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ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO

U.S. HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON

**"EXAMINING THE COSTS AND CONSEQUENCES OF THE
ADMINISTRATION'S OVERTIME PROPOSAL"**

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Introduction

Chairman Walberg, Ranking Member Wilson and distinguished members of the Subcommittee, my name is Elizabeth Hays and I am the Director of Human Resources of MHY Family Services in Mars, Pennsylvania. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I've been a member for nearly twenty years. On behalf of more than 275,000 SHRM members in over 160 countries, I thank you for this opportunity to appear before the Subcommittee to discuss the recently proposed changes to the Fair Labor Standards Act (FLSA) overtime regulations and the potential impact on my organization and others.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of human resource (HR) professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

As the Director of Human Resources for MHY Family Services since 2007, I am responsible for overseeing all HR operational and regulatory areas including those associated with benefits administration, recruitment, employee relations, health and safety, and policy administration. I also serve as the chair of MHY's Health & Safety Committee, and I'm a member of the organization's Continuous Quality Improvement Steering Committee. In collaboration with other Leadership Team and staff members, I support training and development initiatives for all employees of MHY as a member of the Staff Development Committee.

MHY Family Services is a 501(c)(3) nonprofit organization serving youth by providing support and services that afford opportunities for a better life. Through its residential and community-based programming, MHY strives to meet the ever-changing needs of at-risk youth and their families through a holistic approach to treatment. MHY offers comprehensive residential, educational and community-based services responding to an array of hardships and traumas, including mental illness, behavioral issues, abuse and neglect. MHY has an overall budget of \$8.7 million, including approximately \$6.2 million from Medicaid, federal and state dollars with 81 percent of our overall budget going toward programming and delivery of services.

MHY Family Services employs 138 people, most of whom are full-time employees, including 64 exempt and 74 nonexempt employees. Most of our exempt employees—executives, managers and professionals—are currently paid less than \$50,000, and under the Administration's proposal would become eligible for overtime. As a nonprofit organization with limited flexibility in the budget, I have serious concerns about how I will cover potential overtime expenses while still aiming to provide high-quality services for the at-risk youth served by MHY.

Furthermore, if the FLSA's salary threshold is more than doubled, as proposed, exempt employees may lose their exempt status and return to nonexempt status. In their eyes, the exempt classification is seen as a promotion, providing a sense of "workplace status" and greater workplace flexibility to meet work/life needs. Our supervisors will view reclassification as a demotion, causing a decline in employee morale.

In my testimony, I will explain the Department of Labor's (DOL's) recent proposal to update the FLSA overtime regulations, discuss the specific impact of these changes on organizations like mine in the nonprofit sector, and share SHRM's early thoughts on the proposal.

The Fair Labor Standards Act

The FLSA has been a cornerstone of employment and labor law since 1938. The FLSA establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

Virtually all organizations are subject to the FLSA. A covered enterprise under the FLSA is any organization that “has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and has \$500,000 in annual gross volume of sales; or engaged in the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education.”¹

Additionally, many states, such as California, have their own laws pertaining to overtime pay. If a state’s law is more inclusive or more generous to the employee than federal law, the state law will apply. If, however, the state law is less inclusive, employers are required to follow federal law. The myriad federal and state laws create additional complexity when employers are working diligently to remain compliant.

The FLSA also provides exemptions from both the overtime pay and minimum wage provisions of the Act. Employers and HR professionals use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime pay provisions or the minimum wage provisions of the FLSA. Generally speaking, the classification of an employee as either exempt or nonexempt is determined by whether the employee is paid on a salary basis with a fixed rate of pay and by their duties and responsibilities.

Classification determinations must also be made by looking at each individual job position. Classification decisions for all positions are challenging as they are based on both objective criteria (salary basis level, salary basis test) and subjective criteria (duties test). As a result, an employer acting in good faith can easily mistakenly misclassify employees as exempt when they should be nonexempt, or vice versa.

FLSA Overtime Regulations

Regulations governing the FLSA have been revised by the Executive Branch numerous times. Since the FLSA’s passage in 1938, the salary threshold has been updated seven times, most recently in 2004. In 2004, the DOL attempted to simplify the overtime regulations for employers and employees by consolidating the long and short duties tests into a single “standard” test and raised the salary threshold. Specifically, under the current regulations, individuals must satisfy two criteria to qualify as a salaried worker exempt from federal overtime pay requirements: first, they must be paid on a salary basis (that is, the salary cannot fluctuate) of more than \$455/week (\$23,660 annually); and second, their “primary duty” must be consistent with those common to executive, professional or administrative positions as detailed in section 541 of the FLSA overtime regulations or one of the other statutorily defined exemptions. Employees who meet these criteria are considered exempt from the overtime requirements of the FLSA.

