

## June 2003 WorldatWork Member Survey on Proposed FLSA Changes

June 2003

In January 2003, WorldatWork completed a survey of nearly 1,300 members to understand their positions on potential changes to areas of FLSA. With the specifics of the March 31, 2003, Proposed Rule in hand, WorldatWork drafted a new, more detailed survey and again surveyed its membership in early June 2003. A total of 8,299 surveys were sent on June 5, 2003, and the survey closed one week later (on June 12), with 1,013 responses — a 12 percent response rate. This response rate is high by survey research standards and underscores the interest our membership has in the revision of the exemption rules.

### Summary of Findings

- Within the executive exemption test, 59 percent of survey respondents said they preferred the language, “the customary or regular leadership, alone or in combination with others, of two or more other employees,” as opposed to simply supervision of “two or more employees.”
- A combined 52 percent said they either “disagree” or “strongly disagree” with the removal of discretion in the executive exemption test, while a combined one-third said they either “strongly agree” or “agree” with the elimination of this language.
- A combined 58 percent said they either “agree” or “strongly agree” with the deletion of language regarding limitations on nonexempt work in the executive test.
- Within the administrative test, the Department provided a list of proposed types of qualifying work and invited comment regarding what was missing and what was inappropriate on the proposed list. In terms of additions to the list, the single most common response (14%) was a response that can be categorized as “legal” work, including many responses of “paralegal.” “Management,” with various derivations and subcategories was next at 12 percent of open-ended responses. A strong majority (60%) of those providing comment indicated that none of the items on the list should be deleted, although 6 percent felt that Quality Control should be deleted. Others reported that the Employee Benefits and Personnel Management categories might already be captured by the Human Resources category.
- A combined 52 percent majority reported that they either “agree” or “strongly agree” with the deletion of language regarding percentage limitations on nonexempt work for administrative employees.
- The Department asked for comment on the draft list of types of “substantial importance” within the administrative test. A 60 percent majority indicated the

list was complete and had no suggested changes. Thirteen percent complained that the list was too vague and made no real improvement to understanding the rule.

- Finally in the administrative area, the Department invited comment regarding whether the “discretion and independent judgment” requirement should be deleted entirely, retained as a third alternative for meeting the “position of responsibility” requirement or retained by itself but modified to provide better guidance on distinguishing exempt administrative employees. A combined 79 percent preferred that it be retained, either as a third alternative (46 percent), or by itself with clarification (33 percent), while 21 percent favored deleting the “discretion” requirement entirely.
- Fifty-nine percent of professionals reported that they either “agree” or “strongly agree” with this deletion of the percentage limitations on nonexempt work for professional employees, while 30 percent disagreed.
- The Proposed Rule seeks to eliminate the professional exemption requirement of “consistent exercise of judgment and discretion.” Nearly half (46 percent) either disagreed or strongly disagreed with this proposed elimination, while 39 percent supported it. Fifteen percent were neutral to the idea.
- Four hundred and eighty-nine respondents provided comment about the learned professional exemption issue. Twenty-one percent either had no comment or no response to the question, while 28 percent advocated the need for a specific formula to balance the combination of instruction and work experience. Fifteen percent said the entire proposal was too subjective because educational equivalents and work experience vary substantially across industries. Finally, 37 percent indicated a desire to have the Department provide more specific guidance on the issue.
- Nearly two-thirds (64 percent) either agreed or “strongly” agreed with the new creative professional exemption in the Proposed Rule.
- Three hundred and seventy-nine responses were received for an open-ended question asking for further clarifications of the computer employee exemption. The majority of comments indicated a need for unspecified change to the computer employee exemption. Many respondents also believe there should be a change to the salary test for computer professionals, or that computer employees should be folded into the professional employee \$65,000 test.
- Sixty-one percent either “agree” or “strongly agree” with the elimination of the language regarding limitations on nonexempt work for outside sales professionals.

- Many respondents indicated through comment that the requirement to treat inside sales and outside sales personnel distinctly is no longer useful, or consistent with the modern workplace and technology. The suggestion of several was that the Department might consider a “professional” and “non-professional” sales designation, instead of “outside” and “inside” designations.
- Seventy-one percent of respondents agree with retaining a salary basis test in the exemption tests. Fourteen percent opined that there should not be a salary basis test at all.
- The issue of salary levels seems to be divisive. When given the opportunity to agree or disagree with the concept of established salary levels, 44 percent indicated that they agreed with the concept of moving to a single and uniform standard salary level test for all exempt personnel. But, 27 percent said they did not believe that set salary levels should be established for exempt personnel at all. Eleven percent of respondents provided a comment under the “other” response, most of which fell into two categories: either the \$425 amount was too low; or the amount should be adjusted and/or reviewed on a regular basis.
- The Department’s decision not to include an automatic inflationary adjustment to the salary level in the standard test garnered more disagreement than agreement. While about 21 percent were neutral, and a combined 28 percent agreed or strongly agreed that there should be no automatic inflationary adjustment, a combined 39 percent either disagreed or strongly disagreed. Twelve percent of respondents (n=118) chose the “other” response and provided an open-ended remark, most of which expressed a view that there should not be a salary basis test at all.

