To: American Network of Community Options and Resources

From: Avalere

Date: October 31, 2023

Re: Cost Impact Assessment of DOL Proposed Salary

Overview

The American Network of Community Options and Resources (ANCOR) commissioned Avalere to estimate the first-year impact of the Department of Labor's (DOL) proposed changes to overtime pay exemption, as published in the Federal Register on September 8, 2023[1], for community providers serving people with intellectual and developmental disabilities (I/DD). The proposed regulatory change would set the standard salary level required for exemption from overtime pay equal to the 35th percentile of earnings for full-time salaried employees (FTEs), which is projected to be $1,059 per week, or $55,068 annually, in the third quarter of 2023.[2] However, the DOL noted that the salary level could change depending on when the rule is finalized, including $59,285 if finalized in the fourth quarter of 2023 or $60,209 if finalized in the first quarter of 2024.[3]

Avalere estimates that the proposed regulatory changes would lead to $1.05 billion in additional overtime costs for community providers (Table 1). If the DOL changes the salary level to the amount in the fourth quarter of 2023 or first quarter of 2024, Avalere estimates the first-year cost impact would be $1.10 billion or $1.11 billion, respectively. In addition, Avalere modeled the first-year cost impact for various scenarios relating to the different mitigation strategies community providers may employ, the potential impact on Medicaid spending, and alternative overtime exemption salary thresholds. Estimates for the scenarios are summarized in Table 1, with further details below.

[1] Federal Register. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees. Available Here.

[2] The Secretary of Labor will determine the lowest-wage Census Region using the 35th percentile of weekly earnings of full-time non-hourly workers in the Census Regions based on data from the Current Population Survey as published by the Bureau of Labor Statistics.

[3] This is because the Department of Labor will use non-hourly earnings for full-time workers from the Current Population Survey (CPS) Merged Outgoing Rotation Group (MORG) data collected by the Bureau of Labor Statistics. In the final rule, the Department will use the most recent data available, and apply the Congressional Budget Office projections of the employment cost index for wages and salaries of workers in private industry.

Table 1. Estimated Cost Impact to Community Providers Serving Individuals with I/DD due to the DOL Proposal

	First-Year Cost Impact, in Millions
Cost Impact Under Current Policy Proposal	$1,051
Cost Impact Under Different Provider Mitigation Strategies	$411 - $1,012
Cost Impact to Medicaid Spending	$1,100
Cost Impact Under Alternative Exemption Thresholds	$378 - $780

Source: Avalere analysis of Notice of Proposed Rulemaking (NPRM), Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, as of September 8, 2023.

Background and Key Provisions

The Fair Labor Standards Act (FLSA) guarantees a minimum wage and overtime pay at a rate of not less than 1.5 times the employee's regular rate for hours worked over 40 in a workweek.[4] While these protections extend to most workers, the FLSA provides exemptions in some cases. These include executive, administrative, and professional exemptions, each of which has specific tests that must be met for the employee's wages to be exempt from the requirements above.

The standard salary level required for exemption is currently $684 a week ($35,568 annually) and was last updated in 2020. On September 8, 2023, the DOL published the Notice of Proposed Rulemaking (NPRM) with the public comment period through November 11, 2023. In the NPRM, the DOL proposed to set the standard salary level required for exemption from the overtime pay equal to the 35th percentile of earnings for full-time salaried workers in the lowest-wage Census Region (currently the South), which is projected by the DOL to be $1,059 per week, or $55,068 annually, in the third quarter of 2023. The Bureau of Labor Statistics (BLS) data used to set the salary level for the rulemaking consists of earnings for full-time (defined as at least 35 hours per week) non-hourly paid employees. The DOL considers data representing compensation paid to non-hourly workers to be an appropriate proxy for compensation paid to salaried workers. Furthermore, to prevent the salary exemption level from becoming outdated, the DOL proposed to adjust the salary level exemption threshold based on the quarter in which the rule is finalized.

