WHDI WAGE & HOUR DEFENSE INSTITUTE

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U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Submitted Electronically Through Federal eRulemaking Portal

Re: RIN 1235-AA11: USDOL Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Ms. Ziegler:

The Wage & Hour Defense Institute ("WHDI") of the Litigation Counsel of America is comprised of highly talented and experienced wage and hour defense attorneys from across the United States. WHDI serves as a nationwide network and meeting ground for top-tier wage and hour practitioners to engage in professional development. WHDI holds periodic conferences, meetings and colloquia for, among other things, influencing wage and hour law and policy. A list of our members is attached.

Summary of WHDI View

Exemptions are "[a]mong the most heavily litigated provisions of the Fair Labor Standards Act (FLSA)." ABA/BNA THE FAIR LABOR STANDARDS ACT, at page 4-4 (2nd ed. 2010). Since President Obama's March 13, 2014 memo to the U.S. Secretary of Labor directing USDOL to "propose revisions to modernize and streamline" the FLSA overtime regulations, WHDI members have carefully followed the process, collectively reviewed hundreds of pre-proposal comments in legal publications, and thoroughly reviewed the July 6, 2015 Proposed Rules.

In our view, the Proposed Rules fail to comply with the Presidential directive "to modernize and streamline the existing overtime regulations." On the contrary, the Proposed Rules deliberately add another layer of complexity to an already overly complex, nuanced set of overtime regulations that employers, employees, payroll administrators, union representatives, accountants, attorneys, arbitrators, courts, and administrative agencies find vague, confusing, and lacking in plain meaning. Interpretation is frequently uncertain and highly debatable. The administration of exempt classifications causes billions of dollars of expense annually. Wage

and hour class actions and collective actions are the most frequent type of class actions in federal court and most state court systems. Individual wage and hour claims are among the most common civil suits in the country. The Proposed Rules fail to acknowledge, let alone address, this fundamental failure of the current regulatory scheme. Instead, the Proposed Rules maintain and exacerbate the status quo, create false expectations among employees who may be reclassified, and misrepresent the need for a salary level requirement.

The Salary Threshold Is Not a "Minimum Wage" for Exempt Employees

As a matter of common sense and economic reality, to attract and retain exempt employees, employers must appropriately compensate them based on their skill and the nature of services expected. The so-called "white-collar exemptions" (executive, administrative, and professional) are exemptions from both minimum wage and overtime pay. The FLSA makes no mention of a salary level requirement for these white-collar exemptions and, in fact, exempts executive, administrative and professional employees from minimum wage to begin with. 29 U.S.C. §213(a). So why is the Department proposing a rule involving the salary level of exempt workers?

The Department's explanation, as set forth in the NPRM, essentially boils down to: "because we've always done so." The NPRM lists two historical reasons. First, the Department claims a salary level is "the best single test" of exempt status. But, if that were the case, why not define exempt status based on a salary level and leave it at that? Many, perhaps most, employers, employees, and other interested parties would welcome an exemption test based solely on a salary level. Employees below that salary level would be non-exempt. It would be very easy and efficient to administer. There already is something akin to that in the existing highly compensated employee exemption. Yet, the Proposed Rules make no mention of this approach, despite widespread support, nor any explanation as to why it would not be a feasible way to "modernize and simplify the overtime regulations."

Second, the Department claims that a minimum salary level provides "a valuable and easily applied index to the 'bona fide' character of the employment for which the exemption is claimed." Really? If an employee's primary duty is the performance of exempt work, how does a salary level make it simpler or easier to ascertain "the 'bona fide' character of the employment for which the exemption is claimed"? It does not. As we know from the thousands of cases litigated annually on the issue of misclassification, the salary level, if met, only means that the exempt duties question can be considered. It is a threshold question and separate factor that has no bearing on the primary duty analysis. It doesn't make the duties analysis any simpler or easier. The only thing that the salary-level test does is deny an employer the right to demonstrate that an employee qualifies as exempt even though his or her primary duty is performing exempt work regardless of the salary level. As it stands, the salary-level test has no bearing on exempt duties and is used only to thwart otherwise legitimate claims of exempt status. Raising the salary level, as the Department proposes to do, does nothing to simplify or make easier an employer's ability to determine whether a particular employee is exempt. Indeed, raising the salary level will unfairly disqualify thousands or even millions of employees from exempt status where it has been undisputed (and in many cases previously established by court

or agency review) that the employees are exempt and their primary duty is performing exempt work.

The bottom line is that the Proposed Rules neither modernize nor simplify the overtime regulations, but rather perpetuate and expand the misuse of salary levels in defining exempt status.

No Rationale for a One-Size-Fits-All Salary Level

Not only is a salary level an illegitimate factor in determining exempt status, the Department presents no rationale as to why a single-level salary should be imposed on all industries, geographic regions, and types of exemptions. A single-level salary does not account for regional differences, business size, for-profit versus non-profit organizations, industry custom and practice, or type of exemption. Why should the salary level for exempt status be the same for New York City as for Walla Walla, Washington? Why should the salary level for an exempt position at Acme Investment Company be the same as the salary threshold for an exempt position at the local food bank? Why should the salary threshold be the same for administrators as it is for professionals or executives? These questions are highly relevant and important, yet the Proposed Rules simply ignore them.

