



Estado Libre Asociado de Puerto Rico
Oficina de Capacitación y Asesoramiento en Asuntos
Laborales y de Administración de Recursos Humanos

Harry O. Vega Díaz
Director

September 4, 2015

Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
US Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: **RIN1235-AA11**: PROPOSED RULES – DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, OUTSIDE SALES AND COMPUTER EMPLOYEES

Dear Ms. Ziegler:

The Training and Labor Affairs Advisory and Human Resources Administration Office (OCALARH, by its Spanish acronym) of the Commonwealth of Puerto Rico comments on the Proposed Rules at 80 Fed. Reg. 38515, published on July 6, 2015 (hereinafter, the “Proposed Rules.”) Created by Act No. 184-2004, as amended, the OCALARH is in charge of upholding and defending the merit principle in the Commonwealth of Puerto Rico’s civil service. Its broad powers include regulating, advising, auditing, and educating agencies, public corporations and municipalities that compose the Commonwealth’s Human Resources Administration System.

Currently the Department of Labor (hereinafter, the “Department”) regulates the Fair Labor Standards Act of 1938 (FLSA).¹ Section 13(a)(1) of the FLSA exempts from minimum wage and maximum hour requirements:

“any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service

¹ 52 Stat. 1060, as amended; 29 USC §§ 201-219.

establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)."

Section 541 of Title 29 of the Code of Federal Regulations currently defines and regulates the overtime exemption. Generally, it is required that employees meet two (2) requirements to qualify for the white collar exemption: the "salary level test" and the "duties test."

The most significant change stated in the Proposed Rules is a minimum base salary increase from the current \$455 per week to \$970 per week, exclusive of board, lodging or other facilities.² In annual salary this amounts to a **\$26,780.00 increase**; from \$23,660.00 to \$50,440.00.³ This implies a one hundred and thirteenth percentage (113%) increase.

Furthermore, the Proposed Rules proffer an automatic annual update to the standard salary requirement and compensation. This would implement a mechanism where the base salary will automatically increase on an annual basis using a methodology based on a prefixed salary percentage or the Consumer Price Index for all Urban Consumers (CPI-U).⁴ This means that if approved by the Department, there would be an automatic increase to the base salary and compensation by publishing a notice in the Federal Register without subjecting it to public commentary, unless the Department decides otherwise.

The Proposed Rules also increase the section 13(a)(1) exemption salary requirement by raising the highly compensated employee⁵ annual compensation level minimum to \$122,148.00 from \$100,000.00.

These Rules also invite public comment on revising the duties test though no specific dispositions as to what they imply are included. The details regarding the duties test, are important since they would impact the type of employees that are exempted from minimum wage and overtime compensation. It is worrisome that changes to the duties test could be imposed without the opportunity for public commentary on specific changes, as is being done with the proposed automatic base salary test increase.

² 80 Fed. Reg. 38515, in page 38517 footnote 1, disclaims that although the proposed rate is of \$921 per week it can be increased to \$970 or \$47,892.00 annually to \$50,440.00 by the time of publication of the Proposed Rules.

³ *Id.*

⁴ We note that although the CPI-U includes 88 percent of the total population, it excludes index excludes rural nonmetropolitan consumers and the military and the institutional population. Furthermore, the CPI does not equate the cost of living index (COLI). *Chapter 17. The Consumer Price Index (Updated on June 2015)*. <http://www.bls.gov/opub/hom/pdf/homch17.pdf> (last visited on September 4, 2015).

⁵ Because the employee's high level of compensation is a strong indicator of exempt status, the employee's job duties are not analyzed in detail. The employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of 29 CFR § 541. See 29 CFR § 541.601(c).

As stated in the Proposed Rules, the Department “*has long recognized [the salary level test] as ‘the best single test’ of exempt status.*”⁶ The Department expressed that the effectiveness of this test has eroded over time due to increase in the wages of non-exempt employees. Thus, the Department concluded that in order to maintain its effectiveness it had to set and maintain a salary level test equal to the fortieth (40th) percentile of earnings for full time salaried worker at the national level.

The Department used the Bureau of Labor Statistics (BLS) Current Population Survey (CPS) data,⁷ which comprises the “*usual weekly earnings of non-hourly full-time works*” to establish the new base salary requirement.⁸ The data sample consists of “*a scientifically selected national sample of about 60,000 eligible households that represents all 50 states and the District of Columbia.*”⁹ Nonetheless, it’s important to highlight that no non-hourly full-time workers from the Commonwealth of Puerto Rico were sampled. By omitting the lower wages paid on this island the results are skewed in favor of a relatively higher fortieth (40th) percentile of weekly earnings of all full-time non-hourly workers. These Rules would therefore subject our employers to the unintended consequence of a proportionately higher salary level standard.

