



Disability Network

September 4, 2015

Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
US Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210
Via electronic submission at 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 Ms. Ziegler:

Lutheran Services in America Disability Network (LSA-DN) appreciates the opportunity to comment on the DOL proposed rule “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). LSA-DN is a nationwide association of Lutheran social ministry organizations, faith-based organizations and Lutheran professionals supporting people with intellectual and developmental disabilities and related conditions. LSA-DN includes 25 member organizations that provide support to more than 150,000 individuals with disabilities in 33 states and the U.S. Virgin Islands, generating \$1.3 billion in annual revenue. LSA-DN is a part of Lutheran Services in America (LSA), one of the largest health and human services networks in the country.

LSA-DN is supportive of the Administration’s priority to lift up workers, increase wages and provide economic stability through monetary compensation and other benefits. We appreciate that the Department’s proposal is well-intentioned, designed to increase the number of workers who receive overtime pay. While we agree it is important to ensure the regulations governing overtime protections keep pace with the evolving workplace and economy, we are cognizant of the significant impacts this drastic new wage and compensation structure would have on LSA-DN members and the individuals, families, and communities they serve.

However, this rule may potentially harm the very workers it seeks to protect, as well as a significant number of workers beyond its scope including the direct support professionals (DSP) that are the

mainstay of the long-term services and supports (LTSS) industry, and the people with disabilities and older adults who rely on this segment of the workforce in order to fulfill their highest human potential.

Salary Threshold

LSA-DN acknowledges that the overtime exemptions rule is in need of modernization. Yet, the lack of corresponding government rate increases to cover these new costs means that DOL's proposal to more than double the overtime pay exemption threshold would place a massive new burden on our members, many of whom are the sole LTSS provider in their area. The untenable financial pressure resulting from the proposed changes could force many LSA-DN members into significant service cuts, program closures, and staffing reductions, negatively impacting those they serve and employ. We encourage DOL to do so in a more deliberate and incremental manner that minimizes negative consequences on DSPs and the individuals they support.

Providers Cannot Control the Funding of Services Provided

LSA-DN members, private non-profit providers of LTSS to people with disabilities, are significantly challenged in being able to pay wages and salaries sufficient to attract and retain qualified workers as the overwhelming majority of their funding comes from Medicaid, often supplemented with private organizational fundraising and limited state grants. Due to the structure of Medicaid as a federal-state partnership, private providers do not have the ability to pass on increased operating costs to the state, federal government or individuals served since rates are set by states and then matching funds are contributed by the federal government. Providers have no power to negotiate rates and legal efforts to enforce adequate rates within states have been unsuccessful. In *Armstrong v. Exceptional Child Center, Inc.*, the Supreme Court ruled that private providers do not have standing to enforce rates set by a state whose legislature failed to appropriate sufficient funding. The Supreme Court advised providers to seek relief from the Centers for Medicare and Medicaid Services (CMS), despite that agency's precedent of consistently deferring to the states in matters of rate-setting and funding appropriation.

The intersection of these factors has resulted in a worsening DSP workforce crisis. In addition, several states and local jurisdictions have increased their minimum wage to a level that, without additional public funding, will prove unsustainable for providers that are unable to shift costs. Some localities have limited these increases to certain segments of the workforce, which has the potential of drawing workers away from LTSS to less demanding, better compensated sectors.

DOL has previously demonstrated that interagency coordination is possible concerning this unique segment of the workforce in the issuance of the joint letter with the Department of Justice and the Department of Health and Human Services Office for Civil Rights letter to state emphasizing their responsibility to implement DOL's Home Care rule in a way that meets obligations of the Americans with Disabilities Act (ADA) and the Olmstead integration mandate.

Recommendation: LSA-DN recommends that DOL collaborate with other federal agencies to ensure that appropriate funding is in place to meet the requirements of the new rule, particularly with those rules that dramatically impact Medicaid-funded programs.

Recent Policy Changes have Strained an Already Overburdened System

LSA-DN members and their employees are committed to providing exceptional LTSS while managing within very constrained financial realities. As non-profit, faith-based providers, LSA-DN members have very narrow or non-existent profit margins to absorb cost increases. Other recently enacted laws and regulations without corresponding funding leave many LSA-DN members unable to sustain these financial pressures without scaling back wages, services or benefits. Two prominent examples include: the employer health insurance mandates implemented under the Affordable Care Act (ACA) and limiting the use of companionship services by employers within the Fair Labor Standards Act (FLSA).

