



Raising the Overtime Threshold for Exempt Employees: The Impact on Disability and Aging Services

Presenters:

Katherine Berland, Esq., Director of Public Policy (ANCOR)

Mark Davis, President (Ohio Provider Resource Association)

Dan Berland, Director of Federal Policy (NASDDDS)

HCBS Conference
August 30, 2016



DOL Overtime Exemption Rule





FINAL RULE: DOL Overtime Exemption

Finalized: May 23, 2016.

Purpose: To update the “white collar” exemptions threshold which had not been updated since 2004

Key Provisions:

- **\$47,476/year (\$913/wk)** salary threshold for “white collar” exemptions (40th percentile of lowest-wage Census region salary data)
- **\$134,004/year** salary threshold for highly compensated employees (90th percentile of national salary data)
- **Update every 3 years**, beginning January 1, 2020
- **No changes to the duties test**
- Time-limited **non-enforcement policy** for certain Medicaid IDD providers





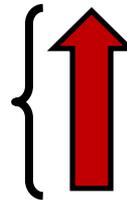
FINAL RULE: DOL Overtime Exemption

Setting a fixed percentile rather than a fixed dollar amount means the dollar threshold may change every 3 years. DOL projects $\approx 2\%$ growth rate annually.

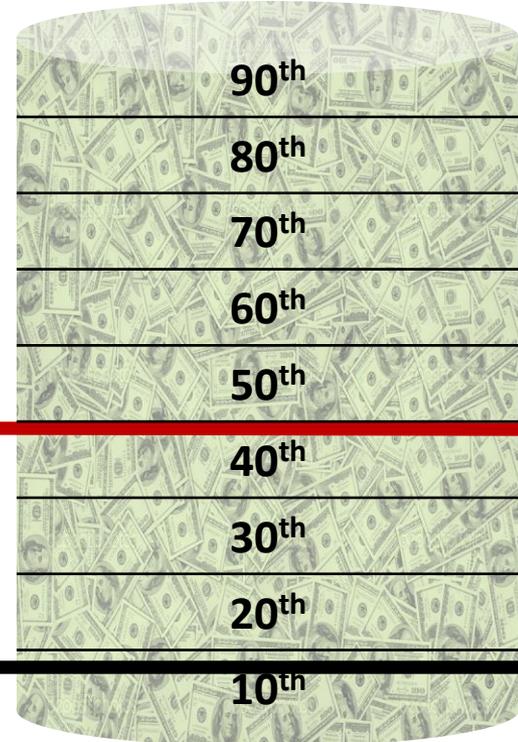
New Threshold: \$47,476/yr (\$913/wk)

(40th percentile of lowest Census region)

100.7%
increase



Former Threshold: \$23,660/yr (\$455/wk)





Pop Quiz: What Qualifies for the “White Collar” Exemptions?



TRUE or FALSE:

There is a point at which the salary is high enough that duties don't matter.



Pop Quiz: What Qualifies for the “White Collar” Exemptions?

“There is a point at which the salary is high enough that duties don’t matter.” ***This is FALSE!***

- No matter what the salary level, there is *always* a duties test that must be met to qualify for the exemption.
- The test is based on job function, not job title.





The DOL Overtime Exemption Rule: EAP Exemptions

Who is Impacted?

Employee Type	Salary	Duties
Executive	≥ \$47,476/yr	Must customarily and regularly direct at least 2 FTEs; independent judgment to hire, fire, etc.
Administrative	≥ \$47,476/yr	Perform office or non-manual work related to business operations; independent judgment to matters of significance.
Professional	≥ \$47,476/yr	Perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
Highly Compensated	≥ \$134,004/yr	Primarily office or non-manual work; must customarily and regularly perform one or more exempt duties of EAPs.
Computer	≥ \$47,476/yr (or \$27.63/hr if hourly)	Must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field.
Outside Sales	N/A	Must customarily and regularly: make sales or obtain orders or contracts, <i>and</i> engage in primary duties away from the employer's place or places of business.



