



May 10, 2016

RE: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees Proposed Rule; RIN 1235-AA11; Docket # WHD-2015-0001

The National Council of Agricultural Employers (NCAE), founded in 1964, is the only national association focused exclusively on agricultural labor issues from the employer's viewpoint. NCAE represents labor-intensive agriculture with Congress and federal agencies. Our members are growers, associations, and others whose business interests depend on labor-intensive agriculture. NCAE's membership, including farmers represented by its association members, represents an estimated two-thirds of all agricultural employers directly engaged in the labor-intensive production of food and nursery crops in the United States. We submit the following comments on behalf of our 250+ Members.

The new annual salary for an EAP is more than double the current level. Although the current \$23,400 level is low, more than doubling the minimum, with insufficient economic impact data is excessive. It is both unusual and extremely disruptive for government to impose significant increases in a one-step approach rather than as a multi-year phase-in.

One size does not fit all! The average salary in rural areas and small towns and in other lower-wage regions of the country is substantially lower than the national average. The proposed EAP minimum will mean that many current salaried managers and supervisors in many industries around the country may (probably will) revert from being salaried employees to hourly employees. This may seem advantageous to employees at first glance; however, the result in many cases, will be that although these employees may well see their paychecks increase substantially during the season, many will be converted to seasonal employees. Employers pay what the market will bear, raising the minimums will only shift how employees are paid, and not necessarily impact the year-end total. Without state, regional, and industry indexing, the results are neither equitable nor fair. It is not valid to assume that a worker in a very small town with the lowest potential cost of living parameters should or can be paid at the same level as a worker in the highest cost of living metropolitan area should or could be paid for similar work.

We do not believe the Department has sufficiently investigated or contemplated the real impact this change is likely to have on agricultural workers who are not exempt from overtime rules. The Department's analysis assumes there will be little negative and significant positive, impact on bottom-line employee wages as a result of this proposed rule. In many regions of the country, for agriculture, the proposed change will provide even more incentive for employers to put all workers on an hourly rate and increase the percentage of total workers who are seasonal rather than year-round employees. There are

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many local, non-seasonal and non-migratory employees in agriculture who function in middle and lower level management or supervisory roles that may work many hours in-season and while they work full time off-season have much less onerous schedules and duties. This will mean, perhaps rightly, that employees will take on more of the down-side risk of farming and other agricultural operations as they will not be paid for hours not worked because of bad weather, poor crops, or poor prices, they will simply be sent home and their hours will be shortened in bad years. We suspect this was not the intent of the Department when proposing this new standard.

As we have commented on other issues, agricultural producers are not price-setters. Just because government entities propose regulations that increase agricultural (food or other products) production costs, growers/producers do not have license to increase prices to cover these new government mandated costs. Ag producers are forced to take necessary measures to hold bottom-line labor costs which may well result in outcomes that the Department neither anticipates nor intends. If costs cannot be contained then this proposal will add to an already growing trend of out of country production of food, ornamentals, and other agricultural staples being supplied to the American public. We do not see that outcome as positive for employees, employers, or the American public.

Additionally, as a 501C6 trade association, and a close affiliate with various Agricultural and Professional 501C3 and C4 associations we are concerned that many associations will be negatively impacted. Many association employees qualify as "exempt" because their salary is greater than \$23,660 and because their primary duties fall under the (EAP) exemptions included in the original Fair Labor Standards Act of 1938. Indeed the many charitable organizations (501C3) in particular employ Executive Directors and upper management at salaries that may not exceed the proposed \$50,440 level. The proposed rule will negatively impact the non-profit/not-for-profit sector significantly.

#### Conclusions:

- While a significant increase in the EAP exemption salary level may be viable in major urban areas, the numbers proposed just do not fit the reality of wages in small-town, small-business, rural America.
- We believe the current proposed EAP exemption salary levels, combined with the current vague language around the additional tests will force agricultural producers and other employers in rural America to convert significant numbers of full-time, salaried management, technical service, and management employees to seasonal and hourly employees thus disrupting their employment stability, career paths, and sense of professional status; while at the same time further destabilizing the labor stability so critical to agriculture and other rural small business. As an example, the mean pay for all degreed Agronomists regardless of experience level, a very important and common professional position in agriculture across the US, is \$49,850 less than the current EAP exemption proposal! The proposal of pushing the majority of university educated agricultural professionals back into hourly, and likely seasonal employment status, would be devastating to agriculture. <http://www.payscale.com/research/US/Job=Agronomist/Salary>
- We are extremely concerned about the impact of imposing any new rule mid-year because businesses will not have time or opportunity to transition. This will be particularly onerous to seasonal businesses like agriculture. Any new rules should include adequate transition time, and processes, so that they do not bisect business, financial, and tax calendars disruptively.

