November 7, 2023

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, U.S. Department of Labor
200 Constitution Ave. NW, Room S-3502,
Washington, D.C. 20210

RE: Comment on notice of proposed rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees,
RIN 1235–AA39

Dear Ms. DeBisschop:

I am an attorney with the Competitive Enterprise Institute. I was a senior policy advisor in Department of Labor's Wage and Hour Division in 2019. The Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy. On behalf of the Competitive Enterprise Institute, I submit to the Department of Labor (Department) the following comments regarding its proposed rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62,152 (proposed Sept. 8, 2023) (to be codified at 29 C.F.R. pt. 541). I shall comment first on the Department's proposal to increase the standard salary level test and second on its proposal to automatically increase the salary level tests.

Proposed Increase in the Standard Salary Level Test

Section 13(a) of the Fair Labor Standards Act of 1938 (FLSA) exempts certain categories of employees from the act's minimum wage and maximum hour requirements. The exempted categories involved in the proposed rule are those set forth in section 13(a)(1):

> any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the

> performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)[.]

29 U.S.C. § 213(a)(1).

The "capacity" in which employees are employed is addressed by the Department's duties tests, which are found in 29 C.F.R. part 541, subparts A through F. The Department has an additional test that it now proposes to revise, the salary level test found in subpart G. Proposed section 541.600 would increase the standard salary level from $684 per week to $1,059 per week or $4,589 per month.

The salary level test concerns the pay and not the capacity of employees. That being the case, the question was raised in *Nevada v. U.S. Department of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017), whether the salary level test has any basis in the statute. The court examined the text of section 13(a)(1) and reviewed contemporaneous definitions of bona fide, executive, administrative, professional, and capacity. "After reading these plain meanings in conjunction with the statute," the court concluded that "Congress defined the EAP exemption with regard to duties." *Id.* at 805. The court held that "the plain meaning of Section 213(a)(1) does not provide for a salary requirement." *Id.* at 806. More recently, Justice Kavanaugh made the same observation: "The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So it is questionable whether the Department's regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act. It is especially dubious for the regulations to focus on how an employee is paid (for example, by salary, wage, commission, or bonus) to determine whether the employee is a bona fide executive." *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting).

Although the *Nevada* court held that section 13(a)(1) does not provide for a salary requirement, it nonetheless added that "the Department has used a permissible minimum salary level as a test for *identifying* categories of employees Congress intended to exempt" and for screening out obviously nonexempt employees. 275 F. Supp. 3d at 806. But the court ruled that the Department cannot use a salary test that excludes from the exemption employees whose duties would exempt them. *Id.* at 806-9. It is undisputed that the current proposal would do just that. The Department admits that excluding from the exemption some employees who meet the duties test is a feature of any salary level test. 88 Fed. Reg. at 62,157.

The Department argues in defense of the salary level test that "[d]espite numerous amendments to the FLSA over the past 85 years, Congress has not restricted the Department's use of the salary level tests." *Id.* at 62,160, 62,178. That assertion is not entirely true. In 1966 Congress amended section 13(a)(1) in a way that is inconsistent with the Department's position. It inserted after "professional capacity" the following: "(including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools)". Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 214, 80 Stat. 830, 837 (1966).

This amendment sheds light on the meaning of "professional capacity." Under the principle of *noscitur a sociis*, "The meaning of a word may be enlarged or restrained, be made broader or narrower, by reference to the whole clause in which it is used." 82 C.J.S. *Statutes* § 422 (2023). In this case, the phrase "including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools" broadens the meaning of "professional capacity." As an analogy, in *City of Oakland v. Thompson*, 91 P. 387 (Cal. 1907), the court held that the phrase "municipal improvements" in a statute was broadened by the adjacent language "including bridges, waterworks, water rights, sewers, light or power works, or plants, buildings for municipal purposes, school houses, fire apparatus" to encompass subjects "concerning which doubt might be entertained as to their proper place in such a category." *Id.* at 388. To give an example, the court said, "it might be debatable in a town adequately supplied with light by a quasi public corporation whether the acquisition of a lighting plant by a city could, in strictness, be denominated a public improvement, and it was to relieve from any necessity of construction that light works, power works, waterworks, and water rights were expressly enumerated." *Id.*

Similarly, in section 13(a)(1) the phrase "including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools" broadens the scope of "professional capacity" to include professions, especially in the educational field, that are not necessarily compensated with high salaries. Such professions include librarians and media collection specialists, whose median weekly earnings in 2022 was $1,092.[1] The Department's proposed standard salary level of $1,059 a week would exclude about half of these professionals from the exemption.

