

May 21, 2019

Submitted via regulations.gov

Melissa Smith
Director of the Division of Regulations,
Legislation, and Interpretation
Wage & Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule and Request for Comment (RIN 1235-AA20)

Dear Ms. Smith,

WorldatWork respectfully submits these comments in response to the Department of Labor's (DOL or the Department) Proposed Rule and Request for Comments, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. We appreciate the opportunity to provide feedback to the Department.

I. Background

For more than 65 years, WorldatWork has set the agenda and has been the standard bearer in the field of Total Rewards. We are the global, nonprofit professional association dedicated to serving, educating and inspiring those who reward and engage the workforce. Our members include professionals who are accountable for the critically important practices of compensation, benefits and work-life programs within their organizations around the world. With more than 70,000 members and subscribers worldwide, we are dedicated to bringing fairness, equity, and a sense of purpose to everyone who works.

WorldatWork provides a pathway to professional excellence through education and certification programs; thought leadership; research; advocacy; and idea exchange. Our signature certifications, data, content and conferences advance our members' leadership, and enable them to guide the conversation about what employee engagement looks like today and should look like tomorrow.



The recent, and needed, global conversation about pay equity sheds light on the critical need for a strategic response to the issue. Compensation practices have the potential to positively impact both individual employees and organizations by motivating productivity and long-term results. This motivation has far-reaching benefits to employees, communities, and the U.S. and global economies. The influence of public policy on shaping compensation practices should be carefully considered. Government has demonstrated that it can positively influence the outcome through areas such as

prohibiting wage discrimination for protected classes or establishing a reasonable minimum wage for employees. However, government policies also can disrupt the delicate environment of cost structures for employers and competitive pay for employees.

It is with this expertise and perspective that we submit the following comments.

II. WorldatWork's Previous Comments on Fair Labor Standards Act (FLSA) White Collar Exemptions

DOL's proposal reflects many of the policies for which WorldatWork has long advocated. Our members expressed significant concerns over the rules finalized in 2016 by the Obama Administration.

Specifically, our members felt strongly that more than doubling the salary level threshold to a \$47,467 level was ill-advised and could have created numerous problems for employers and employees. On top of the additional costs and administrative burdens of tracking hours for a significantly larger nonexempt workforce, our members expressed concerns for employees, who clearly perform exempt duties, feeling like their roles were less valued if they were reclassified from exempt status to nonexempt. These employees faced losing access to benefits and workplace flexibility options along with career-advancement opportunities such as management or supervisory responsibilities and growth gained through attending conferences and traveling for business purposes, which likely would have been limited for newly classified nonexempt employees.

Our members were also concerned with the automatic updates included in the 2016 final rule tied to the 40th percentile of salaried workers in the lowest census region. Connecting an automatic update to an already unjustifiably high index would have resulted in a troubling vanishing exempt workforce over time. According to WorldatWork research, the exempt employee workforce would rapidly decline under the approach finalized in the 2016 rules.

WorldatWork appreciates that the Department intends to formally rescind the 2016 overtime exemptions for executive, administrative, professional, outside sales and computer employees. We



have consistently supported raising the current standard salary-test level, if it is set at a reasonable, workable standard with the goal of identifying those employees performing nonexempt duties.

III. Comments on the Proposed Rule

Salary Level

The DOL proposed to set the salary level at which an employee could be exempt from federal overtime and minimum wage requirements at \$679 per week, or \$35,308 per year. The DOL arrived at this level by adopting the methodology embodied in the 2004 Rule for calculating the salary level, as WorldatWork has urged. The 2004 Rule set the salary level at the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South) and in the retail sector.

WorldatWork believes that the new proposed salary level is reasonable and workable. We also believe that utilizing a consistent methodology is important. We need to avoid erratic changes to the required salary level, and we believe a consistent methodology helps avoid those disruptions. We do believe that the proposed standard will significantly assist employers and employees to efficiently identify exempt and nonexempt roles under the Fair Labor Standards Act.

We also agree with the Proposed rule establishing a single salary level for all executive, administrative and professional (EAP) exemptions. In today's workforce, many jobs can qualify for more than one exemption. Setting different levels would only encourage employers to categorize the role in the exemption with the lowest standard salary level. This is not how the standard salary level should be designed and would likely result in adding layers of complications that are not needed. The more practical and workable approach is to keep the standard salary level as a floor where it operates as a gatekeeper removing roles that are clearly made up of nonexempt responsibilities.

While we understand and appreciate real concerns tied to geographic pay differences, introducing multiple levels of salary tests is not warranted. States and local municipalities can and do address geographic issues setting higher salary requirements or tests in locations where the local market demands higher wages. Adding a new federal layer of regional/geographic based salary levels would be extremely burdensome to multistate employers and would result in more situations where employees in the same job role or function are classified differently based solely on where they work. This causes a host of other complications regarding access to benefits, workplace flexibility options, discrimination allegations and more. The consequences far exceed the limited benefits of considering multiple salary level tests.



In our member survey, 58% of respondents advised that the new salary standard was “about right,” in terms of level. At the same time, 35% of respondents viewed the new salary level as too low, and the remaining 7% of respondents viewed the new salary level as too high. Our members find the proposed minimum salary level is reasonable.

Periodic Updating

The DOL proposed that the salary level be updated every four years through notice-and-comment rulemaking. This approach differs significantly from that adopted in the 2016 Rule, which would have automatically updated the salary level every three years through a prescribed methodology. In previous comments, WorldatWork opposed automatic adjustments to the salary level.

By establishing a process for the agency to consider regular updates to the salary level, the DOL will avert pressure to dramatically increase the salary level at a future date and thus avoid the set of circumstances that led to nearly doubling the salary level, in a single increase several times in the past.