ANCOR is a national trade association representing more than 2,100 private providers of community living and employment services to individuals with I/DD. Most of the funding for these services comes from Medicaid.[5] Reimbursement is set by state Medicaid agencies and private providers do not have the ability to negotiate the rates nor to pass on increased operating costs to the state or individuals served. Community providers employ direct support

[4] US Department of Labor, Wage and Hour Division. Wages and the Fair Labor Standards Act. Available Here.
[5] Government Accountability Office. Medicaid: Characteristics of and Expenditures for Adults with Intellectual or Developmental Disabilities. April 2023. Available Here.

professionals (DSPs) as well as executive, administrative, and other professional employees who are currently exempt from the overtime pay (i.e., earn over $35,568 annually). However, most of those employees earn below the proposed, new salary exemption threshold of $55,068, which means that the DOL's proposed rule, if implemented, would result in additional costs for community providers, due to paying overtime or increasing salary levels to maintain exemption status.

Data Sources

Avalere used the following data sources to develop our estimate:

- DOL Proposed Rule
    - Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees
- ANCOR Member Survey
- Bureau of Labor Statistics –
    - Labor Force Statistics from the Current Population Survey, Q4 2017
    - Occupational Employment and Wage Statistics – 21-1094 Community Health Workers, May 2022

Assumptions and Methodology

For this analysis, Avalere leveraged internal expertise, insights from ANCOR's member survey, and interviews with ANCOR members to develop our methodology and key assumptions. The estimates provided throughout this document, however, are subject to uncertainty given the assumptions made.

Avalere assumed that the proposed policy, if finalized, will implement the currently proposed salary exemption threshold of $55,068 annually. However, the DOL noted that the threshold could change depending on the timing of the final rule.

Overview of ANCOR's Member Survey and Interviews

In September 2023, ANCOR conducted a survey of members and non-member community provider organizations regarding current employment and potential impacts of the proposed DOL rule. More than 500 organizations answered a series of questions to explicate the current makeup of employee types within their organizations, employee pay, and actions that may need to be taken if the DOL rule is finalized as currently proposed.

In October 2023, Avalere interviewed leaders of ANCOR member organizations to get a broader understanding of the potential impacts of the DOL's proposed rule. Interviewees provided details on their current staffing practices, pay rates and salaries, strategies previously used to

address exemption threshold changes, and potential strategies to address the new proposed exemption threshold. Interviewees also provided details on the potential negative impacts on the community provider industry because of the proposed rule.

Cost Impact to Community Providers Under Policy Proposal

Under the proposed rule, the changes would require an increase in community providers' operating expenses to remain in compliance. To determine the estimated impact to community providers, Avalere leveraged various sources to calculate the number of employees who would be impacted by the policy across all community providers and the associated overtime costs per employee that would be required under the policy change.

Determining Newly Non-Exempt Employees Under Policy Change

To determine the number of currently exempt employees who would become non-exempt under the proposed changes, Avalere first assumed that approximately 6,000 community providers—reflective of all providers who are members of state associations—serving individuals with I/DD will be affected.[6] Based on ANCOR survey data, Avalere estimated that community providers employ, on average, 55 salaried FTEs for a total of 313,000 salaried FTEs. Of those, Avalere estimated 91%, or 286,000, are currently exempt from overtime pay.

Next, Avalere estimated the share of currently exempt FTEs who would become non-exempt under the policy change and the subsequent share that works overtime. Of the currently exempt employees, Avalere estimated 38%, or 110,000, are earning salaries between $35,568 and $55,068, and would no longer maintain exemption status. To estimate the share that would be affected under the policy change, Avalere approximated 89%, or 98,000, of the newly non-exempt employees work overtime, an average of 17 salaried, FTEs per provider.

Additional Overtime Payment

Avalere assumed the average salary for a non-exempt employee to be $45,318 under the proposed policy, which is based on the mid-point between the salary range outlined in the proposed rule ($35,568 – $55,068). Based on this information, Avalere calculated an average hourly rate of $22. The hourly rate was increased 1.5 times to account for FLSA overtime modifier, resulting in an overtime rate of $33. Next, Avalere estimated weekly overtime hours worked by an exempt employee at 6 hours. The estimate was based on surveyed providers reporting an average of 16% of hours worked by exempt employees in excess of a 40-hour week. The resulting overtime pay per employee per year was calculated to be approximately $11,000.

