



ARGENTUM
EXPANDING SENIOR LIVING

AMERICAN
SENIORS
HOUSING
ASSOCIATION
Living Longer Better

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: RIN 1235-AA20, Comments on DOL's Notice of Proposed Rulemaking on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith:

Argentum and the American Seniors Housing Association (ASHA) hereby submit the following comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced Proposed Rule published in the *Federal Register* on March 22, 2019, at 84 Fed. Reg. 10900.

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.

About ASHA

The American Seniors Housing Association (ASHA) is a national organization of over 500 senior living providers involved in the operation, development, investment, and financing of the entire spectrum of seniors housing – independent living, assisted living, memory care, and Continuing Care Retirement Communities (CCRCs). Our members' communities are home to a wide range of seniors, including those who live independently as well as those who require varying degrees of assistance with activities of daily living (ADL) such as eating, bathing, and dressing. Our members also offer memory care housing choices for those seniors with Alzheimer's and related dementia.

Background

Argentum and ASHA 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 was struck down by a federal district court in *State of Nevada, et al. v. U.S. Department of Labor*.¹ We further commented in response to the Department's July 2017 Request For Information (RFI) regarding possible changes to the 2016 Rule. At that time, Argentum and ASHA urged the Department to rescind the 2016 Rule and replace it with a new salary standard that is consistent with the court's ruling and with Congressional intent.

Argentum and ASHA now support the Department's decision to rescind the 2016 Rule in its entirety. 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."² 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)."³ The court found that it would be consistent with Congress's intent to set the minimum salary level "somewhere near the lower end of the range of prevailing salaries."⁴

With this background in mind, Argentum and ASHA comment below on the specific proposals contained in the Department's NPRM:

¹ CA No. 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

² *Nevada*, 2017 WL 3837230 at *7, citing Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949), at 7-8.

³ *Id.*

⁴ *Id.*

1. Argentum and ASHA Support The Department's Adoption Of The 2004 Methodology For Determining 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.⁵ 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. That Census Region includes three states (Maryland, D.C., and Virginia) which are in the top 10 for median incomes in the entire country. The wage standard selected in 2016 was also 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 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.

Argentum and ASHA's only concern about the Department's methodology is its continued inclusion of the three high paid mid-Atlantic states of Maryland, D.C., and Virginia in a calculation which is supposed to be restricted to the lowest paid region of the country. If those three states were excluded using the proper 2004 methodology, the resulting minimum standard would fall below \$35,000. It is also of concern to Argentum and ASHA, many of whose members are small businesses, that the proposed minimum has not been rounded down to the nearest thousand dollars, rather than adopting the confusing and hard to remember minimum of \$35,308. For both reasons, Argentum and ASHA advocate a new minimum salary standard no higher than \$35,000. It is also important that the DOL allow for a reasonable phase-in period to accommodate employers who must reclassify and/or adjust compensation and systems to comply with new rules.

2.. DOL Should Maintain The Current Duties Test

The FLSA provides for an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional (EAP) and

⁵ 2004 Final Rule at 22167-68 & Table 2.

outside sales employees. In order for the exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

We support the Department's decision to maintain the current duties test for this EAP exemption. This standard is well established and understood by the industry and employees and should not be changed.

3. 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 Department's new proposal regrettably continues to adhere to the 10 percent cap on bonuses. Argentum and ASHA urge the Department to remove the cap entirely, or at least to raise the cap up to 25%, in order to reflect the realities of many exempt workers.

The 2016 Rule also counted only those bonuses paid quarterly or more frequently, excluding all annual bonuses. There was no rational justification for these restrictions on recognition of bonuses and incentives in exempt employee compensation, and Argentum and ASHA applaud the Department's proposal to allow crediting of bonuses paid quarterly, semi-annually, or annually. We note, however, that the proposal lacks a meaningful safe harbor for inadvertent errors in calculating the impact of incentive payments on the minimum salary. Small businesses should be given more time to correct such unintentional errors, so that the exemption is not lost for an entire year solely due to a failure to catch such an error within the first pay period after an annual incentive payment.

4. The Highly Compensated Salary Test Should Be Maintained At Its Current Level.

As noted above, Argentum and ASHA'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 we believe the current salary level of \$100,000 is sufficient to ensure that only bona fide EAP employees qualify for exempt status. Certainly, no valid reason exists to increase the highly compensated salary threshold above the excessive standard set by the 2016 Rule. Further, the proposed increase to \$147,414 reflects close to a 50% increase, which is unnecessary.

5. The Department Correctly Decided Not To Impose Indexing Of The Salary Level Test, But Should Not Commit Future Department Leaders To Abide By A Rigid Timetable for Updating the Rule.

Argentum and ASHA opposed the 2016 Rule's adoption 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.

Now the Department is proposing to commit the Department to revisit the salary levels every four years. Argentum and ASHA submit there is no need to attempt to impose a rigid four year requirement because the Department is free to revisit the salary level whenever there is good reason to do so. By making a firm four-year commitment to engage in further rulemaking in the final rule, the Department will increase the chances of new legal challenges if the commitment cannot be met, whether because of operational issues or changed circumstances. However, we support the Department's intention to seek stakeholder and public input through a rulemaking process before imposing new salary threshold increases.

Conclusion

For all of the foregoing reasons, the judicially vacated 2016 Rule should be replaced by a salary level no higher than \$35,000. That standard would be consistent with the court's ruling, would adhere to the 2004 methodology, and would be rounded down for ease of use. Bonus incentives should not be capped and should be more flexibly allowed, with a better safe harbor for inadvertent mis-calculations. The highly compensated salary standard should be maintained at the current \$100,000 level.. Finally, neither indexing nor a commitment to four-year rulemakings should be imposed on future Departments. However, any such review of the salary threshold should allow for a rulemaking process to solicit stakeholder input.

Finally, we request the Department to expedite completion of this long-awaited rulemaking and allow for a rational phase-in period for employers. The regulated community has been uncertain as to how to compensate exempt employees for too long. This rule will impact our industry in a significant way and require adequate time to make the necessary adjustments.

Thank you for consideration of these comments.

Respectfully submitted,



James R. Balda
President & CEO
Argentum



David S. Schless
President
American Seniors Housing Association