



August 31, 2015

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

The American Network of Community Options and Resources (ANCOR) appreciates the opportunity to comment on the DOL proposed rule entitled, "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). ANCOR recently surveyed member and non-member provider organizations to determine the impact of this proposed rule. We will share relevant findings throughout these comments.

ANCOR is a national trade association representing more than 1,000 private providers of community living and employment services to more than 600,000 individuals with intellectual and developmental disabilities, and employing more than 500,000 direct support professionals (DSPs) and other staff. Our mission is to advance the ability of our members in supporting people with intellectual and developmental disabilities to fully participate in their communities. ANCOR has long recognized that key to full participation is community supports delivered by a stable, professional workforce. Since 2001, the mission of ANCOR's National Advocacy Campaign has been to enhance the lives of all people with disabilities who rely on long-term supports and services by obtaining the resources to recruit, train and retain a highly qualified and sustainable workforce.

Demand for the provision of community-based services and supports for people with disabilities and seniors is increasing due to many factors, including the aging baby boomer population, policy trends away from institutionalization, the *Olmstead*¹ decision arising from enactment of the Americans with Disabilities Act (ADA), and better access to health care creating better health outcomes and longer lifespans for people with disabilities. This demand for services means that a vibrant, competent, and

¹ See *Olmstead v. L.C.*, 527 U.S. 581 (1999)

adequately-compensated workforce is essential to meet the increasing needs of people with disabilities. According to the Bureau of Labor Statistics (BLS), personal care aides and home health aides are among the fastest growing occupations in the nation, with projected growth rates of 49 percent and 48 percent, respectively, by the year 2022.² The increasing trend of individuals with disabilities choosing, and being empowered, to live in home and community-based settings, a trend that ANCOR has a long history of strongly supporting, means that more workers, travelling longer distances, are required.

The present situation is bleak; low rates beyond the control of their employer providers make direct support work one of the lowest paid in the services industry, with correspondingly high rates of employee turnover, in one state as high as 86%³. Yet the work DSPs perform requires patience, skill, and dedication deserving of robust compensation. Providers currently face a workforce shortage crisis, as the pool of workers who are qualified and willing to perform this work are increasingly lost to other industries that are able to pay higher wages and provide better benefits as the economic condition of the country improves. Providers understand that paying higher wages would result in higher job satisfaction, lower turnover, and more DSPs choosing to progress in their careers in the home and community-based services field. Providers want to offer better compensation, including benefits, but are powerless to raise wages to an appropriate level without going out of business. Drastically raising the compensation threshold for supervisors and other exempt employees will exacerbate these challenges.

ANCOR is familiar with the myriad policy priorities of the current Administration, and strongly supports policies that will lift up workers, increase wages, and provide economic stability through monetary compensation and other quality benefits. However, this rule has the potential to seriously harm the very workers it seeks to protect, as well as a significant number of workers beyond its scope including the DSPs that are the backbone of the disabilities long term supports and services industry, and people with disabilities who rely on this segment of the workforce in order to live meaningful lives.

Salary Threshold

ANCOR concurs with the need to modernize the overtime exemptions rule. However, the Department must do so in a more measured manner that minimizes negative consequences for the direct support workforce and individuals served.

Providers Cannot Control the Funding of Services Provided

ANCOR members, private providers of services to individuals with disabilities, are at a significant disadvantage for being able to pay wages and salaries sufficient to attract and retain qualified workers, as the overwhelming majority (in most states more than 90 percent) of funding for their programs comes from Medicaid, with the balance generally coming from private organizational fundraising and limited state grants. In our field, only a very small percentage (generally much less than 5 percent) of

² U.S. Bureau of Labor Statistics. (2014). *Occupational Outlook Handbook*. Retrieved from <http://www.bls.gov/ooh/fastest-growing.htm>

