



September 4, 2015

Ms. Mary Ziegler, Director  
Division of Regulations, Legislation and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Re: RIN 1235-AA11; Wage and Hour Division, on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Ziegler:

On behalf of our coalition of 4.7 million women business owners and 78 organizations, Women Impacting Public Policy (WIPP) submits the following comments on the Department of Labor's proposed rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees.

### **Background**

On March 13, 2014, the President issued a memorandum that directed the Department of Labor (DOL) to, "propose revisions to modernize and streamline the existing overtime regulations."<sup>1</sup> Specifically, the President cited the exemption for executive, administrative and professional employees as having "not kept up with the modern economy."<sup>2</sup>

The Fair Labor Standards Act (FLSA) guarantees a minimum wage and limits the amount of hours an employee can work without additional compensation. However, Section 13(a)(1) of the Act provides an exemption from additional overtime compensation for "white collar" workers. This exemption exists because, "the exempted workers earned salaries well above the minimum wage and enjoyed other privileges, including above-average fringe benefits, greater job security, and better opportunities for advancement, setting them apart from workers entitled to overtime pay."<sup>3</sup>

There are three criteria that must be met for the exemption apply and include, (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");

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<sup>1</sup> 79 FR 18737

<sup>2</sup> *Id.*

<sup>3</sup> Department of Labor, 80 Fed. Reg. 38516 at 38519 (Proposed July 6, 2015).

(2) the amount of salary paid must meet a minimum specified amount (the “salary level test”); and (3) the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the “duties test”).”<sup>4</sup>

In response to the President’s memorandum, DOL issued the proposed rule on July 6, 2015.

### **Overview of Proposed Regulation**

To address the concerns and directives from the President’s memo, DOL proposed rules to update the salary and compensation level for this exemption. DOL proposed increasing the salary threshold for a full-year worker at the 40<sup>th</sup> percentile for full-time, salaried employees. This would increase to \$47,892 annually in 2013, which, by the Department’s estimate will be \$50,440 for a full year worker when the final rule is takes effect in 2016.

Additionally, DOL has proposed to raise the salary threshold for highly compensated employees (HCE). The proposed rules sets this threshold at the 90<sup>th</sup> percentile of earning for full-time salaried workers, which equates to \$122,148 annually.

### **Concerns**

WIPP raises the following concerns of the proposed rule as written:

#### *Implementation Costs Burden Women-owned Businesses and Non-profits*

Due to regulatory familiarization, adjustment and managerial costs, DOL estimates that small entities, including the vast majority of women-owned businesses, will incur direct employer costs of \$134.5 to \$186.5 million in the first year of implementation.<sup>5</sup> The United States Census Bureau’s Survey of Business Owner recently reported nearly 10 million women-owned businesses in the US and each and every one of them will be directly impacted by these rules.<sup>6</sup>

Implementation of these new standards will be a tremendous burden for women entrepreneurs. Women-owned companies may have to hire the administrative capacity needed to familiarize themselves with the rule changes and make adjustments to ensure compliance.<sup>7</sup> Large companies with higher revenues and larger staffs are more capable of handling this compliance burden.

As was noted in the Senate Small Business & Entrepreneurship report on barriers facing women entrepreneurs, women-owned businesses have significantly less access to sufficient capital to maintain and expand their business. This measure will “reduce the profits available

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<sup>4</sup> *Id* at 38517.

<sup>5</sup> *Id* at 38605.

<sup>6</sup> *2012 Survey of Business Owners*, United State’s Census Bureau (August 2015).

<sup>7</sup> 80 Fed. Reg. 38516 at 38566 (finding that all establishments will incur regulatory familiarization costs, even if they do not employ exempt workers, because all establishments will need to confirm whether this proposed rulemaking includes any provisions that may impact their workers).

to firms for business investment.”<sup>8</sup> Further burdening women-owned and small businesses with these costs will hinder economic growth.

### *Implementation Difficulties*

To ensure compliance with these new regulations, businesses will begin closely monitoring and tracking their employees’ work hours. This will require development and installation of a system to track employees’ hours—yet another costly distraction for women entrepreneurs.

Furthermore, tracking and monitoring employee hours is very difficult, if not impossible, given the evolving dynamics of a 21<sup>st</sup> century workforce. Many employees have flexible schedules, work from home, check and answer emails from smartphones or tablets and are no longer restricted by a rigid 9-5 schedule. The overtime rules, while well intentioned, are no longer applicable to a workforce that is not constrained to an outdated set schedule.

