Smith Summerset & Associates LLC
Wage Hour Consultants
189 E. Big Beaver, Suite 203
Troy, MI 48083
248-918-4448
James@SmithWageHour.com

May 1, 2019

Melissa Smith, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., NW
Washington, DC 20210

Subject: Comments on 29 CRF Part 541 NPRM
RIN 1235-AA20

Smith Summerset & Associates LLC (hereinafter Smith Summerset) provides expert consulting services to assist employers in achieving and maintaining compliance with Wage and Hour laws and regulations. Each of our associates has more than 40 years experience -- the majority of that time employed as career managers within the WHD. Our knowledge of the practical realities of Wage Hour issues is second to none.

Smith Summerset opposes the proposed changes to 29 CFR Part 541, Section 541.602(a)(3), which would allow employers to count nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10 percent of the standard salary level test. We oppose the proposed changes in general and we oppose them in detail. We particularly oppose the allowance of up to a 52-week period to make final payment sufficient to achieve the required standard salary level. We also take note that a massive increase in expensive unexpected litigation would likely ensue if the proposal is adopted.

These comments will use the following acronym and phrases:

- "BIC" for nondiscretionary bonuses, incentives and commissions,
- "BIC provision" for the proposed § 541.602(a)(3).
- "BIC settlement period" for the period used by the employer in implementing the proposed BIC provisions.

First general objection:

The proposed § 541.602(a)(3) is unfair and contrary to the purpose and objective of the Fair Labor Standards Act .

The purpose of the Fair Labor Standards Act (FLSA) stated in FLSA Section 202 is "to correct and as rapidly as practicable to eliminate … labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The FLSA is therefore intended to benefit the interests of employees, particularly low wage employees.

The proposed BIC provision in no way benefits employees. The direct opposite is true -- all benefit flows to employers. More precisely, all benefit flows to those employers who choose to pay an employee the bare minimum, lowest possible salary needed to support the employer's claim of 541 exempt status for the employee. The BIC provision is simply a loophole that would allow delayed payment of as much as 10% of the minimum salary for up to 52 weeks.

Many employers will simply adopt a "longevity bonus" system under which 10% of the standard salary remains unpaid each week, not to be paid until the end of the 52 week BIC settlement period. At the proposed standard salary level of $679 that equals $67.90 per week or $3,530.80 total per year, unpaid for as long as 52 weeks after the work is performed. A great many of the employers who will adopt this approach will have never previously used any BIC system whatsoever. They will adopt it solely to take advantage of the BIC provision.

These are significant amounts of money -- hard-earned wages for hours already worked. Many hundreds of thousands of employees would be affected. These employees are not high wage earners. They are low-level staff who live paycheck to paycheck. They depend on prompt payment of their wages in order to pay their bills and support their families. To allow delayed payments of such large amounts to relatively low wage workers for as long as 52 weeks after the work was performed is entirely unfair and contrary to sprit if not the letter of the FLSA.

Second general objection.

The underlying rational for the inclusion of the BIC provisions is specious - superficially plausible, but actually wrong.

The only rationale for proposed BIC provisions articulated in the 2019 NPRM and in the preamble to the 2016 Final Rule as follows:

1. Business interests expressed support for such inclusion.

2. "Such payments can be an important part of exempt employees' compensation"[1] and "*such compensation might be curtailed* if the standard salary level was increased and employers had to shift compensation from bonuses to salary to satisfy the new standard salary level."[2]

[1] 2019 NPRM
[2] 2016 Final Rule

3. Inclusion of the BIC provision would modernize the regulations.

Point 1 is entirely understandable. The proposed change is the nose of the camel under the edge of the longstanding salary basis tent. It would effectively change the concept of a salary being a predetermined amount *received every week* to one of a salary being a predetermined amount *most of which* is received every week -- the rest need not be received until as much as 1 year after later. The proposed change is an unjustified departure from core FLSA principles. In practical application it lowers the standard salary level by 10%.

Point 2 is verbal sleight of hand. In the first place, while it is true that "such payments can be an important part of exempt employees' compensation", this statement primarily applies to more highly paid employees – those in higher levels of the 541 spectrum, including Highly Paid Employees addressed separately in the regulations. BIC payments are *not* an important pay component for the relatively lowly paid employees who would be affected by the proposed BIC provisions. Employees affected by the proposed BIC provisions are exactly those employees most in need of the certainty and regularity of a salary, even if only a low salary. There is no justifiable reason to lessen the value of their low salaries still further by allowing delayed payment of 10%.

