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**ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

**SUBMITTED TO
U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE**

**HEARING ON
“THE ADMINISTRATION’S OVERTIME RULE AND ITS CONSEQUENCES
FOR WORKERS, STUDENTS, NONPROFITS, AND SMALL BUSINESSES”**

JUNE 9, 2016

Introduction

Chairman Kline, Ranking Member Scott, my name is Tina Sharby, and I am the Chief Human Resources Officer for Easter Seals NH, Inc. (Easter Seals NH). I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I have been a member for eleven years. On behalf of our 285,000 members in more than 165 countries, I thank you for this opportunity to appear before the Committee to discuss how changes to the Fair Labor Standards Act (FLSA) overtime regulations impact nonprofits like mine, our employees and the communities we serve.

SHRM is the world's largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Easter Seals NH, Inc. is the parent organization to Easter Seals Rhode Island, Easter Seals Maine, and Easter Seals Vermont, and has over 100 locations throughout the four states with over 90 locations in New Hampshire alone. In 2015, we assisted 16,000 individuals and provided over \$6,000,000 in free and subsidized services to our communities. Our centers provide camp and recreation activities, family-centered early supports and services, and military and veterans' services. My organization, Easter Seals NH, employs 1,822 staff members, including 511 exempt employees and 1,311 nonexempt employees.

Working at a nonprofit organization with limited flexibility in the budget, I have serious concerns about how I will cover potential overtime expenses under the Department of Labor's (DOL) final overtime rule, while still aiming to provide high-quality services for the populations served by Easter Seals NH.

Doubling the salary threshold, as proposed by DOL, will force many currently exempt employees to 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 DOL's final overtime regulations, discuss the specific impact on organizations like mine in the nonprofit sector, and express SHRM's concerns that DOL missed a real opportunity to create a final overtime rule that works for both employees and employers.

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. In some instances, a state’s law is more inclusive or more generous to the employee than federal law. If, however, the state law is less inclusive, employers are required to follow federal law. In yet other states, the overlapping requirements mean that both the state and federal laws interact to determine coverage under the wage and hour laws. The myriad federal and state laws create additional complexity as employers carefully navigate employment policies in the workplace.

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 and actual activities. 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, 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, an individual must satisfy two criteria to qualify as a salaried worker exempt from federal overtime pay requirements: first, he or she must be paid on a salary basis (that is, the salary cannot fluctuate) of more than \$455 per week (\$23,660 annually); and second, his or her “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 DOL to “modernize and streamline” the FLSA overtime regulations. On June 30, 2015, DOL announced proposed changes to the section 541 FLSA regulations governing overtime determination and coverage. Then, on May 18, 2016, DOL released its final regulations making changes to the overtime exemptions. Key provisions of DOL’s final overtime rule include:

- Increasing the salary threshold by more than 100 percent to \$913 per week, or \$47,476 per year. While this level is slightly lower than the threshold in the proposed rule, it still encompasses many employees who are currently classified as exempt.

¹ 29 U.S.C. 203(s)(1)(A)

- Increasing the total annual compensation level for most white-collar workers to be ineligible for overtime pay to the 90th percentile of full-time salaried workers nationally, or \$134,004 a year.
- Including automatic salary threshold increases every three years to maintain the salary threshold level at the 40th percentile in the lowest-wage census regions. Based on current projections, the salary threshold is expected to rise to more than \$51,000 per year, with its first update on January 1, 2020.
- Requiring an effective date of December 1, 2016.

During the rulemaking process, SHRM was a strong voice for the workplace, supporting an update to the salary threshold using the same guidelines DOL has used in past salary threshold updates. As indicated above, DOL set the salary threshold, under which employees are eligible for overtime, at the 40th percentile of the lowest-wage census district — twice as high as it has been measured in the past. In addition, the final rule includes an automatic increase to the threshold at the 40th percentile, increasing the salary threshold every three years, starting in January 2020. In that year, DOL estimates the new 40th percentile will be \$51,168 — a number that will grow with each automatic adjustment. The doubling of the salary threshold presents unique challenges to nonprofits like Easter Seals NH where salaries tend to be lower.

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 result of the overtime rule, many nonprofit organizations across the country, including Easter Seals NH, will see an impact on employees, services provided, and the organization at large. The details of these concerns are below.

Impact on Services Provided. The rule will directly impact budgets and operations of nonprofits such as mine, as well as colleges and universities, small businesses and local governments. These employers will be unable to absorb such a massive increase in payroll and labor costs. Most of Easter Seals NH’s services are indirectly or directly funded through Medicare, Medicaid and other state and federal funding sources. As a nonprofit, Easter Seals NH is unable to raise prices on products or services to clients to cover these added overtime costs. Instead, the organization will have to reduce services and care for clients, mostly individuals with disabilities — already a vulnerable and underserved population in our country.

