New Mexico State Personnel Board
State Personnel Office

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Submitted via the eRulemaking Portal at *http://www.regulations.gov*:
Mary Zeigler, Director of the Division of Regulations, Legislation and Interpretation
200 Constitution Avenue, NM
FP Building, Room S-3502
Washington DC 20210

REFERENCE

Agency:	United States Department of Labor, Wage and Hour Division
Unified Agenda:	Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Computer Sales and Computer Employees
RIN:	1235-AA11
CFR:	29 CFR Part 541
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Dear Ms. Zeigler:

Please find the attached comments from the New Mexico State Personnel Office, on behalf of the State of New Mexico (State), regarding the proposed rule changes to the Fair Labor Standards Act (FLSA). While the proposed rule changes touch on several points, the three main areas that the Department of Labor (DOL) is seeking comments to address are:

- The minimum salary threshold that must be paid to employees in order to be considered exempt;
- The total annual compensation requirement to exempt Highly Compensated Employees (HCE); and
- Implementing a mechanism that would automatically update the salary and HCE thresholds on an annual basis.

Introduction

We are concerned about the impact that the proposed changes to the overtime regulations will have on the State and its employees. While we understand the need to update the salary threshold, we disagree that increasing it by 113 percent, and setting it at the 40th percentile of weekly earnings for salaried workers, is the appropriate means. We believe this rapid increase will have a significant impact on the labor costs for the State.

Additionally, we are also concerned that the proposed rule changes do not explain what the DOL is planning with regard to the duties tests. Nationally, states and private employers have invested a significant amount of time to understand and apply the current duties test, and any changes will result in many hours spent to understand the new rules, and will likely result in inaccurate classifications due to the short time-frame proposed to implement the changes after a final rule is enacted. In addition, a California-style duties test based on the percentage of time spent on exempt versus non-exempt duties will be overly burdensome to track, and is impracticable in many workplaces today, where otherwise exempt employees must also conduct nonexempt activities. Also, because the salary level and the duties tests work together, it is impossible for us to discuss the impact of potential changes without knowing what the DOL might implement with regard to the duties tests.

Minimum Salary Level

The rule changes proposed by the DOL for full-time salaried workers in determining the "white collar" exemptions under the FLSA would dramatically increase the weekly salary threshold from $455 per week, or $23,660 annually, to an estimated $921 per week, which equates to $47,892 annually. This proposal would index the minimum salary threshold to the 40th percentile of salary for all non-hourly paid employees, using data from the Bureau of Labor Statistics. Based on this proposed indexing methodology, the minimum salary level is expected to be $970 per week, or $50,440 annually. Additionally, the DOL proposes to change the salary threshold from $100,000, to the 90th percentile of annual earnings of full-time salaried workers, which is estimated to be $122,148 in 2016.

Regardless of the finalized salary level, we roughly anticipate more than 2,735 State positions (12 percent) will be impacted by reclassifications from FLSA exempt to nonexempt status, and not because these employees perform nonexempt work. Raising salaries to the proposed levels, predominately for entry and mid-level managers, as well as lower-level professional staff, would create compression of salaries and would therefore have a far-reaching impact across the State's entire salary structure. The State values its employees and compensating them appropriately, but conflicting priorities must constantly be balanced in order to carry out critical missions of the State. Neither the substance nor the implementation schedule of the Proposed Rule provides the flexibility necessary to do so.

Significantly, this proposed rule directly contradicts the intent of the State's personnel system. Section 10-9-2 NMSA 1978 states that the purpose of the Personnel Act is to "…establish for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs." Specifically, the proposed rule changes would place upward pressure on the State's compensation and classification system to increase salaries, in order to avoid paying premium overtime wages, resulting in employee salary misalignment. If the State were even capable of providing salary increases to all of its employees, such increases could have an impact on the salaries paid by private sector employers. Any increase in the cost of wages in the private sector would likely be passed onto consumers, resulting in an increase in the cost of goods to all citizens.

