

September 3, 2015

Ms. Mary Ziegler
Director of the Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-3502
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Regulatory Information Number (RIN) 1235-AA11

Dear Ms. Ziegler,

The International Public Management Association for Human Resources (IPMA-HR) and the International Municipal Lawyers Association (IMLA) are submitting these comments on the Notice of Proposed Rulemaking issued on July 6, 2015 by the U.S. Department of Labor to amend the Fair Labor Standards Act (FLSA) regulations implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees.

The International Public Management Association for Human Resources (IPMA-HR) is a non-profit organization with almost 8,000 members consisting of public sector human resource directors, managers, and professionals who work at all levels of government. Since 1906, IPMA-HR has promoted public sector human resource management excellence through research, publications, professional development and conferences, certification, assessment and advocacy.

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and

advocacy by providing the collective viewpoint of local governments around the country on legal issues that impact local governments.

State and local governments have a strong commitment to complying with all employment laws and regulations. Our associations believe that there is a need to recognize how work in the 21st century is performed and to provide a system that includes flexibility in setting employee hours, and offering opportunities for advancement, while making it easier for public employers who strive to comply with the FLSA to classify employees. Governments perform crucial functions that improve the lives of its citizens and need to be able to recruit, retain, and develop the best and the brightest talent, which requires a workplace that provides the maximum amount of flexibility while ensuring needed worker protections.

Proposed Increase to the Salary Basis Test Threshold

Our associations acknowledge the need to adjust the current salary basis of \$455 per week. The proposed increase to \$970 per week represents a more than doubling of the current minimum salary basis for employees who are considered exempt under the executive, professional, and administrative exemptions. Since the cost of living varies in the United States, one uniform salary basis amount will create challenges for public employers in certain parts of the country. We would recommend either locality adjustments that take into account the differences in cost of living in the country or a lower salary basis test. The federal government currently provides locality pay, with employees for the Department of Labor receiving different salaries based on their geographic location.

The International Public Management Association for Human Resources (IPMA-HR) undertook a survey of its membership with over 70% indicating that they would prefer a lower salary basis threshold than the amount proposed by the Department of Labor. When asked what amount they would support, 44% recommended a 50% increase to \$685 per week and 31% suggested a 75% increase to \$800 per week. If the Department of Labor insists on the \$970 per week salary basis threshold, then we would recommend that given the size of the increase that it be phased in over several years. Over 60% of our survey respondents expressed support for phasing in the proposed increased salary basis threshold.

It is important for the Department of Labor to recognize that the salaries of all state and local government employees are part of an overall compensation system within their respective agencies and do not exist in a vacuum. Therefore, an increase in salary for some employees in order to meet a new salary basis effect has a ripple effect throughout the entire governmental entity. Unlike the federal government, state and local governments are required to have a balanced budget. The public sector has lagged the economic recovery and despite an increase in population, overall government employment is lower than it was in 2009. Many state and local governments are still dealing with serious economic issues and simply cannot afford either to increase salaries or pay more for overtime.

The respondents to the IPMA-HR survey were asked what policy changes they would make concerning those currently exempt employees who earn less than the proposed new salary basis threshold. About 60% said they would convert currently exempt employees to non-exempt and pay them overtime while the same amount would prohibit them from working more than 40 hours per week without approval. Only 1/3 would raise salaries to at least \$970 per week. About ¼ of responding employers would prohibit the use of employer-provided cellphones, laptops, or other equipment outside of normally scheduled work hours.

Where employees who are currently considered exempt are reclassified to being non-exempt, governmental employers will need to monitor the number of hours that they work much more closely. This will lead to reduced flexibility and could result in reclassified employees missing out on career growth opportunities such as participation in training programs that occur outside of regularly scheduled work hours or being assigned to special projects that may be in addition to regularly scheduled work. Government employers also may prohibit non-exempt employees from telecommuting, since it is more difficult to monitor the hours of employees who are working offsite.

Exempt employees may view themselves as being on a managerial track and where they are reclassified to being non-exempt, they may perceive themselves as having been demoted to hourly employees, which could cause morale problems and increased turnover. Due to all the cutbacks that have occurred in the public sector, some governments have experienced low levels of employee engagement, morale and satisfaction. A 2014 employee engagement survey undertaken by IPMA-HR found that only 47% of participating state and local government employees were fully engaged in their jobs.

