

October 30, 2023

Ms. Amy DeBisschop
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-2023-0001-0001; (RIN) 1235-AA39

Dear Ms. DeBisschop:

The National Council of Nonprofits welcomes this opportunity to submit formal Comments regarding the above-captioned Proposed Rule published by the U.S. Department of Labor on September 8, 2023. Many of the National Council of Nonprofits' 30,000+ organizational members are directly affected by the Fair Labor Standards Act (FLSA) regulations at issue in this rulemaking. Similarly, the people they employ and serve will likely be affected by any changes to the "white-collar" exemptions.

These Comments are informed by our network's direct experiences related to the Department's efforts in 2015, 2017, and 2019 to revise the salary level test for determining exemption from overtime requirements. Our member state associations of nonprofits have worked diligently with nonprofits to – among other things – raise awareness regarding the proposed changes; conduct detailed, state-specific analyses on legal and operational matters raised by the proposals; encourage the submission of nonprofit-focused public comments to assist the Department in this rulemaking; and promote full compliance with federal and state labor standards through education and training.

The National Council of Nonprofits neither recommends nor opposes the proposed formulae for the Standard Salary Level and the Salary Level for Highly Compensated Employees, and we do not express views on the proposal to adjust those levels automatically every three years. In these Comments, the National Council of Nonprofits urges the Department of Labor to:

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- Treat all employers the same, regardless of economic subsector (i.e., nonprofit, for-profit, government) and reject calls to carve out some employers and employees, which would essentially create second-class status;
- Retain a national salary level for nonprofit and other employers across the country, and not create confusion and costly burdens and compliance issues through regional salary levels;
- Apply the same standard salary level to the executive, administrative, and professional exemptions – thus avoiding complexity that makes compliance more difficult;
- Treat nonprofit grantees fairly – just as the federal government protects for-profit contractors when government-mandated labor cost increases go into effect, put protections in place for nonprofits performing specific services pursuant to written agreements with the government; and
- Develop detailed, tailored educational materials devoted to expanding nonprofit understanding of and compliance with labor standards.

These Comments focus on charitable nonprofits and their needs both as employers and as mission-focused organizations dedicated to serving others. We do not attempt to speak on behalf of other forms of nonprofit organizations (such as social welfare groups, labor unions, or trade associations). We believe those entities, just like for-profit businesses and governments, can speak on their own behalf, either directly or through their own associations.

Introduction

The issues raised in the pending rulemaking are of great interest and concern for charitable nonprofits, their employees, and the individuals they serve in communities throughout the United States. We believe that for the Department to properly regulate the activities of any sector, its officials should have a basic understanding of the essential facts about the sector. We share the following with that goal in mind.

Charitable nonprofits employ 12.3 million people, which is 10.2% of the private workforce, making the sector the third largest private employer in the country – larger than manufacturing, construction, finance and insurance, transportation, real estate, and agriculture.¹

Despite the collective size of the sector, most charitable nonprofits are relatively small: 97% have budgets of less than \$5 million annually, 92% operate with less than \$1 million per year, and 88%

¹ [Research Data on the Nonprofit Sector: 2017 U.S. Totals](#), U.S. Bureau of Labor Statistics, last updated May 14, 2020.

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spend less than \$500,000 annually for their work. The “typical” charitable nonprofit is community-based, serving local needs.²

There is no standard source of revenue for charitable nonprofits; the percentage mix of revenue streams (earned from private fees, earned from government grants/contracts, donations from individuals, grants from foundations, bequests, and other) varies widely between organizations based on a variety of factors. The charitable nonprofit sector as a whole earns almost a third (31.8%) of its revenues by performing services pursuant to government grants and contracts.

Charitable organizations are evaluating the Overtime Proposed Rule at a time when the sector is experiencing a profound workforce shortage. Nearly three-out-of-four nonprofits (74.6%) completing a nationwide survey in April 2023 reported job vacancies,³ more than double the rate of private businesses.⁴ More than half (51.7%) of responding charitable organizations reported they have more vacancies now compared to before the COVID-19 pandemic, while nearly three out of ten (28.1%) have longer waiting lists for services now.

