



VIA ELECTRONIC SUBMISSION

May 21, 2019

Ms. Melissa Smith
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, DC 20210

Re: RIN 1235-AA20, Comments on DOL's Notice of Proposed Rulemaking on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced proposed rule published in the *Federal Register* on March 22, 2019, at 84 Fed. Reg. 10900.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. 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, which 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.

Background

On May 23, 2016, DOL issued the Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees final rule,¹ which would have changed the federal exemptions to overtime pay under the Fair Labor Standards Act for "white collar" workers by doubling the current minimum salary level for exemption from \$23,660 to \$47,476 per year

¹ 81 Fed. Reg. 32391.

and automatically increasing it every three years. Throughout the rulemaking process, ABC was an active participant² and urged the Department to withdraw the 2015 proposed rule.³

Before the Obama administration 2016 final rule went into effect, it was vacated and permanently enjoined on a nationwide basis by the federal district court for the Eastern District of Texas in the case of *Nevada v. Department of Labor*.⁴

On July 26, 2017, the Trump administration issued a Request for Information,⁵ which sought input on the 2016 final rule, specifically the minimum salary level required for exempt status. In its Sept. 25, 2017, comment letter on the RFI, ABC urged DOL to comply with the district court's decision and immediately rescind the unlawful 2016 rule.⁶ Further, assuming that a new minimum salary standard would be adopted, ABC argued that it should be established by applying the same methodology that was used by the Department in 2004.

On March 22, 2019, DOL issued a new proposal to update and revise the "white-collar" overtime exemption regulations.⁷ Among other changes, the Department is proposing to raise the current minimum salary for exemption from \$23,660 to \$35,308 per year. This level is lower than the threshold of \$47,476 included in the Obama-era 2016 overtime final rule. If finalized, the proposal will replace the Obama administration 2016 final rule.

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.

ABC's Comments in Response to DOL's Proposed Rule

ABC is pleased the new proposed rule addresses many of the concerns that ABC expressed in comments in response to the Department's 2017 RFI, including retaining in large part the 2004 standard salary methodology, adopting only one standard salary level and not imposing automatic indexing of the salary level test. However, we continue to have concerns regarding the data set being used to set the minimum salary, as well as the increase in the highly compensated salary level and the 10% rule for bonuses, which are explained below.

1) ABC supports the Department's application of the 2004 methodology, except for the data set used to determine the proposed increase in the standard salary level.

ABC supports the Trump administration's application in the main of the 2004 methodology to the proposed increase in the standard salary level, which is consistent with past precedent. In 2004, the Department set the minimum salary level at an amount which at that time represented the 20th percentile for salaried employees in the South geographic region and retail industry.⁸

² See ABC's Comments filed on Sept. 4, 2015 (Docket ID: WHD-2015-0001-5178).

³ 80 Fed. Reg. 38516.

⁴ C.A. No. 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

⁵ 82 Fed. Reg. 34616.

⁶ See ABC's Comments filed on Sept. 25, 2017 (Docket ID: WHD-2017-0002-140516).

⁷ 84 Fed. Reg. 10900.

⁸ 69 Fed. Reg. at 22167-68 & Table 2.

The Obama-era 2016 final rule arbitrarily increased the minimum salary to the 40th percentile for salaried employees. This error was compounded by the Department’s expansion of the South region to include the entire current South Census Region, thereby including three of the top 10 median incomes in the entire country—Maryland, Virginia and the District of Columbia—in its calculation for the first time. The Department also erred by failing to tie the wage rate to the lower-paid retail industry and by including in the 40th percentile calculation numerous categories of employees who are not subject to the same salary level test, such as doctors, lawyers, teachers and outside sales employees.

The federal district court for the Eastern District of Texas held that the \$913 salary level established in the 2016 final rule violated Congress’ intent and exceeded the Department’s authority to set a minimum salary level “to screen out the obviously nonexempt employees.”⁹ As the court further stated, the Department “does not have authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 13(a)(1)” [of the Fair Labor Standards Act (the Act)].¹⁰ The court found that it would be consistent with Congress’s intent to set the minimum salary level “somewhere near the lower end of the range of prevailing salaries.”¹¹

Again, ABC agrees with DOL’s proposal to retain the bulk of the 2004 standard salary test. A recent survey of ABC’s members, most of whom are small businesses, indicates that 73% of those responding agree with the new minimum level set in the proposed rule. We note, however, that the Department is departing from the 2004 methodology by including the high wage mid-Atlantic states in the South Census Region on which the 20% calculation is based, resulting in a slightly higher minimum salary outcome than should be the case. We also note that the new proposed minimum of \$35,308 would be much simpler for businesses to apply—particularly small businesses—if it were rounded down to the nearest thousand dollars. In short, we recommend that the final minimum salary be set no higher than \$35,000.

