable” coverage\*
  - Limits on out-of-pocket maximums, minimum coverage, and minimum value

# Options for smaller nonprofits

PPO

EPO

PEO



\$\$\$

DN\*

AHP

QSEHRA

ACA SHOP



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# Options for smaller nonprofits

- Traditional group health plans – PPO plans
- Exclusive provider organization (EPO) plans
- Shared employment arrangement (PEO)
- Qualified Small Employer Health Reimbursement Arrangement (QSEHRA)
- Taxable salary supplement
- Do nothing

# PPO vs. EPO

Preferred Provider Organization (PPO) Plan	Exclusive Provider Organization (EPO) Plan
<ul style="list-style-type: none"><li>• Larger range of providers covered under plan</li><li>• Higher prices for out-of-network providers</li></ul>	<ul style="list-style-type: none"><li>• Plan only covers providers within a limited network</li><li>• No coverage – except for emergency room coverage – for services at out-of-network providers</li></ul>
<ul style="list-style-type: none"><li>• More expensive</li></ul>	<ul style="list-style-type: none"><li>• Typically about 10% less expensive than PPO plans</li></ul>
<ul style="list-style-type: none"><li>• Available in almost all parts of North Carolina</li></ul>	<ul style="list-style-type: none"><li>• Mostly available in urban parts of the state</li></ul>

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# ACA SHOP Tax Credit

- Refundable tax credit for nonprofits with:
  - Fewer than 25 FTE
  - Average salary is about \$56,000 or less
  - Pay at least 50% of full-time employees' premium costs
  - SHOP coverage available to all full-time employees
- Credit is larger for nonprofits with fewer employees and lower salaries



# Coverage of Dependents

- Nonprofit aren't required to pay for dependent coverage
- Current law ("family glitch") – Dependents who are eligible to pay to participate in a nonprofit's plan can't participate in ACA individual marketplace
- New IRS regulation – starting in 2023, "affordability" for eligibility is based on entire family (9.12% of household income), not just employer

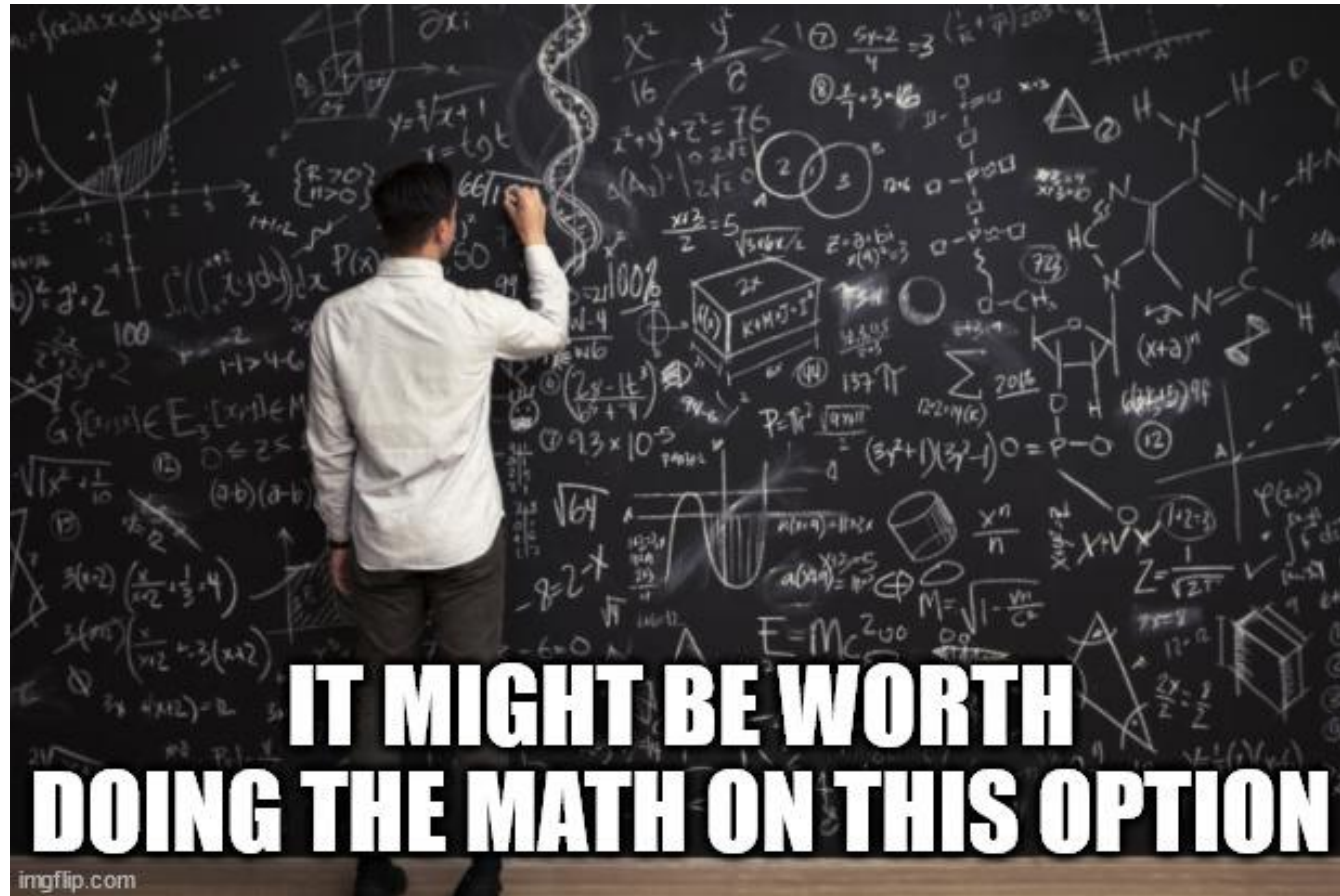
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# Coverage of Dependents



