



WASHINGTON NONPROFITS

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Executive, Administrative, and Professional Draft Rule Concepts Feedback

September 4, 2018

SUMMARY

Below is Washington Nonprofits' feedback on the proposed Draft Rule Concepts issued by Washington State's Department of Labor and Industries. Please contact Washington Nonprofits at (855) 299-2922 for more information.

SALARY LEVEL

Washington Nonprofits does not have a specific recommended salary threshold for being exempt from overtime pay because nonprofit business models and staffing plans vary by agency. In general, any change in the overtime threshold will be disruptive to nonprofit organizations. Smaller changes will be less disruptive. Larger changes will be more disruptive.

Of the salary levels proposed in Part A, Question 1, the salary levels set at 1.5x the state minimum wage would be the most palatable to nonprofit organizations because they are the lowest thresholds. The thresholds set at 2x and 3x the state minimum wage and in Question 2 are higher than the amount proposed by the Obama Administration during its attempt to update the national overtime pay exemption threshold. These higher thresholds are guaranteed to cause disruption and panic among nonprofit organizations.

If the Department selects a salary threshold that is too high for nonprofit organizations to absorb, there will be serious consequences. First and foremost, nonprofits will have to make hard decisions regarding their staffing plans. This means that programs could be understaffed, work could go unfinished, fundraisers and events could be scaled back due to labor costs, and corners could be cut when employees are trying to stay within their time allotments. Further, organizations could opt to cease providing certain services if the costs of overtime pay are too high to absorb. This means that there will be service gaps in communities, which harms those who rely on nonprofits for help or look to nonprofits to raise the quality of life in their communities.

Questions 3 needs more context and explanation about the geographic and employer size criteria used to determine exemption thresholds.

Regarding geography, many nonprofits operate in multiple geographic regions. If an organization based in Spokane operates in Seattle, would they pay employees the rate for Seattle or Spokane? If an employee travels from Seattle for assignments in Olympia, what pay rate would the employee receive? Would the geographically based threshold contain loopholes that incentivize employers to move to a less costly region? Would it cause organizations to cease offering services in particular communities in order to avoid paying overtime? We advise the Department to consider these scenarios if Question 3 is a realistic policy option.

Regarding differential guidelines based on employer size, there are potential unintended consequences for the nonprofit sector. Smaller nonprofits are often not able to pay as much as large nonprofits or for-profit businesses. This puts small, community-focused nonprofits at a disadvantage when it comes to recruiting and retaining talent. Further, size criteria could prove to be disruptive by either dis-incentivizing mergers or incentivizing large nonprofits to spin off particular services in order to get around the overtime pay requirements. This eliminates the efficiencies that are achieved through mergers and integration. This has the potential to not only increase the number of nonprofits for the wrong reasons; it also has the potential to make service coordination much more difficult, particularly in the health and human services arena.

Further, many small nonprofits, like Washington Nonprofits, use Professional Employer Organizations (PEO) to manage their human resources and benefits. Under a PEO arrangement, the nonprofit's employees technically become the PEO's employees. Would the employees be paid the pay rate applicable to the PEO or the nonprofit? This could disincentive nonprofits from using PEO arrangements and leave workers worse off because they would lose access to the PEO's benefits. For these reasons, we advise the Department to consider these scenarios and move away from using organizational size as criteria for determining the overtime pay threshold.

AUTOMATIC UPDATING MECHANISM

As we have said in previous comments, we support having a predictable and nonpolitical updating mechanism for overtime pay. This would allow nonprofits to forecast their personnel costs and make it easier for them to absorb the additional costs, assuming that sufficient public and philanthropic funds are available.

DUTIES TEST

As we said in previous comments, we support a simplified and clear duties test that will leave no ambiguity as to how an employee should be classified. The language of the new duties test should be in plain language so that nonprofit staff with limited human resources experience and volunteer board members can understand and interpret it without making mistakes. At a minimum, the substance of the duties test should be the same as the federal duties test to avoid confusion. However, there is not enough information present in these questions to comment further on the state's proposal.

We appreciate that the Department has listed "add criteria to state duties test to account for technology and workplace changes." This will be helpful for employers who have employees who use their off hours to do work, such fundraising and data entry.

Regarding the Executive exemption, nonprofits do not have ownership stakes among their executive staff members. If "business owners" are clearly exempted from overtime pay, what would this mean for Executive Directors, CEO's, or other executives in the nonprofit sector? We advise the Department to consider this question.

HIGHLY COMPENSATED EMPLOYEES

As we wrote in our previous comments:

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.

If the Department does issue new classification criteria for highly compensated employees, Washington Nonprofits would support a predictable and nonpolitical automatic updating mechanism so that employers can forecast their personnel costs.

PROFESSIONAL COMPUTER EMPLOYEES EXEMPTION

As we wrote in our previous comments:

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.

Because of this, we support the policy laid out in Part F, Question 1 that applies the same overtime exemption standards to “computer professionals” as other employees.

OUTSIDE SALESPERSON

As we wrote in our previous comments:

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.

EFFECTIVE DATE

We support the 12-24 month effective window outlined in Part H, Question 1;ii. As we wrote in our previous comments:

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.

We also recommend that the Department consider timing the implementation date to coincide with Washington's fiscal year so that state agencies and legislators can ensure state contracts will cover the increased personnel costs.

ADDITIONAL RECOMMENDATIONS

1. The Department needs to educate the Governor's office, legislators, and state agencies about these changes so that they can all work to ensure that the 2019-2020 state budget covers the increased personnel costs. We have observed that there is limited awareness about this rulemaking process. Please work to educate all of state government about this rulemaking.
2. The Department should include nonprofits in the Small Business Economic Impact Study that will be conducted toward the end of the rule making process. Additionally, when conducting the study, the Department should use a wide range of nonprofit organizations, including those with publicly funded service contracts since they face the most constraints with their business models. Lastly, we advise against using hospitals and universities as case studies for this since they are able to adjust their pricing in ways that community focused agencies generally cannot.
3. The Department should develop a plan for compliance trainings on the new rules once the rulemaking process concludes. Washington Nonprofits would welcome the opportunity to participate in educating nonprofit employers about any changes.

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. *Response to Request for Feedback on EAP Exemption Scoping Questions*. July 5, 2018. <https://washingtonnonprofits.org/wp-content/uploads/2018/07/Washington-Nonprofits-Round-3-EAP-Comments.pdf>

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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.