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VIA ELECTRONIC FILING: www.regulations.gov

The Honorable R. Alexander Acosta
Secretary of Labor
c/o Ms. Melissa Smith, Director
Division of Regulations, Legislation & Interpretation
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

RE: RIN 1235-AA20, Request for Information, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 FR 34616 (July 26, 2017)

Dear Mr. Secretary:

Littler Mendelson, P.C. ("Littler") submits these comments in response to the Department of Labor's request for information, as published in the *Federal Register*, 82 FR 34616 on July 26, 2017, regarding the regulations at 29 C.F.R. Part 541 ("Part 541 regulations"), defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees in section 13(a)(1) of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. § 213(a)(1).

Littler is the largest global employment and labor law practice with more than 1,000 attorneys in over 60 offices worldwide, representing clients across virtually every industry in all aspects of employment and labor law. Littler is a single source solution provider to the global employer community, consistently recognized in the industry as a leading and innovative law practice. Throughout its more than 70-year history, Littler has provided legal advice and compliance assistance to employers large and small, on the full range of labor and employment matters including the Fair Labor Standards Act and state wage and hour requirements. We have also represented our clients in thousands of wage and hour, discrimination and other class action matters under state and federal law. In the past five years alone, Littler has represented employers in more than 1,700 class and collective actions across the United States. Applying its collective knowledge and experience, the firm created the leading treatise, Littler Mendelson on Employment Law Class Actions, a comprehensive guide to all aspects of employment class and collective actions, including analysis of recent developments and trends. Littler is the collective trade

name for an international legal practice, the practicing entities of which are separate and distinct professional firms.

Littler supports the Department's decision to revisit its 2016 changes[1] to the regulations[2] defining and delimiting the executive, administrative, and professional exemptions in Section 13(a)(1) of the Act.[3] The 2016 Final Rule more than doubled the minimum salary level for exemption from $455 per week ($23,660 annualized) to $913 per week ($47,476 annualized). The high $913 salary level was contrary to Congressional intent and exceeding the Department's authority in *State of Nevada, et al. v. U.S. Department of Labor*.[4] As the court in *Nevada* explained, "it is clear Congress defined the EAP exemption with regard to duties. In other words, Congress unambiguously intended the exemption to apply to employees who perform 'bona fide executive, administrative, or professional capacity' duties."[5] Although the FLSA gives the Department broad authority to define and delimit the exemption, that authority "is limited by the plain meaning of the words of the statute and Congress's intent."[6] The Department "does not have authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 2013(a)(1)."[7]

"While the plain meaning of Section 213(a)(1) does not provide for a salary requirement," before 2016, the Department used "a permissible minimum salary level as a test for *identifying* categories of employees Congress intended to exempt." [8] The Department set "the minimum salary level as a floor to 'screen out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.'"[9] Setting a minimum salary level "somewhere near the lower end of the range of prevailing salaries" is "consistent with Congress's intent because salary serves as a defining characteristic when determining who, in good faith, performs actual executive, administrative, or professional capacity duties."[10]

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[1] 81 FR 32391 (May 23, 2016) ("2016 Final Rule").

[2] 29 C.F.R. Part 541.

[3] 29 U.S.C. § 213(a)(1) (the "EAP exemptions").

[4] CA No. 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

[5] *Nevada*, 2017 WL 38377230 at *7.

[6] *Id.*

[7] *Id.*

[8] *Id.* at *8.

[9] *Id*. (*citing* Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949) (the "1949 Weiss Report") at 7-8.

[10] *Id.*

The $913 level adopted in the 2016 Final Rule, ignored Congressional intent and exceeded the Department's authority by making "overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties."[11] At $913, the minimum salary level for exemption is no longer a plausible proxy for performance of exempt job duties.

If the Department publishes a Notice of Proposed Rulemaking to adjust the minimum salary level for exemption, it should apply the same or a similar methodology used in its 2004 rulemaking to salary data from the Bureau of Labor Statistics ("BLS"). Using the 2014 methodology would cause a minimum salary level of approximately $32,000 which, consistent with *Nevada* and the Department's historical practice, would function only to screen out "obviously nonexempt employees." At that level, the standard salary test is a plausible proxy for performance of exempt job duties. The Department should make no further changes to the Part 541 regulations.

The Department has requested information in eleven specific areas. Littler's responses to each of these are set forth below:

1. Methodology for Determining the Standard Salary Level

> *In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?*

Applying the 2004 methodology would be appropriate if the Department increases the standard salary level, and would not require changes to the standard duties test.

In the 76-year history of salary increases prior to the 2016 Final Rule, with only one exception, the Department studied available salary data and set the salary level near the lower end of salaries in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry. The only change in this methodology over the years was the salary data available to and studied by the Department:

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[11] *Id.*

- In 1940, noting that a salary requirement would "affect both high and low wage areas, high and low wage industries, and large and small businesses," the Department stated that it was "desirable to retain a comparatively low salary requirement."[12] The Department studied current salary levels in different jobs (such as comparing salaries of nonexempt bookkeepers to exempt accountants) to find the "dividing line" between exempt and nonexempt employees, and then "set a figure somewhat lower" than that dividing line.[13]

- In 1949, the Department examined data on increases in salaries for exempt employees since the 1940 increases, compared that data with the earnings of nonexempt employees, and then set a salary level lower than the data indicated to account for lower-wage industries and small businesses.[14]

- To set the salary level in 1958, the Department compiled salary data for employees found exempt during wage-hour investigations over an eight-month period in 1955, grouping employees "by major geographic regions, by number of employees in the establishment, by size of city, and by broad industry groups."[15] Based on this data, the Department set the salary level so that "no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."[16]

- Again, in 1963, the Department relied on a special survey by the Wage and Hour Division on salaries paid to exempt employees, and increased the salary level to "bear approximately the same relationship to the minimum salaries reflected in the 1961 survey data as the tests adopted in 1958."[17]

- In 1970, the Department adopted a minimum salary level for executives of $125 per week, when salary data on "executive employees who were determined to be exempt in establishments investigated by the Divisions between May and October

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[12] Harold Stein, *Executive, Administrative, Professional . . .Outside Salesman" Redefined,* Wage and Hour Division, U.S. Department of Labor (Oct. 10, 1940) ("1940 Stein Report") at 22.

