



September 25, 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: Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith:

Thank you for the providing the opportunity to offer comments in response to the Request for Information (RFI) published by the U.S. Department of Labor on July 26, 2017. The North Carolina Center for Nonprofits (the Center) is providing comments on the potential impact of future rulemaking on 501(c)(3) nonprofits in North Carolina.

About the North Carolina Center for Nonprofits

The North Carolina Center for Nonprofits is a 501(c)(3) public charity that was founded in 1990 to enrich North Carolina's communities and economy through a strong nonprofit sector and nonprofit voice. Today, it serves as an information center on effective practices in nonprofit organizations, a statewide network for nonprofit board and staff members, and an advocate for the nonprofit sector as a whole. The Center has more than 1,400 member nonprofits – all of which are 501(c)(3) organizations – that serve all 100 counties of North Carolina.

Introduction

After the U.S. Department of Labor published the Overtime Final Rule on May 18, 2016, the Center shared information about the Overtime Final Rule and possible compliance options through its e-newsletters, written FAQs, webinars, a series of in-person workshops, and email and phone communications with individual nonprofits from across North Carolina. Through these various communication channels, the Center heard directly from more than 200 North Carolina nonprofits about the impact of the 2016 Overtime Final Rule on their organizations' operations and ways they were considering complying with the Final Rule. This response to the RFI reflects the insights we learned from these communications with North Carolina nonprofits last year.

Overall, most nonprofit organizations that communicated with the Center expressed:

1. Support for the underlying premise that the existing salary threshold for overtime pay under the Fair Labor Standards Act (FLSA), which was last updated in 2004, is too low; and
2. Concern that complying with the 2016 Overtime Final Rule – particularly in the six-and-a-half month time between the rules publication and effective date – would cause severe stress on their nonprofits' operations.

Responses to Questions from the RFI

The Center's communications with North Carolina nonprofits about the 2016 Overtime Final Rule provided several insights that are applicable to the questions posed in the RFI. The responses below reflect the input we received from nonprofits last year.

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?***

In our communications with North Carolina nonprofits about the 2016 Overtime Final Rule, the Center consistently heard that the existing salary threshold of \$455 is too low and should be updated at least to reflect inflation. The nonprofits that communicated with the Center generally gave two reasons for their conceptual support for raising the salary threshold. First, many nonprofits provide services to working-class families and have seen that long working hours and low wages are a significant root cause of many problems in their communities – problems that their organizations are often working to solve. Raising the salary threshold – and thereby either increasing wages or reducing working hours – would alleviate many of these problems and thereby help their nonprofits better meet their missions. Second, many nonprofit leaders recognize that there is a stigma (or reality) that nonprofits underpay their workers. These nonprofit leaders feel that an increase in the salary threshold for FLSA exemption could be one step in raising pay among nonprofit workers and thereby eliminating this stigma (or reality).

The Center heard no consensus among North Carolina nonprofits about the best approach for updating the salary threshold from the 2004 level. However, we consistently heard that the 2016 Overtime Final Rule did not provide most nonprofits with adequate time to assess the impact of their rule on their employees, develop procedures to comply with the rule, and raise the funds necessary to pay for this compliance.

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?***

Many nonprofits communicated with the Center that the 2016 Overtime Final Rule set a salary threshold that seemed too high for most nonprofits in their community, while recognizing that the threshold in the Final Rule may have been appropriate for nonprofits in other parts of the state or the country. According to estimates from the Center (based on nonprofit wage data collected in collaboration with the N.C. Department of Commerce), the salary threshold from the 2016 Overtime Final Rule is higher than the average wages for nonprofit employees in 94 of the 100 counties of North Carolina (every county except Orange, Durham, Pitt, Granville, Forsyth, and Cumberland counties). In particular, nonprofits in some rural parts of North Carolina said that the salary threshold from the 2016 Overtime Final Rule was significantly higher than the salary of virtually every nonprofit employee in their county.

Most nonprofits that communicated with the Center opposed the idea of having a separate salary threshold – or any type of exemption from FLSA compliance – for nonprofit employers. As noted about in the response to Question #1, there is widespread concern among North Carolina nonprofits about a stigma that nonprofits often underpay their workers. Some nonprofits noted that this stigma – or the reality of relatively low wages in the nonprofit sector – creates challenges for nonprofits in recruiting and retaining a talented workforce. Differentiating nonprofit employers from for-profit employers in labor regulations would exacerbate the perception (and perhaps the reality) that nonprofits often underpay their workers and consequently would harm the nonprofit sector. We therefore encourage the Department not to create a separate salary level for nonprofit employers.

- 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?***

In our communications with nonprofits about the 2016 Overtime Final Rule, the Center did not hear of any interest in having different salary thresholds from the executive, administrative, and professional exemptions. In fact, such separate salary levels could make the process of classifying workers as exempt or non-exempt from FLSA more complicated for many charitable nonprofits, since many of these organizations employ program and fundraising staff whose job functions do not align perfectly with traditional business roles. Many nonprofit staff have job duties that correspond to each of the three duties tests, so nonprofits must review all three tests in assessing whether they are exempt from FLSA's overtime pay requirements. Having separate salary thresholds for each duties test would further complicate this analysis.

