

September 4, 2015

Ms. Mary Ziegler
Director, Division of Regulations, Legislation and Interpretation
Wage and Hour Division, U.S. Department of Labor
200 Constitution Ave., N.W., Room S-3502
Washington, D.C. 20210

RE: Wage and Hour Division, U.S. Department of Labor
Regulatory Information Number (RIN) 1235-AA11

Dear Director Ziegler:

On behalf of the members of the Professional Golfers' Association of America, the Club Managers Association of America, the Golf Course Superintendents Association of America, the National Golf Course Owners Association and the National Club Association (collectively the golf industry), we respectfully submit the following comments on the Notice of Proposed Rulemaking (NPRM) under RIN 1235-AA11.

To begin, we would like to acknowledge the hard work the Department of Labor (Department) put into this proposed regulation. Modernizing America's overtime regulations is not an easy task.

With the last major rewrite coming over a decade ago, it is clear that much had to be done to reflect the changing times and expanding needs of employees and employers. To that end, the Department has done yeoman's work.

The golf industry certainly understands the reasons for the changes proposed. However, we do feel there are some issues that need to be addressed before the rule is finalized. We have presented these issues in summary form below with a more detailed discussion in the comments that follow.

Summary of Concerns

Our primary concern is the Department's proposal to increase the minimum weekly salary threshold for exempt employees by more than 200 percent from the current level. We believe this increase is too high for our industry to absorb. In many instances, this new salary figure does not take into consideration the regional cost of living for many of our members.

In addition, we believe this higher wage will actually have a negative financial and employment impact on our employees. Finally, our industry is heavily dependent on golf's seasonality to succeed and we fear this new salary threshold will disproportionately impact golf entities that have shorter seasons in which to prosper.

Along with soliciting comments on the proposed minimum salary threshold, the Department has also requested comments on whether an employee's bonuses or commissions should be included with his/her weekly income to determine if he/she has reached the new salary threshold. Our industry is unanimous in its belief that such earnings should be included as part of an employee's salary.

The Department has also invited comments regarding whether there should be changes made to the white collar duties test. The golf industry feels there should not be any further changes to the overtime exemption rules. However, if additional changes are made, we believe the Department should first present its proposals in a separate NPRM and allow an opportunity for comment.

After reviewing our specific comments below, we hope the Department will better understand the negative consequences that are likely to arise for stakeholders in our industry should the proposed rule remain unchanged.

The Proposed Salary Threshold Is Too High and Does Not Consider Regional Cost of Living

The rule proposes increasing the minimum weekly salary for Executive, Administrative and Professional (EAP) to the 40th percentile of earning for full-time salaried workers nationwide. In addition the rule proposed automatically adjusting the minimum salary level on an annual basis. The Department of Labor has projected this change to be \$50,400 for the year 2016, with automatic increases based on the Consumer Price Index (CPI). While the proposed rule states that adjusting the salary level test is an easy way to distinguish between exempt and non-exempt employees, the simplicity may work against small businesses such as golf courses.

The average salary in many rural areas, small towns outside of major metropolitan areas and certain lower-wage regions of the country is substantially lower than the national average. By setting one nationwide threshold, the rule unnecessarily disregards regional differences in the level of income needed to achieve a middle-class standard of living. The federal government has made available regional data on salaries, and even uses regional salary data in its own General Schedule ("GS") pay tables. This allows the government to include locality adjustments that recognize that certain metropolitan areas have higher costs of living requiring an increase in pay.

The proposed salary level rule would have significant consequences for the operations of many small businesses. Many small businesses do not have the budget flexibility to increase the wages paid to employees, and as a consequence they will either have to lay off employees, or decrease hourly wages in order to prevent a hit to their bottom line.

The Proposed Salary Threshold Will Negatively Impact Employment Status for Workers

In a June 30 statement to the press, Secretary of Labor Thomas Perez said that employees converted from exempt to non-exempt status will benefit from the change, even if they are not permitted to work overtime hours: “Equally precious is the gift of time. It’s not a salary increase, but they will have more time to spend with their families.” Similarly, the NPRM states that “[t]he additional time off may help these workers better balance work-life commitments, thus potentially making them better off.” As the NPRM concedes, however, “not all workers would prefer to work fewer hours, and thus some of these workers might experience an adverse impact.”

