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Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division,
U.S. Department of Labor
Room S–3502
200 Constitution Avenue NW.
Washington, DC 20210.

RE: Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees • RIN 1235-AA20

Dear Ms. Smith:

The HR Policy Association ("the Association") welcomes the opportunity to provide comments to the U.S. Department of Labor (DOL or “the Department”) regarding the Wage and Hour Division’s (WHD) Request for Information (RFI) on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees as published in the Federal Register on July 26, 2017.¹

The HR Policy Association represents the most senior human resource executives in more than 380 of the largest companies in the United States. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. Reform of the Fair Labor Standards Act of 1938 (FLSA) to reflect the 21st century workplace is a long-standing goal of the Association.

A major challenge with the FLSA is that it was designed to address the workplace of the 1930’s and 40’s, not the technology driven workplace of the 21st Century. The law was enacted when there generally was a fixed beginning and end to most employees’ workdays, with none of todays’ advanced communications technology that has created a global virtual workplace that gives many employees the ability to better manage their work/life balance. Moreover, when the exemptions to the FLSA’s overtime requirements were being defined, there was a far more stratified and predictable designation of occupations, as compared to today’s workplaces where there is a greater blurring of distinctions between exempt and nonexempt employees, and a more rapid evolution of job descriptions.

These changes have created a deep-seated tension for employers seeking to comply with the law. On the one hand, the requirement that non-exempt employees be compensated for “hours worked”— and that those hours be meticulously monitored and recorded by the employer— have forced employers to impose restrictions on scheduling and work performed remotely, including

¹ 82 Fed. Reg. 34616.
banning the use of personal digital assistants and smartphones. On the other hand, these forced restrictions on technology are contrary to the goals of employees for a more flexible workplace. More than three-quarters of full-time workers say the ability to use mobile technology outside normal working hours is a somewhat to very positive development, and according to a recent Gallup poll few employees that check their email outside of normal business hours say the amount time they spend doing so is “unreasonable, or that it negatively affects their personal well-being or relationships with friends and family.” Moreover, the alternative for avoiding these technology restrictions—salaried exempt status, which is also preferred by many of today’s employees—is constricted by a substantial lack of certainty under the current regulations and the actions by plaintiffs’ lawyers seeking to exploit those uncertainties through litigation.

In addition, it is not clear how an employer would track, without seriously infringing on privacy, the time an employee spends on an occasional call to a co-worker or supervisor or their checking e-mails when it is being done during off-hours. Employees themselves often don't track these activities, or when they do the employer must take their word for it. The impact that personal digital assistants and smartphones have had on the 1940’s and 50’s definition of “de minimis” time worked, and what is considered compensable commute time needs to be addressed by the Department.

Further, as technology and artificial intelligence advance in the future it will become increasingly important for the Department to update what it means for administrative and professional employees to exercise discretion and independent judgement. According to DOL, this part of the duties test has become increasingly difficult to apply to administrative employees in the 21st century workplace, and the same issue will increasingly apply to professional employees. The degree to which technology and artificial intelligence are already disrupting and/or complementing traditional workplace duties, and is likely to increasingly do so in the near future, should be the subject of any future rulemaking if only to reduce unnecessary and costly litigation. Moreover, as the Department noted in 2004, “the areas in which the professional exemption may be available are expanding” but the Department has not provided any guidance since then on what those areas might be.

Thus, in the face of the disconnect between the law, the regulations, and today’s workplace, the Association recommends that instead of moving forward with simply increasing the salary level test under 29 CFR 541, the Department work closely with employers and other stakeholders on all sides of the issue to explore ways to update the Fair Labor Standards Act to reflect the workplace reality of the 21st Century.

Below are the Association’s comments on the RFI and our recommendations for future rulemaking.

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Comments on the Department’s Request for Information

1. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level?

The recent District Court decision that invalidated the 2016 final rule suggests the appropriate basis for setting a “permissible minimum salary level” would be one that “sets the minimum salary level as a floor to ‘screen[] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary,’” and that any new salary level test should be “somewhere near the lower end of the range of prevailing salaries” for exempt employees. This suggests the methodology the Department used in 2004 to update the salary level test would be the appropriate methodology to use in the future. Further, the Department’s long-standing tradition has been to avoid using an inflation measure to increase the salary level test because such a “mechanical adjustment” does not adequately take into consideration “the impact that an inflation adjustment could have on lower-wage sectors such as businesses in rural areas, businesses in the retail and restaurant industry, and small businesses.” Although in a footnote the District Court decision suggests that if the salary level had been just adjusted for inflation the Court may have upheld the rule, the Court also struck down the automatic adjustment in the 2016 final rule. The Association recommends the Department utilize the methodology used in the 2004 final rule that relied on actual wage and salary data and set the salary level test slightly lower than indicated by the data because of the impact on lower-wage industries and regions. Further, following the recent District Court decision, the Department may also want to take into account the potential impact any increase in the salary level test will have on employees who, in good faith, perform actual exempt executive, administrative, and professional duties, but earn less than any new proposed salary level test.

Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

No. However, as noted above, the outdated FLSA regulations need to be modernized in a number of areas to reflect the technology driven workplace of the 21st Century.

2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method?

See response to question 3 below.

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7 69 Fed. Reg. 22167 and 22168.
8 Because the salary level would be operating more the way it has; as more of a floor. State of Nevada, et al. v. U.S. Dept. of Labor, et al., No. 4:16-CV-731 (E.D. Tex. Aug. 31 2017).
3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

RFI questions 2, 3, and 10 (below) generally ask the same question in different contexts. That is, should the Department set different salary level tests for the executive, administrative and professional exemptions, or by various geographic locations and/or employer sizes? For clarity, simplicity and ease of administration the answer is no. The Association recommends the Department maintain only one standard salary level test, and one highly compensated salary level test.

4. Should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology?

The recent District Court decision that invalidated the 2016 final rule effectively answered this question. Specifically, the salary level test in the 2016 final rule, which was set “at the low end of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels,”9 was struck down by the court because it excluded too many employees who perform bona fide exempt duties. Therefore, the standard salary level should not be set within the historical range of the short test salary level. Moreover, the District Court noted the Department has used a permissible minimum salary level test when it sets the salary level as “a floor” to screen out obviously nonexempt employees. The Association recommends the Department utilize the methodology used in the 2004 final rule that relied on actual wage and salary data and set the salary level test slightly lower than indicated by the data because of the impact on lower-wage industries and regions.

Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

Any changes to the salary level test and duties tests should focus on providing clear bright-line standards that modernize and simplify the regulations for the digital workplace of the 21st Century.

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5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status?

The recent District Court decision that invalidated the 2016 final rule directly answered this question. “Because the Final Rule would exclude so many employees who perform exempt duties, the Department fails to carry out Congress’s unambiguous intent. Thus, the Final Rule does not meet Chevron step one and is unlawful.”10

At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

Since 1938, the Department of Labor has historically used a minimum salary level test in determining exempt status, and the recent District Court decision recognized there is some “permissible minimum salary level” below which all employees are eligible for overtime without regard to their duties.11 However, what salary level this is can only be answered by a detailed analysis of actual wage and salary data. Moreover, logically following the court decision there is likely some legally permissible salary level that can be used to screen out obviously exempt employees, and thereby make an analysis of employee duties in such cases unnecessary. Although the Department did not adopt a “salary only” test for highly compensated employees in 2004,12 the Association recommends the Department reconsider its previous decision and adopt a “salary only” test for highly compensated employees. At the very least, the duties test for highly compensated employees should be as simple and objective as possible to reduce unnecessary litigation.

6. To what extent did employers, in anticipation of the 2016 Final Rule’s effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees’ hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule’s effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

Due to the timing of the preliminary injunction, it is likely some employers made a number of changes to comply with the 2016 final rule while other employers did not. It is not clear what, if any, changes employers have made since the recent District Court decision struck down the rule.

11 Id.
7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test?

No. As the Department has repeatedly noted in the past over the course of different administrations: “The Department has long recognized that the salary paid to an employee is the ‘best single test’ of exempt status (1940 Stein Report at 19), which has ‘simplified enforcement by providing a ready method of screening out the obviously nonexempt employees’ and furnished a ‘completely objective and precise measure which is not subject to differences of opinion or variations in judgment.’” For clarity, simplicity, and objectivity the Department should continue to use a salary level test.

If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

The implementation of a quantitative rule for primary duty based on some certain percentage of time spent performing exempt duties would be exceedingly onerous and potentially unworkable. Many bona fide exempt employees today perform a broad range of exempt and nonexempt tasks throughout the day and workweek due, in part, to the extraordinary technological advances since 1938 and the flattening of organizational structures and employer hierarchies over the past 50 years that where undertaken to promote employee involvement and engagement. Some industries also have fluctuating and unpredictable periods of demand that would make a rigid duties test unworkable. For example, certain retail industries experience unanticipated spikes in demand due to weather and natural disasters that require salaried managers to assist hourly associates fill in gaps at the cash register, fill orders, or stock shelves. This can also be caused by unscheduled employee absences due to illness, family needs or other causes. In such instances, a duties test that included some percentage of time spent performing exempt or nonexempt duties would seriously harm the business’s functionality and the ability to serve customers by tying the hands of managers who are not able to exceed an allowed percentage of time performing such non-exempt tasks.

8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations?

