



VIA ELECTRONIC SUBMISSION

September 4, 2015

Ms. Mary Ziegler
Director of the Division of Regulations,
Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: RIN 1235-AA11, Comments on the WHD's Proposed Regulations for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Ziegler:

Associated Builders and Contractors, Inc. (ABC) hereby submits the following comments to the U.S. Department of Labor's (DOL or Department) Wage and Hour Division (WHD) in response to the above-referenced notice of proposed rulemaking (NPRM), published in the *Federal Register* on July 6, 2015 at 80 Fed. Reg., at 38516.¹

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

¹ ABC shares the concerns and recommendations provided in comments filed to this docket by the Partnership to Protect Workplace Opportunity and incorporates them into this letter by reference.

Virtually all of ABC's members employ some workers who qualify for exempt status under the current and longstanding regulations defining and delimiting executive, administrative, professional, outside sales and computer employees. Employers and employees throughout the construction industry have come to rely on the current definitions of exempt job categories, which promote career advancement opportunities for workers while giving employers flexibility in setting hours and helping avoid misclassification errors.

If the proposed unprecedented increase in the minimum salary of exempt staff becomes final, it would be extremely disruptive and harmful to both employers and many of their currently exempt employees, and would be destabilizing to the construction industry as a whole. The open questions raised in the proposal signaling the Department's apparent intention to make major changes to the exempt job duties tests are equally problematic. By requiring large numbers of exempt executives, administrators and professionals to be reclassified, among other changes, the proposal would greatly restrict the flexibility needed to provide high-quality construction services. It also would hurt career advancement opportunities for employees, injure the morale of reclassified exempt workers, increase the likelihood of lawsuits and increase the administrative costs of construction industry operations, with little or no benefit to the employees themselves. We urge the Department to withdraw the proposed rule.

1. ABC Strongly Objects to the Unprecedented Increase in the Department's Proposed Minimum Salary for Exempt Employees

The Department's proposed rule seeks to increase the exempt employees' minimum salary to the highest levels ever in the history of the Fair Labor Standards Act (FLSA), even after the historical rates are adjusted for inflation. The proposed minimum salary is expected to exceed \$50,000 if and when the new rule goes into effect in 2016.² This is an unprecedentedly high level for exempt status under the white collar exemptions, and is completely unjustified. Setting the minimum salary so high is contrary to legislative intent, which was to set the salary level at a point that would screen out "obviously nonexempt employees."

The Department acknowledges the concern that if the salary level is set too high, it "reduces the number of overtime-protected employees subject to the duties test and eliminates their risk of misclassification, but at the cost of requiring overtime protection for workers who pass the duties test."³ The Department also claims that it chose the 40th percentile rather than some higher figure because a higher percentile "could have a negative impact on the ability of employers in low-wage regions and industries to claim the EAP exemptions for employees who have bona fide executive, administrative or professional duties as their primary duty...."⁴ Yet, the Department has identified no authority for its arbitrary selection of the 40th percentile as the appropriate standard against which to determine a minimum salary level.

² DOL is proposing to increase the salary by more than a 100 percent to \$50,440 per year or \$970 per week.

³ See 80 Fed. Reg., at 38531.

⁴ *Id.* at 38532.

By setting the minimum salary so high regardless of geographic area and regardless of industry, the Department will force construction employers to either reclassify their currently exempt employees or else increase their salaries to disproportionately high levels. This will be particularly true in rural parts of the country and in areas where the cost of living is lower than average. Indeed, the proposed new minimum salary is higher than the minimum salaries required now under *any* state laws, including states that have long been viewed as more restrictive than federal overtime regulations.⁵ The new salary is absurdly higher than the norm in those regions of the country where the cost of living is dramatically lower than average.⁶ In effect, the proposed rule could for all practical purposes *eliminate* the white collar exemptions in significant portions of the country. This is directly contrary to Congressional intent.

