NATIONAL COUNCIL OF NONPROFITS
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September 15, 2017

Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Requests for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees
WHD-2017-0002; RIN 1235-AA20

Dear Ms. Smith:

The National Council of Nonprofits welcomes this opportunity to submit comments in response to the Request for Information published by the U.S. Department of Labor on July 26, 2017. The National Council of Nonprofits is a trusted resource and advocate for America's charitable nonprofits. Through our network of state associations and 25,000-plus organizational members – the nation's largest network of charitable nonprofits – we serve as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. We identify emerging trends, share proven practices, and promote solutions that benefit charitable nonprofits and the individuals and communities they serve.

Charitable nonprofits employ more than 11,420,000 individuals, according to the Bureau of Labor Statistics (2012 data). Many of the National Council of Nonprofits' members are directly affected by the Fair Labor Standards Act (FLSA) regulations at issue in this rulemaking. Similarly, the people they serve will likely be affected by any subsequent changes to the "white-collar" exemptions. We therefore offer these comments in light of both the employment considerations and the mission orientation of charitable nonprofits throughout the country. In these comments, we do not seek to speak on behalf of for-profit businesses, governments, other forms of nonprofit organizations (such as trade associations, labor unions, or social welfare groups), or private foundations. We believe those entities, either directly or through their own associations, can speak to the unique and aggregate interests and concerns of those other subsectors of the economy.

Introduction

The answers to the many questions posed by the Labor Department in the Request for Information (RFI) will vary widely among charitable nonprofits. In connection to the 2016 Overtime Final Rule, many nonprofits expressed moral support for raising the salary threshold because of the potential positive effect on the people they serve and their own employees, but operational anxiety as they worried about how to cover any increased costs.

In responding to the current set of questions, larger organizations that regularly compete with for-profit and governmental organizations (*e.g.*, hospitals) are likely to express different challenges than smaller nonprofits and those that provide services on behalf of governments pursuant to grants and contracts. Additionally, there likely will be wide variations in the impact of potential changes depending on whether a nonprofit operates in a rural versus urban area. We raise these points at the outset to draw attention of Labor Department officials to the fact that there is no monolithic view from the charitable nonprofit community.

In the time since the Department published the RFI in July, the National Council of Nonprofits has encouraged charitable nonprofits to conduct a ***mission-based analysis***. That means we have urged charitable nonprofits to answer questions about how an increase in the minimum salary levels and duties tests would affect their own operations, resources, and staffing, *as well as* what impact changed regulations would have on persons relying on the services and the mission of the nonprofit. Below are some questions that may have helped shape an organization's analysis and responses to the Request for Information.

1. What effect -- positive or negative – could potential changes to the white-collar exemptions have on the individuals and communities your organization serves? For example, would higher compensation, if realized, reduce the number of individuals seeking services from the organization, and thus cut the workload of the organization or enable you to pursue other mission objectives? Or could higher compensation, if realized, for those employed by the organization mean that the charitable nonprofit would have to reduce services to beneficiaries in the community due to increased operating costs?
2. What effect -- positive or negative -- would potential changes have on your organization's ability to advance its mission? Variables could include the need to raise more money, serve fewer people, or not being able to perform under government grants or contracts that fail to cover full costs, among many others.

We encourage Labor Department officials to recognize that the responses they receive by charitable nonprofits may be influenced or motivated by how nonprofits answered those questions.

Beginning with the End in Mind: Recognizing the Need for Transition Relief

Implicit in each of the 11 questions and 30 sub-questions in the RFI is the understanding that the Department of Labor will likely change some or all of the regulations governing the "white-collar" exemptions. It is imperative that we state at the outset that from the charitable nonprofit perspective, ***how*** the Labor Department transitions a new rule is as important as ***what*** the new rule says.

The National Council of Nonprofits has encouraged charitable nonprofits to address what transition rules would be appropriate for their organizations to ensure compliance while making operational adjustments. In particular, we have urged them to respond in public comments regarding whether implementation of final regulations should be delayed until a certain date, until the beginning of an organization's fiscal year, or phased in over a period of time.

