National Association of Independent Schools

National Business Officers Association

September 15, 2017

Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, U.S. Department of Labor
Room 3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1235–AA20, Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith:

The National Association of Independent Schools (NAIS) represents more than 1,600 nonprofit 501(c)(3), independent, day and boarding schools throughout the United States and abroad as well as a number of nonprofit associations. The National Business Officers Association (NBOA) is a nonprofit association dedicated to advancing business excellence in independent schools, with over 1,300 member schools from every region in the United States as well as international schools in Canada, Mexico and 13 other countries around the globe. NAIS and NBOA appreciate the opportunity to respond to the Department of Labor's Request for Information (RFI) as you begin the complex work of setting a salary level for exempt employees that is appropriate and yet does not effectively eliminate the duties test.

Preparation in Anticipation of the 2016 Final Rule's Effective Date

In the RFI, the Department requested information regarding the extent to which employers made changes in anticipation of the 2016 Final Rule going into effect, what changes were made, and what employers did after the preliminary injunction was issued on November 22, 2016. To inform our response to this and other questions put forward by the Department in this RFI, NAIS and NBOA issued a

survey to business officers at member schools.[1] According to this joint survey, approximately half (49%) of schools made salary or hours adjustments for currently exempt non-faculty employees prior to November 22nd in anticipation of the new rules going into effect. Many of these changes were made early because school salaries and agreements tend to run with the school calendar. Of these, schools took a variety of approaches depending on the staff positions affected by the doubling of the salary requirement, the dynamics within the school, and financial flexibility. Some chose different strategies for different employees within the same school. Fifty-five percent of schools converted employees who did not meet the higher salary level to non-exempt and limited hours to 40 in a workweek where possible. Similarly, 55% increased the salary of exempt employees to the new salary level so employees could remain exempt. Beyond these approaches, 43% converted employees who did not meet the higher salary level to non-exempt and paid overtime. Only 6% reduced the regular rate of pay so the total weekly earnings and hours did not change after overtime is paid and 11% chose some other method.

In this RFI, the Department specifically asked whether small businesses or other small entities encountered any unique challenges in preparing for the 2016 Final Rule effective date. While the number of affected employees varied, as small nonprofit educational institutions, budgets are tight and the hours needed to respond to significant changes in the law present challenges with small staffs that often wear many hats. One school with only 30 employees noted that while only 2 staff members were affected, the changes added an unplanned salary expense of $20,000 to their annual budget. Another small school of under 50 employees commented that incurring an additional $10,000 of salary expenses was "a challenge for a small school mid-year and meant redirecting resources that could have been spent more on student experience." Boarding schools also reported unique challenges, with one school writing that since "for 9 months a year, we are 24/7/365 in the residential life area which has a dramatic impact on hours worked."

Beyond the financial, many schools reported a change in workplace morale, with employees who were moved from exempt to non-exempt feeling less professional, less valued, and like they had received a demotion when they had to start tracking hours. One school noted that this made employees feel that "they weren't valued because [they] were 'counting time' rather than letting them do what they love to

[1] This survey had 369 responses, a response rate of 17 percent.

do." Other schools noted issues unique to educational institutions, including having to adjust how they handled overnight field trips, coaching, after-school activities, and volunteers. Again, boarding schools reported additional challenges as keeping track of hours is inherently more complex and employees who live in the dorms may be called on at any time.

After the preliminary injunction was announced, 66% of respondents kept changes in place because they had already been announced to the school community and implemented. Another 11% moved forward with changes that had already been announced but not yet implemented. In comparison, 12% held off on changes that had been announced but not yet implemented, a small 4% reversed changes that had been implemented, and 10% made some other choice. Regardless of their decision, several schools commented that the initial rule update was difficult to undertake and the changing enforceability of the rule was burdensome to monitor.

Updating the 2004 Salary Level

NAIS and NBOA support the update of the exemption salary level for inflation. During the 2015 rulemaking, the Department considered updating the 2004 salary level for inflation based on the Consumer Price Index for all urban consumers which would have resulted in a salary level of $561/week or $29, 172/year.[2] Although the inflation adjustment may result in a slightly different number two years later, the NAIS-NBOA survey asked if $29,172 would be a reasonable salary level. While respondents noted that wage and hour requirements as well as cost of living considerations in different areas of the country require different considerations when determining appropriate compensation, nearly 2/3rds of schools (65%) responded that $29,172 would be a reasonable number for the salary level adjustment at this time. As Secretary Acosta stated in his confirmation hearing, life becomes more expensive over time and he was sensitive to the fact that the overtime rule had not been updated for 13 years. However, the Secretary also noted that doubling the salary level created a "stress" on the economy, including nonprofits. Our schools' responses to our survey reflect this strain.

Setting Different Salary Levels for the Executive, Administrative, and Professional Exemptions

[2] https://www.regulations.gov/document?D=WHD-2015-0001-0001.

NAIS and NBOA do not support different salary levels for the different exemptions. In the RFI, the Department also asks if they should set different standard salary levels for the executive, administrative, and professional exemptions as it did prior to 2004. While this approach could provide flexibility, only 28% percent of survey respondents believed this would be a good idea. While some opponents simply explained that it would be even more complicated to administer, monitor, and track three different salary levels, others were a bit more colorful in their responses. Feedback included "it would be a nightmare!!!" and "good god, please do not further complicate labor laws." For small nonprofit educational institutions, simplicity is key. NAIS and NBOA thereby recommend against setting divergent salary levels for the different exemptions as it would place additional burdens on an already intricate system and smaller schools in particular would have a difficult time managing the complexity with their smaller human resource staff.

Establishing Different Salary Levels for Nonprofits

Lastly, NAIS and NBOA do believe that nonprofits should have a different salary level for nonprofit entities. in the RFI the Department asks if the regulations should contain multiple standard salary levels and suggests classifications such as size of employer, census region, or state. NAIS and NBOA member schools are committed to their nonprofit mission of guiding young people to become well-rounded, knowledgeable, compassionate, and engaged citizens who are prepared for college and career in a rapidly changing globally connected world, not a profit motive. Nonprofits operate on tight budgets and dramatic fluctuations in salary costs cannot be easily absorbed. For schools, tuition is the main source of funding for the school and salaries the largest expense. If salaries rise beyond capacity, schools must raise tuition, reduce staff, or both. In the NAIS-NBOA survey, 72% of schools responded that nonprofits should have a separate salary level threshold. In his confirmation testimony, Secretary Acosta noted the impact of the salary increase on nonprofits in particular. NAIS and NBOA recommend that nonprofits have a separate minimum salary level, so that employees should be compensated fairly and the unique constraints faced by nonprofits can be recognized in wage and hour law.

NBOA and NAIS would like to thank the Department for this opportunity to submit these comments in regard to the request for information. If we can be of any help as you work on these or any issues we are happy to participate moving forward.

Sincerely,

Debra P. Wilson
General Counsel
NAIS
1129 20th Street, NW
Washington, DC 20036
202.973.9716
wilson@nais.org

Grace H. Lee
Vice President, Legal Affairs
NBOA
1400 I Street, NW
Washington, DC 20005
202.407.7140
grace.lee@nboa.org