To the extent that the minimum salary level is increased at all from the current amounts, the increase should be consistent with the 2004 levels adjusted for inflation.

2. The Department’s Proposed Salary Level Defeats the Statutory Purpose of the White Collar Exemptions

The Department’s proposed rule treats the white collar exemptions as if their use by employers is some sort of improper evasion of corporate wage responsibility under the FLSA. In reality, the exemptions are a basic right established by Congress. Contrary to the Department’s proposal, many workers view their exempt status as a symbol of their success and advancement within the company. Certainly this is true in the merit shop construction industry. At the same time, where employers do change their workers from exempt to non-exempt, employees often view such transitions to non-exempt status as demotions. In addition, employee wages likely will not increase under the new rule at all, because employers will have strong incentives to reduce the work hours of the transitioned employees in order to avoid paying overtime. Meanwhile, quality of service and employee morale will suffer in the construction industry as the unintended consequences of the proposed rule.⁷

3. Nondiscretionary Bonuses and Commissions Should Be Counted Toward the Minimum Salary Level

The Department indicates that it plans to limit the inclusion of nondiscretionary bonuses and incentive payments, even “nondiscretionary incentive bonuses tied to productivity and profitability.” The Department appears to intend to limit inclusion of such bonuses or commissions to a mere 10 percent of the weekly salary level.

⁵ The highest current minimum salaries among the states are \$10,000 lower in California (\$37,440 annually) and \$15,000 lower in New York (\$34,124 annually).

⁶ Smaller construction contractors in the deep South, parts of the Midwest, and other rural states are likely to find that many of their supervisory positions will lose their exempt status under the proposed new salary minimum standard, even though their job duties are substantially identical to similar positions held by employees in New York and California.

⁷ Contractors will be forced to pass costs along to customers and it will impact employers’ ability to give merit raises.

ABC believes all forms of compensation should be permissible methods of meeting the minimum salary level for exempt status, regardless of whether an employee earns the minimum in the form of a base salary or in the form of a bonus or commission. Any income that is part of total compensation should be counted, regardless of the percentages. In addition, because bonus payments generally are made less frequently than monthly, the Department should include bonuses paid quarterly or at even greater intervals to reflect how employers make these incentive payments. In the construction industry, bonuses are often based on project specific goals, such as completing a project on time.

Contrary to the proposal, the Department should count commissions toward the new minimum salary. If commissioned employees otherwise meet the duties tests for one or more of the white collar exemptions, then the fact that they are paid on a commission basis should not deprive them of the exemption.⁸

4. Congress Has Not Authorized the Department to Automatically Index the New Minimum Salary Level

ABC further opposes the Department's plan to automatically increase the minimum salary levels for exempt status. DOL is proposing to automatically increase the salary level by either using the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly earnings for full-time salaried employees to update the salary level. With no opportunity for comment, the Department proposes to give employers a 60-day notice of the new minimum annual salary.⁹ Since passage of the FLSA, Congress has for many decades refused to index the minimum wage and has never authorized the Department to index the minimum salary levels of the white collar exemptions. By contrast, Congress expressly authorized such indexing in other statutes, including most recently the Affordable Care Act. Thus, the proposed rule defies Congressional intent that salary levels be periodically reexamined in order to avoid the inflationary results of automatically increasing them.¹⁰

Aside from lacking statutory authority, the Department's new indexing proposal is arbitrary and capricious and will impose significant new burdens on employers. Under either indexing method proposed by the Department, it will be virtually impossible for employers to determine in advance what their new minimum salaries should be. In addition, the indexing proposal will effectively require annual reconsideration of the classification of white collar employees. As a result, within a few years the salary level required for exempt status will rise so far as to virtually eliminate the exemptions in low-wage regions and industries that have not already lost the practical use of the exemptions on the effective date of the final rule.

