NLBMDA
NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION

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Wage and Hour Division
Division of Regulations, Legislation, and Interpretation
U.S. Department of Labor

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

The National Lumber and Building Material Dealers Association (NLBMDA) represents lumber and building material dealers with over 6,000 member locations, serving homebuilders, subcontractors, general contractors, and consumers in the new construction, repair and remodeling of residential and light commercial structures. Today's lumber and building material (LBM) dealer is the supplier of choice for professional contractors, builders, and remodelers. The LBM dealer is a resource for those seeking reliable service, quality materials, kitchen and bath showrooms, and expert advice on do-it-yourself projects. NLBMDA members may also manufacture and distribute trusses, millwork, doors or windows, or provide installation services from framing to insulation to garage doors. NLBMDA member companies highly value their workforce, made up of men and women from every community in this country, many with years of valuable work experience in the LBM sector and many with the same employer.

We applaud the Department's request for information and overall review of the issues created by the failed 2016 Final Rule, now invalidated by the U.S. District Court for the Eastern District of Texas. As we asserted in our 2015 comments, because the salary levels established for determining exempt and non-exempt status are relied upon as a bright-line test for employers and employees alike, the levels must avoid the disruptions identified by the court as well as the many comments filed in opposition to the levels proposed for the 2016 Final Rule. The thresholds need not be spot on any particular salary level; instead, they only need to ensure that employees below them would clearly not meet any applicable duties test.

With these comments we suggest that the structure put in place with the 2004 rule has worked well and should be continued both in how salary levels are determined and the purpose they are intended to serve. NLBMDA believes the salary level should continue to serve as "the best single test of exempt status". We also believe, absent evidence that the current approach is not working, the Department should leave the current regime of salary test as bright line for non-exempt status and duties test as confirmation of exempt status in place.

Previous Comments

In our September 4, 2015 comments to the proposal that resulted in the 2016 Final Rule, we voiced concern that member companies and their employees would be negatively affected by the significant increase in salary level for Executive, Administrative, or Professional employees (EAPs) and cause a significant portion of our member's workforce to be erroneously reclassified as non-exempt employees when under the duties test they clearly qualified as exempt employees.

We further argued that the Department had failed to make the case for the proposed salary threshold increases for "white collar" workers, specifically those classified as EAPs, but also for those classified as Highly Compensated Employees (HCEs). We pointed out that these thresholds are intended to serve as a bright-line test for businesses to easily and accurately identify employees who Congress has deemed are entitled to minimum wage and overtime protection versus those who may qualify as bona fide exempt employees, either as EAPs or HCEs. We also argued that equally important, as bright-lines, the salary levels should be established based on data that most accurately distinguish between exempt and non-exempt employees, based on a rigorous analysis of current data, not based on an arbitrarily-assigned salary level. We noted that the proposal presumed that the current thresholds should be increased because they were last increased in 2004. But the analysis provided by the Department did nothing to verify that this presumption was valid. There was no evidence offered in the proposal to suggest that salaries for overtime eligible workers had increased at the same rate over the same period of time.

We asserted that the proposed increases were arbitrary. They represented a 100% and 20% increase respectively for EAPs and HCEs without any analysis of the salary trends in the many sectors, job families and geographic regions that will be affected. Likewise, the proposal offered no relevant connection between the selected 40th and 90th percentile of the salaried workforce and today's salary levels for legitimately classified EAPs and HCEs. Instead, the Department suggested that it was adequate to use the last-established salary levels as benchmarks, and further proposed automatic annual increases, again, relying solely on the proposition that salary levels will rise corresponding to a predetermined benchmark. We argued that an automatic annual increase only further exacerbates any miscalculation made by the 2016 proposed rule. The Department also failed to explain the departure from the 2004 rule that identified the lower 20% of salaried workers in the South as the bright line salary threshold.

