November 7, 2023

By Electronic Submission (www.regulations.gov)

Ms. Amy DeBisschop, Director
Division of Regulations, Legislation & Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN: 1235-AA39) (88 Fed. Reg. 62152, Sept. 8, 2023)

Dear Ms. DeBisschop:

The International Foodservice Distributors Association (IFDA) submits these comments in response to the above-referenced notice of proposed rulemaking, published in the Federal Register on September 8, 2023, by the U.S. Department of Labor's (DOL or Department) Wage and Hour Division. DOL's proposed changes to the overtime regulations will have serious repercussions for IFDA members and their employees, and we strongly urge the Department not to move forward with the proposal.

IFDA is the premier trade association representing foodservice distributors throughout the United States and around the world. IFDA members play a crucial role in the foodservice supply chain, delivering food and related products to restaurants, K-12 schools, hospitals and care facilities, hotels and resorts, U.S. military bases and government facilities, and other operations that make meals away from home possible. The industry generates $382 billion dollars in sales, employs 431,000 people, and operates 17,100 distribution centers in all 50 states and the District of Columbia. In addition, 86% of foodservice distribution companies are family-owned.

I. The Proposed Changes to the Salary Levels in the Proposal are Excessive under the Law, Inappropriate, and Unnecessary

DOL's proposal to increase the minimum salary level for the overtime exemptions under the Fair Labor Standards Act (FLSA) is excessive. The proposal amounts to more than a 50% increase from the final overtime rule adopted in 2019. Specifically, the new proposed regulation will raise the salary threshold from the current $35,568/year ($684/week) to $55,068/year ($1,059/week), at a minimum. In fact, the proposed rule indicates a salary level that will likely be

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much higher at the time the final rule is implemented. In a footnote, DOL states that it expects to use the latest data when implementing the final regulation and projects the threshold to go as high as $60,209 by that time.[1] It is inappropriate for the Department to propose one threshold and leave open the possibility that another will actually be implemented. This creates a moving target that makes compliance unnecessarily challenging. The ambiguity regarding the salary threshold does not give IFDA's members the certainty they need to prepare for—and address—worker shortages, supply chain challenges, and evolving economic conditions.

Since at least the 1940s, DOL has recognized that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously nonexempt employees."[2] In other words, DOL should not set the level so high that it expands the number of employees eligible for overtime beyond what Congress envisioned when it created the exemptions. Yet, this is exactly what DOL proposes in this rulemaking. In particular, in the retail, restaurant, hospitality, and health care industries, all of which are customers of foodservice distributors, there are many employees earning below the annual threshold who have been found exempt under the duties tests both in DOL investigations and by the federal courts. The regulatory history reveals that, in determining appropriate salary levels, DOL has examined actual salaries and wages paid to exempt and non-exempt employees and set the salary level in such a way as to ensure that it serves a screening function and does not operate as a salary-only test. Recent DOL rulemaking recognizes that the FLSA exemptions focus on an employee's duties and not the application of a salary test.[3]

The proposed rule is also at odds with the FLSA itself, which exempts employees based on duties not dollars. The FLSA exempts "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Significantly, the phrase "employee employed in a bona fide ... capacity" emphasizes a focus on the employee's actual duties as performed in the course of his or her employment. The FLSA exemptions focus on an employee's duties, and these exemptions must be interpreted fairly. *See Encino Motorcars, L.L.C. v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (emphasizing that agencies and courts "have no license to give the exemption[s] anything but a fair reading" and rejecting the argument that exemptions should be construed narrowly).

In 2017, the U.S. District Court for the Eastern District of Texas invalidated the salary level in DOL's 2016 final rule because it created (or was expected to create) significant

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[1] DOL projects that, by the fourth quarter of 2023, the salary threshold could be as high as $1,140 per week ($59,285 annualized) and, by the first quarter of 2024, the salary threshold could be as high as $1,158 per week ($60,209 annualized).

