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September 4, 2015

SUBMITTED VIA www.regulations.gov

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

RE: Comments on Proposed Rulemaking Regarding Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (RIN: 1235-AA11)

On behalf of the National Association of Professional Insurance Agents (PIA), I would like to offer our comments on the notice of proposed rulemaking (NPRM) regarding "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." PIA is a national trade association, founded in 1931, which represents insurance agencies in all 50 states, Puerto Rico and the District of Columbia. The proposal will have significant and negative repercussions for many of our member insurance agencies, and I strongly urge the Department of Labor (DOL) to reconsider the proposal.

PIA members are small business owners. The majority of our insurance agency members have less than 25 employees, which includes primarily exempt status employees. Because our members operate across the U.S., from small towns to big cities, and because the experience and skill levels of employees range, the salaries of exempt employees also range, with some falling below the $50,440 annual threshold proposed in the law.

In response to the NPRM issued by the DOL, PIA surveyed some of its members who reside in higher cost of living areas during July and August to determine how they might react to the proposal. A summary of the relevant survey results is included with this letter, *see* Attachment 1. Unfortunately, due to the short time period for comments, PIA was unable to survey a larger sample of the insurance agencies we represent. We anticipate that if we surveyed PIA members in lower cost of living areas, such as the South, the results would be even more dramatic. Nonetheless, based on the results we did receive we wish to provide the following comments.

The DOL proposes to set the minimum salary threshold, using data from the Bureau of Labor Statistics (BLS), at the 40th percentile for all non-hourly paid employees. In 2016, when the DOL expects a final rule to be published, the minimum salary level based on the 40th percentile would be $970 per week or $50,440 annually—an enormous 113 percent increase from the current requirement of $455 per week

400 N. Washington St. • Alexandria, VA 22314-2353 • *main:* 703/836-9340 • *fax:* 703/836-1279 • *e-mail:* info@pianet.org • *web:* www.pianet.com

or $23,660 annually. This considerable increase will negatively impact our member agencies' employees and put a strain on the operation of their small businesses.

In the past, the DOL has used information regarding employee salaries to set the minimum salary levels for exemption, but the DOL never used a salary level even close to the 40th percentile; nor has the DOL more than doubled the salary level in a single rulemaking.[1] With only a few exceptions, the DOL has increased the salary levels at a rate of between 2.8 percent and 5.5 percent per year. The DOL's proposed increase to $50,440 represents an increase of 10.29 percent per year.[2] While an increase to the salary threshold is due, the magnitude proposed by the DOL will hurt PIA small business members, as well as workers and the economy as a whole.

Such a large increase in 2016 will mean that many small businesses will have to convert salaried employees to hourly employees, resulting in a loss of employee flexibility. Many employees classified or reclassified as hourly, nonexempt workers because of this proposal will lose benefits associated with exempt status. Employers must closely track nonexempt employees' hours to ensure compliance with overtime pay and other requirements. As a result, nonexempt employees often have less workplace autonomy and fewer opportunities for flexible work arrangements.

Additionally, small employers are likely to be faced with crushing increases in labor and administrative costs, businesses would suffer with low employee morale and the American people could experience jumps in prices for insurance-related services, as well as diminished customer service.

Of particular concern to PIA members is the impact this rule will have on their ability to help their clients following extreme weather or other catastrophic events. Research from our members suggests that the exempt administrative employees of insurance agencies work customary work weeks. The exception to this is following severe weather events and other catastrophic events, when claims surge and more time is required to assist policyholders. If insurance agencies are required to convert their employees from salaried to hourly, closely tracking hours and absorbing unpredictable overtime costs, it will make it harder to assist their clients when their services are needed the most, following a disaster.

