



November 6, 2023

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

RE: Regulatory Information Number (RIN) 1235-AA39, U.S. Department of Labor Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

Comments submitted via <https://www.regulations.gov>.

Dear Ms. DeBisschop:

Thank you for accepting these comments.

WafLA is a non-profit 501(c)(6) membership organization comprised of nearly 800 agricultural and seasonal employers. WafLA was formed to make labor stability a reality for all agricultural employers and for farmers and farmworkers to be treated with dignity and respect. We offer ways for our members to access several federal visa programs and receive assistance complying with state and federal labor standards.

We have seen interest and participation in the H-2A visa program grow over the past decade, as our members, agricultural employers, have found it increasingly hard to fill agricultural jobs. In 2022, wafLA filed H-2A applications for more than 200 member employers who collectively employed more than 16,000 individual H-2A workers. In addition, wafLA employer members employed more than 20,000 U.S. workers. We assist farmers with their workers' housing needs and offer human resource training and advice.

Economic Effects of Proposed Regulations on Agriculture

Our country needs a robust food supply and needs farmers and farmworkers to produce that food, especially labor-intensive commodities would not currently be able to grow those crops, which are vital components in our national food security system. Due to the nature of the national and increasingly international agricultural marketplace, farmers are severely limited in their options to pass on increased costs to consumers. Higher labor costs, such as the wage increases proposed by the fees proposed by the Department of Labor in this proposal, contribute to jeopardizing the continued viability of agricultural employment and hampering domestic food production.

Agriculture is unlike many other industries because it involves multiple production variables and requires flexibility in work schedules. The success of agriculture is completely reliant on weather patterns, much more so than any other industry. Because farmers do not typically set their own prices and are subjected to the national and international marketplace, increases in input costs such as labor can squeeze these family businesses perilously close to the edge of going out of business. This situation is especially true at times of low commodity prices. This proposal will have consequences on the ability of some of our members to compete.

Our nonprofit organization is based in Washington state, which has already used state rules to adopt a threshold for salaried exempt workers that is above the federal threshold and will likely remain above even the proposed threshold under these regulations. We also have members in other states, such as Oregon, that currently follow the federal regulations and for whom these proposed regulations would result in cost increases. Just as agricultural employers were concerned when the Washington state government raised the threshold on the state level, those in states affected by this proposal have similar concerns.

These regulations, if enacted, would lead to more salaried workers receiving overtime pay in the agricultural industry nationwide. While the department's own estimates suggest employers involved in agriculture, forestry, fishing, and hunting will not be impacted as much as their counterparts in other industries (see as Tables 9, 25, 26, and 27 in the proposed regulations), the department acknowledges some economic impact.

We believe this proposed change in the salary threshold could have negative consequences for many of our farmers who have managers (including family members) who may be the next generation to take on the tradition, lifestyle, and business of family farming. As stated above, agriculture needs flexibility to deal with changes in natural conditions, and this proposed arbitrarily high threshold impedes that necessary flexibility.

Duties Test

We are pleased to see that the department is not making any changes to the duties test used when determining whether an executive, administrative, or professional exemption can be granted. The current duties test works well. Keeping it unchanged will maintain consistency for employers and workers if this proposal is adopted.

Proposed Salary Threshold

To be exempt from overtime under current federal regulations, executive, administrative, and professional (EAP) workers must meet the duties test and be paid on salary at least \$684 per week. This amount equates to \$35,568 per year. To be exempted as a highly compensated employee (HCE), the worker must earn at least \$107,432 per year.

The department's proposal is to increase the threshold and set the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (\$1,059 per week or \$55,068 annually for a full-year worker). Under the proposal, the HCE threshold would increase to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally, which equates to \$143,988 per year.

This proposed threshold increase is dramatic and quite a jump up for our members, such as those in Oregon, who are following the federal minimum standards. Adopting this new wage threshold all at once would result in a steep and sudden change. The state of Washington has been using a multi-year, phased-in approach to increasing the state-based EAP threshold. If the department is determined to raise the threshold, we suggest using a multi-year, phased-in approach that clearly states the steps for increasing the salary thresholds. This approach would allow employer and employees to know the schedule of the step increases, budget for those increases, and prepare a thoughtful implementation plan.

Automatic Escalator

In this proposed regulation, the department proposes to increase the salary threshold amounts for EAP and HCE automatically every three years. This change, if implemented, will likely affect all of our members, including those in Washington. We oppose this element of these proposed regulations. An automatic escalator inserts additional unknown variables into the employer-employee relationship. Employers and employees need to know with certainty what to count on and not have plan for an unknown and unknowable periodic salary threshold change by the federal government.

Furthermore, the department should undergo rulemaking each time it believes the threshold should be increased. Going through the formal rulemaking process will trigger the economic evaluations necessary to justify the department's proposal. Employers and employees need to know that the department has done sufficient analysis to justify a change to the salary threshold rather than mere reliance on a predetermined factor to serve as an automatic escalator. The department should state its justification and show its analysis each time before it makes EAP and HCE regulatory changes in the future.

Conclusion

Thank you for accepting our comments. Wafla and our members have concerned with this proposal. If the department adopts EAP and HCE threshold increases, we request that those increases be phased in, and we oppose an automatic increase in the EAP and HCE thresholds in future years. We ask the department to reconsider its proposal. Providing more certainty – rather than more unpredictability – is what agricultural employers and farmworkers need in the current economic environment.

Sincerely,



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