## **Detailed Findings**

Similar to percentages captured in January, a combined 92 percent of respondents to the June survey said they were either “very familiar” (52 percent) or “somewhat familiar” (40 percent) with the 541 rules. When asked how frequently they interact with the exemption tests, 22 percent (the single largest percentage by category) said “weekly.” An additional 8 percent said “daily,” and 18 percent said “monthly.” All tolled, roughly 48 percent of respondents said they deal with the exemption tests at least once per month.

### Subpart B, Executive Employees, §§ 541.100-.107

#### *A. Two or More Employees*

The Department invited comment on, and WorldatWork subsequently asked its members, whether the supervision of “two or more employees” required for exemption should be modified to include the following language: “the customary

or regular leadership, alone or in combination with others, of two or more other employees.” A 59 percent majority indicated a preference for this longer language, while 38 percent reported they preferred the simple, “two or more employees.”

The remaining 3 percent of respondents to the question (n=33) checked “other” and provided an open-ended comment. These responses generally fell into two categories: (1) in support of the modification with a disagreement over the specified number of employees under supervision; or (2) in support of the modification with a concurrence with the specified number of two or more employees under supervision. Among the respondents who disagreed with the specified number of employees under supervision, responses varied that the specified number of employees under supervision should be between zero and five. Among the respondents who agreed that the exemption should be modified to include “two or more other employees” and many did so with the provision that those “two or more” employees be specified as full-time employees.

### *B. Discretion*

WorldatWork members are not strongly in favor of the Proposal’s elimination of the current requirement that executive employees “customarily and regularly exercise discretionary powers” (Section 541.107). More than half (52 percent) said they either “disagree” or “strongly disagree” with this elimination, while roughly one third said they either “strongly agree” or “agree.” Eighteen percent said they are “neutral” about it.

### *C. Limitations on Nonexempt Work*

There was stronger positive sentiment for the elimination of the percentage limitations on nonexempt work for executive employees. A 58 percent majority reported that they either “agree” or “strongly agree” with this deletion from the regulations; 29 percent disagreed, and 14 percent were neutral.

## Subpart C. Administrative Employees, §§541.200-.207

### *A. Types of Qualifying Administrative Work*

Under the proposal, the new Section 541.201 attempts to clarify the primary duty requirement of administrative personnel “performing office or non-manual work related to management or general business operations,” and includes a list of the types of work areas that meet this requirement. The Department invited comment, and WorldatWork subsequently asked its membership in an open-ended survey opportunity, for any other areas that should be included on the proposed list, and any areas that should perhaps be deleted.

In terms of what might be missing from the proposed list, 504 open-ended responses were received. Because of the great variety of answers, we

considered answers with at least a 3 percent response rate (n=15) to be noteworthy. The single most common response, at 24 percent, was a response indicating that the proposed list was fine as drafted, or “nothing is missing.” The next most common response could be categorized as “legal,” including many responses of “paralegal,” at 14 percent. “Management,” with various derivations and subcategories was next at 12 percent, and “IS/IT” was the fourth most common response at about 10 percent. The most common responses are listed in the figure below.

<b>Suggested Types of Administrative Work Not Listed in the Proposed Rule (n=504 respondents)</b>	
<u>Type of work</u>	<u>%</u>
Legal, Paralegal	14%
Management	12%
IS/IT	10%
Business Operations, Business Analyst and Development	6%
Customer Service	6%
Executive Assistance/support	5%
Communications	5%
Planning	5%
Training	4%
Compensation	4%
Sales	4%
Engineering	4%
Payroll	4%

Although the strong majority (60 percent) of comments indicated that none of the items on the proposed list were inappropriate or should be deleted, there were a few trends among the 40 percent of those that did not concur. About six percent felt that Quality Control should be deleted, and others believed that the Employee Benefits and Personnel Management categories are both captured by the Human Resources category. Also, 4 percent of respondents did not see the need to include both Procurement and Purchasing because of difficulty identifying the difference between the two. About 13 percent differed with the concept of having any list at all.

*B. Limitations on Nonexempt Work*

When asked about the proposed elimination of the percentage limitations on nonexempt work for administrative employees, respondents were somewhat split. A 52 percent majority reported that they either “agree” or “strongly agree” with this deletion from the regulations; 36 percent disagreed and 12 percent were “neutral.”

