September 4, 2015

Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S–3502, 200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA11) Comments of the Independent Electrical Contractors, Inc.

On behalf of the Independent Electrical Contractors (IEC), thank you for the opportunity comment on the proposal to change the criteria for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA). The proposal will have significant and negative repercussions for IEC members, and I strongly urge the Department of Labor (DOL) to withdrawal it from consideration.

Established in 1957, IEC is a trade association representing 3,000 members with 53 chapters nationwide. Headquartered in Alexandria, 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 the current $455 per week (or $23,660 per year) to $970 per week ($50,440 per year) next year is an unprecedented increase of over 100%. This massive increase will negatively impact IEC member company’s employees and operations.

DOL’s proposed salary threshold is higher than minimums set under any state laws—more than $10,000 higher than that of California and more than $15,000 higher than that of New York, two of the states with the highest costs of living and the highest salary thresholds. The dramatic increase proposed by DOL will fall disproportionately on workers in cities and states with lower costs of living. For example, white collar workers in West Virginia, Nebraska, Oklahoma and Kentucky may be classified as hourly even though they do the same work as employees classified as exempt in New York and California because of regional differences in pay, which are reflective of regional differences in cost of living.

While hourly pay and nonexempt status is appropriate for certain jobs, it is not appropriate for all jobs; otherwise Congress would not have created any exemptions to the overtime pay requirements. The general public understands this, and in a recent survey conducted by the polling company, inc./WomanTrend, a 65%-majority of adults would increase the salary limit by no more than 50%, or to
$35,490 per year. Only 15% thought the threshold should be increased by over 100%, as DOL is considering.

Many employees classified or reclassified as hourly, nonexempt workers, because of this proposal will lose benefits associated with exempt status. Employers must closely track nonexempt employee’s hours to ensure compliance with overtime pay and other requirements. As a result, nonexempt employees often have less workplace autonomy and fewer opportunities for flexible work arrangements, career training and advancement than their exempt counterparts. In addition, the FLSA’s rigid rules with respect to overtime pay also make it complicated for employers to provide hourly employees with certain incentive pay and bonuses. Thus, the proposal may cause a seismic shift, greatly reducing opportunities to work remotely, work part time, work around doctors’ appointments, handle every day errands, or even carry a smartphone to check emails after work hours—in other words, workplace flexibility would be drastically limited.

Additionally, DOL is planning to increase the minimum salary threshold each year by tying it to either the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly earnings of fulltime salaried employees. Employers would be given only 60-days’ notice to adjust to the annual increases. This would also be an unprecedented and unwise change. Automatic updates will require annual reviews of compensation, potential bonuses, and classification of employees. This will be a time- and resource-consuming process. Year after year more employees will be faced with the threat of reclassification to hourly status.

If Congress had wanted automatic updates that fail to take into account changing economic circumstances, it could have done that in the statute, but instead Congress ordered the Department to update the exemptions from “time to time,” presumably to take into account changes to the economy. From 1938 to 1975, DOL regularly updated the salary level every five to nine years. During this time, it made various adjustments to salary levels, often imposing different salary requirements for executives, professionals and administrative employees. From 1975 to 2004 the salary level was not updated—likely because of complications in applying outdated provisions of the regulations to modern white collar employees, and in 2004, DOL remedied this by modernizing the duties test.

Presumably since 2004, the current administration did not update the salary level within the historic five-to-nine-year time frame because of the great recession and the associated prolonged and difficult recovery. This was a wise course of action and argues against any “automatic” updates, as automatic increases could exacerbate future difficulties in the economy. Even as we speak, the economy is struggling to get back to pre-recession levels of growth. DOL needs to fulfill its duty and regularly update the threshold through notice-and-comment rulemaking, as it has with every salary increase. The agency has met that requirement before and can do so again in the future without imposing the rigid and costly automatic updates being considered.

Finally, DOL has asked for public input on the current primary duties test. While DOL did not propose any specific regulatory changes, it said in the proposal that it is considering substantial changes to the duties test, including changes resulting in employers having to monitor and track if, and how often exempt employees are performing non-managerial, or nonexempt work. Based on how DOL has presented these questions, the clear indication is that any such changes would be included in the final rule without any opportunity for the public to review or comment on them. Such an approach would, at the very least, violate the spirit of the Administrative Procedure Act, and potentially the letter of the
law. The APA exists to make sure interested parties have a meaningful opportunity to comment on regulatory actions that will affect them. Adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA. Furthermore, doing so would be at odds with the Administration’s promise to increase transparency in its policy setting activities. Before any changes to the primary duties test are finalized, DOL should provide the public an opportunity to review and comment on a specific proposal and related cost estimates.

DOL is proposing costly changes that our members simply cannot absorb and will negatively affect their employees and the economy as a whole. IEC strongly urge DOL to seriously consider the concerns listed above and reconsider moving forward with such an impractical and disruptive proposal.

Respectfully submitted,

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