On March 13, 2014, President Barack Obama directed the DOL to “modernize and streamline” the FLSA overtime regulations. On June 30, 2015, the DOL announced proposed changes to the section 541 FLSA regulations governing overtime determination and coverage.

¹ 29 U.S.C. 203(s)(1)(A)

Under the proposal, the salary threshold would be set equal to the 40th percentile of earnings for full-time salaried employees—this is estimated to be \$970 per week in 2016. The proposal also raises the highly compensated salary to the 90th percentile of earnings for full-time salaried employees, or \$122,148 annually. For the first time, the DOL is proposing to include a mechanism to automatically update the salary threshold on an annual basis. The DOL is seeking input on whether to use a fixed percentage of wages, such as the 40th percentile of earnings, or to base the annual increase to the salary threshold on the Consumer Price Index for All Urban Consumers (CPI-U), which calculates inflation by measuring the average change over time in the prices paid by urban consumers. The DOL is also seeking comment on a proposed formula to include nondiscretionary bonuses to satisfy a portion of the standard salary requirement.

In its proposed regulations, the DOL did not suggest specific modifications to the section 541 FLSA duties test. The proposal does, however, raise a series of questions focused on what, if any, changes should be made to the duties test, including specific questions on minimum requirements for primary duties, whether California's 50 percent rule should be adopted nationwide, and whether concurrent duty rules or elimination of the long/short duties test should be reconsidered. The DOL also seeks input on what types of examples to provide in the final regulation to illustrate how the exemptions may apply to specific jobs.

The proposed rule was published in the *Federal Register* on July 6, and comments are due to the DOL by September 4, 2015. SHRM is requesting additional time in order to gather member input and provide comprehensive comments on the proposal. In the meantime, SHRM is making sure its members are well-briefed about the potential implications of the rule and on how they can best participate in the regulatory process in the coming months.

As an indication of the significance of this issue, SHRM recently held the most widely attended webinar in SHRM history with over 11,000 members registering to learn about the impact of the proposed rule on their organizations. In response to record-high involvement, SHRM has created a special section in its [HR Policy Action Center](#) dedicated to content and advocacy efforts surrounding changes to the overtime regulations.

In addition, SHRM chairs the Partnership to Protect Workplace Opportunity (PPWO), consisting of a diverse group of associations, businesses and other stakeholders representing employers with millions of employees across the country in almost every industry. The Partnership is the industry coalition that will be responding to the proposed overtime regulations. The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees and clarity for employers when classifying employees.

Overtime Regulations' Impact on Nonprofit Sector

Most nonprofit enterprises and their employees are covered under the FLSA because coverage under the law may be triggered either by individual coverage or enterprise coverage. According to a 2004 DOL opinion letter, there is no exclusion in the FLSA for private nonprofit organizations. Employees of nonprofit organizations are individually covered under the FLSA if, in the performance of their duties, they are engaged in interstate commerce or in the production of goods or materials for interstate commerce. In determining whether employees are engaged in interstate commerce for purposes of the FLSA, "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943). In other words, if nonprofit employees are involved in fundraising, taking credit card numbers, receiving

out-of-state checks or making telephone calls, they could be deemed as utilizing the channels of interstate commerce.

As a nonprofit organization, it is not uncommon for most of MHY's exempt employees, as executives, managers and professionals, to work more than a 40-hour workweek. Due to the nature of our programming and operations, it is common for the majority of these individuals to work 10- and 12-hour days, at times, in response to clients in crisis. This is not unique to MHY but is the reality for many nonprofit organizations across the country. Many nonprofit employees are highly experienced, possess bachelor's and master's degrees, and hold professional certifications aligned with their respective fields. In terms of the proposal's impact on MHY Family Services, consider the following:

Impact of Proposed Salary Threshold: As a result of this proposed rule, I estimate that 48 out of 64 exempt employees who directly or in a supervisory capacity support client care will be affected by the new salary threshold of \$50,440. The employees in question at MHY work as operations specialists, senior therapists, front-line supervisors, program managers and assistant directors. These employees work varied schedules to provide client services (including admissions) and programming, individual and family therapy, supervisory oversight, and crisis support to direct-care employees. Based on their job duties, these employees clearly meet the duties test standard under the current FLSA overtime regulations.

MHY Family Services works hard to reward these employees with the flexibility to work a lighter schedule some days to make up for the long hours that are sometimes needed when providing therapeutic services to our clients. As is the case at many organizations, nonprofits often have a fairly flat organizational structure. As a result, exempt employees in nonprofit organizations often engage in work activities along with nonexempt employees. This happens at MHY, for example, so that we can meet the needs of our youth.