Focus on Government-Nonprofit Grants and Contracts

Tens of thousands of charitable nonprofits enter written agreements to perform services on behalf of governments and earn large percentages of their revenue from reimbursements from governmental entities. Therefore, the questions raised by the RFI are most pressing for nonprofits that operate under government grants and contracts at any level of government (local, state, tribal, or federal). Once final regulations are implemented, these organizations will likely be put in the position of having to comply with new federal requirements that impose new costs not known when those grants and contracts were signed. Unlike for-profit businesses that can raise prices, or governments that can raise taxes or curtail public services, charitable nonprofits with government grants and contracts may find themselves contractually bound to maintain services at increased costs that may not be expressly covered by existing written agreements.

Recommendation

As part of rulemaking related to the "white-collar" exemptions, the federal government needs to create a mechanism through which nonprofits with government grants and contracts can seek adjustments to cover unanticipated increased costs. Potential mechanisms include:

- An **Executive Order** extending the FAR process for "labor standard adjustment" to the Office of Management and Budget Uniform Guidance, with appropriate safeguards that require nonprofits to demonstrate that any adjustment sought for increased labor costs is directly related to the Overtime Final Rule and subsequent changes in law.
- Publication in the Federal Register of a **policy statement** from the Office of Management and Budget that recipients of federal grants and subgrants (including those passing through state, tribal, and local governments to nonprofits) may seek a price adjustment to recoup increased labor costs directly resulting from the increase in the salary threshold in the Overtime Final Rule.
- Make **technical corrections** to the Uniform Guidance to include rights and procedures similar to those in FAR 52.222-44 and FAR 52.222-55.

Rationale

As discussed below in more detail in responses to specific questions in the RFI, the National Council of Nonprofits issued a report in June 2016, The Nonprofit Compliance Conundrum, which summarizes the expectations and challenges that charitable nonprofits expressed in responses to a national survey. Nonprofits with government grants and contracts expressed concern in their survey responses that they would be put in the position of having to comply with significant new federal requirements imposing new costs that were not known when those grants and contracts were signed, being bound contractually to provide the same amount and level of services at increased costs not be expressly covered by existing written agreements. Commenters expressed frustration that funders, whether public or private, appeared unlikely to provide additional resources to cover the unanticipated and externally-imposed financial shortfalls.

Survey respondents consistently stressed that something had to give between reimbursement rates that won't match new cost realities, performance obligations, and terms of agreements. Comments like this made it clear that adjustments will be made: "Without increased government funding to cover the full costs of service, we have no choice but to cut services to our clients." However, out of almost 1,100 respondents from all 50 states, only one individual answered affirmatively to the question, "Is there a provision in your nonprofit's existing government grants or contracts allowing your nonprofit to reopen or renegotiate those written agreements to secure higher reimbursement rates from governments to pay for these increased costs imposed by the change in federal law?" Sixty percent acknowledged that they do not currently have the option to reopen or renegotiate their current agreements. Nearly forty percent were unsure. What is clear is that new solutions must be found to ensure that nonprofits are not put in the position of complying with irreconcilable realities: compliance with grant/contract terms AND complying with a new federal overtime rule.

The rulemaking resulting from the RFI presents the Labor Department and the federal government with an opportunity to correct an existing inequity in contracting and grantmaking law and practices. Federal contractors are entitled to "labor standards adjustments" due to increased costs of direct labor. See FAR 52.222-43, Fair Labor Standards Act and Service Contract Act – Price Adjustments (Multiple Year and 23-2 Option Contracts); FAR 52.222-44, Fair Labor Standards Act and Service Contract Act – Price Adjustments…." See also, the 2014 Contract Attorneys Deskbook from the Judge Advocate General's Legal Center and School Contract & Fiscal Law Department. The Federal Acquisition Regulations prescribe specific contract language that must be included in federal contracts. FAR 52.222-44. The contract language provides: "The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits to the extent that these increases or decreases are made to comply with … an amendment to the Fair Labor Standards Act of 1938 that is enacted subsequent to award of this contract, affects the minimum wage, and becomes applicable to this contract under law."

Further guidance is provided by the President's minimum wage Executive Order 13658, which is being implemented through FAR 52.222-55, which mandates, "The Contractor shall adjust the minimum wage paid, if necessary, beginning January 1, 2016, and annually thereafter, to meet the applicable annual E.O. minimum wage." Importantly, the regulation, at subsection (3)(i), states, "The Contractor may request a price adjustment."

