



September 2, 2015

Director Mary Ziegler  
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

*Via electronic submission at <http://www.regulations.gov>*

**Re: DOL Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees published in the Federal Register on July 6, 2015 (RIN 1235-AA11)**

Dear Director Ziegler:

On behalf of ACCSES, and the more than 1,200 disability service providers serving over 3 million people with disabilities we represent, I am writing to thank you for the opportunity to comment on the proposed DOL rule entitled, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” that was published in the Federal Register on July 6, 2015 (RIN 1235-AA11).

ACCSES represents the full spectrum of non-profit organizations, including educators, employers, federal contractors under the AbilityOne program, as well as providers of vocational and rehabilitation services. As a result of the diversity of non-profit disability service providers in our membership, we have heard significant concerns about the proposed regulations, the impact they will have on employees working with individuals with physical, intellectual and developmental disabilities, and the direct impact it will have on the individuals living and working with a disability. It is vital that the Department balances the equally important priorities of ensuring adequate compensation for all workers and ensuring that services and supports that individuals with disabilities rely on remain intact. However, this rule has the potential to seriously harm the very workers it seeks to protect, as well as a significant number of workers beyond its scope including the disability service providers (DSPs) that are the backbone of the service and support system, and also people with disabilities who rely on this segment of the workforce in order to live meaningful lives.

***Salary Threshold***

Medicaid-funded providers do not have the ability to negotiate rates or to pass on increased operating costs to the state, the people we serve, or other entities.

*Recommendation:* The Department must collaborate with other federal agencies to ensure that policies that will result in appropriate funding are in place to meet the requirements of the rule.

DSPs are keenly focused on providing exceptional supports while managing within very constrained financial realities. In recent years, there have been many new federal and state regulations that providers have to comply with, without increased rates to accompany them. This has left many providers unable to comply with these pressures without scaling back wages, services, benefits, or all three.

*Recommendation:* We recommend that the threshold not be significantly increased unless or until adequate funding can be assured for publicly-funded providers in light of the recognition that the service delivery system is significantly overburdened.

The proposed salary threshold, which would more than double the current threshold, would create significant hardship for DSP's. Raising the threshold to the 40<sup>th</sup> percentile of full-time salaried workers' salaries is too steep an increase for non-profit agencies to absorb.

*Recommendation:* If the threshold is increased, we recommend that the updated threshold be significantly less than the 40<sup>th</sup> percentile.

The proposed salary threshold increase does not account for the value of non-salary benefits, including health benefits, retirement plan contributions, and other employer-sponsored benefits that those providers are currently able to offer to their salaried employees. Given the importance to worker satisfaction and overall personal economic stability such benefits have, it is appropriate to consider an employee's total compensation rather than only take-home income.

*Recommendation:* We recommend that for purposes of meeting the salary threshold, employee benefits received for which the employer bears the financial burden be included in the calculation of total salary.

The proposed rule does not take into account regional variances in costs of living. The effect of this is to disproportionately harm workers and individuals living in states that are the least able to absorb additional costs.

*Recommendation:* We recommend establishing salary thresholds that are appropriate to clearly delineated geographic regions that account for regional variances in cost of living, following a standard similar to that the federal government already uses for its own employees, contractors, and eligibility for many federally-subsidized programs.

#### ***Automatic Adjustment of Salary Threshold***

Using percentiles rather than averages of national salary data creates the potential for significant discrepancies between the highest and lowest percentiles. Using an inflation index, particularly the CPI-U as suggested, does not take into account the variance between rural and urban markets. Any inflation index that is an average of national data has this same weakness; it will disproportionately impact different regions, potentially worsening the income disparity in this country, and inadvertently harming the workers the rule seeks to protect.

*Recommendation:* We recommend, between these two options, basing the threshold on regional salary data. However, we encourage the Department to consider other methods of setting and adjusting the threshold as outlined elsewhere in these comments. Additionally, we recommend that any increases in the salary threshold be accompanied by a requirement for a corresponding increase in Medicaid rates to accommodate the increase.

#### ***Duties Tests***

The Department has asked for comment on the existing duties tests for these exemptions. We recommend that the duties tests not be changed for these exemptions. Specifically, we recommend against setting a fixed threshold for time spent on non-exempt duties as it would be overly prescriptive and not take into account differences in duties and expectations that are present in different industries.