There exists a vast gap between the salaries earned in the fifty (50) states of the Union and D.C. and the salaries earned in the Commonwealth of Puerto Rico. The marked disparity makes the Proposed Rules’ base salary requirement particularly burdensome for employers and the Commonwealth of Puerto Rico’s ailing economy as a whole. The Commonwealth of Puerto Rico’s economy and government finances are currently in a dire state. The persistently high unemployment rate currently at an eleven point nine percent (11.9%), and a stagnant, if not declining, workforce is one of two (2) of the key issues plaguing the island’s struggling economy.¹⁰

The CPS’ available data do not differentiate weekly earnings of non-hourly full-time employees by geographical regions, making the CPS data comparison between the fifty (50) states and the District of Columbia, and the Commonwealth of Puerto Rico practically impossible due to the short term available for commentary on the Proposed Rules. Nevertheless, in an effort to illustrate the enormous disproportion between worker’s salaries in the states and D.C., and the Commonwealth of Puerto Rico, we will use data obtained from the May 2014 BLS Occupation Employment Statistics (OES) Survey at the national level¹¹ and from the Commonwealth of

⁶ 80 Fed Reg. 38517.

⁷ 80 Fed Reg. 38528.

⁸ Bureau of Labor Statistics, U.S. Department of Labor, *Labor Force Statistics from the Current Population Survey*, “Research series on deciles of usual weekly earnings of non-hourly full-time workers from the Current Population Survey.” http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm. (last visited on September 4th, 2015)

⁹ *Id.*

¹⁰ Bureau of Labor Statistics, U.S. Department of Labor, *Economy at a Glance*, “Puerto Rico”. <http://www.bls.gov/eag/eag.pr.htm>. (last visited on September 4th, 2015)

¹¹ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, “May 2014 National Occupational, Employment and Wage Estimates United States,” http://www.bls.gov/oes/current/oes_nat.htm. (last visited on September 4th, 2015).

Puerto Rico.¹² The CPS and the OES are clearly different data sets. The CPS comprises data from “*non-hourly full-time workers. This concept, which is unique to these research series, refers to employed people age 16 and older who usually work 35 hours or more per week at their sole or principal job and who are not paid by the hour.*”¹³ The OES, however, “*covers all full-time and part-time wage and salary workers in nonfarm industries.*”¹⁴ Nevertheless, it gives us an idea of how disproportionate the effect will be.

Table 1 illustrates the disparity in wage earnings between the states and D.C., and the Commonwealth of Puerto Rico for all occupations according to the OES:

	50 states and D.C.	Puerto Rico	Difference
Mean hourly wage	\$22.71	\$13.23	\$9.48
Mean annual wage	\$47,230.00	\$27,510.00	\$19,720.00
Hourly Percentile 10	\$8.82	\$7.82	\$1.00
Hourly Percentile 25	\$11.04	\$8.41	\$2.63
Hourly MEDIAN	\$17.09	\$9.42	\$7.67
Hourly Percentile 75	\$27.75	\$14.60	\$13.15
Hourly Percentile 90	\$43.30	\$22.73	\$20.57
Annual Percentile 10	\$18,354.00	\$16,270.00	\$2,084.00
Annual Percentile 25	\$22,950.00	\$17,490.00	\$5,460.00
Annual MEDIAN	\$35,540.00	\$19,590.00	\$15,950.00
Annual Percentile 75	\$57,720.00	\$30,380.00	\$27,340.00
Annual Percentile 90	\$90,060.00	\$47,270.00	\$42,790.00

Table 2 demonstrates the divergence in wage earnings between the states and D.C. vis-à-vis Puerto Rico for management occupations according to the OES:

¹² Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, “May 2014 National Occupational, Employment and Wage Estimates Puerto Rico.” http://www.bls.gov/oes/current/oes_pr.htm. (last visited on September 4th, 2015).

¹³ See footnote 6. Emphasis added to show that because of the unique data it is necessary to use other surveys to compare earnings in the Commonwealth of Puerto Rico and the 50 states and Washington, DC.

