



May 17, 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: 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,

On behalf of Colorado Nonprofit Association, and our 1,400 member 501(c)(3) nonprofit organizations, I welcome the opportunity to submit comments on this proposed rule. Colorado Nonprofit Association's mission is to lead, serve, and strengthen Colorado's nonprofit community to improve the quality of life throughout our state.

Colorado's tax-exempt 501(c) organizations employ nearly 190,000 employees and account for more than 1 in 20 jobs in our state. Although nonprofit organizations manage overtime pay and exempt employers in ways that are similar to other small businesses, understanding and complying with the Fair Labor Standards Act is more challenging because of the charitable nature of their activities.

Regarding the rule, we recommend the following:

**First, updating guidance and educational materials to help nonprofits understand not only changes made by the rule but also how to understand and comply with the Fair Labor Standards Act (FLSA).**

We appreciate that the U.S. Department of Labor (DOL) has issued more guidance in recent years to help nonprofits understand the applicability of these overtime regulations. However, there are still aspects of the regulations that are confusing. To give some examples:

- Nonprofits would be covered by the FLSA as enterprises if they generate more than \$500,000 from ordinary commercial activities that substantially compete with other businesses. Although the guidance explains how charitable activities provided free of charge are excluded from this threshold, it's not entirely clear how this applies to nonprofits that generate fee-for-service revenues. Would the revenues of a nonprofit that charges income-based sliding scale fees for mental health counseling services be treated as commercial because these services may compete with for-profit businesses or would this income be treated as charitable and related to the nonprofit's charitable purpose?
- Nonprofit employees are covered individually if their jobs regularly involve engaging in interstate commerce. It's clear that activities such as buying goods from out-of-state companies, traveling to other states to do business, etc., would likely be considered interstate commerce. However, would interstate commerce include activities particular to the nonprofit sector such as sending a grant proposal to a foundation located in another state, cultivating out-of-state donors, or travelling to Washington DC to lobby a member of Congress. In speaking with experts in human resources in our



state, some say that almost every type of nonprofit job is covered; other say that only specific types of jobs are covered.

Because this proposed rule could result in changes to how nonprofits manage exempt employees and pay for overtime, it's important that nonprofits have a clear understanding of how their organizations and employees are covered and how they can comply.

**Second, we support increasing the minimum weekly salary level for exempt employees from \$455 per week (\$23,660 per year) to \$679 per week (\$35,038 per year).**

Because the current salary level has not been adjusted for inflation since 2004, we are concerned that the value of the salary level has eroded over time and that exempt status can be applied too broadly. In 2020, Colorado's minimum wage will be updated to \$12 an hour, meaning that the minimum weekly wage will be \$480. The salary test would no longer have any meaning as any employee in Colorado who arguably meets the duties test could be classified as exempt.

Increasing the salary level is also an idea generally supported by our member organizations. When the 2016 Obama administration rule was proposed, we surveyed both the managers and employees of our member organizations about the salary level. It's not surprising that employees supported increasing the salary level but most of the managers also supported a modest increase. Most managers expressed concerns about the \$50,000 level in the 2016 rule but offered numbers between \$30,000 and \$40,000 per year as reasonable.

We believe that nonprofit employees should only be exempt from overtime if they carry out duties that are integral to a nonprofit's ability to operate, generate revenue, and carry out its programs successfully. Exempt positions often require more expertise and responsibility than other positions in the nonprofit sector. Increasing the salary level ensures that exemption is not used for just any position where an employee may work more than 40 hours with any regularity.

Third, we ask that DOL work with federal agencies to ensure that federal grants and contracts may be renegotiated for nonprofits assuming the salary level for exempt employees is increased by this rule. Implementation of this rule may require nonprofits to increase salaries to ensure certain employees remain exempt or pay overtime to employees who have been reclassified as hourly. These changes may occur while existing federal contracts or grant agreements are in place with unadjusted reimbursement rates. Unless there is a mechanism to automatically adjust reimbursements for changes to FLSA regulation, or for nonprofits to renegotiate rates, then nonprofits will be required to provide the same levels of service with higher labor costs. Nonprofits should be able to seek higher reimbursement rates insofar as federal grants and contracts pay them to deliver services.

Thank you for reviewing and considering our comments,

A handwritten signature in blue ink that reads "Mark Turner".

Mark Turner,  
Senior Director of Public Policy