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MEMORANDUM

September 20, 2019

TO: JOSHUA GRICE, EMPLOYMENT STANDARDS PROGRAM MANAGER
DEPARTMENT OF LABOR AND INDUSTRIES
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FROM: BOB BATTLES, GENERAL COUNSEL, ASSOCIATION OF WASHINGTON BUSINESS

DAN THIEME, LITTLER MENDELSON, P.C.

RE: AWB Comments on Proposed Rule re Executive, Administrative, and Professional ("EAP") and Outside Salesperson Exemptions
(CR-102 Published at WSR 19-15-035; continuance of WSR 19-12-102)

Thank you for the opportunity to respond to the Department's proposed rule. We appreciate the Department's consideration of the perspective of the business community throughout this rulemaking process.

AWB objects, in the strongest terms possible, to the proposal to increase the minimum salary level far above the expected new FLSA salary minimum, and well above any other jurisdiction in the country, ramping to 2.5 times Washington minimum wage (and 3.5 times Washington minimum wage for hourly-paid computer professionals), and incorporating upward-only CPI adjustments.[1] This proposal is not supported by the record (which is inadequate in any event to support any action other than to conform the Washington regulation to the FLSA), is not legally permissible, and if adopted is likely to result in litigation invalidating the final rule. Even if it could be legally justified, the proposal is bad public policy.

AWB also objects to the Department's failure to await the conclusion of the pending federal DOL salary basis rulemaking. As reported by Bloomberg, the federal DOL proposed final salary basis rule has cleared White House review and is expected to be published soon. The Department is legally obligated to justify in its cost-benefit analysis any differences between its own rule and the parallel federal law. There is no legally sufficient justification for these

[1] As the Department is aware, the Washington minimum wage adjusts up when the CPI increase but does not adjust down when the CPI decreases.

differences, particularly if the Department acts even before it knows what the new federal standard will be.

AWB also objects to the three other respects in which the proposed rule deviates from the FLSA: the lack of a highly-compensated employee exemption; the requirement that exempt outside salespeople must be compensated on a guaranteed salary, commission or fee basis, and be advised of their status as outside sales employees; and the requirement that professionally-exemption teachers must be paid on a salary or fee basis. The record lacks the mandatory substantial evidence that these differences from federal law are necessary to achieve the general goals and specific objectives of the Washington overtime exemptions. AWB strongly supports the fact that the proposed regulation would bring the Washington duties tests into conformance with the FLSA duties tests in all other respects.

INTRODUCTION

AWB's views are based on current law and precedent and stand on five historical foundational principles embedded in the Washington Minimum Wage Act (WMWA) and the state APA.

First, the scope of these regulations is limited by the statute. From the time of its enactment in 1959, the WMWA has exempted from its coverage any "individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson." RCW 49.46.010 (3)(c).[2] The Department only has authority to "define and delimit" those statutory exemptions, not to rewrite them.

Second, the Department has no authority to deviate from the Washington Legislature's intent that the Washington EAP exemptions should mirror the FLSA EAP exemptions. When enacted in 1959, the WMWA was based directly on the FLSA. *Peterson v. Hagan*, 56 Wn.2d 48, 56 (1960). From then until today, Washington's statutory EAP exemptions – "executive, administrative, or executive capacity, or in the capacity of outside salesperson" – have been identical to the statutory FLSA EAP exemptions. *Cf*. RCW 49.46.010 (3)(c) *with* 29 U.S.C. § 213(a)(1). Appropriately, the Department's regulations in this area have reflected the legislature's intent to mirror the FLSA. The Department's EAP regulations, adopted in 1976, are materially identical to the FLSA regulations that were in effect at that time. *See* Washington Dep't of Labor & Indus. Admin. Policy ES.A.9.2, p.2 (July 15, 2014) ("Washington state overtime regulations generally follow the pre-August 23, 2004 federal overtime regulations").

Third, consistency between state and federal law benefits both employers and employees. Employers, and particularly small employers, struggle to keep up with the increasingly complex

[2] The Washington exemption language was recently amended to change "salesman" to "salesperson." It has remained otherwise unchanged since 1959.

employment regulatory environment. Consistency between state and federal law greatly assists employers in understanding their obligations and enhances interstate uniformity and the State's economic competitiveness for economic development. This is especially true for Washington's rural and border communities. Compliance and uniformity – not mistakes or disputes created by differing, confusing or less competitive standards – is in everyone's interest.

