

Federal Employment Law Update for Nonprofits

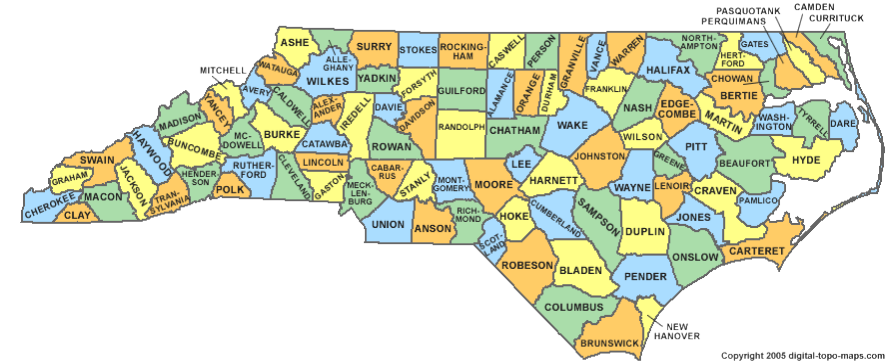
The Latest on Worker Classification and the Latest Proposed FLSA Overtime Rule

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



The Fair Labor Standards Act (FLSA) is a federal law that provides that employees – except for those who are specifically exempt – are required to:

- Be paid at least the minimum wage (currently \$7.25 per hour); and
- Receive overtime pay at one-and-one-half times their regular rate of pay for all time worked in excess of 40 hours in any work week.

Many nonprofit employees are exempt from FLSA’s overtime pay requirement if they:

- Are paid at least the **minimum salary level** under the DOL regulations;
- Are paid on a **salary basis**; and
- Exercise **job duties** that are classified as exempt under FLSA.

Exempt employees include:

- **Executive** employees who are paid a salary of at least \$684 per week (\$35,568 per year), whose main duty is management of a large part of the nonprofit’s operations and who regularly supervise at least two other employees. Check out the [DOL fact sheet](#) for more details about the executive employee duties test.
- **Professional** employees who are paid a salary of at least \$684 per week (\$35,568 per year) and whose jobs are based on recognized professional knowledge (such as attorneys, CPAs, doctors, registered nurses, and some social workers). Check out the [DOL fact sheet](#) for more details about the professional employee duties test.
- **Administrative** employees who are paid a salary of at least \$684 per week (\$35,568 per year) and whose primary duties are non-manual work that include the exercise of discretion and independent judgment. Check out the [DOL fact sheet](#) for more details about the administrative employee duties test.
- **Highly compensated** employees with salaries of at least \$107,432 per year, who regularly perform at least some of the job duties of an executive, professional, or administrative employee.

The DOL regulations make several major changes to these rules. These include:

- **Salary level threshold:** The new regulations raise the standard minimum level for salaried, exempt workers from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year). The final rule also raises the compensation level for **highly compensated employees** (subject to less-detailed duties tests) from its previous amount of \$107,432 to \$143,988 annually. *Note that the salary threshold doesn’t apply to teachers, lawyers, and doctors who are exempt as professional employees.*
- **Duties test:** It is important to remember that white-collar employees can be exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) only if their jobs meet the duties tests for executive, administrative, or professional employees. In addition to receiving a salary at or above the new thresholds, each exempted employee must still also exercise the **job duties** of those categories and be paid on a **salaried basis**. *The final DOL rule creates a process where DOL will automatically update the salary threshold every three years using the same methodology that DOL used to set the \$55,068 per year salary threshold. Practically, this means that nonprofits will need to continue to increase salaries of exempt employees to keep pace with the ever-increasing salary threshold.*



Center for Nonprofits



Initial question:

