



FOR YOUTH DEVELOPMENT
FOR HEALTHY LIVING
FOR SOCIAL RESPONSIBILITY

September 4, 2015

VIA ELECTRONIC SUBMISSION www.regulations.gov

Mary Ziegler, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, DC 20210

Re: Comments on Proposed Rulemaking Regarding the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (80 Fed. Reg. 38,515, July 6, 2015), RIN: 1235-AA11

Dear Ms. Ziegler:

The National Council of Young Men's Christian Associations of the United States of America ["YMCA of the USA"] respectfully submits these comments in response to the above referenced Notice of Proposed Rulemaking ["Proposed Rule"] published in the Federal Register on July 6, 2015. YMCA of the USA is the national resource office for the nation's 2,700 nonprofit YMCAs, which strengthen their local communities through youth development, healthy living, and social responsibility. Annually, YMCAs engage 22 million men, women, and children—regardless of age, income, or background—to nurture the potential of children and teens, improve the nation's health and well-being, and provide opportunities to give back and support neighbors. The Y works side-by-side with communities to make sure everyone has the opportunity to learn, grow, and thrive.

The Y has a federated operating structure, and each YMCA association [the incorporated 501(c)3 organization] is independent and autonomous. YMCA of the USA drafted these comments after receiving significant input from Y associations, and we submit the comments on their behalf.

YMCA of the USA recognizes that the time has come to reset the minimum salary level for the "EAP" exemptions, given that the current minimum annual salary needed to qualify for the exemptions is less than the 2015 federal poverty level for a family of four. We also recognize that policies like this, which are aimed at increasing wages for the middle class and fairly rewarding individuals for their hard work, have the potential to benefit many of our staff, members, and communities.

Currently, more than 12,000 of the approximately 19,000 full-time, exempt Y staff professionals nationwide earn an annual salary that falls between the existing threshold for the EAP exemptions and the proposed threshold. Many of these staff hold important management positions at their YMCAs, such as camp director, program director, and aquatics director. Some are even executive directors of small YMCAs. Our staff are the Y's greatest asset. The Y exists to help all people lead their best lives and to advance the common good, and the programs and services we provide to communities in support of these goals are made possible by our talented, principled, and dedicated staff. Without them, the Y could not deliver on our cause of strengthening community through youth development, healthy living, and social responsibility. We favor public policy that has the potential to enrich their lives.

As for our members and communities, more than half of YMCAs are located in communities where the median household income is at or below 200 percent of the poverty line. Nearly one in five YMCAs is located in a community where the median is at or below 150 percent of the poverty line. Each year, YMCAs care for nearly 580,000 children through affordable before-school, after-school, and full-day school-age child care programs, so their parents can work. More than half of YMCAs offer school-age child care five days a week. The working poor and the middle class are a big part of the Y family.

Although YMCA of the USA sees the potential benefits of the Department of Labor's ["DOL's"] proposed changes, we also wish to remind DOL that YMCAs, like most community-based nonprofit organizations, operate with lean budgets and limited financial resources compared to for-profit businesses. Moreover, a YMCA's revenue stream typically reflects the economic conditions of the surrounding community, and as noted above, many Ys are located in low-income communities. We have heard from hundreds of YMCAs concerned that the proposed change to the minimum salary level for the EAP exemptions does not properly account for differing local economic conditions. Accordingly, we urge DOL to **adjust the proposed minimum salary level to better account for low cost-of-living areas in the country.**

Additionally, many YMCAs are concerned that the proposed salary level will increase too quickly given their limited revenue streams. Unlike for-profit businesses, YMCAs cannot offset rising labor costs by raising prices. To help reduce the cost and administrative burdens of the proposed salary level on nonprofit organizations like YMCAs, we recommend that DOL **gradually phase in any increases to the minimum salary for exempt employees of nonprofit organizations to qualify for the EAP exemptions.**

Consistent with DOL precedent, YMCA of the USA proposes that **increases to the base salary level for the EAP exemptions occur not more often than every five years, and that future increases be tied to the Consumer Price Index.**

YMCA of the USA also urges DOL to **review and consider expanding the exemptions under the FLSA so that small, community-based nonprofits can be excluded from the FLSA's overtime requirements.**

By incorporating these changes, and the changes discussed below, into the Final Rule, DOL will succeed not only in strengthening the middle class, but also in mitigating the potential negative effects of raising the minimum salary on nonprofits, in particular YMCAs, their staff, and the communities they serve.