Key to our concern from a policy matter was that the goal of the salary test must be to establish a simple, bright-line test that employers and employees could rely on in determining exempt or non-exempt status. Prior to the 2016 Final Rule, the Department recognized the salary level test as "the best single test of exempt status". To be the "best single test" for determining exempt versus non-exempt status, it is incumbent upon the Department to demonstrate how the proposed salary levels in their application will be the most accurate test as well. We challenged the Department's rationale and assertion that the proposed salary levels reflected its conclusion that the level set in 2004 "was too low to efficiently screen out from the exemption overtime-protected white collar employees when paired with the standard duties test." We said then and would assert today that "Simply proposing a level that the Department feels makes right a level set too low in a previous rulemaking and overcompensating with a level that in its application will erroneously misclassify employees is not a valid public policymaking solution." Finally, we rejected the policy rationale that the Department believed at that

time that it was being responsive to the President's directive to simplify the exemption. To suggest that arbitrarily raising the salary level that will continue to serve as a bright-line test would simplify the exemption for employers represented remarkable Washington-think and ignores the consequences the proposed levels would have on employers and employees alike.

We also supported the core recommendations of the Small Business Administration's Office of Advocacy in that proceeding. In particular, we agreed that the Department should better analyze the small business impacts of the proposal. The Office of Advocacy had argued that the Department had underestimated the costs, impacts and burdens of the increase on the salary levels in the proposal. The Office of Advocacy also argued that the Department failed to consider and offer less burdensome alternatives to the proposed rule.

While this Request for Information is a step towards a more intentional rule making process, we believe the 2004 rule is working and does not require any wholesale change. We acknowledge that occasional review and updates are necessary to avoid the 30 year passage of time that occurred prior to the 2004 rule. We also acknowledge that with the passage of 12 years that an update may be warranted. While the 2004 rule represented a significant increase in the thresholds as did the 2016 Final Rule, the 2004 analysis and approach, applied to current salary data, would not double the EAP threshold. It would more likely arrive at a threshold for EAPs that would be sufficiently below the 2016 Final Rule so as not to sweep into non-exempt status employees in bona fide exempt positions.

Response to Questions

1. *The Department asks if updating the current salary level set in 2004 for inflation would be an appropriate basis for setting the salary level in the future. In the alternative, the Department asks if applying the 2004 methodology to current salary data be appropriate. The Department also asks if changes to the duties test would also need to be made, using either of the two methods queried above.*

We believe the 2004 rule provides the most appropriate method to use in any future proposal to increase the salary levels for EAPs and HCEs. This method would be the most likely approach to preserve the salary levels as the bright-line test for determining overtime eligibility. That bright line worked well in the past in part because it attempted to ensure those employees who clearly would not meet the elements of the applicable duties tests would automatically be eligible for overtime, while those whose salaries were over the thresholds could be categorized as exempt only if they also met the applicable duties tests. That has been the long-standing test established by the Department to demarcate bona fide executive, administrative, and professional employees without disqualifying from overtime pay a substantial number of such employees.

Regarding the use of any inflationary adjustments, we objected to annual adjustments based on inflation proposed for the 2016 Final Rule, at that time in part because of the incredible 100% increase for the EAP salary level, but also, and applicable here, because it cannot be presumed that salaries for overtime eligible workers in any given sector or nationwide will track to any selected inflationary measure. Nor can it be presumed that an automatic adjustment would always be appropriate to other

national policy initiatives or general economic conditions. The benefit of continuing to use the 2004 approach is that the Department will look at current salary data in determining whether the salary levels remains appropriate or whether a proposed increase is merited.

Regarding the duties tests, we do not believe any changes should be made. The changes made in 2004 anticipated a salary level that would serve as a bright line test, and it is this combined policy approach that we continue to support. We believe the Department should focus on determining if an increase in either the EAP salary level or the HCE compensation level should be increased, and if so, based on an analysis of actual salary data, what that level or levels should be. We do not believe it consistent with the 2004 rule to simply propose a percentage point increase or base a proposal –on the subjective sense of the Department that it's been a long time since 2004 and so the increase must be significant. Finally, any increase should be phased in over a period that allows employers plan and implement without the disruptions the workplace experienced with the 2016 Final Rule.