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

North Carolina



Center *for* Nonprofits

Many missions | 100 counties | One voice

Worker Misclassification

North Carolina



Center *for* Nonprofits

Many missions | 100 counties | One voice

Employees vs. independent contractors



North Carolina



Center for Nonprofits

Many missions | 100 counties | One voice

Employees vs. independent contractors

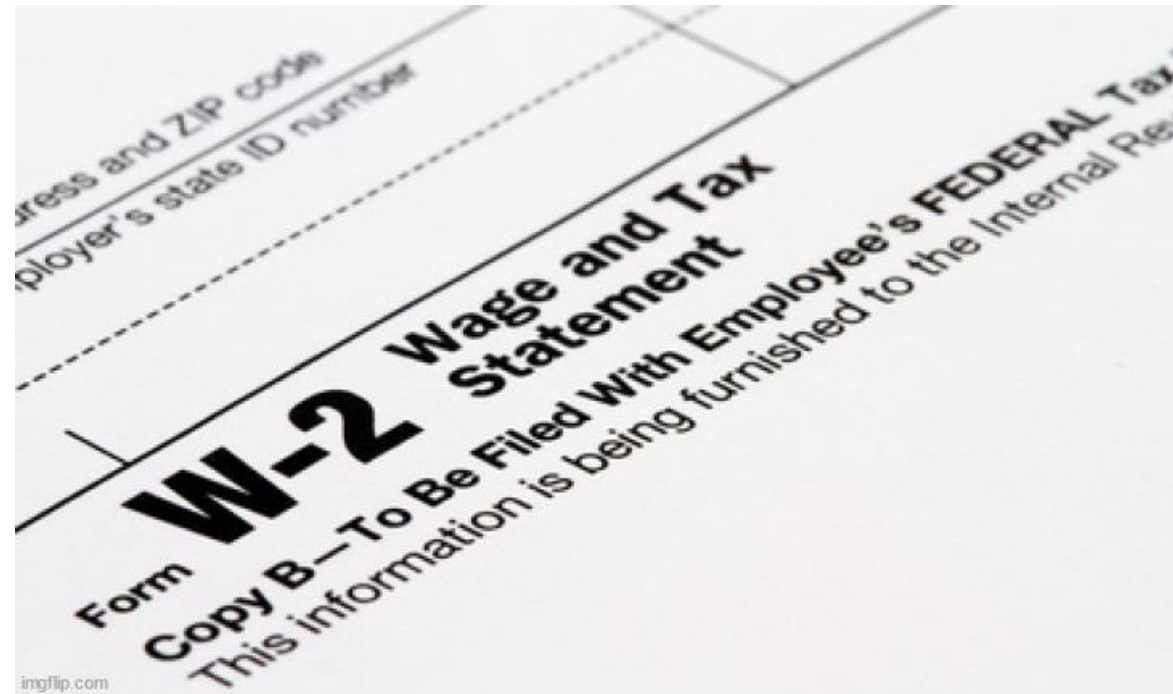


Behavioral control

Financial control

Relationship of the parties

Why it matters



North Carolina



Center for Nonprofits

Many missions | 100 counties | One voice

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



North Carolina



Center for Nonprofits

Many missions | 100 counties | One voice

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

North Carolina



Center for Nonprofits

Many missions | 100 counties | One voice

Fair Labor Standards Act

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

North Carolina



Center *for* Nonprofits

Many missions | 100 counties | One voice

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

North Carolina



Center for Nonprofits

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 – Duties Tests

- Typical nonprofit positions that are unclear include:
 - Development/fundraising staff
 - Volunteer coordinators
 - Some program staff
 - Others?

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

FLSA Exemption

- Important note for professional employees
 - Salary threshold does not apply to teachers, lawyers, or medical doctors