In both a 2021 survey and the 2023 nonprofit workforce shortage survey referenced above, nonprofits reported that salary competition is the greatest challenge for charitable organizations, with more than seven-out-of-ten nonprofits (79% and 72.2%, respectively) identifying this as a factor affecting their ability to recruit and retain staff. While the most recent survey found that 66% of nonprofits have increased salaries, this solution is not sustainable for many nonprofits, and they remain concerned about losing staff to other sectors due to salary competition.

The Labor Department can anticipate that the responses of charitable employees and organizations to the labor-standards changes proposed in this rulemaking will vary widely. In the 2016 overtime rulemaking, many nonprofits expressed *moral support* for raising the salary threshold because of the potential positive effect on the people they serve and their own employees, but *operational anxiety* as they worried about how to cover any increased costs. That internal tension is key to understanding

² [Nonprofit Impact Matters](#), National Council of Nonprofits, September 2019.

³ [2023 Nonprofit Workforce Survey Results: Communities Suffer as the Nonprofit Workforce Shortage Crisis Continues](#), National Council of Nonprofits, August 2023 (results based on responses of more than 1,600 organizations from all 50 states and the District of Columbia).

⁴ Only a third (33.0%) of private businesses had job vacancies at any time between August 2021 and September 2022. [Private establishments that had vacant positions, August 2021 to September 2022, by size of establishment](#), U.S. Bureau of Labor Statistics, *The Economics Daily*, Chart Data, Aug. 4, 2023.

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and processing the varied views by individuals working in the charitable sector, pursuing diverse missions, and engaging in problem-solving in every community in America.

It should also be recognized that in responding to the proposed rule, larger nonprofits that regularly compete with for-profit and governmental organizations (*e.g.*, hospitals) may identify different challenges than smaller nonprofits and those that provide services on behalf of governments pursuant to grants and contracts. Additionally, there may be wide variations in the impact of the proposed changes depending on whether a nonprofit operates in a rural versus urban area. We raise these points at the outset to draw the attention of Labor Department officials to the fact that there is no monolithic view from the charitable nonprofit community.

Comments on the Proposed Rule

In these Comments, the National Council of Nonprofits does not attempt to address all of the issues raised in this rulemaking. Rather, we highlight specific observations and concerns we have heard from frontline organizations and offer recommendations for improving the proposed rule and Labor Department enforcement and guidance.

Standard Salary Level

Much of the commentary in the Discussion of Proposed Rule focuses on explaining and justifying the selection of a higher percentage of earnings from a Census dataset than is currently utilized. The result would be a salary level threshold that is 55% higher than the current regulations require, or a hike from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year) based on current data. After extensive analysis and discussion, the National Council of Nonprofits has decided not to take a position on the proposed formula and result. As noted earlier, charitable nonprofits recognize both moral support and operational anxiety in analyzing this and similar issues. The push-pull within nonprofits means we do not have a consensus position to present in these Comments.

We do, however, believe additional discussion on the methodology is needed to properly frame the issues presented to the nonprofit community and the Department of Labor.

There is not a clear answer as to which formula is best. Current regulations peg the formula at the 30th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). In 2015-16, the Obama Administration had sought to use the 40th percentile of the same

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dataset, but that approach was struck down by a federal district court.⁵ The Trump Administration withdrew the 2016 revision and subsequently updated the rate based on the existing formula using the 30th percentile. The current proposal would shift the level to the 35th percentile, or half way between the rate set in 2004 and the Obama Administration proposal. We anticipate a court ultimately will decide if the higher percentage is within or outside the Department's regulatory power.

While the federal debate over percentiles of the same dataset is important, it must be acknowledged that several states have applied their own formulae for setting their salary level thresholds for exempt employees. The state minimum salary levels vary based on which formula is selected; all result in a threshold that is higher than dictated by existing federal rules. We share the following analysis because a nonprofit leader in one of the states with the highest salary thresholds advised their colleagues in other states, "the sky did not fall" when the higher levels went into effect.⁶

- **Alaska:** As of January 1, 2023, the minimum salary threshold for executive, administrative, and professional employees in Alaska is set at \$868 per week based on a formula of twice the state minimum wage (\$10.85 per hour) for a 40-hour week.⁷
- **California:** The salary-level threshold for exempt employees in California is \$1,240.00 per week, or \$64,480.00 per year. This level is based on a salary equivalent of no less than two times the state minimum wage for full-time employment.⁸
- **Colorado:** The minimum salary required to qualify for the executive/supervisor, administrative, and professional exemptions under state law is set at \$961.54 per week (50,000/annually) in 2023 and goes up to \$1,057.69 per week (\$55,000/annually) in 2024. Thereafter, the "Salary Requirement" rules as well as the Colorado minimum wage will be indexed every January 1 by the Consumer Price Index ("CPI").⁹
- **Maine:** Like California law, the minimum salary threshold for exempting an EAP worker from overtime pay is based on the state's minimum wage. Starting January 1, 2024, the new

⁵ *Nevada v. U.S. Department of Labor*, 275 F.Supp.3d 795 (E.D. Tex. 2017).

⁶ While not dispositive, it is noteworthy that only one of the thousands of comments supplied by frontline nonprofits filling out the [2023 nonprofit workforce survey](#) pointed to higher salary thresholds in individual states as contributing to challenges in retaining and attracting employees. Many other factors, such as salary competition from for-profit and government employers, stress and burnout, and problems caused by government grants and contracts, were commonly cited.

⁷ [Alaska Stat. §23.10.055](#) (2022).

⁸ [Miscellaneous Employees, Industrial Welfare Commission Order No. 17-2001](#), effective Jan. 1, 2002, as amended.

⁹ [Colorado Overtime & Minimum Pay Standards Order No. 38, Rule 2.5](#), Colorado Department of Labor and Employment, effective Jan. 1, 2022.

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minimum salary threshold will be \$816.35 per week, or \$42,450.20 per year. This level is based on an annual rate of 3,000 times the state's minimum hourly wage, which in 2024 will be \$14.15 per hour.¹⁰

- **New York:** Executive and administrative employees in New York must be paid a minimum weekly salary of at least 75 times the state minimum wage rate, which differs based on the region of the state. In 2023, the New York City minimum wage rate of \$15/hour results in a minimum weekly salary of \$1,125.00 (\$58,500/annually). In 2024, state law will increase the NYC minimum wage to \$16.00 per hour, which will amount to a weekly minimum salary of \$1,200 (\$62,400/annually). The FLSA salary level threshold applies to professional employees in New York.¹¹
- **Washington:** Pursuant to regulations adopted in Washington State in 2020, the minimum salary threshold for overtime exempt workers will increase incrementally until 2028, when the change will be fully implemented at 2.5 times the state minimum wage. In 2024, the rate will rise to 2.0 times the state minimum wage, currently set at \$16.28/hour, resulting in a salary level threshold of \$1,302.40 per week (\$67,724.80/annually) for small and large employers.¹²

The National Council of Nonprofits recognizes that it would not be appropriate for the Department of Labor to rely on a multiple of the minimum wage rate set by federal or state law; the variations across the country would be extremely difficult for employers to manage. We include the preceding examples, however, to show that an esoteric debate over formulae should not lose sight of the impact of the chosen methodology on the ability of charitable nonprofits and other employers and their employees to operate in the current and future economic environments.

Lessons from state salary level thresholds: In virtually every instance, states have raised their minimum salary levels for exempt employees over a period of time in clearly defined steps. In cases where the salary level minimum is based on the state minimum wage rates, the state departments of labor have published directives and educational materials well in advance to alert employees to their rights and employers to their obligations. Critically, the advance notice and phase-in periods enable employers to address workplace management and financial issues ahead of implementation dates.

¹⁰ [Maine Rev. Stat., §27-7-663\(3\)\(K\) \(2009\)](#); [Maine's Minimum Wage to Increase to \\$14.15 Per Hour in 2024](#), Maine Department of Labor, Sept. 15, 2023.

¹¹ [12 NYCRR §141-3.2\(c\)\(1\)\(i\)\(e\)\(1\)\(i\)](#), Oct. 18, 2023.

¹² [Changes to Overtime Rules Q&A](#), Washington State Department of Labor & Industries, accessed Oct. 26, 2023. See also, [Salary threshold implementation schedule](#), publication F700-000 (10-2023).

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RECOMMENDATION: Unless the Department decides simply to adjust the Standard Salary Level for inflation, the National Council of Nonprofits recommends that the new level be phased in over two or more steps to give employers time to adjust their finances and staffing practices accordingly. This approach is being taken in Washington State to phase in, over eight years, the highest Standard Salary Level threshold in the nation.

