



WASHINGTON NONPROFITS

WE MAKE SURE NONPROFITS HAVE WHAT THEY NEED TO SUCCEED.

Washington Nonprofits, Washington State's statewide nonprofit association, has prepared public comments for the Department of Labor and Industries' request for feedback on proposed scoping questions intended to update to the Executive, Administrative, Professional ("EAP"), and Outside Salesperson exemptions from the Minimum Wage Act. The responses are in order of the questions posted by the Department.

SCOPING QUESTIONS AND RESPONSES

1. What are your thoughts on whether the department should propose to eliminate the short and long duties test and use a single duties test for EAP employees?

A simple and clear plain language duties test would be helpful for nonprofit organizations, especially since it is often up to staff or board members with minimal human resources or legal training to interpret labor laws. One factor to consider is that nonprofit employees tend to wear many hats in their positions. This means that there are significant numbers of nonprofit employees who perform a mix of exempt and non-exempt duties, depending on the nature of their organization and position. This opens the possibility for employees to be classified incorrectly and underpaid for the work. If the Department decides to create a single duties test, it should leave no ambiguity for whether or not an employee is exempt from overtime pay.

2. If the department were to propose rule language to further clarify the duties tests for EAP employees, what language should be included?

The duties test must be reflective of a modern office and account for changes in technology that limit employees' ability to "clock out" completely at the end of the day. For example, many nonprofit employees answer work emails or perform tasks at home after hours so that they can devote their daytime hours to serving clients or other vital functions of the organization. Additionally, there are a number of staff who work at or attend evening events and fundraisers on behalf of their organization. The state should establish rules for after hours emailing, tasks, and event attendance so that there is no ambiguity as to whether or not they are "just part of the job" or extra work that requires compensation.

3. If the department were to propose an updated salary level for executive, administrative, and professional employees, what specific salary level or approach should be used?

Washington Nonprofits does not have a specific threshold to recommend because different thresholds have different consequences for organizations depending on their revenue streams and business models. There is simply too much variance among nonprofit organizations to state a particular threshold. Any new standard is going to force changes to organizations' business and staffing plans because they will have to figure out where to get the financial resources to fully comply with any new laws. But in general, a higher salary threshold will be more disruptive to nonprofit organizations than a lower salary threshold.

In 2016, many nonprofit organizations attempted to make compliance plans to adapt to the Obama Administration's proposed salary threshold of \$455 per week/\$47,476 per year. While it was a challenging threshold for most nonprofit organizations, it is a threshold that some nonprofits planned for despite significant operational anxiety about where the additional resources to cover personnel costs would come from. For some organizations, compliance meant reclassifying positions and salaries, capping employee hours at 40 hours per week regardless of whether or not all work was finished, reducing benefits, and/or leaving open positions unfilled. For more fragile organizations, compliance with the Obama Administration's proposed salary threshold meant reducing services or ending certain services entirely, which is the worst-case scenario for a mission-driven nonprofit organization. For more on compliance strategies and other concerns among nonprofits, Washington Nonprofits recommends that the Department of Labor and Industry review *The Nonprofit Overtime Implementation Conundrum* published by the National Council of Nonprofits, available here: <https://www.councilofnonprofits.org/nonprofit-overtime-implementation-conundrum>

Additionally, some nonprofits hire professional positions on a part-time basis, but the work fits the duties test for an exempt position. Updates issued by the Department may lead to an increase in nonprofits hiring part-time workers due to their budget constraints. We recommend that the overtime threshold be pro-rated for part-time, exempt positions.

4. If the department were to propose rule language to create an exemption for highly compensated employees, what should be the criteria for meeting that exemption?

There are very few, if any, "highly compensated" employees in the nonprofit sector outside of the largest nonprofit employers, such as hospitals, universities, and other large institutions. However, whatever exemption threshold is set for "highly compensated" employees should be based solely on cash compensation, not title, fringe benefits, or any other criteria that could lead to a misclassification. There should also be guidance regarding how bonuses impact employee classification.

