September 25, 2017

Submitted via regulations.gov

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 Avenue, N.W.
Washington, DC 20210

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees; Request for Information (RIN 1235-AA20) ¹

Dear Ms. Smith:

WorldatWork respectfully submits these comments in response to the Department of Labor’s (DOL or the Department) July 26 published Request for Information (RFI), Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. We appreciate the opportunity to provide further feedback to the Department.

I. WorldatWork Background Information

WorldatWork is a nonprofit human resources association for professionals and organizations focused on compensation, benefits, work-life effectiveness and total rewards — strategies to attract, motivate, retain and engage a productive workforce. It’s our mission to help total rewards professionals achieve their goals and influence their organization’s success. We do so by providing total rewards thought leadership from the world’s most respected experts and fostering an active community of total rewards practitioners.

¹ Wage and Hour Division, U.S. Department of Labor; Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees; Request for Information, 82 Fed. Reg. 34,616-34,619 (July 26, 2017) (codified at 29 C.F.R. § 541).
WorldatWork and our affiliates provide comprehensive global education, certification, research, advocacy and community to our members and the total rewards community. Our work enhances the careers of professionals and optimizes the employee experience, which leads to improved organizational results. WorldatWork has more than 70,000 members and subscribers worldwide; more than 80% of Fortune 500 companies employ a WorldatWork member.

Founded in 1955, WorldatWork has offices in Scottsdale, Ariz., and Washington, D.C., and is affiliated with more than 70 human resources associations across the United States and around the world.

WorldatWork members believe there is a powerful exchange relationship between employer and employee, as demonstrated through the WorldatWork Total Rewards Model. Total rewards involves the deliberate integration of six key elements that effectively attract, motivate, retain and engage the talent required to achieve desired organizational results. The six key elements are: compensation, benefits, work-life effectiveness, recognition, performance management and talent development.

This model recognizes that total rewards operates in the context of overall business strategy, organizational culture and human resources strategy, as well as a complex external environment. Within this context, an employer leverages the six elements to offer and align a value proposition that benefits the organization and the employee. An effective total rewards strategy results in satisfied, engaged and productive employees, who in turn deliver desired performance and results.

There is significant social value derived from a compensation strategy. Compensation’s positive influence on an employer in terms of long-term results and productivity gains has far-reaching benefits to organizations and individual employees; the communities in which they operate, live and work; and the overall U.S. and global economies. There are many approaches to achieving this positive effect from the employment relationship, all of which consider a broad array of ideas, values and goals.

The influence of public policy on shaping compensation practices should be carefully considered. Government has demonstrated that it can positively influence the final outcome through areas such as prohibiting wage discrimination for protected classes or establishing a reasonable minimum wage for employees. However, government policies also can disrupt the delicate environment of cost structures for employers and competitive pay for employees.

It is with this expertise and perspective that we submit the following comments.

II. WorldatWork’s Previous Comments and Advocacy on Fair Labor Standards Act (FLSA) Overtime White Collar Exemptions
As the professional association representing compensation and rewards professionals, WorldatWork has been heavily involved in the debate and formal rulemaking process concerning changes to the Fair Labor Standards Act overtime regulations. Our members expressed significant concerns over the rules finalized in 2016 by the Obama Administration which are outlined in our formal comment letter dated Sept. 4, 2015.

Specifically, our members felt strongly that more than doubling the current standard salary level threshold to the $47,467 level was ill-advised and could have created numerous problems for employers and employees. On top of the additional costs and administrative burdens of tracking hours for a significantly larger non-exempt workforce, our members expressed concerns for employees, who clearly perform exempt duties, feeling like their roles were less valued if they were reclassified from exempt status to non-exempt. These employees faced losing access to benefits and workplace flexibility options along with career-advancement opportunities such as management or supervisory responsibilities and growth gained through attending conferences and traveling for business purposes, which likely would have been limited for newly classified nonexempt employees.