DOL regulations – recent history

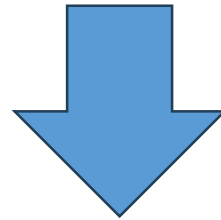


Center for Nonprofits

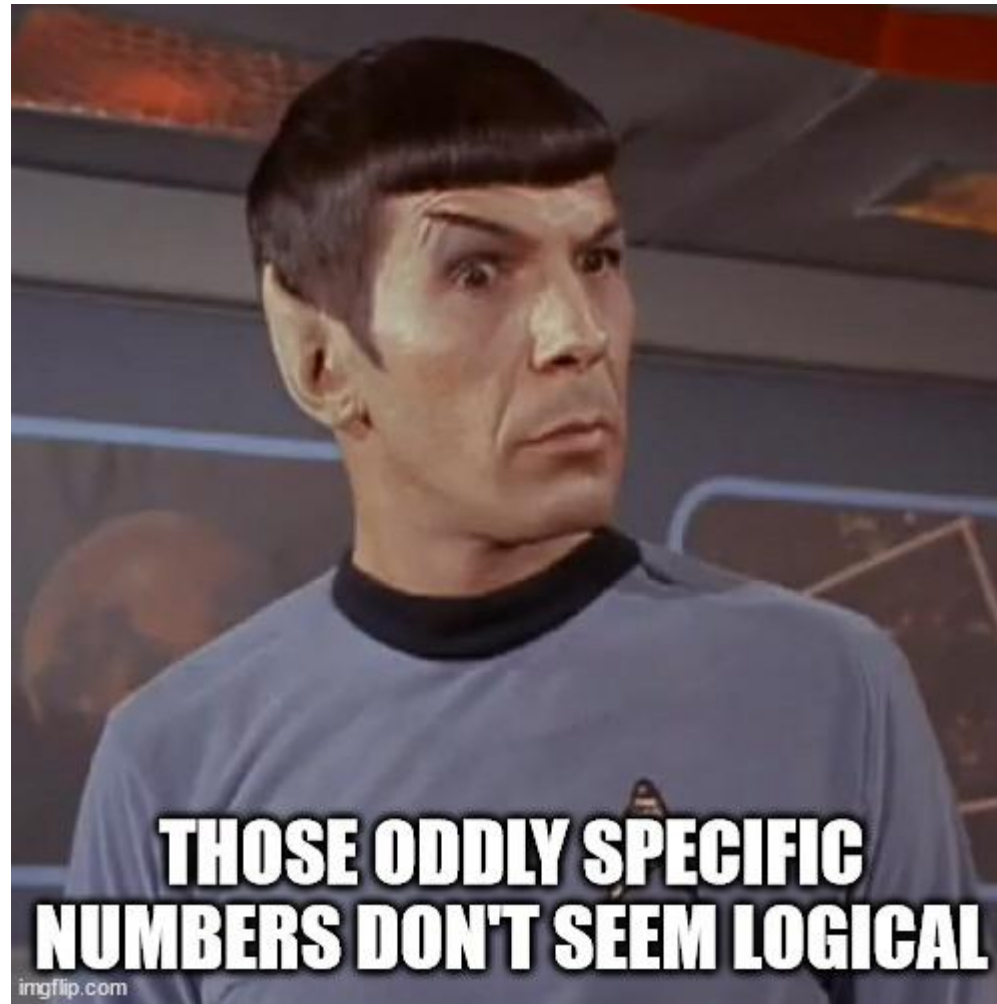
Proposed overtime rule

Salary threshold

\$684/week (\$35,568 per year)



\$1,059/week (\$55,068 per year)





40%



35%

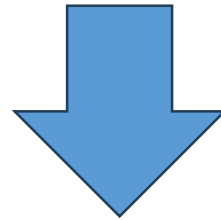


30%

Proposed overtime rule

Highly compensated salary threshold

\$107,432 per year



\$143,988 per year

Proposed overtime rule

Updating salary threshold

Every three years



40%



35%



30%

Proposed overtime rule

Duties tests

No proposed changes

DOL regulations – next steps



November 7 deadline!