### *Workforce & Wage Reductions*

The proposed rule will endanger the jobs of the nearly 9 million employees of women-owned firms.<sup>9</sup> Many may not have sufficient revenue to cope with the increased payroll costs that will result from this regulation. It is estimated that salaries for workers in small entities will increase by an average of \$6.16 per week per affected worker. In the aggregate, this will cost small employers \$561.5 million in additional wages.<sup>10</sup>

These additional wages are a significant cost to women business owners. To avoid these costs, employers will make adjustments to the salary and compensation that they offer to their employees. In fact, the NPRM points out DOL’s expectation that “in response to an increase in the regular rate of pay to the minimum wage, employers may reduce the workers’ hours.”<sup>11</sup> Small employers will not be able to shoulder this additional salary expense and will ultimately have to make significant changes to the composition of their workforce or risk insolvency.

To effectively manage the financial impact of this regulation, businesses are likely to reduce the number of full-time, salaried employees. Additionally, employers may lower base salaries to offset the increased overtime expenses.<sup>12</sup> This would be devastating to many individual employees and is more likely to occur in small and women-owned businesses that are unable to absorb the additional payroll burden that will result from this rule. As women-owned businesses have historically struggled to access capital, adding additional payroll obligations would be detrimental to their ability to sustain and expand. Employers may even be compelled to reduce staff and/or hire solely on a contract basis. Consequently, this rule

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<sup>8</sup> *Id* at 38567.

<sup>9</sup> *2012 Survey of Business Owners*, United State’s Census Bureau (August 2015).

<sup>10</sup> 80 Fed. Reg. 38516 at 38605.

<sup>11</sup> *Id* at 38567.

<sup>12</sup> *Id*.

will endanger jobs, particularly for small and microbusinesses and hinder growth for women-owned businesses.

### *Risks to Employee Benefits*

Some employees may ultimately be forced to sacrifice their flexible work environment to ensure that their employer is able to accurately track their work schedule. The guidance points out that many “white collar” employees enjoy greater fringe benefits and other privileges that hourly employees do not.<sup>13</sup> One of these important benefits is a flexible work schedule. However, this flexibility makes the accurate tracking and accounting of hours worked more difficult for the employer. Employers are likely to reduce the flexibility of work schedules to ensure that employees that no longer qualify for this overtime pay exemption, an estimated 4.6 million, do not exceed a 40-hour workweek.<sup>14</sup>

As discussed previously, employers could change their compensation arrangements to offset their additional payroll obligations. Since there would no longer be an incentive to keep the worker salaried, some firms will choose to switch the employee to an hourly basis and, “salaried workers may perceive such a change as a loss of status.”<sup>15</sup>

The NPRM points out that one of the benefits usually enjoyed by EAPs is increased upward mobility.<sup>16</sup> Due to the financial burden imposed by the regulation, employers will find promoting employees to be more expensive. This could limit the upward mobility of many workers. It would seem counter-intuitive to acknowledge this important benefit and then make this benefit more expensive and, therefore, less attainable, through the rulemaking process.

Ultimately, this will result in the loss of some of the fringe benefits that the employees had previously received, most notably their flexible work schedule and status as a salaried worker.

### *Income Percentile Basis*

Basing the overtime threshold on a 40<sup>th</sup> percentile for all workers does not take into account the average salaries and relative cost of living in different areas of the country. This could have a more damaging impact on small businesses in rural areas where salaries are in-line with a lower cost of living, while having relatively little impact in major metropolitan areas where salaries are higher. Additionally, this change will have a disproportionate effect on microbusiness and non-profits. These organizations tend to offer lower base salaries than larger companies and are, therefore, more likely to be affected by these changes. The unbalanced impact felt by microbusinesses, non-profits, and businesses in rural areas is a significant concern.

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<sup>13</sup> *Id* at 38517.

<sup>14</sup> *Id* at 38518.

<sup>15</sup> *Id* at 38577.

<sup>16</sup> *Id* at 38517.

## **Recommendation**

Due to the burden created by these regulations on women-owned businesses and non-profits, WIPP believes that the rules should not be implemented as written. WIPP recommends an exemption for small businesses that extends beyond the current exemption for firms generating less than \$500,000 in revenue. Because this exemption does not apply to firms engaged in interstate commerce, this exemption is too narrow to protect small businesses and non-profits from the burdensome regulations. Additionally, an exemption for non-profit organizations would limit the hardship that these regulations will cause.

This proposal is part of the Administration's effort to modernize workplace rules; yet, the new barriers created by this regulation will ultimately burden women-owned businesses.

Thank you for the opportunity to comment.

Sincerely,



Kristie Arslan

Executive Director  
Women Impacting Public Policy