

April 30, 2018

Allison Drake, Labor Standards Policy Advisor
Fraud Prevention & Labor Standards
Department of Labor & Industries
PO Box 44000
Olympia WA 98504-4000

Via email to Allison.Drake@LNI.wa.gov

Dear Ms. Drake:

On behalf of our more than 7,000 small business members, NFIB/Washington submits the following comments as “initial feedback” on scope and content for the department’s proposed update to [WAC 296-128](#) – Executive, Administrative, and Professional (EAP) exemptions from the state Minimum Wage Act.

It is important to note at the outset that the federal court ruling in *State of Nevada, et al. v. United States Department of Labor, et al.*, Case # 4:16-cv-00731-ALM, consolidated with *Plano Chamber of Commerce, et al. v. Perez, et al.*, Case # 4:16-cv-00732-ALM, casts doubt on whether an increase in the salary level test above the existing federal threshold of \$455 per week would pass legal muster. Accordingly, **we suggest the department focus on updating** those sections of the rule describing **job duties that qualify for exemption** from the state Minimum Wage Act.

An easier approach that should be considered is **simply updating the state rule so that it points to the US Department of Labor’s (USDOL) 2004 rule** with language allowing the state rule to **update automatically** whenever a federal amendment is final and takes effect.

If the department insists on exploring rule changes beyond these approaches, we recommend the following be considered.

- To the extent possible, **definitions, terms, and general requirements should be harmonized between state and federal rules** on this topic so an employer in compliance with the new state rule is also in compliance with existing federal rules. (We recognize the *salary threshold* could differ with the state being equal to or greater than the federal level.)
- Similarly, **recordkeeping and reporting requirements should be the same** between state

and federal rules on this topic, so employers are not required to maintain duplicate files or “two sets of books” to verify compliance. The time period for maintaining the requisite materials should also be the same for both federal and state rules.

- The new rule should **maintain the salary basis test** along with the **outside sales classification**.
- Given the disparity in wages between metropolitan Seattle / King County and the rest of Washington state, the **salary level test** – if modified – should either be set at **one or more deciles below the lowest county average weekly wage** for full-time salaried workers, **or a regional approach considered** to more closely track with local earnings for EAP workers. Again, it must be noted that the department may lack legal authority to impose a salary level test that exceeds the federal threshold.
- We favor a **single, standard duties test**, consistent with the USDOL 2004 rule, in place of the state’s existing short and long duties tests.
 - Stakeholders should review job duty requirements already in federal rule and, if necessary, **discuss adding additional classifications or activities**, particularly to the definition of “professional,” to minimize the need for future special rulemaking, such as that found in [WAC 296-128-535](#) – Are professional computer employees exempt from the Washington Minimum Wage Act?
 - Similarly, stakeholders should **discuss whether a legitimate reason remains to distinguish between private and public employees** as found in [WAC 296-128-533](#) – Public employees.
- The state primary duty description and **caps on the amount of nonexempt work** that may be performed **should be made consistent with the 2004 USDOL rule**.
- The state rule should **include a “highly compensated employee (HCE)” exemption** as is found in the 2004 USDOL rule.
- The new rule should **provide for a five-year update mechanism or sunset** to trigger review, if allowed under existing statutory authority.
- The new **rules should be written in plain language**, following the department’s use of this approach in other rulemaking.
- **This rule change could result in the re-classification of currently exempt, salaried EAP workers into hourly wage earners.** Consequently:
 - Employers will need a **reasonable timeframe to determine which employees will be affected, adjust work and production schedules** accordingly, **re-program or update payroll systems and records** to reflect these classification changes.
 - The department and stakeholders should **consider the cost and timing of updating payroll and related recordkeeping processes, systems, and software when establishing the rule’s effective date**.

- A **January 1 effective date would be preferable** to a mid-year change. If a January 1 date is not feasible, the effective date should coincide with a quarterly start date where tax or other payroll-related changes could reasonably be expected to occur.
- **Outreach to large payroll processing and accounting software providers**, such as ADP and Intuit, along with **soliciting comments from in-state accounting firms** or their representative association(s) should be strongly considered **to better understand technical considerations that may impact compliance**, such as programming timeframes, software patch or update releases, and other factors that may be relevant.
- The department should **consider hosting webinars and other training opportunities**, like those used for the recent I-1433 Paid Sick & Safe Leave rulemaking, to inform and educate employers and workers about any changes to the state EAP rules **in advance of the rule's effective date**.
- Depending on the complexity of the final rule, the department should consider **delaying penalties, providing technical assistance** in lieu of penalties, and a **stepped enforcement** approach, for the first 12 to 24 months the new rule is in effect.

Finally, NFIB again urges the department to limit its changes, make those changes as simple and easy to understand as possible, and remain consistent with the federal rule to the greatest extent possible, to facilitate easy compliance and minimize adverse impacts and costs to small businesses and the workers they employ.

Respectfully submitted,



Patrick Connor
NFIB/Washington State Director