DOL regulations – likely next next steps



DOL regulations – nonprofit reaction



DOL regulations – tip for nonprofits





North Carolina



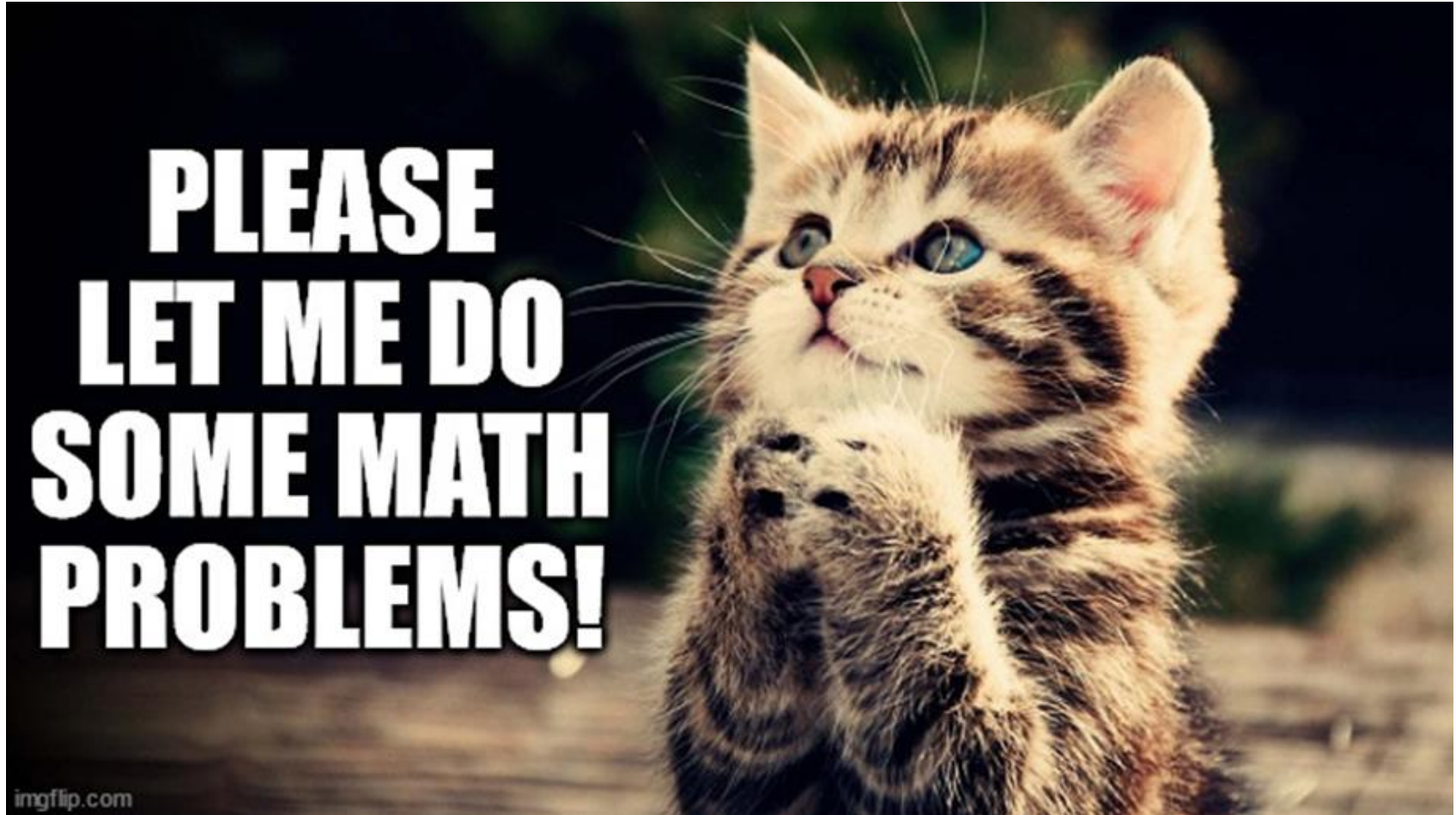
Center for Nonprofits

Many missions | 100 counties | One voice



Center for Nonprofits

Many missions | 100 counties | One voice



North Carolina



Center for Nonprofits

Many missions | 100 counties | One voice

Some other options . . .

- *Pay overtime above a salary*
- *Shift workloads and/or schedules*
- *Consider part-time staff and/or contractors*
- *Change employee benefits*
- *Cut programs and services*
- *Eliminate fundraising events*

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

- I just pulled out my calculator and figured out that \$1,059 divided by 5 equals \$211.80. Can my nonprofit set its exempt employees daily salary at \$211.80?
- *No, salaries need to be set on the basis of a period of a week or longer*

