

CHARLES L. GRECO, President  
MARK KNIGHT, Senior Vice President  
ART DANIEL, Vice President  
JOSEPH M. STELLA, Treasurer  
STEPHEN E. SANDHERR, Chief Executive Officer  
DAVID LUKENS, Chief Operating Officer

**AGC of America**  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
**Quality People. Quality Projects.**



September 4, 2015

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

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 NW  
Washington, DC 20210

**Re: Notice of Proposed Rulemaking Defining the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (RIN 1235-AA11)**

Dear Ms. Ziegler:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the U.S. Department of Labor’s Wage and Hour Division’s (hereinafter “WHD”) notice of proposed rulemaking (hereinafter “NPRM” or “proposed rule”) to define the exemptions for executive, administrative, outside sales and computer employees (hereinafter “white collar”) under the Fair Labor Standards Act (hereinafter “FLSA”). The NPRM was published in the Federal Register on July 6, 2015.

AGC is the leading association for the construction industry, representing more than 25,000 firms, including over 6,500 of America’s leading general contractors and over 8,800 specialty contracting firms. In addition, more than 10,400 service providers and suppliers are associated with AGC through a nationwide network of chapters. These firms, both union and open shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. All of these firms provide employment to workers whose wages are governed by the FLSA.

AGC is a member of The Partnership to Protect Workplace Opportunity coalition (hereinafter “PPWO”), a diverse group of associations, businesses, and other stakeholders representing employers with millions of employees across the country in almost every industry. The PPWO believes that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees. AGC supports the comments submitted by the PPWO related to the proposed rule and encourages the WHD to consider them wholeheartedly. The PPWO’s recommendations suggest that the WHD:

- Lower the proposed minimum salary threshold to account for regional economic and market differences; lessen the impact on an employee's ability to work in a part-time exempt capacity; and lessen the impact on employee compensation, flexibility and morale;
- Allow bonuses and commissions to count toward the minimum salary threshold;
- Phase any salary increase in over time;
- Leave the minimum required salary threshold for application of the Highly Compensated Employee exemption at \$100,000;
- Abandon the proposal to automatically increase the salary threshold;
- Keep the current duties test in place for now;
- Do not adopt California law or any other percentage of time requirement for the duties test;
- Do not re-implement the short- and long duties test model;
- Do not make revisions to the concurrent duties roles; and
- Re-evaluate the economic analysis of the proposed rule.

In addition to the issues addressed by the PPWO that impact all industries, AGC would like to specifically address the impact that the proposed rule will have on the non-residential construction industry. AGC understands the WHD's rationale for modernizing the FLSA regulations by increasing the salary threshold to a number that makes sense for today's workforce. However, as discussed in the PPWO's comments, the proposed increase is too much to absorb all at once and should be phased in over time. To impose such a large and immediate increase as proposed will result in unintended consequences, particularly for small construction companies (which describes the majority of firms in the industry), construction employers in lower-wage regions, and construction personnel.

The NPRM proposes to increase the minimum weekly salary threshold for white collar exemptions from \$455 per week (\$23,660 annually) to \$970 per week (\$50,440 annually) nationwide. That is an increase of more than 100%. In addition, the NPRM proposes to automatically adjust the minimum salary threshold on an annual basis using one of two methods. To understand the full impact of this change on the construction industry, AGC surveyed its members. AGC was not surprised to learn that nearly 70% of the companies that participated in the survey have employees who are currently and lawfully classified as exempt under the FLSA and earn an annual salary that is less than the proposed \$50,440. Most of those impacted are in areas where the cost of living and, consequently, wages are lower than in other areas of the country.

While the WHD may believe that a simple solution to this problem would be to raise the salaries of the impacted workers to the proposed threshold amount, it is in fact not a practical one. Construction contractors operate at a very slim profit margin and cannot afford to increase salaries of all affected employees up to 100% overnight. Also impractical for many is the solution of re-classifying such employees as non-exempt and paying them time-and-a-half for hours worked over 40 per week. Not only does this alternative raise concerns about the affordability of employment costs, it also increases the uncertainty to employment costs – costs that must be predictable far in advance if the company is to submit proper bids on projects and survive.

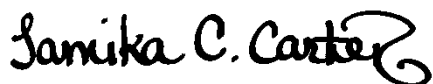
The impracticality of these solutions is reflected in AGC's survey results, which show that an increase in the salary threshold at the proposed level will force construction employers to take drastic measures to maintain the integrity of their compensation budgets. When asked how their companies would

comply with a new salary threshold at the proposed level, 74% of AGC-surveyed construction contractors responded that they would likely reclassify some or all of the impacted exempt workers to a non-exempt hourly status at their current salaries. The survey results also show that: over 60% of respondents expect the proposed rule to result in the institution of policies and practices to ensure that affected employees do not work over 40 hours a week, 40% expect affected employees to lose some fringe benefits, 33% expect some positions to be eliminated, and 23% expect to exchange some full-time positions for more part-time positions. Furthermore, about 80% of respondents expect employee morale to be damaged because employees who are reclassified to hourly, non-exempt status will feel as if they have been demoted despite eligibility for overtime pay.

To avoid this demoralizing and financially burdensome impact on workers, the WHD should set a lower salary threshold that makes sense for employers nationwide, including those in lower-cost, lower-wage regions, allowing the economic market conditions to prevail in higher-cost, higher-wage regions. Specifically, when asked to provide a more appropriate threshold that would lessen the impact on their companies, nearly 70% of those surveyed recommended a new threshold that does not exceed \$37,500 per year. This more reasonable threshold is still significantly higher than the current threshold of \$23,660, but appropriately modernizes the regulations to reflect salaries that construction employers are actually paying, or are able to pay, to employees performing exempt executive, administrative, and professional duties. The WHD should also consider indexing the threshold to properly account for regional economic and market differences, with the decision to do so and methodology to be used subject to a new public notice and comment period.

In conclusion, AGC reiterates our appreciation for the WHD's attempt at modernizing the salary threshold for exempt workers under the FLSA, but we urge you to reconsider the proposed amount of \$50,440 per year and to instead implement a new threshold that makes sense for today's construction employers nationwide. AGC also appreciates the opportunity to engage in the rulemaking process and looks forward to working with the WHD as it continues to amend regulations that impact construction employers. If we can offer assistance in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Tamika C. Carter". The signature is written in a cursive, flowing style with a large, decorative flourish at the end.

Tamika Carter, PHR, SHRM-CP  
Director, Construction HR