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**Overview:**

Since 1929, NCFC has been the voice of America's farmer cooperatives. NCFC members include regional and national farmer cooperatives, which are in turn composed of nearly 3,000 local farmer cooperatives across the country.

The Department of Labor's (DOL) overtime exemption rule is of particular interest to our members. Doubling the salary threshold from the 20<sup>th</sup> percentile to the 40<sup>th</sup> percentile (from \$23,660 to \$50,440) will substantially increase labor costs, significantly driving up the overall cost of doing business. Specifically, small businesses, like the farmer-owned cooperatives NCFC's proudly represents, will have a very difficult time adjusting to such an unnecessarily high surge in the salary threshold percentage.

NCFC urges the Department to maintain the salary threshold at the 20<sup>th</sup> percentile. Maintaining the threshold at the 20<sup>th</sup> percentile using updated figures would achieve the desired outcome of increasing the effectiveness of the salary test, as well as bring the salary level above the poverty line.

**Real World Impact on Cooperatives Varying in Size and Scope:**

**Farm Supply & Marketing Cooperative, Illinois**

Initial calculations suggest the new threshold tests could affect approximately 900 employees and add an additional cost of \$4.5 million to the cooperative.

**Diversified Energy, Grain & Food Cooperative, Minnesota**

Initial calculations suggest the new threshold tests could affect approximately 270 employees and add an additional cost of \$1million to the cooperative.

**Farmer Supply Cooperative, Missouri**

This particular co-op has 75 convenience stores, eight Jiffy Lubes and 16 Big O Tires in numerous rural communities. In an effort to be proactive, they have already begun moving salaried employees to hourly. An average work week for a convenience store manager is 50 hours; 80 percent of convenient store managers fall under the \$50,440 threshold. In converting workers to hourly pay, they have been forced to lower hourly rates to account for the overtime costs they will now be incurring. Overall, many employees are receiving a pay increase but their hourly rate is lower and, therefore, many are having an adverse reaction to the change.

Employees have also showed dissatisfaction with their new classification as an hourly employee, as there is a sense of pride associated with a salaried position.

Outstanding Concerns/Opportunities for Further Clarity:

- *One Size Fits all Approach:* There is great regional diversity across the country. A \$50,440/year salary in Manhattan, IL is very different from the same salary in Manhattan, NY given the vast difference in the cost of living between the two areas. Additionally, our co-ops take into consideration an employee's total compensation package, the duties and responsibilities in their role, the market, and the qualifications they bring to the table when making salary determinations.
- *Timeline:* There needs to be ample time to comply; there are substantial changes that will have to be made and additional recording requirements that will take time to implement.
- *Automatic Update to Salary and Compensation Levels:* An automatic update would create confusion and uncertainty. It would make budgeting for the future very difficult. Updates to the threshold should be made at the discretion of Congress and the Administration, taking into account the complex economic factors that an over simplified average cannot.
- *"White Collar" Definition:* Greater clarity is needed as to who the definition and threshold will apply to. Furthermore, how will the following language be interpreted, "perform work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field?" In particular, how will this language be interpreted in regards to rural occupations such as fertilizer plant manager, spray rig driver, fertilizer blender, etc.?
- *Inclusion of Nondiscretionary Bonuses & Incentive Payments:* NCFC believes nondiscretionary bonuses and incentive payments should be included as part of the salary level test. However, greater clarity is required on how this would be executed. For example, what would happen if an employee were to exceed the salary level threshold with bonuses one year, but not the next? Would their status fluctuate annually and ultimately create a recordkeeping headache?

Conclusion:

Rural communities depend on the ability of these agribusinesses to thrive. We are committed to mitigating the negative impact this regulation could have on rural communities and the farmer co-ops they rely on.