



May 21, 2019

Ms. Cheryl Stanton, Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, DC 20210

Submitted via regulations.gov

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA20) (84 Fed. Reg. 10900, March 22, 2019)

Dear Ms. Stanton:

In response to the Department's request for comments on the proposed rule and request for comments "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" published in the Federal Registrar on March 22, 2019 (RIN 1235-AA30), these comments are submitted on behalf of the National Association of Wholesaler-Distributors (NAW).

I. Introduction

NAW is the "national voice of wholesale distribution," an association comprised of employers of all sizes, and national, regional, state, and local line-of-trade associations spanning the \$6.01 trillion wholesale distribution industry that employs more than 5.93 million workers in the United States. According to Department of Labor data, the April 2019 average hourly earning for workers in the wholesale trades was \$31.15, well above the \$18.58 average for the entire private sector. Approximately 40,000 enterprises with places of business in all 50 states and the District of Columbia are affiliated with NAW.

Further, NAW is a member of and serves on the Management Committee of the Partnership for Workplace Opportunity ("the Partnership") and fully associates itself with the Partnership's broad and detailed comments in this matter, submitted on May 21, 2019. In our comments we will focus on the impact of the proposed changes on NAW member companies and the wholesale distribution industry.

Our comments are drawn from responses from our members to the proposed rule. As such they reflect the real-world impact that this rule would have should it be implemented.

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NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

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NAW applauds the Wage and Hour Division for undertaking the present rulemaking and we acknowledge that today's 21st – century workplace is immeasurably different from the workplaces of years past when these rules were last updated. Further, we feel that this rulemaking is a vast improvement over the final rule promulgated by the Department of Labor in 2016 (See 81 *Fed. Reg.*32391 May 23, 2016).

On September 4, 2015, NAW submitted substantial comments to highlight the significant negative impact our members would have sustained from the 2015 proposed rule. In those comments NAW strongly encouraged the Department to re-think: 1) the proposal to increase the minimum salary level required to qualify for the EAP exemptions from \$455 per week to the 40th percentile of weekly earnings for full-time salaried workers; 2) the proposal to increase the salary level annually; 3) the revelation that the Department is also considering revisions to the duties test... without providing any specifics as to what those revisions might be; 4) the discussion of allowing bonuses and incentive pay to satisfy part of the standard EAP salary requirement; and 5) the discussion of allowing commissions to satisfy part of the standard EAP salary requirement.

Because of the deep concerns NAW member companies had about the negative consequence the 2016 Final Rule would have had, NAW joined as a plaintiff in a lawsuit challenging that Rule in Federal court, and we now urge the Department to formally and fully rescind that rule.

II. The Standard Salary Level Threshold

As mentioned above, NAW had significant issues with the 2015 proposed rule and the 2016 Final Rule, which would have set the standard salary at the 40th percentile of earnings of full-time workers in the lowest wage region – resulting in a proposed salary of \$913 weekly, \$47,476 annually (more than double the 2004 level). At the time, NAW members expressed grave concern that the sharply increased salary threshold would cause significant financial hardships on their businesses. Many member companies also expressed concern that it would cause employee moral to plummet since being moved from a salaried position to hourly wages would deny them the opportunity for growth and advancement in the company. Although the 2016 Final Rule never took effect, a number of NAW member companies took preliminary steps to implement the Rule, including moving employees from salaried to hourly-wage positions. One company executive reported sitting **“through several ‘teary’ sessions with employees being very upset they were being forced to go to hourly . . . and we lost two employees over the change.”**

While NAW actively opposed the 2016 Final Rule, we acknowledge the need to modify the standard salary required to qualify for what are commonly known as the “white collar” exemptions to the Fair Labor Standards Act’s (FLSA) overtime regulations so that it will continue to “distinguish bona fide executive, administrative, and professional employees from those who were not intended by Congress to come within these exempted categories.” NAW is pleased that the Department developed its proposed salary threshold using the 2004 methodology, and our members have informed us that the proposed \$679 per week, \$35,308 annual salary level would not create an undue hardship on their businesses. One NAW member told us:

When looking at broad sweeping regulations like the FLSA salary threshold and duties test, principles of common sense should govern. The currently proposed threshold of \$35,308 is far more reasonable than the prior 2016 proposal and appears to be based on solidly established methodology. Unlike the prior proposal, with its high threshold that rendered the FLSA duties

test moot, this proposal provides a fair threshold that meets Congress’s goal of screening obviously nonexempt employees from the duties test. [We believe] the duties test is most integral in defining FLSA status.