Our members were also extremely concerned with the tri-annual updates included in the 2016 final rule tied to the 40th percentile of salaried workers in the lowest census region. Connecting an automatic update to an already unjustifiably high index would have resulted in a troubling vanishing exempt workforce over time. According to WorldatWork research, the exempt employee workforce would rapidly decline under the approach finalized in the 2016 rules. This research assumed that all employees earning below the standard salary threshold would be reclassified as hourly nonexempt employees. Under this scenario, the 40th percentile of salaried workers’ threshold would reach approximately $70,966 in 2020 and $262,020 by 2032. This would ultimately erase the exempt worker as it exists in today’s workforce.

WorldatWork appreciates that the Department is revisiting the now invalid 2016 overtime exemptions for executive, administrative, professional, outside sales and computer employees. We have consistently supported raising the current standard salary-test level. If this is set at a reasonable, workable standard with the goal of identifying only those employees clearly performing nonexempt duties, both employers and employees will benefit.

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III. WorldatWork Comments in Response to the Request for Information

In response to the Department’s request for information, WorldatWork conducted a survey\(^6\) of our membership to inform our comments on this issue. We also hosted meetings with our Compensation Advisory Council and our Sales Compensation Advisory Council\(^7\). The comments below represent the views of our members expressed through this survey and the personal anecdotes and expertise provided by our council members.

A. *There is value in retaining both the standard salary level and duties tests to determine if an employee qualifies for one of the white-collar exemptions.*

62% of surveyed WorldatWork members indicated that they would NOT prefer an exemption test that relies solely on the duties an employee performs without regard to the amount of salary earned.

The salary test is valued as one of the three tests employers must consider when classifying a job: (1) Employee must be paid on a salary basis; (2) Employee must be paid at a rate not less than $455 per week, the standard salary test; and (3) Employee must satisfy one of the duties tests specified for either the executive exemption, administrative exemption or professional exemption. The standard salary test is relied on as a bright-line test for both the employer and employee where the role is clearly not responsible for exempt level duties, and therefore, a thorough duties analysis is not required.

If the standard salary level test is set at a level where it functions as a gatekeeper in this manner, then the current duties test analysis can be conducted on those roles where exempt-level work is a possibility. Members raised concerns that eliminating the standard salary level test would require significant changes to the duties test, which we argue are not necessary or welcome to meet the goal of appropriately classifying nonexempt employees.

B. *The standard salary level test should be tied to a wage-based methodology and should be devised to be a gatekeeper for screening out transparently nonexempt employees.*

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\(^7\) WorldatWork Advisory Councils serve WorldatWork as strategic thought leaders and are comprised of members who are collaborators and catalysts for action representing their specific knowledge area and total rewards. Advisory Councils act as advocates for the profession and the organization.
WorldatWork Advisory Council members strongly advocate that the standard salary level be tied to a wage based economic indicator. Other economic indicators like the Consumer Price Index are inappropriate in this context because they do not accurately reflect what is happening in the labor market with respect to wages. Using a non-wage methodology risks introducing inflationary measures to this test that do not directly correspond with wage growth, decline or stagnation.

If the Department decides to update the standard salary level test, WorldatWork recommends using the 2004 methodology, which set the salary test at approximately the bottom 20% of salaried employees in the South and in the retail industry. Using this methodology is consistent with past DOL rulemaking prior to the now invalidated 2016 regulations and is the most appropriate methodology to use to update the current standard salary level test.

WorldatWork members overwhelming (84%) indicated that no changes to the duties test are needed if the Department updates the standard salary level test set at either inflation since 2004 or the 20th percentile of salaried employees in the South and in retail.

C. DOL should not set different standard salary levels for the executive, administrative and professional exemptions as occurred prior to 2004.

A majority of WorldatWork members indicated that they do not support setting different standard salary levels for the executive, administrative and/or professional exemptions as occurred prior to 2004. Advisory Council members reiterated strong support that going backwards is not recommended nor needed. Doing so is regarded as impractical and a waste of limited resources.