These provisions protect government for-profit contractors from government-mandated labor cost increases. Government grants to nonprofits, however, are governed not by the FAR, but by the Uniform Guidance of the Office of Management and Budget. The Uniform Guidance does not include a provision for securing "labor standards adjustments" or "equitable adjustments," thus leaving nonprofits unprotected from cost increases. To our knowledge, this lack of equivalent protection comes not by intentional design or intention; rather, people simply missed seeing the issue.

The two FAR provisions stand for the proposition that organizations providing services on behalf of governments should be made whole when a government mandates increased labor costs. We raise them here by analogy, recognizing that a minimum wage or prevailing wage increase is a more straightforward calculation than compliance with a new overtime rule. Any solution presumably would include a requirement that nonprofits with government grants or contracts demonstrate that the increased costs were the result of any changes to the overtime rules. This demonstration is neither complex nor administratively burdensome. Indeed, OMB and cognizant federal agencies are required to engage in similar discussions leading to a nonprofit's Negotiated Indirect Cost Rate Agreements (NICRA). See, e.g., "A Guide to Indirect Cost Rate Determination," U.S. Department of Labor, July 2012.

Responses to Questions Presented in the Request for Information

Below are responses from the National Council of Nonprofits to several of the questions presented in the Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 FR 34616, July 26, 2017, RIN 1235-AA20.

1. In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

The National Council of Nonprofits responds enthusiastically and with a sense of urgency that yes, the standard salary level needs to be increased. We believe that no one can assert that the current salary level test amount of $455 per week ($23,660 per year) is a meaningful measure of "white collar" status. By comparison, the federal poverty level in 2017 for a family of four is $24,600 per year.[1] The poverty level in 2004, when the overtime salary level was last reset, was $18,850 per year.[2] It is therefore understandable that the past and present leadership of the Department of Labor have sought to update the standard based on changing costs of living.

While we state in response to Question #2, below, that a single standard salary level is appropriate, we do not have a specific recommendation as to what the higher level should be.

[1] Federal Poverty Level, Department of Health and Human Services; https://aspe.hhs.gov/poverty-guidelines. For Alaska and Hawai`i, the equivalent poverty levels are $30,750 and $28,290, respectively.

[2] The 2004 HHS Poverty Guidelines; http://www.aspe.hhs.gov/poverty/04poverty.shtml.

2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

This question and the related Question #10, below, raise many alternative approaches to adjusting the standard salary level. We will address the concepts of distinct standard salary levels set (a) by subsector of the economy and (b) by region. For both, we believe the Labor Department should not carve out exceptions or multiply the compliance challenges by creating regional salary levels.

(a) **Standard Salary Level Based on Subsector**

We want to disabuse the Labor Department and any readers of these comments of the notion that the charitable nonprofit community seeks a carve-out or sub-minimum salary level for nonprofits only or nonprofits and small businesses. In the strongest terms possible, the National Council of Nonprofits opposes any such concepts.

In reviewing public comments to the RFI, we have seen in submissions by some claiming to represent the charitable nonprofit community the recommendation that the Labor Department create a lower or substandard salary threshold for nonprofits and small businesses. From our experience representing more than 25,000 charitable nonprofits, we know that such a view does ***not*** reflect a consensus of nonprofit employers. Instead, most nonprofit employers are deeply concerned that treating nonprofit employees under the law as less valuable than their for-profit or government counterparts would turn charitable nonprofits into employers of last resort.

A carve-out for charitable nonprofits is not the conventional thinking of individuals and organizations committed to advancing the missions of their organizations. The Labor Department should apply the same standard under the FLSA to nonprofit workplaces as it applies to for-profit and government workplaces. Setting a sub-minimum salary level for nonprofit employees is tantamount to treating them as second-class citizens and is unacceptable.

(b) **Standard Salary Level Based on Region**

The National Council of Nonprofits strongly recommends that the Labor Department retain a single salary level for nonprofit and other employers across the country. We base our recommendation on at least four considerations:

First, we have heard from many charitable nonprofits across the country that a regional rate would likely skew a standard salary level to urban employment pay scales that may not be appropriate for rural areas. For example, it is likely that a salary level established for the Pacific Northwest would heavily reflect pay scales in the Seattle–Tacoma–Bellevue, WA Metropolitan Statistical Area (population 3.8 million) that are higher or out of line with pay scales in the states of Idaho (population 1.7 million) or Montana (population 1 million). This disparity is likely to occur in each region that the Department may identify. Thus, rather than fine-tuning the standard, the likely result of regionally-based standards will be greater market distortions.