The DOL Overtime Exemption Rule: Provisions

Overtime Salary Threshold Amount



Previous \$23,600/yr (\$455/wk)



Proposed \$50,440/yr (\$970/wk)



Comments \$30,702/yr (\$590/wk)



\$47,476/yr (\$913/wk)



The DOL Overtime Exemption Rule: Provisions

Overtime Salary Threshold Calculation



Previous

N/A – had always been a fixed dollar amount



Proposed

40th percentile based on national salary data



Comments

No higher than 15th percentile



40th percentile based on lowest-wage Census region



The DOL Overtime Exemption Rule: Provisions

Why is the new threshold so high?

1938 - 2004

Short/Long duties test +
Multiple salary levels



(short duties test)

+



(higher salary)

-OR-



(long duties test)

+



(lower salary)

= Exempt

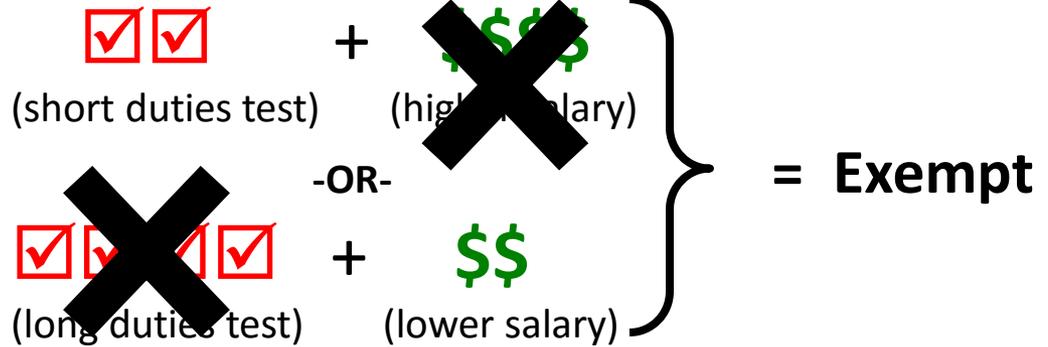


The DOL Overtime Exemption Rule: Provisions

Why is the new threshold so high?

1938 - 2004

Short/Long duties test +
Multiple salary levels



2004

Single short duties test +
Single lower salary level



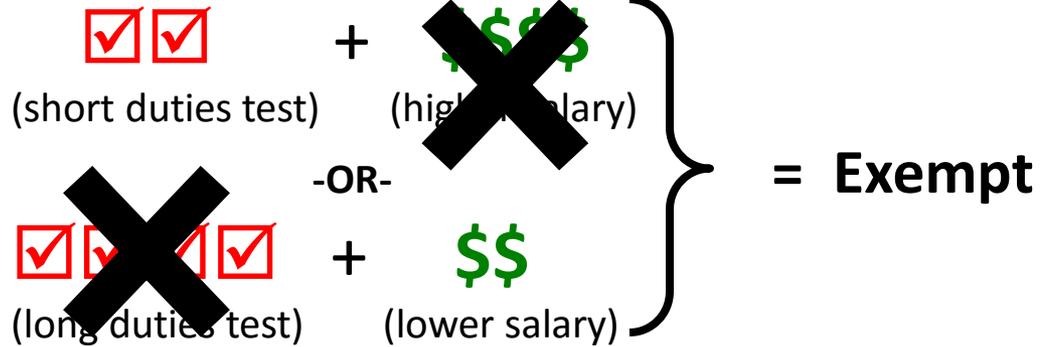


The DOL Overtime Exemption Rule: Provisions

Why is the new threshold so high?