The proposed increase is higher than the minimum requirement in every state. California has the highest minimum salary requirement, which in 2016 will be $41,600.[3] The DOL proposal is $8,840 higher than this. California is one of the highest cost of living states in the country.[4] Since this standard would be implemented nationwide, it is clear that the impact would be unevenly applied across the country. For example, white collar workers in West Virginia, Nebraska, Oklahoma and Kentucky may be classified as

[1] Testimony of Tammy D. McCuthen before the U.S. House Education and Workforce Committee, Subcommittee on Workforce Protections, July 23, 2015. http://edworkforce.house.gov/uploadedfiles/mccutchen_testimony.pdf
[2] Id.
[3] California Labor Code 515a (2013).
[4] Missouri Economic Research Information Center (MERIC) Cost of Living Data 2015. https://www.missourieconomy.org/indicators/cost_of_living/

hourly even though they do the same work as employees classified as exempt in New York and California because of regional differences in pay, which are reflective of regional differences in cost of living. PIA believes that this rule would disproportionately negatively impact certain states without a reasonable basis for doing so.

Therefore, should the DOL recommend a fixed national standard, we suggest a lower threshold be implemented. In applying inflation to historic salary levels, only the short test levels for 1958, 1963 and 1975 would exceed $50,000. If adjusted for inflation, the average salary level under all tests for all years is $42,236.23.[5] PIA recommends instituting a salary threshold closer to this inflation adjusted average. Additionally, our research determined that at a level "around $40,000" many PIA members would be able to respond to this rule change in the manner more likely to yield the result the administration desires to achieve.

The DOL is also seeking comments on the option of allowing nondiscretionary bonuses and possibly commissions provided to exempt employees to satisfy up to 10 percent of the standard salary level. This proposal would provide some relief, particularly in the case of insurance agencies which, as you can see from our member survey, rely on nondiscretionary bonuses as part of employee compensation. However, such bonuses are generally not distributed on a monthly basis. More often than not, they are received on a quarterly or annual basis. PIA would recommend allowing nondiscretionary bonuses or commissions to be considered in meeting the minimum salary threshold, as long as such compensation is received at least on a quarterly basis.

The DOL is planning to increase the minimum salary threshold each year by tying it to either the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly earnings of fulltime salaried employees. However, it is not evident that Congress intended for automatic updates to occur under the law. If Congress had wanted automatic updates that fail to take into account changing economic circumstances it could have done that in the statute, but instead Congress ordered the Department to update the exemptions from "time to time," presumably to take into account changes to the economy.

Furthermore, the DOL proposal to adjust the minimum salary threshold on an annual basis will be a substantial burden on small businesses. In the survey we conducted of PIA member insurance agencies, 69 percent of respondents indicated that annual minimum salary increases would be difficult to comply with.

PIA recommends that the DOL not index salary levels to an inflationary measure. From 1938 to 1975, the DOL regularly updated the salary level every five to nine years. Since then, the DOL has updated the salary threshold on a considerably less frequent basis, presumably due to economic and other considerations. The DOL needs to fulfill its duty and regularly update the threshold through notice-and-comment rulemaking, as it has with every salary increase. However, should the DOL decide to do index

[5] Ibid, Testimony of Tammy D. McCuthen.

the salary level to an inflationary measure, the adjustment should occur no more often than every five years.

PIA also asks that should the DOL index salary levels to an inflationary measure, whether annually or less regularly, that such increases be announced as far in advance as possible. The current proposal would give employers only 60-days' notice to adjust to the annual increases. Not all salary increases occur on a calendar year and budgeting can be a multi-year process. Automatic updates will require annual reviews of compensation, potential bonuses and classification of employees. This will be a time and resource consuming process. For such adjustments to be implemented appropriately, it is essential that a considerably longer notice period be provided.

The DOL did not make a specific proposal regarding potential changes to the duties test, but suggested that the agency may make changes in the final rule. In summary, the DOL proposal asked for comments on whether to modify the current duties tests for exempt status, including the "primary duty" standard, by such means as: (1) adopting the California model requiring that exempt employees spend more than half of their working time on exempt tasks; (2) placing quantitative limits on the amount of time exempt employees may spend on non-exempt duties; or (3) modifying or eliminating the concept of concurrent duties, whereby exempt employees can maintain exempt status when performing exempt and non-exempt activities simultaneously.

