

October \_\_, 2023

The Honorable Julie Su  
Acting Secretary  
United States Department of Labor  
200 Constitution Ave NW  
Washington, DC 20210

Shalanda Young  
Director  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Ms. Amy DeBisschop  
Director of the Division of Regulations,  
Legislation and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue NW  
Washington, DC 20210

Mr. Andrew Reisig  
Mr. Steven Mackey  
Office of Federal Financial  
Management  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

**Re: Joint Comments to Proposed Rules**

**DOL:** Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, WHD-2023-0001-0001; (RIN) 1235-AA39

**OMB:** Guidance for Grants and Agreements, OMB-2023-0017

Dear Secretary Su, Director Young, Ms. DeBisschop, and Messrs. Reisig and Mackey:

The U.S. Department of Labor and the Office of Management and Budget are simultaneously conducting significant rulemaking that could profoundly impact the work of charitable nonprofits, including those of the undersigned organizations. We take this unusual action of submitting these Joint Comments on two distinct proposed rules from separate federal government departments because the potential challenges and solutions are so interconnected.

The undersigned organizations submit these Joint Comments regarding the above-captioned proposed rules to alert the Department of Labor and Office of Management and Budget to this unique challenge:

*Any changes to the regulations governing overtime will impact tens of thousands of charitable nonprofits with written agreements to perform services on behalf of*

governments. When the federal government changes overtime rules, for-profit businesses with government contracts automatically receive the opportunity to reopen their written agreements to seek more reimbursements to cover the resulting increased costs. Charitable nonprofits do not. This disparity means nonprofits must incur unplanned and non-reimbursable additional costs, forcing them to decide between eliminating jobs or services to the public. We seek commensurate relief for nonprofits operating under grants governed by the OMB Uniform Guidance,<sup>1</sup> the subject of the current rulemaking (OMB-2023-0017).

Many of our organizations, local affiliates, and members will submit separate comments expressing their views on the wide range of issues raised by the proposed overtime and grants reform rules. By filing this set of Joint Comments as part of both rulemakings, we seek to elevate this severe issue for your attention and resolution.

### **Unique Problems Presented**

Since DOL overtime rulemaking commenced in 2015, charitable nonprofits with government grants and contracts have expressed concerns that increased labor costs resulting from new regulations, without commensurate increased reimbursement rates, will impose considerable burdens on their ability to fulfill grant obligations and missions.<sup>2</sup> On many occasions, nonprofits with government grants and contracts reported that they would be put in the position of having to comply with new federal requirements imposing significant new labor costs that were not known when those grants and contracts were signed, thus binding them contractually to provide the same amount and level of services at increased costs that are not expressly covered by existing written agreements.

Charitable organizations are evaluating the Overtime Proposed Rule at a time when the sector is experiencing a profound workforce shortage. According to recent data, nearly three out of four nonprofits (74.6%) completing a nationwide survey reported job vacancies.<sup>3</sup> More than half of nonprofits (51.7%) reported they have more vacancies now than before the COVID-19 pandemic. Nearly three out of ten (28.1%) have longer waiting lists for services.

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<sup>1</sup> [Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards](#), 2 C.F.R. Part 200.

<sup>2</sup> See, e.g., [The Nonprofit Compliance Conundrum](#), National Council of Nonprofits, June 2016.

<sup>3</sup> [2023 Nonprofit Workforce Survey Results: Communities Suffer as the Nonprofit Workforce Shortage Crisis Continues](#), National Council of Nonprofits, August 2023; results based on responses of more than 1,600 organizations from all 50 states and the District of Columbia.

It is notable that 20.6% of the survey respondents pointed to problems related to government grants and contracts as being responsible for creating or exacerbating the nonprofit workforce shortage crisis by making it difficult for nonprofits to retain and recruit staff.

Perhaps the most common grievance of charitable nonprofits working under written agreements with governments is that governments – which cover the costs, plus pay profits to for-profit entities – regularly fail to cover the costs nonprofits incur, whether those costs are called indirect costs, overhead, administrative costs, or true costs. This pre-existing challenge of rigid reimbursement rates in government agreements has contributed to the current workforce shortage crisis; imposing new costs without commensurate increases to reimbursements will exponentially aggravate what is already a crisis in delivering services to people in need throughout the country.

New solutions must be found to ensure that nonprofits are not put in the position of complying with irreconcilable realities: meeting service delivery requirements in existing grant/contract terms AND complying with higher labor costs imposed by a new federal overtime rule.

