



September 3, 2015

VIA E-MAIL AND E-FILE

The Honorable Thomas E. Perez
Secretary, Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule

Dear Secretary Perez and Administrator Weil:

The National Small Business Association, on behalf of itself and its members, respectfully submits these comments on the proposed rule. The proposed rule would amend the regulations under the Fair Labor Standards Act (FLSA) governing the “white collar” exemption from overtime pay for executive, administrative and professional employees.¹ In the proposed rule, the Department of Labor (DOL) would change the salary threshold for employees who are eligible to receive overtime pay from \$23,660 to \$50,440, increase the threshold for highly compensated employees from \$100,000 to nearly \$130,000 and provide for automatic readjustments.²

National Small Business Association

NSBA is the nation’s first small-business advocacy organization, celebrating more than 75 years of championing the interests of the country’s entrepreneurs. NSBA is a uniquely member-driven and staunchly nonpartisan organization with more than 65,000 members in all

¹ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule*. Department of Labor, Wage and Hour Division, 80 Fed. Reg. 38516 (July 6, 2015). Comments on this proposed rule are due to DOL by September 4, 2015.

² 80 Fed. Reg. at 38516

sectors and industries of the U.S. economy, from retail to trade to technology. Focused on federal advocacy, NSBA is a recognized leader of America's small-business community.

Comments

Since the publication of the proposed rule, NSBA has identified a number of key areas of concern for a broad base of our members and the small business community nationally. Unfortunately, the restrictive and unnecessarily brief comment period has not allowed for the level of in-depth survey, study, and analysis that would be ideal in commenting on such a significant and far-reaching regulation. However, we have identified a number of key concerns, each of which should be addressed fully before any final regulation moves forward:

1. The cost of compliance for small businesses will be much greater than estimated by the DOL. Many small businesses have no, or very few, non-exempt employees, with most workers being salaried professionals or administrative employees. They do not have timekeeping and payroll systems in place that can accommodate the addition of many more non-exempt employees. Thus, the burden of these changes will fall much more heavily on small businesses than on their larger competitors.
2. No changes should be made to the duties test in this rulemaking, since there has been no specific proposal advanced for consideration. From the perspective of small business, the duties test should emphasize the purpose of the job position over miscellaneous tasks that might also be performed for the employer. In small businesses, everyone—including the owner—tends to do whatever needs to be done to get the job done, without regard to formal job descriptions. The fact that “the boss” spends part of a week fixing a broken piece of equipment and then getting the product out the door should not jeopardize the exemption. There is no bright line between “exempt” and “non-exempt” in the typical small business workplace. Even while doing production work, the manager is still managing.
3. Small businesses are often not equipped to monitor the activities of their employees in order to regulate their time. Companies with fewer than 20 employees rarely have a dedicated HR department, so the creation of new hourly reporting and tracking requirements are likely to be a much greater burden on these companies that do not currently face them. The result will be confusion and excess cost for individual business owners. Tracking the offsite use of company cell phones and computers will be especially difficult for these smallest companies, who are likely to limit the issuance of such devices.

4. Business owners generally work more than any of their employees, and often for little take home pay, as they invest in their businesses. No one is proposing to increase their earnings. For small businesses, this proposal is just a transfer of funds from the business owner to employees, but with additional administrative expenses attached.
5. One result of the change will be to reduce hours for those salaried employees who now work a full schedule. When employers convert salaries to hourly equivalents, they will likely base that on current estimated hours worked, and will then keep the hours worked in the future as low as possible to avoid the overtime penalty (Someone works 50 hours a week and has a salary of \$800; the hourly equivalent will be \$16 per hour; the employer will pay \$16 per hour, but try to keep the hours to 40, so the employee will receive only \$640 per week. Meanwhile the employer will be trying to maintain productivity by making the employee work harder during those 40 hours, or live with reduced service).
6. Employee morale will take a significant hit in many small companies where significant numbers of employees will be “downgraded” from exempt managers to non-exempt workers punching a clock with those they supervise. Many will see little or no increase in overall income, but will be faced with the potential for wide variations in pay by period, complicating family budgets and financial planning.
7. The doubling of the salary required for the exemption is too large a jump. Too many employees will be caught up in this transition. Going from the current level to the 40th percentile means that at least a quarter of all salaried workers will be affected, creating millions of change of status forms, adding millions of salaried employees to hourly payrolls, and monitoring the working time of millions more executives, administrative employees and professionals.
8. There is no compelling reason to increase the minimum salary level for highly compensated salaried employees. Pay levels have not significantly increased since this particular exemption was created and individuals making over \$100,000 per year are not being abused by working more than forty hours in a week.
9. The cost estimates made by the DOL/WHD are wholly inadequate and inaccurate. Our members have given us much higher estimates for the cost of understanding the impact of the changes in their specific workplaces, determining new administrative measures to

September 3, 2015

Page 4

limit overtime penalties while still accomplishing the mission of the business, setting up revised recordkeeping and payroll systems, and paying employees any overtime penalties they are due. If the duties tests are changed on top of this, the cost estimates will be so far wrong as to fail to comply with law. Had additional time for comments been permitted, much more could be provided in support of this point.

For these reasons, we urge the Department to reconsider significant portions of the proposed rule, and recognize the significant new burdens and complications that such a regulation would create for small employers and their employees.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd McCracken", with a long horizontal line extending to the right.

Todd McCracken
NSBA President and CEO

cc: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget