



May 15, 2019

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: Proposed Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees
WHD-2019-0001-0001; RIN 1235-AA20

Dear Ms. Smith:

The National Council of Nonprofits welcomes this opportunity to submit formal Comments regarding the above-captioned Proposed Rule published by the U.S. Department of Labor on March 22, 2019. 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.

These comments are informed by our network's direct experiences related to the Department's recent efforts (beginning in 2015) to revise the salary level test for determining exemption from overtime requirements. Our member state associations of nonprofits have worked diligently with nonprofits to – among other things – raise awareness regarding the proposed changes; conduct detailed, state-specific analyses on legal and operational matters raised by the proposals; encourage the submission of nonprofit-focused public comments to assist the Department in this rulemaking; and promote full compliance with federal and state labor standards through education and training.

In these comments, the National Council of Nonprofits urges the Department of Labor to:

- Act with urgency to increase the amount of the current salary level test that, having been unchanged for 15 years, is stuck below the poverty rate;
- Treat all employers the same, regardless of economic subsector (i.e., nonprofit, for-profit, government) and reject calls to carve out some employers and employees;
- Retain a national salary level for nonprofit and other employers across the country, and not create confusion and costly burdens and compliance issues through regional salary levels;
- Apply the same standard salary level to the executive, administrative, and professional exemptions – thus avoiding complexity that makes compliance more difficult;
- Treat nonprofits fairly – just as the federal government protects for-profit contractors when government-mandated labor cost increases go into effect, put protections in place for nonprofits providing services to the public pursuant to written agreements with the government; and
- Develop detailed, tailored educational materials devoted to expanding nonprofit understanding of and compliance with, labor standards.

National Council of Nonprofits

Comments on Proposed Overtime Regulations

May 15, 2019

Page 2 of 7

These Comments focus on charitable nonprofits and their needs as employers and as mission-focused organizations dedicated to helping others. We do not seek to speak on behalf of other forms of nonprofit organizations (such as private foundations, trade associations, labor unions, or social welfare groups). We believe those entities, just like for-profit businesses and governments, can speak on their own behalf, either directly or through their own associations.

Introduction

The issues raised in the pending rulemaking are of great interest and concern for charitable nonprofits, their employees, and the individuals they serve in communities throughout the United States. We believe that for the Department to properly regulate the activities of any sector, its officials should have a basic understanding of the essential facts about the sector. We share the following with that goal in mind.

Charitable nonprofits employ 12.3 million people, which is 10.2 percent of the private workforce, making the sector the third largest private employer in the country – larger than manufacturing, construction, finance and insurance, transportation, real estate, and agriculture.¹ 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.

There is no standard source of revenue for charitable nonprofits; the mix varies widely between organizations based on a variety of factors. The charitable nonprofit sector as a whole earns almost a third (32.5 percent) of its revenues by performing services pursuant to government grants and contracts.² Despite the collective size of the sector, most charitable nonprofits are relatively small: 97 percent have budgets of less than \$5 million annually, 92 percent operate with less than \$1 million per year, and 88 percent spend less than \$500,000 annually for their work. The “typical” charitable nonprofit is community-based, serving local needs.

The responses of charitable employees and organizations to the labor-standards changes proposed by the Labor Department in this rulemaking will vary widely. 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. That internal tension is key to understanding and processing the varied views by individuals working in the charitable sector, pursuing diverse missions, and engaging in problem-solving in every community in America.

It should also be recognized that in responding to the proposed rule, larger organizations that regularly compete with for-profit and governmental organizations (e.g., hospitals) may identify different challenges than smaller nonprofits and those that provide services on behalf of governments pursuant to grants and contracts. Additionally, there may be wide variations in the impact of the proposed 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.

¹ U.S. Bureau of Labor Statistics, Research Data on the Nonprofit Sector, 2017 Annual Averages (March 2019).

² See generally National Council of Nonprofits, America's Nonprofits – Myths About Nonprofits; <https://www.councilofnonprofits.org/myths-about-nonprofits>.

Comments on the Proposed Rule

The National Council of Nonprofits agrees with virtually every commentator to date that the standard salary level established pursuant to the Fair Labor Standards Act (FLSA) needs to be increased. No one can credibly 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 2019 for a family of four is \$25,5750 per year.³ The poverty level in 2004, when the overtime salary level was last reset, was \$18,850 per year.⁴ 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.

