Att: Melissa Smith
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

Re: Request for Information on Changes to the Overtime Regulations, RIN 1235-AA20

September 17, 2017

Dear Ms. Smith:

The American Network of Community Options and Resources (ANCOR) is pleased to offer input to the Secretary's Request for Information on the Department of Labor's Overtime Regulations. ANCOR was deeply involved in weighing in on the 2015 process and the 2016 Final Rule and greatly appreciates the opportunity to be an ongoing resource for the Department, particularly given the unique situation of our workforce and the potential impact on the rule on our services as further detailed below.

ANCOR is a national trade association representing more than 1,200 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. The services ANCOR provides to people with disabilities are labor-intensive and staff-focused and unfortunately our field is facing one of the country's worst labor force crises.

Our services are unique because our system is almost 100% funded by Medicaid funding. Thus, any changes to labor costs must be reciprocated at the federal and state Medicaid program level. Many state reimbursement rates are over a decade old and can handle very little change in labor regulation until they are updated by the state. In the 2016 Final Rule, there was a single special exception made and it was to our industry to certain providers of our services in recognition of the challenges providers face in adjusting labor changes for Medicaid-funded services. We are hopeful that in any forthcoming changes to the overtime regulations that there will be even greater recognition of our funding limitations.

Below we aim to answer the majority of questions posed by the RFI with the exception of the final two which address high level salaries and are less relevant to our workforce.

1. In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the

standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

RESPONSE: We recommend that the threshold not be 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. Although outside of the direct purview of DOL, it is essential for purposes of this RFI to understand that the employers we represent are not in control of their reimbursement rates and that instead this is a formula determined by state and federal government mechanisms. Therefore, any proposed changes to labor costs must be raised with the Department of Health and Human Services and specifically the Centers for Medicare and Medicaid Services (CMS) to adequately prepare and reevaluate rates for those costs. This is exactly why ANCOR led the introduction of the Disability Community Act, H.R. 5902, in the 114th Congressional session as the 2016 final rule was heading towards implementation which provided the necessary funding to support at least a portion of the increase. The employers we represent can manage a reasonable increase when accompanied by commensurate rate increases. With that policy component in mind, if the threshold is increased, we recommend, as we did in 2015, that the updated threshold not exceed the 15th percentile of full-time salaried workers' salaries.

In terms of the inflation measurement we recommend basing the threshold on regional salary data rather than national salary data or the CPI-U, however if a national measure had to be selected we would advocate for the CPI-U which is the standard measure our members are accustomed to. We also want to clarify that the adjustment to inflation should be made periodically by the Department of Labor and not automatically.

EXPLANATION: In 2015 we conducted a thorough survey and worked with the nationally renowned firm of Avalere Health to analyze the impact of the proposed 2016 rule on our membership. We determined that it would not be possible for our services to be sustained if the threshold exceeded the 15th percentile range. We also determined that the automatic increase would be further harmful to our services and we did not support that change in the 2016 Final Rule.

For the method of inflation, using the CPI-U would, by its very nature, not take into account the variance between rural and urban markets, however it is likely the best national method to use. Any inflation index that is an average of national data has this same weakness; it will disproportionally impact different regions, potentially worsening the income disparity in this country, and inadvertently harming the workers the rule seeks to protect.

2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of

multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

RESPONSE: In line with our 2015 recommendations, ANCOR supports and encourages establishing salary thresholds that are appropriate to clearly delineated geographic regions that account for regional variances in cost of living. However, although we appreciate the consideration for other standards like employer size, we are very concerned that it could be counterproductive to workforce recruitment (smaller employers would pay less and have harder time recruiting much needed labor).

EXPLANATION: The survey of providers conducted by ANCOR 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. There are a number of ways that the regional variances could be set and as long as they were appropriately reflective of the diversity of wage and salary data, we would support that consideration.

One idea that currently works for our members in Ohio is the cost of doing business categories organized by counties for all businesses in Ohio, including the members we represent. These categories take in account the regional and cost differences in the geography to ensure that costs are being applied as evenly and fairly as possible.

3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

RESPONSE: ANCOR's preference would be a standard salary level for the executive and administrative classification be set less than the professional classification.