Second, charitable nonprofits, like many other organizations, employ a mobile workforce and rely heavily on the work of employees located outside of the primary location. As one example, the National Council of Nonprofits employs two remotely-located professionals, one in Ohio and the other

in Pennsylvania. Through technology, each is an integral part of our operations, yet works hundreds of miles away from most of the organization's workforce. Establishment of regional salary levels under the FLSA could subject our one organization to three separate minimum salary levels; new telecommuting employees would compound the confusion. The National Council of Nonprofits does and will continue to pay staff in excess of the minimum salary levels, however determined under this rulemaking, but our practices stand as an example of how work is performed in 2017 and how adding complexity to the regulations would impose multiple unintended challenges.

Third, it must be recognized that states have exercised their power to set higher standards for non-exempt and exempt employees. Currently, 31 states have set minimum wage levels higher than the federal minimum wage of $7.25 per hour. Likewise, some states, such as California and New York, have set the salary level test at a higher amount than is set in current U.S. Department of Labor regulations. We are concerned that imposition of multiple standard salary levels would create even greater confusion and uncertainty than already exists.

Finally, simplicity under the FLSA should be a priority in order to promote compliance with fair labor standards. Despite efforts in 2004 and 2016, inconsistencies, confusion, and frustration abound as organizations and their employees try to adapt their current realities to sometimes awkward regulations. Some problems, of course, are understandable given that the workforce and work practices have changed immensely since enactment of the FLSA in 1938. Still, past and present guidance from the Labor Department has been scarce and confusing. For the four out of five nonprofits with revenues less than $1 million, they do not have regular access to attorneys to decipher complex regulations. It is essential that the Labor Department update its regulations to adapt the law's requirements to fit today's actual work practices.

The National Council of Nonprofits surveyed charitable nonprofit employers in late spring 2016 and found, among other things, that many of the concerns they expressed about the then-pending Overtime Final Rule were in fact questions of compliance with the underlying FLSA. Comments from survey participants indicate that many nonprofits believed they were complying fully with their wage and hour obligations by offering their employees "flex time," compensatory time ("comp time"), and other schedule and pay adjustments that may not be appropriate or available to them under the federal law. In response to this finding, the state association members of the National Council of Nonprofits conducted more than 150 training sessions in 2016 seeking to improve compliance. (We discuss the full report, The Nonprofit Compliance Conundrum, in greater detail in responses to Question #6.)

In short, the law is already too confusing for many organizations and their employees to follow. Future rulemaking should avoid complexity; a single salary level is an important labor standard that all can understand and follow.

3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

For the sake of simplicity, and in light of how smaller charitable nonprofits operate, the National Council of Nonprofits recommends that the Labor Department **not** set different standard salary levels for the executive, administrative, and professional exemptions.

We believe that in most cases the highest level for the three categories will prevail in smaller charitable nonprofit organizations. It is a fact of small nonprofit life that individuals typically perform

multiple tasks across various job descriptions and duties. We believe that a sizeable percentage of executive directors/chief executive officers of small nonprofit human service providers are licensed social workers (professionals) who frequently perform program as well as administrative work. Likewise, teachers often lead smaller nonprofit elementary schools which benefit from their performance of in-class teaching as well. College deans frequently teach a class or more each term. Invariably, the executive director of a nonprofit litigation center is a lawyer performing multiple services on behalf of the organization.

In each of these, and many other scenarios, charitable nonprofit organizations expect employees to wear many hats and can only comply with the FLSA by applying the highest standards. Therefore, we recommend applying the same standard salary level to the executive, administrative, and professional exemptions.

4. In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

Please see the responses to Question #2 and Question #3, above. Smaller charitable nonprofits are likely to continue to pay the highest standard salary level because their executive, administrative, and professional employees typically perform multiple duties that cross the categories.

6. To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

In May and early June, 2016, the National Council of Nonprofits surveyed nonprofits with government grants and contracts to identify views on the impact of the then-pending Overtime Final Rule from the Department of Labor. Nearly 1,100 individuals from all 50 states submitted survey responses and comments that provide insights into the presumed impact of the new overtime rules, plans for how nonprofits will adjust their operations to follow with the new regulation, and concerns about how they will comply with both existing grant and contract performance obligations and fixed reimbursement rates and new increased employment costs. The National Council of Nonprofits published the results of the survey in its report: The Nonprofit Compliance Conundrum: Results of the National Survey of Nonprofits with Government Grants and Contracts Regarding the New DOL Overtime Rules.