[13] *Id.* at 46 (professional salary level); *see also id.* at 32 (administrative salary level; because the FLSA "applies to low-wage areas and industries as well as to high-wage groups … [c]aution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude.").

[14] 1949 Weiss Report at 12-15.

[15] Harry S. Kantor, *Report and Recommendations on Proposed Revision of Regulations, Part 541*, Wage and Hour & Public Contracts Division, U.S. Department of Labor (March 3, 1958) ("1958 Kantor Report") at 6.

[16] *Id.* at 7-8.

[17] 28 FR 7002, 7004 (July 9, 1963).

1968 for all regions in the United States, 20 percent received less than $130 per week, whereas only 12 percent of such executives employees in the West and 14 percent in the Northeast received salaries of less than $130 per week."[18]

- In 2004, the Department considered BLS data "showing the salary levels of the bottom 10 percent, 15 percent and 20 percent of all salaried employees, and salaried employees in the lower wage south and retail sectors."[19] The Department set the minimum salary level at $455 per week ($23,660 annually), the 20th percentile for salaried employees in the South region and retail industry.[20]

Only in 1975 did the Department deviate from this methodology by using the Consumer Price Index (CPI) to determine the salary level increases. But 1975 was an anomalous rulemaking that presented special challenges for the Department: Between 1970 and 1974, the CPI had increased by 23.67 percent.[21] Such rapid inflation caused an urgent need for the Department to increase salary level, but the Department had not completed its study of salary levels. As the Department stated in its 1974 proposed rule:

> In order to make the salary tests in 29 CFR Part 541 realistic, interim salary tests are being proposed, pending a study in salary levels in the prescribed occupations to be made during the next six months after which further change, if necessary, upon completion of the study will be made.[22]

The Department intended to complete a salary study as it had done in all the prior rulemakings. The study was never completed, however, and the 1975 *interim* salary levels remained unchanged until 2004.

Adjusting the salary levels based on the CPI in 1975 was an expedient method for quickly setting interim salary levels when the economic conditions at the time had caused the 1970 salary levels to become obsolete. The Department intended to issue new regulations based on a salary study to be completed six months later. Even then, the Department set the interim salary levels "slightly below the rates based on the CPI."[23] The Department also stated that the 1975 rulemaking should not be a precedent:

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[18] 35 FR 883, 884 (Jan. 22, 1970).

[19] 2004 Final Rule at 22167 & Table 2.

[20] *Id.* at 22168.

[21] 40 FR 7091, 7091, 7091 (Feb. 19, 1975).

[22] 39 FR 29603, 29603 (Aug. 16, 1974).

[23] 40 FR at 7091.

> These interim rates, pending completion of the study to be made in 1975, are necessary because present economic conditions have substantially impaired the current salary tests as effective guidelines for determining the exempt status of bona fide executive, administrative and professional employees. The present rates have become obsolete and interim rates are required to protect the interests of all concerned, including employees and employers, and to enable the Wage and Hour Division to administer the Act in a proper and equitable manner. *The use of interim rates is not, however, to be considered a precedent*.[24]

The Department's goal in applying this historical methodology also has remained unchanged: "screening out the *obviously* nonexempt employees."[25] Section 13(a)(1) of the Act *exempts* executive, administrative and professional employees from the FLSA minimum wage and overtime requirements. Although Congress granted the Department authority to define and delimit the white collar exemptions, the agency has long acknowledged that:

> The Administrator is not authorized to set wages or salaries for executive, administrative and professional employees. Consequently, improving the conditions of such employees is not the objective of the regulations. The salary tests in the regulations are essentially guides to help in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. Any increase in the salary levels from those contained in the present regulations must, therefore, have as its primary objective the drawing of a line separating exempt from nonexempt employees rather than the improvement of the status of such employees.[26]

The Department acknowledged the historical goal of the salary level test in the 2016 Final Rule[27] – even while ignoring it. The 2016 Final Rule set the standard salary

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[24] *Id.* at 7092.

[25] 1949 Weiss Report at 8 (emphasis added). *See also* 1958 Kantor Report at 2-3; 2004 Final Rule, 69 FR at 22165).

[26] *Id.* at 11. *See also* Stein Report at 6.

[27] 2016 Final Rule, 81 FR at 32402.

level "at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region."[28] The 40th percentile was not intended, and did not function, to screen out only obviously nonexempt employees. Rather, the 2016 Final Rule was intended to expand overtime protection to millions of employees who actually performed the job duties required for exemption based on their salary alone:

> White collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, *irrespective of their job duties and responsibilities*. Employees earning this amount or more on a salary or fee basis will qualify for exemption only if they meet the standard duties test, which is unchanged by this Final Rule. As a result of this increase, 4.2 million employees *who meet the standard duties test* will no longer fall within the EAP exemption and therefore will be overtime-protected.[29]

This result is far beyond the "few employees" that might be denied exemption because of the minimum salary level although performing exempt work, as envisioned by the Department since 1940,[30] and is contrary to Congressional intent to exempt employees who perform executive, administrative or professional job duties.[31]