Related to this question, the Center heard that the 2016 Overtime Final Rule caused many nonprofits to review the duties tests for the first time in a number of years. Several nonprofits noted that the U.S. Department of Labor's regulations and fact sheets do not provide sufficient clarity for whether certain types of nonprofit administrative, fundraising, and program staff satisfy the duties tests. As the Department revisits its regulation of the overtime salary threshold, we encourage further outreach to nonprofits about this lack of clarity in the duties tests and the development of further regulatory or administrative guidance on whether many common nonprofit-specific positions are typically exempt from FLSA's overtime pay requirements.

- 5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?***

As noted above in the response to Question #2, the salary level set in the 2016 Overtime Final Rule is higher than the average wages for nonprofit employees in the vast majority of North Carolina counties. Consequently, in many parts of North Carolina, the Final Rule would have eclipsed the duties test in determining FLSA exemption status for nonprofit employees.

- 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?***

The 2016 Overtime Final Rule posed significant and unique challenges for many charitable nonprofits. Complying with the Final Rule would have required significant increases in labor costs for many North Carolina nonprofits. Unlike many for-profit businesses, most charitable nonprofits do not have the option of passing along increases in labor costs to consumers, either because:

1. Their revenue streams are largely based on government grants and contracts, foundation grants, and individual and corporate contributions, none of which would typically pay more to offset the additional labor costs that would be incurred by compliance with the 2016 Overtime Final Rule; or
2. The fees that they charge for goods and services are necessarily priced below market rate because this is a part of their mission or part of the reason for their tax-exempt status.

The timing of the publication and effective date of the Final Rule was particularly challenging for many nonprofits because:

1. It only allowed nonprofits six-and-a-half months to assess the impact of the Final Rule on their workforces, assess compliance options, and make changes to operations, staffing, and pay rates;
2. Many nonprofits operate on fiscal years that begin on July 1 and were already in the process of finalizing their FY 2016-17 budgets when the 2016 Overtime Final Rule was published in May 2016; and
3. Many governmental and private funders of nonprofits already grossly underpay for indirect costs and lack the financial capacity and/or willingness to increase payments to nonprofits to increase their funding of nonprofits to pay for the increases in labor costs required to comply with the 2016 Overtime Final Rule.

Because most charitable nonprofits in North Carolina are already operating on very tight budgets and had limited ability to find new revenue sources to pay for new labor costs, many nonprofits felt that the 2016 Final Rule was effectively an unfunded federal mandate for their organizations.

The Center has heard from many North Carolina nonprofits about the steps they considered implementing – or in some places did implement – to adapt to the 2016 Overtime Final Rule. Here are some of the solutions – many of which were particularly problematic for their organizations' missions and operations – that nonprofits shared with the Center:

1. ***Raising employees' salaries so they remain exempt.*** One solution for some nonprofits was to raise exempt employees' wages so their salaries were higher than the threshold in the 2016 Overtime Final Rule. This solution appears to have been most common for nonprofit employees whose salaries were only slightly lower than the revised threshold in the 2016 Overtime Final Rule. We have heard that some nonprofits increased salaries effective December 1, 2016 in anticipation of the Final Rule and have found it difficult to undo the change, since the resulting salary reduction would hurt employee morale. This option was generally not be feasible (at least in the short-term) for nonprofits with workers whose salaries were significantly lower than the new threshold of in the Final Rule.
2. ***Paying overtime to employees above a salary.*** A few nonprofits told the Center that they were considering this option so that workers would be less likely to feel like their reclassification to non-exempt status was a "demotion" if they were still paid on a salary basis and did not have to track hours worked unless they were eligible for overtime.
3. ***Considering using the fluctuating workweek method of overtime payment.*** A few nonprofits told the Center that they were exploring using the "fluctuating workweek" method, which is permitted under DOL regulations, to pay some non-exempt employees. Nonprofits with workers who work on irregular schedules – such as theatres, camps, and nonprofits with major annual fundraising events – were most likely to consider this approach. We heard that some nonprofits found the "fluctuating workweek" method confusing and had difficulty predicting whether it would be cost effective.
4. ***Reorganizing workloads or adjust schedules.*** Some nonprofits told the Center that they planned to mitigate the costs of complying with the new rules is by shifting job functions among employees so that more of their non-exempt staff worked close to – or less than – 40 hours per week.
5. ***Adjusting employees' wages to pay approximately the same total compensation after the 2016 Overtime Final Rule took effect.*** A few nonprofits told the Center that they were considering reducing the salaries of employees who would be reclassified as non-exempt under the 2016 Overtime Final Rule, but paying them time-and-a-half their salary for the hours they work in excess of 40 hours per week. For example, some explored setting a lower base hourly wage rate that would take into account a certain number of time-and-a-half hours each week for individuals who typically work overtime; the result would be that they could receive the same pay based on a lower official wage rate. The upside of this would be maintaining labor costs at close to their current level, but the downside could be that salary decreases tend to have a negative effect on employee morale.
6. ***Limiting the number of hours non-exempt staff can work.*** Some nonprofits considered establishing policies that non-exempt staff may only work 40 hours per week or must receive approval from their supervisors to regularly work overtime. This option could help improve employees' awareness of how they spend their time and could lead to increases in efficiency and productivity. However, other nonprofits noted that it may not be appropriate for some types of program staff, such as emergency service providers, residential care providers, and case workers working with nonprofit clients such as adoptive families or victims of domestic violence.
7. ***Redefining the start and end of the workweek.*** Some nonprofits – particularly those with programs and events on Fridays and weekends – told the Center that they were considering adopting a Wednesday through Tuesday workweek so non-exempt employees can take extra time off on Mondays and Tuesdays to avoid working more than 40 hours in a workweek.
8. ***Making lunch breaks unpaid.*** Some nonprofits told the Center that they currently allow non-exempt staff to count their lunch breaks as working hours. By making lunch breaks