In an organizational cost analysis performed by LSA-DN member Mosaic, raising the salary threshold to \$50,000 would cost \$2.2 million annually. Furthermore, in a member survey conducted the American Network of Community Options and Resources (ANCOR), their members would realize a 3% average increase in annual operating expenses.

These increased expenses are complicated by the reality that most states have seen little or no increase in funding for Medicaid programs in the past decade, despite a steady increase in operating costs and increased demand for services. Some states have actually cut funding rather than increasing or maintaining current levels.

Recommendation: We recommend that the threshold not be significantly increased unless or until adequate funding can be assured for publicly-funded for providers due to the fact that the current LTSS delivery system is significantly overburdened.

Setting the Proposed Salary Threshold

LSA-DN shares the Department's goal of ensuring that workers are paid adequately and appropriately, and agrees the white collar overtime exemption rules should be modernized. LSA, our parent organization, conducted interviews with members to better understand the potential implications of this rule if it were to be finalized as proposed. The overwhelming majority of those who responded with data indicated that although they prioritize employee satisfaction and fair wages, without increased government reimbursement rates to offset the proposed new costs, the threshold would present significant challenges to their ability to employ workers and provide services.

Accordingly, we are concerned that more than doubling the current exemption threshold without simultaneously enhancing government contract rates would result in drastic program and service cuts, harming LSA-DN members, their employees and the people they support.

Recommendation: To mitigate these impacts, LSA-DN recommends that if the salary level is increased, it should be done incrementally, and tied to a threshold that is significantly below the 40th percentile of full-time salaried workers' salaries.

The Proposed Salary Threshold does not Account for Non-Salary Benefits

The proposed salary threshold does not include the value of non-salary benefits, such as health benefits, retirement plan contributions and other employer-sponsored benefits that are currently being offered to salaried workers. 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 pay.

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.

Accounting for Geographic Variances

LSA-DN is concerned that the proposed rule would increase the salary threshold uniformly, without taking into account regional variances in costs of living. This is problematic, as it would disproportionately impact workers, service providers and people with disabilities in less prosperous areas where reimbursement rates are correspondingly low.

The federal government acknowledges this discrepancy, as it uses different pay tables for its employees based on geographic location; even DOL sets wage determination rates based on region for certain contractors. As the federal government already determines appropriate wages and other rates based on regional variances, LSA-DN does not believe it is unreasonable or overly burdensome for the Department to incorporate geographic realities in its final rule.

Recommendation: We recommend adopting a salary scale that is keyed to regional cost of living standards, similar to the Office of Personnel Management's General Schedule (GS), which takes locality into account to determine pay thresholds.

Automatic Adjustment of the Salary Threshold

LSA-DN appreciates DOL's intention to simplify the existing rules. A steadier, more predictable trend of increasing will likely benefit providers who will be able to adjust to smaller, more frequent changes better than to larger, less frequent ones.

Basing the Salary Threshold on an Inflation Index

DOL asked for comments on tying the salary threshold to an inflation index as opposed to national salary data. Inflation does not impact all regions uniformly. Using the CPI-U would not take into account the variance between rural and urban markets. Any inflation index that is an average of national data has the same weakness; it will disproportionately impact different regions, potentially worsening the income disparity and inadvertently harming workers.

Recommendation: LSA-DN recommends basing the threshold on regional salary data. Additionally, we recommend that any increases in the salary threshold be accompanied by a requirement for a corresponding increasing in Medicaid rates to accommodate the increase.

Effective Date for Adjustments

DOL asked for comments on when adjustments should take place. Funding for providers of LTSS is linked to state budgets. The majority of states have a budget cycle that ends in June. In addition, approximately 40% of states run on biennial legislative budget cycles.

The Federal Medical Assistance Percentage (FMAP) has a fiscal cycle of October 1 to September 30. This is a challenge for states whose budget cycle does not align with that timeframe.

Recommendation: LSA-DN recommends that rates be adjusted biennially with an effective date of July 1 to correspond to most states' budget cycles. We further recommend that new rates be announced at least two years before their effective date to ensure that states have sufficient time to adjust their budgets accordingly.

Duties Tests

LSA-DN believes that the duties tests should not be changed for these exemptions. Specifically, we caution against setting a fixed threshold for time spent on non-exempt duties. A standard with a bright line percentage, such as the 50% used in California, is overly prescriptive and does not take into account differences in duties and expectations that are present in different industries.