Annual Indexing of the Salary Basis Test

The Notice of Proposed Rulemaking indicates that the Department of Labor intends to index the salary basis test annually, either based on the increase in the CPI-U or to maintain the salary basis at the 40th percentile of weekly earnings for all full-time salaried workers. The proposed automatic indexing of the salary basis test is unprecedented in the long history of the FLSA and has not been authorized by Congress as it has done in other laws. Almost 2/3 of the respondents to the IPMA-HR survey oppose annual adjustments to the salary basis threshold. This is the equivalent of an annual salary increase, which many state and local governments no longer can afford to provide. As stated previously, any automatic annual adjustments to one group of employees will have a ripple effect throughout state and local governments and could result in governmental employers having to cut staff, reduce benefits, or provide less services to its citizens.

The proposed annual indexing of the salary basis test would add to the administrative burden of public sector employers. Each year, employers would need to review positions based on the increase and determine which employees will have their salaries increased in order to remain exempt and which employees will be reclassified as being non-exempt. The suggestion that employers will be provided with only 60 days' notice of the new salary level each year is

insufficient to allow time for public employers to plan and budget in order to ensure that they are in compliance with the rule.

If forced to choose between the two proposed methods of indexing the salary basis test, the respondents to the IPMA-HR survey would prefer that the increase be based on the CPI-U.

Changes to the Duties Test

The Notice of Proposed Rulemaking indicates that the Labor Department is “considering whether revisions to the duties tests are necessary in order to ensure that these tests fully reflect the purpose of the exemption.” No specific proposed changes are included in the proposed regulations, but comments are invited on “whether the tests are working as intended to screen out employees who are not bona fide executive, administrative and professional employees.”

Given the absence of specific proposed changes to the duties tests, our organizations strongly opposes any modifications to these tests without the Department of Labor publishing another Notice of Proposed Rulemaking and opening a new public comment period. Almost 100% of the IPMA-HR members who responded to the survey support an opportunity to submit comments on any proposed changes to the duties test. Not only does fairness and equity require that a new notice and comment period be provided, but we also believe that the Administrative Procedure Act requires it.

The current duties tests are ambiguous and difficult for public employers to apply. The public sector strives to comply with all laws and regulations, but the current duties tests lack clarity. If the Department of Labor is going to propose any changes to the duties tests, the inclusion of examples specifying how the exemptions would apply to specific occupations would be a positive step. The potential liability for misclassifying employees as exempt can be significant, especially for governmental employers who are still suffering from the effects of the recession.

Any proposed changes to the duties tests need to reflect the way work is performed currently and not rely on an outdated model. For example:

- Much more work today is done in a team-based environment where team members need to work closely to get the job done in the most efficient and effective manner possible. This may involve exempt employees assisting with work that would be considered non-exempt.
- Public safety employees often respond to emergencies where they must deal with the current crisis and cannot assign work based on whether it would be considered exempt or non-exempt.
- Due to technology, many government employers no longer have administrative support staff, which requires exempt employees to perform some clerical tasks that previously were undertaken by administrative assistants or secretaries.

- Many governmental employers have smaller staffs than they did prior to the recession coupled with increased citizen demands resulting in the need for cross training and for employees to perform a variety of tasks in order to ensure that the work gets done.

In the Notice of Proposed Rulemaking, the Labor Department specifically asked if, it should “look to the State of California’s law (requiring that 50% of an employee’s time be spent exclusively on work that is the employee’s primary duty) as a model?”

Our organizations oppose the inclusion of an arbitrary 50% standard in order for employees to be considered exempt. This will create recordkeeping challenges and put a burden on already over-burdened governmental employers to keep close track of the percentage of time devoted to the work that is being performed. Will the employee or employer determine the percentage of time? Such a standard could encourage additional litigation by employees who could allege for example that they only spent 45% rather than 50% of their time on exempt activities. We would urge that the Department of Labor recognize the need for flexibility and not burden state and local governments with an additional regulatory burden.

Conclusion

We appreciate the opportunity to submit comments on the proposed regulations. Please do not hesitate to contact us if you have any questions concerning our comments or if we can be of assistance.

Sincerely,

Neil Reichenberg
Executive Director
IPMA-HR
703/549-7100
nreichenberg@ipma-hr.org

Charles W. Thompson, Jr.
Executive Director
IMLA
202/742-1016
cthompson@imla.org