Fourth, regulations should be amended only to the extent there is a demonstrated *need* for change. The Department's CR-101 stated the purpose of this rulemaking was to "restore appropriate function to the exemption rules" but then makes the unsubstantiated conclusory assumption that the exemptions "currently exempt more workers than originally intended." The Department acknowledges that these proposed regulations are a "significant legislative rule" as defined by RCW 34.05.328. But the Department does not appear to acknowledge the obligations that arise from that statute. Preliminarily, the Department must make a determination that any rule is "***needed***." RCW 34.05.328(1)(b). Stakeholder comments have provided no basis for the Department's assumption that the existing exemption regulations are exempting more workers "than originally intended." While the Washington EAP salary levels are largely irrelevant, there is **no** evidence this has resulted in workers being exempted who are not performing exempt work. Virtually all employers are covered by the FLSA and must comply with the higher federal salary minimum. Regardless of salary level, a worker qualifies for exemption ***only if*** performing executive, administrative, professional or outside sales work, thereby ensuring that the intent of the regulations is respected regardless of salary level; there has not been the slightest showing that the higher salary level is "needed" to effectuate the purposes of the exemption.

Fifth, APA cost-benefit rules require evidentiary justification for deviations from federal law. The APA requires that any deviations be justified by substantial evidence that the difference is necessary to achieve the general goals and specific objectives of the Washington overtime exemptions. Neither the record nor the Department's cost-benefit analysis provide substantial evidence justifying the proposed rule.

AWB'S RESPONSES TO THE DEPARTMENT'S PROPOSED RULE

A. The Department Should Not Promulgate Proposed Amendments Prior to the Soon-to-be-Issued Final Rule by the U.S. Department of Labor.

The United States Department of Labor is on the verge of issuing a new final rule addressing the minimum compensation levels required for the white collar exemptions under federal law. The DOL issued its notice of proposed rulemaking on March 21, 2019, proposing to increase the minimum salary under the FLSA to $679 per week (equivalent to $35,308 per year), and the total annual compensation requirement for "highly compensated employees" (HCE) to

$147,414 per year. Fed. Register 2019-04514. The DOL sent its proposed final salary basis rule to the White House on August 12, 2019 for final review before publication, and that review was concluded earlier this week. Since nearly all Washington employers must comply with the U.S. DOL's new rule, the new rule will effectively address issues the Department raised in its pre-rule process. There is no need for the Department to create extreme variances between state and federal law that are unnecessary, at odds with Washington legislative intent, and will impose significant costs and negative consequences on both employers and employees. All of our comments below apply with equal vigor to this issue.

After the U.S. DOL issues its final rule, the Department should propose adopting the new U.S. DOL amendments, plus those from 2004 that were not added in Washington when the U.S. DOL updated its rules that year.

B. The Proposal to Make the Salary Threshold a Super Minimum Wage Is Unlawful, Not Supported By the Rule-Making Record, Has Not Been Assessed Though a Valid Cost-Benefit Analysis, and Is Poor Public Policy.

The Department's proposal to convert the salary threshold test to a super minimum wage (a multiple of the state minimum wage), and thereby control salary levels for exempt employees or force otherwise exempt employees to be paid as non-exempts, is fundamentally flawed.

The Department does not have authority to establish a super minimum wage salary level based on generally prevailing wage or salary levels, or on policy views about how much salaried employees "should" make. The minimum salary level must be based on a factual determination that employees paid less than some minimum salary are virtually certain not to be performing exempt duties, such that further review of that employee's duties is unnecessary. Said another way, a minimum salary can only be a proxy for a more detailed examination of an employee's duties, not as a vehicle to exclude significant numbers of employees from the statutory exemptions when they are, in fact, performing exempt duties. *See Nevada v. United States DOL*, 275 F. Supp. 3d 795, 805 (2017) (invalidating 2016 FLSA salary level regulation on the basis that the U.S. Department of Labor, whose regulatory authority on this issue is identical to that of the Department's, was "limited by the plain meaning of the words in the statute," specifically, "limited to determining the essential qualities of, precise signification of, or marking the limits of those '*bona fide* executive, administrative, or professional capacity' employees who perform exempt duties and should be exempt from overtime pay."). The Department's proposal to set a minimum exempt salary of 2.5 times the state minimum wage (and 3.5 times for hourly computer workers) is a purely legislative determination that has no relationship to the purpose of determining whether a worker is working in a "*bona fide* executive, administrative or professional capacity."