The Department made four errors when setting the $913 salary level, all of which should be corrected in any new rulemaking:

First, the Department erred by setting the salary level at the 40th percentile of weekly earnings of full-time salaried employees – twice and four times as high as previous percentiles used by the Department. In 1958[32] and 1963,[33] the Department used the 10th percentile. In 1970, the Department set the salary level just below the 12th percentile of executive employee in the West.[34] In 2004, the Department used the 20th percentile of salary levels in the South region and the retail industry.[35] The Department's only and often repeated justification for quadrupling the percentile used in 1958 and 1963 was a perceived

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[28] *Id*. at 32404.
[29] *Id.* at 32405.
[30] *See* 1940 Stein Report at 6.
[31] *Nevada,* 2017 WL 3837230 at *8.
[32] 1958 Kantor Report at 7-8.
[33] 28 FR at 7004.
[34] 35 FR at 884.
[35] 69 FR at 22167-69 and Tables 2 & 3.

"mismatch" which occurred in 2004 when the standard salary level was set "equivalent to the historic levels of the former long test salary" but "paired with a standard duties test based on the short duties tests."[36]

There was no mismatch. The standard duties test for executives adopted by the Department in 2004 is more rigorous than the old short duties tests, for example. The pre-2004 short test for the executive exemption required only that the employee have a primary duty of managing the enterprise (or a recognized department or subdivision thereof) and customarily and regularly direct the work of two or more other employees.[37] The 2004 regulations added a third requirement: "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."[38] This new requirement under the standard test was taken from the pre-2004 long test.[39] The standard duties test for the executive exemption is more difficult to meet than the pre-2004 short test.[40]

The standard duties tests adopted in 2004 eliminated the 20 percent limit on nonexempt work (40 percent in retail and service establishments) in the old long duties tests, but that test had been inoperative for decades by 2004. Because of the 29 years that passed between the salary level increases of 1975 and 2004, the $155/$170 salary levels for exemption under the long duties tests were barely above the minimum wage for a 40-hour workweek by 1980 (when minimum wage increased to $3.10 per hour) and below the minimum wage beginning in 1991 (when minimum wage increased to $4.25 per hour). In 2004, the long duties tests had been effectively inoperative for almost 25 years and were not functioning to distinguish between exempt and nonexempt employees. As the Department stated in 2004, "reactivating the former strict percentage limitations on nonexempt work in the existing 'long' duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's

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[36] 2016 Final Rule, 81 FR at 32400. *See also Id.* at 32392, 32403, 32404, 32406, 32409, 32412, 32413 and 2015 NPRM, 80 FR at 38517, 38519, 38529, 38526, 38530 and 38531. The Chamber respectfully submits that repeating a flawed and factually incorrect argument 14 times does not make it true or justify quadrupling the 10th percentile methodology used in 1958 and 1963.

[37] 68 FR 15560 (April 23, 2003).

[38] 29 C.F.R. § 541.100.

[39] 2004 Final Rule, 69 FR at 22127.

[40] Should the Department review the public comments filed in response to the 2003 Notice of Proposed Rulemaking, it will find that most employer groups objected to this change.

daily and weekly tasks in order to determine if an exemption applied."[41] Which tasks are exempt and which nonexempt? How much time did each employee spend performing exempt tasks and nonexempt tasks? Did the employee spend 19 percent of his time performing nonexempt tasks or 21 percent of his time? Only trial lawyers would benefit from resuscitating this rule now effectively dead for 36 years.

In addition, in 2004, the Department doubled the percentile historically used to set the minimum salary level, from 10 percent to 20 percent, to account for eliminating the restriction on nonexempt work in the old long duties tests.[42] In actuality, the percentile increase was even more significant in 2004 because of the differences in the data used by the Department to increase the minimum salary level before 2004. From 1940 to 1970, the Department studied data on salaries paid to exempt employees. Although the documentation from the 1940 and 1949 rulemakings do not provide the source of that data, the Department conducted special surveys or pulled data from investigation records to determine salaries being paid to exempt employees. In 2004 and continuing today, a much larger sampling of earnings data is available through BLS, but that data is also much less concise. Although we talk about "salary" data as a short-hand, BLS actually does not collect separate data on salaries. Rather, the BLS data sets include earnings for "hourly paid" and "non-hourly paid" employees. The data set used by the Department in both 2004 and 2016 is for non-hourly paid employees. The non-hourly paid data set includes employees paid on any basis other than hourly, including being paid on a piece rate, a fee basis or by commission. The available BLS data also does not distinguish between exempt and nonexempt employees. Inclusion of piece rate and salaried nonexempt employees (e.g., secretaries and office clerks) results in lower "salary" levels generally as they are paid less than most exempt employees.

In the 2016 Final Rule, the Department did not adequately explain why doubling the percentile from 10 to 20 in 2004 did not appropriately adjust for the duties tests changes or why quadrupling the percentile to 40 was necessary.

Second, the Department erred by using the South Census Region to determine the 40th percentile. In the 2016 Final Rule, the Department determined the 40th percentile based on earnings of full-time salaried workers in the South Census Region. The Department was responding to criticism that the proposed level, which was based on

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[41] 2004 Final Rule, 69 FR at 22127; *see also Id.* ("Moreover, making such finite determinations would become even more difficult in light of developments in case law that hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks.").