³ ANCOR 2009 Direct Support Professional Wage Survey located online http://www.ancor.org/sites/default/files/pdf/ancor_wage_data_summary_2009.pdf 2009 ; 2015 NASDDDS National Core Indicator Wage Stability Survey pilot results located online [http://www.nationalcoreindicators.org/upload/presentation/Staff_Stability_Survey_Mary_Lee_Fay_\(NASDDDS\)_and_Dorothy_Hiersteiner_\(HSRI\).pdf](http://www.nationalcoreindicators.org/upload/presentation/Staff_Stability_Survey_Mary_Lee_Fay_(NASDDDS)_and_Dorothy_Hiersteiner_(HSRI).pdf)

services is paid for privately by individuals and their families – with much of the private pay supporting organizations that do not primarily serve the Medicaid population. Because of the nature of Medicaid as a state-federal partnership, with rates set by states and matching funds contributed by the federal government, private providers do not have the ability to pass on increased operating costs to the state, the federal government, the individuals served, or any other entity. Providers have no power to negotiate rates, and efforts to enforce adequate rates within states have been unsuccessful. Recently, the United States Supreme Court ruled that private providers do not have standing to enforce rates set by a state whose legislature failed to appropriate adequate funding.⁴ The Court advised providers to seek relief from the federal agency which oversees Medicaid, ignoring the precedent out of that agency for consistently deferring to the states in matters of rate-setting and funding appropriation.

The result of being unable to increase wages to attract, train, and retain qualified workers is that many potential workers are lost to other industries, worsening the workforce crisis. Additionally, several states and local jurisdictions have increased their minimum wage to a level that, without additional public funding, will prove unsustainable for providers that cannot shift costs. In some localities, these increases apply only to certain segments of the workforce, which has the effect of drawing potential qualified workers away from the home and community-based services worker industry to less demanding, better compensated sectors.

Recommendation: ANCOR recommends that the Department collaborate with other federal agencies to ensure that policies that will result in appropriate funding are in place to meet the requirements of the rule. President Obama has been a leader on interagency coordination and it would follow his leadership to ensure that DOL policies that dramatically impact Medicaid funded programs be accorded a very high level of coordination.

Such coordination was evident with the issuance of the Department of Justice and the Department of Health and Human Services Office for Civil Rights letter to states emphasizing their responsibility to implement the Home Care rule in a way that meets obligations of the Americans with Disabilities Act (ADA), particularly the Olmstead integration mandate.

Recent Policy Changes Have Strained an Already Overburdened System

Provider organizations and their employees are keenly focused on providing exceptional supports while managing within very constrained financial realities. As noted above, private providers do not have the ability to pass on increases in operating costs. Whether organized as non-profit or for-profit entities, providers have very narrow or non-existent profit margins to absorb cost increases. Other recently-enacted laws and regulations, such as new employer health insurance mandates implemented under the Affordable Care Act (ACA) and the limiting of the use of companionship services by employers within the FLSA have imposed additional employer obligations without a corresponding mandate to ensure that increased funding is available, which leaves most providers unable to comply with these pressures without scaling back wages, services, benefits, or all three. These are just two examples of new regulations which impact providers; there are many others at both the federal and state levels.

In a survey of providers that ANCOR conducted, respondents that have performed a cost analysis of implementing the rule as proposed reported it would require, on average, a 3 percent increase in operating expenses. As noted above, the Medicaid program, which is the primary source of funding for

⁴ *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. ___ (2015)

services, is reliant on states setting appropriate rates and allocating appropriate funding. Most states have seen little to 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 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 providers in light of the recognition that the service delivery system is significantly overburdened.

The Proposed Salary Threshold Increase is Unattainable

ANCOR shares the Department's goal of ensuring that workers are paid adequately and appropriately, and agrees that the white collar overtime exemption rules should be modernized. ANCOR conducted a survey of provider organizations to determine the impact this rule will have if it is finalized as proposed. The overwhelming majority of respondents responded with data indicating that the proposed threshold will present significant challenges to their ability to employ workers and provide services. Although some providers responded that they could not absorb any level of increase, some reported that they could manage a less extreme increase to the salary threshold. Members identified a threshold of the 15th percentile as being a more fiscally manageable threshold than the unattainably high 40th percentile, although not without challenge.

Recommendation: If the threshold is increased, we recommend that the updated threshold not exceed the 15th percentile of full-time salaried workers' salaries.

The Proposed Salary Threshold Does Not Account for Non-Salary Benefits

The proposed salary threshold increase neglects to account for the value of non-salary benefits, including health benefits, retirement plan contributions, and other employer-sponsored benefits those providers that are able to currently offer to their salaried employees. 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 income.

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.