I. THE NEW MINIMUM SALARY LEVEL SHOULD BETTER ACCOUNT FOR LOCAL ECONOMIC CONDITIONS.

YMCA of the USA believes that the salary level needed to achieve DOL's goal of setting the minimum salary for the EAP exemptions at a level that will keep exempt employees in the middle class differs throughout the country. Consequently, we are concerned that DOL's proposed methodology for setting the salary level based on the 40th percentile of earnings for full-time salaried workers does not sufficiently take into account local cost-of-living differences. This methodology could have a detrimental impact on YMCAs and other community-based nonprofit organizations in low cost-of-living areas of the country because the resulting increases in labor costs will strain budgets. Rather than have one minimum salary level for the entire country, YMCA of the USA advocates for DOL to set differing minimum salary requirements that mirror the country's differing costs of living.

In setting the salaries for their exempt staff, YMCAs seek to pay them fairly, taking into account the local market conditions. For example, a program director for a YMCA in Chicago who has a salary of \$50,000 would only need to receive a salary of \$27,400 to have a comparable standard of living in Jackson, Mississippi.¹ The United States Government also recognizes that wages for similar jobs differ across the country and accounts for these differences in setting the General Schedule pay rates based on location.²

Setting the minimum salary at too high a level for employers in certain locations poses significant challenges for community-based nonprofits like YMCAs, which operate on very lean budgets and generally are not able to provide wages as generous as those paid by businesses in the for-profit sector.³ The Y movement has more than 12,000 exempt staff, i.e., greater than 50 percent of our exempt staff, who currently have a salary of less than DOL's proposed minimum salary level of \$50,440 in 2016. There are approximately 75 executive directors of YMCAs in small communities across the county who receive a salary of less than \$50,440. These data points highlight the budgetary and operational concerns YMCAs will face if the new minimum salary level does not take into account local economic conditions.⁴

All YMCA associations operate independently and autonomously, and thus lack the scale to spread increased costs over a large infrastructure. Each YMCA relies on member dues, charitable giving, and grants to pay staff and operate the programs and services it offers to the community. Unlike for-profit businesses, YMCAs cannot offset rising labor costs by raising

¹ It is 45.3 percent less expensive to live in Jackson than in Chicago. See http://tools.gmsrelo.com/ToolsFAS/Tool_SalarySurveyCity.asp.

² Cost-of-living differences also are acknowledged by the Government in setting per diem rates for expenses. See <http://www.gsa.gov/portal/content/110007>.

³ DOL acknowledges that setting a minimum salary level too high may prevent employers from properly classifying even senior executives as exempt. See 80 Fed. Reg. 38516 at 38532 [using too high a percentile of nationwide salaries "could have a negative impact on the ability of employers in low-wage regions and industries to claim the EAP exemptions for employees who have bona fide executive, administrative, or professional duties as their primary duty"].

⁴ In setting the minimum salary level in its 2004 rulemaking, DOL adopted a methodology that used "earnings data of full-time salaried employees [both exempt and nonexempt] in the South and in the retail sector," *id.* at 38,526, because "[t]he South was determined to be the lowest-wage region," *id.* 38,557. In selecting this methodology in 2004, DOL implicitly acknowledged the importance of taking into account cost-of-living differences in setting the minimum salary level for the EAP exemptions.

prices. Moreover, a YMCA's revenue stream typically reflects the economic conditions of the surrounding community. Consequently, increasing revenue to meet drastic increases in labor costs is difficult, especially for the 457 YMCAs (19 percent of total) that are located in communities with a median income at or below 150 percent of the poverty line.

As such, if DOL sets the minimum salary level for exempt status too high for YMCAs in low cost-of-living areas, many of these Ys will be forced to cut back staff, convert exempt staff to nonexempt status, and/or cut services to the communities they serve. As one YMCA's CEO stated, "My fear is if the proposed salary increase comes to fruition, some [Ys] will have no choice but to eliminate staff and much-needed community services."

The concerns that many YMCAs have if the minimum salary level is set at a level that does not properly take into account the local market conditions are summarized below.

A. YMCAs may need to lay off staff and/or reduce their hours to offset increased labor costs for retained staff.

YMCAs have informed YMCA of the USA that if their labor costs significantly increase as a result of the Final Rule, they may need to lay off staff. Even if jobs are not eliminated, some YMCAs will have to reduce the hours for certain reclassified employees which, in turn, will result in them receiving reduced compensation. The increased labor costs also will have an adverse impact on the exempt staff of many YMCAs. Exempt staff will need to spend additional hours on the job completing work that otherwise would have been performed by their formerly exempt colleagues who had their hours reduced and/or positions eliminated. The increased time that exempt staff will need to work likely will hurt morale and possibly make employment at a YMCA less attractive.