EXPLANATION: ANCOR's qualified workforce would mostly fall within the administrative and executive classifications. Because the roles of our workers change frequently, it may not always be clear which classification fits best. We agree with the current Administration that the goal should be to minimize administrative burden. While we are currently not challenged by the present standard classifications, we would be interested in proposals to set one standard salary level for the executive and

administrative classification at a lower threshold than the professional classification as had been historically in place.

4. In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

RESPONSE: We are opposed to any changes that 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. Our members feel strongly that the current duties test is sufficient and is not overly burdensome. We are wary of any changes that would alter that characterization. We recommend against setting any type of bright line threshold, and also recommend against reinstituting 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, it will be essential to ensure that the public is given sufficient opportunity to comment on any proposed changes before the rule is finalized.

EXPLANATION: The current duties test is sufficient and allows our members the needed flexibility they require in order to properly compensate a unique set of workers. For example, 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 a person served.

5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

RESPONSE: The balancing role of the duties test in conjunction with the salary test have been important for human resource decisions in this arena. Further, we are aware of the recent decision in the *State of Nevada, et. al v. U.S. Department of Labor* case in the Eastern District of Texas and expect to see that decision impact the ability of the salary test to eclipse the role of the duties test. We look forward to DOL's proposals following this decision.

6. To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

RESPONSE: ANCOR members executed a full array of responses to the 2016 Final Rule implementation. Unfortunately for those who made the changes, there was no Medicaid reimbursement to balance these changes in their agency.

EXPLANATION: ANCOR members were very serious about the implementation of the DOL Overtime Rule in 2016. In preparation for implementation, many of our members changed workers to hourly wages, increased salaries to preserve exempt statuses, reduced hours and hired part-time workers if they could, restructured job positions so that overtime was not as likely a quality of the job, and in some instances prepared to pay the increased overtime pay. For some, their pay period covering the implementation date of December 1 began weeks earlier, so they had to implement the changes before the preliminary injunction was even granted. Few of our members, if any, reverted these changes after the injunction was issued with concern to both legal obligations and the messaging it would send to workers that they work hard to retain.

7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

RESPONSE: ANCOR currently opposes a test that would rely solely on the duties test, however if a duties only test is able to be extraordinarily clear and well defined to avoid legal complications, we would be open to exploring it.

EXPLANATION: In direct response to this RFI, ANCOR members shared their deep concerns that relying on a duties-only test would be a vague, unclear process and open the door even wider to legal disputes. However, our association is open to suggested proposals and sees the value in a duties only test should there be clear legal constructs in place. For instance, a duties only test could potentially better define the class that is intended to be covered and it may be more simplified for employers to apply. Ultimately whatever is proposed should provide some standard and indisputable guidelines so that the policy is easily shifted into practice.

Regardless of whether the salary test is maintained or not, one issue that members did recognize that may be addressed through a change of the test application is the ability of supervisors to assign themselves overtime work.

8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

RESPONSE: Yes, ANCOR has found that residential coordinators, case managers, support coordinators, therapists, mid-level managers, job coaches, and others were falling into coverage under the 2016 Final Rule when they had historically been exempt.

EXPLANATION: The above response was informed directly from our membership who referenced the analysis they did for preparing for the 2016 Final Rule and the unprecedented changes they noted derived from that rule.

9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard

salary level relevant in determining whether and to what extent such bonus payments should be credited?

RESPONSE: Not only does ANCOR believe these bonuses and incentive payment should qualify for the salary level – and to a greater extent – but 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 inclusive of health benefits, retirement plan contributions, and other employer-sponsored benefits.

EXPLANATION: For small businesses and businesses like ANCOR represents that are publicly funded through sources like Medicaid, it is extremely important that all monetary expenditures are being accounted for in the salary level calculation. It is one of the only ways to ensure that small business, nonprofits, and publicly funded operations are not being overly burdened by regulation compared to their larger corporate counterparts in the labor field.

CONCLUSION

We sincerely thank the Department for considering ANCOR's input. We have been invested in the overtime rule regulations for several years and we look forward to be a continuing resource on the impact, particularly to publicly funded providers of services. As a national trade association, we are able to gather information from those directly impacted throughout the country and collect precise data that forecasts that impact. We encourage you to reach out to us to follow up on any additional information and again thank you for your work on this regulation.

For more information please contact:

Esmé Grant Grewal, Esq.
Senior Director of Government Relations
American Network of Community Options and Resources (ANCOR)
1666 K Street NW, Suite 440
Washington, DC 20006
202-579-7789
egrant@ancor.org