The Proposed Salary Threshold Disproportionately Impacts Different Geographic Areas

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 and providers in less prosperous areas where Medicaid rates are correspondingly low. The proposed rule fails to account for the wide difference in what constitutes a middle class income in various parts of the country.

The survey of providers conducted by ANCOR recently showed that impact of the rule would require an average increase of 3 percent in operating expenses, and in some states as high as 6 percent. The effect of this rule, if finalized without taking geographic variances into account, is to disproportionately harm workers and individuals living in states that are the least able to absorb additional costs.

The federal government acknowledges this discrepancy and uses different pay tables for its employees based on geographic location. The federal government also acknowledges this difference in making wage determination for federal contracts. The Department also sets wage determination rates based on region for contractors subject to the Service Contract Act. The Department of Housing and Urban Development (HUD) also accounts for regional differences in its determination of eligibility for federally-subsidized housing. These are just a few examples of ways the federal government currently accounts for regional variances in cost of living.

As the federal government already determines appropriate wages and other rates based on regional variances, ANCOR does not believe it is unreasonable or overly burdensome for the Department, in promulgating this rule, to do the same with this rule.

Recommendation: We recommend establishing salary thresholds that are appropriate to clearly delineated geographic regions that account for regional variances in cost of living.

Automatic Adjustment of Salary Threshold

ANCOR appreciates the intention of the Department to simplify the existing rules, and to create a mechanism that will automatically update the threshold, minimizing what often times are sudden and large increases. 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. However, the methods on which the Department has requested comment both present some challenges.

Basing Salary Threshold on Percentile

The proposed rule would set the salary threshold at the 40th percentile of full-time salaried workers' salaries. Using percentiles rather than averages, there is the potential for significant discrepancies between the highest and lowest percentiles. If a significant number of employers simply do not raise salaries year over year, salaries would stay stagnant, impeding the Department's goal of providing a mechanism by which the salary threshold would adjust to benefit exempt workers. Conversely, if employers instead keep increasing salaries of exempt workers to just over the threshold, artificial inflation of the threshold would result, creating a skewed picture of appropriate salary levels.

Basing Salary Threshold on an Inflation Index

The Department asked for comment on whether it would be more appropriate to tie the salary threshold to an inflation index rather than base it on national salary data. One issue with taking such an approach is that, as noted above in discussing regional cost variances, inflation does not impact all regions uniformly. Using the CPI-U would, by its very nature, not take into account the variance between rural and urban markets. Any inflation index that is an average of national data has this same weakness; it will disproportionately impact different regions, potentially worsening the income disparity in this country, and inadvertently harming the workers the rule seeks to protect.

Recommendation: We recommend, between these two options, basing the threshold on regional salary data. However, we encourage the Department to consider other methods of setting and adjusting the threshold as outlined elsewhere in these comments. Additionally, we recommend that any increases in the salary threshold be accompanied by a requirement for a corresponding increase in Medicaid rates to accommodate the increase.

Effective Date for Adjustments

The Department asked for comments on when adjustments should take place. Some possibilities are annually based on the calendar year or on the effective date of the rule. Since funding for providers is linked to state budgets, we recommend that the effective date of adjustments correspond with state budget cycles. The majority of states have a budget cycle that ends in June. Additionally, approximately 40 percent of states run on biennial legislative budget cycles.

The Federal Medical Assistance Percentage (FMAP) (the rate of federal funding match for state Medicaid programs) has a fiscal cycle of October 1 to September 30. This is a challenge for states whose budget cycles do not align neatly with that date.

Recommendation: We recommend 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

The Department has asked for comment on the existing duties tests for these exemptions. We recommend that the duties tests not be changed for these exemptions. Specifically, we recommend against setting a fixed threshold for time spent on non-exempt duties. We believe that a standard with a bright line percentage, such as the 50% standard used in California, is overly prescriptive and does not take into account differences in duties and expectations that are present in different industries.

In our field, it is not uncommon 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 or her subordinate, and would also impose an additional recordkeeping burden. Additionally, given the nature of the work in our field, it is not uncommon for a supervisor to cover a shift for a worker. This is not typically scheduled or planned for, and exempt supervisory employees understand that part of the job may involve performing unscheduled or emergency direct care in order to ensure continuity of care for a person served.

Either of these options would increase the administrative burden on exempt workers and providers, be overly prescriptive, and reduce the flexibility and discretion to perform duties as employees see fit.

