UNITED CONTRACT ATTORNEYS
c/o Ryan Bruckenthal, CWA Local 1180
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Submitted via www.regulations.gov
Mary Zeigler
Director, Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: United Contract Attorney's Comments on the Proposed Department of Labor Overtime Rule "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees Under the Fair Labor Standards Act," RIN 1235-AA11.
By Valeria A. Gheorghiu, Esq., Co-Founder of United Contract Attorneys and Foreign Language Contract Attorney, and edited by Cristina Gallo, Esq., Labor & Employment Law.

Dear Ms. Zeigler:

I. Introduction

United Contract Attorneys ("UCA") and its allies submit these comments to the proposed Department of Labor ("DOL" or "Department") overtime rule "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" (" EAP"). United Contract Attorneys is an association of Contract Attorneys, or Document Review Attorneys, which began meeting in 2012 for the purposes of improving working conditions and wages. Currently with nearly 200 subscribers to our listserv, we meet monthly at the CWA 1180 headquarters in New York City, and now with a national reach, we collectively work on various projects. (See our website www.unitedcontractattorneys.org for more information.)

Contract Attorneys, or Document Review Attorneys, are temporary lawyers who are currently paid on average anywhere from $19.00 - $35.00 an hour on a project basis for conducting legal document review. Document review is the largely routine work of the discovery phase of litigation, reviewing hundreds of thousands of business documents for evidence. Document Review Attorneys work on projects year-round for long hours, sometimes

as many as 90 hours a week, and are generally not paid overtime. At least 14,000 Contract Attorneys are seeking temporary work at any given moment.[1] Many Contract Attorneys work as Contract Attorneys for the long term, with some having worked solely as Contract Attorneys straight out of law school for over ten years, jumping from one project to the next, from agency to agency, hired as W2 employees on behalf of law firms by multiple agencies in any given year. Contract Attorneys lack benefits or job security and face unwelcome breaks between projects. Since the recession in 2008, total compensation has diminished: most agencies and law firms, which competitively bid for contracts with law firms, have stopped paying overtime, with wages falling from a regular $45.00 an hour plus overtime to the current low of $19.00 an hour flat.

Therefore, the assumption that lawyers earn a "professional" salary – and are therefore categorically exempt from overtime compensation – is simply no longer true. The legal industry has changed as law firms regularly rely on temporary attorneys to perform the necessary but often tedious and largely routine function of document review, still an important and essential part of the practice of law. Furthermore, the O*NET description of lawyers' tasks, work activities and work context, relied on by the DOL to determine the probability of exemption by occupation, is outdated because Contract Attorneys solely perform the largely routine function of reviewing thousands of documents as part of the essential discovery phase during litigation. Finally, some Contract Attorneys have law school and college debt as high as $300,000 but make, on average, $50,000 a year. From this amount, they are required to pay for health insurance. As a result, Contract Attorneys are a stark example of the disappearing middle class sorely in need of higher wages. In fact, Contract Attorneys would fall within the proposed salary basis test but for the arbitrary exemption as professionals: on an annualized basis, $50,000 amounts to a mere $961.54 per week, which is less than the proposed $970 per week.[2]

Therefore, the DOL should review the professional exemption as well as review the HCE exemption, and update it to reflect the current legal industry and the financial and economic circumstances of ordinary American workers. Given that 53 million workers work on a freelance and temporary basis in the country, UCA therefore submits that the salary basis test

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[1] See https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/january-2014-contract-lawyers.cfm. The Project Counsel Group, which maintains the Posse List, the leading job board and list serve for the contract attorney industry, maintains that it has 94,000 members worldwide. See http://www.theprojectcounselgroup.com/. Of that number, 51,000 describe themselves as Contract Attorneys (also known as Document Review Attorneys or temporary attorneys). See id.

[2] As the DOL's own proposed regulations state, "The exemption was premised on the belief that the exempted workers earned salaries well above the minimum wage and enjoyed other privileges, including above-average fringe benefits, greater job security, and better opportunities for advancement, setting them apart from workers entitled to overtime pay. The statute delegates to the Secretary of Labor the authority to define and delimit the terms of the exemption." Document Review Attorneys or Contract Attorneys have no benefits, no job security in a temporary, project-based industry, no opportunities for advancement, and low wages compared to their traditional professional counterparts who work at law firms, in private practice, or for the government. Take the example of one contract attorney: with $50,000 a year in salary and $900 a month for student debt payment, she is left with $18.85 an hour, or $753.00 a week. This amount is not "well above the minimum wage" and actually falls well within the proposed weekly salary basis test of $970.00 per week.

should be adapted to the changing employment landscape.[3] UCA proposes that the exemption for lawyers from the salary basis test should exclude Contract Attorneys, who perform the often routine legal work of document review, of which less than 50% requires the consistent exercise of professional judgment and discretion. UCA further submits that the duties test should be changed to the California rule defining "primary duty" as 50% or more of exempt work and then apply this test to the document review attorney as an exception to the professional exemption, while maintaining that document review is a necessary part of the practice of law. UCA further proposes that the salary basis test should go from a weekly salary to an hourly salary test. Such a change, in addition to simplifying the test, would expand the universe of the Fair Labor Standard Act's intended beneficiaries. Given the greater student debt burden of lawyers, an industry-specific wage should be applied for Contract Attorneys of $35.00 an hour, just as exceptions are made for individuals working as computer workers and in the motion picture industries. Finally, UCA recommends greatly easing the determination of overtime compensation eligibility by doing away with the licensed professional exemption for attorneys, et al. entirely and relying on a salary-hourly basis test alone.