Raising the exempt salary threshold under the new FLSA regulations to \$50,440 literally presents the risk of MHY closing its doors. Given our nonprofit status and tight costs, we are unable to provide pay increases and hire additional employees. I estimate that these changes could result in additional costs of \$797,371.38 a year—more than three-quarters of a million dollars of additional unfunded costs on an \$8.7 million budget. This assigns to MHY a 9.1 percent unfunded increase to our current budget.

Given our reliance on federal, state and local funding, MHY's service programs are not expected to receive any significant increases at this time. Unfortunately, the youth that we serve present increasingly chronic and complex mental health and trauma issues, while demands on MHY and programming expectations from stakeholders have increased exponentially. We are forced to do more with less.

Impact on Populations We Serve: At MHY, we prioritize a continuity of care model that ensures that the at-risk youth population receives services and care from the same therapists and supervisors. Consistent with best practices, developing a relationship between the youth and practitioners maximizes the opportunity for healing and effective treatment.

Therapeutic services are driven by the relationships that professionals have with the youth and families to which they are assigned. Months and sometimes years go into building that trust and bond, and this can't be replicated by swapping in another professional to avoid exceeding 40 hours on the part of the primary professional. Such measures are contrary to generally accepted effective practices in therapy and also to the expectations of our stakeholders (families, counties, insurers). Under this overtime proposal, continuity of care would be undermined by limiting the ability of therapists to effectively respond to clients' clinical needs, as well as their school and work schedules.

Furthermore, currently many exempt employees are available during non-traditional hours and overnight on a regular basis to provide crisis services or supervisory response to crisis as needed. In our residential setting, managers commonly work longer hours and shift their schedules to ensure their presence during anticipated difficult admissions and discharges or, again, if client behaviors are elevated and unsafe, in order to provide direction and support to staff members. They maintain on-call rotations during which they provide remote supervisory direction and problem solving, in separate specialized units that differ based on their clients and programming. Limiting managers' availability to their units risks jeopardizing client care and staff safety and violates state regulation. If the overtime regulations were to be implemented as proposed, MHY would likely have to decrease services because, as noted earlier, we would not be able to afford the additional overtime pay. In addition, MHY would be forced to reduce our client base and unfortunately underserve our county and family stakeholders.

Impact on Employees: If the proposed overtime rules become final, nonprofit organizations like MHY will also be forced to make difficult decisions to potentially reduce employee benefits. Pay in nonprofits, including at MHY, trends lower than in the for-profit sector. To offset the costs and to attract and retain talent, MHY tries to maintain an attractive benefits structure. Diminishing or eliminating benefits, and thereby diminishing total compensation, would only add to the significant challenges of recruitment and retention already faced by this industry. Turnover only places greater demands on managers, who spend additional time coordinating staffing, delivery of services and crisis support, resulting in longer workweeks.

As is the case for many employers, a majority of MHY employees mention the importance of workplace flexibility when deciding whether or not to take a new job with us. Changes to the overtime regulations will likely require employers to reclassify a significant number of salaried employees to hourly employees. Hourly employees are paid only for the hours they work and often are forced to closely track their hours to ensure compliance with federal and state overtime requirements, which can lead to less flexibility.

At MHY, our Residential Program Managers are provided with workplace flexibility options. For example, a manager who may work a long shift or report to campus due to a client crisis can then use flextime to attend a child's soccer game or go to a doctor's appointment. Our exempt workforce has the ability to leave early on calmer workdays or take a Friday off to offset long work hours on other days. Offering these flexibility options to our employees is an additional benefit that would be lost if we are forced to reclassify our current exempt workforce to hourly status.

SHRM's Initial Analysis of the Overtime Regulations

While SHRM continues to carefully review the proposed rule to determine its full impact, the Society has the following initial concerns:

First, SHRM appreciates the Administration's interest in modernizing the FLSA overtime regulations and updating the salary threshold. SHRM agrees that an appropriate salary threshold increase is warranted. However, more than doubling the salary threshold to the 40th percentile of weekly earnings (an estimated \$50,440/year in 2016) presents challenges for employers whose salaries tend to be lower. This includes employers in certain industries; nonprofits such as MHY Family Services; and employers in certain geographic areas of the country.

DOL claims a significant increase to the salary threshold is needed in exchange for not reinstating the more detailed long duties test.

SHRM agrees that the DOL should not reinstate the outdated, more detailed long duties test which would lead to further complications for employers and employees. However, the DOL's dramatic increase to the 40th percentile sharply contrasts with previous increases to the salary threshold. In 1958, 1963 and 1970, the DOL set the salary threshold to exclude approximately the lowest paid 10 percent of exempt salaried employees in low-wage regions, taking into account employment size groups, city size and industry sectors. In 2004, the DOL set the required salary threshold at approximately the 20th percentile of salaried employees in the south region and in the retail industry.