1938 - 2004

Short/Long duties test +
Multiple salary levels



2004

Single short duties test +
Single lower salary level



2016

Single short duties test +
Single higher salary level





The DOL Overtime Exemption Rule: Provisions ***Automatic Update Mechanism Timing***



Previous

N/A – had always been a fixed dollar amount



Proposed

Update annually



Comments

Provide at least two years notice prior to changes, align with state budget cycles



Update every three years on January 1
(with 150 days notice)



The DOL Overtime Exemption Rule: Provisions

Effective Date



Previous

120 days after finalization



Proposed

60 days after finalization



Comments

Phased-in implementation over 3 to 5 years



December 1, 2016 (\approx 6 months)



The DOL Overtime Exemption Rule: Provisions Duties Tests



Previous

See chart/DOL guides



Proposed

No proposed changes, but comments requested



Comments

No changes to the duties tests



No changes to the duties tests



The DOL Overtime Exemption Rule: Provisions ***Non-Discretionary Bonuses and Commissions***



Previous

These payments were not included for EAP exemptions



Proposed

Comments requested



Comments

Permit these payments to count as compensation towards the threshold



Up to 10% of the salary level may be satisfied by these payments, must be made at least quarterly



The DOL Overtime Exemption Rule: Provisions Benefits Counted as Income



Previous

Benefits not included in income calculation



Proposed

N/A – DOL did not consider this change



Comments

Permit benefits the employer pays for to count as compensation towards the threshold



Benefits are not included in the salary level test calculation



The DOL Overtime Exemption Rule: Provisions Interagency Collaboration

 Previous N/A

 Proposed N/A

 Comments Actively engage with HHS/CMS to ensure minimal disruption to services

FINAL

Evidence of interagency collaboration



Pop Quiz: Non-enforcement policy

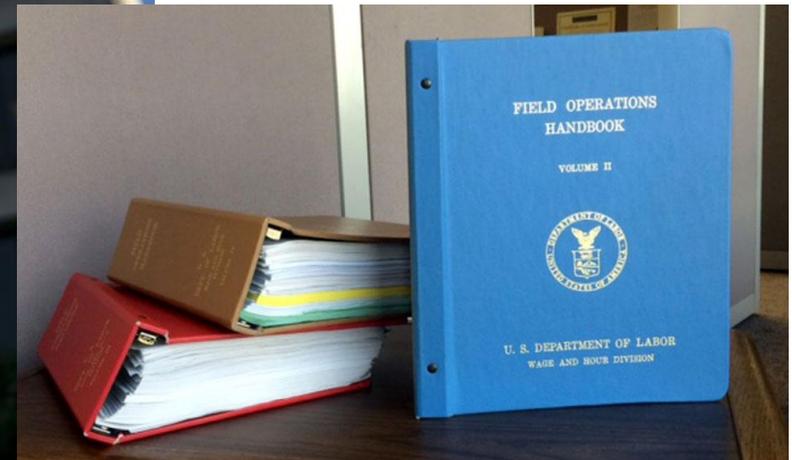
Does DOL non-enforcement mean that employers covered by the policy are not required to comply with the new rule?





