



VIA ELECTRONIC SUBMISSION

September 25, 2017

Ms. Melissa Smith  
Director of the Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Ave., N.W.  
Washington, DC 20210

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

Dear Ms. Smith:

Associated Builders and Contractors Inc. (ABC) hereby submits the following comments to the U.S. Department of Labor's (DOL or Department) Wage and Hour Division (WHD) in response to the above-referenced request for information (RFI) published in the *Federal Register* on July 26, 2017 at 82 Fed. Reg. 34616.<sup>1</sup>

**About Associated Builders and Contractors, Inc.**

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

On May 23, 2016, the DOL issued the Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees final rule,<sup>2</sup> which would have unlawfully increased the minimum salary threshold for the executive, administrative and

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<sup>1</sup> ABC shares the concerns and recommendations provided in comments filed to this docket by the Partnership to Protect Workplace Opportunity and incorporates them into this letter by reference.

<sup>2</sup> 81 Fed. Reg. 32391.

professional (EAP) employees exemptions. Throughout the rulemaking process, ABC was an active participant<sup>3</sup> and urged the Department to withdraw the 2015 proposed rule.<sup>4</sup>

The 2016 rule was recently vacated and permanently enjoined on a nationwide basis by the federal district court for the Eastern District of Texas in the case of *Nevada v. Department of Labor*.<sup>5</sup> The court's order compels rescission of the invalid 2016 rule. Assuming that any minimum salary level is still deemed to be desirable, ABC submits that the 2016 rule should be replaced by a new salary standard that is consistent with the methodology adopted by the Department in 2004.

The Department's RFI asked for commenters to address a series of questions in eleven categories regarding the salary standard of the EAP rules. ABC responds below to each set of the Department's questions in the order presented by the Department.

**1) Assuming That a Minimum Standard Salary Level Continues to Serve the Purposes of the Act, the Department Should Retain the 2004 Methodology for Determining the Standard Salary Level.**

The Department's first set of questions asks for comments on different methodologies for setting the new standard salary level. As discussed in response to question 7 below, ABC assumes that some form of a minimum salary level will be retained in the interests of institutional stability, but in a manner consistent with past precedent and the district court's decision. Based on that assumption, ABC supports application of the Department's 2004 methodology to any proposed increase in the standard salary level. In 2004, the Department set the minimum salary level at an amount which at that time represented the 20<sup>th</sup> percentile for salaried employees in the South geographic region and retail industry.<sup>6</sup> The district court held that the \$913 salary level established in the 2016 rule violated Congress's intent and exceeded the Department's authority to set a minimum salary level "to screen out the obviously nonexempt employees."<sup>7</sup> As the court further stated, the Department "does not have authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 13(a)(1)" [of the Fair Labor Standards Act (the Act)].<sup>8</sup> The court found that it would be consistent with Congress's intent to set the minimum salary level "somewhere near the lower end of the range of prevailing salaries."<sup>9</sup>

The 2016 rule arbitrarily increased the minimum salary to the 40<sup>th</sup> percentile for salaried employees. This error was compounded by the Department's expansion of the "South region" to include the entire current South Census Region, thereby including three of the Top 10 median incomes in the entire country—Maryland, Virginia and the District of Columbia—in its calculation for the first time. The Department also erred by failing to tie the wage rate to the lower-paid retail industry and by including in the 40<sup>th</sup> percentile calculation numerous categories of employees who are not subject to the same salary level test, such as doctors, lawyers, teachers and outside sales employees.

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<sup>3</sup> See ABC's Comments filed on Sept. 4, 2015 (Docket ID: WHD-2015-0001-5178).

<sup>4</sup> 80 Fed. Reg. 38516.

<sup>5</sup> C.A. No. 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

<sup>6</sup> 69 Fed. Reg. at 22167-68 & Table 2.

<sup>7</sup> *Nevada*, 2017 WL 3837230 at \*7, citing Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949), at 7-8.

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

<sup>9</sup> *Id.*

The district court stated that adjusting the 2004 data for inflation would be consistent with the Act, and ABC has no objection to that approach. However, ABC believes it would be equally consistent with the Act to leave in place the 2004 methodology for setting the salary standard, which would result in a new minimum salary slightly in excess of \$30,000 per year.

The Department's RFI also asks whether using either of the methods above would require changes to the standard duties test, to which ABC replies in the negative. The 2016 rule wrongly claimed that the 2004 methodology was "mismatched" with the standard duties test after the previous long and short tests were eliminated. Contrary to the 2016 rule, the standard duties test adopted in 2004 was more rigorous than the old short duties test. Any return to the previous short or long duties tests would impose significant new monitoring requirements and recordkeeping burdens.

## **2) The Department Should Adopt Only One Standard Salary Level.**

In response to the Department's second set of questions, ABC opposes adoption of more than one standard salary level in any new rule. ABC is concerned that creating multiple salary tests based on census region, size of employer, state, metropolitan statistical area or some other method will create needless complications and more implementation costs and litigation in the construction industry. The Department has long rejected previous proposals of multiple standard salary levels, and the single salary level should be retained now.