[42] 2004 Final Rule, 69 FR at 22167 ("we relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, because of the proposed change from the short and long test structure and because the data included nonexempt salaried employees").

salaries nation-wide, would have a disproportionate and adverse impact on businesses in lower-wage southern states.[43] The Department's choice of the South Census Region was disingenuous and intended to deceive the public at worse. The Census Bureau divides the country into four large regions: Northeast, Midwest, South and West. Each region is then subdivided into smaller divisions. The states in the South Census Region, as shown in the table below, include some of the highest wage areas of the country:[44]

Jurisdiction	Median Income	Ranking
Maryland	$74,551	1
District of Columbia	$70,848	4
Virginia	$65,015	9
Delaware	$60,509	15
Texas	$53,207	24
Georgia	$49,620	32
Florida	$47,507	39
Oklahoma	$46,879	41
North Carolina	$46,868	42
South Carolina	$45,483	43
Tennessee	$45,219	44
Louisiana	$45,047	45
Kentucky	$43,740	47
Alabama	$43,623	48
West Virginia	$41,751	49
Arkansas	$41,371	50
Mississippi	$39,665	51

Employers and employees in Mississippi may have been surprised to learn that Maryland is a southern state, and that the 40th percentile of salaries in the "South" was $47,476 annually. Including data from three of the top 10 income areas in the country (Maryland, the District of Columbia and Virginia) ignores the Department's historical methodology of studying salaries paid to exempt employees in lower-wage areas, resulting in an inappropriately high salary level.

Third, the Department erred by failing to consider salary levels in other lower wage sectors, such as retail, non-profits or small businesses. Salary levels in retail businesses are

[43] 2016 Final Rule, 81 FR at 32408.

[44] A map of the Census regions and divisions is attached as Exhibit B.

lower regardless of where they are located. The Department should also consider the impact of the minimum salary level on non-profit business and small business where salaries also are lower. Ignoring these low wage sectors contradicts the historical methodology of studying salaries paid to exempt employee in "the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry."[45]

Fourth, the Department erred by including in its data set the earnings of employees not subject to the FLSA salary level test. The Part 541 salary basis and salary level tests do not apply to doctors,[46] lawyers,[47] teachers,[48] and outside sales employees.[49] In addition, the Part 541 salary level test is not used to determine the exempt status of federal government employees covered by regulations of the Office of Personnel Management.[50] The salary level test is also irrelevant to employees not covered by the FLSA or exempted from the overtime requirements under other exemptions.[51] The Department excluded these categories from the data set when determining the salary level in 2004,[52] but inexplicably included this date in 2016.[53] Many employees in these categories – doctors, lawyers, outside sales and federal government employees – earn wages far above the average. As none of the categories are subject to the salary level test, the salary data for employees in these categories is not helpful in determining the appropriate salary level that will function to exclude only the obviously nonexempt from the EAP exemptions. Once again, including this data in the 2016 data set artificially inflated the standard salary level.

Littler does not support using an inflationary measure to set the salary levels for the exemptions. The Department has adjusted salary levels by inflation only once, in 1975, and stated that doing so was not to be a precedent. The economic conditions that caused the Department to use this expedience are not present today.

If the Department applies the 2014 methodology to increase the standard salary level, no changes in the duties tests are needed. In the 2016 Final Rule, the Department

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[45] 1958 Kantor Report at 7-8.

[46] 29 C.F.R. § 541.304(d).

[47] *Id.*

[48] 29 C.F.R. § 541.303(d).

[49] 29 C.F.R. § 541.500(c).

[50] 29 U.S.C. § 204(f).

[51] *See, e.g.,* 29 U.S.C. §§ 203(e), 213(b)(1) and 213(b)(12).

[52] 2004 Final Rule, 69 FR at 22168.

[53] 2016 Final Rule, 81 FR at 32404.

cited the elimination of the 20 percent cap on nonexempt work in the pre-2004 long duties tests to justify its unlawfully high salary level. But the long duties tests and their restriction on non-exempt work has been inoperable not for 36 years. Bringing the test back now would send employers and employees to the courthouse as the parties argued in class action litigation over whether employees spent more or less than 20 percent of their time performing nonexempt work. Because employers and employees understand the duties tests, and the large body of case law interpreting those tests, any changes at this point would lead to litigation chaos that benefits only trial lawyers.

2. Multiple Standard Salary Levels.

> *Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?*

The Department should not adopt multiple standard salary levels, as doing so adds unneeded additional complexity.

There is no need for multiple salary levels to minimize the economic impact of an increase in lower-wage regions, industries and other sectors if the Department adopts a standard salary level that screens out only obviously nonexempt employees. Applying the 2004 or similar methodology to current BLS data will cause a salary level that functions as a reasonable proxy for performance of exempt job duties. At that level, a few employees performing exempt duties may be excluded from the exemption, but not a substantial number. Employees earning above the standard salary test would not qualify for exemption without meeting the duties test for the executive, administrative or professional exemption.

Adopting multiple standard salary levels to reflect real differences in actual salaries would be a very daunting task for which sufficient reliable data may not be available. Differences in salary are found based on industry; size of the employer; whether the employer is a for-profit, non-profit or a state or local government; and whether the employee is working in an urban versus rural area. Adopting different salary levels by these categories would be difficult because of limitations on BLS data. Adjustment by employer size is impossible based on BLS data because the monthly survey does not include data by size; BLS would need to add new questions to the monthly survey.

Multiple salary levels based on industry, geographic area or employer size, would require the Department to establish new, and probably complicated, rules. The Department would need to define each geographic area and industry, and address questions such as what salary level would apply when the employee traveled for work (e.g., traveled from Mississippi to work in Maryland for three days) or spent time working in different industries (e.g., a retailer's store and distribution center). Adopting multiple salary levels by employer size would require the Department to define the different size categories by revenue, number of employees or some other measure. Inevitably, questions would arise regarding where an employer fell in each category, leading to a new type of class action litigation.