The Department Has Misled the Public as to the Impact of the Proposed Rules

Employers generally set a salary for a particular position based on factors related to market competitiveness such as type of position, size of employer, geographic market, industry standards, market competition, education and training, experience, skill, and effort. To the extent a position requires more than 40 hours per week, the employer and the employee presumably take that into account when the employer sets the salary and the employee accepts the job. Consequently, the salary for the position that is currently exempt generally has an "overtime" recognition factor built into the salary structure.

Eligibility for overtime pay does not mean that a formerly exempt worker is entitled to more pay for the same job upon being reclassified.

Nothing in the FLSA requires an employer to raise the pay for any position simply because the U.S. Department of Labor changes the classification rules so that the position becomes non-exempt. The employer can reconfigure the compensation formula so that the total earnings for the newly non-exempt employee, including overtime pay, does not exceed the amount of salary received by the employee for the same job when the employee was classified as exempt. In fact, such a restructuring of the compensation will necessarily be based on projections of expected hours worked.

Nevertheless, the "pay raise" sloganeering of the Department has deliberately misled employers, employees, and the public to believe that raising the salary threshold will automatically increase the take-home pay of workers who are currently receiving salaries of less than $50,440 per year and work more than 40 hours per week.

The Department should be transparent and inform the public that if an exempt position is reclassified as non-exempt, there is no requirement that the employer treat the salary paid for the old exempt position as the 40-hour base pay for the new position. Rather, the employer is free to set a base pay or hourly rate that, when used to calculate overtime pay, results in approximately the same total compensation as when the employee was paid a salary so long as that pay is at least minimum wage for all compensable hours worked. The FLSA does not determine what the pay rate is for a non-exempt position other than to require that it be at least minimum wage.

Further, many salaried exempt employees do not regularly work a significant amount of overtime. Thus, instead of these workers receiving the purported pay increase by virtue of the Department's proposed salary level increase, they will more likely lose their exempt status and not work much, if any, overtime. How have these workers been helped?

Again, the Department should make clear that its change to the salary level does not change the fact that there is no obligation on the part of an employer to set the base pay for a new non-exempt position at any particular hourly rate so long as it is at least minimum wage.

Negative Impact on Employee Relations and Other Collateral Damages

Based on our collective experience counseling employers regarding thousands of actual or potential exempt reclassification, we know that transitioning employees to non-exempt status not only creates major administrative costs due to training on recordkeeping, time-reporting, meal/rest periods, unauthorized overtime, and numerous other requirements affecting hourly employees, but employers must take appropriate monitoring and enforcement action to enforce rules that workers resent and would reject if the wage/hour law allowed them to do so. Morale suffers when formerly exempt employees are involuntarily converted to non-exempt status. They see it as a demotion. They prefer the freedom to manage their own time and be paid a fixed salary rather than "punch a clock" and have their reported hours constantly scrutinized and arbitrarily fixed.

Also, some exempt employees enjoy additional benefits or perks that they will lose when re-classified as non-exempt employees.

Automatic Annual Increase in Salary Level

As we explained, the salary-level test is a flawed concept and the Proposed Rules only exacerbate its misuse. The proposal to automatically bake in an annual increase is an unprecedented abuse. Previous changes to the salary level have required a specific proposed rule and comments prior to adoption. The Department's efforts here are a blatant attempt to skirt such a formal process for implementing future increases.

Until we know the effects of the current Proposed Rules (should they be adopted), there is no justification for an automatic increase. An automatic increase eliminates the ability of the public to address the salary-level test in relation to changing policies and subsequent economic circumstances (will there be a decrease if there is deflation?). Instead, an automatic increase creates a self-perpetuating mechanism that ignores unintended consequences and forces

employers to annually re-compute the new salary level and evaluate how to deal with it. Perhaps more importantly, regardless of an employer's financial success or stability, such automatic increases would require the employer to provide commensurate raises so that its exempt employees near the threshold retain their exempt status. This will create logistical and administrative uncertainty as employers are forced to re-evaluate the exempt status of certain job positions annually.

The Proposed Rules Will Likely Increase Litigation

Complex and confusing wage and hour laws have spawned an epidemic of claims and lawsuits. The Proposed Rules will make this shameful situation worse in two ways. First, by reclassifying millions of exempt employees as non-exempt employees, there is every reason to believe that the myriad of disputes – regarding what is compensable time, the accuracy of time records, compliance with rest/meal period requirements, pre- and post-shift use of electronic devices, and other questions already deluging courts and agencies – will increase in the same proportion among the new non-exempt employees as for the current cohort of non-exempt employees. These employees will have to become accustomed to the new practices associated with being a non-exempt worker, including recording their time accurately, not working before and after scheduled shift times, not checking their emails at home; and their employers will likely experience some resistance in having these employees comply with the rules underlying their new status. This difficult process will be exacerbated by the fact that many job positions will become non-exempt for the first time in the living memory of anyone working in them or supervising them due to the economics of the job not justifying the extraordinary increase in salary that the proposed regulations mandate. Thus, the employees and employers will have no frame of reference for carrying on the job or supervising it other than as a salaried exempt employee. Second, the new salary level will create additional claims, particularly against small employers who mistakenly fail to understand or apply the new salary level correctly or who fail to understand how to administer "salary basis" issues properly.