Without seeing the proposed language we are unable to assess how it would impact our members, and therefore oppose any changes to the duties test without exposure of draft language. Such an approach is contrary to the intent of the Administrative Procedure Act (APA). The APA exists to make sure interested parties have a meaningful opportunity to comment on regulatory actions that will affect them. Adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA.

PIA suggests leaving the duties test as it currently is or undergoing another rulemaking in which draft language is put forward. However, should the DOL make changes to the duties test in the final rule, despite the notice and comment requirements of the APA, PIA opposes the concept of strict quantitative standards. Such standards would be difficult for small business employers to track and implement, and the same quantitative standard may not be equally applicable to all lines of business that such a standard would cover.

In closing, PIA recommends:

- The DOL reconsider the proposed minimum salary threshold of $50,440 and instead consider a more appropriate inflation adjusted amount around $40,000.

- The DOL allow nondiscretionary bonus and/or commission compensation to be considered in meeting the minimum salary threshold as long as such compensation is received at least on a quarterly basis.

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- The DOL not index salary levels to any inflationary measure; however, if the DOL indexes salary levels to an inflationary measure, have the adjustment occur no more frequently than every five years.

- The DOL leave the duties test as it currently is or undergo another rulemaking in which draft language is put forward in accordance with the APA.

We would like to thank you for the opportunity to express the views of independent insurance agencies on this issue. PIA appreciates the effort that has gone into drafting the proposed rule. Please contact me at jennwe@pianet.org or (703) 518-1344 with any questions or concerns.

Kind Regards,

J. M. Webb

Jennifer M. Webb
Counsel & Director of Regulatory Affairs
National Association of Professional Insurance Agents

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ATTACHMENT 1

Summary of Selected Survey Results from PIA members in Connecticut, New Hampshire, New Jersey and New York