Littler appreciates the Department's effort to think outside the box with its suggestion of using a percentage-based adjustment similar to federal government's Locality Pay Tables. However, doing so would not obviate the complexity of multiple salary levels or the need for new regulations to define each locality and how those definitions would apply to employees who travel for work. Here the new type of class action litigation would focus on whether the employer or the employee was within a locality pay area or not. The federal government has an entire agency, the Office of Personnel Management ("OPM"), to ensure federal agencies properly apply the 46 locality pay percentages in the federal tables.[54] Few private-sector businesses have such resources.

Without a compelling need to guard against economic hardship and job losses, adopting multiple standard salary levels would only add to cost and complexity of complying with the rule, with no corresponding benefit. For over 75 years, the Department has rejected repeated requests by the regulated community to adopt multiple salary levels. For example:

- In 1940, the Department rejected proposals for different salary levels based on community size because the FLSA "itself has as an objective a universal minimum wage" without "lower differential minima."[55]

- In 1963, the Department rejected proposals that "differential rates be set on an industry, area, or regional basis."[56]

- In 1970, the Department rejected proposals that "differential rates be set on geographical bases" because the "salary tests as proposed had already taken

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[54] The 2017 General Schedule Locality Pay Tables are available at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2017/general-schedule/. These tables are updated annually.

[55] *See* 1940 Stein Report at 5-6.

[56] 28 FR 7002, 7002 & 7004 (July 9, 1963).

geographical variations in salary levels into consideration" by proposing levels based on "lower wage nonmetropolitan areas on the South."[57]

- In 2004, the Department rejected proposals for multiple salary levels as administratively unfeasible and unnecessary with a salary level set using the historical methodology.[58]

- In 2016, quoting the 2004 Final Rule, the Department rejected proposals "to adopt different salary levels for different regions of the country or for different industries or sizes of businesses.[59]

The Department should not change its course now, but continue its historical practice of accounting for differences in salaries by setting the salary level near the lower end of salaries in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry.

3. Different Salary Levels by Exemption.

> *Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?*

The Department should not adopt different standard salary levels for the executive, administrative and professional exemptions. If the Department adopts a standard salary level "somewhere near the lower end of the range of prevailing salaries" to exclude only obviously nonexempt employees based on salary alone, there would be no need to add the additional complexity of different salary levels for executive, administrative and professional exemptions.

The regulated community has not been burdened with complying with multiple salary levels by exemption for more than two decades. Prior to 2004, the Part 541 regulations established different salary levels under the long duties test for the executive, administrative and professional exemptions. *See* Exhibit B (list of the Part 541 salary levels from 1938 to 2004). From 1940 to 1963, the Department adopted a lower salary level for the executive exemption. Beginning in 1963, the salary level for executive and

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[57] 35 FR 883, 884 (Jan. 22, 1970).

[58] 2004 Final Rule, 69 FR at 22171.

[59] 2016 Final Rule, 81 FR at 32411.

administrative employees were the same, with a higher salary level for professionals. The Part 541 regulations have never included different salary levels by exemption under the short duties test. The salary level under the long duties test in effect from 1975 to 2004 for executive and administrative employees was $155 per week – equivalent to just $3.875 per hour for a 40-hour workweek, which was below the 1991 minimum wage of $4.25 per hour. For professionals, the salary level under the long duties test in effect from 1975 to 2004 was $170 per week – equivalent to just $4.25 per hour for a 40-hour workweek, which was equal to the 1991 minimum wage and below the 1996 minimum wage of $4.75. By 1996, few employers relied on the long duties test and salary levels, and instead used the short duties test for exemption that, until 2004, required a salary level of $250 per week ($6.25 per hour for a 40-hour workweek). The Part 541 regulations have not included different and operative salary levels by exemption since 1996.

Adopting different salary levels by exemption is likely to increase litigation as, more often than not, the distinction between executive, administrative and professional employees are not clear. Many employees can qualify for two or three of the exemptions simultaneously – for example, a CPA accountant (professional) who supervises five employees (executive) and has authority to negotiate and resolve matters before the IRS (administrative). On the other end of the continuum, under the "combination" exemption, an employee who cannot meet all of the job duty requirements under any single exemption is exempt if he primarily performs a combination of exempt executive, administrative, professional, outside sales or computer duties.[60]

Establishing different salary levels for different exemptions would require employers to determine which exemptions applied – which could lead to opportunistic behavior by employers. Although most employers make good faith efforts to comply with the FLSA, adopting a lower salary level for executive or administrative employees could lead some employers to shoe-horn employees into the exemptions with the lower salary level. This mischief would be harmful for employees who would have to rely on the limited resources of the Department or expensive and time-consuming private litigation to correct the violation. Clear and simple rules benefit both employers and employees.

4. Pre-2004 Short and Long-Test Salary Levels.

> *In the 2016 Final Rule the Department discussed in detail the pre- 2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test*

[60] 29 C.F.R. § 541.708.

salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

If the Department begins a rulemaking to increase the standard salary level, using the 2004 methodology to set that salary level would be an effective measure for excluding obviously nonexempt employees from the exemptions.

As discussed in response to Question 1, above, the 2004 methodology fully accounted for the replacement of the long and short duties tests by more than doubling the salary level percentiles that the Department has used in prior years. The standard duties tests adopted in 2004 were more rigorous than the pre-2004 short duties test. The standard salary level was set higher than the long test salary level adjusted using the historical 10th percentile of salary levels in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry. In 2004, the Department set both the duties tests and the salary level between the pre-2004 long and short duties tests and salary levels. The Department should return to the 2004 methodology for setting the standard salary level and no changes to the duties tests are needed.