Additional considerations on the Standard Salary Level: We anticipate that the Department of Labor will receive well-intended recommendations in public comments that run counter to the best interests and operational capacities of charitable nonprofits. We offer the following considerations to ensure the Department has the full range of views.

(a) **Standard Salary Level Based on Size or Subsector**

Some of the comments to the proposed rule call on the Department to create a separate, lower salary level for small businesses, nonprofits, or some other grouping. In the strongest terms possible, the National Council of Nonprofits opposes any such carveouts.

From our years of experience representing more than 30,000 charitable nonprofits, we know that any call for a nonprofit carveout does *not* reflect a consensus of nonprofit employers. Instead, most charitable nonprofit employers are deeply concerned that a law treating nonprofit employees as less valuable than their for-profit or government counterparts would turn charitable nonprofits into employers of last resort. As noted, charitable nonprofit employers are already experiencing a workforce shortage that is worse than other sectors. A substandard salary test would make it harder for nonprofit employers to attract and retain qualified workers. **Setting a sub-minimum salary level for nonprofit employees would be tantamount to treating them as second-class workers and would be unacceptable.**

A carveout for charitable nonprofits is not the conventional thinking of individuals and organizations committed to advancing the missions of their organizations. The Labor Department should reject any such carveout and apply the same standard under the FLSA to nonprofit workplaces as it applies to for-profit and government workplaces.

(b) **Standard Salary Level Based on Region**

The National Council of Nonprofits commends the Labor Department for proposing the retention of a single salary level employers across the country, relying on a percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). We base our support on at least four considerations:

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First, we have heard from many charitable nonprofits across the country that a regional rate would likely skew a standard salary level to urban employment pay scales that may not be appropriate for rural areas. For example, it is likely that a salary level established for the Pacific Northwest would heavily reflect pay scales in the Seattle–Tacoma–Bellevue, WA Metropolitan Statistical Area (population 4.1 million) that are higher or out of line with pay scales in the states of Idaho (population 1.9 million) or Montana (population 1.1 million). This disparity is likely to occur in each region that the Department might identify. Thus, mandating regionally based standards would create greater market distortions than a simple fine-tuning of one nationwide standard.

Second, charitable nonprofits, like many other organizations, employ a mobile workforce and rely heavily on the work of employees located outside the primary location. As one example, the National Council of Nonprofits employs seven professionals who work remotely rather than from our offices in Washington, D.C. Those individuals work from their homes in Alabama, Colorado, Kentucky, North Carolina, Oregon, central Virginia, and Washington State. Through technology, each is an integral part of our operation, yet works hundreds or thousands of miles away from the organization’s primary office. Establishment of regional salary levels under the FLSA could subject our one organization to four or more separate minimum salary levels; new telecommuting employees would compound the confusion. The National Council of Nonprofits does and will continue to pay executive, administrative, and professional staff in excess of the minimum salary levels, however determined under this rulemaking. Nonetheless, we cite our example to demonstrate how work is performed in 2023 and how adding complexity to the regulations would impose multiple unintended challenges.¹³

Third, a majority of states have exercised their power to set higher standards for non-exempt and exempt employees. Currently, 30 states and the District of Columbia set their minimum wage levels higher than the federal minimum wage of \$7.25 per hour.¹⁴ Likewise, some states have set the salary level test at a higher amount than is set in current U.S. Department of Labor regulations.¹⁵ We are concerned that imposition of multiple standard salary levels would create even greater confusion and uncertainty than already exists. It should also be noted that higher state mandates would add to the distortion of regional rates, as discussed above.

¹³ The number of people working remotely – including working from home in a state other than where their employer is located – has skyrocketed since the beginning of the pandemic. Researchers at [McKinsey & Company](#) found that in 2023 58% of job holders responding to a survey – “which, extrapolated from the representative sample, is equivalent to 92 million people from a cross section of jobs and employment types – report having the option to work from home for all or part of the week.” Stanford economist Nickolas Bloom presents recent data when explaining why [The Return-to-Office Movement Is Dead](#), *New York Times*, Oct. 16, 2023.

¹⁴ [State Minimum Wage Laws](#), Wage and Hour Division, U.S. Department of Labor, updated Sept. 30, 2023.