We believe the 2016 Final Rule was based at its core on the belief that it was time to increase the salary levels and that the increase needed to be significant since it had not been increased since 2004, and by setting the level at the bottom 40% of salaried workers in the lowest wage region of the country (essentially doubling the reference point determined in the 2004 rule, which set the salary level at the bottom 20% of salaried workers in the South and retail sector). We also don't think the overtime rule should serve as an engine for salary increases. The point of the salary levels, as made plain in 2004, is to easily remove from consideration for exempt status those workers who would not meet an applicable duties test. The marketplace and other mechanisms should be left to determine viable salaries for the various occupations potentially subject to overtime pay. What we learned from the 2016 Final Rule is that the Department should not outrun the marketplace with thresholds that disrupt employment relationships and expectations regarding compensation and duties established between employer and employee.

2. *The Department asks if multiple salary levels should be established, and if so, how. The Department also asks what the impact of multiple salary levels would be on particular regions or industries, and on employers with locations in more than one state.*

We would oppose multiple salary levels, primarily because it would overcomplicate what has prior to the 2016 Final Rule been an easily understood set of rules. While we argued in our 2015 comments that the Department failed to take into consideration the regional and sector variations in salaries, as did a number of commenters, our point was not to propose multiple salary levels based on regions or sectors. We, like many commenters were responding to the 100% and 20% increases for EAPs and HCEs respectively, as well as the prospect that an automatic inflation adjustment would be made going forward. Regarding multiple salary levels, there is also the very practical question of how the Department or others will get those numbers right, particularly in an era of fewer governmental resources and greater expectations of simplicity and transparency. If the 2004 methodology is reaffirmed and applied, we do not believe the variations would need to be taken into consideration. As offered by the Partnership to Protect Workplace Opportunity –

A salary level that is sufficiently low to avoid excluding from the exemption employees performing exempt duties in the South serves the same function in the West or the Northeast. If the objective is to screen out obviously nonexempt employees (thereby rendering analysis of the duties unnecessary), then a salary level that works in the lowest wage areas and the lowest wage industries is sufficient. There simply is no need for multiple salary levels.

3. *The Department asks if different salary levels should be set for the EAP exemptions (as was the case prior to the revisions made by the 2004 rule). Associated with this question is whether executive and administrative salary levels would be lower than professional salary levels, and what impact this approach would have on employers and employees.*

Multiple salary levels, whether established by region or sector (as queried above), or by type of exempt worker (as queried here), would be difficult for the Department to get right and for employers to implement. We would oppose this approach.

In many businesses, perhaps more common in small businesses, a single individual will wear many hats and could devote a certain amount of time to executive functions, and the remainder of time to administrative or professional functions (or an employee's time may involve all three functions). Under the current 2004 regime, employers can easily determine if employees are non-exempt and therefore eligible for overtime. Since 2004 the application of the duties test has also seen interpretations that help employers determine if employees are eligible to be categorized as exempt. With multiple salary levels, the employer would essentially need to consider the duties test first, determining which test best applies to the employee, undermining the current straightforward approach that allows employers to first look to the salary level. If the Department endorses the 2004 rule's approach as we have proposed, there is no need for different salary levels for executive, administrative and professional employees.

4. *The Department asks if the salary level should be within the historic range of the short test salary level, at the long test salary level, or between the short and long test salary levels, or should it be set based on some other methodology. The Department also asks if any of these approaches would work effectively with the standard duties test or if the duties test would need to be changed.*

The 2004 rule established salary levels that have worked effectively with the current duties tests. Any increase in salary levels over the current levels should be determined by applying the 2004 approach to current salary data. Attempting to fix the thresholds to some historic level associated with pre-2004 duties tests would be contrary to the very policy rationales that established the current methodology and duties tests.

As the PPWO comments note, the 2004 duties tests were made more robust –

The 2004 standard duties tests are not equivalent to the old "short" tests, which might be used to justify a higher standard salary level. In fact, the pre-2004 "short" test for the executive exemption required only that the employee have a primary duty of managing the enterprise (or a recognized department or subdivision thereof) and customarily and regularly direct the work of two or more other employees. The 2004 regulations, however, added a third requirement: "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." On its face, this added requirement means that the 2004 duties tests are more stringent than the pre-2004 short tests.