(a) Retention of the Salary Level Test

The National Council of Nonprofits fully supports the decision of the Department to retain the salary level test as one of three criteria for satisfying exempt status. The salary level test serves the important purpose of applying one objective standard – a starting point – that provides employers some degree of certainty. The duties tests require subjective analysis, sometimes requiring the involvement and expense of employment counsel, and we agree with the judge in *State of Nevada v. U.S. Department of Labor*⁵ that a careful review of duties is essential. A bright-line starting point that can dispense with the need to review duties is helpful.

(b) The Proposed Salary Level of \$679 per week

The National Council of Nonprofits does not express an opinion on the appropriateness of the salary level of \$679 per week or the methodology selected by the Department. We recognize that the approach selected – essentially adjusting the current rule to inflation – is easiest to understand and explain. We also acknowledge that many worker groups express very strong opposition to the retention of the 2004 methodology and believe it locks in unacceptable labor standards. As noted earlier, charitable nonprofits recognize both moral support and operational anxiety in analyzing this and similar issues. The push-pull within nonprofits and within the membership of the National Council of Nonprofits means that we do not have a consensus position to present in these comments.

(c) Standard Salary Level Based on Subsector

Some of the comments to the proposed rule call on the Department to create a separate, lower salary level for small businesses, nonprofits, or some other grouping. In the strongest terms possible, the National Council of Nonprofits opposes any such carveouts.

From our experience representing more than 25,000 charitable nonprofits, we know that the call for a nonprofit carveout does **not** reflect a consensus of nonprofit employers. Instead, most charitable 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 substandard salary test would make it harder for nonprofit employers to attract and retain qualified workers. Setting a sub-minimum salary level for nonprofit employees is tantamount to treating them as second-class citizens and is unacceptable.

³ Federal Poverty Level, Department of Health and Human Services; <https://aspe.hhs.gov/2019-poverty-guidelines>. For Alaska and Hawai`i, the equivalent poverty levels are \$32,190 and \$29,62, respectively.

⁴ The 2004 HHS Poverty Guidelines; <http://www.aspe.hhs.gov/poverty/04poverty.shtml>.

⁵ 275 F. Supp. 3d 795 (E.D. Tex. 2017).

National Council of Nonprofits

Comments on Proposed Overtime Regulations

May 15, 2019

Page 4 of 7

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 reject any such carveout and apply the same standard under the FLSA to nonprofit workplaces as it applies to for-profit and government workplaces.

(d) Standard Salary Level Based on Region

The National Council of Nonprofits commends the Labor Department for proposing the retention of a national 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 might identify. Thus, rather than fine-tuning the standard, the result of regionally based standards would 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 the primary location. As one example, the National Council of Nonprofits employs two professionals who are located remotely from our offices in Washington, D.C.: one in New York State 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 executive, administrative, and professional staff in excess of the minimum salary levels, however determined under this rulemaking. Nonetheless, we cite our example to demonstrate how work is performed in 2019 and how adding complexity to the regulations would impose multiple unintended challenges.

Third, it must be recognized that a majority of states have exercised their power to set higher standards for non-exempt and exempt employees. Currently, 29 states and the District of Columbia set their minimum wage levels higher than the federal minimum wage of \$7.25 per hour.⁶ Likewise, some states, such as California and New York, have set their salary level tests at a higher amount than in current and proposed U.S. Department of Labor regulations. Pennsylvania and Washington are in the process of finalizing their own, higher salary level tests that exceed the federal level in the proposed regulations. We are concerned that imposition of multiple standard salary levels would create even greater confusion and uncertainty than already exists. It should also be noted that higher state mandates would add to the distortion of regional rates, as discussed above.

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. Nine out of ten nonprofits have revenues less than \$1 million and almost by definition do not have resources to pay for regular

⁶ <https://www.dol.gov/whd/minwage/america.htm>.

National Council of Nonprofits

Comments on Proposed Overtime Regulations

May 15, 2019

Page 5 of 7

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. Moreover, the Department needs to provide the regulated community clear interpretive guidance so smaller employers – whether nonprofit or for-profit – can comply without undue costs.

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 indicated 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 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 alone seeking to improve compliance.⁷

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

(e) Single Level for Executive, Administrative, and Professional Employees

The National Council of Nonprofits supports the decision by the Labor Department to retain a standard salary level that applies equally to the executive, administrative, and professional exemptions. This approach is simple and easy to administer, and recognizes how smaller charitable nonprofits operate.

If the Department were to establish three separate salary levels, the result would be that the highest level for the three categories would prevail in smaller charitable nonprofit organizations. It is a fact of life among smaller nonprofits 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 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. 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 to advance their missions. They can only comply with the FLSA by applying the highest standards. The Department's proposal to apply the same standard salary level to the executive, administrative, and professional exemptions is therefore the appropriate response.