Further, the Department has acknowledged that the available Washington State wage data is not differentiated between exempt and nonexempt work. As such, the Department cannot estimate what salary levels are being paid in the Washington economy to employees performing *bona fide* exempt duties. There is thus no factual basis for a finding that employees paid a salary below 2.5 times the state minimum wage will not be performing *bona fide* exempt duties, particularly in the less affluent areas of the state. Indeed, throughout this process the Department has been unable to identify the number of employees who are in fact[3] performing the duties of an executive, administrative or professional employee, but will nonetheless be denied -- solely through the Department's administrative action -- the exemption allowed by the Legislature.

The proposed super minimum wage is also contrary to the Washington Legislature's intent that the Washington EAP exemptions should mirror the FLSA EAP exemptions. It would be invalid for that reason as well.

In addition, these factors have made it impossible for the Department to prepare a valid cost benefit analysis to support the proposed regulation, as required by RCW 34.05.328.

RCW 34.05.328(d) requires that the cost-benefit analysis must:

> (d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

The Department's cost-benefit analysis fails this test. For example, the record contains no data on the following subjects, as to both the costs and claimed benefits:

> The record contains no data regarding the minimum salary level adopted by the DOL, as that information is not yet available.
>
> The cost-benefit analysis claims "benefits" that are entirely without basis. Among other things, the only alleged benefits that the Department attempted to monetize arise from an alleged expansion of the number of employees who would be eligible for paid sick leave. However, these calculations are deeply flawed and without foundation. For example, the only evidence cited by the Department for the percentage of additional

[3] We note that many -- perhaps most -- of the individuals testifying at the public hearings in favor of the Department's proposed rule appeared to already be non-exempt under existing law by virtue of performing duties that would not qualify for any exemption regardless of the salary level. These proceedings have thus emphasized the disconnect between the Department's goal of raising the salary threshold and any fair consideration of whether employees qualify as *bona fide* executive, administrative or professional workers.

employees who might qualify for paid sick leave is "Table 32" in a Bureau of Labor Statistics publication. Preliminary Cost Benefit Analysis, p. 39, fn. 129. However, the cited BLS publication *does not contain any Table 32.*

The record contains no data demonstrating the extent (if any) to which the current exemption test is contributing to misclassification of employees.

The record contains no data correlating salary levels in the Washington economy with performing *bona fide* exempt duties.

The record contains no data showing the salary levels being paid to employees performing *bona fide* exempt duties in employment outside of Seattle, in employment in the rural portions of the State, or in employment in the nonprofit sector.

The record contains no data addressing the impacts on the competitiveness of Washington business from imposing a higher minimum salary for exemption than sister states, including the impacts on Washington business generally, and on Washington border businesses.

The record contains no data addressing the impact on employment levels in Washington by adversely affected Washington employers.

The record contains no data addressing the negative impact on employees from employers reclassifying as hourly employees currently performing *bona fide* exempt duties and enjoying the status and flexibility of being a salaried exempt employee.

The record contains no data addressing the negative impact on employees from reducing the opportunities for advancement into salaried management positions. The proposed significant increase in minimum salaries for exempt positions will force businesses to reduce the numbers of entry-level managerial positions that can be offered, which will reduce employee opportunities for advancement into more responsible, family-wage jobs.

The record contains no data addressing the costs that would be imposed on Washington employers by the steps they would take to reduce the hours of work of reclassified employees to avoid overtime obligations.

The record contains no data supporting the claimed benefits of raising the salary threshold, such as increased compensation for employees or increased 'free time.' Advocates have casually assured the Department that such results would be obtained without advancing any evidence or data to support these claims, or even attempting to

> analyze the impact of other actions by employers to offset costs, such as changing other elements of the overall compensation structure.

In addition, RCW 34.05.328(e) requires that the cost-benefit analysis must (emphasis added):

> (e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, *that the rule being adopted is the least burdensome alternative* for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;

This analysis requires that the salary level be set at the lowest level consistent with "weeding out" employees who, based on their salary level alone, can be known not to be performing exempt duties. A super minimum wage approach cannot satisfy this requirement, and in any event, the Department does not have data available to support this conclusion for any particular salary level.