The Department's proposed rule concedes that 4.6 million currently exempt workers will need to be reclassified as nonexempt, or else their salaries will have to be raised in order to maintain their exempt

⁸ See 29 C.F.R. 541.604(a). And see the Partnership to Protect Workplace Opportunity's comments pages 9-12.

⁹ In the construction industry, projects can last three to five years, with exempt staff managing those jobs, making the 60-day notice unworkable.

¹⁰ In 2004, the Department declared that it lacked any authority to index the minimum salary. Nothing has changed to justify the Department's new arrogation of un-delegated authority. See 80 Fed. Reg., at 38537.

status, because they currently do not make high enough salaries to qualify for exempt status.¹¹ Regardless of how employers respond to the new rule, the effect of indexing will be to dramatically reduce the number of exempt employees even further in the coming years.

5. The Department Should Not Change the Duties Tests

The Department has not made any actual proposed revision to the duties tests for the white collar exemptions. Instead, the Department has asked for comments on a series of questions about the duties tests. Unless and until the Department gives actual notice of the proposed changes themselves, ABC submits that the Department is statutorily prohibited by the Administrative Procedure Act and the Regulatory Flexibility Act from issuing a final rule without further notice and public comment. Though ABC will respond to the Department's questions below, we preserve our objection to this entire procedure if the Department proceeds to issue a final rule without first allowing notice and comment on all actual proposals.

First, the Department has asked whether it should adopt a percentage-of-time rule for purposes of the exemptions' primary duties test, and, in particular, the Department has asked whether it should adopt California's 50 percent rule. ABC strongly opposes any such plan. The California rule already has resulted in burdensome recordkeeping requirements and increased litigation costs, and should not be extended to the federal level. Significantly, in 2004 the Department correctly found that a time-based rule "would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens)."¹² Such new and burdensome recordkeeping requirements would defeat the very purpose of the white collar exemptions, which were intended by Congress to give employers greater flexibility in employing their white collar workforces. Even if employers attempt to precisely track their exempt employees' work hours, they would be hopelessly exposed to lawsuits regarding the accuracy of such records and disputed employee testimony.

The Department also has asked for comments on whether it should return to the obsolete "short" and "long" test. Nothing would be achieved by returning to these confusing and time-consuming standards. To the contrary, returning to the long and short tests will deter employers even more from treating any of their white collar employees as exempt. As the Department correctly found in 2004, the old long form test was "subjective and difficult" to apply and added to the cost of applying the white collar exemptions with no discernible benefits.¹³

ABC further opposes any change to the Department's current enforcement of the concurrent duties test. On construction projects, frontline managers often perform supervisory and non-supervisory duties concurrently, and such functions should not jeopardize their exempt status. The Department should not change the rule. Even worse is the Department's suggestion that it might inject a

¹¹ See 80 Fed. Reg., at 38518.

¹² See 69 Fed. Reg., at 22186.

¹³ See 69 Fed. Reg., at 22127.

percentage-of-time mandate into the concurrent duties rule. Such a change would eviscerate the exemption rule.

Finally, ABC must decline the Department's invitation to submit comments on unidentified examples for additional guidance in administering the exemptions, unless and until the Department provides specific proposals in the regulatory text. ABC is prepared to comment on any particular job classifications in construction industry facilities that the Department believes should be addressed as examples of the application of the white collar exemption. It is the Department's responsibility to identify such examples and seek public comment on them; not the other way around.

6. The Department's Cost Impact Analysis Is Absurdly Low

In a recent survey of ABC membership, 90 percent of respondents stated the Department's estimate of compliance costs resulting from the new Rule was dramatically lower than what the real costs will be. For example, 72 percent of respondents believe that the costs of compliance will be 75 percent to 100 percent higher than the Department's poorly supported estimate. Many construction contractors are small businesses that do not have in-house legal counsel or human resource directors. They will be required to incur significantly higher expenses to comply with the proposed rule than the Department has estimated.

Conclusion

ABC urges the Department to withdraw the proposed rule.

Respectfully submitted,



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