¹⁵ [Exempt Employees: Minimum Salary Requirements for 2023](#), *HR Newsletter*, ADP, Jan. 11, 2023.

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Finally, simplicity under the FLSA should be a priority in order to promote compliance with fair labor standards. Despite efforts to modify and improve the white-collar regulations in 2004, 2016, and 2019, inconsistencies, confusion, and frustration abound as organizations and their employees try to adapt their current realities to sometimes awkward regulations. Some problems, of course, are understandable given that the workforce and work practices have changed immensely since enactment of the FLSA in 1938. Still, past and present guidance from the Labor Department has been scarce and confusing. Nine-out-of-ten nonprofits have annual revenues of less than \$1 million¹⁶ and almost by definition do not have resources to pay for regular access to attorneys to decipher complex regulations.

The National Council of Nonprofits surveyed charitable nonprofit employers in connection with past rulemaking and found, among other things, that many of the concerns they expressed about the then-pending Overtime Final Rule were in fact questions of compliance with the underlying FLSA. Comments from survey participants indicated that many nonprofits believed they were complying fully with their wage and hour obligations by offering their employees “flex time,” compensatory time (“comp time”), and other schedule and pay adjustments that may not be appropriate or available to them under federal law.¹⁷

In short, existing law is already too confusing for many organizations and their employees to follow. Rulemaking should avoid complexity wherever possible; a Standard Salary Level is an important labor standard that all can understand and follow.

(c) Single Level for Executive, Administrative, and Professional Employees

The National Council of Nonprofits supports the decision by the Labor Department to retain a standard salary level that applies equally to the executive, administrative, and professional exemptions. This approach is simple and easy to administer, and it recognizes how smaller charitable nonprofits operate.

If the Department were to establish three separate salary levels, the result would be that the highest level for the three categories would prevail in smaller charitable organizations. It is a fact of life among smaller nonprofits that individuals typically perform multiple tasks across various job descriptions and duties. A sizeable percentage of executive directors/chief executive officers of small nonprofit human service providers are licensed social workers who frequently perform programmatic as well as

¹⁶ [Nonprofit Impact Matters](#), National Council of Nonprofits, September 2019.

¹⁷ [The Nonprofit Overtime Implementation Conundrum](#), National Council of Nonprofits, July 5, 2016.

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administrative work. Likewise, teachers often lead smaller nonprofit preschools and elementary schools, which benefit from their performance of in-class instruction as well. Invariably, the executive director of a nonprofit litigation center is a lawyer performing multiple services on behalf of the organization.

In each of these, and many other scenarios, charitable nonprofit organizations expect employees to wear many hats to advance their missions. They can only comply with the FLSA by applying the highest standards. The Department's proposal to apply the same standard salary level to the executive, administrative, and professional exemptions is therefore the appropriate approach.

Standard Salary Level for Highly Compensated Employees

The proposed rule would also raise the standard salary minimum for highly compensated employees from \$107,432 per year to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally, or \$143,988 per year. As with the standard salary level discussed above, the proposed approach seeks to split the difference between the current percentage (80th percentile) and the rate proposed by the Obama Administration (90th percentile) that was struck down by a federal district court. The result of the proposed rule would be a 35% increase in the minimum salary level for highly compensated employees, well higher than the 18.9% rate of inflation since the threshold was last updated on January 1, 2020.¹⁸

As in the standard salary level discussed above, the National Council of Nonprofits does not take a position on this proposed formula set with a higher percentile. It will initially be for the Labor Department, and perhaps later for a court, to decide whether the proposed methodology is an appropriate initial screen for determining exempt status or one that overrides the need to analyze jobs based on the duties performed.

RECOMMENDATION: Unless the Department decides simply to adjust the Standard Salary Level Highly Compensated Employees for inflation, the National Council of Nonprofits recommends that the new level be phased in over two or more steps in order to give employers time to adjust their finances and staffing practices accordingly.

Automatic Three-Year Updates

The Department is also proposing a system to automatically adjust the two minimum salary thresholds every three years utilizing the methodologies or formulae designated in the proposed rule.

¹⁸ CPI Inflation Calculator, in2013dollars.com, accessed Oct. 27, 2023 (comparing data from January 2020 through September 2023).