The annual cost to increase salaries for the State employees across the board is approximately $13 million for each one percent increase in salary, and the proposed DOL rule changes would subject an additional 12 percent of State employees to FLSA overtime provisions, including employees in the following key occupations:

- Lower and mid-level managers;
- Management Analysts;
- Environmental Scientists and Specialists;
- Human Resource Specialists;
- Accountants and Auditors;
- Prosecution Specialists;
- Social and Community Services Specialists; and,
- Blindness Skills Instructors.

The DOL has never before doubled the salary levels for exemption in a single rulemaking, let alone more than doubled the salary levels as has been proposed. In fact, in the past 77 years, the salary threshold levels have only been adjusted seven times. If DOL wishes to establish a practice of adjusting salary thresholds more frequently, a five-year period would better identify bona fide trends by permitting two years of past data to serve as a basis to forecast two years ahead before employers shifted resources and financial priorities.

Additionally, the DOL proposes to use non-discretionary bonuses and incentive payments toward partial fulfillment of the salary level threshold. It is the State's position that non-discretionary bonuses and incentive payments should not count toward the partial fulfillment of the salary level threshold for several reasons. First, adoption of this proposal would create a competitive disadvantage for public sector employers, because public employers are not able to provide non-discretionary bonuses and incentive payments. The competitive advantage for private employers stems from the ability to compete for talent by offering a lower base salary, along with the mere potential of a higher salary due to a variable pay component. Base pay and potential variable pay combine to meet or exceed the minimum salary level threshold, while public sector employers may only offer base pay with certainty, at the time of hire. Because public sector salaries are tied to tax revenues, incentive payments cannot be a matter of routine practice for public sector employers. Furthermore, legally, bonuses cannot be provided in the public sector, where employers must guard against even the appearance of gratuitous payments made with tax dollars.

Second, the non-discretionary bonuses and incentive payments proposal fails to further the public policy goals of the FLSA regulations because it is unlikely that including or excluding non-discretionary bonuses and incentive payments will improve the accuracy of FLSA exempt and nonexempt classifications. In 29 U.S.C. 213(a)(1), Congress exempted white collar employees from both the minimum wage and overtime requirements of the FLSA. By setting the minimum salary threshold at a level that excludes many employees who meet the duties tests for the exemption, the DOL is not furthering Congress' intent. Similarly, by setting the salary level so high ($50,440), the number of employees eligible for overtime will be expanded beyond what Congress envisioned when it created the exemptions. There are many employees in key industries, including the public sector, that earn below $50,440 annually and that have been found exempt under the duties tests, both in DOL investigations and by the federal courts.

We are also concerned how the increase to the salary threshold will impact other nonprofit employers, small businesses, and employers in lower cost of living areas in the country. According to DOL data, approximately 20,000 workers in New Mexico will be affected by this proposed change in the regulations. Although this is a small portion of the total 4.68 million workers to be affected nationally, it is a large portion of employees that mostly work for small businesses, in a rural state with a cost of living lower than many large metropolitan areas.

Significantly, the DOL proposes an unrealistic time frame (60 days) for public and private employers to react and adjust to the proposed salary levels. Regardless of where the salary line is ultimately drawn, and which methodology is used to keep salaries updated, the financial and administrative impact of the initial update will be significant to the State. Therefore, we request a phased approach to update the salary level, similar to the approach applied to minimum wage rate, rather than the 60-day implementation period provided in the Proposed Rule.

In sum, while there is speculation as to why DOL used the 40th percentile, what methodology was used, and what category of workers they used to calculate the proposed salary threshold, it is clear that a proposed increase of 113 percent over the current rate is unreasonable and will have a negative impact on most employers.

Highly Compensated Employees

The State does not currently use the HCE salary threshold in determining the FLSA status of its employees. All employees who earn between $100,000 and $122,148 annually are currently classified as FLSA exempt under the Executive, Administrative, or Professional duties test, or are elected officials who are not covered by the provisions of the FLSA.