See response to question 5 above. Further, if the standard salary level test for the FLSA white-collar exemptions had been $940 per week in 2014, this would have automatically excluded 11 percent of chief executives, 15 percent of physicians and surgeons, and 13 percent of lawyers and judges from being eligible for the executive, administrative, and professional employee exemption regardless of their duties. Clearly Congress did not enact the white-collar exemption so the Department could nullify its application through rulemaking for 11 percent of CEOs.

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Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

As noted above, many bona fide exempt employees perform a broad range of exempt and nonexempt tasks throughout the day and workweek. However, for a number of reasons a duties test that included some percentage of time spent performing exempt or nonexempt duties would seriously harm the business’s functionality and the ability to serve customers.

9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

The Association encourages the Department in any future rulemaking to allow nondiscretionary bonuses and incentive payments to count toward a portion of the standard salary level test for the executive, administrative, and professional exemptions. The Association also recommends the Department allow the amount of nondiscretionary bonuses and incentive payments that could be applied toward meeting the standard salary level test be up to 50 percent of the salary level and that employees could receive the bonus payments on an annual basis similar to the current highly compensated employee exemption. Requiring employers to pay nondiscretionary bonuses on a monthly or quarterly basis, will effectively eliminate the incentive to provide such bonuses at all.

10. Should there be multiple total annual compensation levels for the highly-compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method?

See response to question 3 above.

11. Should the standard salary level and the highly-compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

In the 2004 final rule, the Department provide a well-reasoned explanation for not automatically indexing the salary level test. Then in the 2016 final rule, the Department provide a well-reasoned explanation for automatically indexing the salary level. Further, the recent District Court determined the automatic updating

mechanism in the 2016 final rule is unlawful under *Chevron*, and the Department has not sought to overturn the decision. Based on this regulatory and legal history, the Association recommends the Department either appeal the District Court decision regarding its authority to implement an automatic updating mechanism, or follow the court’s decision and update the salary level test on a more regular basis through notice and comment rulemaking.

**Recommendations for Future Rulemaking**

In 2004, DOL added a number of examples of jobs that meet the administrative and professional duties tests, including insurance claims adjusters, certain financial service employees, team leaders, human resource managers, physician assistants, dental hygienists, accountants, paralegals, and certain computer employees. Should the Department decide to proceed with new rulemaking to update the FLSA’s regulatory provisions, the Association offers the following recommendations.

Computer employees:

The FLSA regulations include an exemption for “computer employees” but the definition is rooted in the technology of 1992, a time before many people had Internet access or email, let alone use of the sophisticated software technologies of today. Thus, many of today’s critical IT duties, such as information security, enterprise-wide database administration, systems integration and ensuring the overall integrity and continuity of IT systems and applications are not part of the exemption even though individuals performing these duties are clearly highly-skilled and well-paid computer employees. Even basic concepts like “debugging” and the Internet are not part of the current outdated FLSA language. The following duties should enable an employee to qualify for the administrative exemption:

- Provide analytical ability & creativity in developing solution to enable or optimize continuity of systems and/or applications
- Identify and review client needs and/or requirements, making recommendations regarding design or improvements of hardware and/or software solutions
- Lead or participate in database design, recommending improvements and/or advising others
- Perform system improvements, upgrades, and/or other servicing to ensure optimal system operations
- Have significant responsibility in dealing with investigations of cybercrime, including hacking, identity theft, and/or threats to system integrity and security
- Undertake significant work to identify, prevent and/or fix system-wide operational problems
Administrative Exemption:

According to the Department of Labor, “the administrative exemption is the most challenging of the Sec. 13(a)(1) exemptions to define and delimit, and the ‘discretion and independent judgment’ requirement has become increasingly difficult to apply with uniformity in the 21st century workplace.”\(^\text{16}\) Even back in 1949, the Department recognized the standard was subjective and the difficulty of applying it consistently has increased with the passing decades.\(^\text{17}\) The Department has also noted the “production versus staff dichotomy” is difficult to apply uniformly in the 21st century workplace.\(^\text{18}\)

In the absence of a clear bright-line compensation standard for the administrative exemption, the Department should work with all stakeholders to develop additional real-world examples of what types of employees meet the exemption and develop a consensus on how to clarify the rules to reduce litigation. This could include a review of how difficult it is to apply the “discretion and independent judgment with respect to matters of significance” requirement. As technology and artificial intelligence advance it will become increasingly important for the Department to update what it means for administrative employees to exercise discretion and independent judgment. The Department may also want to review how well the “production versus staff” dichotomy embedded in the administrative exemption operates in today’s service and sales economy, and what changes, if any, could be made to simplify the standard for employers.