The Proposed Regulations Will Impact Collective Bargaining Obligations

There are many exempt employees whose salaries are controlled by collective bargaining agreements. This includes many professionals and administrative employees, particularly in the public, not-for-profit and health care sectors, in positions such as nurses, social workers, finance, accounting and non-executive managerial positions. Salaries below the proposed new threshold are not uncommon in the entry level pay grades or salary structures in non-profits or rural areas. These salaries are locked for the duration of the applicable collective bargaining agreements. If such a dramatic and sudden increase to the salary level threshold occurs as proposed, then the exempt status of many employees could be lost without the employer having an opportunity to negotiate over the impact of the employees' losing their exempt status. Should their salaries be increased? If not, how should their overtime rates be calculated? To what extent can they be required to record their time or work so that they minimize overtime? Are they appropriately placed in a bargaining unit of otherwise exempt employees, or should they move to the units of other hourly and non-exempt employees? The potential burden that will be imposed on collective bargaining negotiations, as well as the inherent leverage that will be given at least initially to labor unions, cannot be underestimated.

The Proposed Regulations are silent as to these issues, but the likelihood that those questions will be asked and debated at the job site is high. It is also likely that the parties will differ in their view of the best approach to take, and that will result in more litigation under the FLSA, as well as a potential slew of arbitration demands and unfair labor practice charges.

Requesting Comments on a Hypothetical Change to Primary Duty Test Is Improper

Despite years to consider the issue, the Department failed to present a proposed change to the primary duty rule as part of the NPRM. Nevertheless, the Department attempts to create a placeholder to change to the primary duty test by inviting comments on a ghost Proposed Rule. The implication is that the Department might address the primary duty test in the final rules. Such an attempt would be wholly improper under the Administrative Procedures Act, as well as violate any semblance of reasonableness and due process. In the absence of a proposal regarding the primary duty test, there is nothing to comment on in the rulemaking process. The Department is free to seek input from the public on the primary duty test (and, presumably, has been doing so informally for years) outside of the formal rulemaking process.

The Department Should Have Allowed a Longer Comment Period

Given the enormous and broad impact of the Proposed Rules, which the Department itself touts, the Department should have extended the comment period at least until November 4, 2015, to allow a reasonable opportunity for interested parties to review the proposal and thoughtfully respond. The NPRM is lengthy (nearly 100 pages) yet provides for a comment period that is shorter than what was provided in 2003 for a significantly shorter proposal. The old saw that "your failure to plan is not my emergency" applies. The Department has had years to come up with a proposal. Then, it gave itself 16 months from the time of the President's directive until the NPRM was published. Now after spending years formulating the Proposed Rules, the Department is running roughshod over the public by limiting it to a 60-day comment period on a highly complex and controversial proposed rule change that will likely impact the vast majority of employers in the United States.

Conclusion

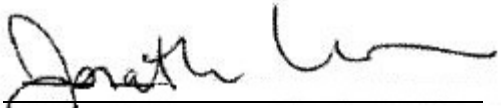
In sum, the Proposed Regulations, if adopted, will have dramatic and damaging consequences for both employers and employees, many of which the Department fails to acknowledge. Moreover, the very predicate that the salary level test is appropriate is questionable. Why should employees who are deemed to be exempt executive, administrative or professional employees today lose that status upon the implementation of the new regulations when the duties of their jobs have not changed an iota? If there's a proper purpose for a salary level test, it would be to serve as a proxy for exempt status, but not a prerequisite for exempt status where the employees are performing the duties of an executive, administrative or professional.

The Proposed Regulations perpetuate and exacerbate a flawed regulation and should not be adopted. Considering the scope of the potential impact, the public should be allowed more time to provide its input. And, as to the timing of implementation of any final rules, the

Department must take into consideration that– if they resemble the Proposed Rules – the final rules will require employers to undertake a major revamping of the compensation systems and practices that have long been in place at the great majority of workplaces.

Sincerely,

Wage & Hour Defense Institute



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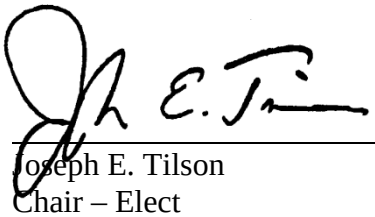

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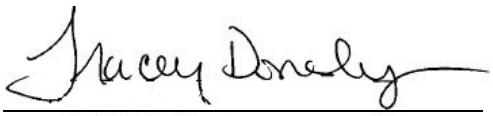

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