This regulatory history reflects both Democratic and Republican administrations increasing the salary level between 10 and 20 percent of affected employees while taking into consideration regional and industry differences. SHRM is concerned that the recent proposed increase to the 40th percentile sharply contrasts with historical updates to the salary threshold that represented more reasonable increases that acknowledged pay differences across sectors and in certain areas with lower costs of living.

Second, SHRM notes that, for the first time, the DOL is proposing to include a mechanism to automatically update the salary threshold on an annual basis. As noted earlier, the DOL is seeking input on whether to use a fixed percentage of wages, such as the 40th percentile of earnings, or to base the annual increase to the salary threshold on the CPI-U, a measure that calculates inflation by measuring the average change over time in the prices paid by urban consumers. A robust analysis will be needed to understand the potential for salary compression (when the pay of one or more employees is extremely close to the pay of more-experienced employees in the same job or when employees in lower-level jobs are paid nearly the same as employees in higher-level jobs) and how the proposal would impact employers' compensation decisions around merit increases.

As with any employment policy, one size does not fit all. Average salary increases look very different across industries, sectors and regions. The proposed indexing model would likely present administrative challenges to employers who would need to update exemptions yearly, leading to increased legal and compliance costs. Furthermore, the automatic wage adjustments will have numerous ripple effects for HR policies, likely impacting workers' compensation, payroll taxes and employee benefits.

Third, SHRM is concerned that the DOL may still make changes to the duties test that would further exacerbate an already complicated set of regulations for employers, particularly employers in industries where managers often conduct exempt and nonexempt work concurrently. Further changes to the primary duty test, including a required quantification of exempt time or the elimination of managers' ability to perform both exempt and nonexempt work concurrently, would create challenges for employers and employees.

Today's modern workplace often means a flatter organizational structure, with fewer staff in support roles and many employees performing a combination of exempt and nonexempt work. Nonprofits, in particular, often employ a workforce that must pitch in and work at the front desk, answer client phone calls and check in on clients. If overtime regulations eliminate the ability of an employee to perform concurrent duties and maintain their exempt status, many organizations would need to be restructured in ways that diminish the services being provided. The DOL's questions about the duties test in the proposed rule suggests a potential interest in changes. But, by not proposing specific changes to the duties test the DOL places employers and employees in a very uncertain waiting period. Should the DOL ultimately suggest changes to the duties test, SHRM believes a full comment period would be warranted.

Fourth, SHRM cautions that the proposed changes to expand overtime *eligibility* will not necessarily result in a windfall of overtime income for newly classified nonexempt employees. Employers across all sectors monitor labor costs closely and will likely cap or eliminate access to overtime work or will adjust salaries to make sure that an employee's total wages remain the same even if that employee's overtime hours increase.

If the overtime changes are implemented as proposed, some employers may hire more part-time workers who usually enjoy fewer workplace benefits. Furthermore, some employers will look to identify ways to reduce labor costs, such as automating service-sector jobs. From store kiosks to online and mobile ordering, it's hard to ignore the impact of technology on service-sector jobs. Many well-known restaurants and retailers are starting to replace cashiers and service staff with electronic devices such as iPads to expedite the ordering process for customers. Automation of entry-level jobs is likely to increase as federal and state laws and regulations make it more expensive to conduct business.

Finally, SHRM believes the proposed changes to the overtime regulations will limit workplace flexibility. If the salary threshold is doubled, many employees will lose their exempt status and the workplace flexibility it affords. Employers will need to closely monitor hours to avoid potential lawsuits and carefully track employee time. Greater workplace flexibility allows employees to meet work/life needs and benefits the employer through greater employee retention and engagement.

Conclusion

In conclusion, Mr. Chairman, MHY, other nonprofits, and employers across the country are concerned with these proposed changes to the overtime rules. As I noted earlier, more than doubling the salary threshold will significantly impact my organization, our employees, and the youth and families we serve.

It is important to note that when the overtime regulations were last updated in 2004, many SHRM members reported reclassifying exempt employees to nonexempt status, resulting in lower employee morale, a sense of loss of "workplace status," and increased distrust between employers and employees. SHRM and its members are concerned that the recent proposed changes to the overtime rules will have the same result.

While SHRM appreciates the need to update the salary threshold over time, challenges arise if the increase is too high, is implemented too quickly, or fails to consider geographic and industry differences. SHRM would also caution against making any changes to the primary duty test that would include a quantification of exempt time or eliminate the ability to engage in exempt and nonexempt work concurrently.

SHRM and its members, who are located in every congressional district, are committed to working with policymakers to ensure that any proposed changes to the FLSA regulations work for both employers and employees.

Thank you, I welcome your questions.

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