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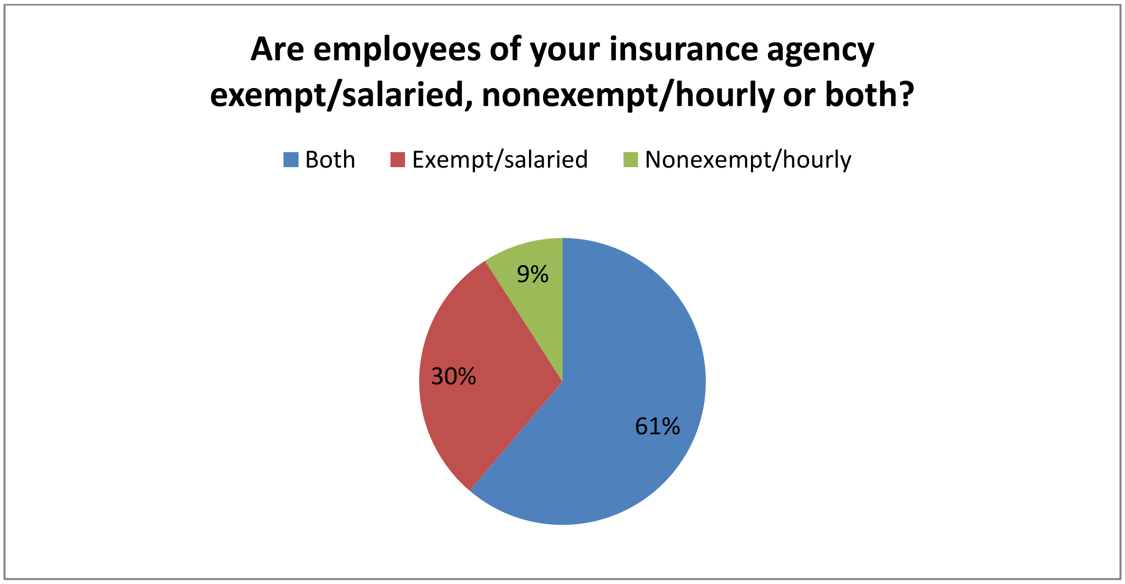
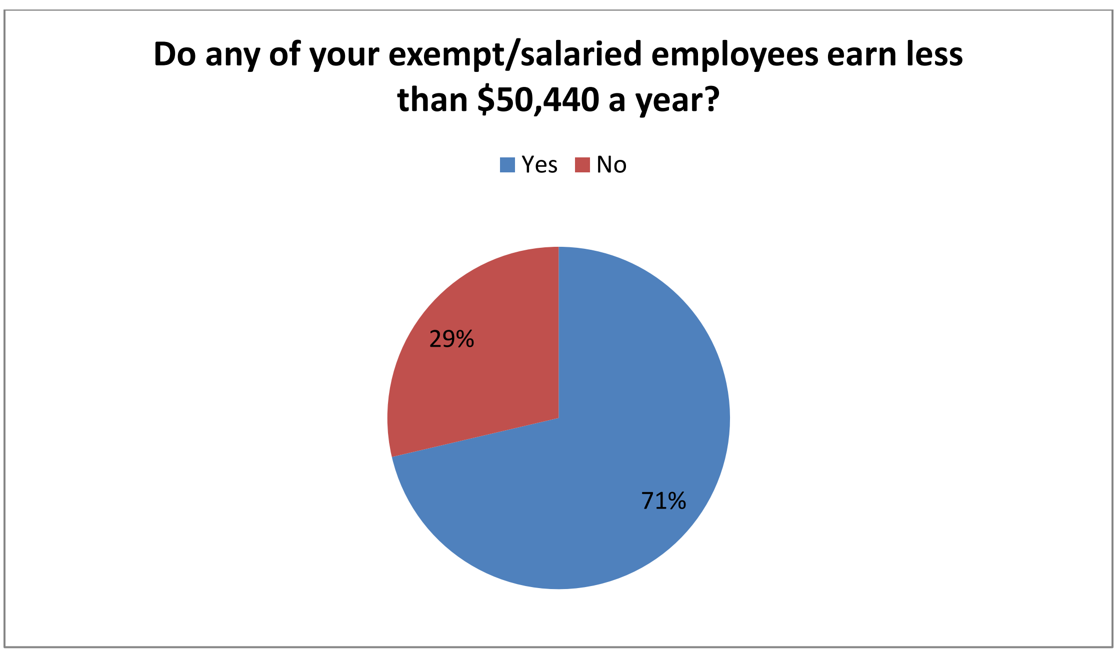
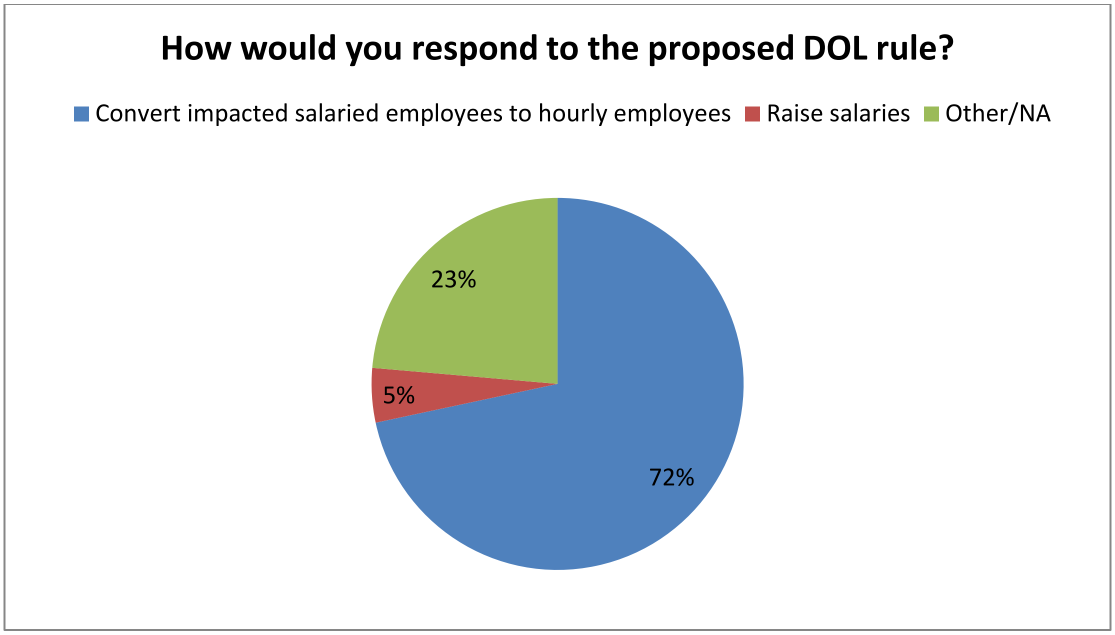
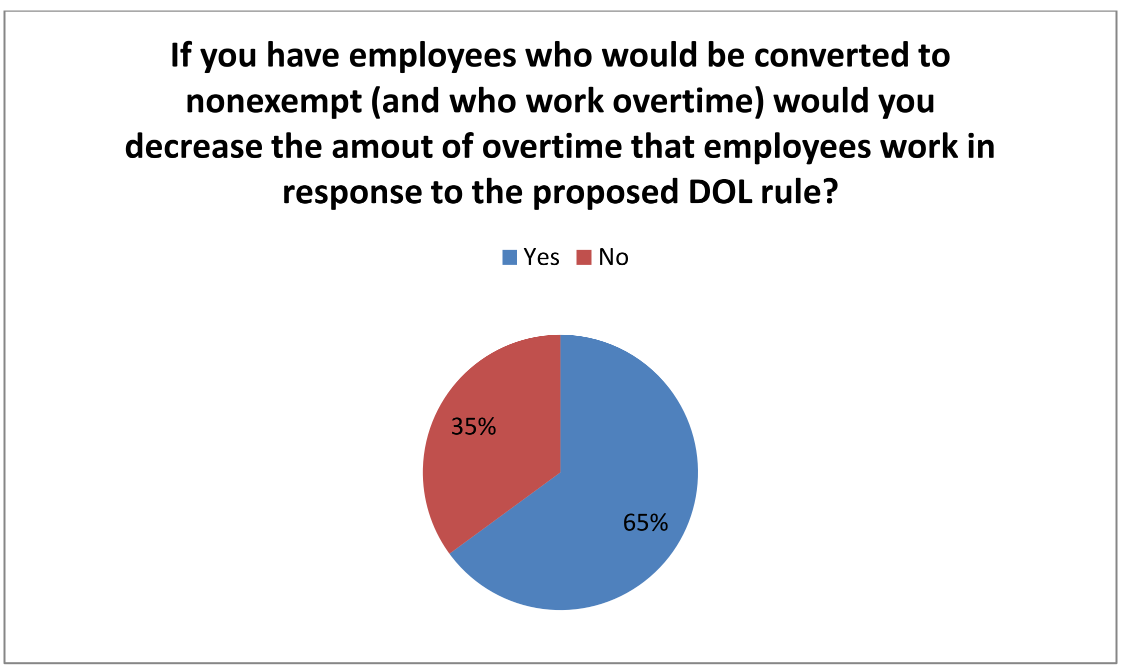





