



May 21, 2019

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 NW  
Washington, DC 20210

Re: Comments on Regulatory Information Number (RIN) 1235-AA20: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Submitted electronically

Dear Ms. Smith:

Dēmos objects to the Department of Labor’s proposed overtime rule (“Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees)(“EAP Rule”) because it fails to sufficiently safeguard working people. Dēmos is a non-partisan public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Overtime rules that fairly compensate workers for the additional hours they work are critical to ensuring economic opportunity, particularly for people working in low-paying industries.

The proposed rule inadvisably reverses the previous EAP Rule’s protections proposed by the Department just 3 years ago, and offers the fewest protections to workers in low wage industries who need overtime protections the most. The current proposal fails to fix the key problem with current law: the proposed salary level is still far too low given that the duties test allows employers to exempt workers even when they perform a disproportionate amount of nonexempt work. This combination means that the proposed rule fails to adequately protect workers who are not Executive, Administrative, or Professional employees in any meaningful sense.

For these reasons, the proposed rule departs from decades of historical precedent and undercuts the purposes of the Fair Labor Standards Act’s overtime provisions. The Department must either raise the proposed salary level significantly or strengthen the duties test to truly capture only those who should be exempt in the final rule – and provide a concrete rule for regularly updating the salary level – in order to realize fully the promises of the FLSA. Dēmos regards the Department’s proposal to modestly raise the salary level for the EAP exemption from \$23,660 to \$35,308 per year as entirely insufficient to assure that employees who can pass the current duties test are truly bona fide exempt EAP employees, who are supposed to have sufficient executive authority or independent discretion to manage their jobs and their hours.

The Economic Policy Institute (EPI) has shown that under the current proposed salary threshold, 8.2 million workers who would have benefitted from the Obama Administration’s 2016 final rule will be left out. This number includes 3.1 million workers who would have gotten new overtime protections, and another 5.1 million workers who would have gotten strengthened overtime protections under the that rule. Further, by setting the salary threshold so far below the 2016 rule, workers will lose \$1.2 billion dollars each year. Raising the salary level would go a long way towards remedying this issue, as it would eliminate the need for a more stringent duties test, create a bright-line rule



that will deter litigation, and reduce the number of workers who are inappropriately classified as exempt and underpaid.

If the Department is not willing to raise the salary threshold high enough to adequately account for workers who should receive overtime, the Department should instead pursue a more restrictive “duties test” to bring this proposal in line with the FLSA and the purposes of the EAP exemption. Strengthening the duties test would also promote the proper classification of workers who have limited professional or managerial duties and who are not “bona fide” executives, administrators or professionals. For example, the Department could set a bright-line duties test requiring a strong majority of a worker’s work to be exempt, as the previous rules did, and as a couple of states have done. If the Department declines to raise the salary level, a more restrictive duties test is appropriate to remedy the mismatch and reduce inappropriate classification.

Finally, Dēmos is very concerned that the Department does not propose an automatic method for updating the salary level regularly. The Department vaguely suggests that once every four years it intends to update the salary level through an NPRM published in the federal register, but this still requires months or even years of work with no assurance that future Departments will do so. Inaction leads to stagnant wages and contributes to wage inequality for workers, not to mention uncertainty and possible price shocks for employers. As discussed above, workers in particular stand to lose billions of dollars from the salary level proposed in this rule alone. These losses will be exacerbated by the lack of indexing – from \$1.2 billion to \$1.6 billion of lost wages over the first 10 years of implementation.

Over time, the Department’s inaction in this area has already undermined the FLSA’s overarching purpose to extend pay protections broadly, spread employment, and exempt only bona fide “white-collar” workers from coverage. As currently proposed, this NPRM will have detrimental effects on workers and should be revised to raise the salary level, or in the alternative strengthen the duties test, and include the addition of a clear proposal for indexing.

Respectfully,

Amy Traub  
Associate Director, Policy and Research  
Dēmos