November 7, 2023

SUBMITTED ELECTRONICALLY

Jessica Looman
Principal Deputy Administrator
Wage and Hour Division, U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Wage and Hour Division, Department of Labor Proposed Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (RIN 1235–AA39)

Dear Deputy Administrator Looman:

On behalf of our more than 5,000 members and partners, including mission-driven organizations representing the entire field of aging services, LeadingAge appreciates the opportunity to submit comments relating to the Wage and Hour Division's proposed rule defining and delimiting the overtime exemption for executive, administrative, professional (EAP) employees.

We agree that it is appropriate for the Department to update from time to time the minimum salary level that must be met for an employer to classify a given staff position as exempt from overtime. LeadingAge members are committed to their workforce and to providing competitive compensation and benefits, and deeply appreciate the critical role their employees play in serving and supporting clients, residents, and their broader communities. We are concerned, however, that the current proposal calls for an increase that is greater than many organizations will be able to absorb without significant impacts on their operations, given current financial challenges and the reliance of aging services providers on government funding. We also have concerns about the Department's proposal to update the salary threshold automatically without a notice and comment rulemaking process, and with the relatively short period the Department is proposing between publication of a final rule and the rule's effective date. We elaborate on these issues below, and we appreciate your consideration of our comments.

The cost of the proposed increase to the minimum salary level will be difficult for many organizations to absorb without significant impacts to their operations, and we ask the Department to consider a smaller increase.

The Department last updated the minimum salary level required for exemption on January 1, 2020. Under those current regulations, an employee meeting one of the standard EAP duties

tests must be paid a minimum salary of $684 per week or $35,568 annually; and a highly compensated employee (HCE) meeting a less stringent duties test must be paid $107,432.

The Department now proposes to increase these figures significantly: to $1,059 per week or $55,068 annually (a 55% increase) for the standard duties test, and to a total annual compensation figure of $143,988 (a 34% increase) for a highly compensated employee. These increases result largely from the Department's choosing to set the salary threshold level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region in the U.S., compared to the 20th percentile under the current regulations, and to set the HCE threshold at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally (compared to the 80th percentile currently). It is also important to note, as the Department indicates in the preamble of the proposed rule, that the $55,068 figure potentially will rise closer to $60,000, based on applying the proposed methodology application to the most recent wage data available at the time the rule is finalized. See 88 FR 62152, footnote 3.

For the reasons addressed below, we ask the Department to consider implementing a smaller increase that what it has proposed. For example, the U.S. Department of Labor's inflation calculator shows that a salary of $35,568 in January 2020 has the same buying power as $42,437 in September 2023, a lower figure than the $55,068 the Department is proposing. See http://www.bls.gov /data/inflation calculator.htm, accessed Nov. 3, 2023. We also believe an increase in the current HCE compensation level to $143,988 is likely greater than necessary to ensure that only appropriate employees qualify for exemption in the HCE category, and we ask the Department to consider a smaller increase, such as by maintaining the 80th percentile that applies under the current rule.

The Cost Impact is Significant: The primary reason for concern is the significant cost that employers will incur, whether they raise salaries to the new thresholds or reclassify employees as eligible for overtime. The Department estimates that, in year one of implementation, 3.4 million workers who meet the standard duties test and earn at least $684 per week but less than $1,059 per week would either become eligible for overtime or have their salary increased to at least $1,059 per week; and of that total, DOL estimates that approximately 600,000 employees working in the healthcare and social services sector – including aging services – would be affected. In addition to the direct costs, there would be regulatory adjustment costs, the cost of tracking hours for additional employees and related training, and revisions to personnel policies. The Department estimates that in year one, the proposed rule would impose $1.2 billion of direct costs on employers in aggregate, including regulatory familiarization costs, adjustment costs, and managerial costs.

Aging Services Providers Rely Significantly on Government Funding. Aging services providers are heavily dependent on public healthcare programs to reimburse them for the services they deliver, at rates established by a federal agency or by a state, depending on the program. Unfortunately, Medicaid funding is inadequate to cover the full cost of delivering care for many

services and in many states. And while Medicare rates are higher than Medicaid for skilled nursing facility services, the modest rate increases the Centers for Medicare and Medicaid Services (CMS) have established through rulemaking have not been sufficient to fully offset labor and non-labor costs that have risen significantly in recent years. Medicare payment rates for other services present challenges too, with home health care rates being subject to baseline cuts, for example, including under a payment rule CMS has just finalized for implantation in calendar year 2024.

Also, many LeadingAge members are rely heavily on Housing and Urban Development (HUD) funding for their low-income senior housing communities, and most of their communities face steep hurdles and time delays to securing budget-based rent increases that would enable them to raise salaries to the threshold required to maintain the EAP exemption for their management staff, and HUD's annual Operating Cost Adjustment Factor increases have averaged just 3 - 8% in recent years.