Overall, Avalere estimated that the DOL's proposed rule would incur an additional $1.05 billion in overtime costs for community providers, an average of approximately $185,000 per provider.

[6] Based on ANCOR's internal analysis of community providers serving people with I/DD that was cross-referenced and validated against provider directories and state provider association listings.

Findings

Baseline Findings

Avalere first assessed the baseline cost impact of the DOL's proposed rule on community providers if no mitigation strategies were used. To obtain this measurement, Avalere assumed that providers would keep all salary levels within their organization at current levels. Then, to comply with the rule, provider organizations would pay overtime for salaried employees who fall below the new threshold of $55,086. Based on these assumptions, the total cost impact would be approximately $1.05 billion under the policy change.

Cost Impact to Providers Under Different Mitigation Strategies

In its survey, ANCOR assessed the likelihood of its members and industry partners employing different strategies to mitigate the impact of the DOL proposal. Avalere outlines several of these strategies and the corresponding cost impact associated with these changes, where applicable. Under each potential strategy, Avalere does not estimate the cost to providers associated with payroll taxes and employer contributions to retirement accounts, which will likely increase or decrease depending on the salary or staffing changes made by a provider. Notably, providers could employ a mix of these strategies. However, for the purposes of this analysis, the estimated cost for these strategies is non-additive and provides a range of the potential impact to providers under various approaches.

Increase FTE Salaries to Meet New Threshold

Under this scenario, as a measure to maintain exemption status, providers would increase the annual salary for newly non-exempt employees to meet the new threshold. The salary increase would be based on the difference between an individual's current salary and the upper salary exemption threshold proposed by the DOL. The ANCOR survey indicated that 56% of providers would likely employ this strategy. These providers would account for approximately 55,000 of the newly non-exempt employees. Based on an average salary of $45,318, Avalere assumed providers would need to increase annual salaries by approximately $10,000 for each employee, equating to a total salary cost of $535 million. Avalere assumed that the remaining share of non-exempt employees, 43,000, would be subject to the DOL proposed overtime policy for a total additional cost of $462 million. Together, this strategy would result in a total cost of $997 million.

Convert Current Exempt Employees to Hourly Pay

Approximately 61% of providers, accounting for 59,583 employees, indicated that they would convert current exempt employees with salaries below the newly proposed threshold to hourly pay. If providers were to convert currently exempt employees to hourly workers and restrict them from working overtime, there would be no additional cost under the DOL proposed policy.

Workers' total compensation could fall under baseline through this approach, given that providers could potentially generate savings due to reduced employee benefits associated with hourly workers relative to salaried workers. However, this strategy may be challenging to implement and would still result in additional overtime costs of $411 million for the share of providers not employing this strategy.

Restrict Over Time Hours Permitted

To mitigate their costs, 49% of providers indicated that they would restrict the number of overtime hours for employees—accounting for 48,374 employees that become non-exempt. On average, Avalere assumed that providers would reduce the number of hours overtime allowed to 2 hours, decreasing annual overtime costs per employee from $11,000 to $3,000. For the providers employing this strategy, the total additional cost would be $164 million. On the other hand, Avalere assumed the remaining 49,554 employees would continue to work an average of 6 hours overtime per week, a resulting cost of $532 million. The total cost associated with this strategy would be $696 million.

Hire Additional Employees

In response to the proposal, some providers indicated that they may need to make structural changes to staffing, wages, and benefits, including hiring additional entry-level (i.e., lower-paid) workers to eliminate overtime among the employees affected by the policy. According to survey data, 8% of providers indicated that they would hire additional employees. To replace an average 110 hours (based on an average of 17 salaried FTEs that become non-exempt and 6 overtime hours per employee per organization), Avalere assumed each provider employing this strategy would need to hire approximately 3 entry-level workers, a total of 1,300 new hires. Based on BLS' compensation and wage statistics for community health workers, Avalere assumed an annual salary of $38,000 (hourly pay rate of $18 for 40 hours a week), a total cost of $50 million.[7] For the providers that are not employing this strategy and would be subjected to the DOL proposed policy, Avalere estimated an additional cost of $962 million. The total impact to providers under this strategy would be $1.01 billion.