Though a majority of ABC’s survey respondents felt the Department’s new minimum salary was acceptable, as discussed above, a majority also responded that the proposed increase will adversely affect their ability to award merit-based increases, budgeting and/or morale, due to wage compression and some reclassification requirements. ABC submits that setting the minimum salary at any higher level would be unduly disruptive to construction industry employers.

2) The Department should retain the highly compensated salary test at the 2004 level.

ABC is disappointed that the new proposed rule does not retain the highly compensated salary test at the 2004 level. Instead, the Department applied the methodology imposed by the Obama administration in its 2016 final rule. As a result, the proposal increases the threshold from its current level of \$100,000 to \$147,414 per year.

Consistent with the desire of ABC members for simplicity in any new salary level that is adopted by the Department, the highly compensated salary test should be retained at its 2004 level. There was no good reason for the 2016 rule to increase the highly compensated salary level for EAP employees. The previous salary of \$100,000 was sufficient to ensure that only bona fide EAP employees qualified for

⁹ *Nevada*, 2017 WL 38377230 at *7, citing Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949), at 7-8.

¹⁰ *Id.*

¹¹ *Id.*

exempt status. At worst, a rate that applied the 2004 methodology should be adopted, specifically by using the same South and retail data used to set the minimum salary level.

3) The Department should allow employers to use all nondiscretionary bonuses to be counted toward the standard salary level.

Bonus and incentive pay are important components of employee compensation in many industries, including construction. Unfortunately, as in the 2016 final rule, the new proposed rule arbitrarily restricts bonuses to 10% of compensation in determining exempt status. The new proposal does allow annual bonuses, which the 2016 final rule excluded.

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. The 10% cap should be lifted, or at a minimum raised to 25%, in recognition that bonuses are now a common and important indicator of exempt status. ABC further supports recognition of bonuses, regardless of whether they are paid on a quarterly, semi-annual or annual basis.

The Department should also provide a more realistic safe harbor for employers who make unintentional errors in calculating incentive pay credits. The proposed rule allows employers to cover any shortfall in annual incentive pay only by making a one-time makeup payment within one pay period after the end of the year. Small businesses should be given more time to correct unintentional errors in incentive pay, and it should be made clear that such errors will not lose the exemption for an entire year if such errors are unintentional and isolated.

Exempt employees are more likely than non-exempt employees to receive bonuses and commissions in the construction industry. It is arbitrary and capricious to limit such compensation from being considered as part of the salary test for exempt status. All methods of payment should be fully credited.

4) ABC supports the Department's decision not to impose automatic increases to the minimum salary level or highly compensated test.

ABC is pleased that the proposed rule departs from the unlawful 2016 final rule and does not include automatic increases to the minimum salary level or the highly compensated test. As the Department itself found in 2004, Congress did not intend the salary level test to be indexed, as evidenced by the fact that Congress has never provided for automatic increases of the minimum wage or other exemptions to the Fair Labor Standards Act.

In response to the Department's request for comments on its proposed commitment to revisit the salary levels every four years, ABC submits that such a commitment is unnecessary and perhaps problematic. The commitment is unnecessary because the Department already has the statutory and regulatory authority to revisit the final rule via notice and comment at any appropriate time. But by making a specific four-year commitment in the final rule, the Department exposes itself to legal challenge if the commitment cannot be met due to unanticipated changed circumstances raising budgetary and operational concerns.

Conclusion

ABC is pleased the new proposed rule largely retains the 2004 standard salary test, adopts only one standard salary level and does not impose automatic indexing of the salary level test. The use of Mid-Atlantic state data, the excessive increase in the highly compensated minimum salary and the proposed limits on bonuses and other incentive payments, as well as the commitment to revisit this contentious rule every four years, should each be reconsidered and modified. We hope DOL will move swiftly to finalize this proposal.

Respectfully Submitted,



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