It is likely that this adverse impact to employees in our industry could be substantial. The proposed regulations will cause the small businesses in our industry to face increased budget expenditures for labor costs. Under this economic pressure, many will be forced to reclassify currently exempt employees and in essence demote them to hourly, non-exempt positions. These employees will experience a perceived demotion and no tangible compensation increase to balance this action. Employees will find themselves working the same number of hours but earning less on an hourly basis than other previously lower-level, non-exempt employees. This could lead to a decrease in employee morale and job satisfaction for these employees, leading to overall higher employee turnover and decreased productivity.

In addition, the proposed regulations could cause the loss of career growth opportunities for formerly exempt employees converted to non-exempt status and those entering the industry. Faced with these difficult economic choices, small businesses will hire more hourly staff and eliminate many management positions. With fewer management roles, there will be less opportunity for upward movement and career advancement. This change will be detrimental to young professionals entering our industry as there will be fewer opportunities for them to train for management positions and could lead to a dearth of trained and skilled future managers and leaders.

As a Seasonal Industry, the Proposed Salary Threshold Will Negatively Impact Our Employees

In 2014, the golf industry was comprised of 15,372 courses¹, more than half being privately-owned facilities. A vast majority are small, family-run businesses that have been handed down from previous generations, with fewer than 18-holes and less than \$2 million in annual income.

¹ Source: National Golf Foundation, <http://www.ngf.org/>

Golf course managers work daylight hours, so their work schedules vary from long days in the summer to very short days in the winter. This effectively balances the number of hours worked for salaried employees over a year. Changes to the overtime rule for salaried employees would likely force many course owners to eliminate full-time salaried workers and replace them with seasonal workers.

One of the most critical factors that impacts the amount of play a given course receives is weather. Golf is one of the few businesses that is dramatically affected by the weather forecast, which historically is not highly accurate on a micro-level. Additionally, weather patterns (and even weather forecasts) often endure for periods longer than the typical work week; thus, it is difficult for a golf course that is able to modify its labor force to meet demand to also accommodate wage/labor-related restrictions on total hours within a given period.

As a recreational activity, golf is a discretionary spend for its customer base. Additionally, the golfer's decision of whether to play and where to play golf often is made within a 24-hour window; these decisions are typically influenced by a wide range of factors that are subject to change right up to the last minute. Therefore, as an industry, the business of golf has an inherent challenge in accurately forecasting the demand on any facility on any given day. We need the flexibility to manipulate our work schedules to coincide with the demands of our customer base.

Golf is a very popular health and wellness activity, with numerous research studies that indicate golfers tend to be more healthy and active than average Americans. However, the current trend towards a less active, more sedentary lifestyle has precipitated a drop in participation in golf, resulting in financial hardships for many golf facilities. Further erosion of the economic viability of existing golf facilities through wage/hour restrictions will result in fewer opportunities for people of all ages to engage in a healthy lifestyle activity.

Comments Regarding the Inclusion of Bonuses and Commissions in the Salary Threshold

The U.S. Department of Labor seeks comments on whether the Department should modify the standard exemption for executive, administration, and professional employees to permit nondiscretionary bonuses and incentive payments to count toward partial satisfaction of the salary level test. In addition, the Department of Labor invited comments on the appropriateness of including commissions as part of nondiscretionary bonuses and other incentive payments that could satisfy the salary requirement. We appreciate that the Department of Labor is seeking this information to help determine what compensation should be considered when evaluating the salary requirement.

We strongly encourage the Department of Labor to take a broader approach to how it proposes to define compensation. The proposed rule that would establish a minimum salary level for exempt employees of \$50,440 takes a one-size-fits-all approach to salary income and does not consider the differing compensation systems in varied industries. The club industry and the employees we represent include PGA golf professionals, tennis professionals, and fitness trainers. Many of these employees are compensated in a manner substantially different from employees in other industries.