Reduce Salaried, FTE Employees

Another potential staffing change providers indicated they would consider is a reduction of positions that would become non-exempt under the proposed policy. An estimated 33% of providers noted they would likely employ this strategy. Avalere assumed that if employment for all individuals who would become non-exempt were terminated, this strategy would not pose any additional costs under the proposed change. However, if providers elected to reduce only a portion of the newly non-exempt positions, there would be a cost impact for the share of positions not terminated and subject to the proposed policy. Using the 33% as a proxy for the share of newly non-exempt positions that would be terminated, Avalere estimated that, on average, there would be 17 newly non-exempt positions per provider and 6 of those would be eliminated—approximately 11,000 positions across the providers likely to employ the strategy.

[7] Bureau of Labor Statistics (2022). Occupational Employment and Wage Statistics – 21-1094 Community Health Workers, May 2022. 25th Percentile. Available Here.

The remaining 22,000 individuals, in addition to the 65,482 employees under the providers that would not employ the strategy, would result in additional overtime costs of $935 million under the proposed policy.

Additional Provider Considerations

Cost estimates for specific mitigation strategies have a degree of uncertainty. Based on Avalere's interviews with provider organizations, it is likely that providers will employ multiple strategies to address the proposed rule and will consider secondary and tertiary costs that they may face as a result of addressing the policy change, if finalized.

In addition to the potential strategies outlined above, some providers indicated that they may not have the resources to offset the potential costs under the policy proposal and may need to reduce wages and/or eliminate annual wage increases for direct support professionals (DSPs). DSPs are often a core component of the staff serving individuals with I/DD that earns less than $35,568 and often are currently non-exempt from overtime pay. Estimates for these potential changes were not calculated.

Providers also indicated that they would likely need to reduce the number of services provided by their organizations in order to remain financially viable. Several providers stated that services such as day programs, employment support services, and group homes would be the first to be impacted if a reduction of services were required. Providers also mentioned that non-mandated staff and positions, such as training support and quality management, would need to be eliminated if the cost impact of other mitigation strategies is considerable.

In choosing mitigation strategies, providers expressed that they would be more likely to adopt salary increases for employees who currently fall close to the DOL's proposed threshold of $55,068. For those who fall well below the new threshold, some providers plan on employing different strategies such as restricting overtime hours and supplementing shifts with per diem workers. However, each strategy presents secondary and tertiary consequences that providers must weigh before moving forward. For each employee whose salary is increased to meet the new exemption threshold, provider organizations would have to account for additional costs such as payroll taxes, contributions to employee retirement accounts, and other benefits like life insurance.

Additionally, increasing salaries for employees who fall below the proposed threshold poses a compression issue for employees who currently meet or exceed the threshold. Salary ranges within organizations are typically structured based on position, experience level, and tenure. Providers indicated that a salary increase for employees at the bottom of a range would require a proportional increase for each employee above that level to maintain internal equity, or else risk lowering employee morale and losing essential employees. These increases across a range of salaries pose a significant cost for providers that they must consider when determining which strategies to apply considering the proposed rule.

Medicaid Impact

In addition to estimating the impact to community providers under the DOL proposal and potential risk mitigation measures, Avalere also calculated the potential impact to Medicaid from the loss of community-based services for individuals with I/DD. Based on the ANCOR survey, 14%of providers indicated that they may reduce services in response to the DOL proposed rule.

To determine the estimated impact to Medicaid of providing care for individuals that would lose access to community provider services, Avalere first estimated the share of individuals that would lose access to care under the DOL proposed policy and the associated per person cost to Medicaid. Based on data from the Residential Information Systems Project (RISP) for FY2019, there are 7.39 million individuals living with I/DD and 1.58 million individuals are receiving services.[8] Of those receiving services, Avalere extrapolated 92%, or 1.45 million, receive care in the community settings and 8%, or 126,000, received services in the institutionalized setting.[9] On average, Avalere assumed, consistent with its previous analysis, a 10%reduction in the number of individuals that access services through community providers, approximately 145,000. In addition, based on the current share of individuals with I/DD that receive institutional care, Avalere assumed 8%, or 12,000, of those individuals will acquire services through more costly institutional care settings including large state-run or private nursing facilities. The remaining share will continue to seek services through other community providers.

