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November 7, 2023

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-3502
Washington, DC 20210

Re: Proposed Rule Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; RIN 1235-AA39

Dear Ms. DeBisschop:

The Independent Electrical Contractors (IEC) offers the following comments in response to the Proposed Rule by the Department of Labor (DOL) to raise the salary threshold for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA). The Proposed Rule will have significant negative repercussions for IEC's merit shop electrical contractors, and we strongly urge DOL to withdraw it from consideration.

Established in 1957, the Independent Electrical Contractors is a trade association representing over 3,800 members with more than 50 chapters and training centers nationwide. Headquartered in Arlington, Va., IEC is the nation's premier trade association representing America's independent electrical and systems contractors. IEC National aggressively works with the industry to establish a competitive environment for the merit shop—a philosophy that promotes the concept of free enterprise, open competition, and economic opportunity for all.

DOL's proposal to increase the minimum salary to qualify as an exempt employee from \$35,568 annually to \$60,209 annually next year is an unprecedented increase of over 70 percent. This massive increase will negatively impact IEC contractors and their employees. IEC is concerned the proposed increase will:

- Limit the ability of contractors to offer remote work and flexible scheduling options which have become increasingly popular and also help ease the growing childcare crisis;
- Limit career advancement opportunities for employees;
- Reduce employee access to a variety of additional benefits, including incentive pay;

- Limit a contractors' ability to provide employees with mobile devices and remote electronic access, further limiting employee flexibility;
- Force employees to be reassigned or let go as contractors make operational changes needed to achieve the company's mission under new pay and staffing paradigms;
- Trigger declines in employee morale, particularly in cases where peers remain exempt as exempt status is often seen as a higher status;
- Increase FLSA litigation based on off-the-clock and regular rate of pay claims; and
- Introduce other legal and operational issues, such as increased administrative costs.

Comment Period Insufficient

Due to the significant impact the Proposed Rule would have on merit shop electrical contractors, IEC joined with others from the regulated community requesting an extension of the comment period to allow additional time to evaluate the consequences of this rulemaking. In rejecting those requests, DOL relied primarily on its assertion that it engaged in "listening sessions" on a proposed change to the salary level with no concrete proposal to comment on at the time. Consequently, during a construction industry listening session, the only message IEC could deliver was to urge DOL to refrain from making any changes due to historic levels of inflation in the overall economy and because it had just recently enacted an increase in 2019.

Courts Rejected Similar Rule

In addition, IEC finds it concerning that DOL is taking a similar approach to the rule finalized in 2016 which more than doubled the then existing threshold. That final rule was ultimately challenged in the U.S. District Court for the Eastern District of Texas and later vacated altogether because it was such a significant increase to the salary level in a short amount of time. Given the precedent set by the courts only a few years ago, it would seem DOL's latest proposal is destined for the same fate and therefore, would likely prove to simply be an academic exercise that will only serve to waste American taxpayer dollars. Therefore, IEC believes this should be reason enough for DOL to reconsider this proposal altogether.

Automatic Escalation Illegal

As it also included in the failed 2016 rule, DOL is proposing to automatically adjust the exemption salary threshold every three years. DOL lacked statutory authority under the FLSA back then and it still does today. If enacted, this would also mean adjusting the minimum salary thresholds without complying with the notice-and-comment requirements outlined in the FLSA. Additionally, just as its prior effort failed to contemplate the practical economic impact of an auto-escalation provision, its current effort again fails to do so.

Furthermore, the current regulatory processes require DOL to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis of any proposed update. An automatic update mechanism would allow DOL to announce a new salary level on a predetermined schedule in the Federal Register without notice-and-comment, without a Regulatory Flexibility Act analysis, and without any of the other regulatory requirements established by various Executive Orders. Each of those regulatory requirements is intended to force the agency to consider the consequences of its proposed actions and to ensure that the regulatory actions it takes are carefully crafted and well-supported before being implemented. For each of these reasons, DOL should abandon any effort to automatically increase the exemption salary threshold in any final rule.

Automatic Escalation Overly Burdensome

Should an automatic escalation of the exemption salary threshold be enacted, it will only serve to create an ongoing cycle of uncertainty for contractors. After each new salary threshold is announced, contractors will have the difficult task of deciding which employees will get a salary increase and remain exempt, and which employees will be reclassified to non-exempt status. The costs and time obligations of engaging in this exercise every three years are dramatically understated in the required economic analysis accompanying the Proposed Rule. The financial impact on contractors will be enormous. Not only will there be the obvious costs of increased salaries or potential overtime pay, but also the contractor's costs in conducting the classification analysis, the decision-making process, and implementation of any changes in response to the new salary level.