III. Future Updates to the Earnings Thresholds

NAW fully appreciates that the current proposed rule does not include automatic, indexed increases in the standard salary level as did the 2016 Final Rule. Further, most of the comments we received from NAW member companies acknowledged that the salary level should be reviewed more frequently than it has been. We further support the Department’s conclusion that future reviews should be pursued with an appropriate notice-and-comment process.

However, several NAW member companies expressed concern about the proposal in the current proposed rule for a review of the salary level every four years. One company suggested that **“it could be problematic . . . if the standard salary periodic adjustment is too frequent or outpaces the economic conditions.”** Another company, supportive of a periodic review, said they would be **“in favor of less frequent adjustments to enable more accurate wage forecasting and ease of administration.”**

And another NAW member company raised concerns that a periodic review would automatically assume a salary threshold increase even if not economically warranted:

As far as increasing the amount on a regular basis, I would like to see them come up with an economic driven metric . . . for increasing the levels only if justified, not just because. I am in support of looking at it regularly to prevent these types of actions in the future. Would they decrease it in an economic downturn?

IV. Inclusion of Nondiscretionary Bonuses, Incentive Payments, and Commissions in the Salary Level Requirement

NAW welcomes the Department’s discussion of allowing non-discretionary bonuses, incentive payments and commissions to satisfy part of the standard salary test. We also appreciate that the rule proposes to allow such payments to be made annually as well as on a more frequent basis, and that “catch-up” payments would be allowed.

However, we would urge the Department to extend the time deadline for such catch-up payments beyond the one pay period as provided in the proposed rule. Especially in the context of payments made on an annual basis, the time period of a single pay period could well be insufficient for the company to assess employee performance and make the calculations necessary to determine the amount of the payment.

Further, NAW member companies have commented that the proposed 10 percent cap on the amount of threshold salary that can be met with these non-salary payments is inadequate and does not take into account how businesses are run and employees are compensated. Non-discretionary bonuses, incentive pay, and commissions are all part of an employee’s compensation package and should be counted in their entirety to

satisfy the salary test. An employee who is earning more than the new salary threshold should not be removed from a salaried position and moved to hourly wages simply because more than 10 percent of their compensation is outside of base salary.

As one NAW member succinctly put it: **“Nondiscretionary bonuses are compensation and should be included in all calculations.”**

A large Midwestern distributor reported that they:

. . . favor the inclusion of incentive pay in calculating salary, and would advocate for a rule allowing the inclusion of more than 10 percent. Although the current proposal’s allowance of annual incentives in calculating salary is a welcome change, [we] would advocate a higher cap. The ten percent cap is particularly low for a company like [ours], where incentives and commissions constitute large portions of many employees’ pay. Allowing full inclusion of commissions/incentives is appropriate. [We] further advocate that, contrary to the current proposal, commissions/incentives should also be fully included with regard to the Highly Compensated Employee exemption; that threshold is substantially higher than even the prior 2016 proposal.

V. Treatment of Inside Sales

While the proposed rule does not address the issue of inside sales personnel, NAW believes it is an omission that should be addressed. The presumption, embodied in CFR 541.201(a), that inside sales personnel are assumed to be non-exempt is woefully out-of-date and no longer even remotely reflects the roles of these sales people in the modern company – or the modern world. When the original FLSA rules were written, exempt outside sales personnel drove across town, or across a state, to call on their customers; non-exempt inside sales personnel supported the outside sales force and processed orders.

In today’s technological world, sales are made across the country, and across the world, without the sales staff having to leave their desks. The assumed distinction between “inside” and “outside” sales simply no longer exists.

