September 22, 2017

Submitted via regulations.gov

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

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Request for Information (RIN 1235-AA20)

Dear Ms. Smith:

Argentum 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).

About Argentum

Argentum is the leading national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Argentum member companies operate senior living communities offering assisted living, independent living, continuing care, and memory care services to older adults and their families. Since 1990, Argentum has advocated for choice, independence, dignity, and quality of life for all older adults.

Many of Argentum's members employ workers who qualify for exempt status under the new and longstanding regulations defining and delimiting executive, administrative, professional, outside sales, and computer employees. Employers and employees throughout the senior living industry have come to rely on the new definitions of exempt job categories, which promote flexibility in setting hours and promoting career advancement opportunities for employees, while helping to avoid misclassification errors by employers.

Argentum filed comments opposing the Department's 2016 Rule that would have radically increased the minimum salary threshold for the white collar salary exemptions. That rule has now been struck down by a federal district court in *State of Nevada, et al. v.*

U.S. Department of Labor.[1] It is therefore incumbent on the Department to rescind the invalid rule and replace it with a new salary standard that is consistent with the court's ruling and with Congressional intent.

Background

Argentum supports the Department's decision to revisit its 2016 changes[2] to the regulations defining and delimiting the executive, administrative, and professional exemptions in Section 13(a)(1) of the Act.[3] The 2016 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 district court held that the high $913 salary level violated Congress's intent and exceeded the Department's authority to set the minimum salary level "as a floor to screen out the obviously nonexempt employees."[4] As the court further stated, 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)."[5] The court found that it would consistent with Congress's intent to set the minimum salary level "somewhere near the lower end of the range of prevailing salaries."[6]

With this background in mind, Argentum responds below to the eleven specific groups of questions listed in the Department's request for information:

.

1. The Department Should Return To The 2004 Methodology For Determining The Standard Salary Level

At the outset, the Department has asked for comments on various proposed methodologies for setting the standard salary level. In response, Argentum supports application of the Department's 2004 methodology to any proposed increase in the standard salary level. In 2004, the Department set the minimum salary level at an amount which at that time represented the 20th percentile for salaried employees in the lowest paid South geographic region and retail industry.[7]

There was no justification for the decision in the 2016 Rule to increase the minimum salary to the 40th percentile for salaried employees. This error was compounded by the Department's expansion of the "South region," which in 2004 was limited to states with lower than average median incomes, to include for the first time the entire current South Census Region, which includes three states (Maryland, D.C., and Virginia) in the top 10 for median incomes in the entire country. The wage standard selected in 2016 was also

---

[1] CA No. 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).
[2] 81 FR 32391 (May 23, 2016) ("2016 Final Rule").
[3] 29 U.S.C. § 213(a)(1); 29 C.F.R. Part 541.
[4] *Nevada*, 2017 WL 38377230 at *7, *citing* Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949), at 7-8.
[5] *Id.*
[6] *Id*.
[7] 2004 Final Rule at 22167-68 & Table 2.

inflated by no longer limiting the rate to the 20th percentile of retail employees in the South region, and by improperly including in the data set the salaries paid to doctors, lawyers, teachers, and outside sales employees.

Returning to the methodology used in 2004 provides for the greatest degree of consistency with the statute and the district court's decision in *Nevada v. U.S. Dept. of Labor*. The district court also indicated that adjusting the 2004 data for inflation would be consistent with the Act, and Argentum has no objection to this alternative approach.

The Department's request for information also asks whether using either of the methods above would require changes to the standard duties test, to which Argentum replies in the negative. The 2016 rule wrongly claimed that the 2004 methodology was "mismatched" with the standard duties test, after the previous long and short tests were eliminated. Contrary to the 2016 rule, the standard duties test adopted in 2004 was more rigorous than the old short duties test. Any return to the previous short or long duties tests would impose significant new monitoring requirements and recordkeeping burdens.

2. The Department Should Not Adopt More Than One Standard Salary Level.

In response to the Department's second set of questions, Argentum opposes adoption of more than one standard salary level in any new rule. Regardless of whether multiple levels are adopted based on census regions, size of employers, state, metropolitan statistical area, or some other method**,** the end result would be the same: the minimum salary rule(s) would become hopelessly complicated and burdensome for employers generally, and for senior living employers in particular. New types of class action litigation would surely arise, questioning each employer's designation of its employees as exempt based upon the new geographical or industry-based categories. The Department has rejected previous proposals of multiple standard salary levels for more than 75 years. No legitimate purpose is served by departing from that precedent now.

3. The Department Should Not Impose Different Salary Levels By Exemption.

For similar reasons, there is no need for the Department to increase the complexity of the salary level standard by imposing different levels for executive, administrative and professional exemptions. The exemption regulations have not included different salary levels by exemption for more than 30 years, and the lines of demarcation between the various EAP exemptions are by no means clear, particularly in senior living communities.