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Such an approach would eliminate the need for the Labor Department to go through the regulatory process to make future changes in the thresholds. While the National Council of Nonprofits does not have a substantive objection to this approach, we do note that the judge who struck down the Obama Administration overtime rule also revoked this same process.

Additional Comments and Priorities

In addition to the foregoing, the National Council of Nonprofits requests that the Department of Labor take additional actions as part of this rulemaking to promote fairness and greater compliance with the overtime regulations specifically, and with the FLSA generally.

We Call on the Department to Correct the Unfair Disparity Between How the Government Treats For-Profit and Nonprofit Entities

In separately submitted Nonprofit Joint Comments, the National Council of Nonprofits and several other nonprofit organizations will explain the disparate impact changes in the salary level tests will have on nonprofits that perform services on behalf of governments pursuant to grants. We seek the Department's assistance in correcting the underlying disparity between how the federal government addresses mandated changes to FLSA compensation policies as applied to for-profit entities doing business with governments pursuant to written agreements (typically called contracts) versus nonprofit entities doing business with governments pursuant to written agreements (typically called grants). There is no rational basis for **government contracting policy** with for-profit businesses and **government grants policy** with charitable nonprofits to differ when federal law mandates that compensation levels increase. Yet federal law automatically increases the amount paid to for-profit entities, while nonprofits are forced to struggle to survive. We incorporate those comments here.¹⁹ We ask the Department to commit to working to fix fundamental flaws in current law and policies that will impose unintended yet unnecessary and significant burdens on charitable organizations before or as part of the overtime final rule that is promulgated.

We Call on the Department to Improve Its Guidance to Promote and Support Greater Nonprofit Compliance with the FLSA

The National Council of Nonprofits recognizes that many nonprofits are not clear on when and whether the Fair Labor Standards Act applies to some or all of their employees and operations. There is also confusion about what practices constitute full compliance. In NCN's 2016 report, "The

¹⁹ See forthcoming Nonprofit Joint Comments on Government Grants Reforms, scheduled for submission on Nov. 2, 2023, to both the Overtime Proposed Rule and proposed regulations from the Office of Management and Budget, Guidance for Grants and Agreements, OMB-2023-0017.

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Nonprofit Overtime Implementation Conundrum,²⁰ we identified areas of confusion under existing law and the opportunity that the overtime rulemaking presented in increasing awareness about the application of the law. Outreach in response to the current rulemaking indicates that greater guidance is still needed – guidance that tailors the complexities of the law to the realities of nonprofit workplaces in the 2020s.

(a) **Clarify That the FLSA Applies to Charitable Nonprofits**

There is a persistent misperception that charitable organizations are exempt from the Fair Labor Standards Act. Current guidance is partially responsible for this misunderstanding because direct answers are obfuscated by nuances that do not, on their face, seem relevant to charitable organizations.

In its answers to Frequently Asked Questions, the Department states that there “is no exemption for nonprofit organizations under the FLSA or in the proposed rule.” Yet, the answer goes on to confuse things by writing about “[c]haritable, religious, educational, or similar activities” that may be ignored in determining coverage and considered as outside the coverage of the law.²¹ The Department explains that it will treat an employer (*enterprise*) as covered by the FLSA only if it has commercial sales of \$500,000 or more – a standard that most charitable nonprofits would not meet either by dollar volume or the nature of its activities. Indeed, most charitable organizations do not think of themselves as engaging in “commercial sales” at all.

However, the Labor Department considers virtually every worker (*individual*) as covered by the wage and hour law because their work causes them to engage in interstate commerce, including activities like sending and receiving mail, making out-of-state phone calls, and processing credit cards. Based on those admittedly outdated examples it appears that, with rare exceptions, most if not all workforces of charitable organizations are covered by the Fair Labor Standards Act. Yet because of the Department’s own guidance, confusion continues, unfairly putting nonprofits at risk.

²⁰ The Nonprofit Overtime Implementation Conundrum, National Council of Nonprofits, July 5, 2016, <https://www.councilofnonprofits.org/nonprofit-overtime-implementation-conundrum>.