RCW 34.05.328(h) further requires that the cost-benefit analysis must (emphasis added):

> (h) Determine *if the rule differs from any federal regulation or statute applicable to the same activity or subject matter* and, if so, *determine that the difference is justified by . . .*
>
> > (ii) *Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection*;

The Department should recognize that this aspect of RCW 34.05.328 imposes obligations on the Department that go beyond the normal operation of Washington administrative law; it ***requires*** that the Department justify with substantial evidence that differences from the FLSA standard are ***necessary*** to achieve the goal of the state statutory exemptions. That goal, as shown by the state statutory language itself, is to exempt from minimum wage and statutory overtime pay "[a]ny individual employed in a *bona fide* executive, administrative, or professional capacity or in the capacity of outside salesperson." RCW 49.46.010(3)(c). There is no evidence in the record, or otherwise, supporting that a minimum salary level greater than the proposed new FLSA level is consistent with or "necessary" to achieve the goal of the statute.

Contrary to what the Department has argued in its Preliminary Cost Benefit Analysis, a minimum salary level of two or two and a half times the minimum wage cannot be justified by referring to a purported relationship between the salary and minimum wage levels established under the FLSA at different points in time. That purported relationship has never been a basis for setting the exempt salary level under federal law, and even if there was such a relationship it would be wholly inapplicable to the Washington minimum wage rate due to the skewing effect of the voter-mandated increase in the Washington minimum rate. Applying a CPI adjustment to the 1970 FLSA short-test exempt salary level is also not a sufficient basis for this

rulemaking. It does not account for the lack of a lower long-test salary level in the Department's proposed rule, nor does it account for changes in the economy and wage rates over the intervening 50 years. (It is worth noting that the minimum exempt salary level of $30.00 per week that was adopted under the FLSA within a few months of its passage in 1938, if adjusted for inflation using the Department's methodology, would be approximately $540.00 per week today.) And tellingly, the salary data on which the Department seeks to rely actually undercuts the Department's proposal by indicating that the proposed regulation would deny exempt status to more than half of Washington's salaried workers, without regard to their performance of *bona fide* exempt duties.

AWB hopes that this rulemaking process can lead to a result that both employers and employees can approve of. However, for the reasons outlined above, AWB presumes that the enactment of a super-minimum-wage salary threshold would generate litigation that would ultimately invalidate the rule as contrary to the statute and unsupported by a valid cost-benefit analysis. AWB therefore respectfully urges the Department not to continue down that path.

C. The Other Variances from Federal Law Should Be Rectified.

WAC 296-128-___ Highly compensated employees.
AWB continues to advocate for incorporating the highly compensated employee exemption that was added to the FLSA in 2004, for consistency with the FLSA. Continuing this Washington deviation from the FLSA is not supported by substantial evidence that the difference is necessary to achieve the general goals and specific objectives of the overtime exemption. Highly compensated employees are in less need of the protection of the overtime laws, as the federal HCE exemption properly recognizes.

WAC 296-128-540 Outside salesman.
Subpart 2 of this proposed rule should be deleted in its entirety. It reads:

> 2) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of the employee [sic] status as "outside salesperson."

The foregoing are not elements of the FLSA exemption for outside salespersons. These proposed deviations from the FLSA are not supported by substantial evidence that the differences are necessary to achieve the general goals and specific objectives of the overtime exemption. The form of an employee's pay has no relevance to whether the employee is conducting "outside sales." Moreover, because the requirement for a "guaranteed" basis of payment need not cover all of the employee's compensation, all this requires is a compensation agreement to be structured in certain ways. The "advised of" requirement is likewise irrelevant to the existence of "outside sales" duties. In addition, because neither the "guarantee" component nor the "advised of" requirement is a part of any other overtime exemption under

either federal or state law, employers are often unaware of this odd rule, which then acts only as a trap for the unwary and generates needless litigation over an issue with no actual heightened protection for Washington employees.

WAC 296-128-530 Professional.
Subpart 2(b), related to teachers, should be deleted in its entirety. In the proposed rule, it reads:

> (b) Who is compensated on a salary or fee basis.

The foregoing is not an element of the FLSA exemption for teachers. This proposed deviation from the FLSA is not supported by substantial evidence that the difference is necessary to achieve the general goals and specific objectives of the overtime exemption. The form of a teacher's pay does not affect whether the teacher is acting in a professional capacity. Moreover, at the Seattle public hearing, and in a comparison chart issued on September 6, 2019, the Department confirmed that subpart 2(b) was not intended to incorporate the heightened salary or fee threshold reflected in Proposed WAC 296-128-545. While the best solution is to eliminate subpart 2(b), at the very least the Department should make more clear in the regulation itself that a minimum salary or fee threshold is not part of the professional exemption for teachers.