## **3) The Department Should Continue to Impose a Single Salary Level for All of the EAP Exemptions.**

The Department's third set of questions asked whether commenters favored adoption of separate minimum salary levels for each of the EAP exemptions. ABC submits that there is no need for the Department to increase the complexity of the salary level standard by imposing different levels for executive, administrative and professional exemptions. Particularly in the construction industry, it can be difficult to classify multi-tasking exempt employees in any single one of the exemptions. The Department has long applied a single salary to all of the EAP exemptions and the Department should continue that policy.

## **4) The Department Should Retain the 2004 Standard Salary Test, and Should Not Recreate Short and Long Test Salary Levels.**

In response to the Department's fourth set of questions raising the possibility of returning to pre-2004 long and short tests for exemption, ABC opposes any such approach. To the contrary, the new salary level should be matched to the standard duties tests adopted in 2004.

## **5) The 2016 Rule's Salary Level Should Be Rescinded as Ordered by the Court, Because it is Not a Proxy for Exempt Job Duties.**

Responding to the Department's fifth set of questions regarding the merit of the 2016 rule's increased salary level, ABC agrees with the district court's holding in *Nevada v. Department of Labor* cited above. As the court there held, the unprecedented high salary level adopted in the 2016 rule unlawfully

eclipsed the duties test in determining exempt status. If allowed to take effect, this increase would have resulted in removing 4.2 million employees from their exempt status, “irrespective of their job duties and responsibilities” and in defiance of Congressional intent.<sup>10</sup> Because the 2016 rule has been found unlawful and permanently vacated by the court, the Department must rescind it.

**6) Very Few ABC Members Implemented the 2016 Rule Before the District Court Enjoined It, and Those Who Did Suffered Adverse Impacts.**

In the Department’s sixth set of questions, compliance data under the enjoined 2016 rule is requested. ABC has surveyed its membership and found that the overwhelming majority of respondents did not implement any changes in 2016 to comply with the new rule before the court issued its injunction. ABC’s members waited as long as possible before complying with the 2016 rule because they confronted significant cost burdens, interference with productivity and negative impacts on employee morale. Those construction contractors who chose to comply with the 2016 rule encountered a number of the predicted negative impacts, particularly increased costs. ABC therefore remains concerned that any attempt to re-impose the 2016 rule will have an adverse impact on the construction industry and should not be adopted.

**7) The Department Should Not Adopt a Duties-Only Test if Elimination of the Minimum Salary Level Results in Alteration of the Duties Tests and/or Increased Litigation.**

The Department next asked whether it should eliminate the salary level entirely and rely on a duties-only test for the EAP exemptions. Some ABC members support elimination of the salary requirement, noting that the Act does not require a minimum salary and there has been continuing litigation over the enforcement of the minimum standard salary. But others are concerned that elimination of the salary standard could lead to even more litigation if the duties-only tests are changed as a result of elimination of the minimum salary. And ABC notes that some construction industry employers have over the decades found the salary test to be a useful tool to exclude obviously non-exempt employees from the exemption. ABC therefore believes that elimination of the minimum salary requirement should not occur unless it can be done without creating more confusion or increasing the amount of litigation over exemption issues in the construction industry.

**8) Imposition of the Unlawful 2016 Rule Would Result in Virtual Elimination of the Executive Exemption for Some Categories of Supervisors in Several Regions of the Country.**

The Department has asked whether the 2016 rule might exclude entire job classifications from previously exempt status if allowed to take effect. ABC members believe that is the case in lower-paying regions of the country. In particular, smaller construction contractors in the deep South, parts of the Midwest and other rural states are likely to find that many of their supervisory positions will lose their exempt status under the proposed new salary minimum standard, even though their job duties are substantially identical to similar exempt positions held by employees in New York and California.

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<sup>10</sup> 81 Fed. Reg. at 32405.

**9) The Department Should Allow Employers to Use All Nondiscretionary Compensation to Meet Any New Salary Levels For Exempt Status.**

The 2016 rule recognized that bonus and incentive pay is an important component of employee compensation in many industries, including construction, but arbitrarily restricted bonuses to 10 percent of compensation in determining exempt status. The 2016 rule also counted only those bonuses paid quarterly or more frequently, excluding all annual bonuses. Exempt employees are more likely than non-exempt employees to receive bonuses and commissions in the construction industry. It is arbitrary and capricious to limit such compensation from being considered as part of the salary test for exempt status. All methods of payment should be fully credited.

**10) The Highly Compensated Salary Test Should Be Kept at its Current Level.**

Consistent with the desire of ABC members for simplicity in any new salary level that is adopted by the Department, the highly compensated salary test should be retained at its 2004 level. There was no good reason for the 2016 rule to increase the highly compensated salary level for EAP employees. The previous salary of \$100,000 was sufficient to ensure that only bona fide EAP employees qualified for exempt status.

**11) The Department Should Not Impose Indexing of the Salary Level Test.**

ABC opposes adoption of any form of automatic indexing of the salary level test. As the Department itself found in 2004, Congress did not intend the salary level test to be indexed, as evidenced by the fact that Congress has never provided for automatic increases of the minimum wage or other exemptions to the Fair Labor Standards Act.

**Conclusion**

In order to comply with the district court's decision, and because the district court's holding is correct, the Department should immediately rescind the unlawful 2016 rule. Assuming that a new minimum salary standard is adopted, it should be established by applying the same methodology that was adopted by the Department in 2004. Other aspects of the 2016 rule discussed above should be reconsidered and rejected as well.

Respectfully Submitted,



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