



September 22, 2017

VIA ELECTRONIC SUBMISSION

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Melissa Smith
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34616

Dear Secretary Acosta and Ms. Smith:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments in response to the U.S. Department of Labor (DOL) on the Request for Information (RFI), to aid the agency as it formulates a proposal to revise overtime regulations and exemptions under the Fair Labor Standards Act (FLSA). Advocacy has completed extensive small business outreach on this proposal across the country. Small businesses have told Advocacy that doubling of the standard salary threshold to \$47,476 would have disproportionately impacted small entities, adding significant compliance costs and paperwork



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burdens.¹ Advocacy is pleased that DOL has released this RFI and is seeking to reform this regulation. Advocacy recommends that DOL adopt a lower level national salary threshold that has been adjusted to minimize small business impacts to the most adversely affected low wage regions and industries.

The Office of Advocacy

Congress established Advocacy under Pub. L. No. 94-305 to represent the views of small entities before Federal agencies and Congress.² Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁵ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule. The agency is not required to provide a response for the Federal Register if it certifies that the public interest is not served by doing so.⁶

Background

The Fair Labor Standards Act (FLSA) guarantees a minimum wage and overtime pay of time and a half for work over 40 hours a week.⁷ While these protections extend to most workers, the FLSA provides a number of exemptions. The "white collar" exemption is for executive, administrative, professional, outside sales, and computer employees. To be considered exempt, employees must meet tests related to their primary job duties, be paid on a salary basis, and be paid not less than the standard salary threshold.⁸ In May 2016, DOL finalized a rule that changed the standard salary threshold for the "white collar" exemption to overtime pay under the FLSA from \$23,660 to \$47,476.⁹ The salary threshold for this exemption had last been changed

¹ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 81 Fed. Reg. 32,391 (May 23, 2016) (hereinafter "2016 Final Rule"). In DOL's final rule, the agency set the standard salary threshold at \$47,476. The standard salary threshold actually would have been a higher number due to inflation.

² 1976 Amendments to the Small Business Act and Small Business Investment Act, Pub. L. No. 94-305, 90 Stat. 663.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁴ Pub. L. 104-121, 110 Stat. 857 (1996) (codified at U.S.C. § 601)

⁵ See Pub. L. No. 111-240 §1601, 124 Stat. 2504, 2551 (2010) (amending 5 U.S.C. § 604(a)).

⁶ 5 U.S.C. §§ 604, 608 (2016).

⁷ 29 U.S.C. § 206(a)(1)(c); see also 29 U.S.C. § 207(a)(1).

⁸ 29 CFR § 541.

⁹ *2016 Final Rule*, 81 Fed. Reg. 32,391.

in 2004.¹⁰ In November 2016, one month before the rule was to become effective, the rule was temporarily enjoined by a federal court.¹¹

On July 26, 2017, DOL published a RFI, seeking feedback on these regulations, as it plans to formulate a new proposal on this issue.¹² On August 31, 2017, the United States District Court for the Eastern District of Texas invalidated the Department of Labor's 2016 final rule, making the injunction permanent.¹³

Advocacy has completed extensive outreach to small businesses throughout the rulemaking period. Over the past three years, Advocacy held multiple small business roundtables on DOL's overtime regulations in Colorado, Kentucky, Louisiana, and Washington, D.C. Advocacy thanks DOL for attending all of these roundtables. Advocacy staff also spoke to small entities and representatives at multiple conferences, meetings and on conference calls about these regulations. At the proposed rule stage, Advocacy submitted a public comment letter to the Department of Labor based on this small business feedback.¹⁴ Advocacy also held Small Business Regional Regulatory Reform Roundtables in Idaho, Louisiana, Kansas, Kentucky, Missouri, Ohio, and Washington this year to seek feedback from small businesses on regulations that are burdensome and should be reformed pursuant to Executive Orders 13771 and 13777.¹⁵ At each of these roundtables, small businesses discussed their experiences and concerns with the Overtime rule, and recommended that this rule be reformed.¹⁶ This letter will outline some of the feedback and information we gathered regarding this proposal.

Comments on DOL's Request for Information Questions

Question 1: In 2004, the Department set the standard salary level at \$455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Would applying the 2004 methodology to current salary data (South and retail industry) be appropriate? Would setting the salary level using either methods require changes to the standard duties test, and if so, what change(s) should be made?

¹⁰ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122 (April 23, 2004) (hereinafter "2004 Final Rule").

¹¹ *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731 (E.D. Tex. Aug. 31, 2017).

¹² *Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 Fed. Reg. 34,616 (July 26, 2017).

¹³ *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731 (E.D. Tex. Aug. 31, 2017).

¹⁴ U.S. Small Bus. Admin., Office of Advocacy, Comment Letter on Proposed Rule for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (Sept. 4, 2015) (hereinafter "Advocacy Comment Letter"), <https://www.sba.gov/advocacy/942015-defining-and-delimiting-exemptions-executive-administrative-professional-outside>.

¹⁵ *Reducing Regulation and Controlling Regulatory Costs*, Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017); *Enforcing the Regulatory Reform Agenda* Exec. Order No. 13777, 82 FR 12,285 (Feb. 24, 2017).

¹⁶ U.S. Small Bus. Admin., Office of Advocacy, *Regulatory Reform*, <https://www.sba.gov/advocacy/regulatory-reform>. (containing transcripts of Small Business Regulatory Reform Roundtables).

DOL Should Adopt an Updated Version of the 2004 Standard Salary Level

Small businesses told Advocacy that the standard salary level of \$47,476 set in the 2016 final rule was set too high. This high salary threshold disproportionately affected certain low wage regions and low wage industries, resulting in a very large percentage of workers in these areas to be newly eligible for overtime and their employers to be subject to increased costs. The inclusion of such a large percentage of workers eliminated the usefulness of the duties test in these regions, and decreased flexibility in setting wages in lower wage regions. In the final 2016 rule, DOL set the standard salary threshold to exclude from the exemption the bottom 40 percent of salaried workers in the lowest-wage Census Region (currently the South).¹⁷

The recent district court decision invalidating the Department of Labor's final rule determined that the agency exceeded its authority by setting the salary threshold to such a high level that effectively eliminates a consideration of the duties test. The court stated that "the Department sets the minimum salary threshold as a floor to screen out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." The court noted that "any new figure recommended should also be somewhere in the lower end of the range of prevailing salaries for those employees."¹⁸

Small businesses at Advocacy's roundtables support DOL adopting an updated version of DOL's final rule in 2004, because it would adopt a lower "floor" of the bottom 20 percent of salaried employees; this threshold would also adjust for the south region and retail industries and minimize the impact for these low wage groups.¹⁹ They pointed out that the FLSA provides minimum wage and hour standards; nothing would prevent a state from establishing higher standards for non-exempt and exempt employees. For example, 30 states have higher minimum wage requirements than the federal requirement of \$7.25 per hour, and California and New York have adopted standard salary thresholds higher than the current federal requirements.²⁰ Small businesses commented that employers can pay wages higher than this minimum.

Advocacy also believes that DOL needs to account for the regional differences in a more granular level; this would allow the agency to choose a more precise threshold to minimize the impact of this rule on low wage states. In DOL's 2004 final rule and 2016 final rule, the agency adjusted the national salary threshold by the general South region, covering 17 states; this includes high wage states such as Virginia and the District of Columbia. Advocacy recommends that DOL consider choosing a more narrow Census classification such as the East South Central portion of the census, which includes Alabama, Kentucky, Mississippi and Tennessee. Including a state like Virginia in the calculation would increase the standard salary threshold significantly. Using 2015 data from Oxford Economics, the 40th percentile of salaried full time wages in Virginia was \$53,976/year; while the 40th percentile in Mississippi was \$40,768/year.²¹

¹⁷ 2016 Final Rule, 81 Fed. Reg. 32,391.

¹⁸ Nevada v. U.S. Dep't of Labor, No. 4:16-CV-00731 (E.D. Tex. Aug. 31, 2017).

¹⁹ 2004 Final Rule, 69 Fed. Reg. 22,122.

²⁰ U.S. Dep't of Labor, Wage and Hour Div., *Minimum Wage Laws in the United States* (July 1, 2017), <https://www.dol.gov/whd/minwage/america.htm>.

²¹ Oxford Economics for the National Retail Federation, *State Differences in Overtime Thresholds*, Addendum to *Rethinking Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries* (Aug. 31, 2015), <https://nrf.com/sites/default/files/Documents/retail%20library/OE%20Addendum%20%20-%20State%20level%20overtime%20threshold%20analysis.pdf>.

Advocacy recommends that DOL also adjust the standard salary threshold to reflect certain industries that have low profit margins and wages and would incur a disproportionate impact. In 2004 the standard salary threshold was adjusted to reflect retail wages. The 2016 final rule did not include a salary adjustment for retail wages or any other low wage industry wages.

2. Should the regulations contain multiple standard salary levels? If so, how should levels be set: by the size of the employer, census region, census division, etc.? What would the impact of multiple standard levels be on particular regions or industries, and on employers with locations in more than one state?

Based on small business comments, Advocacy recommends that DOL should have a moderate national standard salary level, which is adjusted to reflect the low wage regions and industries. Most small businesses attending the roundtable seek simplicity and predictability in this regulation, and do not support multiple standard salary levels because it may create confusion. One commenter noted that the FLSA and the duties test is complicated enough, and salary test is the more understandable bright line rule. A representative from small colleges commented that multiple salary thresholds would create compliance problems and litigation.

Roundtable participants in general did not support multiple standard levels based on region. Small businesses stated that there are significant pay differences within a state like New Jersey or Idaho, depending on whether it was a metropolitan or rural part of the state. A small business owner with restaurants in two states commented that their managers could be in different employment classifications. This small business already has to keep up with multiple wage compensation models by city that regularly change. Small businesses also stated that technology has created a more mobile workforce; it may be difficult to categorize the region of employees who telework or work in multiple locations.

Small entities had differing opinions on whether there should be multiple salary thresholds based on the size or type of employer. As stated above, most small businesses at Advocacy's roundtable did not support a separate salary level for small businesses, as this would cause complexity and confusion. However, nonprofit organizations differed on whether there should be a separate salary threshold for nonprofits, to adjust for the potentially lower wages in the nonprofit industry. The American Society of Association Executives (ASAE) recommended that "DOL set a lower salary level to all employers or set the minimum salary level at a lower percentile of the national average for nonprofit and/or small employers."²² Advocacy spoke with a number of small nonprofits that are strongly opposed to having a separate salary threshold level for non-profits. The National Council of Nonprofit's comment letter states, "Most nonprofit employers are deeply concerned that treating nonprofit employees under the law as

²² Am. Soc'y of Assoc. Execs. (ASAE), Comment Letter on Proposed Rule for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (hereinafter "*ASAE Comment Letter*") (Aug. 2, 2017). ASAE represents more than 21,000 association executives and partners representing more than 9,300 organizations. ASAE's members manage nonprofit 501(c)(6) trade associations, individual membership societies and voluntary organizations, and 501(c)(3) tax-exempt charities. According to ASAE staff, a majority of their members would qualify as a small organization.

less valuable than their for-profit or government counterparts would turn charitable nonprofits into employers of last resort.”²³

6. What was the impact (both economic and non-economic) on the workplace for employers or their employees? To what extent did employers, in anticipation of the 2016 Final Rule’s effective date on December 1, 2016, make changes to their employees’ status? Did small entities encounter any unique challenges in preparing for the 2016 Final Rule’s effective date?

Small businesses across the country have told Advocacy that DOL’s doubling of the standard salary threshold to \$47,476 in such a short time frame was a “shock” to their businesses, and created burdensome paperwork requirements and unplanned businesses expenses. In the DOL’s 2016 final regulatory flexibility analysis (FRFA), DOL estimates that the average total cost per affected small entity is \$3,265, and the range of costs is \$847-\$75,059 per affected small entity.²⁴ Small businesses stated that the compliance costs from this rule were much higher than estimated by DOL, and many of the workforce changes due to compliance with this rule could not be undone after the court injunction of the rule. Advocacy recommends that DOL revisit the compliance cost and burden estimates in an Initial Regulatory Flexibility Analysis (IRFA) in the upcoming proposed rule. Advocacy is available to help DOL in its compliance with the RFA.

Small Businesses Spent More Time Understanding Rule

DOL estimated that it would take small businesses one hour of time for regulatory familiarization, or the cost incurred to read and become familiar with the requirements of the rule.²⁵ Small businesses attending Advocacy’s roundtables commented that it took much more time and resources to understand this rule. Small businesses often have no in-house counsel or human resources staff to assist with new regulation compliance. Many participants stated that they had to hire outside HR consultants, legal staff, payroll providers and other staff to understand and come up with a plan on how to comply with these regulations. Many small businesses purchased new payroll and management software with time and attendance features to track the hours of their formerly exempt employees.

Small Business Managers Spent More Time Scheduling their Workers

DOL estimated that small business would spend 75 minutes per worker managing and adjusting workers’ schedules as a result of this rule.²⁶ Small businesses told Advocacy that managing worker hours took longer than anticipated, because these businesses have fewer staff to absorb or shift schedules. In certain low wage industries like restaurants, a large percentage of the

²³ Nat’l Council of Nonprofits, Comment Letter on Proposed Rule for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (*Nonprofits Comment Letter*) (Sept. 15, 2017). The National Council of Nonprofits represents a network of 25,000 charitable nonprofits or 501(c)(3) tax-exempt charities. According to the National Council of Nonprofits staff, almost all of its members would qualify as a small organization.

²⁴ 2016 Final Rule, 81 Fed. Reg. at 32,525, Table 36, *Overview of Costs to Small Business, All Employees at Establishment Affected Methodology*.

²⁵ 81 Fed. Reg. at 32,525.

²⁶ *Id.*

workforce became eligible for overtime under the new regulations. Managers and human resources staff at small businesses also reported spending many hours and days evaluating every position and duties and determining the proper staffing categories. Managers also stated that they had to dedicate a significant portion of their time to managing these schedules weekly to comply with this rule. Management also had to communicate these staffing changes and train their staff and employees to implement these changes.

Small Businesses Incurred Extra Costs and Burdens Implementing Payroll Changes

In anticipation of the final rule's effective date of December 1, 2016, small businesses reported making many payroll changes to their employees' status to manage the potential costs to overtime to the many workers that were newly eligible for overtime. According to DOL's Final Regulatory Flexibility Analysis, over 1.6 million of the 4.2 million affected workers are employed by small entities.²⁷ An April 2016 report by Paychex from a pool of 417,000 clients showed that 500,000 employees spread amongst 190,000 small business clients would be affected by the proposed FLSA overtime regulations. This equates to approximately one-third of salaried employees who would be eligible for newly overtime pay.²⁸

Small businesses have commented that DOL has underestimated payroll costs. DOL estimated that small business would only incur an average payroll increase of \$2,516 per entity, and the range of payroll increases would be \$647-\$54,430.²⁹ DOL has estimated that this payroll cost would average \$6.51 per week per affected employee.³⁰

Some small businesses reported that they increased their workers' pay to over the \$47,476 threshold to allow them to remain as salaried employees. Advocacy spoke to one seasonal small business in Kentucky that has 20 employees in the winter time and 150 employees in the summer. This small business raised five worker's wages from \$32,000 to over \$47,476, which is an over \$75,000 increase in wages. Small businesses that raised the salaries of their workers in anticipation of the effective date of this regulation were unable to undo these raises for these workers even after an injunction was issued against enforcement of this rulemaking. A small business technology company in Ohio commented that they have strived for 30 years to retain their valuable employees for a long tenure by providing attractive benefits such as private health care, 401Ks, paid vacation, holiday pay and flexible schedules. This business noted that they may have to reduce benefits and bonuses, or cut back on staff to offset steep pay raises. Small businesses in multiple industries stated that this is a difficult job market to obtain employees, and they are afraid that these changes will hinder their ability to attract and retain good talent.

Many more small businesses told Advocacy that they converted their salaried employees making \$47,476 to hourly employees. One small retailer told Advocacy that they could not increase their manager salaries to the new level because this would be an "overly compensated salary for

²⁷ 81 Fed. Reg. at 32,532.

²⁸ Paychex, *FLSA Overtime Regulations: Meeting with Office of Information and Regulatory Affairs* (April 25, 2016), available at: <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=1235-AA11&meetingId=1855&acronym=1235-DOL/WHD>. As of April 2016, Paychex has 590,000 clients, almost all of these clients would be considered small businesses under SBA size standards.

²⁹ 81 Fed. Reg. at 32,525.

³⁰ 81 Fed. Reg. at 32,537.

this type of position in Alabama.” Small businesses stated that they had to either reduce hours to avoid overtime pay or had to decrease the hourly employees’ hourly rates. Managers or human resource staff had to dedicate many hours scheduling and keeping track of employee work to avoid these extra costs. Employers had to hire and train new workers to handle these hours, or increase the workload of those employees in salaried positions. Certain industries in low wage and low profit industries reported incurring disproportionate costs. Several owners of restaurants stated that they operated with slim margins and could not raise the price of their products to meet the new costs. One small business in North Carolina, a 70-room hotel, stated that they will have to increase their room rates and it would be hard to compete with larger hotels. This small business cannot afford to hire a sales manager at this higher salary.

Small Business Incurred Non-Financial Costs

Many small businesses that converted their salaried employees to hourly employees reported a negative impact on worker morale and by extension productivity, because many employees believed that they were demoted when they were changed to an hourly status.³¹ Small businesses who own restaurants commented that the restaurant industry is a good entry into the workforce, and individuals work for a more desirable salary position which adds prestige, benefits and added flexibility. One small business restaurateur believes that these changes will deter individuals from going into the restaurant industry as a career. Small businesses have also commented that they may not be able to fill as many entry-level management positions, and their senior managers will be required to absorb many of these job responsibilities.

Small businesses are also concerned that employees who are transferred from salaried positions to hourly positions will be dissatisfied with their jobs because they will lose these workplace flexibilities. These new hourly workers will have to clock in and out, and will lose the freedom to adjust their schedules for a child’s soccer game or a medical appointment. Small businesses also reported restricting alternate work arrangements such as telework, and traveling for work, training or meetings. Some businesses noted that they even restricted phone calls and computer-use off-hours, to avoid paying overtime costs.

Small Nonprofits and Small Governmental Entities Incurred Disproportionate Impacts from Overtime Regulations

In Advocacy’s comment letter to DOL on the 2015 proposed overtime rule, we cited concern that DOL did not provide any analysis on the numbers of small nonprofits and small governmental jurisdictions affected by this rule or estimate the compliance costs of this rule to these entities.³² In its final regulatory flexibility analysis (FRFA), DOL has provided some data on these affected groups, but this data is not transparent. Advocacy believes that DOL’s FRFA

³¹ *Examining the Small Business Labor Market: Hearing Before the H. Select Comm. on Small Bus. Subcomm. on Econ. Growth, Tax and Capital Access*, 115th Cong. (2017) (statement of Carlos Castro, Founder, Todos Supermarkets, member of National Grocers Association), https://smallbusiness.house.gov/uploadedfiles/9-7-17_castro_testimony.pdf.

³² *Advocacy Comment Letter* at 5. Under the Regulatory Flexibility Act, a “small entity” is defined as a small business as defined by SBA, a small organization such as a not-for-profit enterprise that is independently owned and operated and not dominant in its field, and small governmental jurisdictions with a population of less than 50,000.

also underestimates compliance costs for these communities. DOL has estimated that small nonprofits will incur an average of only \$3,570 per entity and small governmental jurisdictions (state and local) will incur an average of only \$9,264 per entity in Year 1 of this rule. Small nonprofits and small governmental jurisdictions have commented that these estimates of compliance costs are too low. Advocacy recommends that DOL revisit these compliance cost and burden estimates in an Initial Regulatory Flexibility Analysis (IRFA) in the upcoming proposed rule.

Small nonprofits and small governmental jurisdictions told Advocacy that they have incurred disproportionate impacts from DOL's overtime regulations because these organizations by definition have limited budgets to fund additional payroll expenses. Advocacy specifically reached out to these communities and groups.

Small Nonprofits Incurred Disproportionate Impacts

Advocacy held a conference call with members of the National Council of Nonprofits in September 2017. Small nonprofits expressed frustration because they generally support an increase in the DOL's overtime salary threshold, but they are experiencing operational anxiety in trying to pay for these additional payroll costs with their limited budgets. Nonprofit organizations operate on tight budgets, and depend on member dues, donations, and government grant and contracts to carry out their mission. A survey by the National Council of Nonprofits found that even the government grants and contracts rarely pay or reimburse nonprofits for the complete costs of services provided to these governments, leaving these nonprofits unable to accommodate these extra payroll costs.³³

Nonprofits expressed their biggest concern with the overtime rule; the inability to renegotiate government nonprofit grants and contracts to reflect these higher and unanticipated costs of these new federal overtime requirements. The National Council on Nonprofits recommends a nationwide, government-nonprofit grant/contract reopener provision, which is further discussed in their comment letter.³⁴

As a result of these financial challenges, a third of nonprofit survey respondents predicted that their organization would reduce staff to adjust to the new costs, and a third of nonprofit respondents further expect that their organizations will be forced to reduce the level of services provided to the public.³⁵

ASAE commented that this rule has negatively impacted employees in trade associations that are currently exempt junior and mid-level employees and who would be converted to non-exempt status. These employees would be "excluded from conferences and annual meetings that are the

³³ The National Council of Nonprofits, *The Nonprofit Overtime Implementation Conundrum* (2016), <https://www.councilofnonprofits.org/nonprofit-overtime-implementation-conundrum>. The survey is of 1,094 individuals from nonprofits in 50 states. According to the survey, only 13 percent of participants reported that their government grants and contracts pay for all of their actual costs for providing services on behalf of governments. 58 percent responded that they receive reimbursement between 70 to 90 percent for their services.

