



May 20, 2019

VIA ELECTRONIC SUBMISSION: www.regulations.gov

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

Re: Comments on Regulatory Information Number (RIN) 1235-AA20, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith,

Independent Sector appreciates the opportunity to provide comments on the above referenced proposed rule regarding employee eligibility for overtime compensation. We are a national coalition of nonprofits, foundations, and corporations whose members represent tens of thousands of organizations and individuals locally, nationally and globally who are committed to advancing the common good in America and around the world. We request that you consider these comments, based on consultation with our member organizations and others in the charitable and philanthropic community, as you finalize this important proposal.

The charitable sector is a critical component of the nation's economy. Nearly one in 10 workers in the United States is employed by a nonprofit organization, and with 13.5 million paid workers, we employ more people than the finance and real estate sectors combined. Further, these organizations pay nearly \$670 billion annually in wages and benefits, salaries that support families in communities across America. In 2010, 501(c)(3) organizations paid \$35.2 billion in payroll taxes.

The true impact of the charitable sector goes far beyond the number of people employed or the wages and benefits paid. Every day, charitable nonprofit organizations, among many other contributions to society, provide educational and economic opportunities for families in need; work to alleviate poverty and suffering at home and abroad; assist victims of disaster; enhance the cultural and spiritual development of individuals and communities; facilitate scientific advances; and foster worldwide appreciation for the democratic values of justice and individual liberty that are part of the American character.

Too many of these charitable organizations – in the face of stagnant, if not declining, revenues – struggle continuously to meet increased demand for assistance. Rather than turn away those in



need, tens of thousands of these employers balance a commitment to continued employment of staff with benefits and providing services to as many people as possible. As the leadership forum for these charitable and philanthropic organizations, Independent Sector applies this same balance when assessing the impact of federal policy proposals on the communities that benefit from the work of America's nonprofit sector and on the dedicated staff we employ to deliver vital programs and services across the country.

The charitable sector's outsized role in the economy is worthy of special recognition, but it also brings unique responsibility. In order for all people to thrive, they must have the opportunity to earn a life-sustaining wage, and charitable organizations are called to achieve a balance between effectively advancing their missions while striving to pay wages that allow employees to provide adequately for their families. The current salary threshold for overtime eligibility—last updated in 2004—should be increased. Indeed, it is concerning that this threshold now falls well below the federal poverty level for a family of four. With that noted, several aspects of the proposed rule could have broad impact on the individuals and families who rely on the work of America's charitable sector, and we offer the following suggestions:

Phased-in implementation

While an increase in the salary threshold is called for, it will not be inconsequential for the roughly seven percent of nonprofit and government jobs that are impacted, by the Department's own analysis. Nonprofit employers of all sizes may struggle with an overnight salary threshold increase of approximately 50 percent. This problem is compounded by the fact that many nonprofit grants and contracts span multiple years, thereby locking in fixed costs that will be difficult to adjust in a single fiscal year. The proposed rule should be implemented over an appropriate period of time that achieves the goal of increasing employee wages while allowing nonprofit employers to plan for and absorb the increased costs without a reduction in programs and services. Some nonprofit organizations like the YMCA of the USA have suggested a two-year period for this implementation, and Independent Sector believes this is reasonable.

Revision of federal government grants, contracts, and reimbursements

Fully one third of total revenues public charities report to the IRS came from government fees for goods or services or from government grants, and current federal and state reimbursement rates are insufficient to enable nonprofit organizations to adequately increase wages. The proposed rule will increase the cost of providing the same level of programming and services, and must be accompanied by a sufficient increase in government funding for the delivery of those services. If governments at every level are to continue relying on the charitable sector to carry out essential functions, these organizations must be allowed to adjust before the brunt of the burden is borne.



Open process for any changes to the duties tests

While the current proposed rule does not include changes to the duties tests used to determine overtime eligibility, we believe any such changes should only be made through an additional rulemaking that allows public comments on any proposed changes.

Clarity about application to the nonprofit workforce

In addition to the above concerns and suggested revisions to the proposed rulemaking, we are concerned that this process highlights a lack of clarity regarding when and how the Fair Labor Standards Act applies to the nonprofit sector workforce. Information provided by the Department at the time of the 2015 rule suggested that activities “not in substantial competition with other businesses” would not be considered toward determining enterprise coverage, while indicating that fee-for-service activities would, in fact, be considered commercial.¹ With for-profit entities increasingly moving into fields long served by charities, and with many fee-for-service activities serving a fundamentally charitable purpose, it is evident that more clearly defined criteria are necessary. Given the broad and diverse make-up of business models across the nonprofit sector, it is difficult for an individual organization to discern how to best comply with current law or fully evaluate the potential impact of a proposed rule. We urge the Department in the strongest possible terms to work with nonprofit employers to clarify these ambiguities and uncertainties related to the applicability of FLSA standards to exempt organizations.

The recommendations above seek to balance the goals of ensuring nonprofit sector employees are able to provide adequately for their families and preserving the ability of charitable organizations to continue serving their communities.

We look forward to working with the Department of Labor to achieve these important goals. For additional information, please contact Ben Kershaw at benk@independentsector.org. Thank you for your consideration.

Sincerely,

Daniel J. Cardinali
President and CEO
Independent Sector

¹ “Fact Sheet #14a: Nonprofit Organizations and the Fair Labor Standards Act (FLSA).” Department of Labor. <https://www.dol.gov/whdregs/compliance/whdfs14a.pdf>.