Answers to some common nonprofit questions

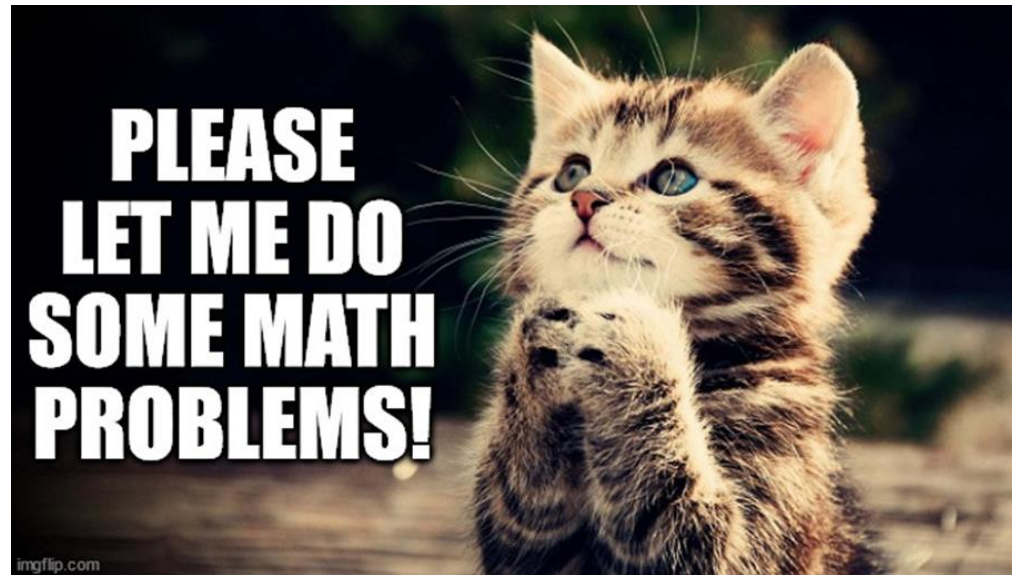
- If our nonprofit's work week is 35 hours per week, do we need to pay overtime when non-exempt staff work 36+ hours in a week?
- *No, regardless of how you define your work week, you don't need to pay overtime until workers have exceeded 40 hours in a work week*

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 nonprofit's employees work two different jobs with two different rates of pay. How do we calculate overtime?

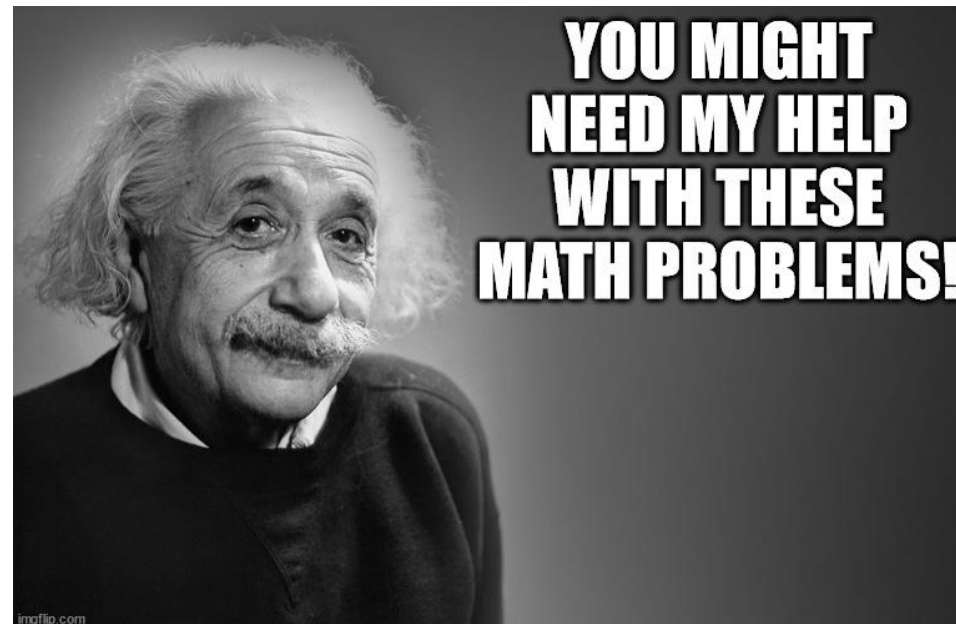


Answers to some common nonprofit questions

- Some of our nonprofit's 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

- Some of our nonprofit's non-exempt employees work very different schedules from week to week. How do we calculate overtime?