B. YMCAs may need to reclassify some exempt staff to nonexempt status.

Many YMCAs have informed YMCA of the USA that if the proposed salary level is raised to \$50,440 in 2016, some of their exempt staff currently paid below this level will be reclassified as nonexempt. Even if the staff converted to nonexempt status do not experience a reduction in the compensation they receive, the YMCAs are concerned about how this reclassification will affect morale and career opportunities for the reclassified staff.

YMCA of the USA understands that many Y staff view being classified as exempt as an indication of professional status and career achievement. Being reclassified will be seen by many as a step back in their careers and as a devaluation of their roles in the organization. Additionally, many staff who will be reclassified will now have to "punch a time clock," which will reinforce their perception that they have been demoted.

As mentioned previously, community-based nonprofits like YMCAs generally are not able to offer the same wages as the for-profit sector. But many of the employees who work for nonprofits are attracted to these organizations not for the compensation, but because of the mission of the organizations and the difference they make in their communities. For instance, in a 2013 survey of Y staff, 90 percent of respondents strongly agreed or agreed with the statement, "I get more than a paycheck from working at the Y." In the same survey, 97 percent of respondents strongly agreed or agreed with the statement, "My work contributes to the well-being of the community."

Another perk that draws employees to nonprofits like YMCAs is greater opportunity for work-life balance. Many exempt Y staff appreciate that their exempt status provides them with the flexibility of coming in late, leaving work early, determining the timing and duration of meal and break periods, and otherwise setting their own schedules to create a healthy work-life balance while still receiving a minimum level of pay each week. For example, exempt staff have the ability to respond to unexpected events, like needing to pick up a sick child at school, without the fear of losing pay as a result of their time away from work. In contrast, nonexempt staff paid by the actual hours worked may still have flexibility in their schedule, but it often comes with an associated loss of income when they are away from work.

Additionally, in an effort to control overtime costs, many YMCAs do not provide nonexempt staff the same opportunity to work remotely and during nontraditional hours that exempt staff receive. Similar concerns about controlling overtime costs may also affect the reclassified staff's career opportunities. Staff converted to nonexempt status may miss out on after-hours training programs, networking opportunities, and other programs that would foster career progression and greater opportunities for future increases in income. Also, those staff who will be reclassified as nonexempt will need to be more mindful of their hours so as not to incur undue overtime. This means they will lose the ability to use their own discretion in deciding whether to work extra hours to help their community and/or to enhance their own professional development. For many, this loss of freedom and ability to spend their time as they see fit will result in delayed career progression. Indeed, YMCA of the USA is concerned about a hollowing of the ranks of junior and middle-level leaders in the Y.

In short, if the proposed changes become final without modifications to account for cost-of-living differences, YMCA of the USA sees the changes impeding the career growth of thousands of hard-working Y staff and others in the nonprofit sector. This will be a significant loss for the communities where these staff are located and for the nation as a whole.

C. YMCAs may need to cut and/or significantly modify valuable programs that serve communities.

Many YMCAs have informed YMCA of the USA that if the proposed salary level is raised to \$50,440 in 2016, they may have to cut and/or significantly modify some of the programs and services they offer to help offset increases to their labor costs. For example, approximately 577,200 youths participate in YMCA child care programs before school, after school, and/or for the full school day. Several YMCAs have expressed concern that they might not be able to meet the needs of these children and their families if members of their exempt staff are reclassified, because of the resulting overtime costs and/or cost of hiring additional part-time workers to provide sufficient coverage.

Additionally, a number of YMCAs run programs on behalf of the federal government: Head Start, universal prekindergarten, child and adult feeding programs, diabetes prevention programs, Department of Justice youth programs, foster care, substance abuse prevention and treatment, refugee and human trafficking assistance, TANF services, veteran and military support services, and more. Without some relief in implementation, these YMCAs say, they would need additional funding to offset increased staff costs resulting from the Proposed Rule, either from the government or new charitable contributions, in order to support these vital programs for their communities. Current government funding does not cover increased labor costs, so it is unclear how YMCAs and other community-based nonprofits will be able to comply

with these important obligations to the children and families in their communities in the face of significant cost increases.

In sum, YMCA of the USA urges DOL to modify the proposed increase in the minimum salary level for the EAP exemptions to better account for local cost-of-living differences. Such a modification will still allow the DOL to achieve its policy goal of strengthening the middle class, but will mitigate the negative impact that rising labor costs will have on YMCAs and other community-based nonprofits.

II. THE NEW MINIMUM SALARY LEVEL SHOULD BE PHASED IN OVER A FIVE-YEAR PERIOD FOR NONPROFIT ORGANIZATIONS.

As discussed above, increased labor costs resulting from raising the minimum salary level for the EAP exemptions will present significant challenges for many YMCAs and other community-based nonprofits. YMCAs simply do not have the ability to quickly increase their revenue stream to meet the increased labor costs. Moreover, many YMCAs lack the administrative staff needed to make adjustments required under the new rule expeditiously.⁵ For example, the changes to the EAP exemptions will require YMCAs to engage in a comprehensive review of the affected staff's compensation, benefits, job duties, and work schedules. YMCAs may need to revise job descriptions and wage statements, and communicate the changes to the affected staff and their respective supervisors. These staff and supervisors will need to undergo training on recording and monitoring time. The Proposed Rule also will require payroll adjustments, the expansion of timekeeping systems, and verification that all of the changes are correctly made. In short, the cost and administrative burdens resulting from the changes to the EAP exemptions will be disproportionately high for nonprofit organizations like YMCAs, given their tight budgets and lean staffing.

To help ease the cost and administrative burdens, and to provide nonprofits more time to adjust budgets so that their employees can remain exempt and services do not need to be cut, YMCA of the USA requests that DOL gradually increase the minimum salary level needed for employees of these organizations to qualify for the EAP exemptions. Specifically, we propose that the minimum salary level for the EAP exemptions be increased in phases over a five-year period. In providing for this stepped increase, DOL will significantly reduce the adverse impact that the changes to the EAP exemptions would otherwise have on nonprofit employees and the charitable services and programs they provide.

III. FUTURE INCREASES TO SALARY LEVELS SHOULD TAKE PLACE NO MORE FREQUENTLY THAN EVERY FIVE YEARS AND BE TIED TO THE CONSUMER PRICE INDEX.

YMCA of the USA encourages DOL not to annually increase the salary level needed to qualify for the EAP exemptions. Annual increases would place significant, unprecedented cost and administrative burdens on community-based nonprofits like YMCAs. As such, YMCA of the USA proposes that increases to the base salary level for the EAP exemptions occur not more often than every five years. This approach is consistent with historical precedent. Indeed, DOL acknowledges in the Proposed Rule that the shortest period between salary level increases was five years. See 80 Fed.Reg. 38,526. Moreover, DOL previously rejected suggestions to

⁵ Approximately 70 percent of YMCAs do not employ a human resources professional on staff.

annually increase salary levels. See 80 Fed.Reg. 38,537,38. Although DOL suggests that a break with historical precedent is necessary to ensure “that the salary level does not become obsolete over time,” this goal can still be achieved through increasing the minimum salary level every five years.

To the extent that a Final Rule adopts a mechanism to routinely and automatically update the salary levels, DOL should provide notice of the amount of the increase to employers at least six months in advance. YMCAs conduct financial planning many months in advance and need at least six months to adequately prepare for changes. For example, in addition to having to determine whether the change in the minimum salary level warrants any reclassifications, YMCAs must determine new compensation rates for affected staff, and if any resultant changes to the organization’s staffing structure and services are needed. They will need to conduct a cost analysis to make appropriate operational and financial decisions. YMCAs will need to develop and implement timekeeping and recordkeeping practices for reclassified staff (which may not necessarily lend itself to a “one size fits all” approach) and provide training to both staff and managers with regard to such procedures. YMCAs also will need time to ensure that any changes are properly communicated to the reclassified staff and families affected by the changes. As such, DOL’s proposed 60-day notice period is an unreasonably short period for YMCAs to conduct necessary planning, implement any resulting changes, and ensure timely compliance.

YMCA of the USA also respectfully requests that DOL refrain from adopting the methodology of using the 40th percentile of all full-time salaried employees to determine further increases in the salary threshold. Using this methodology will lead to exponential increases in the salary needed to qualify as exempt. For example, if the Final Rule sets the minimum salary level needed to qualify at \$50,440, YMCA of the USA anticipates there will be relatively few salaried employees making less than this amount going forward. Consequently, if DOL uses the 40th percentile of full-time salaried employees to set the new level the next time an increase occurs (automatic or otherwise), it will be significantly higher than \$50,440, because the initial increase to \$50,440 for the base salary level will now serve as the “floor” of those full-time salaried workers examined to determine the increase. For this reason, YMCA of the USA recommends that future salary level increases be tied to the Consumer Price Index.

IV. EXEMPTIONS FROM THE FLSA’S OVERTIME REQUIREMENTS SHOULD BE REVIEWED AND AN EXEMPTION FOR SMALL, COMMUNITY-BASED NONPROFITS CONSIDERED.