In the second place, omitting the BIC provisions from the regulations would in no way inhibit or curtail payment of bonuses, incentives or commissions as claimed. An employer affected by the proposed standard salary level increase who already makes BIC payments to the affected employee could (and almost certainly would) address the issue in its entirety by a simple one-time accounting change by which the employer would re-allocate some portion of previous BIC payments to the employee's weekly salary sufficient to at least equal the standard salary level. The employer's total payroll expense would not change at all. The dollar amounts would simply move from one accounting category to another. Nor would the employee's total compensation package change. The employee's salary would increase to at least the standard salary level but their BIC compensation would decrease by an equivalent amount. Such one-time accounting changes would be easily implemented by any employer wishing to do so. Such one-time changes would be widely implemented across the low wage industries primarily affected by this issue. The changes would be simple one-time readjustments of BIC calculation protocols used by that employer. They would in no way inhibit or curtail the payment of bonuses, incentive or commissions in a general sense.

Point 3, asserting that the change would modernize the regulations, is misleading and unrealistic. "Modernize" is not specifically defined or even described in the NPRM. The term apparently refers to "an attempt to align the regulations better with modern pay practices".[3] Or perhaps the term "modernize" envisions some imagined simplification which would assumedly make the regulations easier to understand or implement.

Aligning the regulations with modern pay practices must *not* be viewed as a legitimate goal within the context of these regulations. M*any modern pay practices, particularly*

[3] 2019 NPRM Executive Summary

with the advent of complicated and difficult to understand computer applications, violate the law or otherwise harm workers. Modern pay practices often pay workers less than FLSA minimum wage. Modern pay practices often violate FLSA overtime provisions. Modern pay practices often improperly treat employees as 1099 independent contractors, imposing both short-term and long-term financial harm on the employees and on future U.S. society in general. Modern pay practices often perpetuate discriminatory wage differentials based on unlawful criteria. "Modernizing" the regulations to better comport with "modern pay practices" should not be viewed as a legitimate FLSA goal. It is disingenuous to equate modernization with justification within the context of the proposed BIC provisions. It is no different than claiming internet rules should be "modernized" to better allow phishing fraud or Trojan horse virus attacks because such practices comport with "modern internet practices".

The proposed changes would *complicate* the regulations, not simply them. The proposed changes would make the regulations more difficult for all parties to understand, not less difficult. The bright line test of the minimum salary requirement would be dimmed. The relatively low wage employees affected by the BIC provisions[4], in particular, would be especially ignorant of how their pay was calculated, when to expect payment, and their rights under the law. Employers choosing to utilize the BIC provision would be forced to keep new and previously needed records fully documenting their BIC settlement periods and precisely detailing the BIC earnings and all payments including all "catch-up" payments for each affected employee. All such records would need to be kept in active status for all affected employees i*ncluding those no longer employed* until such time as all "catch-up" payments were calculated, paid and fully documented. Employers would also need to take special care to insure that all persons involved – both affected employees and their supervisors – fully understood the system in order to minimize the flood of litigation likely to ensue.

Particular complexities would arise every time an affected employee is terminated (other than employees terminated exactly at the end of BIC settlement period). When would "catch-up" pay be due to the terminated employee? Must "catch-up" pay to terminated employees be paid by the next pay period after termination? Or could the employer wait until the end of the BIC settlement period before paying "catch-up" – perhaps as long as 51 weeks in the future? If the employer can wait until the end of the BIC settlement period, why wouldn't every employee who is owed "catch-up" immediately file a private lawsuit (on the day after their termination) for unpaid overtime pay, since, by definition, if "catch-up" pay is owed then the standard salary test was not met and therefore the employee was not 541 exempt?

Third general objection.

A flood of expensive and unexpected litigation would ensue.

[4] Many likely paid below the minimum State minimum wage level in their State.

If "catch-up" pay under the BIC provision *is* owed to an employee then by definition the employee was not 541 exempt because the standard salary test was not met for that employee.

It is therefore clear that if an employer *fails* to timely pay required "catch-up" pay for any reason then back wages will be owed to the affected employee for all overtime hours worked during the settlement period. This is plain fact and certain law. The terms of the 541 exemption will not have been met because the employee did not receive the minimum required salary. No other conclusion is possible.

The reasons for failure to pay "catch-up" pay will not matter. It might range from simple administrative oversight to outright intentional wage theft. But the end result will be the same in terms of back wage liability … back wages will be owed. The dollar amounts will surprisingly be very large. Back wages will not equal the unpaid "catch-up" wages; they would equal the total unpaid overtime premium for all overtime hours worked during the BIC settlement period … a surprising and unexpected liability to those unsophisticated employers who might stumble into the violation simply by reason of administrative oversight.