If the Department proposes future changes to the duties tests, we expect there would be a separate opportunity for public comment prior to the finalization of any rule.

Recommendations: We recommend against setting any type of bright line threshold, and also recommend 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, ensure that the public is given sufficient opportunity to comment on any proposed changes before the rule is finalized.

Impact on Worker Satisfaction and Turnover Rate

As has been noted throughout these comments, ANCOR appreciates and supports policies that will better compensate employees in our field. Providers understand the importance of providing adequate monetary compensation and quality benefits to attract, train, and retain a qualified workforce.

However, due to serious budgetary shortfalls within states, Medicaid-reliant providers are often at a significant disadvantage in paying wages that commercial industries can.

Many Currently Exempt Workers Would Be Converted to Hourly Wage Earners

ANCOR collected survey responses from providers to gauge the impact this rule would have on agencies, their employees, and the individuals they serve. Most surveys were completed by human resources or other program staff of the agency. According to survey responses, approximately 72 percent of providers would convert currently exempt salaried workers to hourly workers. Less than a third of providers would be able to increase the salary of full-time exempt workers to meet the projected threshold. Additionally, more than 70 percent of providers surveyed would prohibit or significantly restrict overtime permitted. An additional strategy for compliance identified by providers is to shift some work currently performed by exempt workers to part-time and other non-exempt workers.

What these data show is that providers are largely unable to raise the salaries of exempt workers, and instead must look to strategies for compliance that will result in nearly the same number of hours worked and wages paid. The unfortunate consequence of this reality is lower job satisfaction, higher turnover, and a further reduction in the pool of workers who choose to work in the long term supports and services field as a long-term career path. It may result in lower wages, the elimination of raises, and/or lower raises for direct support professionals, as providers look to make ends meet.

Salaried workers are recognized by society as professionals, a recognition that Congress shared in creating the exemptions at issue in this rule. Many workers see a salary, rather than hourly wages, as the mark of a professional career as opposed to a job. In our field, providers have strived to “professionalize” direct care work, creating a career path and encouraging entry-level, hourly DSPs to progress in their careers to mid-level management, program manager, and front-line supervisor positions. Converting these salaried employees to hourly wage earners, even if the total amount of compensation remains the same, will have a significant negative impact on employee satisfaction and motivation to continue to progress in a career in this field. ANCOR is extremely concerned about the impact on workers career paths which is why we created the National Advocacy Campaign to recruit, train and retain a highly qualified and sustainable workforce to enhance the lives of all people with disabilities.

As one member noted, for many employees, moving from a salaried position to an hourly position “feels like a demotion,” even if the total amount of compensation remains the same.

Reduced Flexibility and Independence in Job Performance and Career Path

Many workers who fall under these exemptions in our field started out as Direct Support Professionals, and advanced into supervisory or administrative positions that require independent judgement and flexibility. Many providers encourage their exempt employees to take part in various career and education enhancement and training programs. This is one way that salaried exempt employees can advance in their career paths. Placing restrictions on overtime for these employees, as providers would be forced out of necessity to do, would take away options for workers to pursue career-advancing extra activities, including participation in committee work and professional organizations that are foster career growth and professional development of workers.

Additionally, many salaried exempt employees choose to spend additional time with their teams or individuals served outside of the work environment. Some of these activities are properly classified as work and would be required to count towards hours worked for non-exempt employees. Many providers would be forced to limit these activities if counted toward hours worked, which could have a devastating impact on employee morale (for both supervisors and subordinates), and also on the individuals served.

Therefore, unintended consequences of this rule as proposed include a chilling effect on the ability for providers to offer, and for employees to avail themselves of, opportunities for career advancement and personal enrichment.

Treatment of Nondiscretionary Bonuses and Incentive Payments

The Department requested comment on the treatment of nondiscretionary bonuses and incentive payments. We recommend that such income be included as counting toward the salary threshold. These payments are awarded to employees that fulfill certain requirements set by the employer as part of their job description. As such, it is within the employee's power to perform in a manner that will result in the payment of such income.

For salaried exempt employees, such payments serve as an incentive to perform work of the type that will advance them in their professional career path. This is squarely in line with the purpose of the exemptions affected by this rule.

