

## FAQs Regarding the Department of Labor Overtime Exemption Rule

### Introduction

On May 23, the United States Department of Labor (DOL) finalized a rule<sup>1</sup> that significantly impacts employers across industries. The rule raises the salary threshold below which all employees must be paid overtime. Additionally, it creates an auto-update mechanism to adjust the threshold at regular intervals. Concurrently with the rule, DOL issued a separate, non-binding document announcing a time-limited period of non-enforcement for certain providers of Medicaid-funded IDD services. This policy does not shield providers from private or state enforcement of wage and hour law, so organizations must independently assess their liability exposure.

This document is meant to serve as a high-level, quick reference summary of the rule's major provisions. **This document should not be construed or relied upon as legal advice on any specific facts or circumstances. Providers should consult an attorney familiar with wage and hour law at the federal, state, and local level to determine their obligations under the law in their jurisdiction.** ANCOR is currently working on a comprehensive summary and analysis of the rule, which will be available to members soon.

### Frequently Asked Questions (FAQs)

**Q) What employees are impacted by this rule?**

A) This rule covers specifically salaried “white collar” workers who are exempt under the executive, administrative, professional, and highly compensated employee exemptions within the Fair Labor Standards Act (FLSA)<sup>2</sup>. To be covered, these employees *must* be paid on a salary basis<sup>3</sup> (as opposed to hourly), be paid at least the minimum salary threshold, and perform exempt duties as defined through regulation. In many IDD provider agencies, the employees impacted are front-line supervisors and program coordinators who are exempt under the executive and/or professional exemptions. Direct support professionals, who are paid hourly and whose duties are not exempt, are not impacted.

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<sup>1</sup> United States Department of Labor, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” [81 Fed. Reg. 32391](#) (May 23, 2016)

<sup>2</sup> Outside sales employees are also exempt under the “white collar” provisions of the FLSA. However, the criteria for outside sales employee exemptions have not changed with this rule, so they are not included in this document.

<sup>3</sup> Outside sales employees and computer professionals do not need to be paid on a salary basis. These exemptions are not common in the IDD provider field.

**Q) What is the new threshold and how often will it change?**

A) The threshold has been raised to \$913/week (or \$47,476/year), which is based on the 40<sup>th</sup> percentile of full-time non-hourly salary data for the lowest Census region (currently the South).<sup>4</sup> The threshold will update automatically every three years, starting on January 1, 2020.

**Q) Has the definition of exempt duties changed?**

A) No. Although DOL considered making changes to the duties tests, it declined to do so. The current duties tests still apply.

**Q) What is the effective date of the rule?**

A) The effective date is December 1, 2016. This is more than six months, which is unusual for DOL, who had initially planned on a 60-day implementation period. The effective date is the same for everyone, regardless of the time-limited non-enforcement policy announced by DOL for Medicaid IDD providers.

**Q) What is in the time-limited non-enforcement policy? Who does it help?**

A) Accompanying the rule was a policy announcement which outlined a [time-limited non-enforcement policy](#) specific to Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. From December 1, 2016 to March 17, 2019, DOL will not enforce the new provisions of the FLSA for this group. The stated goal is to support states as they transition settings under the CMS HCBS rule. ANCOR has identified several questions that require additional guidance, including whether employees that work in other, non-covered sites would be covered by the policy.

As will be explained in the next question, the non-enforcement policy does not shield providers from all liability under the FLSA. It may, however, offer some protection to states from private litigation during the period it is in effect.

**Q) What does it mean that DOL will not conduct enforcement activities? Does this mean I do not need to comply with the rule until 2019?**

A) Employers are still subject to private enforcement of the FLSA as well as state law if not in compliance by the rule's effective date. The policy announced by DOL in conjunction with the rule is a non-binding internal policy of the Department. It may be expanded, contracted, revised, or revoked at any time without going through the rulemaking process. DOL enforcement activities include conducting investigations, supervising

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<sup>4</sup> The threshold for HCEs has also been adjusted, based on the 90<sup>th</sup> percentile of full-time non-hourly salary. It will be \$134,004/year as of the rule's effective date. Unlike the EAP threshold, this is based on national, rather than regional, data.

settlements, and filing lawsuits on behalf of workers who it believes have been subjected to FLSA violations.

Although DOL enforcement may be helpful in enforcing the FLSA, it is not necessary. The law contains a private right of action, which means that individuals may file a private lawsuit to enforce wage and hour law. Additionally, states may enforce state law, which in many states mirrors or even surpasses the FLSA. If you are not able to come into compliance with the new provisions of the rule by the effective date of December 1, 2016, we recommend you consult with an attorney familiar with wage and hour law in your jurisdiction to assess your organizational risk and determine the best strategy to come into compliance as quickly as possible.

**Q) What options do providers have for compliance absent additional funding being in place by December 1, 2016?**

- A) Providers, like other employers, will likely have to make some difficult decisions regarding how to manage overtime hours, salaries, and duty allocation between exempt and non-exempt employees. Some strategies to consider include:
- Restrict or eliminate overtime permitted
  - Convert currently exempt employees to hourly workers, and manage overtime worked to keep total compensation to a manageable level
  - Increase salaries to the new threshold where feasible
  - Hire additional full- or part-time workers

These options are not mutually exclusive, so you may combine several different strategies for compliance for different employees.

**Q) What is the impact of this rule on providers who offer shared living programs, including adult foster care and paid roommate arrangements, and who use independent contractors?**

- A) This rule likely does not impact the independent contractors who are providing the services under shared living or adult foster care arrangements, nor does it change the non-applicability of the FLSA to bona fide independent contractor arrangements. However, the provider who offers the shared living program and who contracts with these independent contractors may employ exempt managers overseeing the program who will need to be paid increased salaries to maintain their exemption or be reclassified as nonexempt employees. More information about shared living, adult foster care, and independent contractors may be found in the ANCOR analysis of the DOL Home Care rule.

**Q) What is the current status of the [Save Our Services \(S.O.S.\) Campaign](#)? Has legislation been introduced?**

A) Although we did not get the type of accommodation we had hoped for in the final rule, our work is far from done! The non-enforcement policy only for Medicaid IDD providers is an important acknowledgement of the unique position providers are in. No other group was singled out for any type of special accommodation, so it is clear that the S.O.S. campaign is working to get our message out!

We are using this momentum to keep carrying our message up on Capitol Hill, getting support for our proposed legislation for temporary additional funding. The legislation, tentatively titled “The Disability Community Act of 2016” has not been introduced, but we have several legislators interested in sponsoring or co-sponsoring it, and hope to have it introduced very soon. We will hold a targeted fly-in day in June, followed by a Hill day in September in conjunction with our Leadership Summit.

We also continue to have conversations with officials at the Department of Labor as well as the Centers for Medicare and Medicaid Services to discuss ways that each can assist providers in fully implementing the law while not disrupting the provision of services to the people we support.

**Q) Who can I contact if I have questions about the rule?**

A) ANCOR is committed to providing accurate, timely information to its members. We will continue to push out relevant updates to our members through our electronic newsletters, ANCOR Connected Community, and conference sessions. Members may contact ANCOR staff, including Katherine Berland, Director of Public Policy ([kberland@ancor.org](mailto:kberland@ancor.org)), directly with specific questions on the rule. Members may also contact Doris Parfaite-Claude, Government Relations Manager ([dparfaite-claude@ancor.org](mailto:dparfaite-claude@ancor.org)), for questions regarding grassroots organizing and Congressional outreach.