How would you respond to the proposed DOL rule?
Convert impacted salaried employees to hourly employees
Raise salaries
Other/NA
23%
5%
72%


If you have employees who would be converted to nonexempt (and who work overtime) would you decrease the amout of overtime that employees work in response to the proposed DOL rule?
Yes
No
35%
65%

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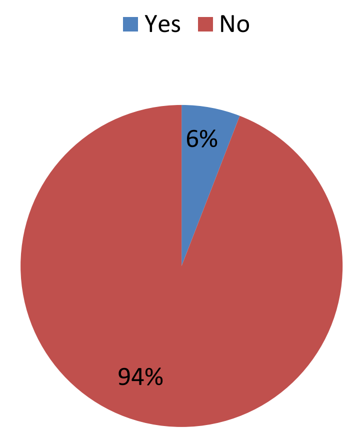
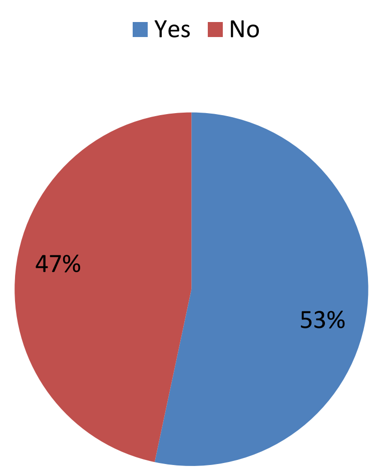
If you would decrease the overtime hours of employees in response to the proposed DOL rule, would you hire more employees?