The Department should focus on if the salary levels merit an increase, apply the methodology used in 2004, and ensure that any increase serves the bright line purpose explained above. We have already mentioned our support for an adequate phase-in. It is essential that employers be given adequate time to budget for and implement any new changes that may be required under new salary levels.

5. *The Department asks if the salary level set by the 2016 Final Rule work effectively with the standard duties test, or does it eclipse the role of the duties test for purposes of determining exempt status. The Department further asks at what salary level does the duties test no longer fulfill its historic role in determining exempt status.*

The salary level established by the 2016 Final Rule effectively eclipsed the role of the duties test in determining exempt status. The apparent goal behind the large increase in the 2016 Final Rule was to capture as many workers under the salary level, so as to maximize the number of non-exempt workers. Because the level in our opinion and in the opinion of many other commenters was too high, it had the effect of pushing otherwise exempt employees, those meeting the elements of the applicable duties test, into a non-exempt position. In our 2015 comments, we spoke to the untenable choices employers would have to make and the effects those decisions would have on employees.

While we know the salary levels of the 2016 Final Rule were too high, creating many disruptions, we are not able to identify a specific salary level where there would be precise balance between the intended role of the salary level and the intended role of the duties test. However, we do not believe the Department should attempt to or needs to find that exact balance. The salary level need only effectively serve as a bright line test to make sure that clearly non-exempt employees remain eligible for overtime, and the duties tests should continue to be used to determine if all employees with salaries exceeding the thresholds do in fact qualify for exempt status. The approach of the 2004 rule does not harm done by setting the salary level too low; however, setting the salary level too high creates the harm previously articulated in the many comments filed in opposition to the salary level proposed for the 2016 Final Rule.

6. *The Department asks what employers did in anticipation of the 2016 Final Rule: Did they increase salaries for exempt employees in order to retain their exempt status, decrease hours of those employees re-designated as non-exempt, change employees' implicit hourly rates so that worker pay would remain the same, convert pay from salaries to hourly wages, or change policies to limit employee flexibility to work after normal work hours or track work performed during those times? The Department also asks what impact on the workplace for employers and employees any of these or other changes had. And the Department asks what employers did, such as reversing any policy changes made, after the preliminary injunction was issued.*

We have not conducted a formal survey of our members; however, we know that many dealers assumed the rule would go into effect and did make changes. We are aware of significant concern and efforts made by members to understand how the 2016 Final Rule would affect their workforce, how best to address specific cases without significantly disrupting the employment relationship and the employee's role, contribution and compensation earned in the organization. Members told us that they attempted to ensure that the employee was not penalized with any reduction in salary, duties, role in organization, or status. Where a small increase in salary was needed to meet the 2016 Final Rule thresholds, employers would likely have increased salaries. The various calculations that the Department offered in the aftermath of the 2016 Final Rule were complicated, and we are not sure how many members followed these, for example, calculating how much a formally exempt employee's new hourly rate must be in order to be made whole as a newly categorized non-exempt worker. We do know this exercise burdened employers and created anxiety for many employees faced with a change in their roles and responsibilities in their organizations. We are unaware of widespread reversal of policies after the issuance of the preliminary injunction. Because the 2016 Final Rule was sufficiently disruptive for employers and employees alike, whatever changes were made would in many cases be impractical to reverse. However, it is likely that some employers would attempt to reestablish an employee's preferred exempt status once a definite threshold is decided upon.

In our 2015 comments, we outlined the options employers were faced with, none of which were attractive then or now. We believe at this point the questions raised for purposes of policy making should be forward looking. Whether or not changes made by employers are reversible at some point, it is most important to avoid the same mistakes in the future: unreasonable increases, short implementation time, policy making representing a complete break from historic experience and development of the overtime rule.