Answers to some common nonprofit questions

- Some of our nonprofit's non-exempt employees work very different schedules from week to week. How do we calculate overtime?
- *The fluctuating workweek method allows employers to pay different hourly rates each week to reflect the total compensation paid to non-exempt employees who work inconsistent hours – and then pay them an additional one-half times that rate for each hour beyond 40 in a workweek.*

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.*

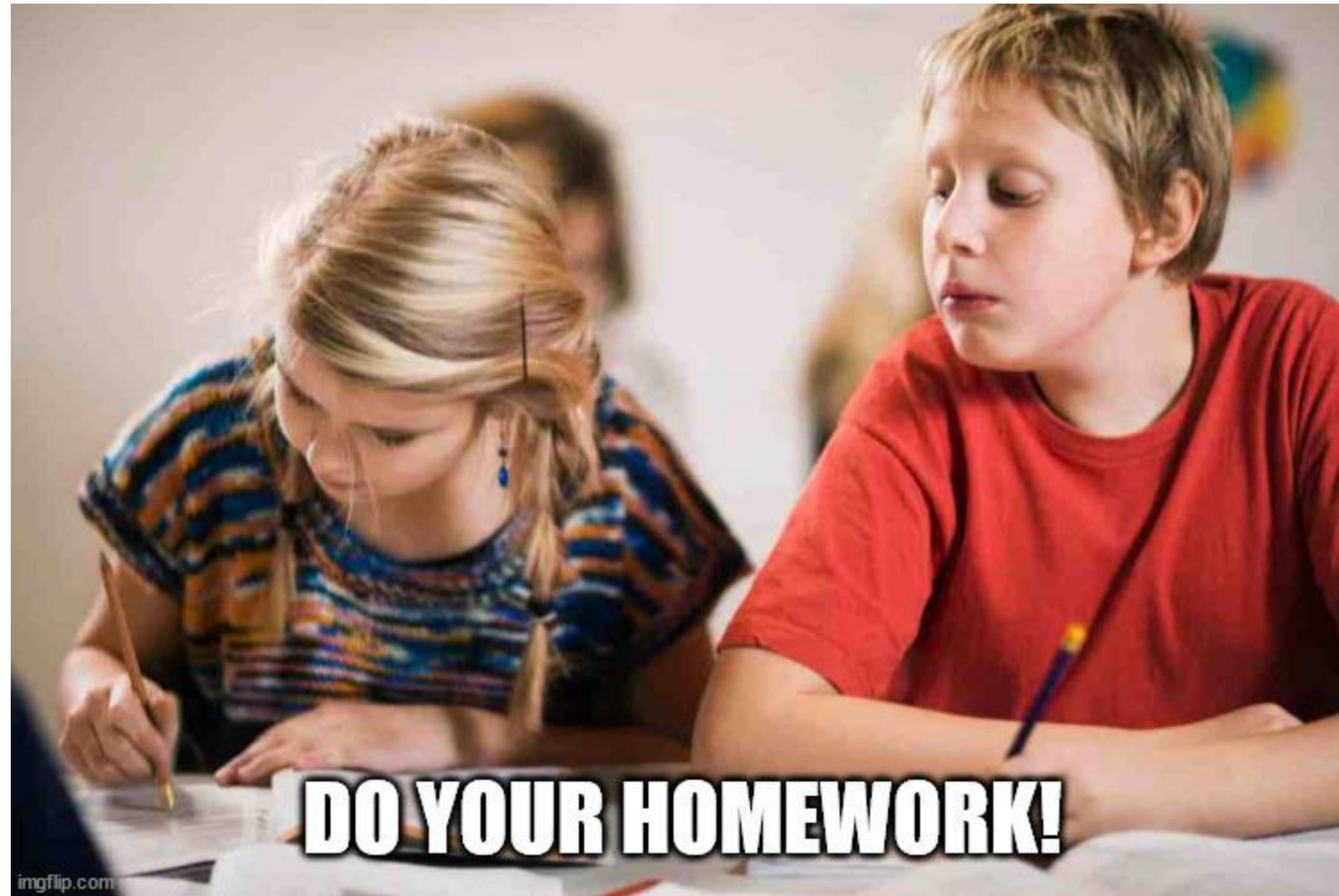
Answers to some common nonprofit questions