Even though the Department has chosen not to apply its salary level test to teachers, 29 C.F.R. §§ 541.303(d), 541.600(c), teachers' salaries should also be considered because this issue is one of statutory construction. The objective is to understand the meaning of "executive, administrative, or professional capacity" and to determine whether the proposed standard salary level gives proper effect to that meaning. Congress did not create a separate category of exemption for teachers and academic administrative personnel. Rather, it essentially said that employees employed in an executive, administrative, or professional capacity include elementary and secondary school teachers and academic administrative personnel. But contrary to the express language of the statute, the proposed standard salary level would define and delimit "professional capacity" to exclude elementary and secondary school teachers in many cases. In 2022 the annual mean wage for elementary school teachers in thirteen states was below $55,068, the annual wage yielded by the proposed monthly standard salary level of $4,589.[2] The annual mean wage for secondary school teachers was below that figure in ten states.[3] According to the National Education Association, the average teacher starting salary is $42,844.[4]

[1] U.S. Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey," https://www.bls.gov/cps/cpsaat39.htm.
[2] U.S. Bureau of Labor Statistics, "Occupational Employment and Wages, May 2022: Elementary School Teachers, Except Special Education," https://www.bls.gov/oes/current/oes252021.htm.
[3] U.S. Bureau of Labor Statistics, "Occupational Employment and Wages, May 2022: Secondary School Teachers, Except Special and Career/Technical Education," https://www.bls.gov/oes/current/oes252031.htm.
[4] NEA, "Educator Pay Data: Starting Teacher Pay," May 2023, https://www.nea.org/resource-library/educator-pay-and-student-spending-how-does-your-state-rank/starting-teacher.

Thus, the proposed standard salary level goes beyond identifying categories of employees Congress intended to exempt, as might permissible. *See Nevada*, 275 F. Supp. 3d at 806. Rather, it removes from the exemption professionals Congress said it wanted to exempt.

These would be far from the only employees employed in a bona fide executive, administrative, or professional capacity that the proposed 155% increase in the standard salary level would remove from the exemption. This increase is far greater than is needed to account for inflation occurring since the present salary level of $684 per week went into effect in January 2020. According to the Bureau of Labor Statistics (BLS), $684 at that time had the buying power of $816.09 today,[5] considerably less than the proposed salary level of $1,059 a week. The Department estimates that "3.4 million workers who meet the standard duties test and earn at least $684 per week but less than $1,059 per week and would either become eligible for overtime or have their salary increased to at least $1,059 per week." 88 Fed. Reg. at 62,185. Because the proposed increase in the standard salary level "would exclude so many people that perform exempt duties," as the *Nevada* court said of the 2016 increase, "the Department fails to carry out Congress's unambiguous intent." *Id.* at 807.

The Department should, therefore, substantially reduce its proposed increase in the standard salary level. Should the Department fail to do so, it risks incurring a ruling that section 13(a)(1) does not authorize any salary test at all.

Proposal for Automatically Increasing the Salary Level Tests

The Department proposes that every three years the Secretary of Labor update both the standard salary level and the salary level for highly compensated employees. For the former, the Secretary would use the 35th percentile of weekly earnings of full-time, non-hourly workers in the Census Regions based on data from the Current Population Survey as published by the BLS. For the latter, the Secretary would use the 85th percentile of weekly earnings of full-time, non-hourly workers nationally based on data from the Current Population Survey as published by the BLS. The Secretary is to post a notice of the updates in the Federal Register. 88 Fed. Reg. at 62,240 (to be codified at 29 C.F.R. § 541.607).

The Department admits that in 2004 and 2019 it decided against automatically increasing the salary levels and that in 2004 it found nothing in the legislative or regulatory history supporting that course of action. 88 Fed. Reg. at 62,178. In an effort to show that this precedent "in no way suggests that it lacks authority to do so," the Department asserts that "[t]he 2004 rule did not discuss the Department's authority to promulgate an automatic update mechanism through notice-and-comment rulemaking." *Id.* This assertion is not defensible. In the preamble to the 2004 rule, the Department bluntly and unambiguously took the contrary position, stating that with regard to automatic increases in salary levels, "The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,171 (Apr. 23, 2004).