²¹ “Thus, the proposed rule may impact nonprofit organizations that have an annual dollar volume of sales or business done of at least \$500,000. In determining coverage, only activities performed for a business purpose are considered. Charitable, religious, educational, or similar activities of organizations operated on a nonprofit basis where such activities are not in substantial competition with other businesses are not considered. Employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce.” FAQ #13, [Frequently Asked Questions](#), Wage and Hour Division, U.S. Department of Labor, posted Aug. 30, 2023.

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RECOMMENDATION: The National Council of Nonprofits urges the Department of Labor to revisit FAQ #13 both to acknowledge that the references to “commercial sales” are not usually relevant to many charitable organizations, and to update examples of the job functions, such as using the internet and meeting via Zoom, that trigger individual eligibility.

(a) **Provide Guidance on Unique Nonprofit Job Classifications**

The National Council of Nonprofits and other organizations have urged the Labor Department as part of prior rulemaking on the Fair Labor Standards Act to update its guidance to ensure that fact situations and analyses are relevant to the economic realities and workplaces of charitable nonprofits. Specifically, the Department has been criticized for explaining the law and offering examples as if all employees work in a factory setting. To their credit, DOL officials have reached out to sector leaders seeking more information and suggestions for improvements. That outreach is recognized here and appreciated. In response to that outreach, we offer the following insights.

In communicating with charitable organizations throughout the country, the National Council of Nonprofits has sought such input, asking if there are “unique nonprofit jobs ... that need clarification as to how and when the FLSA overtime rule applies?”²² Two job classifications were most frequently cited in responses. The following commentary is based on a review of job postings websites:²³

- 1) **Development Director:** While every organization structures this job differently, the Director of Development can work in the areas of individual giving, foundation and government grants, corporate sponsorships, special events and fundraisers, development committee, budget, and other activities. The duties often cross the lines between executive, administrative, and professional employees, yet rarely fall squarely into one of these three categories, or as outside sales persons.
- 2) **Volunteer Manager:** Unlike for-profit businesses, charitable nonprofits can and do rely on volunteers to provide a wide array of support. The job of managing volunteers can entail recruitment, screening/background checks, training & supervision, case management, volunteer supervision, program activities, and community collaboration. Depending on the size of the charitable nonprofits, this job could involve such things as managing hundreds of individuals for special events in the community, a small group of interns for a few months, an *ad hoc* group for a fundraising event, or numerous regularly scheduled individuals. Importantly, no similar position exists in the for-profit workplace.

RECOMMENDATION: In response to comments provided from charitable nonprofits as part of this rulemaking, the Department of Labor should draft new guidance that explains which job

²² [DOL Proposed Overtime Reforms and the Impact on Nonprofits](#), National Council of Nonprofits, updated Sept. 8, 2023.

²³ See, e.g., [Find a Job in the Nonprofit Sector](#), National Council of Nonprofits.

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duties are most relevant under the FLSA for the above and other unique nonprofit job classifications that do not fall squarely in the executive, administrative, professional, or outside sales persons categories under the law.

Conclusion

As stated at the outset and explained throughout these comments, the National Council of Nonprofits urges the Department of Labor to take the following actions as it considers revisions to the regulations governing the “white-collar” exemptions to overtime rules:

- Phase in changes to the salary level thresholds over two or more steps;
- Treat all employers the same, regardless of economic subsector (i.e., nonprofit, for-profit, government) and reject calls to carve out some employers and employees;
- Retain national salary level thresholds for nonprofit and other employers across the country, and do not create confusion and costly burdens and compliance issues through regional salary levels;
- Apply the same standard salary level to the executive, administrative, and professional exemptions – thus avoiding complexity that makes compliance more difficult;
- Treat nonprofits fairly – just as the federal government protects for-profit contractors when government-mandated labor cost increases go into effect, put protections in place for nonprofits providing services to the public pursuant to written agreements with the government; and
- Develop detailed, tailored educational materials devoted to expanding nonprofit understanding of, and compliance with, labor standards.

Respectfully submitted,



David L. Thompson
Vice President of Public Policy

National Council of Nonprofits

Communities thrive when nonprofits succeed. For more than 30 years, the National Council of Nonprofits has mobilized the largest network of nonprofits in the United States to achieve transformative results. We champion, connect, and inform nonprofits across the country. Join our collective efforts to ensure a connected and powerful nonprofit community equipped to champion the public good. Learn more at www.councilofnonprofits.org.