Next, Avalere estimated per person cost to Medicaid to provide services for these individuals who would lose their access to community provider services under the proposed policy. To determine the cost, Avalere calculated the approximate annual Medicaid spending per person for individuals accessing care in the community-based settings and those receiving services in the institutionalized settings. Based on Medicaid spending on home and community-based services for people with I/DD, Avalere estimated that the annual per person cost of care for individuals receiving serviced in the community-based setting is $48,000.[10] In addition, based on Medicaid spending on ICF for individuals with I/DD, Avalere estimated that the annual per person cost of care for individuals receiving services in the institutional setting will be $140,000.[11] Using the cost of care in both settings, Avalere estimated that the impact to Medicaid would be an average annual cost of $95,000 per person—approximately a total cost of $1.10 billion after accounting for the share of individuals that would lose access to community provider services.

[8] Residential Information Systems Project (2019). People with IDD in the United States. Minneapolis: University of Minnesota, RISP, Research and Training Center on Community Living, Institute on Community Integration. Available Here.
[9] Residential Information Systems Project (2019). Living arrangements for people with IDD. Minneapolis: University of Minnesota, RISP, Research and Training Center on Community Living, Institute on Community Integration. Available Here.
[10] Residential Information Systems Project (2019). Medicaid HCBS Spending in FY 2019. Minneapolis: University of Minnesota, RISP, Research and Training Center on Community Living, Institute on Community Integration. Available Here.
[11] Residential Information Systems Project (2019). ICF/IID expenditures in FY 2019. Minneapolis: University of Minnesota, RISP, Research and Training Center on Community Living, Institute on Community Integration. Available Here.

Cost Impact Under Alternative Scenarios

In addition, Avalere estimated the cost impact to providers for two alternative scenarios below the 35th percentile of earnings for salaried FTEs, including the 25th and 30th percentiles. To determine the upper limit of these percentiles, Avalere extrapolated the BLS' labor force statistics on weekly earnings of non-hourly FTEs in the lowest-wage Census Region for the fourth quarter of 2017 to the DOL's proposed 35th percentile of weekly earnings ($1,059).[12] Based on the 2017 data, Avalere calculated the proportion of weekly earnings for the 25th and 30th percentile relative to the 35th percentile and applied it to the $1,059 to determine the respective salary limit for the alternative exemption thresholds. Next, Avalere estimated the share of salaried, FTEs that are currently exempt under the 25th and 30th percentile of earnings. To determine this, Avalere used the percent change in the upper limit salary for the 25th and 30th percentiles relative to the 35th percentile as a proxy to reduce the estimated 38% of current exempt employees under the current policy proposal. Similar to the previous baseline estimate, this does not account for providers employing any mitigation strategies.

Table 2. Estimated Cost Impact to Community Providers Serving Individuals with I/DD Under Alternative Salary Exemption Thresholds

Upper Limit of:	Salary Exemption Threshold	Estimated Percent of Currently Exempt with Salaries Between $35,563 and Salary Exemption Threshold	First-Year Cost Impact, in Millions
20th Percentile	$42,735	16%	**$378**
25th Percentile	$46,675	23%	**$571**
30th Percentile	$50,615	30%	**$780**
35th Percentile	**$55,068**	**38%**	**$1,033**

Source: Avalere analysis of Notice of Proposed Rulemaking (NPRM), Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, as of September 8, 2023.

[12] U.S. Bureau of Labor Statistics. Research Series on Earnings of Non-Hourly Full-Time Workers from the Current Population Survey. Available Here. Labor force statistics on weekly earnings of non-hourly FTEs for the fourth quarter of 2017 were the most recent publicly available data.