



August 19, 2015

## Comments to Proposed Rule

### Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

#### Regulatory Information Number 1235-AA11

Dear Ms. Ziegler,

Thank you for the invitation to submit comments on possible revisions to the **duties test**. The Employers Association of New Jersey (EANJ) is a nonprofit trade association comprised of mostly private sector, non-retail employers in the state of New Jersey, all of which are defined as “Employers” under the Fair Labor Standards Act (FLSA).

EANJ respectfully urges the U.S. Department of Labor, Wage and Hour Division to:

- 1) Not revise the duties test for most employers as an outgrowth of the instant proposal;
- 2) Consider, if necessary, a separate duties test for the retail and restaurant industries instead of imposing a burden on the rest of the economy, particularly on manufacturers;
- 3) Not apply the automatic annual escalator to the salary level without notice and comment, as it violates the Administrative Procedures Act;
- 4) Alternatively, not apply an automatic annual escalator of the salary level to the small nonprofit sector; and
- 5) Alternatively, phase in the automatic annual escalator over a three-year period for all employers.

#### 1. The Duties Test

The Wage and Hour Division (the “Division”) notes in the *Federal Register*, dated July 6, 2015, that a Final Rule may include requiring overtime ineligible employees to spend a specified amount of time performing their primary duty or otherwise limiting the amount of nonexempt work an overtime-ineligible employee may perform. EANJ agrees that at some point, a disproportionate amount of time spent on nonexempt duties may call into question the exempt status of the employee. The Division recognized this issue when it revised and modernized the

duties test in 2004 in conjunction with raising the salary level. The Final Rule promulgated in 2004 recognized that the performance of both exempt and nonexempt duties concurrently or simultaneously did not preclude an employee from qualifying for an exemption. At that time, the Division received over 75,000 comments from a wide range of stakeholders and determined that organizational change, technological enhancements in the workplace and a long line of judicial decisions warranted a modern, workable definition of the duties test. For over a decade, regulators, employers, economists and researchers have been guided by that clear and straight forward definition.

Under the existing rule, “primary duty” means “the principal, main, major or most important duty that the employee performs.” In making a determination “all facts in a particular case” are considered. Further, four nonexclusive factors are considered. They are: “the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the same kind of nonexempt work.”

As the Division noted at the time, the objective, plain language of the duties test that it adopted made the definitions more understandable to employees and employee representatives, small employers and human resource professionals. Further, the prior tests to determine an employee’s primary duties were complicated and required employers to time-test exempt employees for the duties they perform, hour-by-hour in a typical workweek.

Commentary from employees and employee representatives on the current proposal revealed the concern that retail and restaurant employers are either misapplying the primary duty formulation or intentionally abusing it. Thus, many commentators are calling for a 50 percent primary duty “rule of thumb,” similar to the regulation in California. In contrast, retail and restaurant employers do not want to change the definition because it provides flexibility within their specific industries.

For all of the reasons stated above, we urge the Department to not revise the duties test as an outgrowth of the instant proposal.

## 2. A Selective Duties Test

EANJ respectfully submits that whatever systemic mistakes or widespread abuses which may exist in the retail and restaurant industries should not form the basis of changing the rules for the entire rest of the economy. Indeed, the Division notes that raising the salary level will address most concerns about misapplication of the duties test. Thus, a separate rule, if needed, designed to meet the needs of the retail and restaurant industries is a better alternative than causing widespread confusion and disruption for all other employers; not to

mention the cost of familiarization and compliance. Indeed, even without revising the duties test, the Division notes that average annualized direct employer costs associated with the salary level change alone will be approximately \$250 and an additional \$1,500 approximately will be transferred to employees from employers.

