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Ms. Amy DeBisschop
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-AA39, Comments on DOL's Notice of Proposed Rulemaking on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 88 Fed. Reg. 62152 (Sept. 8, 2023).

Dear Ms. DeBisschop:

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 Sept. 8, 2023, at 88 Fed. Reg. 62152.

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.

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

Many of Argentum's and ASHA's members employ workers who qualify for exempt status under 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 these 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 and ASHA members collectively represent over 75% of professionally managed senior living communities in the United States. Throughout the COVID pandemic, all senior living operators experienced significant operating losses and increased care expenses exceeding $30 billion, of which less than $2 billion was reimbursed by government relief programs such as the CARES Act Provider Relief Fund.

Despite these historic losses, senior living providers increased wages significantly at the non-exempt employee level in order to retain these employees and hired thousands of additional employees to meet the challenging resident care needs associated with COVID and other associated supportive services. In fact, our industry is now finally weaning itself off of agency staffing, which at times was the only available source for workers. Wage increases for non-exempt and exempt employees continue as a result of the significant demand for labor that will only increase in the coming years. The aging demographics of our country demand that we be ready for those who will need our care services. We know that the number of older adults turning 75 will exponentially increase. We also know that 70% of these older adults will need some form of long term care services and support. We must pursue policies that will ease the burden of those providers who are working tirelessly to serve this population today and incentivize those who will be in great demand as our population ages.

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] 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 213(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]

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[1] CA No. 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).
[2] *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.
[3] *Id.*
[4] *Id*.

After the 2016 Rule was invalidated, the Department promulgated a new rule in 2019 which raised the salary threshold to the current $684 per week or $35,568 annually and increased the HCE to its current $107,432 per year. Argentum and ASHA supported the methodology underlying the Department's 2019 rule.

The newly proposed rule, however, exceeds even the unlawful 2016 Rule and should be withdrawn for the reasons set forth below. The Proposed Rule would increase the salary level by nearly 70 percent, from $35,568 annually to at least $55,068 and up to $60,209 (as indicated in footnotes to the proposal); and would increase the highly-compensated exemption ("HCE") from $107,432 per year to $143,988 per year (an increase of 34 percent). The Proposed Rule also seeks to include another indexing proposal, notwithstanding that similar indexing was found unlawful by Judge Mazzant as part of the 2016 Rule.

As further set forth below, Argentum and ASHA submit that the Proposed Rule fails for the very same reasons found to nullify the 2016 Rule, *i.e.*, because the proposed increases are so extreme that they essentially eliminate the duties tests.[5]

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

1. DOL Should Recognize How the Pandemic Has Changed the Workplace and Workforce.

As indicated above, the pandemic has changed the workforce dynamics in many ways and the senior living industry is front and center in this evolving environment to ensure we can attract and retain the best people to serve our seniors. They must be reliable, kind, smart and possess the compassion to care for older adults who rely on them at the most vulnerable stage of their lives. The Proposed Rule constitutes bad policy at a time when employers and employees are adapting new and innovative approaches in staffing to meet these needs. The demands for more flexibility in schedules and higher wages that was introduced during the pandemic are now a necessary component in business operations. To layer on top of these current market-driven adjustments in the workplace an unmanageable, unnecessary and costly increase in the salary thresholds will place at risk the meaningful changes that are already occurring in our industry.

The Proposed Rule also increases the likelihood of wage discrepancies based on regional differences and limits career advancement opportunities and will provoke declines in employee morale among workers who seek such opportunities. Many currently exempt employees who will need to be reclassified as non-exempt under this proposal will perceive the change as a reduction in prestige and cause a reduction in morale. Further it is likely that many employees who are currently exempt and do not have to record time off for doctor's appointment or childcare needs and emergencies, will be forced to account for such time out of the office, thus creating a negative impact on their financial stability.

[5] *See Nevada v. U.S Department of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

2. Argentum and ASHA Strongly Oppose The Department's 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.[6] 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 included three states (Maryland, D.C., and Virginia) which are in the top 10 for median incomes in the entire country.

The Proposed Rule again adopts a methodology that fails to account for regional differences, and fails to adhere to the salary level's historic function of screening obviously non-exempt employees from the exemption.[7] This principle has been at the heart of the Department's interpretation of the EAP exemption for over 75 years.[8] The Proposed Rule makes the salary test, in effect, the sole test for exemption, greatly limiting the ability of employers to avail themselves of the EAP exemptions.

This methodology is particularly onerous in the health care industry, in which many employers including members of Argentum and ASHA are unable to justify the types of salary increases needed to qualify for exempt status. This is so because the Proposed Rule fails to acknowledge or address the capped nature of reimbursements from Medicare, Medicaid, and private insurance.

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 and 2019 rules 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 percent, in order to reflect the realities of many exempt workers.

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.

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[6] 2004 Final Rule at 22167-68 & Table 2.
[7] *See* 88 Fed. Reg. 62,167 and 62,195.
[8] *Id.*

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

Argentum and ASHA's members desire simplicity in any new salary level that is adopted by the Department. This should especially be true for highly compensated employees as well as those who are exempt for other reasons. There was no rational reason for the Proposed Rule to increase the highly compensated salary level for EAP employees, since we believe the current salary level of $107,432 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 $143,988 reflects a 34 percent increase, which is unnecessary. Increasing the HCE threshold, which in effect increases the gap between the standard salary threshold and the HCE threshold, will require employers to dedicate significant resources on administrative, human resources, and legal efforts to determine more precisely whether an employee meets exempt status, defeating the primary purpose of the HCE exemption.

5. The Department's Proposal to Impose Indexing of the Salary Level Test Is Unlawful and Should Be Withdrawn.

Argentum and ASHA strongly oppose the Proposed 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.

Conclusion

For all of the foregoing reasons, the flawed Proposed Rule should be withdrawn and replaced by a rule that sets the salary level no higher than the 20% threshold in the lowest income states. Bonus incentives should not be capped and should be more flexibly allowed, with a better safe harbor for inadvertent miscalculations. The highly compensated salary standard should be maintained at the current level. Finally, the salary levels for both should not be indexed. Any such review of the salary threshold should allow for a rulemaking process to solicit stakeholder input and closely reflect current economic conditions. Finally, if the Department moves forward with this rule, we request it include a rational phase-in period for employers.

Thank you for your consideration of these comments.

Respectfully Submitted,

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