4. The Department Should Not Return To Pre-2004 Short and Long-Test Salary Levels.

As noted above, Argentum opposes any return to pre-2004 methodologies and divisions between short and long job duties tests. In response therefore to the Department's fourth set of questions asking which job duties test the salary level should be matched to, the answer is that the new salary level should be matched to the standard duties tests adopted in 2004. Nor should there be any change to the concurrent duties test of the 2004 rule. In senior living communities, front line managers often perform supervisory and non-supervisory duties concurrently, and such functions should not jeopardize their exempt status.

5. The Salary Level Should Remain A Proxy For Exempt Job Duties.

Responding to the Department's fifth set of questions regarding the merit of the 2016 rule's increased salary level, Argentum agrees with the district court's holding in *Nevada v. Department of Labor* cited above, The court correctly found that the radically increased salary level adopted in the 2016 Rule unlawfully eclipsed the duties test in determining exempt status, resulting in 4.2 million employees being removed from exempt status, "irrespective of their job duties and responsibilities."[8] Because the 2016 rule has been found unlawful and permanently vacated by the court, the Department must rescind it.

6. Only A Small Percentage Of Argentum's Members Implemented The Unlawful 2016 Rule Prior To Its Being Enjoined.

In response to the Department's sixth set of questions asking for compliance data connected to the abortive 2016 Rule, Argentum has surveyed its membership and concluded that only a relative few (less than 30%) of the senior living employer members of the association implemented changes in 2016 to comply with the increased salary threshold. The overwhelming majority of Argentum's members did not comply until the last possible moment because of the significant burdens and costs of doing so, and the district court injunction relieved the employers of any such obligation.

Those senior living association members who chose to comply with the 2016 Rule encountered a range of adverse impacts, including increased costs, loss of flexibility, and negative impacts on employee morale. Based on this experience, the sizable majority of Argentum's members remain concerned that any attempt to impose the 2016 Rule, or anything like it, will have an adverse impact on the senior living industry and should not be adopted.

[8] 2016 Final Rule, 81 FR at 32405.

7. The Department Should Not Adopt A Duties-Only Test.

The Department has asked whether it should eliminate the salary level entirely and rely on a duties-only test for the EAP exemption. Argentum opposes this approach because senior living employers have over the decades found the salary test to be a useful tool to exclude obviously non-exempt employers from the exemption. A different approach is more likely to create confusion and increase litigation with no attendant benefits.

8. **Absent Rescission, the 2016 Rule Would Result In Virtual Elimination Of The Executive Exemption For Senior Living Supervisors In Several Regions Of The Country**.

In response to the Department's question whether the 2016 Rule might exclude entire job classifications from previously exempt status if allowed to take effect, Argentum members believe that is the case. In particular, as stated in Argentum's 2016 comments, Argentum members believe that virtually all of their supervisory positions in the deep South, parts of the Midwest, and other rural states would lose their exempt status under the 2016 rule, even though their job duties are substantially identical to similar positions held by exempt employees in New York and California.

9. The Department Should Allow Employers To Use All Non-Discretionary Compensation To Meet Any New Salary Levels For Exempt Status.

Exempt employees are more likely than non-exempt employees to receive bonuses and commissions in senior living communities. The 2016 rule recognized that bonus and incentive pay is an important component of employee compensation in many industries, including health care, but arbitrarily restricted bonuses to 10 percent of compensation in determining exempt status. The 2016 rule also counted only those bonuses paid quarterly or more frequently, excluding all annual bonuses. There is no rational justification for these restrictions on recognition of bonuses and incentives in exempt employee compensation, and such methods of payment should be fully credited.

10. The Highly Compensated Salary Test Should Be Kept At Its Current Level.

As noted above, Argentum's members desire simplicity in any new salary level that is adopted by the Department. This should be true for highly compensated employees as well as those who are exempt for other reasons. There was no rational reason for the 2016 rule to increase the highly compensated salary level for EAP employees, since the previous salary of $100,000 was sufficient to ensure that only bona fide EAP employees qualified for exempt status.

11. The Department Should Not Impose Indexing Of The Salary Level Test.

Argentum opposes adoption of any form of automatic indexing of the salary level test. As the Department itself found in 2004, Congress did not intend the salary level test to be indexed, as evidenced by the fact that Congress has never provided for automatic increases of the minimum wage or other exemptions to the FLSA.

Conclusion

For all of the foregoing reasons, the judicially vacated 2016 rule should be immediately rescinded and replaced by a salary level that is consistent with the court's ruling. The new salary standard should be established by applying the same methodology that was adopted by the Department in 2004, and other aspects of the 2016 rule should be reconsidered and rejected for the reasons set forth above.

Respectfully Submitted,

James Balda
President & CEO
Argentum