In most clubs, PGA golf Professionals, tennis professionals, and fitness trainers in exempt positions are paid a salary and retain fees they earn from lessons and programs they direct for their respective clubs. These employee's annual salaries might be less than \$50,440, but their total compensation, including lesson fees, program fees, and commissions, often easily exceeds \$50,440. As such, the allied club and golf associations urge the Department of Labor to redefine the compensation calculations to include outside income from lessons, programs, and commissions for purposes of the salary requirement.

If the definition of compensation is not changed, clubs will encounter significant challenges to contain payroll costs. Clubs have limited revenues and will need to change their compensation schemes, if outside income is not included in compensation and adopt options that are not in the best interests of the employee or the club. For example, a club might increase base salary above the exemption level, but will retain lesson and program fees, thus limiting the earning potential of these employees. In addition, currently exempt employees may be converted to an hourly basis and limited in their hours to conduct lessons or programs.

In addition, the formerly exempt employees converted to non-exempt status will face the loss of career growth opportunities. Faced with these economic choices, small businesses will hire more hourly staff and eliminate many management positions. With fewer management opportunities, there will be less opportunity for upward movement and career advancement to the detriment to new young professionals entering our industry.

Finally, many membership clubs maintain holiday funds to pay club employees a bonus at the end of the year. The holiday funds are long standing traditions for clubs and do not vary from year to year. We encourage the Department of Labor to consider these payments as part of compensation as well. If these payments are not considered compensation, clubs could be forced to curtail these payments and shift the payments to salary increases for exempt employees. In doing so, this will impact the end of year holiday payments made to lower income nonexempt employees.

While well-meaning in its intent, the proposed rule as currently constructed will in fact harm the very employees it seeks to help by creating fewer salaried employees with lower

total compensation. Therefore, we urge the Department to calculate salaried compensation in a manner that provides maximum flexibility for both employees and their employers.

Comments Regarding Modification of the Duties Test

In its proposed rule, the Department has requested comments regarding modifying the current white collar duties test. Though no specific proposal has been presented, there is a suggestion that the Department favors reinstating a limitation on nonexempt work performed by exempt employees.

The golf industry does not believe any changes to the duties test are warranted. More specifically, we do not believe that the reintroduction of a limitation on nonexempt work would be equitable for employees or employers in our industry.

When the Department first established the duties test in 1940, it included a minimum weekly salary requirement and a limitation on the performance of nonexempt work by an exempt employee. Such employee could not spend more than 20 percent of his time on nonexempt tasks (the percent test).

Unfortunately, the time and administrative effort it took to monitor an employee's tasks made satisfying this requirement extremely burdensome for employers. To resolve this, the Department established a second duties test nine years later.

This new test (the so-called short duties test) dropped the percent test completely and instead significantly increased the minimum weekly salary threshold for exemption. The original duties test (dubbed the long duties test) was maintained, but only if an employee did not receive the new higher minimum salary.

These two tests dominated the overtime exemption landscape for more than fifty years. However, in 2004 a fundamental change took place. This Department decided to remove the long duties test – thereby doing away with the percent test for good – while again increasing the minimum weekly salary threshold for exempt employees.

The Department's rationale for this change was two-fold: 1) The administrative work involved was too burdensome for businesses and their staffs and 2) With higher salary levels, there was less need to scrutinize the actual work performed by an employee. Thus, the Department acknowledged that time spent on complying with red-tape from Washington was hurting businesses and that salary mattered more than how much time an employee spends on different tasks.

In our estimation, that rationale is as correct today as it was when first proffered more than a decade ago.

The golf industry succeeds when all employees pitch-in as needed. Those in leadership positions (traditionally exempt employees) are required to lead by example, which is why they receive higher pay. Sometimes, that means they must perform even the simplest tasks to help the business succeed.

Bringing back the percent test would mean those employees would have to think twice before doing their jobs. They would have to refrain from helping the team simply because they could be nearing a fixed percentage of time spent on tasks they are too “important” to do.

For our industry, that could mean a club manager would not be able to seat patrons in the clubhouse restaurant. It could also mean a club’s pro shop manager would be unable to assist someone looking to buy equipment or apparel. In any service industry, such a result would be unthinkable.

Naturally, the exempt employee could still complete those tasks but what would that mean for the worker and club?

