



November 6, 2023

Ms. Julie A. Su  
Acting Secretary  
U.S. Department of Labor  
Division of Regulations, Legislation & Interpretation  
Wage and Hour Division  
200 Constitution Avenue, NW, Room S-3502  
Washington, D.C. 20210

**RE: RIN 1235-AA39, Notice of Proposed Rulemaking, 29 CFR Part 541, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, WHD 2023-0001**

Dear Acting Secretary Su:

ISSA, the worldwide cleaning industry association, appreciates the opportunity to comment on the proposed changes the criteria for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA). ISSA is a nonprofit trade association that represents more than 10,500 distributor, manufacturer, manufacturer representative, building service contractor, in-house service provider, residential cleaning, and associated service members. Our members represent an essential industry that ensures our offices, schools, hotels, hospitals, and other buildings are healthy and safe.

Businesses in the cleaning industry are already facing labor shortages, while the demand for cleaning products and services remains at an all-time high. For example:

- The cleaning industry continues to struggle with increased demand for cleaning services and massive labor shortages. The most recent report from the U.S. Bureau of Labor Statistics reported 11 million job openings.<sup>1</sup> The labor challenges are particularly acute for service industries such as professional janitorial and cleaning services.
- The commercial cleaning market is highly competitive and made up of more than 1.2 million businesses and nearly 3 million workers nationwide<sup>2</sup>. This is in addition to many more workers employed by manufacturers and distributors of cleaning products.

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<sup>1</sup> <https://www.bls.gov/news.release/jolts.nr0.htm>

<sup>2</sup> <https://www.ibisworld.com/industry-statistics/number-of-businesses/janitorial-services-united-states/>

- According to the [U.S. Bureau of Labor Statistics](#), “About 335,500 openings for janitors and building cleaners are projected each year, on average, over the decade” which includes a 4% annual projected growth.<sup>3</sup>

Because of the tight labor market, increasing demand for cleaning, and market and policy changes increasing the cost of labor we oppose the U.S. Department of Labor’s (DOL) proposed rule. We also urge the Department in finalizing any rule to allow adequate time for the implementation and adoption of the new rule in the workplace.

The proposal as written will:

- Result in positions not being filled and cleaning services not being able to meet the demands from facilities.
- Result in significant financial harm to businesses due to having to turn down business.
- Result in loss of employee benefits and flexibility.
- 86% of our surveyed members said this rule would drive the cost of cleaning products and services higher. This makes keeping facilities healthy and clean more expensive and would likely cause a reduction in proper and trained cleaning of facilities because some facilities may opt to use lesser or untrained workers to clean facilities to lower their operating costs.
- 62% of our members said this proposal will reduce opportunities for professional development.
- Not allow for public comment on automatic updates and thus will not be able to DOL to accurately account for significant fluctuations and changes in the economy.

### **Salary Threshold and Methodology**

The nearly 70% increase to the minimum salary threshold in 2024 with an automatic adjustment every 3 years is not sustainable for the cleaning industry. Since at least the 1940s, the DOL has set salary levels to ensure that employees below the salary threshold clearly meet any duties test and that employees above the threshold would still need to meet a duties test in order to qualify for exemption. The Department’s 2004 methodology is the most appropriate methodology to establish the level of a salary intended to screen out clearly nonexempt employees. The proposed salary threshold is too much, too fast and is neither a manageable nor appropriate threshold level.

### **Automatic Increases Provision**

The DOL again proposes to automatically adjust the exemption salary threshold every three years as it tried to as part of the failed 2016 Final Rule. The economic impact of an auto-increase provision would be a huge burden for the industry so many uncertainties of what the economy and the industry will look like in even three years let alone six, nine, or

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<sup>3</sup> <https://www.bls.gov/ooh/building-and-grounds-cleaning/janitors-and-building-cleaners.htm>

twelve. Additionally, we strongly oppose the idea of an automatic increase due to its lack of transparency and the ability for those impacted to comment on future increases.

For each of these reasons the Department should abandon any effort to automatically increase the salary threshold in any final rule.

### **Failure to Address Regional Cost Differences**

The DOL's proposed salary threshold does not account for regional differences in wages and cost of living. Salaries and living costs are significantly higher in major metropolitan areas than in more rural parts of the country. The DOL's one-size-fits-all approach to wage levels fails to account for this diversity.

The increase proposed by the DOL will fall disproportionately on workers in cities and states with lower costs of living. The proposals threshold would still negatively impact workers and small businesses that operate in lower cost of living areas. The wage threshold set by the DOL should be the most reasonable minimum rather than trying to set a one-size-fit all amount for the entire country.

ISSA recommends considering addressing the reality that cost of living and wages can be vastly different based on location.

### **Bonuses and Commissions**

All forms of compensation should be used to determine whether the salary level has been met including bonuses and commissions. As far as the employee is concerned, at the end of the year, the total compensation is the same. Like employees, employers hold the same global view of compensation rather than focusing on the individual components. Any new regulation should look at total annual compensation, rather than distinguishing between a base salary and any incentive payments.

DOL should include count 100% of the bonuses paid quarterly, semi-annually, or annually to satisfy a portion of the salary threshold. This decision reflects how these incentive payments are made by employers. The point of the salary level is to assist the Department in screening out non-exempt employees. Where someone is performing duties that qualify for an exemption, is paid a substantial amount of money for doing so, and is paid some amount in salary, it is difficult to see why the precise way the employer attributes the payments should make a difference as to that employee's exempt status.

### **Timing of Salary Threshold Updates**

Congress did not intend for the law to include automatic annual updates. Instead, Congress ordered the Department to update the exemptions from "time to time," to take into account changes to the economy. From 1938 to 1975, the 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, the DOL remedied this by modernizing the duties test.

For example, the salary threshold post 2004 would not have made sense during the Great Recession and the associated prolonged and difficult recovery. The decision not to raise the threshold during the recession was a wise course of action and argues against any automatic updates, which could exacerbate future recessions. The DOL needs to fulfill its duty and regularly update the threshold through notice-and-comment rulemaking, as it has with every salary increase. The DOL can meet this requirement without rigid and costly automatic updates.

### **Adequate Implementation Time**

The 2016 final rule would have required employers to review exempt classifications and compensation levels and make decisions regarding FLSA exempt status while considering a wide variety of operational issues and while attempting to integrate compensation changes into budget and performance review cycles in very short order. When the court injunction was put in place, nearly six months after the rule was published in the *Federal Register*, many employers were still grappling with implementing these changes. In order to avoid undue workforce disruption, we recommend that the Administration provide at least 12 months before any new requirements take effect.

### **Conclusion**

Ultimately, if cleaning related businesses cannot afford to fill vacancies, public health will suffer and customer contracts will be given up, all of which negatively impacts U.S. workers and the economy. For these reasons, we respectfully urge DOL to abandon this rule completely.

Thank you for the opportunity to submit these comments on behalf of the cleaning industry.

Sincerely,



John Nothdurft  
Director of Government Affairs  
ISSA – The Worldwide Cleaning Industry Association