In summary, we believe the lack of adequate federal and state funding will present a significant limitation on many of our member organizations' ability to absorb the full financial impact of the proposed rule, especially when combined with other pending proposed regulatory changes that would raise operating costs, such as CMS's proposed minimum staffing standards for nursing homes.

Geographical Impact Varies. It is also important to note that wage variation throughout the country means the proposed rule will impact some areas more than others. For example, a salary of $55,000 may be more common as an entry-level professional salary in large metropolitan areas than in rural and other smaller population areas. Put another way, the cost of living is lower in some areas of the country than others, and wages along with it. The specter of a disproportionate impact on rural providers – which likely would have a greater salary gulf to bridge in order to meet the salary test in the proposed rule than their urban and metropolitan counterparts – is important to note, given that these providers serve communities where access to care is often limited compared to larger population areas.

Other Considerations: Providers that are not able to absorb the full increased labor cost of the proposed rule will be required to make challenging decisions. In some cases, a provider may have to reduce non-essential services and programming in some form, affecting the quality of life for those they serve, or, alternatively, choose to serve fewer individuals. Providers may also have to consider whether and to what extent they can pass some cost through to the individuals they serve by increasing fees (again, an option limited with respect to individuals whose services and supports are funded by government healthcare programs).

The proposed regulation may lead to other unintended outcomes, as well. For example, organizations may conclude that they have to reclassify some employees affected by the proposed rule to hourly, non-exempt status and establish limits on the number of hours that those employees will work. An unintended consequence in such a case may be that employees

who remain exempt would carry the burden of additional work, as a result of the management of overtime hours. Alternatively, as noted above, the organization may elect to reduce services or programming.

Also, reverting to non-exempt status may be a dissatisfier for some employees, for different types of reasons. Some individuals feel invested in being an exempt employee, as it reflects or conveys that they and their position have professional status, or that their employer values the leadership they provide. For these individuals, a reclassification to non-exempt status may negatively impact morale. Other exempt staff members, though sometimes called to work in excess of forty hours per week, may be afforded flexibility in scheduling or flexible time off – flexibility they appreciate but that may not be available in a non-exempt role. Still others may find the required tracking and recording of hours worked to be frustrating or may be uncomfortable with limitations resulting from re-classification that prevent them from wrapping up certain tasks on a given day in a manner they are comfortable with and prefer.

To conclude this section, we reiterate that while we appreciate the need to update the salary level periodically, we are concerned that the Department's proposed increase will be greater than many providers can absorb without significant impacts on their operations, and we ask the Department to consider a smaller increase.

The Department should maintain the current approach to updating the salary thresholds needed for overtime exemption.

The Department is also proposing to automatically update the standard salary level and the HCE total compensation requirement every three years, using the most using the most recent available four quarters of earnings data. Following an internal review of the data, the Department would simply publish a notice of the updated levels at least 150 days before those levels take effect. In our view, one of the hallmarks of our regulatory system is the public accountability and transparency that results from subjecting agency proposals to public analysis, assessment and comment. Automatic adjustment of the monetary threshold for the salary test would bypass this critical component of the regulatory process and impair the process of achieving a proper balance between employer and employee interests through public input. For these reasons, we urge the Department not to include an automatic adjustment of the salary test threshold.

The effective date of any final rule should to give employers sufficient time to conduct analysis and make the operational adjustments that the rule will require.

The Department is proposing for a final rule to become effective 60 days after publication – a period shorter than the effective dates for the 2004, 2016, and 2019 rules, which the Department notes were between approximately 90 and 180 days. A reasonable phase-in period is important, especially with a significant increase such as the Department proposes, in order to conduct analysis and make adjustments to operational budgets, personnel systems,

and policies. For example, formerly exempt employees will need detailed training regarding appropriate work practices for hourly staff, including the recording of time worked. As another example, many employees whose positions are reclassified may be used to working in a connected environment, even when away from the work site. Because time spent working away from the employer location, on things such as reviewing email or other tasks, in many cases will be compensable and relevant to the overtime calculation, employers will need to ensure that formerly exempt employees are not performing work in excess of internally established limits. Accordingly, we urge the Department to include a lead time of 180 days following publication of the final rule. We also request that the Department develop and make available to employers training materials and fact sheets to facilitate retraining of formerly exempt employees.

Conclusion

We appreciate the opportunity to submit comments and respectfully request that the Department consider our concerns before publishing a final rule. Thank you and please contact me (jlips@leadingage.org) if I can answer any questions or provide additional information.

Sincerely,

Jonathan Lips

Jonathan Lips,
Vice President, Legal Affairs