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Allison Drake, Labor Standards Policy Advisor  
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Department of Labor & Industries  
PO Box 44000  
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Via email to [Allison.Drake@LNI.wa.gov](mailto:Allison.Drake@LNI.wa.gov)

Dear Ms. Drake:

Thank you for the opportunity to comment on the department's "**EAP Draft Rule Concepts**." As we noted during the August 1 stakeholder meeting, the format and decision-tree style approach used in that document was instructive.

That said, the recent announcement of a September 11 US Department of Labor (USDOL) listening session in Seattle on the federal Fair Labor Standards Act "overtime rule" update reinforces our **concerns about the likelihood of disparate approaches between state and federal agencies on essentially the same subject matter**. It again demonstrates the challenges small businesses face trying to follow, understand, comment upon, and comply with what could be differing regulations governing the same employees. Consequently, **we again request the department delay its EAP rule-making until the federal update is complete**.

In response to the department's "EAP Draft Rule Concepts," we submit the following.

#### **A. Salary Level – Executive, Administrative, Professional**

NFIB favors **Option 4, adopt a salary level equal to the federal salary threshold**. We would suggest referencing the federal regulation "as amended" to reflect the increase expected to be adopted in the forthcoming rule.

We would again caution the department about adopting a super-minimum wage, such as Option 1, for use as a primary or significant test in determining whether a salaried position is exempt under the rule. In the *Plano* ruling, the court found the federal rule exceeded USDOL's authority "... by making overtime status depend predominately on a minimum salary level." As we have in previous comments, NFIB suggests the department update the state rule so that it points to the 2004 USDOL rule with language allowing the state rule to update automatically whenever a federal amendment is final and takes effect. If the department insists instead on adopting its own language, we urge you to focus on updating those sections of the rule describing job duties that qualify for exemption from the state Minimum Wage Act.

## B. Automatic updating mechanism for EAP salary level

NFIB favors **Option 3, do not adopt an automatic updating mechanism; update only through rulemaking.** However, as noted above, we do support pointing the state rule to the federal rule so that both update when a federal rule change becomes effective.

Once again, if the department insists on state-specific language different than that in the current or forthcoming federal update, focusing on the job *duties* that qualify for exemption from the state Minimum Wage Act should minimize the need for frequent updates.

Moreover, this stakeholder process has demonstrated to us that any "automatic updating mechanism" is unlikely to satisfy demands for ever-increasing salary thresholds and further reductions in qualifying exempt positions. To include any such mechanism would be unwise and of little (or no) lasting utility.

## C. Duties Test – Executive

We agree with **Options 1** (in part), **2, 3, and 5i.** The state short and long tests should be eliminated and replaced with the federal duties test, referencing the federal rule to allow for future changes consistent with federal action. Business owners should be exempt, consistent with the federal rule. When analyzing a worker's primary duties to determine whether the worker qualifies for an EAP exemption, that analysis should be the same as the federal criteria.

## D. Duties Test – Administrative

We agree with **Options 1** (in part), **2 and 4i.** The state short and long tests should be eliminated, with the federal duties test used instead, including pointing the state rule to the current federal rule and as it will be amended. State and federal duties analyses should follow the same criteria.

## E. Duties Test – Professional

NFIB agrees with **Options 1** (in part), **2 and 4i** for the same reasons as state above.

## F. Highly Compensated Employees Exemption

NFIB supports adoption of a **\$100,000 highly-compensated employee exemption.**

## G. Professional Computer Employees Exemption

Our preferred approach is **Option 3, align duties test with federal duties test.**

We would be interested in stakeholder discussion related to Option 1 to better understand how the department currently treats this classification of workers differently than other workers qualifying for an EAP exemption.

## H. Outside Salesperson

NFIB supports **Option 2, align duties test with federal duties test.**

## I. Effective Date

First, we would again note that any state action should be fully informed by a completed federal rulemaking process to update the 2004 "overtime rule."

If the department insists on filing a final EAP rule before the federal rule is complete, NFIB favors **Option 1ii, an effective date 12 to 24 months from filing**, and **Option 2, stair-stepped increases to final salary level over a timeline specified in rule.**

Again, thank you for the opportunity to comment on the department's "EAP Draft Rule Concepts." We look forward to a robust and productive stakeholder discussion about these and other comments submitted on this important rule-making effort.

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