uncompensated time, these nonprofits indicated they may be able to increase the total productive working time that employees can provide within a 40-hour workweek.

9. **Expecting exempt staff to work more.** Many nonprofits told the Center that the reality is that the most cost-efficient short-term solution to complying with the 2016 Final Rule would be to shift some additional job functions to the executive director or other exempt staff who are paid \$47,476 per year or more.
 10. **Replacing some full-time workers with part-time staff or contractors.** Several nonprofits told us that, by shifting more work to part-time employees, they may be able to reduce overall labor costs, since part-time employees rarely work more than 40 hours in a week. Likewise, some nonprofits said that the 2016 Overtime Final Rule may encourage them to use independent contractors rather than employees for some functions in the future.
 11. **Limiting telecommuting.** Many nonprofits told the Center that preparation for the 2016 Overtime Final Rule caused them to realize that employees often work longer hours (often without realizing it) when they work from home or use their mobile devices for work-related email, phone calls, social media, and texting. Some nonprofits indicated that they may have revisited their telecommuting policies if more of their employees would be non-exempt under the Final Rule. Limiting the ability of employees to work remotely can help minimize inadvertent overtime, but can also have negative consequences for employee morale (more time away from home), employee productivity (more distractions in the office), and the environment (more time commuting).
 12. **Reducing employee benefits.** With diminishing revenue and rising costs, many nonprofits have already been forced to cut employee benefits like health insurance and retirement savings. Some nonprofits told the Center that further reducing employee benefits may be a short-term way to comply with the 2016 Overtime Final Rule without adding to overall labor costs.
 13. **Eliminating or reducing some programs or services.** Several nonprofits told us that the 2016 Overtime Final Rule may cause them to evaluate the continued cost-effectiveness of mission-related programs and services. Specifically, if a particular program or service requires staff to work long hours (and receive overtime pay for much of this work) without adequate compensation from private or governmental funders, some nonprofits have may needed to make hard choices about whether it made sense to reduce service levels or eliminate the program altogether.
 14. **Eliminating some fundraising events.** Some nonprofits found that it might make (counterintuitive) financial sense to cut back on revenue-raising activities that required significant staff time. These nonprofits indicated that they were analyzing whether these events would bring in sufficient revenue to justify the additional labor costs of paying overtime to more staff.
8. ***Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?***

As noted above in the response to Question #2, the salary level set in the 2016 Overtime Final Rule is higher than the average wages for nonprofit employees in the vast majority of North Carolina counties. Consequently, in many parts of North Carolina, the Final Rule would have excluded from exemption the majority of nonprofit workers, including many who traditionally have been exempt as administrative, executive, or professional employees. In parts of North Carolina, this includes nonprofit executive directors, fundraising professionals, finance staff, creative professionals, and a wide variety of programs staff such as case workers, researchers, nurses, social workers, and project managers.

11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

As noted in the response to Question #6, if the Department updates the salary threshold in the future, nonprofits would greatly benefit from having adequate lead time to assess the impact on their operations, develop a compliance plan, and determine the best way to pay for compliance while minimizing impact on mission-related programs and services. Periodically updating the salary level for FLSA exemption would help nonprofits plan for necessary changes in employee pay or organizations policies and could help prevent the need for a drastic increase in the salary level like the one proposed by the 2016 Overtime Final Rule.

Conclusion

Based on communications from a wide range of charitable nonprofits in North Carolina, the North Carolina Center for Nonprofits encourages the Department to:

1. Increase the salary threshold from the level set in 2004;
2. Provide adequate notice of any future change in the salary threshold so that employers have sufficient time to assess the impact of rule changes, implement compliance options, and pay for any new costs required for compliance;
3. Treat nonprofits the same as other employers in any future changes to FLSA exemption salary thresholds so that labor regulations do not perpetuate the stigma (or reality) that nonprofits underpay their employees; and
4. Consider seeking input from nonprofits about possible changes to regulations or Department guidance on the duties tests to provide better clarity about which nonprofit employees meet the criteria for FLSA exemption.

Thank you for issuing the Request for Information and inviting input from the public. Please feel free to contact us if you have any questions about the Center's response.

Sincerely,



Jeanne Canina Tedrow
President & CEO



David Heinen
Vice President for Public Policy and Advocacy