Would you need to cut other benefits (i.e. healthcare or 401K contributions) to offset increased costs?



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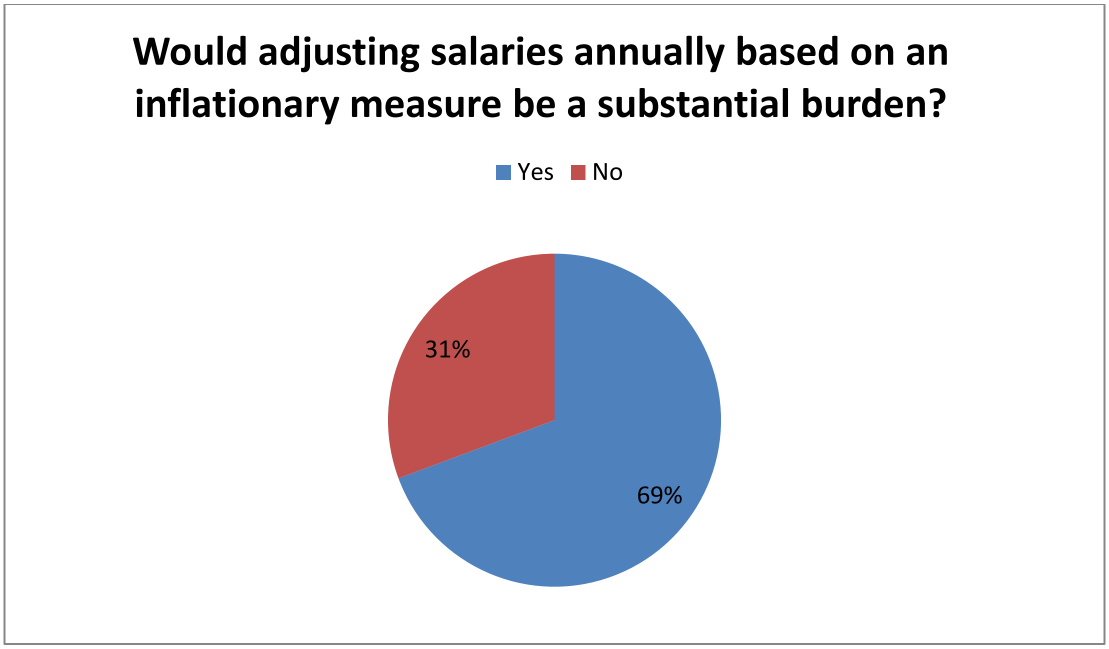