Specific objections:

The proposed yearly (52 week) period for BIC catch-up payments is far too long. If the BIC proposal is adopted at all (*which we do not support)* then the period for BIC catch-up payments should be no more than quarterly (13 weeks).

Allowing a yearly (52 week) BIC settlement period effectively lowers the proposed minimum salary test for as long as one year after the work is performed. Many thousands or hundreds of thousands of employees would be adversely affected. These are not highly paid employees. They are lower middle class workers who are paid the lowest possible salary necessary to achieve a 541 exempt status claimed by their employers. They live paycheck to paycheck and depend upon prompt payment of their wages in order to pay their bills and maintain a modest lifestyle. To allow payment of a portion of their modest wages to be delayed long after the work is performed is misguided public policy.

If the BIC proposal is adopted at all (*which we do not support)* then the period for BIC catch-up payments should be no more than quarterly (13 weeks). We do not support or recommend even a 13 quarterly (13 week) settlement period -- it is just the lesser of two evils. All of the objections noted herein also apply to a quarterly (13 week) settlement period, but it is only 25% as bad as the yearly (52 week) proposal in this NPRM.[5]

[5] Smith Summerset did not comment during formulation of the 2016 Final Rule, though we did not support the BIC provisions it contained. We still do not support them. We do take note that substantial differences exist between the 2016 rule and the current proposal: The standard salary level in the 2016 final rule was $913 per week and the resulting sub-standard salary for BIC recipients was 90% of $913 or $821.70 per week. The sub-standard salary level for BIC recipients in this 2019 NPRM is only 90% of $679 or $611.10 per week. So the BIC provision in the 2016 final rule, though objectionable, still paid $210.60 more per week into the pockets of affected low wage level employees than the 2019 NPRM would pay. So the BIC

Particular complexities would arise ever time an affected employee is terminated. They would increase in severity with the length of BIC settlement period.

The proposed regulations would allow payment of catch-up wages no later than the next pay period after the end of the 52 week BIC settlement period. So an affected employee *who is still employed by the employer* must be paid "catch-up" wages within one week. But the regulations make no mention of, and seemingly take no consideration of, employees who are *terminated prior to the end of the BIC settlement period.* This is especially important in view of the high turn-over rates historically encountered at the low salary levels involved in this issue.

Numerous questions and problems will arise.

- Must "catch-up" wages to terminated employees be paid by the next pay period following their termination? Or could the employer wait until the end of the BIC settlement period – perhaps as long as 52 weeks in the future – before paying "catch-up" wages?

- Regardless of the answer to the question above, what is the required amount of "catch-up" wages owed o terminated employees who don't work the full BIC settlement period? Is it equal to a pro-rata portion of the 52-week amount due corresponding to the fraction of BIC settlement period worked by the employee? The current language of proposed § 541.602(a)(3) only identifies "52 weeks times the weekly salary amount" as the first calculation in computing the "catch-up" wage amount owed. It makes no provision for employees who may not work the full 52 weeks.

- If "catch-up" wages to terminated employees need *not* be paid until the end of the 52-week settlement period, why would not every terminated employee who is owed "catch-up" wish to immediately (on the day after their termination) file a private lawsuit for overtime back wages, liquidated damages, and attorney fees? Because if "catch-up" wages are owed to the former employee for the period involved, then by definition the standard salary test was not met in that period and therefore the former employee was not 541 exempt.

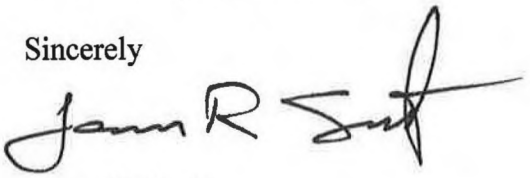
- If "catch-up" wages to terminated employees *can* be delayed until the end of the 52-week BIC settlement period, then what responsibility will the employer have to locate terminated employees and deliver "catch-up" wages to them? May thousands of such former employees will have moved repeatedly or to far distant locations since their termination but before the end of the settlement period.

---

provision under the 2016 Final Rule was at least more palatable than under the current NPRM because of the significantly higher underlying standard salary level.

We appreciate the opportunity to comment on the NPRM. We hope our comments will be taken fully into account.

Sincerely



James R. Smith
Managing Member