Automatic Annual Increases to the Salary Levels

The DOL has proposed to establish a mechanism for automatically increasing the salary levels annually based either on percentile or inflation (CPI-U) methodologies. The current proposal includes setting the salary levels at the 40th percentile for the white collar exemptions, and the 90th percentile for highly compensated employees. If the DOL implements the 40th percentile threshold indexed to the weekly earnings of all full-time salaried workers nationwide, this will result in an accelerated upward movement of the threshold, as previously salaried workers are reclassified to hourly, or as they have their incomes increased to be over the new $50,440 threshold. The State does not recommend using the CPI-U, as the CPI-U measures purchasing power, and it does not address the supply and demand of labor.

As stated in the 2004 Final Rule, the DOL has repeatedly rejected requests to rely mechanically on inflationary measures when setting the salary levels, because of concerns regarding the impact on lower-wage industries and geographic regions. As far back as 1949, the DOL rejected requests from stakeholders to impose automatic annual increases to the salary levels. Accordingly, it is unclear as to why DOL would now propose an automatic adjustment tied to these same measures. A single percentage threshold increase of this magnitude is not appropriate for rural states, such as New Mexico, with lower economic activity than states like California or New York. The automatic increase would have a much greater financial burden on New Mexico employers, than on those in other areas of the country with higher cost of living scenarios.

Significantly, in the public sector, an automatic annual increase would become an unbudgeted mandate placed on the Executive and the Legislature, which would require the State to respond both fiscally and administratively. Public employers must operate within their budgets, and the proposed automatic annual increase may cause budgets to be diverted from other areas such as health, safety, and security, possibly impacting services to citizens.

Since the State FY16 Budget has already been appropriated, any increases to expenditures for overtime to comply with the proposed rule changes would have to be accommodated by reductions in other areas, such as freezing hires, freezing salary increases, or freezing reclassifications with pay increases when an employee takes on duties representative of a higher job classification. Such freezes would have a negative impact on employee morale and productivity, and could affect the ability of the State to provide statutorily required services to the public. Additionally, the proposed rule changes would have a negative impact on the State's budgeting process, by requiring the Legislature to estimate the annual appropriation of limited funds, diverting funds from projects with actual quantitative research backing funding needs. Further, if automatic increases are adopted into law, it is unknown at what point in time the automatic increases will take place, and they may not coincide to public and private employers' budget cycles.

The proposed frequency of future automatic updates to the salary level test also causes concern. Contrary to comments in the Proposed Rule, automatic annual salary updates do not result in greater planning certainty. Rather, annual updates would cause constant classification movements, budget impact evaluations, and shifting of resources. Many jobs created in the public sector to deliver traditional government services are common across multiple state agencies, and therefore contain a large numbers of incumbents. Even seemingly small percentage increases in salary result in significant budget impacts, which must be justified by state employers through the annual legislative appropriations process. Annual updates to the salary level would be an extreme overcorrection for the lack of past updates, and would be overly burdensome due to constant reactionary administrative activities.

Finally, it is unclear if the DOL even has the administrative resource capability to effectively manage annual increases to the salary threshold.

In a survey conducted by WorldatWork, over half of the respondents do not recommend an automatic update by any index. Further, almost half of the respondents recommended that if any changes were made they should maintain a fixed salary threshold while maintaining the current standard duties test, or a lower salary threshold, while maintaining the current standard duties test.

Duties Tests

The salary threshold is only one part of the determination process to classify an employee as exempt from the overtime provisions of the FLSA. Once an employer has determined that an employee earns the minimum salary level paid on a salary basis, an employer cannot classify an employee as exempt unless the employee also meets one of the duties tests for exemption. The FLSA establishes different duties tests for executive, administrative, learned professional, creative professional, and computer employees. Many employees earn above the minimum salary level, but cannot be classified as exempt because they do not supervise employees, are not involved with managing the business, or do not hold professional degrees.