NAW commented on the antiquated treatment of inside sales personnel in our June 28, 2003 comment letter to the Department in response to proposed FLSA changes. Regrettably, the comments we submitted then are as relevant today as they were fifteen years ago:

Under the existing FLSA regulations governing overtime pay, inside sales personnel of wholesale distribution industry employers must be paid at the overtime rate for hours worked in excess of 40 per week. The degree of professionalism, technical expertise, training and/or decision making responsibility of the inside sales person is of no effect here. Neither is the extent to which the inside sales person is compensated by commission or the aggregate amount of the inside sales person’s compensation.

The net effect of current law in this area is to undermine the ability of inside sales personnel to work as *they* would like to maximize their own income-earning potential, because their employer must, as a matter of law, compensate them at the overtime rate when the employee has worked more than 40 hours during the week. This serves neither the interest of employers (who are clearly interested in enhanced sales of the products(s) and/or service(s) they provide) nor employees (who are clearly interested in enhanced commission income) and is particularly problematic as a practical matter for inside sales personnel who must communicate with customers a continent away.

NAW believes this situation could and should be overcome by the abandonment of the production dichotomy . . . [W]e believe these regulations would better serve the modern workplace by recognizing that the work inside sales personnel do and the services they provide to their employer and their employer's customers is substantially important to their employer and not inherently non-exempt.

And today, as in 2003 it would take a simple modification in the Code of Federal Regulations to resolve this issue and recognize the value of sales personnel to a company. For a company the business of which is selling a product, such sales are very obviously related to the "general business operations" of the company. Therefore, NAW recommends the following changes to sections 541.201(a) and (b):

- (a) To qualify for the administrative exemption, an employee must perform work related to the management or general business operations of the employer or the employer's customers. The phrase "related to management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product.
- (b) Work related to management or general business operations includes, for example, work in areas such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, sales promotion, customer service, technical support, and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption. For example, a tax attorney and an accountant likely are performing work that qualifies for professional exemption.

The importance of inside sales personnel in the \$6.01 trillion wholesale distribution industry is not in dispute. In fact, when the Department was considering changes to the overtime regulations almost fifteen years ago, an article in *Modern Distribution Management* accurately described the role of inside sales representatives in the distribution industry:

The importance of inside salespeople in distribution has risen dramatically over the past decade. They've become a critical factor at many companies in the never-ending quest to drive cost out of the distribution channel. They are often the sharpest tool in focused customer service and segmentation strategies. Where once they were simply telemarketers and order-processors supporting the outside sales force, inside salespeople are now the key access point for many customers, large and small. (MDM, Aug. 10, 2004)

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NAW member companies agree:

Inside sales people should be treated as sales professionals. There should be a clear definition to separate an order processor and a sales person. We have sales support (processors) and inside sales people. Define each group appropriately to show the differences in duties.

Our ISR's have quite a bit of autonomy in their jobs, have independent decision-making authority, and are some of the most knowledgeable people in the industry. They operate, not as Customer Service Representatives, but true salespeople that just happen to work at a desk instead of on the road.

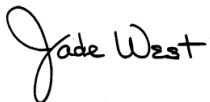
NAW urges the Department to review this issue and bring the FLSA regulations governing sales personnel into the modern age.

VI. Conclusion

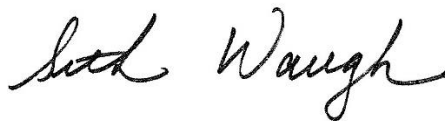
Overall we are pleased with the thoughtful way the Wage and Hour Division has undertaken this proposed rule. The proposed standard salary level threshold is a significant improvement from the 2016 Final Rule and we agree with the methodology used to determine the threshold. Additionally, we welcome the proposal to allow non-discretionary bonuses, incentive pay and commissions to satisfy part of the standard salary test, but would support removing – or at least significantly increasing – the 10% cap. Finally, we implore the Department to consider our proposed changes to how to modernize the regulatory view on inside sales personnel.

Thank you for your consideration of NAW's views.

Sincerely,



Jade C. West
Chief Government Relations Officer



Seth M. Waugh
Associate Vice President-Government Affairs