In provision of LTSS, it is common 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/her subordinate and would impose an additional recordkeeping burden. Given the nature of this work, it is normal for a supervisor to cover a shift for a frontline worker. Exempt supervisory employees understand that part of their job may involve performing unscheduled or emergency direct care in order to ensure continuity of care for the individual with a disability.

Either of these options would increase the administrative burden on exempt workers and providers, be overly prescriptive and reduce flexibility and discretion to perform duties as employees see fit. If DOL proposes future changes to the duties tests, LSA-DN expects there would be a separate opportunity for public comment prior to the finalization of any rule.

Recommendation: LSA-DN recommends against setting any type of bright line threshold and 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, LSA-DN recommends that DOL ensure the public is given sufficient opportunity to comment on any proposed changes before the rule is finalized.

Impact on Worker Satisfaction and Turnover Rate

LSA-DN appreciates and supports policies that will better compensate DSPs. We understand the importance of providing appropriate monetary compensation and quality benefits to attract, train and retain qualified workers. Due to serious budgetary shortfalls within states, providers of Medicaid-funded LTSS are often at a significant disadvantage in paying wages as opposed to commercial industries.

According to an ANCOR member survey, 72% of their members would convert currently exempt salaried workers to hourly workers. Less than a third of their members would be able to increase the salary of full-time exempt workers to meet the projected threshold. More than 70% of their member would prohibit or significantly restrict overtime. Others indicated that they would shift some work currently performed by exempt workers to part-time and other non-exempt workers.

This data shows that LTSS providers are largely unable to raise the salaries of exempt workers and are looking to strategies for compliance that will result in nearly the same number of hours worked and wages paid. These strategies often result in lower job satisfaction, higher turnover and a reduced pool of potential workers. In the disability services field, many providers have worked to professionalize direct care work, creating career paths and encouraging entry-level, hourly DSPs to progress to mid-level management, program manager and front-line supervisor positions. Converting these salaried employees to hourly wage earners will have a significant negative impact on employee satisfaction and motivation to continue a career in supporting people with disabilities.

Implementation Timeframe

As noted earlier, LSA-DN members are reliant on their states to allocate and appropriate sufficient funding for their state Medicaid program. Many state legislatures do not meet year round, some only meet biennially. Any significant increase in operational costs for publicly-funded programs requires action on behalf of state legislatures to appropriate more funding. More than doubling salary threshold as proposed would result in many providers being unable to absorb the extra operating costs in a timely manner. Therefore, the immediate impact would be to cut workers, cut wages, cut services and perhaps close agencies. This would leave a large pool of unemployed workers and an influx of individuals with disabilities at risk for institutionalization.

We believe the proposed threshold is unattainable and that a lower threshold would be more appropriate. Regardless of the amount of the increase, states must be given adequate time to allocate and appropriate additional funding.

Recommendation: LSA-DN recommends an effective date for the final rule that is at least two years after the rule's finalization to allow states sufficient time to allocate and appropriate funding. Ideally, we 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 and swift increase.

Conclusion

LSA-DN appreciates the commitment the Administration has shown towards workers and people with disabilities. We welcome the deliberate manner in which the Administration has sought to coordinate the work of various federal agencies to advance policy goals.

Thank you again for the opportunity to provide comment. As discussed earlier, LSA-DN members primarily rely on federal, state, and local government funds to serve those in need; resources which have been steadily declining in recent years due in part to sequestration; inadequate, stagnant Medicaid provider reimbursement rates; and the lingering impacts of the Great Recession.

Despite this challenging financial climate, LSA-DN members have adhered to their mission-driven principles, seeking to answer their call to service and support the individuals with disabilities in communities across the country, while championing worker-friendly wage and benefit policies within their individual organizations.

However, we are extremely concerned that this rule in its current form will have negative, unintended consequences for many workers and people with disabilities. Since we serve individuals on Medicaid, LSA-DN members are dependent on state Medicaid programs to set sufficient rates, state legislatures to appropriate funding and CMS to provide strong oversight of state Medicaid programs. LSA-DN urges DOL to consider the above comments to avoid unintentional harm to DSPs, providers of LTSS and, most importantly, people with disabilities.

LSA-DN thanks you for consideration of our comments to this rule. We looking forward to working more with DOL as you work to finalize the regulation. Please feel free to contact me at smEEK@lutheranservices.org or (202) 499-5831 should you have any questions or would like more information on any of the issues discussed.

Sincerely,

A handwritten signature in black ink that reads "Sarah L. Meek". The signature is written in a cursive, flowing style.

Sarah L. Meek
Director of Public Policy & Advocacy
Lutheran Services in America Disability Network