



## WASHINGTON NONPROFITS

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### **Executive, Administrative, and Professional Pre-Draft Proposed Rule Language Feedback** October 26, 2018

#### SUMMARY

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

#### WASHINGTON NONPROFITS POSITION

Washington Nonprofits is committed to supporting nonprofits and their employees. Nonprofit employees are professionals who serve their communities and deserve to be paid fairly and appropriately for their work. We recognize there are benefits to expanding overtime pay for workers, including larger paychecks and/or better work/life balance, which can keep nonprofit organizations as sources for meaningful work.

However, as the National Council of Nonprofits' research report on the 2016 Fair Labor Standards Act (FLSA) rule making noted, nonprofit organizations have significant "operational anxiety" about how to implement expanded overtime pay. The biggest question for nonprofits is where the resources will come from to pay for increased personnel costs. In general, public and private funders do not fund the full cost of service delivery. Without an increased financial commitment from public and private funders to keep up with the rising costs of labor to provide services, expanded overtime pay represents an unfunded mandate for nonprofit employers.

If resources from public and private funders do not keep up with the increased cost of services, 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 (potentially reducing revenue further), 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, which is the worst-case scenario for any mission-driven organization. The end result of this could 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.

As the state association for nonprofits, we are working toward a vision of a strong, united nonprofit sector that is a valued partner in creating thriving communities throughout Washington. In keeping with our vision statement, we feel obliged to convey concerns regarding nonprofits' abilities to serve and work toward mission fulfillment. The status quo system is imperfect, and we hope that organizations committed to serving are doing what they can to treat their employees fairly and respectfully in terms of compensation. Nonetheless, our intent during the rulemaking process has been to convey broad nonprofit sector anxieties and advocate for additional resources to satisfy new regulatory requirements.

We sincerely hope that the Department will consider the diverse concerns that have been raised by community-focused organizations during this process.

#### DUTIES TEST

Washington Nonprofits supports the Department's intent of aligning Washington State's duties test with the duties test contained in the federal Fair Labor Standards Act. This will help reduce confusion among Washington State employers and allow for employee classification to be conducted with a set of standardized criteria. If the Department chooses to align directly with the FLSA, we recommend that the Department issue plain language guidance that can be used by employers to ensure that employees are not misclassified.

#### SALARY THRESHOLD

The state's proposal to link the overtime pay threshold with increases in the minimum wage is a helpful proposal that will help nonprofits be able to forecast their personnel costs for the future.

Regarding the proposed salary level, we wrote in our comments submitted September 4, 2018:

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.

Our initial view regarding the salary level holds true today: a lower threshold will be easier for nonprofits to adapt to than a higher salary threshold. Because of this, we hope that the Department will assess the impact of its proposed salary level increase on community-serving nonprofit organizations and adopt a salary threshold that is fair and workable for both employees and employers alike.

#### FEDERAL RULEMAKING CONSIDERATIONS

The U.S. Department of Labor announced that it will issue proposed FLSA rules in March 2019. Without knowing what the proposals will be, we recommend that the Department ensure that the definitions contained in its proposed rules are aligned with the forthcoming federal proposal in order to have clearer standards for employers. The reason for this is that nonprofits need certainty in order to operate. For example, if Washington State issues proposed rules that conflict with proposed federal rules, that will add uncertainty into the regulatory landscape for nonprofit employers and make it more difficult for them to plan and classify employees correctly.

#### ADDITIONAL RECOMMENDATIONS

1. The Department's feedback sessions were limited in their geographic scope. Therefore, we recommend that the Department conduct additional feedback sessions on the pre-draft rules in Seattle, Tacoma, Vancouver, Bellingham, Walla Walla, Yakima, and other areas of the state in order to increase the number of local perspectives heard during this process.

2. 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, which is concerning given that the 2019-2020 state budget proposal is due to be released in the coming months. Please work to educate all of state government about this rulemaking so that this does not become an unfunded mandate for nonprofit organizations that are contracted to deliver services on behalf of government.
3. 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 to represent the entirety of the nonprofit sector since they are able to adjust their pricing in ways that community focused agencies generally cannot.
4. The Department should develop a plan for compliance trainings for boards of directors and staff 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>

Office of Management and Budget. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*. Fall 2018.

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1235-AA20>

Washington Nonprofits. *Executive, Administrative, and Professional Draft Rule Concepts Feedback*. September 4, 2018.

<https://washingtonnonprofits.org/wp-content/uploads/2018/09/Washington-Nonprofits-EAP-Comments-090418.pdf>

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 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 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 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>

#### 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 [www.washingtonnonprofits.org](http://www.washingtonnonprofits.org) or contact Washington Nonprofits' Public Policy Director David Streeter at (855) 299-2922 for more information.