Professional Exemption:

The “discretion and independent judgment” requirement has become increasingly difficult to comply with in the 21st century workplace, and it is especially inconsistent with modern workforce practices as it applies to professional employees.\(^\text{19}\) It is also not clear when an employee, whose job qualifications requires a four-year college degree in a specific field of science or learning, is working in a “profession” or “occupation” where specialized academic training is a standard prerequisite for entrance into the profession, especially when the FLSA regulations allow for employees to meet the exemption through a combination of work experience and intellectual instruction and not necessarily through an entity that has been approved by an accrediting or certifying organization. Moreover, as the Department noted in 2004, “the areas in which the professional exemption may be available are expanding” but the Department has not provided any guidance since 2004 on what those areas might be.\(^\text{20}\)

In the absence of a clear bright-line compensation standard for the professional exemption, similar to our recommendation regarding the administrative exemption, the Department should work with all stakeholders to identify the areas in which the professional exemption may be available as well as developing additional up-to-date examples of what types of employees meet the exemption and the computer employee exemption. This could include developing eligibility criteria that is based on knowledge needed to perform the job duties, rather

\(^{16}\) 68 FR 15567, March 31, 2003.
\(^{17}\) 69 FR 22142, April 23, 2004.
\(^{19}\) See Pippins v. KPMG LLP, 2d Cir., No. 13-889, July 22, 2014. Accountants working as “audit associates” for an accounting firm fit within the learned professional exemption.
than any specific degree requirement that is consistent with the Department’s long-standing application of the exemption to employees who lack a four-year degree but have substantially the same knowledge level and perform substantially the same work as the degreed employees. Moreover, as with the administrative exemption, it will become increasingly important for the Department to update what it means for professional employees to exercise discretion and independent judgement as technology and artificial intelligence advance in the workplace.

Outside Sales Exemption:

When the FLSA was enacted in 1938, neither Congress nor the Department could have envisioned the means by which sellers and buyers of non-point-of-sale transactions would conduct business in the digital age. Clients, customers and prospects who are seeking a wide variety of goods and services today often prefer to connect virtually, versus an actual face to face meeting. Their preference is based on the ability of technology to provide instant and easy connections with sales representatives and can save a customer much time and effort vs. scheduling an in-person meeting. Technology-based communication has fundamentally changed the nature of seller-client interaction.

In order to reflect the advancements of the 21st century workplace, the Department should consider updating its interpretation of the FLSA outside sales exemption in a future rulemaking. For example, salespeople who regularly engage in virtual sales by performing web-based product demonstrations and attending real-time client meetings via video and/or web conferences, or using collaboration technologies to co-create contracts and solutions in real-time, are effectively making personal calls for the purposes of obtaining sales orders or contract for services, and the use of virtual technology or web-based demonstration technology enables significant interaction in the setting of the customer's place of business.

Providing Greater Flexibility for Nonexempt Employees in the Digital Workplace:

- Negligible Amounts of Time -

Although an employee who occasionally checks and perhaps quickly responds to messages on a mobile device or platform may technically be working, the activity is often sporadic and typically involves negligible periods of time. The current FLSA “statements of general policy or interpretation not directly related to regulations” seek to address this so-called “de minimis” time by citing court cases that are 59 or more years old and provide little meaningful guidance for today’s digital workplace. The Department’s interpretation states that an employer may disregard “insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes . . .” The Department’s interpretation then cites a 1952 court case where amounts of time involving a dollar in pay per week should not be disregarded, and a 1955 case where “10 minutes a day is not de minimis.” The Department should consider establishing a clearly defined and realistic de minimis exception that recognizes the reality of technology as well as the fact that employees want to stay connected to their workplaces outside of their normal working hours.
• Commuting Time –

If an employee spends more than a de minimis amount of time performing work away from the worksite prior to or after commuting, some plaintiffs' attorneys argue this makes the commuting time compensable. Although there are no cases where this theory has been affirmed by a court or the Department of Labor, the law's silence has resulted in the allegation being included in several lawsuits. The Department should consider clarify that time spent commuting is not compensable even if it occurs before or after work has been performed.

• Unauthorized work –

Even where an employer has specifically ordered an employee not to perform work outside working hours, the law requires that the time be counted and the employee paid if the employer “should have known” the employee was working overtime. Establishing this assumed knowledge could involve an innocuous phone call or email during off hours or even a failure of an employer to recognize that a certain task could not have been completed during normal working hours. The Department should consider establishing a safe harbor for employers who clearly communicate the requirement that work outside of normal working hours must be both authorized and recorded.

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HR Policy appreciates the opportunity to comment on the Wage and Hour Division’s Request for Information on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, and we look forward to working with you in the future. If the Association can be of further assistance, please contact me at 202-315-5575 or mwilson@hrpolicy.org.

Sincerely,

D. Mark Wilson
Vice President, Health & Employment Policy