- 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).*

Next steps







North Carolina

Center for Nonprofits

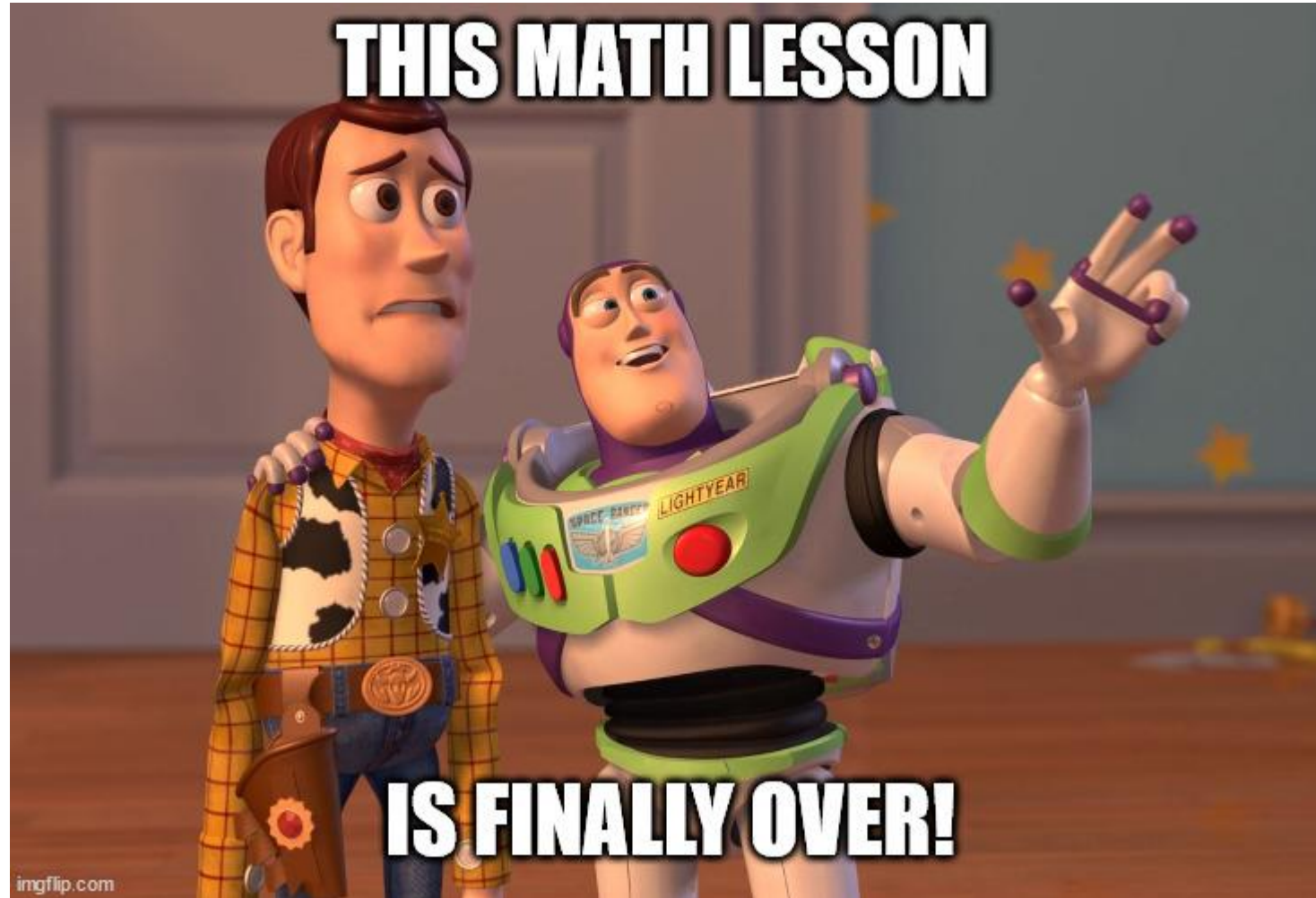
Many missions | 100 counties | One voice





Center for Nonprofits

Many missions | 100 counties | One voice



Center for Nonprofits

Many missions | 100 counties | One voice