YMCA of the USA notes that Sections 7 and 13 of the FLSA contain numerous exceptions (or exemptions) to the Act’s minimum wage and/or overtime requirements. We ask that DOL conduct a review of these exceptions and exemptions to determine whether all of them are still valid and necessary, and consider whether an exception to the FLSA’s overtime requirements should be extended to community-based nonprofit organizations with less than five exempt employees. Given the invaluable public services these organizations provide—services much more meaningful than those rendered by many job classifications that already are covered by exceptions or exemptions—and their pinched revenue sources, these organizations would greatly benefit from not having to be concerned with the cost and administrative burdens of paying employees overtime premiums.

There is precedent for exempting small organizations that serve the community from the FLSA’s overtime requirements. For example, there is an exemption for small, municipal police

and fire departments. See 29 C.F.R. § 553.200(c). Additionally, in enacting the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Act of 1996, Congress directed agencies to evaluate whether regulations are expected to have a significant impact on small entities and to consider less burdensome alternatives.

YMCA of the USA recognizes that this proposed change may exceed DOL's authority and require Congress to amend the FLSA. Nonetheless, we believe the issue of exempting small, community-based nonprofits is ripe for discussion and hope that DOL is particularly mindful of the burdens placed on these organizations when it drafts the Final Rule.

V. ANY CHANGE TO THE DUTIES TEST SHOULD FIRST BE VETTED THROUGH FORMAL NOTICE AND PROVIDE AN OPPORTUNITY FOR THE PUBLIC TO COMMENT ON SPECIFIC PROPOSED CHANGES.

To the extent that DOL determines that it is appropriate to modify the duties test under 29 C.F.R. Part 541, YMCA of the USA urges DOL not to implement any changes without first proposing specific language that would give the public notice and opportunity for comment, especially given the significant economic impact such changes would have on operations. Any changes to the duties test without providing the public with the opportunity to formally vet proposed changes would violate the spirit and purpose of the notice and comment requirements under the Administrative Procedures Act ["APA"]. See *Small Refiner Lead Phase-Down Task Force v. U.S. Env'tl. Prot. Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) [vacating EPA's change to regulatory definition under the Clean Air Act because EPA's "general notice that it might make unspecified changes in the definition of small refinery" was "too general to be adequate. Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking."]; see also *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) [stating that "the opportunity for comment must be a meaningful opportunity. That means enough time with enough information to comment and for the agency to consider and respond to the comments." (citation omitted)].

Without first setting forth the specific changes to the duties test in a Notice of Proposed Rulemaking, employers would not have "fair notice" of any change or the ability to comment on the economic costs associated with changes. See *Long Island Care At Home, LTD. v. Coke*, 551 U.S. 158, 174 (2007) ["The object, in short, is one of fair notice."]; *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) [stating that purposes of APA's notice and comment requirements are "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review"]. Thus, YMCA of the USA believes that any change to the duties test without fair notice and opportunity to comment would violate the APA.⁶

⁶ Additional laws may potentially be implicated if DOL fails to give fair notice, including but not limited to the Paperwork Reduction Act and the Unfunded Mandate Reform Act of 1995.

VI. EFFECTIVE DATE OF FINAL RULE.

YMCA of the USA requests that DOL give employers sufficient time to review the Final Rule once it is issued and to implement it in a manner that allows for timely compliance and does not unduly disrupt operations and the key services YMCAs provide their communities. YMCA of the USA respectfully submits that six months is a reasonable period to do so.

VII. CONCLUSION.

YMCA of the USA thanks DOL for the opportunity to provide comments on the Proposed Rule. We recognize that the time has come to reset the minimum salary level for the EAP exemptions, but we request that DOL consider modifying its methodology in setting the minimum salary level to better account for differences in local economic conditions. We also request that DOL allow nonprofits to phase in the increases to minimum salary levels over a five-year period. Furthermore, we propose that increases to the base salary level for the EAP exemptions occur not more often than every five years, and that future increases be tied to the Consumer Price Index. We believe such modifications will lessen the adverse impact of the proposed changes on community-based nonprofits like YMCAs and will allow the Final Rule to have greater prospects for success. Additionally, we urge DOL to consider creating specific exemptions under the FLSA for small, community-based nonprofits given the significant contributions these organizations make to the nation and the compliance burden that FLSA's overtime requirements place on them.

If you have any questions about YMCA of the USA's comments, please contact our Office of the General Counsel at 800-872-9622.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin Washington', with a stylized flourish at the end.

Kevin Washington
President and CEO
YMCA of the USA