It is not uncommon for a supervisor to perform direct care work as a means of training or modeling to a subordinate how to properly perform the work. If this work were to be classified as non-exempt, it could impede a supervisor's ability to effectively manage his or her subordinate, and would also impose an additional recordkeeping burden. Additionally, it is not uncommon for a supervisor to cover a shift for a worker. This is not typically scheduled or planned for, and exempt supervisory employees understand that part of the job may involve performing unscheduled or emergency direct care in order to ensure continuity of care for a person served.

*Recommendations:* We recommend against setting any type of bright line threshold, and also recommend against reinstating the long duties test which was abandoned in 2004. We recommend that changes not be made to the existing duties tests. If changes are proposed, ensure that the public is given sufficient opportunity to comment on any proposed changes before the rule is finalized.

#### ***Impact on Worker Satisfaction and Turnover Rate***

If this rule is finalized as proposed, non-profits would be forced to convert currently-exempt salaried employees to hourly workers. This will have a huge negative impact on worker morale and job satisfaction, as well as create operational challenges as we struggle to shift work from exempt employees to others.

Many workers who fall under these exemptions in our field started out as direct care workers, and advanced into supervisory or administrative positions that require independent judgement and flexibility. These exempt employees are typically encouraged to take part in various career and education enhancement and training programs in order to advance in their career paths. Placing restrictions on overtime for these employees would take away options for workers to pursue career-advancing extra activities, including participation in committee work and professional organizations that foster career growth and professional development of workers.

Additionally, many salaried exempt employees choose to spend additional time with their teams or individuals served outside of the work environment. Some of these activities are properly classified as work and would be required to count towards hours worked for non-exempt employees. Many providers would be forced to limit these activities if counted toward hours worked, which could have a devastating impact on employee morale (for both supervisors and subordinates), and also on the individuals served.

Therefore, unintended consequences of this rule as proposed include a chilling effect on the ability of providers to offer, and for employees to avail themselves of, opportunities for career advancement and personal enrichment.

#### ***Treatment of Nondiscretionary Bonuses and Incentive Payments***

The Department requested comment on the treatment of nondiscretionary bonuses and incentive payments. These payments are awarded to employees that fulfill certain requirements set by the employer as part of their job description. As such, it is within the employee's power to perform in a manner that will result in the payment of such income. For salaried exempt employees, such payments serve as an incentive to perform work of the type that will advance them in their professional career path. This is squarely in line with the purpose of the exemptions affected by this rule.

*Recommendation:* We recommend that nondiscretionary bonuses and incentive payments be included in the calculation of income that will meet the salary threshold.

#### ***Reduction in Benefits and Other Impact on Hourly/Non-exempt Workers***

The Department must understand the impact that this rule will have on industries and employers as a whole. There is the potential for serious and severe negative consequences for non-exempt workers if this rule is implemented as proposed.

Non-profits providing support under Medicaid struggle to keep positions filled with qualified employees. They are unable to pay higher wages to hourly workers, or salaries to mid-level workers, which worsens turnover. Since rates cannot be negotiated or increased costs passed on, non-profits have no choice but to scale back wherever possible, which means not being able to offer health insurance or other employee benefits comparable to companies in other industries.

#### ***Implementation Timeframe***

Any significant increase in operational costs for publicly-funded programs requires action on behalf of state legislatures to appropriate more funding. More than doubling the salary threshold, as proposed, would mean that

non-profits could not adjust quickly enough to absorb the extra operating costs, because of the time it takes a state to appropriate funds through its budget process. It is imperative that states be given sufficient time to allocate and appropriate funding.

*Recommendation:* We recommend an effective date for the final rule of at least two years after its finalization to afford states sufficient time to allocate appropriate funding. We further recommend that the final rule have a phased implementation timeframe of three to five years to minimize the negative impact on workers that would accompany a steep increase.

### ***Conclusion***

ACCSES is extremely concerned that this rule, as proposed, would have negative unintended consequences for many non-profits, their employees and the individuals with disabilities they serve. While we applaud the intent of the Department in drafting this rule, we seek to ensure that other issues that would prevent the rule from operating as envisioned are addressed prior to or simultaneously with the issues addressed by this rule. Medicaid-funded entities are dependent on state Medicaid programs to set appropriate rates, state legislatures to appropriate funding, and the Centers for Medicare and Medicaid Services (CMS) to provide strong oversight of Medicaid programs. We strongly urge you to consider our comments to avoid unintended consequences to disability service providers nationwide and the people with disabilities they support.

Thank you for the opportunity to comment on the proposed rule. If you have any questions regarding our comments, please contact Leann Fox, Director of Government Affairs at [lfox@accses.org](mailto:lfox@accses.org) or (202) 349-4279.

Sincerely,



Terry R. Farmer  
CEO, ACCSES