In today’s workforce, many jobs can qualify for more than one exemption. Setting different levels would only encourage employers to categorize the role in the exemption with the lowest standard salary level. This is not how the standard salary level should be designed and would likely result in adding layers of complications that are not needed. Employees do not want to spend time determining how much time they spend doing exempt work vs. nonexempt work or duties designated under each of the different exemptions. Trying to track this creates an administrative nightmare for both the employer and employee.

The more practical and workable approach is to keep the standard salary level at a federal floor where it seeks to be a gatekeeper removing roles that are clearly made up of nonexempt responsibilities. Then the focus of each of the duties test exemptions should remain on the

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8 While the survey results indicated that the preferred methodology be updating the 2004 level using the Consumer Price Index for Urban customers, Advisory Council members strongly advocated that this methodology would be inappropriate standard to establish since it is not tied to what is happening specifically with wages.

primary duties performed in their entirety; it should not revert to consideration of the time an employee spends on a particular exemption. 73% of surveyed WorldatWork members said they opposed restoring the long and short tests used prior to 2004.

**D. Neither the standard salary level or the highly-compensated salary-level test should include multiple levels set by size of the employer, geographic location, census region, census division, state, metropolitan statistical area or any other method. Doing so would create unnecessary confusion, complications and unintended consequences.**

WorldatWork strongly advocates against setting multiple salary levels for the standard and the highly-compensated salary tests.

80% of surveyed WorldatWork members indicated that the Department should not set multiple salary levels for the highly-compensated employee test based on employer size, location or any other factor. And 69% of members indicated that they did not favor setting multiple standard salary-level thresholds for the standard salary level-test based on factors such as employer size, location or region.

While we understand and appreciate the real concerns specifically tied to geographic pay, introducing multiple levels of salary tests is not warranted. States and local municipalities can and do address geographic issues setting higher salary requirements or tests in locations where the local market demands higher wages\(^\text{10}\). Adding in a new federal layer of regional/geographic based salary levels would be extremely burdensome to multistate employers and would result in more situations where employees in the same job role or function are classified differently based solely on where they work. This causes a host of other complications regarding access to benefits, workplace flexibility options, discrimination allegations and more. The consequences far exceed the limited benefits of considering multiple salary level tests. Establishing multiple tests would likely also move the standard salary test away from the stated goal of identifying only those job roles preforming nonexempt work.

**E. All performance based compensation should be counted toward satisfying the standard salary level test.**

WorldatWork members appreciated that non-discretionary bonuses and incentive payments, including commissions, were considered for the first time in the 2016 Final Rule as ways to satisfy the standard salary level. However, the 10% limit made counting these payments

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\(^\text{10} \) Minimum Wage Order for Miscellaneous Industries and Occupations, 12 N.Y.C.R.R. Part 142; (Effective Dec. 31, 2016). [https://www.labor.ny.gov/formsdocs/wp/CR142.pdf](https://www.labor.ny.gov/formsdocs/wp/CR142.pdf); Beginning Jan. 1, 2017, the California minimum salary for exempt employees is $840 per week, or $43,680 per year. By 2022, the amount will increase to $62,400 per year. Section 1173, Labor Code; and California Constitution, Article XIV, Section 1. Reference: Sections 1182 and 1184, Labor Code. [https://www.dir.ca.gov/t8/11040.html](https://www.dir.ca.gov/t8/11040.html)
unusable for many employees whose compensation is designed around these exact payments. The quarterly look-back period also kept many employers from utilizing this provision when evaluating job-role exemption classification. A six-month or annual look-back period would be preferred; it more accurately captures the compensation earned by the employee.

Advisory Council members maintain that in today's workforce, all performance-based compensation should be included to meet the standard salary level test. This should be measured by total compensation earned. Members caution against looking at W-2 wage information because this is affected by individual choices made by the employee. When employees are clearly performing exempt work, and are paid some portion on a salary basis, it follows that these employees should meet the exemption tests if their total compensation exceeds the standard salary test.