To start, the employee would be required to track how much time he spends on each duty. Then, he would need to ascribe a percentage to the exempt and nonexempt tasks performed. Finally, the club would need to determine whether that exempt employee reached the 40-hour threshold and then see whether overtime would be due.

Of course, this would be a daily task that could produce different results each day depending on the work done. To say the least, this would reintroduce an extremely convoluted process for the worker and the golf facility alike.

In 2004, the Department removed the percent test to streamline the overtime review process. Should it be brought back, the same administrative issues would return with it. We do not believe such a result is in the best interest of our industry nor do we believe that is how the Department wants business to function in America.

In addition, we would note that in President Obama’s March 13, 2014, Presidential Memorandum, the Department was specifically directed to “modernize and simplify” the overtime regulations. As such, we have a difficult time understanding how the reintroduction of an antiquated and complex requirement like the percent test would ever meet the President’s stated goal.

Not only does our industry believe that bringing back the percent test would increase administrative burdens and run opposite to the President’s directive, but we also believe that the proposed increase to the minimum weekly salary threshold completely removes the need for such a test altogether.

In 2004, the removal of the percent test was predicated on the introduction of a higher minimum weekly salary threshold. In this current NPRM, that rationale was reaffirmed when the Department reiterated that it “has long recognized the salary level test as ‘the best single test’ of exempt status.”

While it is unclear what the new minimum weekly salary threshold will be, we can say with certainty that it will increase – significantly. That being the case, the higher minimum weekly salary should be more than enough to protect an employee’s right to a “fair day’s pay for a fair day’s work” without returning to the percent test.

In short, if the administrative burden tracking such work was high in 2004, then it has only gotten worse in 2015. Additionally, if the President’s stated goal is a more modern and simple rule, then returning to an elaborate test of the past will not help reach that goal. Finally, if instituting a higher minimum weekly salary threshold helped alleviate the Department’s concerns when it removed the percent test years ago, then that should still be the case today. Therefore, we would strongly urge against changing the duties test by reinstating the percent test.

In the event that the Department still wishes to alter the duties test, it is the golf industry’s hope that such change would only occur following a Notice of Proposed Rule Making and an opportunity for comment on the proposed changes.

Without doubt, this NPRM’s proposed change to the minimum weekly salary threshold is a major issue for our industry. The only benefit is that we are somewhat aware of what might be coming in the months ahead. The same cannot be said regarding any change to the duties test.

To date, we have not received any proposal from the Department suggesting what the changes could be – other than a brief reference to the California rule, which we’ve addressed above. However, the fact remains that any adjustment to the duties test could impact our industry even more than the salary threshold change.

Whether through reinstating the percent test or enhancing an exempt employee’s supervisory duties or increasing the number of employees he must supervise, any alteration of the duties test would likely mean a fundamental change our industry’s basic business model. Such a major disruption would take time and financial resources to implement.

The golf industry finds it hard to imagine that the Department would suggest making such a change without any opportunity for notice and comment on each specified proposal. Putting aside the potential legal issues that could arise from such an action, we believe

fundamental fairness dictates that such a notice and comment period should be offered if any modifications to the duties test are made.

Conclusion

As leading representatives of the golf industry, we are proud to say that golf helps support nearly two million jobs in the United States. Our employees earn more than \$55 billion in income per year. In that sense, the golf industry has never shied away from ensuring its employees are well and appropriately compensated for the work they do.

After reviewing the Department's proposed rule, our industry agrees that there may be a need to update the current minimum weekly salary threshold. However, we urge the Department to consider and adopt our recommendations. We are concerned that if the proposed rule is not amended, the rule will cause economic harm to the golf industry and its employees. The rule could cause employers to reduce employment and shift workers to part-time status to comply with the rule. In addition, we do not believe any other changes to the duties test are necessitated to ensure the overtime exemption rules work as required. As such, we hope the Department will fully consider our proposed suggestions and incorporate them into the final product.

Working together, we can craft an overtime exemption rule that meets the needs of our industry while ensuring the Department fulfills its duties to protect America's workers. Thank you for your consideration.

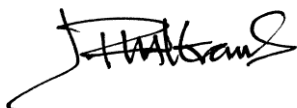
Sincerely,



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