WorldatWork members agree that the salary level should be revisited from time-to-time to remain relevant and effective at its gatekeeping function. The best method for doing so is through the Administrative Procedure Act’s required notice-and-comment rulemaking process. This gives the regulated community the opportunity to weigh in on current economic conditions that may be relevant to establishing an effective salary level.

In our survey, 63% of the responding compensation professionals advised that they supported periodic updates to the salary level, with 27% neutral and 10% opposed. In terms of the 4-year frequency, 71% of our members that responded to the survey believe that the 4-year frequency was reasonable.

Inclusion of Incentive Payments in the Salary Level Requirement

The DOL proposed to permit nondiscretionary bonuses, incentives, and commissions to satisfy up to 10 percent of the standard salary level test for the EAP exemptions, provided that such bonuses or payments are paid at least annually.

Under the proposal, if the employee’s salary plus bonuses, incentives, and commissions do not equal the \$35,308 salary level by the last pay period of a 52-week period, the employer may make one final payment sufficient to achieve the \$35,308 level by the next pay period after the end of the year.

WorldatWork has advocated for inclusion of incentive payments when determining eligibility for the EAP exemptions in prior submissions to the DOL. We appreciate including this concept in the



proposed regulations, and the DOL removing the practical obstacles to this credit contained in the 2016 rule. We believe this option will be beneficial to employees and employers generally. In our member survey, 66% of the respondents advised that they viewed the 10% credit as an appropriate level for the purposes of the EAP exemption standards.

Highly Compensated Employees

The DOL proposed to update the compensation threshold for an employee to be classified as a “highly compensated employee” (HCE) to \$147,414. The 2004 Rule created the HCE test, which is based on the rationale that it is unnecessary to apply the standard duties test to employees who earn a certain amount annually. As the proposal states, the HCE test “combines a high compensation requirement with a less-stringent, more-flexible duties test.” The 2004 Rule set the HCE total annual compensation amount at \$100,000.

The DOL’s proposal would adopt the 2016 Rule’s methodology of using the 90th percentile of earnings of full-time salaried workers to set the HCE compensation threshold, based on data from the Census Bureau’s Current Population Survey for 2017, inflated to January 2020 figures. That approach results in a compensation threshold of \$147,414.

WorldatWork agrees that the compensation level for the highly compensated exemption, should be examined on a regular basis. We have advised the DOL in the past that we see little benefit to allowing that figure to get stale and then confronting dramatic adjustments in the compensation threshold. The DOL proposal, along with the periodic reexamination, is consistent with views that we have previously expressed. We also continue to agree with the concept that a highly compensated exemption should be available, with a more flexible duties test, for those individuals compensated at a certain threshold.

In our member survey, we did see a significant difference of opinion on the new compensation threshold level of \$147,414 per year. Forty-four percent of the respondents viewed the level as too high, 40% viewed the level as about right, and 17% viewed the level as too low. As we have studied this issue, WorldatWork believes that the proposed compensation threshold in the Proposed rule is too high to achieve the objectives of the HCE exemption. The dramatic change from the current \$100,000 threshold is precisely the disruption which adversely affects employees and employers. We have learned that the proposed level could needlessly result in current exempt-classified employees being reclassified to nonexempt status, with all the distraction which results from that reclassification. WorldatWork does not believe that using the 90th percentile of earnings of full-time salaried workers as announced in the 2016 rule is reasonable or workable.

Instead, we believe that the DOL should set the HCE total annual compensation amount at an amount equal to annualized weekly earnings of the 80th percentile of full-time salaried workers



nationally. We believe this figure will result in a far more workable standard, given the fluctuation in weekly earnings in different parts of the country and in different industries. We also believe that the resulting compensation level would more effectively serve its purpose by identifying those individuals who should be eligible for a more relaxed duties test. By combining use of national data and a 90th percentile standard, the proposed rule generates an artificially inflated figure which undermines the entire purpose behind the HCE exemption.

Implementation

While not explicitly solicited in the request for comments, we have also conferred with members regarding the time period needed to implement changes to these regulations. Our members are compensation professionals in organizations of all sizes, so they have expertise when it comes to implementing regulatory changes. Eighty-one percent of the survey respondents advised that they believe that 180 days or more were necessary to properly implement these proposed changes, as well as changes that may occur in the future in connection with these periodic updates.

When the DOL implements new salary or compensation standards for the EAP exemptions, compensation professionals are called upon to carry out a host of responsibilities. Whether it's assessing impacts on currently exempt classified personnel to evaluating changes to salary, incentive compensation, and benefit programs to retain exempt status to redesigning roles and responsibilities, compensation professionals work to avoid adverse implications for employees and their organizations. Where adverse impacts cannot be avoided, compensation professionals need to implement manager and employee communications plans, along with training to educate individuals converted to nonexempt status, concerning their new recordkeeping and work responsibilities. Effective implementation occurs when adjustments can be implemented during the company's compensation review cycle, performance review cycle, or other annualized activity. We saw firsthand an incredible level of disruption caused by the timeline for implementing the Obama administration rule, where employees and employers were not provided the time to implement the changes smartly.

IV. Conclusion

WorldatWork appreciates the Department's attention to the overtime exemptions for executive, administrative, professional, outside sales and computer employees. The uncertainty surrounding these rules over the past few years has been disruptive for many organizations and employees. If the Department moves forward with a formal rulemaking, we strongly advocate that standard salary level be adjusted to a reasonable rate based on the methodology used in 2004 and that no new changes be made to the duties tests. We strongly recommend keeping the federal standard





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salary level as a federal floor without regard to geographic location, employer size or any other factors.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Cawood". The signature is fluid and cursive, with a large initial "S" and a long, sweeping underline.

Scott Cawood, Ed.D, CCP, GRP
WorldatWork President and CEO

