

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: Joint Comments to 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 undersigned organizations submit these Joint Comments regarding the above-captioned proposed rule to alert the Department of Labor to this unique challenge: **any** changes to the regulations governing overtime will impact tens of thousands of charitable nonprofits with written agreements to perform services on behalf of governments and the people they serve. We raise this challenge not to delay or alter the outcome of the overtime final rule; rather, we seek the Department's assistance in correcting a significant anomaly in current law and policy. When the federal government changes overtime rules, for-profit businesses with government contracts automatically receive the opportunity to reopen contracts to seek more reimbursements to cover the resulting increased costs, but charitable nonprofits do not. This disparity means nonprofits must incur unplanned and non-reimbursable additional costs and forces them to decide between eliminating jobs or eliminating services to the public.

Many of our organizations already have submitted separate comments (or will be doing so soon) expressing their own views on the wide range of issues raised by the proposed rule. By filing this set of Joint Comments, we seek to elevate this serious issue for your attention and resolution.

Unique Problem Presented

Since the overtime rulemaking commenced in 2015, charitable nonprofits with government grants and contracts have expressed concerns that increased labor costs resulting from new regulations, without commensurate increased reimbursement rates, will impose considerable burdens on their ability to fulfill grant obligations and missions. The National Council of Nonprofits issued a report in June 2016, [The Nonprofit Compliance Conundrum](#), documenting the expectations and challenges that charitable nonprofits expressed in response to a national survey. Nonprofits with government grants and contracts reported that they would be put in the position of having to comply with new federal requirements imposing significant new labor costs that were not known when those grants and contracts were signed, thus binding them contractually to provide the same amount and level of services at increased costs that are not 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 clear the harm a higher salary level test would cause: "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. New solutions clearly must be found to ensure that nonprofits are not put in the position of complying with irreconcilable realities: meeting service delivery requirements in existing grant/contract terms AND compliance with operating at higher costs imposed by a new federal overtime rule.

Discussion

The current rulemaking 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 Executive Order 13658 relating to minimum wages, 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, and thus ensure that businesses are not forced to subsidize government. 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 was not by intentional design or intention, but most likely an omission that only now has serious consequences.

The two FAR provisions quoted above 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 already 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.

Recommendation

As part of rulemaking related to the “white-collar” exemptions, it is essential that the federal government 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 Federal Acquisition Regulations process (found in [FAR 52.222-44](#) and [FAR 52.222-55](#)) 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](#).

Conclusion

The undersigned nonprofit organizations submit these Joint Comments to stress the urgent need – *before* new rules are promulgated – for the creation of a mechanism that ensures that written agreements that nonprofits have to provide services for governments are adjusted to cover the increased costs of complying with the overtime final rule. In short, we ask that the government treat nonprofits fairly, as the federal government already does in protecting for-profit contractors from government-mandated labor cost increases.

Respectfully submitted,

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