**F. The Department of Labor does not have the constitutional authority to establish an automatic update to the salary tests. However, it is advised that the Department revisit the exemptions through formal Notice and Commenting procedures periodically to ensure the tests remain effective.**

If Congress intended to authorize the Department of Labor to automatically update the standard salary level or the highly-compensated employee salary level, they would have clearly provided this authority in the statute. Congress has expressed this authority in other statutes where it specifies that a certain provision should be indexed to inflation. One example of this is the Excise Tax or Cadillac Tax that was passed as part of the Patient Protection and Affordable Care Act. Furthermore, indexing language is absent in the Fair Labor Standards Act section 13(a)(1). The FLSA has been the bedrock labor law of the United States since its passage in 1938. It has been amended and the Department of Labor has revisited the salary level multiple times since its passage. Over the course of these 79 years, Congress has not acted to give the Department of Labor this expressed indexing authority. Therefore, WorldatWork strongly believes that the Department lacks the constitutional authority to establish an automatic index for the salary-level test through regulations.

WorldatWork members agree that the salary level should be revisited from time-to-time to remain relevant and effective at its gatekeeping function. The best method for doing so is through the Administrative Procedure Act’s required notice-and-comment rulemaking process. This gives the regulated community the proper opportunity to weigh in on current economic conditions that may be relevant to establishing an effective salary level. Members indicated that evaluating the salary level every five years may be appropriate. Advisory Council members strongly cautioned against changing the standard salary level too frequently, which would result in additional cost, confusion and burdens that yield few benefits.

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11 26 U.S. Code §49801.
IV. Conclusion

WorldatWork appreciates the Department’s attention to the overtime exemptions for executive, administrative, professional, outside sales and computer employees. The uncertainty surrounding these rules over the past few years has been disruptive for many organizations and employees. If the Department moves forward with a formal rulemaking, we strongly advocate that standard salary level be adjusted to a sensible rate based on the methodology used in 2004 and that no new changes be made to the duties tests. We strongly recommend keeping the federal standard salary level as a federal floor without regard to geographic location, employer size or any other factors.

Please do not hesitate to contact me at melissa.murdock@worldatwork.org for further information or to schedule a meeting to discuss items addressed in this letter. We look forward to working with you on this and other important workplace issues.

Sincerely,

Melissa Sharp Murdock, Esq.
Director, External Affairs
WorldatWork conducted a quick survey to gather practitioner perspectives in response to the U.S. Department of Labor (DOL) request for information on defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees under the Fair Labor Standards Act, commonly known as overtime regulations. This survey informed WorldatWork’s comment letter to the DOL.
Executive Summary

- The current model is preferable to one that only includes a duties test.
- Using the Consumer Price Index for Urban customers (CPI-U) is seen as the most appropriate method for updating the 2004 threshold for inflation.
- Setting the threshold per inflation since 2004 or at the 20th percentile in the South region/retail would not require a change to the standard duties test.
- 69% of respondents do not think there should be multiple thresholds for duties tests based on employer size, location, etc.
- 53% do not think the DOL should set different thresholds for executives, admins, and professionals.
- 27% said that allowing 10% of nondiscretionary salary payments to satisfy the salary test is appropriate. 24% indicated that the limit should be higher.
- Most people do not think that there should be multiple thresholds for highly compensated employee exceptions.
- The majority of respondents think that the tests should be updated every five years to ensure they accurately identify exempt employees.
  - Most believe that updates should be paused during times of negative economic growth.
- 73% of respondents are not in favor of restoring the long and short tests.
Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test?

- Yes: 38%
- No: 62%

n = 489
If a salary level test remains part of the standard test, please rank the methods for updating/setting the salary level threshold, with the most appropriate method at the top.