A program at significant risk is the Military and Veterans Services Care Coordination services program. Services are provided around the clock to respond to emergency situations for our

veterans and their families. Since the program's inception seven years ago, Easter Seals NH responded to over 100 incidents by providing quality services and care, significantly reducing the risk of suicide. Under the final overtime rule, reclassified hourly staff will now have to punch in and out and account for every hour worked. Because of the potential cost for overtime, Easter Seals NH will be forced to limit the number of coverage hours for this already underfunded program, limiting our ability to provide around-the-clock care and lessening these lifesaving support services.

Another program that will be affected is the Special Education School which provides services to over 80 children. Many of the children with disabilities served by Easter Seals NH are cared for 24 hours a day, 7 days a week and often do not have strong family support who can attend important life events. Currently, employees spend time covering events like birthday parties and graduations to offer support and build the self-confidence of the children we serve. The new overtime rules will force us to reconsider staff attendance at such important events for the children, as we will likely need to limit staffing to stay within the budget for overtime. Easter Seals NH simply cannot afford to pay overtime and the children with disabilities that we serve are the ones who will suffer the most.

Also consider the role of our care coordinators who are salaried employees who respond to care needs at any time, day or night — whenever a service member, veteran or family member needs help. These care coordinators make an average of \$43,000, below the final rule's salary threshold but they clearly conduct exempt tasks such as supervising services, overseeing the planning of client care, and directing service coordination. If these care coordinators are reclassified as nonexempt, they will no longer be able to provide these critically needed services around the clock to our community. Further, Easter Seals NH will be less likely to retain these care coordinators, who currently enjoy flexible schedules to meet work/life needs, where they can balance a late night with an afternoon off.

To make things worse, the underserved and often forgotten segment of society will receive fewer services and lower quality care. Unfortunately, it will be challenging for these critical services to be picked up by other agencies as other service-oriented organizations are faced with similar financial challenges under the final rule.

Impact on Employees. In response to the final rule and an increase in the salary threshold, Easter Seals NH will need to reclassify 280 employees from salaried to nonexempt status, resulting in the implementation of a "cap" on overtime work, limiting career opportunities and reducing flexible work schedules that both attract our staff and enable us to provide certain services.

The final rule will impact employees on a personal level. Faced with the reality of Easter Seals NH having to reclassify many employees from exempt to nonexempt, many staff members have expressed feelings of being "demoted" and not being viewed as a part of the professional segment of the organization. Employees have voiced concerns that they will be unable to assist with special events due to overtime restrictions, and fear that upward mobility will be impacted as "stretch" projects will not be assigned as regularly. For example, attending an Easter Seals fundraiser or pitching in to help a client can require working more than 40 hours in a week, and these tasks are often performed by employees trying to advance their careers and demonstrate leadership capabilities. If these employees are now classified as nonexempt employees, Easter Seals NH will be forced to closely monitor hours and may deny the requests of employees to work certain events if they will result in the nonexempt employees working overtime.

Furthermore, the final rule will lessen the workplace flexibility provided to our currently exempt care coordinators. During times of crisis, these coordinators often work over 40 hours a week to provide emergency client care. When the schedule returns to normal, these exempt employees are allowed to flex their time (also known as a flextime arrangement) where they can start and end the work day at different times to manage work/life needs. As professional, exempt employees they are in charge of their own schedule and caseload. Once the job is done, they are allowed to flex that time and leave early for a doctor's appointment or attend a child's soccer game. Because of the rule, these employees will now be reclassified to nonexempt and will be forced to closely track every minute in a workweek.

It is important to understand that pay in nonprofits, including at Easter Seals NH, trends lower than in the for-profit sector. Employees are drawn to the nonprofit sector to make a difference in someone's life and support the underlying mission. Employees often go above the call of duty to serve the community and provide the highest level of quality care for the neediest populations. To attract and retain talent, Easter Seals tries to maintain a competitive and attractive benefits structure. Reducing workplace flexibility or eliminating benefits, and thereby diminishing total compensation, would only add to the significant challenges of recruitment and retention already faced by this industry.

The final rule's automatic increases to the salary threshold will also have a negative impact on the performance system. Currently, Easter Seals NH conducts an annual performance and salary review with merit increases based on performance and the financial soundness of the organization. The rule will require exempt staff to receive mandatory pay increases in order to stay above the increasing threshold, resulting in less funding available for merit increases for nonexempt employees and less funding to serve our community's needs. Merit raises should be based on the success of my employees and organization, not by a salary threshold that increases at a level determined by DOL.

Cost to the Organization. The final overtime rule will cost Easter Seals NH approximately \$265,000 to raise certain exempt employees' salaries above the new salary threshold. We have also budgeted \$162,400 annually for estimated overtime and on-call costs. In other words, in the first year alone, this overtime rule will cost Easter Seals NH \$427,000.

Importantly, the consequences of the rule are not just financial. Easter Seals will be forced to tightly monitor hours worked, resulting in less flexibility in how programs and services are structured. While some organizations in other states may mitigate the overtime rule by hiring more part-time employees to maintain services, this is not a workable solution in New Hampshire with a low unemployment rate of 2.6 percent. It is nearly impossible to find employees seeking employment; Easter Seals NH currently has over 150 vacancies.