A resurrection of the previously abandoned "long/short" test would undermine President Donald Trump's directive to reduce regulatory burden. This goal is plainly not met should the Department incorporate any form of the old quantitative prong contained in the prior long duties test. Nor is the goal furthered by returning to two tests instead of one standard test.

Complicating the duties test by creating a tiered system, requiring employers to test multiple requirements under different scenarios represents neither a modernization nor a streamlining of the analysis. Indeed, when the Department proposed merging the long/short test into a single duties test in its 2003 NPRM, the Department concluded:

The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption.

In eliminating the short/long duties test in favor of the current "primary duty" tests through the 2004 Final Rule, the Department advanced its goal to reform and simplify the regulations. A return to two tests will make it more difficult to determine the application of the duties test and create instability and uncertainty amongst the regulated community.

5. Salary Level as Proxy for Duties.

Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in

determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

As the court found in *Nevada*, the high salary level adopted in the 2016 Final Rule unlawfully eclipsed the role of the duties test in determining exempt status. The Department admitted in the 2016 Final Rule that a $913 per week ($47,476 annualized) salary level would cause "4.2 million employees *who meet the standard duties test*" to no longer qualify for the EAP exemptions "*irrespective of their job duties and responsibilities*."[61] For those 4.2 million employees who met the duties tests but earned below $913 per week, the 2016 Final Rule was a total eclipse.

Adjusting the standard salary level using the Department's 2014 methodology would allow both salary and duties tests to fulfill their historical role. Although slight modifications to the 2014 methodology is unlikely to defy Congressional intent, predicting the exact salary level that a court might view as exceeding the Department's authority would be pure speculation. The Department invites litigation, however, by adopting a standard salary level over $750 per week ($39,000 annualized).

6. Implementation and Impact of 2016 Final Rule.

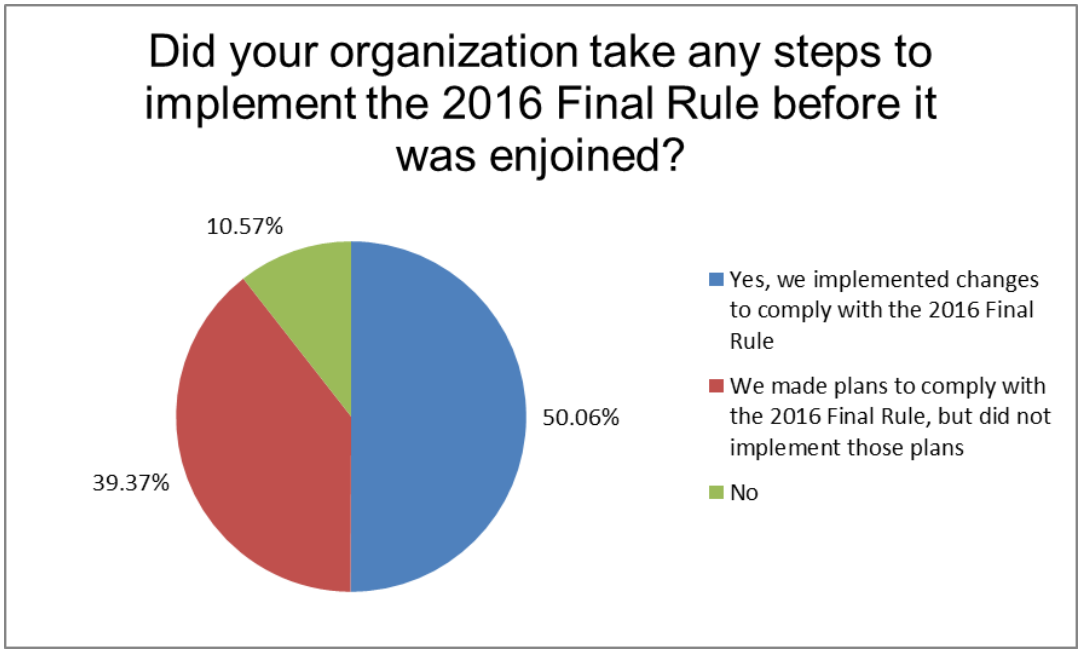
To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

Because of the litigation challenging the 2016 Final Rule, employers reacted differently in anticipation of the December 1, 2016 effective date – often dependent on the expected costs of providing salary increases to maintain the exemptions and additional overtime due to employees reclassified to nonexempt. Employer reactions ranged from

[61] 2016 Final Rule, 81 FR at 32405 (emphasis added).

taking no steps towards implementation of the 2016 Final Rule, preparing for changes but not implementing, and implementing either or both salary increases and reclassifications. In high wage industries, such as technology and energy, where most exempt employees earned just below or above the $913 salary level, employers were more likely to implement salary increases. In lower wage industries, such as retail, where starting salaries for assistant managers average in the mid-$30,000s and employers could not afford $10,000 salary increases, reclassifications not completed before the November 22 preliminary judgment were delayed. Other retailers, concerned with implementing disruptive changes during the key sales season between Thanksgiving and Christmas, implemented early.

To assist the Department, the Chamber and Littler Mendelson conducted a survey of employers on the actions they took towards compliance with the 2016 Final Rule and the impact those actions had on their businesses. About half of the almost 900 responding employers implemented changes to comply with the 2016 Final Rule before the preliminary injunction was issued. Of the remaining respondents, 39.4 percent had made plans to comply, but did not implement; and 10.6 percent had taken no steps to comply.



Of the employers who had implemented or made plans to implement changes to comply with the Final Rule, most used a combination of increasing salaries to maintain the exemption and reclassification of employees to nonexempt. As shown in the table below, however, employers also took other actions to comply and minimize the cost of compliance. Nearly 29.4 percent of employers reported limiting the use of email or other technologies by reclassified employees outside the workplace; 21.2 percent limited the

flexibility of employees to work alternative hours or at home; 7.2 percent reduced benefits to offset the cost of the salary increases; and 6.4 percent replaced employees with automated alternatives or otherwise reduced headcount. Some employers, 11.5 percent, also reported raising prices for customers in order to offset the costs of the 2016 Final Rule.