[5] U.S. Bureau of Labor Statistics, "CPI Inflation Calculator," accessed Nov. 7, 2023, https://www.bls.gov/data/inflation_calculator.htm.

That conclusion was and remains correct. Each triennial update would be a rule that must be adopted through the notice and comment procedure of the Administrative Procedure Act (APA) rather than automatically.

The Department now states that it "has determined that an automatic updating mechanism would better fulfill its statutory duty to define and delimit the EAP exemption." 88 Fed. Reg. at 62,178. The statute, however, tells the Department *how* it is to fulfill its duty to define and delimit the terms of the exemption. The statute exempts employees employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman "as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5." 29 U.S.C. § 213(a)(1). An automated updating mechanism cannot fulfill the Department's statutory duty to define and delimit the terms of the EAP exemption. That can only be done by a regulation adopted by the Secretary pursuant to the provisions of subchapter II of chapter 5 of Title 5 of the United States Code, i.e., the APA.

The APA itself makes clear that each update, not merely the creation of a mechanism for updating, must proceed through rulemaking. The APA defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The rulemaking process must involve the notice-and-comment procedures set forth in the APA unless there is a stated good cause or the interpretive rule exception applies. *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 301 (3d Cir. 2012). The APA defines "rule" as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551.

This definition has three distinct elements,[6] each of which is present. The first element that the updates meet is that a rule is the whole or a part of any agency statement. The updates will not really happen automatically. The Secretary will publish a statement in the Register based upon a review of BLS data. The second element is that the statement has general or particular applicability and future effect. The updates in the Secretary's statement will have general applicability and will be in effect for three years into the future upon publication. The third element is that the statement is designed to implement, interpret, or prescribe law or policy or to describe an agency's organization, procedure, or practice requirements. Each update would implement the exemption of section 13(a) and interpret the terms of section 13(a)(1). "[A]n agency act designed to implement law is by definition a rule. . . ." *U.S. Dep't of Labor v. Kast Metals*, 744 F.2d 1145, 1151 (5th Cir. 1984).

[6] *Abbs v. Sullivan*, 756 F. Supp. 1177, 1187 (W.D. Wis. 1990), *vacated on jurisdictional grounds*, 963 F.2d 918 (7th Cir.1992).

But there is more. In addition to the three distinct elements, the definition gives examples of what is included within the definition. While the definition cannot possibly mention every type of agency statement that would contain the elements, it specifies the type at issue here: "the . . . prescription for the future of . . . wages." The Department's updates will be prescriptions for future wages, as was the Secretary of Labor's adoption of "an adverse effect wage" under the Immigration and Nationality Act. *Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 303 (5th Cir. 1976).

There can be no contention that the updates would be within the APA's exception for interpretive rules. Interpretive rules do not have the force and effect of law. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 103 (2015). In contrast, the salary levels tests that the Department proposes to establish automatically would be mandatory. "[I]n order to qualify for exemption under Section 13(a)(1) of the FLSA, an employee must meet all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in 29 CFR Part 541." WHD Op. Letter FLSA-2005-5 at 1 (Jan. 7, 2005).

Therefore, the updates would be legislative rules. They could also be seen as amendments to the existing rule. Either way, the APA would require the same notice-and-comment rulemaking procedures. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. at 101.

The procedures the APA requires for rulemaking are not to be found in the procedures for updating the salary levels in proposed section 541.607. Following publication of the notice called for by proposed section 541.607(c)(1), there is no opportunity for comment and there is no provision for the Department's "consideration of the relevant matters presented" in comments or for publication with the updated salary levels of "a concise general statement of their basis and purpose," as required by the APA. 5 U.S.C. § 553(c).

Accordingly, if the Department proceeds with rulemaking in RIN 1235–AA39, it should substantially reduce its proposed increase in the standard salary level, as discussed, and it should omit from the final rule proposed section 541.607 as well as any reference to that section's unlawful rulemaking procedure in proposed sections 541.600, 541.601, and 541.709.

Cordially yours,

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