Recommendation: We recommend that nondiscretionary bonuses and incentive payments be included in the calculation of income that will meet the salary threshold.

Reduction in Benefits and Other Impact on Hourly/Non-exempt Workers

Though hourly and other non-exempt workers are beyond the scope of this rule, it is important for the Department to understand the impact that this rule will have on industries and employers as a whole. There is the potential for serious and severe negative consequences for workers if this rule is implemented as proposed.

Because of all the various factors contributing to a dearth of qualified workers in our field noted elsewhere in these comments, providers are constantly seeking ways to attract new workers. In order to compete with other industries in attracting workers, providers often must increase starting wages for workers, despite not having the budget to do so. This results in wage compression, where employees who have been with the agency longer are often not given regular raises in compensation, because the employer has no place to take the additional money from. This negatively impacts worker satisfaction, and often results in higher turnover of mid-level employees than would otherwise happen.

As noted previously, Medicaid-funded providers cannot control the rates or funding levels set by states. Any increase in operational costs, whether for increased salaries, increased benefits, or increased overhead, must take funds away from another area. Many respondents to the impact survey that ANCOR put out reported that this rule, if finalized as proposed, would have a severe and negative impact on non-exempt worker wages, health insurance coverage, and other employee benefits.

Implementation Timeframe

As noted above, providers are reliant on their states allocating and appropriating sufficient funding for their state Medicaid programs. Many state legislatures do not meet year round, and some meet only 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 the salary threshold, as proposed, would result in many providers being unable to adjust quickly enough to absorb the extra operating costs, as they are dependent on their states allocating and appropriating funding. The immediate impact would be to cut workers, cut wages, cut services, and in some cases, close agencies, leaving a spate of unemployed workers and an influx of people with disabilities who would become at risk for institutionalization.

As noted previously, ANCOR believes the threshold proposed is unattainable and believes a lower threshold would be appropriate. Regardless of the amount of the increase, states must be given sufficient time to allocate and appropriate funding. As previously noted, many states have a two-year budget cycle, which means that a state's ability to react to a rule that requires additional funding may take up to 24 months.

Any significant increase to the salary threshold will require a period of adjustment for employers. More than doubling the threshold, as has been proposed, would cause significant challenges to providers, many of whom would not be able to recover from the initial spike and would be forced out of business or to scale back significantly on operations, including laying off workers and disrupting services for people with disabilities. As noted previously, there are several new costly federal and state requirements that impact providers that have recently come into effect, or will soon go into effect. In order to give providers sufficient time to adjust to these various requirements, ANCOR strongly recommends a phased implementation timeframe, allowing a period of at least three to five years to ramp up to the full threshold.

Recommendation: We recommend an effective date for the final rule of at least two years after its finalization to afford states sufficient time to allocate appropriate funding. We further 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 increase.

Conclusion

ANCOR appreciates the commitment this Administration has shown towards workers and the strong support it has shown for advancing opportunities for and empowering people with disabilities. We believe these are both critically important priorities that are not inconsistent with one another. We also appreciate the thoughtful way the Administration has worked to align the work of various federal agencies to advance its policy goals.

We are extremely concerned that this rule, as proposed, would have negative unintended consequences for many workers and many people with disabilities. While we applaud the intent of the Department in drafting this rule, we seek to ensure that other issues that would prevent the rule from operating as envisioned are addressed prior to or simultaneously with the issues addressed by this rule. As we have demonstrated in our comments, providers are price-takers, and thus unable to act to appropriate additional funding required to implement this rule as proposed. As Medicaid-funded entities, providers

are dependent on state Medicaid programs to set appropriate rates, state legislatures to appropriate funding, and the Centers for Medicare and Medicaid Services (CMS) to provide strong oversight of Medicaid programs. We strongly urge you to consider our comments to avoid unintended consequences to disability service providers, and ultimately – and most importantly – to the people with disabilities served, nationwide.

ANCOR appreciates your consideration of our comments to this rule, and we stand ready to provide additional information and recommendations as the Department moves towards finalization of the rule. Please feel free to contact Katherine Berland (kberland@ancor.org) or Esmé Grant Grewal (egrant@ancor.org) if you have any questions or would like more information on any of the issues discussed in these comments. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Barbara Merrill".

Barbara Merrill
Chief Executive Officer