The Non-Enforcement Policy

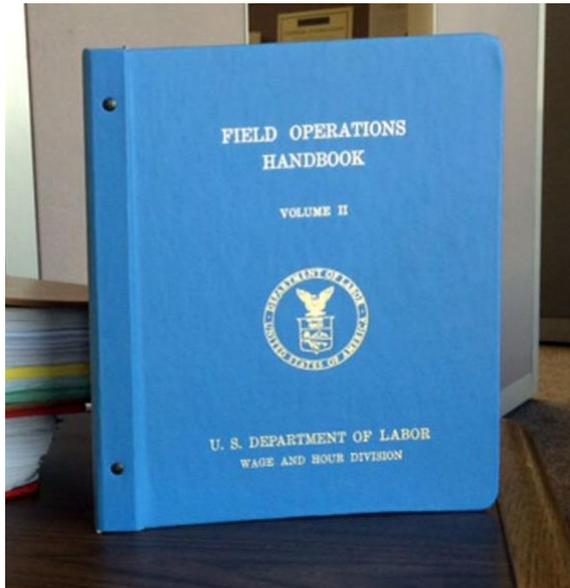
What it means...and what it doesn't





The Non-Enforcement Policy

What it Is

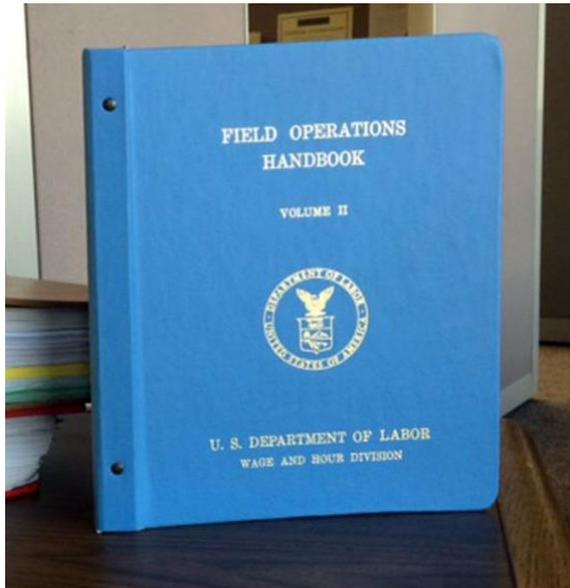


- A non-binding internal policy announcement
 - May be revised, expanded, contracted or revoked *without going through notice and comment process*
- Issued concurrently with the final rule, but not part of the final rule
- Scope is limited to Department of Labor's enforcement authority



The Non-Enforcement Policy

What it Says



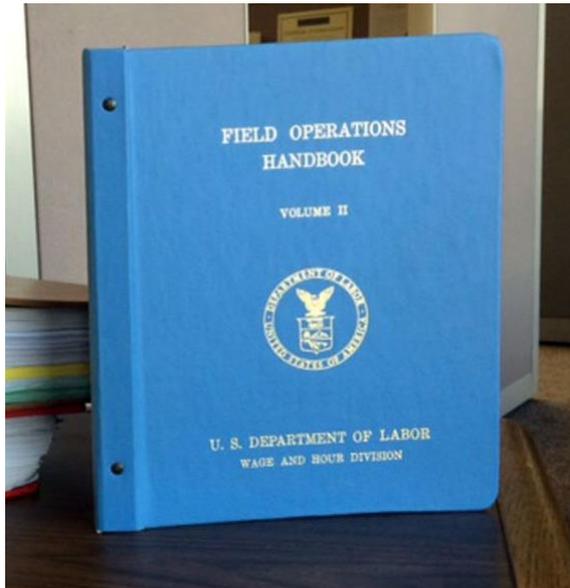
From December 1, 2016 to March 17, 2019, DOL will not enforce the updated salary threshold of \$913/week for a limited subset of employers.

All other provisions will be enforced, including the previous \$455/week threshold.



The Non-Enforcement Policy

Who it Covers

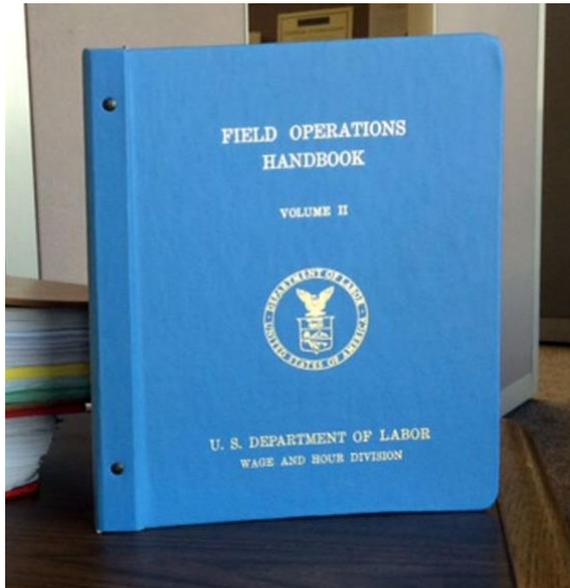


- ONLY providers of Medicaid-funded services for individuals with IDD in ***residential homes and facilities with 15 beds or fewer***
- This *does* include ICFs
- This *does* apply to both for-profits and non-profits
- This *does not* apply to other operations of the same provider (*i.e.* day program, vocational rehabilitation, transportation)



The Non-Enforcement Policy

What's the Intent and Purpose?