EANJ recognizes that roughly 70 percent of Gross Domestic Product of the United States is based on consumer spending. It recognizes that a sustainable economy requires that workers are paid a fair day's pay for a fair day's work. It also recognizes those employees are free to bargain either individually or collectively with employers for higher wages. Some industries are more amenable to bargaining than others. Those that are not, such as the retail and restaurant industries, may require further attention under a separate proposed rule. But for the vast majority of employers and employees, the current duties test has accomplished exactly what the Division set out to do in 2004. It has streamlined the duties test, it has made the test more understandable to employees and employers alike, it has reduced the burden of complex administration and has reduced the amount of litigation. In fact, in the ten years following the 2004 commonsense revision to the duties test, Registered Employee Complaints and Concluded Cases have decreased nearly each year. At the same time, the Back Wage Settlements have mostly gone up. This suggests a more focused enforcement strategy that recognizes that alleged misclassification and/or overtime violations are not spread equally over the entire economy and may be concentrated in a few industries whose business models rely on exempt assistant managers performing nonexempt tasks. <http://www.dol.gov/whd/statistics/statstables.htm> Accordingly, EANJ does not believe that the duties test should be revised at this time for the majority of employers who do not engage in the retail and restaurant sectors.<sup>i</sup>

A selective approach to revising the duties test in a future proposal is also consistent with this proposed rule's main purpose, which is to give working Americans a raise. The same industries that make up the bulk of enforcement activity – retail and restaurant – pay roughly 19 percent lower compensation compared to manufacturers. See Facts About Manufacturing, National Association of Manufacturing (2012). Over the last decade, America's manufacturers have been competing against low wage economies primarily with capital investments in technology and investments in a skilled workforce to increase productivity. As noted, the current streamlined and modern duties test has afforded an easy to understand definition for business and industry. Less money is spent on lawyers and consultants, leaving more resources to invest. In short, the FLSA provides vital worker protections, ensuring that employees who are eligible for overtime receive every cent owed to them. At the same time, the current duties test provides a commonsense standard for employers to apply so that employees are protected. If workers in the retail and restaurant industries are more vulnerable to inadvertent or intentional overtime violations, a separate duties test covering those industries could be

proposed. An administratively complex duties test should not be imposed on the entire economy because of the concerns of discrete industries.

### 3. Automatic Annual Escalator

In the instant proposal, the Department recognizes the unprecedented nature of promulgating the automatic annual escalator to the salary level. While it is true that FLSA does not expressly establish a salary level test and the first salary level was established by regulation in 1938, setting a salary level by regulation is wholly distinguishable from putting that level on an automatic escalator. Indeed, Congress has never directed the Department to establish a salary level (or required limits to the salary level) because the salary level is subject to the Administrative Procedures Act (APA), requiring an economic impact analysis for the Department and the opportunity for public commentary.

The Department has increased the salary level in 1940, 1949, 1958, 1963, 1975 and 2004 through administrative rulemaking. Respectfully, the absence of Congressional authority to establish the salary level without rulemaking does not mean that the Department has such authority to do so. While the Supreme Court of the United States has pronounced a deferential standard of judicial review of *congressional* efforts to structure and accommodate the burdens and benefits of economic life, actions of administrative agencies are given stricter scrutiny. Regarding federal administrative agencies, “[b]oth their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*.” *City of Arlington v. Federal Communications Commission*, 133 S.Ct. 1863 (2013).

In the instant proposal, the Division notes that “automatically updating the salary level will ensure that it continues to be a reliable proxy for identifying overtime-eligible white collar employees, thus reducing one source of uncertainty for employers and employees.” However, unlike the duties test, which is a regulation promulgated under the Department’s administrative jurisdiction, the salary level is an economic regulation. The Department recognized that it lacked authority in 2004 to establish an escalator without rulemaking. The law proscribing the actions of federal agencies has not changed since then. As a regulation which is expressly economic in nature, raising the salary level (or lowering it, for that matter) requires notice and commentary. Respectfully, competing regulatory priorities and the time sensitive nature of notice and comment rulemaking is not an excuse for acting outside the scope of statutory authority. While acting in the name of efficiency, the proposed escalator violates due process of law.

Moreover, the escalator clearly impairs the ability of employers and employees to bargain, collectively or otherwise, for wages and the contributions made to fringe benefits that are

dependent on wage levels. Certainly, Congress has the authority to regulate interstate commerce with the Fair Labor Standards Act. *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). With the FLSA, Congress prevents states from using substandard labor practices to their own economic advantage through interstate commerce. Thus, the FLSA prevents states from racing to the bottom. 312 U.S. at 115. But the FLSA has preserved the liberty of employers and employees to bargain over and to adjust their economic relations with one another. Equally axiomatic, is the principle that administrative agencies must adhere to due process standards when exercising their authority to promulgate regulations. The notice and comment requirements of the APA meet this standard. Where a regulation purports to set the wages between employer and employee, it most certainly requires notice and comment. Accordingly, the Department should adhere to its past practice of not raising the salary level with an automatic escalator.

