



**OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416**

October 8, 2003

Via Facsimile and Electronic Mail

The Honorable Ted Stevens
Chairman
Committee on Appropriations
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

Re: Amendments to FY 2004 Labor, HHS, and Education Appropriations Bill

Dear Chairman Stevens:

The Office of Advocacy of the U.S. Small Business Administration urges the conference committee on the FY 2004 Labor, Health and Human Services, and Education Appropriations bill to allow the Department of Labor (DOL) to proceed with its rulemaking titled, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees."¹ On behalf of this nation's small businesses, the Office of Advocacy urges the conference committee to reject measures that would prohibit or restrict DOL's current efforts to update and simplify rules on overtime pay.

The Office of Advocacy (Advocacy) was established pursuant to Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Chief Counsel for Advocacy participates in rulemakings to ensure proper representation of small business interests. In addition to these responsibilities, the Chief Counsel monitors agencies' compliance with the Regulatory Flexibility Act (RFA). The RFA requires Federal agencies, such as DOL, to consider alternatives to avoid overly burdensome regulation of small entities.²

Advocacy believes that DOL's proposed rule will positively affect small businesses. In fact, in my office's comment letter on the proposed rule, we commended DOL for its

¹ NPRM, 68 *Fed. Reg.* 15559 (March 31, 2003).

² Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§ 601-612).

outreach to small entities covered by the rule and urged consideration of additional small business flexibilities.³

I. The proposed overtime rule expands the number of employees eligible for overtime and helps small businesses by simplifying the regulations.

The proposed rule will extend the right to overtime to more workers than ever. DOL estimates its proposal will result in 1.3 million employees receiving overtime pay who currently do not. As a result, small employers will incur significant costs through increased payroll expenditures and the cost of updating their payroll practices to comply with the new rule.⁴ Despite these costs, small businesses support the rule, because it simplifies and updates the regulations, reducing the complexity of compliance.

The DOL proposal would increase the salary threshold for determining which employees are exempt from overtime requirements. While increasing the salary threshold will cause more employees to become overtime-eligible, the current “salary test” is in need of updating. Small employers advised Advocacy that the current minimum salary is too low and, therefore, unhelpful in determining an employee’s status.

The proposal also removes complexity from the “duties test” that has complicated small business compliance under the existing regulations. The current duties test has led to complex case law, which small businesses cannot reasonably be expected to apply. The test’s complexity and resulting misapplications all too often resulted in lawsuits. The simplified duties test in DOL’s proposal will enable small business employers to understand the regulations without outside experts or attorneys.

Small businesses need a rule that is easy to apply to determine which employees are overtime-eligible and which are not. The Office of Advocacy believes that the rule proposed by DOL is an important step to update the rules. The small business community deserves credit for their willingness to incur additional costs and we join their belief that those costs are outweighed by the benefits of simplifying the criteria for overtime.

³ Advocacy’s June 24, 2003, comment letter to DOL is available on Advocacy’s website at http://www.sba.gov/advo/laws/comments/dol03_0624.html.

⁴ The total cost of the rule to employers is between \$870.3 million and \$1.5 billion, with small business bearing from \$502.4 to \$835.9 million. 68 *Fed. Reg.* 15560, at 15577, 15579.

II. The Department of Labor should be allowed to revise its rule to address concerns raised by the public comments and Congress.

The Office of Advocacy urges Congress to allow DOL to address the concerns raised during the public comment period on the proposed rule. Appropriations language that would alter the notice and comment process could jeopardize DOL's ability to give proper consideration to the concerns of small businesses and their employees that were raised during the rulemaking process. DOL's regulatory and economic experts are required by law to evaluate and address all public comments, and we believe that DOL is currently revising its rule to reflect the concerns of the public.

Under the Congressional Review Act (CRA), Congress will have an opportunity to review DOL's final rule before it goes into effect.⁵ The Office of Advocacy believes that DOL's revisions to the proposed rule and its analysis of the rule's impact on employers and employees are likely to address the concerns being raised by Congress. The Office of Advocacy urges the conference committee to allow DOL to proceed with this rulemaking and issue a final rule.

III. Conclusion

In conclusion, Advocacy urges the conferees to refrain from adopting any measure that prohibits or restricts DOL from acting to help small businesses confronted by these complex and confusing Federal regulations on overtime pay. Advocacy appreciates the opportunity to submit the views of small business to the conference committee. Thank you for your consideration and please do not hesitate to contact me or Michael See of my staff at (202) 619-0312 or Michael.See@sba.gov.

Sincerely,

/s
Thomas M. Sullivan
Chief Counsel for Advocacy

/s
Michael R. See
Assistant Chief Counsel

Cc: House and Senate Conferees

⁵ Pub. L. No. 104-121, 110 Stat. 868 (1996) (codified as amended at 5 U.S.C. §§ 801-808).