## Discussion

The current rulemakings by the Labor Department and the Office of Management and Budget create the opportunity to correct an existing inequity in contracting and grantmaking law and practices. Federal contractors performing service contracts are entitled to "labor standards adjustments" due to increased direct labor costs.<sup>4</sup> The Federal Acquisition Regulations (FAR) prescribe specific contract language that must be included in federal contracts: "The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits to the extent that these increases or decreases are made to comply with ... an amendment to the Fair Labor Standards Act of 1938 that is enacted subsequent to award of this contract, affects the minimum wage, and becomes applicable to this contract under law."<sup>5</sup>

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<sup>4</sup> See [FAR 52.222-43](#), Fair Labor Standards Act and Service Contract Act – Price Adjustments (Multiple Year and 23-2 Option Contracts); [FAR 52.222-44](#), Fair Labor Standards Act and Service Contract Act – Price Adjustments." See also, Chapter 23, "Pricing of Contract Adjustments," [Contract Attorneys Deskbook 2023](#), from the Judge Advocate General's Legal Center and School Contract & Fiscal Law Department.

<sup>5</sup> [FAR 52.222-44](#).

Further guidance is provided by the regulations implementing Executive Order 14026 relating to minimum wages, which mandates, "The Contractor shall adjust the minimum wage paid, if necessary, beginning January 1, 2023, and annually thereafter, to meet the applicable annual E.O. minimum wage...."<sup>6</sup> Importantly, the regulation, at subsection (3)(i), states, "The Contractor may request a price adjustment."

These provisions protect government for-profit contractors from government-mandated labor cost increases. As a result, the provisions ensure that businesses are not forced to subsidize government by having to provide up-paid-for services. Government grants to nonprofits, however, are governed not by the FAR but by the Uniform Guidance of the Office of Management and Budget.<sup>7</sup> The Uniform Guidance does not include a provision for securing "labor standards adjustments" or "equitable adjustments," thus leaving nonprofits unprotected from cost increases. To our knowledge, this lack of equivalent protection was not by design or intention but most likely an omission that now has serious consequences.

The FAR provisions quoted above support the proposition that organizations providing services on behalf of governments should be made whole when a government mandates increased labor costs. We raise them here by analogy, recognizing that a minimum wage or prevailing wage increase is a more straightforward calculation than compliance with a new overtime rule. Any solution presumably would include requiring nonprofits with government grants or contracts to demonstrate that the increased costs were the result of any changes to the overtime rules. This demonstration is neither complex nor administratively burdensome. Indeed, OMB and cognizant federal agencies are already required to engage in similar discussions leading to a nonprofit's Negotiated Indirect Cost Rate Agreements (NICRA).<sup>8</sup>

## **Recommendation**

As part of rulemakings related to the "white-collar" exemptions and to reforms to the OMB Uniform Guidance, the federal government must create a mechanism through which nonprofits with government grants and contracts can seek adjustments to cover unanticipated increased costs. Potential mechanisms include:

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<sup>6</sup> FAR 52.222-55.

<sup>7</sup> 2 C.F.R. Part 200.

<sup>8</sup> See, e.g., "A Guide to Indirect Cost Rate Determination - Applicable to Nonprofit and Commercial Organizations," U.S. Department of Labor.

- Make technical corrections to the Uniform Guidance to include rights and procedures similar to those in FAR 52.222-44 and FAR 52.222-55.
- An Executive Order extending the Federal Acquisition Regulations process (found in FAR 52.222-44 and FAR 52.222-55) for "labor standard adjustment" to the Office of Management and Budget Uniform Guidance, with appropriate safeguards that enable nonprofits to demonstrate that any adjustment sought for increased labor costs is directly related to the Overtime Final Rule and subsequent changes in law.
- Publication in the Federal Register of a policy statement from the Office of Management and Budget that recipients of federal grants and subgrants (including those passing through state, tribal, and local governments to nonprofits) may seek a price adjustment to recoup increased labor costs directly resulting from the increase in the salary threshold in any Overtime Final Rule.

### Conclusion

The undersigned nonprofit organizations submit these Joint Comments to stress the urgent need – *before* new rules are promulgated – for the creation of a mechanism that ensures that written agreements that nonprofits have to provide services on behalf of governments can be adjusted to cover the increased costs of complying with any Overtime Final Rule. In short, we ask that the government treat nonprofits fairly, as the federal government already does by protecting for-profit contractors from government-mandated labor cost increases. We believe the solutions proposed in these Joint Comments are in the best interests of governments, charitable nonprofits, and, most importantly, the people we collectively serve.

Respectfully submitted,

[national organizations]