



711 Capitol Way South
Suite 505
Olympia, WA 98501

1-360-786-8675
NFIB.com

October 16, 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 EAPRules@Lni.wa.gov

RE: First "pre-draft" rule for **Executive, Administrative, Professional, and Outside Sales Rulemaking** regarding exemptions to the state Minimum Wage Act (WAC 296-128-500 through 296-128-540)

Dear Ms. Drake:

Please accept the following as comments for the record regarding the department's first "pre-draft" EAP rule, which will be the subject of statewide feedback sessions this month.

Before addressing the rule proposal, we must note the draft was emailed at 4:59 p.m. Friday, October 5, 2018. Scheduling the first "statewide feedback session" for Tuesday, October 9, at the department's headquarters in Tumwater provided very little notice or opportunity for small business owners to participate in person. Since this is the only western Washington listening session currently scheduled south of Everett, we urge the department to consider adding another to its calendar. The Longview or Vancouver areas would accommodate southwest Washington residents unable to attend the Tumwater session on such short notice.

As to the "pre-draft" itself, we submit the following.

WAC 296-128-500, Purpose

- NFIB **supports** the changes to **WAC 296-128-500**.

WAC 296-128-505, Definitions (NEW SECTION)

- Consistent with our earlier comments recommending consistency between the federal and state "overtime rules," NFIB **supports** adding the proposed **new section 296-128-505**.

WAC 296-128-510, Executive

- We **support** many of the **changes to WAC 296-128-510**, specifically **revisions to (1), (1)(a) through**

(c), deleting (4), and removing (d) to align with the federal rule.

- However, **we object to (e) so long as it includes any salary threshold in excess of that established in the federal rule**, or as may be required in an amended federal rule. As explained in NFIB's previous comments, the federal court decision invalidating the Obama Administration's overtime rule held that the US Department of Labor acted arbitrarily, and in contravention of the Fair Labor Standards Act, in doubling the required salary test. This approach improperly made the salary-level test the most important factor in classifying employees. Likewise, we believe an attempt by the department to set a state threshold at an amount higher than the federal rule, without specific legislative direction, would similarly exceed Labor & Industries' grant of authority. Basing Washington's threshold on the state minimum wage would exceed the current federal threshold immediately; moreover, using a factor of twice the state minimum wage would exceed the Obama Administration's invalidated threshold in 2019, and a factor of 1.5 times the state minimum wage would nearly match it in 2024.
- NFIB also **supports deleting the text in Drafting Note 6**, thus eliminating the short and long duty tests.
- We **support the addition of the new subsection (2)** found in Drafting Note 7, to align with the federal rule.
- Accordingly, we also **support the addition of the new subsection (3)** found in Drafting Note 8.

WAC 296-128-520, Administrative

- We **oppose (d)**, in Drafting Note 12, **and (2)(c)** establishing a wage threshold based on some multiple of the state minimum wage, for the reasons described above for WAC 296-128-510 (1)(e).
- We would also note that there appears to be a drafting error in the last line of (c): "... at least equal to the entrance salary for teachers in the educational establishment by which employed." It appears that where "he is" has been deleted, another term such as "the teacher" or "the worker" should have been added.
- NFIB **supports the other changes to 296-128-520, including deleting both (4c) [sic] in Drafting Note 11, and the text found in Drafting Note 13, as well as the addition of a new subsection (3), Drafting Note 14, to correspond with the federal rule.**

WAC 296-128-530, Professional

- Aside from our **objection to (d)**, Drafting Note 18, again seeking to establish a wage threshold based on some multiple of the state minimum wage, **we support the other proposed changes to WAC 296-128-530**. This includes **deleting the text in Drafting Notes 15, 17, 19, and 20**. If the text in Drafting Note 17 is not removed, it appears a correction in the numbering to "(2)(c)" is needed to maintain consistency.

WAC 296-128-535, Computer professionals

- NFIB believes more stakeholder discussion is necessary to determine whether this section should

remain in the WAC. Based on the proposed changes and comments in Drafting Note 26, **we are inclined to favor its removal.**

- Drafting Note 26 explains that the current hourly rate for exempt computer workers is \$27.63, equivalent to 6.5 times the *federal* minimum wage in 1990. Increasing the salary threshold for computer professionals to 6.5 times the current *federal* minimum wage of \$7.25 per hour would be a 70 percent increase. That alone is cause for concern.
 - The range proposed for an updated wage threshold for exempt computer professionals is **2.5 to 6.5 times the state minimum wage** (instead of federal), **rather than 1.5 to three times** the state minimum wage for executive, administrative, professional, and outside sales workers elsewhere in the pre-draft rule. **No explanation for this variance has been provided.**
 - Similarly, there is no explanation as to why a top range of 6.5 times the *state* minimum wage should be considered instead of 6.5 times today's *federal* minimum wage. Washington State's minimum wage diverged from the federal minimum wage in 2001, as a result of Initiative 688. The department took no action to tie the computer-professional threshold to the new state minimum wage at that time. Thus, the 1990 comparison is only relevant if the federal minimum wage remains the standard against which exempt computer professional wages are measured.
 - At **6.5 times today's \$7.25 hourly federal minimum wage**, following the formula the department infers was the basis for the computer professional wage threshold in the current rule, that hourly rate **would be 3.9 times the 2019 state minimum wage and 3.5 times the 2020 state minimum wage**, both **exceeding the highest proposed rate for all other classifications** within the current EAP rule. Again, **no justification** for using a different range **has been given.**
- **NFIB would be likely to support the changes proposed** to WAC 296-128-535, as described in Drafting Note 25, in order **to align with the federal rule if any revised salary threshold were also consistent with the federal rule.** It is difficult to view utilizing a threshold range of 2.5 to 6.5 times the state minimum wage as anything but arbitrary, particularly given the department's commentary about the federal minimum wage previously being used as the basis for establishing the existing threshold for this class of workers.

WAC 296-128-540, Outside salespersons

- **NFIB supports the proposed changes**, including deleting the language in Drafting Note 28, to make this section of the WAC consistent with the federal rule.

WAC 296-128-xxx, Highly compensated employees

- NFIB is disappointed that the department is not recommending an exemption for highly-compensated employees, which is a part of the existing federal rule. As we have indicated in prior comments, **NFIB supports a highly compensated employee exemption for those workers earning a salary of at least \$100,000.** It should be noted that such an exemption would be more than three times the state minimum wage at least through 2025, assuming three-percent annual inflation from 2021 to 2025. We urge the department to give additional consideration to, and engage stakeholders in further conversations about, a highly-compensated employee exemption.

In addition, NFIB is concerned the **department has not addressed a phase-in period** to allow employers adequate time to formulate and implement staffing and production changes, modify or update payroll and accounting systems, or make other operational changes that will undoubtedly be necessary to comply with a rule change as sweeping as what has been proposed.

Moreover, we note the **absence of any supplemental materials describing outreach or educational efforts, technical assistance, deferred penalty structure, or stepped enforcement approach** the department may undertake to prepare employers for such a drastic change. We hope these important aspects of implementation are forthcoming, and that stakeholders will have opportunities to offer additional suggestions for ways to better ensure the new rule is well understood.

Again, thank you for the opportunity to provide these comments about the department's first "pre-draft" rule for Executive, Administrative, Professional, and Outside Sales Rulemaking regarding exemptions to the state Minimum Wage Act (WAC 296-128-500 through 296-128-540).

We look forward to further stakeholder conversations to modify and refine the proposal.

Respectfully submitted,

A handwritten signature in black ink that reads "Patrick L. Connor" with a stylized flourish at the end.

Patrick Connor
NFIB Washington State Director