[2] Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations*, Part 541, at 7–8 (1949); Harold Stein, *Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541*, at 42 (1940).

[3] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230, 51,238 (Sept. 27, 2019) (codified at 29 C.F.R. 541) (recognizing that salary level is generally "not a substitute for an analysis of an employee's duties," but is, "at most, an indicator of those duties").

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additional costs, disruptions in operations, and dramatic increases in costs for an employer to monitor and ensure compliance.[4] The 2016 rule was explicitly intended to increase the number of employees eligible for overtime. In enjoining the rule, the district court held that "the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed" in the FLSA.[5] DOL accordingly withdrew the rule and promulgated a new rule in 2019. In the new rule, it discussed the district court decision, recognized "the 2016 final rule was in tension with the Act," and emphasized that a "salary level set that high does not further the purpose of the Act, and is inconsistent with the salary level test's useful, but limited, role in defining the EAP exemption."[6] Like the 2016 rule, this proposed rule's increased salary thresholds would make the duties test null and void due to such high salary designations.

Moreover, in the current economic environment, employers continue to struggle to find enough employees and often already pay higher wages to attract and retain a skilled workforce. For example, the latest research on the labor shortage in foodservice distribution shows that 68% of IFDA members faced significant difficulty finding warehouse workers, and 55% faced significant difficulty finding drivers. Accordingly, payroll expenses per employee in our industry have grown nearly 15% between 2019 and 2021 to help keep workers. Increasing the cost of labor even further through this regulation will unnecessarily add to their burdens and have a significant impact on small businesses.

II. The Proposed Rule will Negatively Impact Workers

IFDA members strongly believe employees and employers are best served with a system that promotes optimal flexibility in structuring hours and career advancement opportunities for employees and that offers clear guidelines for employers when classifying employees. Unfortunately, the proposed changes will create problems for both employees and employers. The new regulatory standards envisioned by DOL are likely to cause many employees to be reclassified from exempt to nonexempt, which prioritizes potential pay increases over work-life flexibility and upward mobility for each of these employees.

According to a survey of IFDA members, 73% of respondents expect to reclassify at least some of their employees if the rule is finalized in its current form. As a consequence, employees will lose various advantages many of them currently enjoy. Among these advantages are workplace flexibility and the ability to structure their hours around personal needs (*e.g.*, childcare needs, children's school activities, and medical appointments); status and morale; career advancement opportunities; and preferred benefits.

Furthermore, merely because an employee is eligible for overtime does not necessarily mean they will earn overtime—employers are likely to be increasingly careful about monitoring

[4] Nevada v. U.S. Dep't of Labor, 275 F. Supp. 3d 795, 805–808 (E.D. Tex. 2017).

[5] *Id.* at 805.

[6] 2019 Final Rule, 84 Fed. Reg. at 51,238.

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hours worked.[7] Employees who are reclassified as hourly workers will only be compensated for the hours they work. This means that instead of being able to structure their day around childcare needs, children's school meetings, doctor's appointments, and other personal needs without losing pay, they will lose critical flexibility. While the Department has promoted helping employees balance their work and personal lives, the proposed rule effectively forces millions of employees who currently enjoy these benefits to entirely different work-life considerations that are tightly linked to being on the clock. Employers may no longer allow these employees to work from home or other locations removed from the central workplace since doing so will hinder the employers' ability to track hours worked in an accurate and reliable manner. This may even go so far as employers ceasing to provide electronic devices since using them beyond the specified work hours would require the employee to be compensated.[8]

These concerns are even more pronounced today, given the prevalence of—and preference for—flexible working arrangements in the post-COVID world. Again, to reclassify some of these employees and put them on the clock could jeopardize their ability to work remotely, which has been a boon to many workers and their ability to juggle personal responsibilities such as childcare with their professional obligations.

The proposed changes to the overtime regulations will also likely reduce career opportunities and prevent employee advancement as employees may need to forgo workplace training or other career-enhancing opportunities because the employer is not able to pay overtime rates for that time.