#### 4. Nonprofit Organizations

If the Department does not follow the Administrative Procedures Act as recommended above, it should at least relieve the financial burden of the automatic escalator on small nonprofit organizations.

EANJ has about 250 nonprofit employers that are “employers” under the FLSA. For them, the automatic annual escalator of the salary level is excessively burdensome. Budgets, including payroll expenses, are fixed by government or foundation grants. Further, middle class employees in the nonprofit sector often enjoy more flexibility in their schedules to compensate for modest salary increases. Many nonprofit employers are also subject to agreements mandating annual escalators, thus giving a union a role in providing value to employees. As such, the automatic annual escalator of the salary level doesn’t work for the nonprofit employer, who year-in and year-out must provide essential services with less money from constricting government budgets. Thus, EANJ respectfully urges this part of the proposed rule not be applied to nonprofit organizations as defined by section 503(c)(3) of the Internal Revenue Code and that derive at least seventy percent of annual operating revenue from government grants, foundations or other donors. This sensible rule would apply to nonprofit organizations that provide vital services within local communities and not to large nonprofit institutions such as hospitals, universities and health insurance companies or to other nonprofit organizations such as trade associations or political action committees.

#### 5. Automatic Escalator Phase In

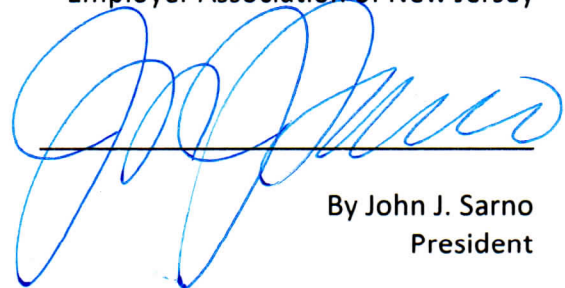
Again, if the Department does not follow the Administrative Procedures Act, the automatic escalator should be phased in for all employers to relieve some of the economic impact. In 2004, the national salary level was established at approximately the 20<sup>th</sup> percentile of full-time salaried workers. In the instant proposal, it is established at the 40<sup>th</sup> percentile - \$941 per week – or a one hundred percent increase. The Division notes that this dramatic increase is

necessary to correct the lower level salary “long test” with a duties test based on a less rigorous “short” duties test. However, because of the outdated salary levels, the long test fell into disuse. According to the Division, doubling the national salary level will ensure that the salary threshold serves a more clear line of demarcation between employers who are entitled to overtime and those who are not and will reduce the number of *white collar employees* who may be misclassified (emphasis added). In short, according to the Division, setting the salary level as the 40<sup>th</sup> percentile of full-time salaried workers places it far above the minimum wage to provide an effective means of screening out workers who should be overtime protected.<sup>ii</sup>

It is clear that the proposed salary level threshold and the express trade off of using the short test is designed primarily to increase the salaries of workers in the service sector of the economy. In other words, if the service sector wants the continued benefits of the short test, which are simplicity and less litigation, it must also accept the higher salary threshold. That is the deal that the Department of Labor has essentially offered, as the prospect of going back to an onerous duties test – anathema to the service sector - hangs over the entirety of the instant proposal. It could well be true that working Americans in the service economy deserve a raise but fundamental fairness requires a longer period of time before automatic escalation. Accordingly, EANJ respectfully suggest that the salary escalator simulate a collective bargaining agreement that pays salary increases in three-year increments. In this way, the service sector can enjoy the predictability of a union shop.

Respectfully submitted,

Employer Association of New Jersey



By John J. Sarno  
President

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<sup>i</sup> A focused enforcement strategy first outlined in a May 2010 report by Boston University Professor David Weil, “Improving Workplace Conditions Through Strategic Enforcement,” proposed allocating enforcement resources to cover restaurants, hotels and motels, and retail establishments.

<sup>ii</sup> Currently, approximately 75 percent of the white collar employees who do not meet the current duties test earn less than the proposed salary level threshold of \$921 per week. About 78 percent of all exempt workers earn about \$921 per week