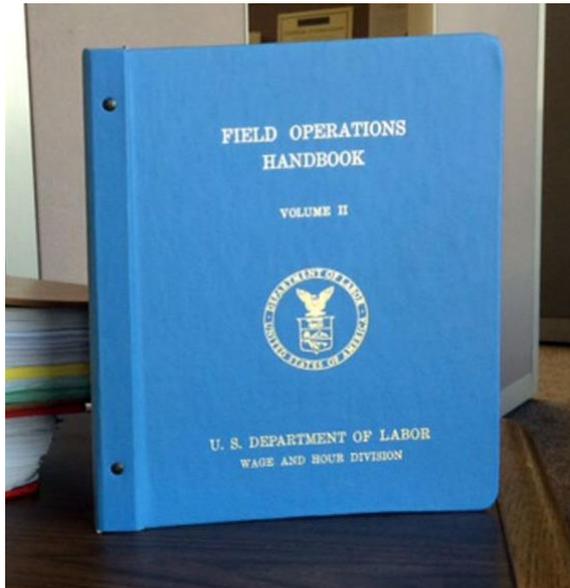


- To support the federal government's efforts to encourage the use of smaller, community-based providers
- End date corresponds to deadline for states to complete transitioning under CMS' HCBS rule
- To allow the Department to devote its time and resources to providing assistance to these providers and allow time to work with state legislatures and HHS on implementation of final rule



The Non-Enforcement Policy

What it Does

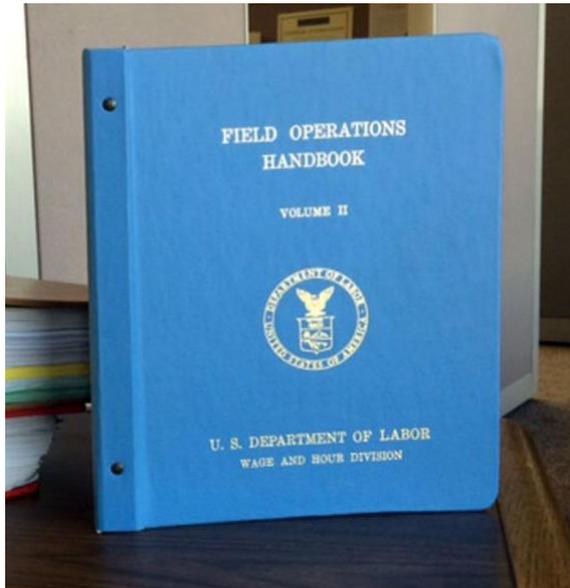


- DOL enforcement activities include:
 - Conducting investigations prompted by worker complaints
 - Supervising settlements
 - Filing lawsuits regarding violations
- DOL will provide technical assistance to employers during this period
- May shield states from damages due to sovereign immunity



The Non-Enforcement Policy

What it Does Not Do



- Shield providers from private lawsuits
- Prohibit states from enforcing state law
 - 11 states incorporate the FLSA by reference (Alaska, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Carolina, and Ohio)
 - States may set higher standards than the FLSA (*e.g.* California, New York)
- Obviate contractual obligations to comply with federal and state regulations



The Non-Enforcement Policy ***Additional Guidance***

Guidance could help clarify in situations where:

- Employees split time between covered and non-covered sites
 - Sites serve both individuals with IDD and individuals with other support needs
 - A single setting has more than 15 beds but each room is reimbursed individually
 - Non-residential HCBS-qualified services are provided
 - There are multiple funding streams, where some are not IDD-specific
-
- We have sought clarification on the scope of the non-enforcement policy, including whether DOL will include as part of the technical assistance it offers the issuance of a notice to an employee complainant advising them of their right to pursue private litigation





The Non-Enforcement Policy

Additional Guidance

Guidance will not change:

- The effective date of the rule
 - The salary threshold
 - The defined duties of exempt employees
 - The amount of time between automatic updates to the threshold
 - The amount of notice given prior to the threshold updating
 - The private cause of action contained within the FLSA
 - A state's authority to enforce state wage and hour law
- New Rulemaking {
- New Law —
- Constitutional Issue —





In Case You Were Wondering... the DOL Home Care Rule



The Home Care Rule (aka “Companionship Rule”)

- Finalized in 2013, effective date of January 1, 2015
- Prohibits third-party/joint employers from taking companionship exemption
- Narrows the definition of duties permitted as companionship activities

Current Status

- Reinstated, after an appeals court reversed a district court ruling vacating the third-party prohibition against taking the exemption
- The rule is reinstated in full and back in effect as of October 13, 2015
- DOL began enforcement on November 12, 2015
- The Supreme Court declined to hear a further appeal, bringing finality to the rule



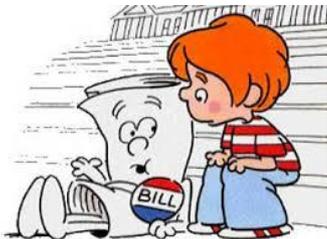
The Response: *The Save Our Services (SOS) Campaign*

The Objectives:



Advocate for an extended implementation timeframe in final rule and seek a reasonable, measured increase of the threshold in consideration of the unique Medicaid funding structure.

AND



Advance legislation that will temporarily increase the FMAP in order for Medicaid-funded providers to comply with changes to this and other federal rules.





The Response: *The Save Our Services (SOS) Campaign*

The “Disability Community Act of 2016” ANCOR is currently lobbying on:

- Provides temporary (3-year) FMAP bump to help comply with specific federal rules (DOL Overtime, DOL Home Care, and CMS HCBS) structured as a 90/10 match.
- Updates outdated language throughout Title XIX of Social Security Act.
- Was introduced by Reps. Paul Tonko (D-NY) and Steve Stivers (R-OH) on July 14, 2016. We are actively seeking a Senate lead sponsor.





The Response: *Proposed Legislation*

Title	Introduced	Blocks/Delays Implementation	Blocks Automatic Increases	Increases funding
Disability Community Act	H.R. 5902 – 7/14/16	X	X	✓
Protecting Workplace Advancement and Opportunity Act	S. 2707 – 3/17/16 H.R. 4773 – 3/17/16	✓	✓	X
Overtime Reform and Enhancement Act	H.R. 5813 - 7/17/16	✓	✓	X



Pop Quiz: Compliance

True or False:

The rule means that any employee not earning an annual salary of at least \$47,476 must be paid on an hourly basis



Pop Quiz: Compliance

*“The rule means that any employee not earning an annual salary of at least \$47,476 must be paid on an hourly basis.”
This is FALSE!*

Employees will be “salaried non-exempt” if they

- Do not meet the duties test for any exemption
and/or
- Do not meet the salary threshold

You may decide to convert salaried employees to hourly, but the rule does not mandate that you do so.





The DOL Overtime Exemption Rule: Compliance

Do the math!

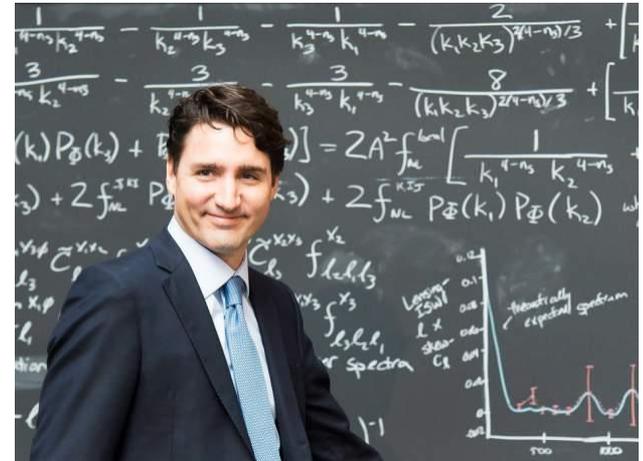
Option 1: Increase exempt employee's salaries to new threshold.