¹⁴ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, “Overview.” http://data.bls.gov/cgi-bin/print.pl/oes/oes_emp.htm (last visited on September 4th, 2015).

¹⁵ See footnote 8 and 9.

	50 states and D.C.	Puerto Rico	Difference
Mean hourly wage	\$54.08	\$33.90	\$20.18
Mean annual wage	\$112,490.00	\$70,500.00	\$41,990.00
Hourly Percentile 10	\$22.33	\$14.72	\$7.61
Hourly Percentile 25	\$32.25	\$19.71	\$12.54
Hourly MEDIAN	\$46.75	\$28.05	\$18.70
Hourly Percentile 75	\$67.86	\$42.25	\$25.61
Hourly Percentile 90	> \$90.00	\$59.84	> \$30.16
Annual Percentile 10	\$46,440.00	\$30,620.00	\$15,820.00
Annual Percentile 25	\$67,080.00	\$41,000.00	\$26,080.00
Annual MEDIAN	\$97,230.00	\$58,340.00	\$38,890.00
Annual Percentile 75	\$141,150.00	\$87,870.00	\$53,280.00
Annual Percentile 90	> \$187,200.00	\$124,470.00	> \$62,730.00

Table 2 is of exceptional significance because it exemplifies that if the minimum base salary is increased, most managers in the Commonwealth of Puerto Rico will fail the salary test of the administrative employee exemption, thus qualifying to accumulate overtime. Additionally, it shows that the highly compensated employee exemption would only apply to the ninetieth (90th) percentile versus the states and D.C. where it is achieved somewhere between the median and the seventy-fifth (75th) percentile.

As the previous tables illustrate, the earnings of all full-time and part-time wage and salary workers in the Commonwealth of Puerto Rico are significantly lower than those paid in the states and D.C., according to the OES. Moreover, the spread between the wages is greater for the managerial employees than in all occupations. Thus, we find no reason to believe that such disparity should be different for non-hourly full-time workers.

The new threshold and consecutive annual increases would have a detrimental effect on the Commonwealth of Puerto Rico's economy since most workers would no longer qualify for the exemptions under the salary level test. Mostly, the only remaining exempt employees would be the outside sales employees, teachers, licensed professional and certain medical occupations. Thus, the reduction in exempt employees could translate into an increase in overtime pay, furthering the Commonwealth of Puerto Rico's current economic crisis.

We further note that the CPS' data do not reflect the cost of living index (COLI), which varies among states and has a market impact on salaries.¹⁷ For example, a \$50,440.00¹⁸ salary might be

¹⁶ *Id.*

¹⁷ According to the Missouri Economic Research and Information Center, the cost of living data for the first quarter in 2015 indicates that, in general, the most expensive areas to live in are New England, Alaska, Hawaii, and the West Coast, while the

Ms. Mary Ziegler

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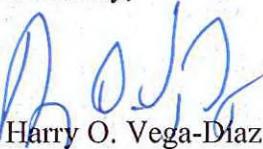
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considered high in Mississippi while considered low in Washington, D.C. Thus, we recommend that the salary data per region be reduced by the COLI per region to arrive at the salary data from where the fortieth (40th) percentile can be selected to establish a national standard salary level. Furthermore, we suggest that the formula be the national standard salary level plus the COLI per region. This formula is similar to the cost-of-living allowance currently granted to federal employees.

In conclusion, due to the overly onerous impact the proposed standard salary level increase represents for the Commonwealth of Puerto Rico, we request the current salary level test be maintained. Currently, American Samoa holds a lower threshold for the exemption than everyone else, \$380 per week, if employed in American Samoa by employers other than the Federal Government. In the alternative, should the Proposed Rules be approved, we request that employees in the Commonwealth of Puerto Rico be excluded from the Proposed Rules minimum salary exemption, or at the very least that the American Samoa's exemption threshold be extended to the Commonwealth of Puerto Rico.

We hope the aforementioned comments are useful to the evaluation of the Proposed Rules. The OCLARH is at your service for any further analysis on the Commonwealth of Puerto Rico's public human resources.

Cordially,



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Director

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least expensive are the Southern and Midwestern States. https://www.missourieconomy.org/indicators/cost_of_living/ (last visited on September 4, 2015).

¹⁸ 80 Fed. Reg. 38515, in page 38517 footnote 1, disclaims that although the proposed rate is of \$921 per week it can be increased to \$970 or \$47,892.00 annually to \$50,440.00 by the time of publication of the Proposed Rules.