

Civic Ventures

Date: September 5, 2018

From: Jasmin Weaver

Re: EAP Exemption Rules – Stakeholder Feedback on Draft Rule Concepts

Dear Director Sacks and Deputy Director Smith,

We appreciate the opportunity to provide feedback on the Executive, Administrative, and Professional Exemptions – Draft Rule Concepts provided by the Washington Department of Labor & Industries. We commend the department for the thoughtful and thorough process that you have conducted to date and we welcome the opportunity to provide feedback at this crucial stage.

We would like to begin by emphasizing how critical it is for the department to update overtime rules in Washington State. **The department last updated its rules on the EAP exemptions in 1976—over 40 years ago.** Thus, this work is long overdue. In addition, because it has been over 40 years since these rules were last updated, the current rules are grossly out of sync with the needs of Washington workers and employers, and the values of Washington voters.

In 1975, 63% of U.S. salaried fulltime workers were eligible for overtime. By 2016, that percentage had fallen to below 7%. This illustrates the damage 40 years of inattention and neglect has caused across the county and in Washington State. Clearly, it is time to update these rules and restore overtime protections to the majority of workers.

It is also important to remember that the threshold we are talking about here is the salary level at which businesses can force people to work more without paying them anything additional. Forcing people to work more without added compensation should be the exception, not the rule, and it is far too common of a practice today. This basic principle should not be forgotten as the department finalizes the details of this important policy.

You will likely hear two main arguments from people and groups opposed to updating these rules and restoring these protections. Their arguments are profoundly flawed.

Increases need to be big to catch up for over 40 years of neglect, but that doesn't mean they are too big: First, you will hear that the increases being supported by some are way too large and cannot be sustained by businesses or nonprofits. In response, we would like to emphasize that 40 years of inaction have necessitated a large increase to restore these protections to the levels they

once were. We would also like to point out that many of the same people arguing that some of the increases being discussed are too large have never met a proposed increase that they like and have fought any proposed increases over the last 40 years, resulting in the need for a large increase today.

In addition, it is important to note that businesses and nonprofits once existed and thrived under overtime rules that covered the majority of fulltime salaried workers, and businesses and nonprofits will be able to thrive under updated rules that cover the majority of fulltime salaried workers. This is not to say that phase-in time is unnecessary. Nonprofits and for-profits alike will need time to adjust, but that should not lead the department to back away from its obligation to restore these protections to workers. And as mentioned above, this is something the residents of Washington undoubtedly support. In fact, a poll released in 2015 by Public Policy Polling found that 65% of people support overtime pay for individuals earning up to \$75,000 (<http://fortune.com/2015/05/12/poll-overtime-rule/>). In 2018, three years later, support for this issue has only grown.

Restoring overtime protections to the majority of full-time workers will reap enormous benefits for all of Washington State. It will benefit Washington workers, families, communities, businesses, and the economy. Washington workers will either be required to work less and have more time to spend with their families, in their communities, or on a second job or hobby; or they will finally be compensated for the work they do over 40 hours. Washington businesses will benefit from more productive workers, and the economy will benefit because workers will either have higher wages or more leisure time—both of which pump more money into the state economy.

We believe in the creativity and ingenuity of Washington businesses and nonprofits, and their ability to adjust to restoring overtime protections to workers if given a clear, predictable rule and enough time to adjust.

Washington is a leader on workers' rights, and we should not delay action to follow potential Trump Administration actions on overtime: Some have also argued that now is not the time for Washington State to act and that the Department of Labor & Industries should wait for the Trump Administration to update national overtime protections and then follow their lead. This argument is out of step with the desires of Washingtonians and our state's longstanding leadership on workers' rights. Washington is a national leader on minimum wage, sick leave, paid family leave, equal pay, and many other important worker protections. The people of Washington expect nothing less for overtime protections.

Below we have provided brief feedback on the specific draft rule concepts provided by the department.

A. Salary Level – Executive, Administrative, Professional

The department should utilize a **multiple of the minimum wage** when establishing the

salary threshold, and it should set the threshold at **three times the minimum wage**. Three times the minimum wage is in line with historical linkages between the minimum wage and salary threshold (when the overtime threshold was first established it was three times the minimum wage), and the recent draft overtime rule proposed by the Obama administration. A multiple of the minimum wage is easy for workers to understand and for employers to calculate and predict.

B. Automatic updating mechanism for EAP salary level

We prefer **option one – establish in state rule a mechanism to allow automatic updating via a defined relationship between the salary threshold and the minimum wage**. An additional benefit of tying the wage threshold to the minimum wage is that it will track with inflation automatically, and will not require burdensome, unpredictable, and irregular rulemaking to ensure that overtime protections maintain their value over time. This will provide predictability for workers and employers and prevent many of the challenges we must address today.

C. Duties Test – Executive

Labor & Industries should adopt these policies, with some caveats:

- 1. Eliminate the short and long tests and adopt a single state duties test.**
- 2. Align the state duties test with the federal duties test – with caveat**

We suggest that the department strike one element of the Executive exemption with respect to hiring and firing, promotion, or demotion.

- Primary duty is managing the enterprise, or a customarily recognized department or subdivision of it.
- Customarily and regularly direct the work of two or more employees or their equivalent.
- Has authority ~~or input that is given particular weight~~ over hiring and firing, promotion, or demoting employees.

This small change will ensure that only workers who have true executive authority will be exempted from overtime protections under this test.

3. Exemption of business owners.

5. Primary duties analysis:

ii. **Retain a percentage cap on non-exempt duties:** This percentage cap is reasonable, and easy to understand.

D. Duties Test – Administrative

The department should largely align with the federal test, but should make the following changes:

2. Align the state duties test with the federal duties test.

Federal Test:

- Non-manual office work directly related to management or general operations of employer or employer's customers.
- Primary duty customarily and regularly includes discretion and independent judgement on matters of significance.

3. Establish, retain, or clarify state specific criteria for meeting duties tests.

i. **Add policy excluding clerical or routine work.**

4. Primary duties analysis.

ii. **Retain a percentage cap on non-exempt duties**

E. Duties Test – Professional

The department should adopt a single duties test, largely reflective of the federal duties test, with the caveat that the state rule should:

3. Establish or retain state-specific criteria for meeting duties test.

i. **Retain broad requirement of discretion and independent judgement.**

F. Highly Compensated Employee Exemption

Do not add a highly compensated employees' exemption to state rules.

G. Professional Computer Employees Exemption

No special exemption should exist due a workers' professional connection to computers. This exemption is antiquated and should be eliminated. So-called "Computer Professionals" should be assumed to have the same overtime protections as any other worker, and should only be exempted based on Executive, Administrative, and Professional standards which apply to all other workers.

H. Outside Salesperson

Outside salespersons should be guaranteed a minimum compensation to qualify for this exemption, that ensures access to something approximating full-time, minimum wage compensation, and which updates regularly like the minimum wage.

I. Effective Date

The effective date of this rule should be as soon as possible while ensuring a reasonable transition time for employers. Whether the effective date is three months out from the adoption of the new rule, six months, or longer should be connected to the value of the increase for workers. Further discussion of this element of the rule should be contingent upon the significance of the final rule.

Thank you for the time your staff has spent soliciting comment on possible policy approaches and distilling them into a menu of clear, concise policy statements. This level of community engagement, idea generation, and multi-faceted communication is unprecedented and has helped to guide a thoughtful, data-driven policy discussion amongst stakeholders who often hold disparate views. We look forward to continuing to work with you in the coming months on this fundamental labor protection.

Sincerely,



Jasmin Weaver
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Civic Ventures