# Professional Employer Organization

Pros	Cons
<ul style="list-style-type: none"><li>• Nonprofit maintains control of personnel decisions like hiring and firing staff</li></ul>	<ul style="list-style-type: none"><li>• Nonprofits have to switch benefit providers if the PEO decides to make changes to its offerings</li></ul>
<ul style="list-style-type: none"><li>• PEO covers administrative tasks like payroll processing</li></ul>	<ul style="list-style-type: none"><li>• Nonprofits have to give up existing benefits and switch to PEO's providers</li></ul>
<ul style="list-style-type: none"><li>• PEO offers wide range of employee benefits, typically with better and more affordable options that small nonprofits can negotiate on their own</li></ul>	<ul style="list-style-type: none"><li>• Difficult to move out of a PEO arrangement since it means finding new payroll and benefit providers</li></ul>
<ul style="list-style-type: none"><li>• PEO can simplify compliance for nonprofits and their employees</li></ul>	<ul style="list-style-type: none"><li>• Transition can be difficult for employees</li></ul>

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# QSEHRA

- Eligibility requirements for nonprofits
  - Fewer than 50 full-time employees
  - Provide arrangements on same terms to all full-time employees
  - No offer a group health plan or FSA

# QSEHRA

Pros	Cons
<ul style="list-style-type: none"><li>• Nonprofits can offer non-taxed reimbursement for health insurance premiums and co-insurance</li></ul>	<ul style="list-style-type: none"><li>• Nonprofit can't offer group health plan or FSA</li></ul>
<ul style="list-style-type: none"><li>• Employees often have a wider range of health coverage options than group health plan may offer</li></ul>	<ul style="list-style-type: none"><li>• Employees generally have to find their own health coverage through the ACA Marketplace</li></ul>
<ul style="list-style-type: none"><li>• Reimbursement may cover a higher percentage of overall cost of health care than group health plan for some employees</li></ul>	<ul style="list-style-type: none"><li>• Reimbursement may cover a smaller percentage of the overall cost of health care than group health plan for some employees</li></ul>
<ul style="list-style-type: none"><li>• Nonprofit can rollover unused amounts</li></ul>	<ul style="list-style-type: none"><li>• Employees have to submit reimbursement claims</li></ul>

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# Association Health Plans

- State law now allows AHPs to be formed in North Carolina
- Federal regulations allowing more AHPs (2018)
  - Blocked by federal court
  - Not being pursued by Biden Administration

# Association Health Plans

Pros	Cons
<ul style="list-style-type: none"><li>• Statewide, nonprofit-specific plan could be an option</li></ul>	<ul style="list-style-type: none"><li>• Unclear whether insurers would consider offering AHPs in North Carolina</li></ul>
<ul style="list-style-type: none"><li>• Could offer more – and more affordable – options than individual group health plans for many nonprofits</li></ul>	<ul style="list-style-type: none"><li>• Adverse selection concerns – would larger nonprofits choose to join?</li></ul>
<ul style="list-style-type: none"><li>• Potential for greater stability of plan offerings and pricing if there is a large pool of employees</li></ul>	<ul style="list-style-type: none"><li>• Challenges switching to other options if the AHP isn't a good fit for a nonprofit</li></ul>

# Another option



**(BUT IT IS TAXABLE)**

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# Basics on unemployment and workers' compensation laws

# Workers' compensation

- Required for nonprofits with three or more employees
  - Nonprofits don't need to provide coverage to uncompensated board officers
  - But if nonprofits have any employees, they probably need coverage
- Rates set by activity risk
- Disability benefits are two-thirds of average weekly earnings

# Unemployment insurance

- Federal unemployment insurance taxes (FUTA)
  - 501(c)(3) nonprofits are exempt
- State unemployment insurance taxes (SUTA)
  - Does not apply to nonprofits with fewer than four employees who work 20 weeks in a year
  - Administered by Division of Employment Security (DES)

# Unemployment insurance

- State options for nonprofits
  - Pay state unemployment tax (SUTA) – based on experience rating
  - Self-insure instead of paying SUTA – must reimburse UI Trust Fund for UI claims of nonprofit's employees
  - Exempt from SUTA – churches, religious nonprofits, and 501(c)(3)s with fewer than four employees – no UI benefits

# Unemployment insurance

- Cost of state unemployment options:
  1. SUTA: Quarterly payroll taxes based on experience rating
    - Current base rate is 1.9%
    - Note: may be subject to surcharge in some years
  2. Reimbursement method: Maintain 1% of payroll in escrow with DES
    - Nonprofits may need to replenish their escrow account annually if they have had claims or if payroll has increased
    - Nonprofits may apply for refund if they put more than 1% of payroll in escrow account