Likewise, DOL underestimates the rulemaking's impact with respect to compliance costs. Regulatory familiarization, adjustment, and managerial costs are all dramatically understated. Contrary to the DOL's suggestions, compliance with the proposed rule would not be as simple as reviewing the salary level and making a one-time decision. The time and effort associated with complying with the Proposed Rule will be immense as contractors determine which positions will remain exempt, which will be reclassified as non-exempt, and how the contractor will implement the conversion to non-exempt status, including adjustments to time and attendance systems and associated administrative issues.

Finally, DOL fails to account for these costs on a recurring basis. As noted above, contractors will have to engage in the same compliance review activities every three years. For each new exemption salary threshold, contractors will need to engage in cost/benefit analysis to determine whether it should increase an employee's salary to maintain the exemption, reclassify them as non-exempt, or otherwise change the terms and conditions of their employment.

Impact on Merit Shop Electrical Contractors' Employees

At most merit shop electrical contracting companies, young people are hired and enter a four-year apprenticeship program where they work during the day and go to school in the evenings. At the end of their training period, they are electricians and are still paid an hourly rate. However, the best and most motivated among them often attempt to make the jump from the field to the office and start a career track that leads them toward a management position, normally starting in the office as an estimator.

The job of an estimator is to quantify the labor and materials required to complete a project from drawings provided by owners who are soliciting bids from several contractors. Their work hours can vary widely because the number of owners seeking bids for electrical work does not follow any regular trend. Some weeks there is nothing to estimate while other weeks there are more bid solicitations than can be completed in a typical 40-hour work week.

One of the benefits of making the jump from electrician, where the employee is paid hourly, to that of an estimator, where the employee is typically paid a salary, is the certainty that comes from knowing how much money will be in their paycheck from week to week. Even though an entry level estimator does not make a lot of money, they never have to worry about a week when they are only paid for 20 hours of work because there wasn't much work to bid.

Another benefit to moving up within the industry as a salaried estimator is becoming eligible for bonuses. The salaried employees in many of our member companies that work to help make their company profitable will often times share in the profits at the end of the year with being rewarded

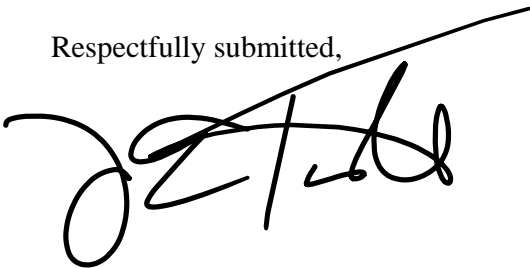
with a bonus. Bonuses are typically rewarded each year commensurate with both the success of the company and the level of commitment of the individual employee, including consideration for extra hours worked. By raising the threshold to an amount that is in the range where many salaried employees are paid, like an entry level estimator, contractors may need to reclassify these employees from exempt to non-exempt. As a result, these employees who were once eligible for bonuses will now likely miss out on incentive pay due to the complicated requirements and calculations required under law.

Reclassifying these employees as non-exempt will not only impact their potential earnings but also the job flexibility that is typically expected by moving up within the company. He/she will lose the ability to tend to personal affairs, to include things like their child's school activities or a doctor's appointment, as they see fit. They may also lose the opportunity to work from home or remotely, as it can be difficult for employers to track employees' hours in those situations. And nearly as important is that transitioning an employee from exempt to non-exempt status requires careful planning and implementation by the contractor to avoid undermining employee morale, since employees often view reclassifications to non-exempt status as "demotions."

In addition, merit shop electrical contractors will have to adjust schedules and demands on certain employees within the company. For example, when the time arises and extra help is needed, most contractors will request salaried employees who are paid above the threshold amount to work longer hours, and those who are paid on an hourly basis will be sent home. This removes the ability of the lower paid employee to earn extra money. Not only will overtime pay not be available to them, but, as already mentioned, the bonuses at year end will likely go to the salaried employees, which will also lead to a widening of the income gap.

DOL's costly changes to the overtime salary level in the Proposed Rule will have a significant impact on IEC's merit shop electrical contractors, most of which are small businesses with limited resources. Such a sizeable increase in a short amount of time is something they simply cannot absorb and will only serve to negatively affect their employees and the economy as a whole. IEC strongly urges DOL to seriously consider the concerns listed above and abandon this impractical and disruptive rulemaking.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. E. Todd", with a long horizontal line extending from the top of the signature across the page.

Jason E. Todd
Vice President, Government Affairs
Independent Electrical Contractors