*C. Position of Responsibility and Substantial Importance*

The Proposed Rule would delete the current language regarding administrative personnel exercising “discretion and independent judgment” and replace it with

“a position of responsibility” with the employer. The new “position of responsibility” requirement says an employee must either perform work of “substantial importance,” or employ a high level of skill or training, and provides a draft list of types of “substantial importance.”

The Department asked, and WorldatWork subsequently asked members in an open-ended question, for feedback on the draft list of types of “substantial importance.” A total of 307 responses were received, and a majority (60 percent) indicated the list was complete and had no suggested changes or revisions. Thirteen percent complained that the list was too vague and made no real improvement to understanding the rule.

The remaining 27 percent offered a suggestion or modification to the proposed list. The most common suggestion offered was not a new addition to the list, but simply a variation of one of the items already listed.

Among the other suggestions offered: project manager, legal/compliance duties, and negotiating on behalf of or representing employer. A handful of respondents had suggestions such as supervising, training, closing sales, safety inspections, administrative assistance, and creative work.

#### *D. Discretion and Independent Judgment*

Finally, in the administrative exemption area, the Department invited comments, and WorldatWork subsequently asked members, whether the “discretion and independent judgment” requirement should be deleted entirely, retained as a third alternative for meeting the “position of responsibility” requirement, or retained by itself but modified to provide better guidance on distinguishing exempt administrative employees. The vast majority (79 percent) preferred that it be retained, either as a third alternative (46 percent), or by itself with clarification (33 percent), while 21 percent favored deleting the “discretion” requirement entirely.

### Subpart D. Professional Employees, §§541.300-.304

#### *A. Limitations on Nonexempt Work*

Respondents were somewhat split when asked about the proposed elimination of the percentage limitations on nonexempt work for professional employees. A 59 percent majority reported that they either “agree” or “strongly agree” with this deletion from the regulations, while 30 percent disagreed; 11 percent were “neutral.”

#### *B. Judgment and Discretion*

The Proposed Rule also suggests elimination of the current professional requirement of “consistent exercise of judgment and discretion.” Nearly half (46

percent) either disagreed or strongly disagreed with removing this requirement, 39 percent supported the elimination, and 15 percent of respondents were “neutral.”

### *C. Learned Professional Exemption*

The Department’s proposal for the new “learned professional” exemption would require advanced knowledge in a field of science or learning through instruction, or an equivalent combination of instruction and work experience. The Proposal does not, however, provide detailed guidance or a specific formula to determine work experience equivalents of instruction.

Four hundred and eighty-nine WorldatWork members provided comment to an open-ended inquiry about this issue. The majority of respondents, 37 percent, indicated a desire to have the Department provide more specific guidelines on this issue. Although these respondents did not specifically advocate a formula, many were frustrated with the vague terms in the proposal, and requested far more definitional clarification or a specific list of jobs that would qualify. Those seeking more clarification sought more guidance and terms of art to apply across all industry lines.

Twenty-eight percent advocated a specific formula to balance the combination of instruction and work experience. Comments ranged widely here. Some respondents recommended a simple 1:1 ratio of years of education to years of work experience. Others thought a degree or some sort of professional license should be required. One respondent simply recommended that the work experience equivalents should match those of the federal government.

Twenty-one percent of respondents either had no comment or no response to the question. Finally, 15 percent said the entire proposal was too subjective because educational equivalents and work experience vary substantially across industries. Many who answered in this category warned that the section is too vague and will lead to challenges in court.

### *D. Creative Professional Exemption*

The DOL proposal for the new creative professional exemption is identical to the existing short test: performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. When asked, nearly two-thirds of WorldatWork members (64 percent) either agreed or “strongly” agreed with this proposal. Only 5 percent disagreed; 31 percent were neutral.

### Subpart E. Computer Employees Exemption, §§541.400-.403

The Department has proposed no substantive changes in the current Proposed Rule to the computer employee exemption (other than the deletion of the discretion and judgment requirement) because these regulations were partially

revised in 1992. However, the Proposal states that the Department recognizes that the computer employee exemption has been particularly confusing. Because of this, comments have been invited regarding further clarifications.

WorldatWork received 379 responses to an open-ended question asking for suggested further clarifications of the computer employee exemption. The types of response were as varied as the number of responses. However, a few conclusions can be drawn. First, respondents overwhelmingly want a change to the computer employee exemption; very few stated that the regulation is fine as it currently stands. A second recurring theme in the comments recommends treating different computer jobs differently. For example, computer employees who simply maintain a system, perform data entry, or only work with hardware should not be exempt in the opinion of some. Computer employees who create and program something new or different should be exempt, some said. Third, many respondents believe there should either be a change to the salary test or that the special exemption be eliminated by folding computer employees into the professional employee \$65,000 test. Finally, respondents prefer a dichotomy between computer employees with a bachelor's degree (or higher) and those who do not have a degree.