³⁴ *Nonprofits Comment Letter* at 3.

³⁵ *Id.*

most important work of membership organizations, because the travel time and long hours associated.”³⁶

Small Governmental Entities Incurred Disproportionate Impacts

Advocacy spoke at the National Association of Counties (NACo) annual conference last summer to get small entity feedback on DOL’s final rule. Almost 70 percent of members are considered rural and have fewer than 50,000 residents.³⁷ Small counties commented that they have very little discretionary spending in their budgets, and that they have to deal with balanced budgets, the budget cycle and approvals from local officials to obtain additional funds. Small counties have difficulties increasing taxes, and many states impose limitations on these types of local taxes. Small counties commented that in reaction to this rule, they will have to reduce current levels of service, decrease employee benefits or reduce their county employee work hours or staffing levels.³⁸ For example, one small county with a population of under 5,000 in Nevada has 13 to 17 staffers eligible for overtime out of over 100 employees. The 2016 final rule had a potential cost of \$25,000-45,000. This county planned to make up this cost with cuts in non-emergency personnel, and reclassifying a long-serving librarian; this will result in the library closing earlier in this county. Advocacy recommends that DOL work with organizations that represent small governments as it develops its IRFA for the upcoming proposed rule, to come up with alternatives to minimize compliance costs for these small entities.

7. Would changing the salary level require changes to the duties test and, if so, what change(s) should be made? Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of the salary paid by the employer be preferable to a duties test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

Small businesses attending Advocacy’s roundtable were opposed to any changes to the standard duties test, and would likely be opposed to a duties-only test. Small businesses commented that changes to the duties test would be the most costly and problematic aspect of any update to the FLSA “white collar” exemption. Small businesses are concerned that quantification of exempt managers’ duties will be extremely burdensome for operations because every task must be tracked and classified either an exempt or non-exempt action. Small operations will be disproportionately impacted because they have less staff and managers are constantly multi-tasking throughout the day. Employers would also be vulnerable to extra litigation if there were a duties-only test.

DOL should specifically seek feedback in its NPRM if the agency seeks to adopt any changes to the duties test or create a duties-only test, to provide adequate notice to small businesses on the proposed revisions or any analysis of the economic impact of these changes. In the DOL’s 2015 proposed rule, the agency discussed possibly making changes to the duties test but did not provide any regulatory text or compliance cost analysis in its Initial Regulatory Flexibility

³⁶ ASAE Comment Letter at 3.

³⁷ Nat’l Assoc. of Counties, Analysis of the Impact of the U.S. Dep’t of Labor’s Overtime Rule on Counties (June 16, 2016), [http://www.naco.org/sites/default/files/Overtime%20Rule%20Analysis_06.21.16%20\(1\).pdf](http://www.naco.org/sites/default/files/Overtime%20Rule%20Analysis_06.21.16%20(1).pdf).

³⁸ *Id.*

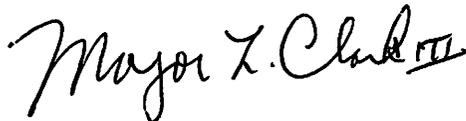
Analysis. DOL did not adopt any changes to the duties test in its 2016 final rule.

Recommendations and Conclusion

Advocacy is pleased that DOL has released this Request for Information, and is seeking to reform this regulation. Advocacy has conducted extensive outreach to small businesses across the country throughout the rulemaking period. Small businesses discussed their experiences and concerns with the Overtime rule, and also recommended that this rule be reformed. Small businesses told Advocacy that they believe that the standard salary level of \$47,476 set in the 2016 final rule was set too high. Advocacy recommends that DOL adopt a lower level salary threshold that has been adjusted to minimize small business impacts to the most adversely affected low wage regions and industries. Advocacy recommends that DOL work closely with our office and small business stakeholders to ensure that the proposed rule's Initial Regulatory Flexibility Analysis reflects the numbers of small entities impacted, the compliance costs of this rule, and evaluates alternatives that may minimize the cost of this rule for small entities. Advocacy is available to help DOL in its compliance with the RFA.

If you have any questions or require additional information please contact me or Assistant Chief Counsel Janis Reyes at (202) 619-0312 or by email at Janis.Reyes@sba.gov.

Sincerely,



Major L. Clark III
Acting Chief Counsel for Advocacy



Janis C. Reyes
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Neomi Rao, Administrator
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