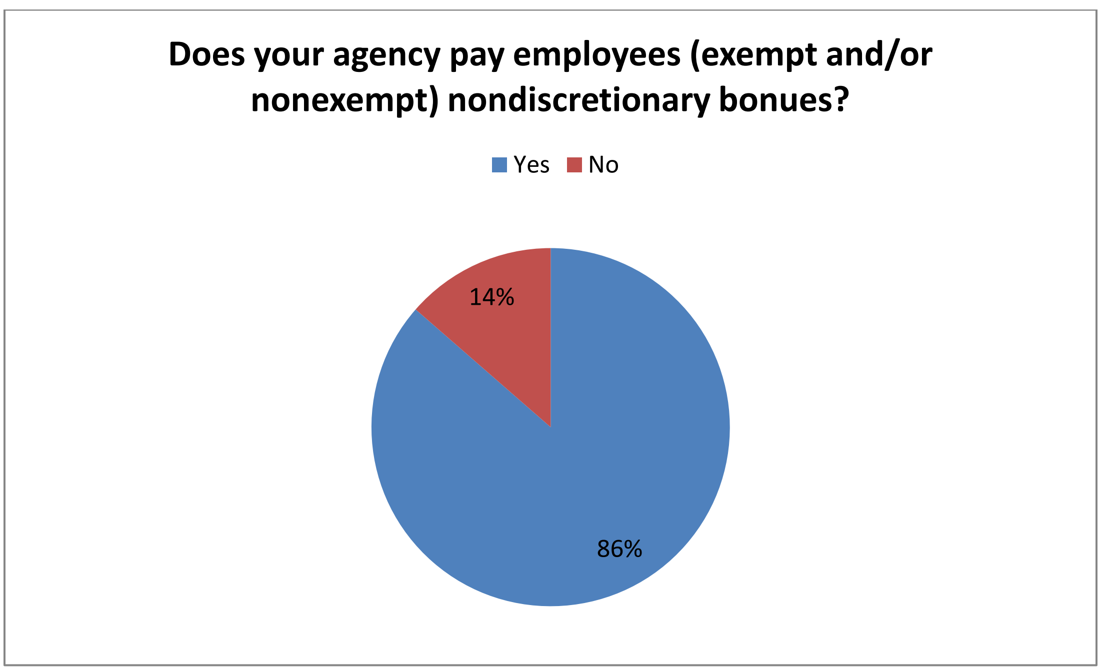

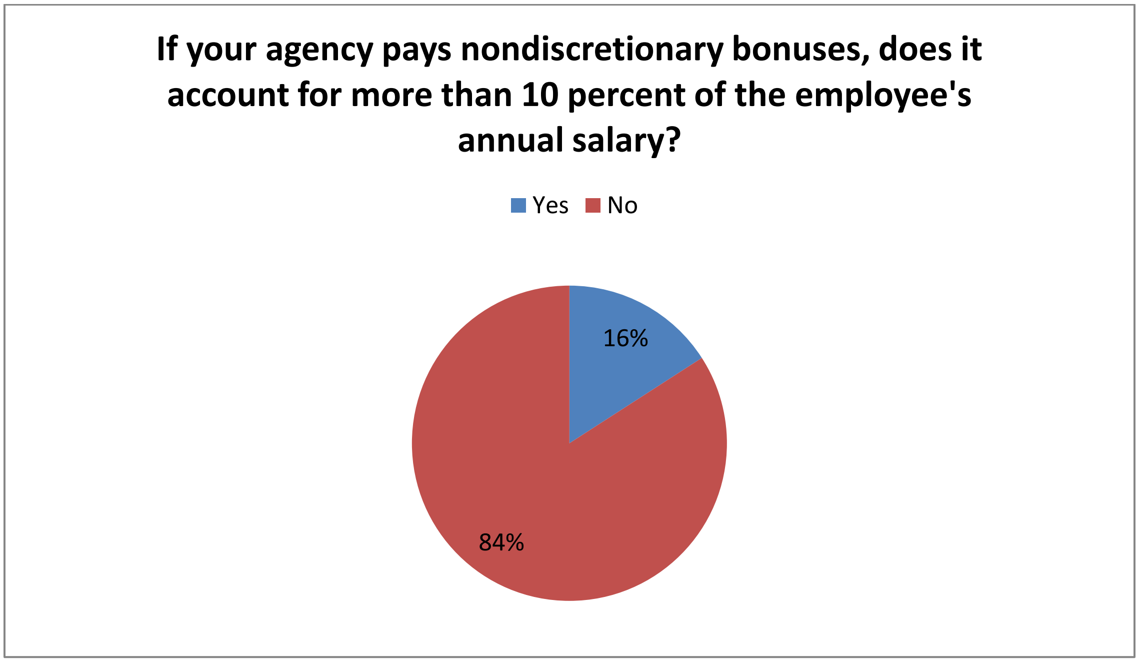

PIA also asked respondents to "provide any other information you think would be helpful or any other comments you have on the proposed rule." Those comments can generally be summarized into the following categories:

- Concerns over elimination or decrease of workplace flexibility because of conversion of salaried employees to hourly.
- Suggestions that the salary threshold be raised to an amount around $40,000.
- Concerns that the proposed rule would impose a substantial burden on small businesses.