7. *The Department asks if the exemption test should rely solely on the duties performed by the employee without regard to the amount of salary paid by the employer, and 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.*

We would oppose a duties-only test. The 2004 rule attempted to simplify the regulations for employers and employees alike. A duties-only test would likely require more complex if not more rigid duties tests, including the difficult and subjective inquiry of percentage of time an employee spends on the exempt work. This would in turn likely impose significant new recordkeeping requirements on employers and potential disagreements between employers and Wage and Hour investigators regarding an employee's time spent on exempt activities. This would represent a significant step backwards in terms of a regime where employers can easily determine the exempt and non-exempt status of employees without fear of being found in noncompliance.

8. *The Department asks if the salary level in the 2016 Final Rule excludes from exemption particular occupations that have traditionally been covered by the exemption, and further asks if employees in these particular occupations perform more that 20 percent or 40 percent non-exempt work per week.*

By virtue of the significant increase in the salary level for EAPs, the 2016 Final Rule excluded many of these workers from the exempt status they had previously been designated in. Their work met the elements of the EAP duties test, one can assume that in most cases there was no pressing issue relative to their salary or earnings, and they enjoyed the flexibility in work and assumption of responsibility that exempt status provides. The 2016 Final Rule essentially excluded them from exemption because their employers could not double their salaries.

We note that outside sales employees and drivers of commercial motor vehicles are very important in our sector and many members were concerned that these workers would be affected by the 2016 Final Rule's implementation. Neither of these exemptions has a salary test.

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. The Department asks if this or a different cap would be an appropriate limit. The Department also asks if the salary level is relevant in determining whether and to what extent bonuses should be included in the salary level calculation.*

We believe all non-discretionary bonuses should be applicable to the standard salary level. It should not matter what the elements of one's salary are or when a certain amount of the salary is paid should. From the employer and employee perspective, these are payments made for value given, and these are essentially factored into the employer's scope of work and the employment expectations between employer and employee. The total compensation, along with the scope of work and opportunity to grow within an occupation or job is also an important component to an employee's decision to take a job and stay in a job.

We also believe employers should be allowed to make "catch up" payments so that employees are not penalized if incentives are not met. For these same reasons, we support allowing discretionary bonuses to be used to meet the overall standard salary level.

10. *The Department asks is there should be multiple total compensation levels for the highly compensated employee exemption, and if so, how it should be set.*

We would oppose the adoption of multiple compensation levels for the HCE exemption for the same reasons explained above regarding the same question for the EAP exemption. Key to our opposition would be the unnecessary complexity this would create to a current system that works.

11. *The Department asks if the EAP salary level as well as the HCE compensation level should be automatically updated on an annual or other periodic basis, and if so, what mechanism should be used to determine the automatic update.*

We would oppose any automatic adjustment over any periodic time period. We note the point made by the PPWO that the Department does not have the authority to make such adjustments, as well as the importance of revisiting the salary level through normal notice-and-comment rulemaking. We also agree that automatic adjustments cannot anticipate specific economic or public policy conditions that would otherwise argue against an increase – this might be during a period of economic downturn or the implementation of major policy initiatives that when combined with an increase would create unanticipated and unnecessary hardship. This we believe reveals the very importance of employing the normal rulemaking process as and when such a review is deemed necessary.

Conclusion

The current regime of salary levels and duties tests established in the 2004 rule work. While we acknowledge the salary level for both EAPs and HCEs must at some point be reviewed and updated, we believe the levels should not be set so high as to disrupt current employment relationships. As we have noted above, we also believe the levels should only serve as a way to easily identify those workers who will not meet the duties test. The duties tests are in place to additionally protect employees from being categorized as exempt when they should, based on their actual duties, be non-exempt. The 2016 Final Rule completely disrupted this easily understood and applicable approach, and in so doing, undid the 2004 concept of a bright line test that benefitted employers and employees alike. If the Department employs the 2004 approach towards analysis of salary levels, any new salary level proposed will be significantly lower than the levels in the 2016 Final Rule. We also believe that total compensation should count towards the salary levels and that any change should include an adequate phase-in period. We believe the salary level should continue to serve as "the best single test of exempt status".

RESPECTFULLY SUBMITTED,

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