Another negative consequence is that when employees have been reclassified from exempt to nonexempt there is very often a decline in employee morale, as this change is generally seen as a loss of "workplace status." Employees often believe they are being punished or demoted, and some even lose trust that their employer sees them as professionals.

These are just a few examples of how employees will be negatively affected—even if the impacts are unintended—and should be considered by the Department in determining whether to move forward.

III. Automatic Increases to the Salary Levels Every Three Years Should be Rejected

DOL's proposal to establish a mechanism for automatically increasing the compensation thresholds every three years should also be rejected. Historically, and by comparison, Congress has consistently rejected automatic increases to the minimum wage. DOL has also 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. The same reasoning applies to automatic annual salary increases based on inflation. Using the

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[7] *See* Bradford J. Kelley, *Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act*, 34 STAN. L. & POL'Y REV. 261, 307—08 (2023) (explaining that some practitioners have recommended that employers adopt policies completely prohibiting off-the-clock work).

[8] *Id.* (explaining that practitioners have recommended limiting company-provided devices such as smartphones or tablets to exempt employees or configuring an employer's computer systems so that non-exempt employees cannot access company computer systems or use company property after work hours).

proposed methodology to trigger automatic increases and at a set frequency is equally troublesome and could lead to additional unintended consequences, such as rapidly increasing income thresholds. It also effectively penalizing the business community for increasing salary levels, and reducing flexibility for more workers.

More fundamentally, DOL lacks the authority to increase the salary level through an automatic process without notice-and-comment rulemaking, as the Administrative Procedure Act requires. On a practical level, automatic increases to the salary bases would leave businesses in a perpetual state of uncertainty. While IFDA understands and agrees that, from time to time, the salary bases should be adjusted to reflect economic changes and growth, such action should be taken through the regular rulemaking process so all stakeholders have the opportunity to provide feedback and help shape—then adequately prepare for—any changes that will affect them. Indeed, all IFDA survey respondents stated that DOL should evaluate the rule and allow for public comment before updating it in the future. Although notice-and-comment rulemaking takes time and resources, the process is crucial not only for the regulated community but also for the agency when evaluating the impact of its proposal and establishing good and thoughtful policy.

IV. IFDA Opposes Any Changes to the Duties Test

In the proposed rule, DOL states that it "is not proposing any changes to the salary basis or duties test requirements in this rulemaking" but notes that the Department "welcomes comments on all aspects of this proposal." IFDA supports the Department's decision not to address the duties test.

V. Businesses Need More than 60 Days to Comply with the Final Rule

The Department is proposing that a final rule become effective 60 days after it is published. Should the Department finalize a rule, more time will be needed to comply. One hundred percent of our members surveyed prefer that more than 60 days be provided. Businesses will need time to read the final rule, train staff on the changes, conduct pay assessments, and review all job descriptions. If the rule is finalized, the preferred timeframe for implementation varied from 90 days up to 365 days. In fact, DOL acknowledges that 60 days is shorter than the effective dates for its three prior overtime rules, which became effective between approximately 90 and 180 days after those rules were issued. Therefore, DOL should not have an effective date of any earlier than 90 days after a final rule is published.

Conclusion

DOL's proposed revisions would increase the salary level out of proportion to any previous increases. The Department's approach would result in a rapidly escalating salary threshold by skewing the pool of included employees to those with higher and higher salaries. By increasing the salary threshold so dramatically, the likely result of these changes will be that millions of employees will be reclassified from exempt to nonexempt. The proposed rule will also significantly increase operational and compliance costs and burden employees and employers.

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DOL's proposed rule undermines workplace flexibility, hurts career advancement opportunities for employees, and will lead to decreased employee morale. It is also important to emphasize that any rule change now would be ill-advised because of significant concerns regarding workforce shortages, inflationary pressures, supply chain disruptions, and the shifting dynamics of the American workforce following the COVID-19 pandemic.

For these reasons, IFDA urges DOL to withdraw the current proposal. Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

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