In order to function as a nonprofit, Easter Seals NH relies heavily on the ability to raise funds in order to continue to provide free and subsidized services to our communities. Dedicated employees often attend these fundraising events to show support for the organization and the people we serve. Many of these employees will now be reclassified to nonexempt status which will lessen their ability to attend these events. As a result, Easter Seals NH will be less successful in raising funds with fewer staff available to manage the events. Just last week, Easter Seals NH organized a Run/Walk race with a record number of 2,500 participants, raising \$200,000 for the organization. In order to make the event a success, over 100 employees prepared for the event in addition to attending to their regular duties. Under the new overtime rule, many of these employees will be unavailable to assist in ensuring our fundraisers are a success.

Furthermore, many nonprofits operate in multiple states. Easter Seals NH, for example, has locations in three other states, each with a different cost of living. The final rule ignores these economic differences. Due to these regional differences, I will need to decide if a certain position in one region of the country should be classified as exempt while the exact same job and title in another region remains nonexempt.

SHRM's Reaction to the Final Overtime Regulations

After receiving over 270,000 comments to its proposed overtime rule, the Administration failed to make any substantive changes to the main elements in the final rule. Although DOL responded to some of our comments, SHRM is disappointed in the dramatic increase in the salary under which employees are eligible for overtime and the automatic increases in the salary level. Unfortunately, DOL missed a real opportunity in finalizing the overtime rule.

While SHRM supports an update to the salary threshold, a 100 percent increase to the salary threshold in the first year is too high and too fast. The drastic increase will present challenges for employers whose salaries tend to be lower, such as small employers, nonprofits, employers in certain industries and employers in lower cost-of-living areas. Of equal concern, SHRM opposes automatic increases to the salary threshold, which have been considered and rejected in the past. Automatic increases ignore economic variations of industry and location and the overall state of the economy.

The salary threshold — although slightly less than originally proposed — will mean many employees will lose the professional exempt status that they have worked hard for and the flexibility from rigid schedules that they care deeply about. While changes in regulations were meant to benefit employees, a change of this magnitude will do the opposite in many instances. There likely will be fewer opportunities for overtime pay as employers are forced to restructure their compensation and staffing.

Throughout the rulemaking process, SHRM cautioned 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. Since the release of the final overtime rule, many of our members have indicated that they will indeed take these steps. As mentioned previously, Easter Seals NH is already planning to institute restrictions on overtime, leading to diminished services for veterans and youth with disabilities.

SHRM also believes the changes to the overtime regulations will limit workplace flexibility in some instances and impact certain flexible options such as telecommuting and flextime. Workplace flexibility allows employees to meet work/life needs and benefits the employer through greater employee retention and engagement. Doubling the salary threshold will mean many employees will lose their exempt status and the workplace flexibility it affords. Employers will be forced to closely monitor hours to avoid potential lawsuits and carefully track employee time. Simply put, it is challenging to offer nonexempt employees flexible workplace arrangements because every hour over 40 must be tracked and accounted for. Even though the Administration has repeatedly stated that workplace flexibility will not be reduced, the consequences of the rule are clear — newly nonexempt employees will see diminished flexibility in the workplace.

The Partnership to Protect Workplace Opportunity (PPWO), a diverse group of associations, businesses, and other stakeholders representing employers with millions of employees across the country, has expressed similar concerns with changes to the overtime regulations. The PPWO, co-chaired by SHRM, is made up of 85 associations including private, public, and nonprofit sectors and represents nearly every industry. The Partnership continues to advocate for a regulation that is considerate of all stakeholder and economic realities facing employers and employees, and has urged Congress to support H.R. 4773, the Protecting Workplace Advancement and Opportunity Act.

Given these collective concerns with the current DOL overtime rule, SHRM appreciates the leadership of Representatives Walberg and Kline in introducing H.R. 4773, to nullify the current overtime proposal. This reasonable legislation does not prevent DOL from moving forward with changes to the overtime regulations. It simply requires DOL to perform an economic analysis of how changes to overtime regulations will impact nonprofits, small businesses, and employers in other industry sectors before issuing a new rule. The bill would also prohibit automatic increases to the salary threshold while ensuring that any proposed changes to the duties test receive proper scrutiny through the formal notice and comment process. SHRM strongly supports this legislation and recommends its swift passage.

Conclusion

In conclusion, Mr. Chairman, Easter Seals NH, other nonprofits, and employers across the country are concerned with the final overtime rule. As I noted earlier, more than doubling the salary threshold will significantly impact my organization, our employees and the people we serve.

It is important to note that when the overtime regulations were last updated in 2004, a majority of 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 these changes to the overtime rule will have the same result.

While SHRM supports an update to 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 and its members look forward to working with Congress to improve the overtime rule in a way that works for both employers and employees.

Thank you. I welcome your questions.

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