Additional Comments and Priorities

In addition to the foregoing, the National Council of Nonprofits requests that the Department of Labor take additional actions as part of this rulemaking to promote fairness and greater compliance with the overtime regulations specifically, and the FLSA generally.

Correcting the Disparity Between Government Treatment of For-Profit Contracts and Nonprofit Grants

In separately submitted comments, the National Council of Nonprofits and several other nonprofit

⁷ **The Nonprofit Overtime Implementation Conundrum**, National Council of Nonprofits, July 5, 2016, <https://www.councilofnonprofits.org/nonprofit-overtime-implementation-conundrum>.

National Council of Nonprofits

Comments on Proposed Overtime Regulations

May 15, 2019

Page 6 of 7

organizations explain the disparate impact that changes in the salary level test will have on nonprofits that perform services on behalf of governments pursuant to grants. We seek the Department's assistance in correcting the underlying disparity between government contract policy with for-profit businesses and government grants policy with charitable nonprofits. We incorporate those comments here⁸ and ask the Department to commit to working to fix fundamental flaws in current law and policies that will impose unintended and unnecessary burdens on charitable organizations before or as part of the overtime final rule that is promulgated.

Expanding Educational Activities to Promote Greater Compliance with the FLSA

The National Council of Nonprofits acknowledges that many nonprofits are not clear on when and whether the Fair Labor Standards Act applies to some or all of their employees and operations. In our 2016 report, **The Nonprofit Overtime Implementation Conundrum**⁹, we identified areas of confusion under existing law and the opportunity that the overtime rulemaking presents in increasing awareness about the application of the law.

A fundamental area of confusion is coverage – does the FLSA apply to individual employees of charitable nonprofits? Many small organizations – for-profit employers and nonprofits alike – assume they have too few employees for the federal law to apply. The statute itself, enacted in 1938, and the explanatory materials from the Department focus on engagement in interstate commerce, gross volume of sales, and production of goods. Charitable organizations generally do not think of themselves as engaging in commerce, or producing and selling goods. The Department's attempts to explain its view that individual employees may be protected under the FLSA based on their job duties that are connected to interstate commerce through such things as telephones, internet connections, mails, and shipping. But the explanations neither address the realities of nonprofit workplaces nor inspire employers to take corrective action.

We believe it is incumbent upon the Department of Labor to improve its interpretive and advisory materials to ensure charitable organizations fully understand both their obligations under the federal law and possible interplay with various state labor standards. While we all can anticipate that a cottage industry of trainings by law firms and consultants will rapidly emerge once this rule is promulgated, the simple fact is that the vast majority of charitable nonprofits are small and will not be able to afford such trainings. The National Council of Nonprofits and its network of state associations of nonprofits will continue to do what we can to meet the educational needs of frontline nonprofits, but we are not resourced to be an educational arm of the federal government. We encourage the Labor Department to partner with state associations of nonprofits in promoting greater understanding and compliance through trainings and other means.

Conclusion

As stated at the outset and explained throughout these comments, the National Council of Nonprofits urges the Department of Labor take the following actions as it considers changing the regulations governing the “white-collar” exemptions to overtime rules:

- Act with urgency to increase the amount of the current salary level test that, having been unchanged for 15 years, is stuck below the poverty rate;

⁸ See Nonprofit Joint Comments on Government Grants Reforms, May 15, 2019; <https://www.councilofnonprofits.org/sites/default/files/documents/nonprofit-joint-comments-on-govt-grants-reform-in-overtime-rulemaking-5-15-2019.pdf>

⁹ See footnote 7.

National Council of Nonprofits

Comments on Proposed Overtime Regulations

May 15, 2019

Page 7 of 7

- Treat all employers the same, regardless of economic subsector (i.e., nonprofit, for-profit, government) and reject calls to carve out some employers and employees;
- Retain a national salary level for nonprofit and other employers across the country, and not create confusion and costly burdens and compliance issues through regional salary levels;
- Apply the same standard salary level to the executive, administrative, and professional exemptions – thus avoiding complexity that makes compliance more difficult;
- Treat nonprofits fairly – just as the federal government protects for-profit contractors when government-mandated labor cost increases go into effect, put protections in place for nonprofits providing services to the public pursuant to written agreements with the government; and
- Develop detailed, tailored educational materials devoted to expanding nonprofit understanding of and compliance with, labor standards.

Respectfully submitted,



David L. Thompson
Vice President of Public Policy