Survey participants were representative of the nonprofit community at large. Fifty-seven percent of respondents represented human services providers. Arts organizations made up 10 percent of nonprofits that completed the survey, and education nonprofits represented nine percent of the

responding organizations. Most of the nonprofits would be considered medium sized in terms of their annual budgets, with almost half having budgets of more than $1 million but less than $10 million, with a definite concentration of between $1 million and $3 million. Six percent of the respondents reported they do not have any government grants or contracts at this time.

The following are some of the key findings from the 1,093 survey responses and comments of survey participants:

- **Mixed Views on Impact**: Most participants in the survey (68 percent) expressed concern that the DOL Overtime Final Rule would have a negative impact, but a sizable minority (18 percent) believed the impact of the Rule would be very positive, somewhat positive, or have no impact. Views ranged from considering the threshold change "an absolute disaster for us" to confidence that the "changes will help all nonprofits in the long run."
- **Confusion about Current Law**: It is clear that greater training is needed to help nonprofit organizations understand their obligations under the Fair Labor Standards Act. Comments from survey participants indicated that many nonprofits believe they are complying fully with their wage and hour obligations by offering their employees "flex time," compensatory time ("comp time"), and other schedule and pay adjustments that may not be appropriate or available to them under the federal law.
- **Already Challenging Times**: Many survey participants expressed frustration that the 2016 overtime rules were coming at a time when the organizations were experiencing cuts in government spending on grants and contracts, increased workloads and needs, reduced or no reimbursement for indirect or administrative costs (sometimes called "overhead"), and caps on payment of overtime. Only 15 percent of participants reported that their government grants and contracts pay all of their actual costs for providing services on behalf of governments; nearly three out of five (58 percent) responded that they receive reimbursement of between 70 percent to 90 percent for their services. Those who answered "other" to the question explained that their reimbursement rates are variable and could be a low as 10 percent to 20 percent.

7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

The salary level test serves the purpose of applying one objective standard – a starting off point – that provides employers some degree of certainty. The duties tests require subjective analysis, sometimes requiring the involvement and expense of employment counsel, but we agree with the judge in *State of Nevada v. U.S. Department of Labor* that a careful review of duties is essential. A starting off point that can dispense with the need to review duties is helpful.

In the past, of course, some employers and employees may have assumed that the salary level test was the end of the inquiry, rather than just the beginning. We think it better to rely on education rather than complexity to promote full compliance with the FLSA. As written previously, state association members of the National Council of Nonprofits conducted more than 150 training sessions in 2016 seeking not just to explain the Overtime Final Rule, but also to improve overall compliance. (See responses to Question #2 and Question #6, above.)

10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

Please see responses to Question #2.

Conclusion

The National Council of Nonprofits recommends that, as the Department of Labor considers changing the regulations governing the "white-collar" exemptions, the Department should:

- Act with urgency to increase the amount of the current salary level test that, having been unchanged for 13 years, is stuck below the poverty rate for a family of four – Americans deserve better;
- Recognize that *how* it transitions a new rule is as important as *what* the new rule says – organizations need reasonable time to prepare for any announced changes;
- Create a mechanism so written agreements that nonprofits have to provide services for governments are adjusted to cover the increased costs of complying with the new requirements – treat nonprofits fairly, as the federal government already does in protecting for-profit contractors from government-mandated labor cost increases;
- Apply the same FLSA standard to nonprofit workplaces as it applies to for-profit and government workplaces – it is unacceptable to treat nonprofit employees as second-class citizens by creating a carve-out or sub-minimum salary level for nonprofits only or nonprofits and small businesses;
- Prioritize simplicity under the FLSA in order to promote compliance with fair labor standards – the law is already too confusing for many organizations and their employees;
- Retain a single salary level for nonprofit and other employers across the country — that's an important labor standard that all can understand and follow; and
- Apply the same standard salary level to the executive, administrative, and professional exemptions – avoid complexification that makes compliance more confusing.

Thank you for issuing the Request for Information inviting insights and perspectives. Please let us know if you have any questions.

Tim Delaney
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