Did your organization take or plan to take any of the following actions to comply with the 2016 Final Rule	
Increase salaries of exempt employees to retain their exempt status	76.42%
Increase salaries of exempt employees in order to retain their exempt status, but also reduce benefits, such as health care or auto or phone allowances, to minimize costs associated with the salary changes	7.21%
Reclassify employees to nonexempt (overtime eligible)	77.39%
Replace employees with automated alternatives or otherwise reduce headcount	6.38%
Raise prices for customers	11.51%
Limit the flexibility for employees to work alternative hours or at home	21.22%
Limit the use of email or other technologies by non-exempt employees outside the workplace	29.40%
Limit the ability of nonexempt employees to travel for work	15.81%

For employees reclassified to nonexempt because of the 2016 Final Rule, 73.1 percent of employers converted the employees from salaried to hourly, 34 percent decreased their work hours to 40 or less, and 19.4 percent of employers reduced benefits, bonuses, and commissions. Only 7.2 percent of employers made no changes to work hours and compensation of employees reclassified to nonexempt.

For employees reclassified to nonexempt, did your organization:	
Allow them to work the same number of hours and earn overtime compensation without restriction?	28.72%
Convert them from salaried to hourly pay?	73.14%
Reduce their effective hourly rate so that their total pay remained the same?	18.60%
Require them to track and record work hours?	72.31%
Decrease their work hours to 40 hours or less?	34.09%
Change their status for benefit plans, resulting in less favorable benefits (e.g., paid leave, retirement, insurance benefits)?	7.02%
Reduce bonuses or commissions?	12.40%
Change their status to be included in a collective bargaining unit?	0.21%
Make other changes	14.05%
Make no changes	7.23%

Most employers reported incurring increased payroll costs to comply with the 2016 Final Rule, including increased overtime costs, training costs, and travel time costs. Employers also reported increased cost for administering timekeeping and payroll systems, drafting or modifying policies, and supervising newly nonexempt employees.

Did your organization incur, or anticipate incurring any of the following costs:	
Increased overtime costs	72.97%
Costs associated with reclassification of employees	59.10%
Increased training costs	16.94%
Increased timekeeping and/or payroll administration costs	52.79%
Increased travel time and/or on-call time costs	24.14%
Increased managerial costs of supervising additional non-exempt employees	37.66%
Costs associated with drafting or modifying policies and procedures	52.25%
Costs associated with benefits and/or benefit plan changes	18.92%

7. Duties Test Only.

> *Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?*

Littler does not support a duties-only test for exemption if such a test came with any changes to the current duties tests.

Any changes to the current duties tests would be disruptive, especially reinstating the 20 percent cap on nonexempt work. The restriction on the amount of nonexempt work was an element of the pre-2004 long duties test. But, as explained under Question 1, above, the long duties test has been effectively dead for 36 years. As the Department recognized in 2004 Reinstating the 20 percent rule as the Department stated in 2004, "reactivating the former strict percentage limitations on nonexempt work in the existing 'long' duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an

exemption applied."[62] The Department did not reinstate the 20 percent cap in the 2016 Final Rule, and should not do so now. Adopting a duties-only test and changing those duties tests would increase litigation, with uncertain results – increasing costs for employers and delay payment of wages to employees.

Although the Department has the authority to adopt regulations that define and delimit the exemptions based solely on job duties, the Part 541 regulations have included a salary level test since they were first adopted in 1938. Employers, employees, courts and the Department have found the salary tests a useful tool to exclude obviously non-exempt employers from the exemption. If the Department applies the 2014 methodology to make any increase to the standard salary level, that salary level will fulfill its historical roll, and no changes in the duties tests are needed. A salary level set near the lower end of current salaries in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry establishes a bright and reasonable line between exempt and nonexempt employees.

8. Affected Occupations.

> *Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?*

Because salary levels for the same occupation can vary based on the work location of the employee (e.g., geographic region, rural v. urban), generalizations regarding occupations that would have been excluded under the 2016 Final Rule are difficult.

Further, with no current requirement or imperative for employers to track the time – hour by hour, day by day, week by week – that employees spend performing exempt versus non-exempt tasks there can be no reliable data on which occupations spend more than 20 or 40 percent of time each week performing non-exempt work. Even when some

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[62] 2004 Final Rule, 69 FR at 22127. In the 2004 Final Rule, the Department also rejected quantitative, "bright-line" 50 percent rule for the primary duty "because of the difficulties of tracking the amount of time spent on exempt tasks." *Id.* at 22185-86. The Department stated: "An inflexible 50-percent rule has the same flaws as an inflexible 20-percent rule. Such a rule would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens)." *Id. See also In re Family Dollar FLSA Litigation*, 637 F.3d 508, 511, 516–18 (4th Cir. 2011) (retail manager was exempt even though she ''devoted most of her time to doing . . . mundane physical activities'' such as unloading freight, stocking shelves, working the cash register, or sweeping the floors); *Soehnle v. Hess Corp., 399 Fed. App'x*, 749, 750 (3d Cir. 2010) (gas station manager who spent 85 percent of time operating a cash register was exempt).

anecdotal evidence is available, such as case law on retail managers,[63] the exempt employees likely are performing both exempt and nonexempt work, which does not defeat the exemption under the concurrent duties rule.[64]

9. Bonuses and Commissions.

> *The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?*

The Department should allow employers to use all non-discretionary compensation to satisfy both the standard and highly compensated salary levels, without limit. Many bonuses or incentive payments earned by exempt employees are paid on a far less frequent basis than monthly. Often, such earnings are paid quarterly or annually. These payment cycles are not arbitrary, but instead are a function of the practical reality that the computational methods require longer earning cycles to access performance metrics. Excluding these payments from total compensation unduly burdens employers as they are often critical components of an employee's total wages. As the stakeholders conveyed prior to the issuance of the NPRM "nondiscretionary bonuses and incentive payments are an important component of employee compensation in many industries" and "such compensation might be curtailed if the standard salary level was increased and employers had to shift compensation from bonuses to salary to satisfy the new standard salary level." Doing so would have a "negative impact on the workplace and would undermine managers' sense of 'ownership' in their organizations."

