

November 7, 2023

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees” (RIN 1235-AA39)

Dear Ms. DeBisschop:

The National Demolition Association (NDA) represents nearly 500 U.S. and Canadian companies that offer standard demolition services as well as a full range of demolition-related services and products. NDA educates members on the latest advances in equipment and services, provides educational programs and tools to stay abreast of regulatory and safety matters and keeps regulators informed about issues in our industry. NDA also increases public awareness of the economic and societal benefits of demolition.

On September 7, 2023, the Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) to update and revise the regulations issued under the Fair Labor Standards Act (FLSA) implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. Per the Federal Register, the Department is proposing to increase the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region—\$1,059 per week (\$55,068 annually for a full-year worker)—and increase the highly compensated employee total annual compensation threshold to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally (\$143,988). The Department is also proposing to implement automatic updates to the salary threshold every three years.¹

NDA believes employees and employers are the best parties to determine issues ranging from wages and working conditions, through either individual or collective bargaining, within the boundaries of the law. Employers and employees are appropriately served by overtime regulations that promote flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers in classifying their employees under the FLSA. In addition, NDA believes any increase to the overtime pay eligibility threshold must take into consideration regional variations in wages and cost of living as well as current economic conditions.

Unfortunately, the Department’s most recent proposal on overtime pay fails to achieve these aims and will do more harm than good for employers and employees. NDA’s concerns with the proposed rule are highlighted below.

1. DOL’s Proposed Rule Will Negatively Impact Employers and Employees

America’s businesses, including the demolition industry, are still recovering from the economic effects of the COVID-19 pandemic. Inflation remains persistently high and demolition contractors across the country are struggling to hire enough workers to operate at full strength. The labor costs associated with DOL’s proposed

¹ 88 FR 62152

increase to the salary threshold will be difficult for many employers to absorb and will result in large numbers of employees being reclassified from salaried (exempt) to hourly (nonexempt).

Further, because the FLSA requires employers to carefully monitor employees' hours and pay the overtime for every hour worked over forty in a given workweek, employers must treat hourly employees differently than salaried employees. Having to reclassify workers due to these proposed regulations will have detrimental consequences for some employees, including:

- employees being reassigned or let go as employers make operational changes due to new pay and staffing constraints;
- limits on career advancement opportunities for employees who are reclassified from salaried to hourly;
- reduction in employee access to a variety of additional benefits, including incentive pay;
- employees in the same job classification (for the same employer) being classified and treated differently based on regional cost-of-living differences, facility profitability or other factors that impact the balance sheet;
- declines in employee morale as exempt status is often viewed as a more prestigious status in the workplace;
- limits on the ability of employers to provide, and employees to take advantage of, remote work and flexible scheduling options; and
- limits on employers' ability to provide employees with mobile devices and remote electronic access, further limiting employee flexibility.

These changes will disproportionately impact entry level employees, particularly those from rural and economically struggling regions or individuals graduating with degrees that do not command high salaries. In addition, just because an employee may be reclassified as newly eligible to earn overtime pay does not guarantee that they will actually earn overtime as DOL assumes. It is highly likely these employees will be supervised closely to avoid having to pay overtime. As a result, these employees will lose the advantages of being exempt and not earn any further compensation.

2. Burdensome Compliance Costs

For employers, the consequences of the proposed rule will include extensive new legal, administrative, and operational costs related to rapidly reassessing each worker's pay, position, and job duties as well as restructuring operations to meet organizational objectives under different pay and staffing models. Reclassifications, changes in duties and staffing, and adjustments to salaries to maintain exemption and the resulting pay compression all come with considerable costs. The dramatic expansion of remote work following the COVID-19 pandemic will put an additional strain on employers as they attempt to accurately monitor employee hours to ensure proper compliance with the new regulations.

Employers could also be exposed to increased FLSA litigation triggered by errors that will occur during a rushed reclassification process and by employees who pursue lawsuits because they have been negatively impacted by reclassification. These new operational costs for businesses will only exacerbate inflation and lead to higher prices for consumers.

3. Automatic Salary Threshold Increases Are Likely Unlawful

DOL is proposing to automatically update the minimum salary threshold by setting it to the 35th percentile of weekly earnings for full-time salaried workers in the lowest wage Census region. These automatic updates are likely unlawful given the FLSA explicitly requires DOL to "define...from time to time by regulations of the

Secretary subject to the provisions of [the Administrative Procedure Act]”.² The Department documented its lack of authority to index the salary level in its 2004 overtime rulemaking,³ and it acknowledged as much in its 2015 proposed rule, noting that it determined “nothing in the legislative or regulatory history... would support indexing or automatic increases.”⁴ Nothing has changed in the last eight years to justify a different conclusion from DOL.

4. New Overtime Regulations Are Unnecessary Given the Most Recent Updates in 2019

Given that the overtime rule’s salary threshold was most recently updated just four years ago, DOL’s proposed increase is unnecessary and contradictory to historical norms. DOL has updated the salary level eight times since 1938, with updates occurring on average every 9 to 10 years. DOL recently increased the minimum salary in 2019 from \$23,660 to \$35,568. The leap from \$23,660 in 2019 to \$60,209 in 2024 would be a 154% increase in a six-year span. This is inconsistent with previous updates, where increases in the minimum salary threshold have ranged from 5% to 50% and have never reached 154% in a six-year period. Such a rapid increase in a short amount of time is unprecedented, excessive and threatens to disrupt employers, employees, and the U.S. economy.

5. NDA Member Survey Reveals Concerns with Overtime Proposal

Last year, NDA conducted a survey among member companies to gauge how changes to overtime regulations would affect demolition contractors and their workers. The results of the survey indicate that many demolition contractors and workers would be negatively impacted by DOL’s proposed rule.

- According to the survey, 66% of demolition contractors said they would have to reclassify exempt employees as hourly employees and restructure jobs if DOL raised the minimum salary threshold to \$55,000 annually.
- Over two-thirds of employers also said their businesses would face new operational challenges if DOL raised the minimum salary threshold, including:
 - reduction in opportunities for professional development;
 - diminished workplace autonomy;
 - less flexibility;
 - higher costs; and
 - more labor hours dedicated to review all job descriptions and to communicate and train staff on changes.
- Additionally, 72% of respondents said DOL should refrain from implementing automatic updates to the salary threshold every three years. Over 66% of respondents said DOL should evaluate economic circumstances and take public comments through a formal rulemaking process before instituting updates to the minimum salary threshold.

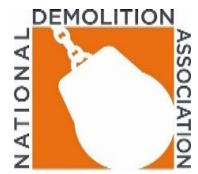
Conclusion

For all the reasons listed above, NDA opposes the proposed rule on overtime pay eligibility and urges DOL to withdraw the rule before it goes into effect. It is important to note that NDA is not wholly opposed to periodic updates to overtime regulations and was amiable to the modest changes that were promulgated by DOL in 2019. However, DOL’s proposal to dramatically increase the minimum salary threshold by 55% and institute automatic updates to the threshold every three years regardless of economic conditions is unreasonable and will impose

² 29 U.S.C. 213 (a)(1)

³ 69 FR 22171

⁴ 80 FR 38537



significant costs on employers and employees. As businesses continue to struggle with supply chain disruptions, worker shortages, and high inflation, now would be the wrong time to implement sweeping changes to FLSA overtime regulations.

Thank you for the opportunity to provide comment on this issue. For any questions, please contact NDA's Director of Government Affairs Alex McIntyre at amcintyre@demolitionassociation.com.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Lambert", is written over a light blue horizontal line.

Jeff Lambert
Chief Executive Officer
National Demolition Association (NDA)