Ohio Council of Retail Merchants & Affiliates

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September 4, 2015

Mary Ziegler, 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, D.C. 20210

Re: Comments on Proposed Rulemaking Regarding the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (80 Fed. Reg. 38,515, July 6, 2015), RIN: 1235-AA11

Dear Ms. Ziegler:

These comments are submitted on behalf of the more than 6,500 business members of the Ohio Council of Retail Merchants (OCRM) in strong opposition to the U.S. Department of Labor's (DOL) proposed Overtime Rule referenced above, which would have a significant and harmful impact on employers, employees, and the economy.

OCRM opposes DOL's proposed increase to the minimum salary threshold and requests that DOL revise the formula used to calculate the new figure. The purpose of the salary threshold is to clearly delineate which employees are exempt or non-exempt from overtime requirements. Employees earning below the salary level were considered clearly exempt, while those above the level were required to pass the executive, professional, or administrative job "duties test" before qualifying for exemption. Based on untested and complicated methodology, DOL has proposed raising the salary threshold more than 100 percent above its current level of $23,660 to an estimated $50,440 in 2016, with automatic increases every year thereafter. This unprecedented, dramatic increase to the minimum salary interferes with a test that has been in place for more than 50 years and updated in 2004. Salary will now replace job duties as the determinative factor for exempt status, forcing employers that cannot afford the heightened salary level to reclassify employees who are primarily performing exempt managerial duties simply for budgetary reasons.

The proposed minimum salary also fails to take into account cost-of-living variations across the country. The new figure is higher than the minimum salary for both New York and California, placing an even heavier burden on Ohio businesses and those located in lower cost-of-living regions, and putting them at a greater competitive disadvantage to other regions. The retail industry faces fierce competition and thin profit margins, and cannot afford to absorb significant volatility, uncertainty, and increases in labor costs.

OCRM further opposes the rule's proposal to exclude discretionary bonuses, incentive compensation, and commissions from calculation of the salary minimum. This will only hurt employees because employers will have little incentive to offer this as part of the broader compensation package.

OCRM opposes the short timeframe for compliance with the rule, which poses significant challenges for businesses that do not know the extent of hours worked by employees within the given wage range and are therefore unable to budget accordingly. DOL has underestimated the time and resources it would take for our member businesses to understand and comply with the changes. DOL's estimate that it would take companies only one hour to read and familiarize themselves with the rule, one hour per employee to adjust their status, and five additional minutes per week to schedule and monitor each impacted employee is inconsistent with the reality of the retail industry. The magnitude of the changes made by the proposed rule would require serious expenditures of time and money to ensure that retailers are in compliance on an annual basis. Moreover, the recommendation to annually increase the salary minimum would create an additional layer of uncertainty for both employers and employees in years to come because employers would have to continually evaluate its workforce to ensure that each employee is making at least the ever-increasing threshold in order to remain exempt.

The consequences of the proposed rule on employees will be dramatic and far reaching. The changes will certainly result in a large increase in the number of salaried managers becoming non-exempt hourly workers. As these middle-management positions shrink, workers will lose opportunities for career advancement, which would likely result in diminished benefits. This in turn threatens to decrease the morale of employees, many of whom highly value their exempt status and title, and will feel as though they are being demoted to non-exempt status. Newly non-exempt managers will lose out on the job flexibility that so many exempt employees desire because the need to track their hours and to strictly adhere to their regular hours will become paramount. This means, for example, that these non-exempt employees can no longer simply leave for an appointment in the middle of the day or come in early or leave late to attend to childcare needs without taking paid or unpaid time off.

The notice of proposed rulemaking intimates several potential changes to the current duties test. These revisions would negatively impact customer service, as workers are forced into and out of roles that traditionally fall within their purview. In the retail industry, managers want and need to have a "hands on" approach to ensure that operations run smoothly. Performing hands-on work at the manager's discretion to ensure that operations are successfully run does not negate the fact that a manager's most important responsibility (the manager’s “primary duty” as defined in the DOL’s current regulations) is performing exempt work. Any attempt to artificially cap the amount of time exempt managers can spend on non-exempt work would place significant administrative burdens on retailers, increase labor costs, and, as has been retailers’ experience in California for example, increased wage-and-hour litigation (and especially class action litigation).

The retail industry is responsible for one in every four jobs in Ohio, and prides itself on the myriad career opportunities it presents to the state’s residents. Our goal is to create a regulatory climate that fosters job creation and advancement, not the opposite. OCRM strongly opposes the proposed increase to the salary level, any proposal for annual automatic increases of the salary level, and any changes to the duties test. We request that DOL revise this ill-advised proposal.

Thank you for the opportunity to provide comments on the proposed rule and its impact on Ohio’s retail community.

Sincerely,

Gordon M. Gough
President & CEO

Council Affiliates

Ohio Association of Wholesaler-Distributors