Arbitrarily capping the amount of additional compensation that can be considered as meeting the salary threshold runs afoul of other provisions of the FLSA. For example, recognizing the realities of compensation structures, the regulations reflect that "commissions, nondiscretionary bonuses and other nondiscretionary compensation" – in

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[63] *See, e.g.,* 2004 Final Rule, 69 FR at 22186 (*citing Jones v. Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003) (manager who spent 75 to 80 percent of her time on basic line-worker tasks held exempt); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 618-20 (8th Cir. 1991) (manager exempt despite spending 65 to 90 percent of his time in non-management duties), *cert. denied*, 502 U.S. 1073 (1992); *Glefke v. K.F.C. Take Home Food Co.*, 1993 WL 521993, at *4-5 (E.D. Mich. 1993) (employee found exempt despite assertion that she spent less than 20 percent of time on managerial duties); *Stein v. J.C. Penney Co.*, 557 F. Supp. 398,404-05 (W.D. Tenn. 1983) (employee spending 70 to 80 percent of his time on non-managerial work held exempt).

[64] 29 C.F.R. § 541.105 ("Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption…").

addition to a guaranteed salary – may be counted towards meeting the current $100,000 threshold required to establish the highly compensated employee exemption.

In addition to permitting unrestricted incentive pay and commissions to comprise the required salary, the Department should also include a "make up" provision, similar to that provided by the regulations governing the highly compensated employee exemption. In other words, employers should be given an opportunity to provide employees who otherwise meet the white collar duties tests additional compensation – on an annual basis – to ensure that they are at the minimum salary level.

10. Highly Compensated.

> *Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?*

For the reasons discussed above under Questions 2 and 3, the Department should not adopt multiple annual compensation levels for the highly compensated test.

The Department adopted the highly compensated test[65] in recognition that "the higher the salaries paid the more likely the employees are to meet all the requirements for exemption, and the less productive are the hours of inspection time spent in analysis of the duties performed."[66] An employee must earn $100,000 annually, with $455 per week paid on a salary basis. Employees who earn more than the required total annual compensation are not exempt unless: (1) their primary duty includes performing office or non-manual work; and (2) they customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.[67]

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[65] The highly compensated test is not a separate exemption. Rather, 29 C.F.R. § 541.600 provides a different and shorter duties *test* for highly compensated employees under Section 13(a)(1) of the FLSA. *See* 2004 Final Rule, 69 FR at 22123 ("The 'highly compensated' *test* in the final rule applies only to employees who earn at least $100,000 per year …") (emphasis added).

[66] *Id.* at 22173 (quoting the 1949 Weiss Report); *see also* 29 C.F.R. § 541.601(c).

[67] 29 C.F.R. § 541.601(a), (c) & (d).

The duties requirements in the Part 541 regulations are sufficient to ensure that only *bona fide* executive, administrative and professional employees qualify for the Section 13(a)(1) exemption under the highly compensated test. The Department should revise the Part 541 regulations to remove the requirement of a weekly salary. Alternatively, the Department should not increase the $100,000 total compensation level.

11. Indexing.

> *Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?*

The Department should not revise the Part 541 regulations to provide for automatic updates to the standard salary level or the highly compensated total annual compensation level.

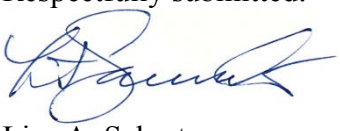
Littler strongly urges the DOL to abandon any proposed annual indexing. As a threshold matter, automatically increasing the minimum salary level annually creates an unsustainable floor and creates annual instability and uncertainty in employers' carefully calibrated compensation strategies and budgeting models. Employers operate on varying fiscal calendars. Preparing for annual increases presents challenges in terms of budgeting and implementation. Potential annual reclassification puts an undue burden upon employers who must in an extremely limited time period comply with state notice requirements, reprogram compensation systems and conduct additional training, much less conduct the necessary legal and compliance review to determine if reclassification is appropriate. Additionally, employers must contend not only with the costs of increased wage rates, but also must incur the additional expense of routine classification analysis, decision-making, and implementation of changes in response to the new salary level when it is announced each year.

At no time has Congress granted the Department the authority to index its salary test. While the issue has been raised by stakeholders during prior rulemakings, the DOL has repeatedly rejected the imposition of automatic annual increases. Most recently, in 2004, the Department summarily rejected the concept of automatic increases to the minimal salary level. At the time, the DOL contended that such an action is contrary to Congressional intent and disproportionately impacted lower-wage geographic regions and industries.

The complexities associated with indexing the current salary level clearly would undermine President Trump's stated goal to reduce regulatory burden. Accordingly, Littler urges the Department to reject any proposal to implement annual increases in the minimum salary level.

Thank you for the opportunity to respond to the Request for Information and present our views before you begin a formal rulemaking. We look forward to working with the Department on this important issue.

Respectfully submitted:



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