#### Subpart F. Outside Sales Employees, §§541.500-.504

##### *A. Limitations on Nonexempt Work*

The Proposal includes minor changes to the exemption for outside sales employees, the most notable of which is the elimination of language related to time devoted to nonexempt activities. A 61 percent majority of WorldatWork members either “agree” or “strongly agree” with the elimination of this language, while about 20 percent disagree and 18 percent are neutral.

##### *B. Other Comments Regarding Outside Sales Exemption*

Numerous respondents indicated that the requirement to treat inside sales and outside sales personnel distinctly (i.e., exempt/nonexempt) is no longer useful, or consistent with the modern workplace and technology. In the opinion of many, sales professionals are sales professionals — whether selling inside or outside — because these professionals must work to identify, cultivate and maintain ongoing customer relationships. And so, in the eyes of some, a preferable distinction would be “professional” and “non-professional” sales personnel, instead of “outside” and “inside” sales.

One member noted that, in his business, the “inside” sales professional is not merely an order taker, but must “present high-tech products ... ascertain a customer's needs for high-tech products, and to guide a customer through multiple solutions to their high-tech needs.” He continues, “The range of products and the technical specifications of these products requires these employees to have a high level of technical knowledge and an ability to match a customer's technology needs with appropriate products.”

He proposes that the Department consider, consistent with several other exemption tests, a “Sales Professional” exemption with criteria such as holding a position of responsibility with the employer, a high level of knowledge, skill and training, and/or responsibility for the management of significant customer relationships.

In addition, a new “Sales Professional” exemption could require that the employee perform non-manual office work, manage significant customer relationships (not including retail or telephone consumer customers), use advanced knowledge of hardware or software products to suggest solutions to a customer’s technological needs, and be designated as the primary contact for customers.

#### Subpart G. Compensation Requirements, §§541.600-.606

##### *A. Salary Basis*

The Department would not change the requirement that exempt executive, administrative, and professional employees be paid on “salary basis.” When asked about the retention of the “salary basis” test, strong positive consensus was attained, with 71 percent in agreement with retaining a salary basis test for exemption, with 3 percent disagreement and 14 percent responding that there should not be a salary basis test at all. Among the 30 comments received to this question, there was great variety, but the single largest number of comments indicated difficulty working with part-time employees within the salary basis test.

##### *B. Salary Levels*

The Proposal would eliminate the different long and short test salary levels for executives, administrative, and professional personnel and replace them with a single uniform “standard test” of \$425 per week for all exempt personnel. When given the opportunity in the survey to agree or disagree, or disagree with the concept of established salary levels, the largest percentage of WorldatWork members (44 percent) indicated that they agreed with the concept of moving to a single and uniform standard salary level test for all exempt personnel (except computer personnel), at a level of \$425 per week. Twenty-seven percent said they did not believe that set salary levels should be established for exempt personnel, at all, and 11 percent of respondents selected “other” for this question and provided a comment about this section of the Proposal. The comments largely fell into two categories: 68 comments indicated the \$425 amount was too low; and 37 comments said the amount should be adjusted or reviewed on a regular basis.

##### *C. Automatic Inflationary Adjustment to Salary Levels*

The next survey question asked specifically about the issue of salary level adjustments within the Rules, and whether there should be an automatic

inflationary adjustment. The Department's decision not to include an automatic inflation adjustment in the standard test drew a mixed response, which garnered more disagreement than agreement. While about 21 percent were neutral to the idea and 28 percent agreed or "strongly" agreed with this omission in the Proposal, 39 percent either disagreed or "strongly" disagreed.

Beyond the 39 percent who disagreed, 12 percent of respondents (n=118) chose the "other" response and provided an open-ended remark. The single largest number of comments expressed a view that there should not be a salary basis test at all. Other comments indicated that the salary level should be scheduled for review "periodically" or "regularly" — perhaps every year, two years, or five years — but not necessarily indexed to inflation. The overarching sentiment was that the level should be reviewed periodically and regularly, "so we don't end up in the situation we're in now," as one respondent said. A handful of other comments suggested that the salary level be automatically adjusted whenever the minimum wage is adjusted.

### Other Comments

Finally, WorldatWork allowed respondents to provide additional comments about the proposal, or any portion of it. More than 200 comments were written on a variety of topics, including 48 that were specifically positive about the proposal as a whole, and 45 that were negative about the proposal as a whole.

Another 46 comments specifically asked for greater clarification, better definitions, and/or clearer guidelines from the Department as the proposal moves forward.

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