The proposed updates do not contain changes to the existing duties tests describing the duties that employees must perform to qualify for exemption. Rather, DOL has indicated that it "seeks to determine whether, in light of our salary level proposal, changes to the duties test are also warranted." The DOL raises "issues" for discussion that seems to indicate that the agency is considering changes. Traditionally, under the Administrative Procedure Act USC § 553(b)(3), the DOL would be effectively precluded from making changes because they will not have given the public notice and the opportunity to comment; however, the Administrative Procedure Act does not require agencies to include proposed regulatory text, and permits a discussion of issues. Accordingly, just because DOL did not propose specific changes to the FLSA, it does not mean that the DOL will not make any changes to the duties test in the final regulations. Regardless, the State recommends that no change be made to the current duties tests without first proposing specific language and vetting it through public comment.

While there are no specified proposed changes to the current duties tests, it has been speculated from comments made by DOL leadership that a 50 percent or other percentage, "bright line" test for managers and supervisors under the Executive exemption may be implemented, possibly without soliciting public comment on specific proposed language. However, a "bright line" test for managers and supervisors, similar to that used in the California, would be unworkable. Specifically, it would be nearly impossible to quantify a specific percentage for a supervisor or manager with regard to the amount of time they perform supervisory duties versus line duties. Even when performing line duties, supervisory and managerial assessments and decisions are being made on how to evaluate employees, how to manage employees, how to train employees, in addition to potential needed process and procedural changes, making a specified percentage impractical to administer.

Also, if DOL was to implement a California-style, over 50 percent quantitative rule for primary duty, it would go against the qualitative standard used for the duties test used since 1949 for the "white collar" exemptions. The changes to the FLSA in 2004, introduced the concept of a primary duty. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all of the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. The primary duty does not need to be the one performed most of the time, but rather representative of why the job exists in the first place and/or what the outcome the job is expected to produce. The addition of this term used in conjunction with the salary test has made it much easier and more efficient for employers to make accurate exemption determinations. Accordingly, a shift to a quantitative rule for primary duty would likely lead to a significant increase in litigation. It is our understanding that the quantitative rule has resulted in considerably higher levels of litigation in California, because plaintiffs' attorneys understand the difficulty for employers in proving the amount of time that employees spend on exempt versus non-exempt tasks.

Statements in the proposed rule suggest that one potential change to the duties test could possibly resurrect a component of the former "long duties test," which set a 20 percent limit on the amount of time overtime-exempt employees could perform nonexempt duties without jeopardizing their overtime-exempt status. This would also have a negative impact on the State's ability to function. Specifically, the State promotes a modern work environment that encourages managers to lead by example. Contrary to the traditional image of managers that merely manage the work of others, working alongside a direct-report employee is an effective management technique that fosters positive relations between managers and employees. Beyond the impact to workplace relations, restricting the percentage of time overtime-exempt employees spend on overtime-protected tasks would have a serious impact on certain public services. Furthermore, the expectation that managers of managers will in practice be able to effectively monitor precise percentages of time that their direct-report managers spend on overtime-protected tasks is impractical. Such a ministerial requirement causes focus on activities rather than results, is contrary to the recordkeeping exception for these types of employees, and is simply an outdated view of the work environment and working relations. In sum, restricting the percentage of time overtime-exempt employees spend on overtime-protected tasks would have a serious impact on certain public services, and is not a restriction that can be practically monitored.

Conclusion

In conclusion, the State is concerned about the impact that the proposed changes to the overtime regulations will have on the State and its employees. The proposed minimum salary threshold is too high and the automatic annual indexing of the salary threshold is unrealistic. The mention of changes to the duties tests without proposed language is concerning. The proposed implementation timeline is too short and will not allow employers adequate time to prepare and properly implement final changes.

Thank you for the opportunity to comment on the changes proposed by DOL. We hope that you will consider our comments not only in your role as a government regulatory body, but also in your role as an employer.

Sincerely,

Justin Najaka
Director