- **Update the 2004 threshold based on inflation, as measured by the CPI-U (n=404)**
  - Most appropriate: 40%
  - Second-most appropriate: 34%
  - Third-most appropriate: 19%
  - Least appropriate: 7%

- **Use a threshold that represents the bottom 20% of salaried employees in the South (n=410)**
  - Most appropriate: 36%
  - Second-most appropriate: 24%
  - Third-most appropriate: 24%
  - Least appropriate: 13%

- **Update the 2004 threshold based on inflation, as measured by another index (n=407)**
  - Most appropriate: 10%
  - Second-most appropriate: 40%
  - Third-most appropriate: 37%
  - Least appropriate: 11%

- **Fixed percentile of full-time U.S. salaried employees (n=407)**
  - Most appropriate: 15%
  - Second-most appropriate: 20%
  - Third-most appropriate: 54%
  - Least appropriate: 11%
If the DOL decides to keep both tests, would setting the threshold based on inflation since 2004 or the 20th percentile of salaried employees in the South and in retail require a change to the standard duties test?

Yes 16%
No 84%

n = 373
If the DOL decides to keep both the salary level and duties tests should the standard test contain multiple salary level thresholds based on employer size, location, etc?

- Yes: 31%
- No: 69%

n = 380
If the DOL decides to keep both the salary level and duties tests, for which of the following should different salary level thresholds exist within the standard test? Please select all that apply.

1. Metropolitan statistical area: 14%
2. Size of employer: 11%
3. State: 10%
4. Census region: 9%
5. Census division: 4%

n = 114
If the DOL decides to keep both tests, should it set different standard levels for the executive, admin, and professional exemptions as it did prior to 2004?

- Yes: 47%
- No: 53%

n = 363
If the DOL decides to keep both tests, is allowing 10% of salary from bonuses and incentives an appropriate limit?

- Yes: 27%
- No, the limit should be higher: 24%
- No, nondiscretionary bonuses and incentive payments should not be included: 48%
- No, the limit should be lower: 1%

n = 363
If the DOL decides to keep both tests, should highly compensated employee exemptions contain multiple total annual compensation level thresholds based on size, location, etc?

Yes 20%  
No 80%

n = 361
If the DOL decides to keep both the salary level and duties tests, for which of the following should different salary level thresholds exist within the highly compensated employee test? Select all that apply.

- Size of employer: 8%
- Metropolitan statistical area: 8%
- State: 6%
- Census region: 4%
- Census division: 2%

n = 73
If the DOL decides to keep both tests, should they be automatically updated on a periodic basis to ensure they effectively identify exempt employees?

Yes: 83%
No: 17%

n = 360
If the DOL decides to keep both tests and they’re automatically updated, what is the best mechanism for the update?

- Inflation, as measured by the consumer price index for all urban consumers: 68%
- Inflation, as measured by another index: 11%
- Fixed percentile: 13%
- Other method: 8%

n = 352
Should automatic updates be delayed during periods of negative economic growth?

Yes: 72%
No: 28%

n = 356
What should the time period be between updates to reflect long-term economic conditions?

- Every five years: 54%
- Every three years: 36%
- Every 10 years: 7%
- Other: 3%

n = 356
Would you be in favor of restoring the long and short tests?

- Yes: 27%
- No: 73%

n = 348
Only industries with more than 5% of respondents shown here.
Methodology

This report summarizes the results of an Aug. 2017 survey of WorldatWork members to inform WorldatWork’s position on potential changes to the FLSA overtime regulations.

On Aug. 8, 2017, 82,753 survey invitations were included in the workspan weekly newsletter sent electronically to WorldatWork members and customers. On Aug. 9, 2017, an 4,994 additional invitations were sent to members randomly selected for participation (there is some degree of overlap between these two groups). The survey was open to members in the United States. The survey closed on Aug. 28, 2017, with 556 responses. The dataset was cleaned, resulting in a final dataset of 544 responses. To provide the most accurate data possible, data was cleaned and analyzed using statistical software. Any duplicate records were removed. Data comparisons with any relevant, statistically significant differences are noted within this report.

The demographics of the survey sample and the respondents are similar to the WorldatWork membership as a whole. The typical WorldatWork member works at the managerial level or higher in the headquarters of a large company in North America. The frequencies or response distributions listed in the report show the number of times or percentage of times a value appears in a dataset. Due to rounding, frequencies of data responses provided in this survey may not total exactly 100%.

Go online for the full text of the questionnaire. Please refer to this instrument for all definitions used within this document. A list of participating organizations can be found here.