5. If the department were to propose a fixed salary level, should this rulemaking also include an automatic updating mechanism?

Yes. Nonprofit organizations need the ability to plan and forecast their staff costs. Having a predictable, non-political updating mechanism would be tremendously helpful for any employer, but especially nonprofit organizations that have to plan for multiyear projects or programs.

6. If the department were to propose modifications to the exemption for computer professionals, what should be the criteria for meeting that exemption?

In general, nonprofits lack "computer professionals" as defined in WAC 296-128-535. The reason for this is that many organizations simply cannot afford to hire such specialized talent. This often causes many non-"computer professional" employees to wear a "computer professional" hat and perform certain "computer professional" tasks as part of their overall work. Whatever standard is set for this group of workers, it should not be set at a level that would discourage nonprofit organizations from hiring "computer professionals," since their work can vary based on their projects. There also should be guidance issued to prevent employees who sporadically wear the "computer professional" from being misclassified as exempt or non-exempt.

7. If the department were to propose modifications to the exemption for individuals employed in the capacity of an outside salesperson, what should be the criteria for meeting that exemption?

Nonprofits generally do not employ “outside salespersons” as defined by WAC 296-128-540. However, some nonprofits employ outreach staff or fundraisers who may spend significant amounts of time away from the office. If the state makes changes to the exemption for outside salespersons, there should be no ambiguity that could lead to a misclassification.

8. If the department were to propose an effective date for the updated rule, what should that effective date be?

In general, more time for compliance is better for nonprofit organizations, especially for those that will need to seek new income to cover the increased personnel costs. Because of this, the effective date should be at least one year to twenty-four months from the date of issue. This would give nonprofit organizations a chance to evaluate, plan, and budget for the changes, regardless of where they are in their fiscal year. It also would provide nonprofits with some time to negotiate contract or grant increases for their staffing costs. In addition, the Department must ensure that state and local governments are aware of the changes so that they can provide adequate resources to their nonprofit contractors in order to ensure that agencies are not left with an increased gap between their contracted reimbursement rate and the actual cost of delivering services.

ADDITIONAL SOURCES

National Council of Nonprofits. *Re: Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, and Professional, Outside Sales, and Computer Employees.* WHD-2017-0002; RIN 1235-AA20. September 15, 2017.

<https://www.councilofnonprofits.org/sites/default/files/documents/national-council-of-nonprofits-comments-to--dol-overtime-rfi.pdf>

National Council of Nonprofits. *The Nonprofit Overtime Implementation Conundrum.* July 5, 2016.

<https://www.councilofnonprofits.org/nonprofit-overtime-implementation-conundrum>

Washington Nonprofits. *Growing Impact of Nonprofits in Washington State (2013-2016).*

<https://public.tableau.com/profile/george.gorczynski#!/vizhome/WAStateNonprofitsEconomicFootprint/State>

Washington Nonprofits. *Re: Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, and Professional, Outside Sales, and Computer Employees.* WHD-2017-0002; RIN 1235-AA20. September 19, 2017.

<https://www.regulations.gov/document?D=WHD-2017-0002-138389>

Washington Nonprofits. *Response to Initial Request for Feedback on Updating Washington’s EAP Exemptions.* May 1, 2018. <https://washingtonnonprofits.org/wp-content/uploads/2018/06/Washington-Nonprofits-EAP-Comments.pdf>

Washington Nonprofits. Response to Additional Request for Feedback on Updating Washington's EAP Exemptions. May 31, 2018. <https://washingtonnonprofits.org/wp-content/uploads/2018/06/Round-2-EAP-Comments.pdf>

WASHINGTON NONPROFITS

Washington Nonprofits is Washington's state association for nonprofits. Its mission is to make sure nonprofits have what they need to succeed. It helps nonprofits learn, increase their influence, and connect to people and resources. Visit our website at <http://www.washingtonnonprofits.org> or contact Washington Nonprofits' Public Policy Director David Streeter at (855) 299-2922 for more information.