



September 21, 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: Requests for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees WHD-2017-0002; RIN 1235-AA20

Dear Ms. Smith:

The Nonprofit Coordinating Committee of New York (NPCC), a membership organization for 501(c)(3) nonprofits in New York City, Westchester, and Long Island, New York, welcomes the opportunity to submit the below comments in response to the U.S. Department of Labor's Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees WHD-2017-0002; RIN 1235-AA20 on behalf of NPCC's members. NPCC, established in 1984, supports our nearly 1,500 members by encouraging strong, transparent, and informed management and by advocating for fair and reasonable nonprofit public policy. We surveyed our members regarding the questions raised in the Request for Information to present the below information to the US Department of Labor.

The nonprofit sector's views must be considered in all Department of Labor rulemaking. The nonprofit sector has a tremendous economic impact in the country, and in New York. The New York nonprofit sector employs 1.25 million people, and is 18% of the state's workforce. In New York City alone, over 35,000 nonprofit pay \$33.6 billion in payroll and employ more than 600,000 workers. Nonprofits generate more than \$260 billion in annual revenues.¹ As importantly, nonprofits play a critical role in our communities, as they provide necessary services, expertise, and advocacy to address societal inequities, promote art and culture, educate people, protect the environment, tend to the health needs of community members, and provide places of worship within communities.

¹ Independent Sector, [Economic Impact of New York's Nonprofit Sector, The Nonprofit Sector in New York](#), February 2016.

Responses to Questions Presented in the Request for Information

NPCC surveyed our members by presenting the questions outlined in the Request for Information and asking for member response to each question. The below responses are a summary of the responses of NPCC members.

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?

NPCC members uniformly responded that the standard salary level needs to be increased. While responses varied on the exact amount, all agreed that \$23,660 was too low, with the majority of responding members indicating the \$47,476 or higher is reasonable, particularly given the cost of living in New York City. (There were some members who would advocate for a lower salary than \$47,476, primarily because of the impact on their budget, but all support an increase overall.) 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.

We do not have a specific recommendation as to what the higher level should be.

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?

NPCC members were split on this question, with some believing that one national standard was fair and least burdensome for compliance, and some stating that a regional standard was more appropriate, given the cost of living in the New York City area.

The charitable nonprofit community does not seek a carve-out or sub-minimum salary level for nonprofits only or nonprofits and small businesses. In the strongest terms possible, NPCC opposes any such concepts, which could create two classes of employment, with nonprofit and small business workers being paid less. As the National Council for Nonprofits submits in their comments to this Request for Information, "most 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... The Labor Department should apply the same standard under the FLSA to nonprofit workplaces as it applies to for-profit and government workplaces. Setting a sub-minimum salary level for nonprofit employees is tantamount to treating them as second-class citizens and is unacceptable."

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?

Given the administrative and compliance confusion that would result from different salary levels for different exemptions, NPCC recommends that the Labor Department not set different standard salary levels for the executive, administrative, and professional exemptions. Many nonprofit employees have executive, administrative, and professional responsibilities, and it would be difficult to clearly segregate each duty within one position.

4. In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

Please see the responses to Question #2 and Question #3, above.

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?

NPCC members responding to this question stated that the duties test was sufficient, although many would like more clarification about the definitions within each test. A minority of respondents would replace the duties test with a salary test, and believe that duties tests should no longer determine exempt status of salaries of \$100,000 or more.

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?

Our members spent time preparing for the 2016 proposed Overtime Rule before it was challenged in court proceedings. Our members focused on assessing the duties tests for each employee, reviewing job descriptions and functions, to determine exemption status, a process they found useful, although frustrating given the subsequent delays in the implementation of the Rule. Some members used the opportunity to adjust salaries, assess salary scales, and incorporate anticipated increases in the salaries of exempt employees, anticipating both the increase from the federal government, and a likely state wage and hour increase in response to

the federal Rule. Many found the federal Rule salary limits "sudden and dramatic," although members agreed with the principle that employees must be paid a living wage. Unsurprisingly, members reported that this assessment had an economic impact on their organizations, where some paid for professional consultants to assess their current employee categories and anticipated future compliance issues and others increased salaries (and experienced a correlated increase of benefits), increase their overall annual expenses. Members reported that they strongly supported increases in wages and careful assessment of overtime because these changes are necessary to the economic well-being of nonprofit workers. Members also reported that increasing salaries and benefits left them with fewer resources to achieve their mission, and in some cases reported a need for increased scrutiny on overtime tracking and enforcement.

7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

See response to question #5, above.

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?

We did not survey our members on this question, as we focused on the nonprofit sector as a whole.

9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

We did not survey our members as to this specific question. However, the overall theme of our members' response was that the salary must be fair, a livable wage, and consistent across all sectors and organizations. While different organizations may choose to do this through bonuses or raising the salary level, all want to be able to anticipate their budget expenses each year.

10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they 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 total annual compensation 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 total annual compensation levels be on particular regions or industries?

Please see responses to question #2, above.

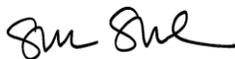
Conclusion

NPCC recommends that, as the Department of Labor considers changing the regulations governing the “white-collar” exemptions, the Department should:

- Increase the amount of the current salary level test so that nonprofit workers have a fair and livable wage;
- Give nonprofits a reasonable time to prepare for, and budget for, changes;
- Include increased cost (both salary, and administrative costs associated with implementing these and other similar rules) provisions in all government contracts to nonprofits providing services for the government that allow nonprofits to comply with new wage and salary requirements, including increased overtime costs;
- Create a uniform FLSA standard for nonprofit, for-profit, and government workplaces – it is unacceptable to treat nonprofit employees as second-class citizens by creating a carve-out or sub-minimum salary level for nonprofits only or nonprofits and small businesses;
- Prioritize simplicity in procedures and definitions under the FLSA in order to reduce confusion with the rules and to promote compliance with fair labor standards;
- Retain a single salary level for nonprofit and other employers across the country — that’s an important labor standard that all can understand and follow; and
- Apply the same standard salary level to the executive, administrative, and professional exemptions – avoid complex tables and schedules that make compliance more confusing.

Thank you for your consideration of these comments to the Request for Information inviting insights and perspectives. Please do not hesitate to reach out with questions.

Very truly yours,



Sharon Stapel
President