

September 4, 2015

**VIA ELECTRONIC SUBMISSION: [www.regulations.gov](http://www.regulations.gov)**

Mary Ziegler, 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 Proposed Rulemaking Regarding the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (80 Fed. Reg. 38,515, July 6, 2015), RIN: 1235-AA11

Dear Ms. Ziegler:

Independent Sector appreciates the opportunity to provide comments on the above-referenced Notice of Proposed Rulemaking issued by the Department of Labor regarding employee eligibility for overtime compensation. Independent Sector is a national coalition of more than 500 public charities, foundations, and corporate giving programs whose members represent tens of thousands of organizations and individuals working locally, nationally, and globally. These comments are based on broad consultation with our member organizations and others in the charitable and philanthropic community.

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.<sup>1</sup>

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, 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 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, including health care coverage, and providing services to as many people as possible. As the leadership forum for these charitable and philanthropic organizations, Independent Sector applies the same balance when assessing the impact of

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<sup>1</sup> National Center for Charitable Statistics (NCCS), the Urban Institute, the Nonprofit Almanac 2012.

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.

We believe deeply that individuals should have the opportunity to earn a life-sustaining wage, and that charitable organizations should be guided by the balanced approach of effectively advancing their missions while striving to pay wages that allow employees to provide adequately for their families. As a result, Independent Sector in 2014 called for an increase in the federal minimum wage, and encouraged those nonprofit organizations in a position to do so to commit to paying their employees a living wage.

With respect to the above-referenced proposed rulemaking, Independent Sector similarly supports an increase in the salary threshold for eligibility to receive overtime compensation. It is unacceptable that the current threshold, last updated in 2004, falls below the 2015 federal poverty level for a family of four.

We also have concerns about several aspects of the proposed changes, and the potential impact on the individuals and families who rely on the work of America's charitable sector, and we offer the following suggested revisions to the proposed rulemaking:

- **Phased-in implementation**

Nonprofit employers, large and small, will most certainly struggle with an overnight doubling of the income threshold for overtime pay eligibility. 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.

- **Revision of federal government grants and contracts**

Fully one third of the total 2012 revenues for public charities reporting 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 increase wages.<sup>2</sup> 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.

- **Account for regional economic and market differences**

Charitable nonprofit organizations work in every community across the country, from major urban centers to very small towns, with wide disparities in local economies and costs of living. The proposed rulemaking's single, national

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<sup>2</sup> McKeever, Brice S. and Sarah L. Pettijohn. "The Nonprofit Sector in Brief 2014." Urban Institute. October, 2014. <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413277-The-Nonprofit-Sector-in-Brief--.PDF>

salary threshold of \$50,440 fails to account for these regional market differences. Indeed, the federal government's own General Schedule pay tables for its own employees include locality adjustments to account for the differences in the cost of living across the country. We urge the inclusion of such locality adjustments in the final rule.

- **Open process for any changes to the duties tests**

While the current proposed rulemaking does not include changes to the duties tests used to determine overtime eligibility, it does request comments on “whether the tests are working as intended to screen out employees who are not bona fide EAP employees.” We are concerned that this invitation may indicate that changes to the duties test are being contemplated, and we believe any such changes should only be made through an additional proposed rulemaking that allows public comments on any proposed changes.

In addition to the above concerns and suggested revisions to the proposed rulemaking, we are concerned that this process has highlighted a lack of clarity regarding when and how the Fair Labor Standards Act applies to the nonprofit sector workforce. While current rules and Department documents provide broad descriptions of enterprise and individual coverage for organizations, they do not clearly define the criteria used to determine when these types of coverage apply.

Recent attempts to provide clarification for nonprofit employers have contributed to more confusion across the nonprofit sector. For example, a senior Department official recently suggested that “most employees of non-profit organizations are entitled to the minimum wage and overtime protections guaranteed by the Fair Labor Standards Act.”<sup>3</sup> This is inconsistent with the subsequent assertion of a former senior Department official that “most nonprofits and their employees will not be covered by the FLSA and, consequently, not affected by the proposed overtime change.”<sup>4</sup>

A Department FAQ document<sup>5</sup> indicates that enterprise coverage applies to nonprofits that have an annual dollar volume of sales or business done of at least \$500,000, further stating that charitable activities “not in substantial competition with other businesses” are not covered by FLSA. However, as for-profit entities move into fields long dominated by nonprofit organizations, this type of definition provides insufficient guidance for nonprofit managers.<sup>6</sup>

The Department additionally suggests that nonprofit fee-for-service activities could be considered a business activity under FLSA, noting that while an animal shelter's adoption services qualify as a charitable activity, the veterinary care for which fees are charged is a

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<sup>3</sup> Weil, David. “Non-Profits and the Proposed Overtime Rule.” U.S. Department of Labor Blog. August 26, 2015. <https://blog.dol.gov/2015/08/26/non-profits-and-the-proposed-overtime-rule/>.

<sup>4</sup> Hancock, Michael. “Why Nonprofits Shouldn't Fret Over the New Proposed Overtime Rules.” Working Economics Blog, Economic Policy Institute. August 21, 2015. <http://www.epi.org/blog/why-nonprofits-shouldnt-fret-over-the-new-proposed-overtime-rules/>.

<sup>5</sup> “Frequently Asked Questions: Overtime NPRM.” U.S. Department of Labor. <http://www.dol.gov/whd/overtime/NPRM2015/faq.htm>

<sup>6</sup> Frumkin, Peter. “Service Contracting with Nonprofit and For-Profit Providers: On Preserving a Mixed Organizational Ecology.” 2002. [http://www.payforsuccess.org/sites/default/files/service\\_contracting.pdf](http://www.payforsuccess.org/sites/default/files/service_contracting.pdf).

business activity.<sup>7</sup> The Department further indicates that only staff engaged in business activities are covered,<sup>8</sup> but many nonprofit employees work to implement both charitable services as well as fee-for-service activities, making it difficult for nonprofit organizations to determine which staff, and what percentage of their time, might be covered under FLSA.

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.

It is worth noting the Department might have addressed some of this confusion by engaging the nonprofit community during the course of crafting this proposed rule change. During the course of our outreach since the release of the proposed rulemaking in July, we have yet to hear from a nonprofit organization that was asked to share with the Department its thoughts on the proposal. The perspectives of a sector that employs ten percent of the American workforce ought to be both heard and considered as significant changes to labor rules are developed.

Through such conversations the Department would have learned that charities will struggle to absorb such a dramatic increase in labor costs, and that instead the number of hours worked by key staff will be reduced, resulting in a loss of capacity for these organizations. The reality is that the impact of this proposal will be most acutely felt by those individuals and families across who depend upon the programs and services provided by the nonprofit community every day.

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.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Diana Aviv". The signature is written in a cursive, slightly slanted style.

Diana Aviv  
President and CEO  
Independent Sector

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<sup>7</sup> Weil, David. "Non-Profits and the Proposed Overtime Rule." U.S. Department of Labor Blog. August 26, 2015. <https://blog.dol.gov/2015/08/26/non-profits-and-the-proposed-overtime-rule/>.

<sup>8</sup> Ibid