Option 2: Start paying overtime to newly non-exempt salaried employees.

Option 3: Reclassify employees from salaried to hourly and adjust hourly rate to maintain compensation at existing levels.

Option 4: Restrict or forbid overtime.

Other options may be available!



What to Do Now?



- Determine the potential operational and financial impact for your organization.
- Plan for compliance by December 1, 2016. ***Consult with a wage and hour attorney familiar with federal, state, and local law to determine your organizational risk if you cannot comply by this date.***
- Work with legislators in your state and Congress to educate them on the rule's impact and advocate for adequate funding.

Provider Environment

- Must ensure health and welfare, implement individual service plan
- Poverty level wages for direct support professionals
- Turnover – over 50%
- Increase in open shifts that need filled
- Turning down service opportunities due to inability to find staff
- Significant system change at all levels
- Unfunded mandates

OT Rule Non-Enforcement for IDD Providers

- Provide time to achieve compliance with CMS HCBS rule
- Recognition of the unique circumstances of IDD providers
- Applicability
 - Medicaid funded IDD residential providers with 15 beds and fewer
 - Includes waiver and ICF providers
- Scope:
 - Exempts from DOL enforcement based on increase in salary threshold
- Application needs clarification
 - Private action
 - State action
 - Employees providing mixed services
- Effective December 1, 2016 - March 17, 2019

Provider Impact

- IDD services are almost 100% Medicaid funded
- Price takers, not price setters
- Productive vs. nonproductive (billable)
- Working from home
- Eliminates flexibility in work schedules
- Necessitates drastic solutions in a short period of time

Provider Impact

- Current threshold \$11.37 and new threshold is \$22.83 per hour for full time staff
- Front line program managers 13.85
- Other staff
 - Behavior specialist 18.51
 - HR specialist 18.61
 - Office manager 17.12
 - Billing supervisor
 - Maintenance supervisor
 - Qualified Intellectual Disability Professional 18.08
 - RN 26.39 (20.48 minimum)
 - LPN 19.86
 - PTA 20.58

Provider Compliance Strategies

- Disability Community Act of 2016
- 3 year FMAP bump/enhanced match for increased cost of compliance only
- Voluntary for states
- Provides the opportunity for states, providers and CMS to work on long term solutions
- For additional information
www.disabilitysos.org

Compliance Strategies

Straight Conversion

- Track hours worked
- Estimate total hours of OT per salaried employee
- Back into hourly rate per employee
- Monitor OT closely
- Goal is same annual earnings

Compliance Strategies

Conversion + Bonus

- Track hours worked
- Convert to hourly as described on prior slide
- Give bonus periodically (*e.g.*, monthly, quarterly, annually) based on percentage of earnings
- Percentage of wage bonus includes all necessary compensation for any overtime worked
- Goal is same annual earnings

Compliance Strategies

Increase Salary

- Confirm duties meet applicable test(s)
- Increase all salaries to be above new threshold
- Goal is to avoid having to monitor OT and to avoid converting salaried employees to hourly
- Clearly not an option for most salaried employees, unless Medicaid funding is increased to cover additional cost
- Determine feasibility/advisability of using bonus provisions of new rule

Compliance Strategies: Salaried, Non-Exempt

- Also known as “fluctuating work week”
- Comply with salary basis, but not salary level
- Unique overtime pay calculation: extra half-time for overtime hours
- Track hours worked
- Beware of compliance “traps”
 - Bonuses
 - Proper regular rate calculation
 - Degree of hours fluctuation

Questions?



Contact Information



Katherine Berland, Esq.

Director of Public Policy

American Network of Community Options and Resources (ANCOR)

kberland@ancor.org

(703) 535-7850, ext. 104



Mark Davis

President

Ohio Provider Resource Association (OPRA)

mdavis@opra.org

(614) 224-6772



National Association of State Directors
of Developmental Disabilities Services

Dan Berland

Director of Federal Policy

National Association of State Directors of Developmental
Disabilities Services (NASDDDS)

dberland@nasdds.org

(703) 683-4202