# U.C. Chamber of Commerce

# Spring 2019 LRC Meeting

# Summary of Chamber Comments on the Part 541 NPRM

# *Due: May 21, 2019*

## Minimum Salary Level

* The Chamber supports the Department’s decision to return to the methodology it established in 2004 for setting the minimum salary level at the 20th percentile of employees in the South and retail industry.
	+ However, the Department did not actually apply the 2004 methodology because the proposal re-defines the “South” as the entire South Census Region.
	+ In 2004, the Department used just the 8 states in the East South and West South Census Division in 2004: Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma and Texas.
	+ The NPRM includes salary data from Maryland, Virginia and Washington, D.C. – three of the highest earnings states in the country.
	+ In addition, the Department inappropriately increased the calculated minimum salary based on 2017 actual data for inflation to 2020.
	+ Correcting these errors, the minimum salary level for exemption should be $615 per week ($31,980 annually).
* The Chamber supports allowing employers to credit toward the minimum salary level non-discretionary incentive pay paid annually or more frequently.
	+ We support change from 2016 Final Rule which only allowed credit for incentives paid quarterly.
	+ However, we object to the 10% cap. The Department should allow all non-discretionary incentive pay to count towards the minimum, but no less than 25%
	+ Also, the Department should allow more than one pay period for make-up payments and adopt a safe harbor to prevent minor errors to cause loss of the exemption.
		- The highly compensated test gives employers one month for make-up payments; a calendar quarter is justified here because more employers will be using the incentive credit for more employees.
		- The Department should adopt a provision similar to the safe harbor for salary basis test violations.

## Highly Compensated Test

* The Chamber believes that the Department’s proposal to increase the total annual compensation level for highly compensated employees from $100,000 to $147,414 sets the level too high.
	+ The Department based its new level on the 90th percentile of national salary data, rather than the South and retail data used to set the minimum salary level.
	+ The Department should use the same data set used for the minimum salary level.
	+ In addition, the Department inappropriately increased the calculated minimum salary based on 2017 actual data for inflation to 2020.
	+ Correcting these errors, the highly compensated level should be $122,000 annually.

## Future Increases

* While the Chamber applauds the Department’s commitment to notice-and-comment rulemaking in setting future salary thresholds, we see no reason to commit to a rigid schedule of every four years. Instead, the Department should pursue future overtime rules to set the salary threshold based on economic conditions.
* The Chamber has no objection to including the methodology for determining the salary levels in the regulations as doing so would ensure transparency and stability of the methodology.

**Table 1**

**Comparison of DOL 2019 NPRM Calculated and Projected Minimum Salary and Highly Compensated Levels to Chamber Calculations Based on 2004 DOL Methods**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **DOL 2017 Calculated** | **DOL 2020 Projections** | **Chamber Corrected** **(2017 data)[[1]](#footnote-1)** |
| Minimum salary test based on 20th percentile weekly earnings percentile of full-time covered workers in retail or the “South” |
| Weekly  | $641 | $679 | $615.42 |
| Annual | $33,332 | $35,308 | $32,002 |
| HCE salary test based on 90th  percentile weekly earnings percentile of covered workers nationwide |
| Weekly basis  | $2,682 | $2,835 | $2,564.24 |
| Annual  | $139,464 | $147,414 | $133,340 |
| HCE salary test based on 90th  percentile weekly earnings percentile of covered workers in the eight South-central states plus retail nationwide |
| Weekly basis | N/A | N/A | $2,347.57 |
| Annual  | N/A | N/A | $122,073 |
| The corrected 2017 20th percentile benchmark reflects the change in the definition of South from the 16 States and DC applied by DOL in 2015 and 2019 to the eight states applied by DOL in 2004. The corrected 90th percentile (nationwide) reflects expansion of the potentially affected observations to include full-time salaried at all weekly earnings amounts.  |

**Table 2**

**Weekly Earnings of Full-time Non-Hourly Workers**

**Potentially Covered by FLSA Part 541 EAP Exemptions**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Nationwide** | **South + Retail** | **South-Central + Retail** | **Ten Lowest States**  |
| Number of employees in tabulation group |  39,509,544  |  17,117,942  |  9,599,832  |  6,066,471  |
| Mean |  $ 1,325.43  |  $ 1,238.25  |  $ 1,215.57  |  $ 1,177.49  |
| Median |  $ 1,153.84  |  $ 1,036.61  |  $ 1,017.28  |  $ 985.69  |
| Minimum |  $ 0.01  |  $ 0.01  |  $ 0.01  |  $ 0.01  |
| Maximum |  $ 2,958.73  |  $ 2,958.73  |  $ 2,958.73  |  $ 2,958.73  |
| Percentile cut points: The indicated percentage of workers have weekly earnings less or equal to -- |
| 10th |  $ 512.85  |  $ 487.20  |  $ 480.00  |  $ 461.56  |
| 20th |  $ 692.30  |  $ 630.80  |  $ 615.42  |  $ 600.00  |
| 40th |  $ 985.69  |  $ 903.00  |  $ 887.23  |  $ 865.00  |
| 75th |  $ 1,759.89  |  $ 1,577.99  |  $ 1,564.58  |  $ 1,500.00  |
| 80th |  $ 1,956.23  |  $ 1,799.57  |  $ 1,760.67  |  $ 1,675.98  |
| Annual equivalent |  $ 101,723.93  |  $ 93,577.55  |  $ 91,554.71  |  $ 87,151.17  |
| 90th |  $ 2,564.24  |  $ 2,406.25  |  $ 2,347.57  |  $ 2,307.00  |
| Annual equivalent |  $ 133,340.22  |  $ 125,125.20  |  $ 122,073.48  |  $ 119,964.00  |
| 2015-2017 CPS MORG data, earning adjusted to 2017 dollars. Weighting adjusted to 2017 U.S. population benchmark. Workers paid on an hourly rate basis, workers not covered by FLSA, and workers subject to possible exemption under another FLSA regulation or in a named occupation exemption were removed.  |

1. For the final regulations, the Department should use actual CPS MORG data for 2018 (12 months) and January to June 2019 to calculate updates of the Chamber’s corrected minimum salary and highly compensated salary levels, without any speculative projections. [↑](#footnote-ref-1)