II. The Occupational Description of Lawyer in O*NET Is Outdated and Document Review Attorney Should be Added. Furthermore, a Document Review Attorney Should Be Treated Analogously to an EAP, specifically, the Learned Professional Employee and Highly Compensated Employee, By Applying the California 50% Primary Duties Test for Purposes of Qualifying for Overtime.

The DOL is "considering whether revisions to the duties tests are necessary in order to ensure that these tests fully reflect the purpose of the exemption," "solicit[ing] suggestions for additional occupation examples," and considering whether it "may need to adjust its assumptions of the likelihood of exemptions should the Department revise the duties test." To this end, UCA submits that "document review attorney" is another occupational example which O*NET should add and which should fall under the DOL classification of "learned professional employee exemption," "highly compensated employee," or "over-time eligible white collar workers" for purposes of qualifying for overtime subject to a duties test if he/she makes less than the proposed $122,148 annually. The UCA further submits that the DOL should adopt the California duties test requiring that the exemption only apply to the EAP if 50% or more of an individual's primary tasks are exempt. Applying this 50% duties test to the Document Review Attorney as a learned professional employee – not as an automatically exempt licensed professional – the Document Review Attorney would qualify for overtime.

The tasks of the Document Review Attorney sharply contrast with those of the traditional irreplaceable lawyer who is exempt from overtime, and who is described as representing clients in court, arguing motions, preparing legal documents, negotiating, and so on, as per the outdated occupational description of O*NET. By contrast, the Document Review Attorney reviews

[3] See https://www.upwork.com/press/2014/09/03/53-million-americans-now-freelance-new-study-finds-2/.

documents for relevance to the litigation one by one, coding them as "relevant" or "not relevant" and checking off an "issue" tag, as well as determining whether the document should be privileged and confidential under an attorney/client confidentiality or trade secret privilege. While this is an essential part of discovery and the practice of law, in this context Contract Attorneys are easily replaceable, and in fact are replaced multiple times, from project to project and agency to agency, and often for arbitrary reasons.

Applying the 50% California duties test to Document Review Attorneys as learned professionals in this way shows that the Document Review Attorney exercises professional discretion and judgment less than 50% of his or her time, and like a highly compensated employee rarely, if ever, makes more than the proposed $122,148 a year. Often, over 50% of the hundreds of thousands of documents under review are irrelevant images or logos, financial spreadsheets, business reports, and news articles and thus professional judgment and discretion are not required to discern their lack of relevance to the litigation subject matter. When the document, however, is related to the subject matter, professional legal judgment is required and the document review attorney does use his or her legal education and license to make the determination and sometimes explain the grounds for relevance or privilege. The moments where the professional legal judgment is being exercised can be easily deduced from the responsiveness rate in a document review project, generally analyzed as a percentage of the documents coded each week. Using a new and more accurate occupational code of Document Review Attorney classified as a learned professional employee subject to the California 50% primary duties test, and excepting them from the licensed professional exemption in this way, would therefore qualify Document Review Attorneys for overtime while maintaining that they are performing an essential function of the practice of law and exercising independent professional legal judgment at least some portion of the time.

The DOL further states that "If changes were made to the standard duties tests, the Department would need to consider whether any of the probabilities of exemption for specific occupations used in the analysis would need to be revised since the new duties test would potentially result in workers in some occupations being more or less likely to meet the duties test." According to the proposed rule, the probability of EAP exemption for lawyers is currently at the second to highest level of "1", with a probability between 90% and 100% that a worker in this occupation passes the duties test and includes only a very small amount of workers eligible for the EAP exemptions. But this lends itself to the possibility that Document Review Attorneys, still lawyers, would fall under the EAP exemption because it is not a probability code of "0" defined as "not likely to include any workers eligible for the EAP exemptions." Nonetheless, a probability level of "1" is high based on the outdated exemption and presumptions of the work and salaries of lawyers as defined traditionally in the O*NET. Given that Document Review Attorneys clearly do not work like traditional lawyers or earn law firm salaries, and that over 50% of their work is non-exempt routine mental work as outlined above, this probability of

exemption should probably be changed to a lower ranking, such as "2", because there are more than 51,000 lawyers who are mostly contract attorney-document reviewers.

III. The Misclassification of EAP Managers as Exempt from Overtime is Analogous to the Current Classification of Document Review Attorneys as Exempt from Overtime, Resulting in Similar Exploitation.

Although, as the DOL states, "the salary requirements do not apply to certain licensed or certified doctors, lawyers, and teachers," this distinction makes no sense for Contract Attorneys given the FLSA's original intent and Document Review Attorneys' wages and working conditions. This exemption is outdated, as is the occupational code. Currently, highly compensated employees under the EAP exemption are presumed exempt if they make over $100,000, and the new proposal is to set this rate at $122,148, or "the 90% percentile of the weekly wages of all full time salaried employees . . . if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee [EAP] identified in the standard tests for exemption." Contract Attorneys often make nowhere near this amount, and yet they do not perform most of the exempt work of an attorney as defined in the O*NET occupational code for "lawyer." Their work is often routine and easily transferable. The DOL's 2004 rule creating the test for highly compensated employees and the licensed professional exemption for attorneys seem to presume that all lawyers make over $100,000 a year and would therefore be exempt. The Secretary of Labor has the authority to revisit this exemption to update it to the changing employment landscape for professional workers and to keep it in line with the original intent of FLSA.

Furthermore, the exploitation of Document Review Attorneys who perform largely routine tasks while exempt from overtime simply because they are attorneys is analogous to the exploitation faced by those in "management" who are exempt solely because of their title yet spend "disproportionate amounts of time performing routine nonexempt tasks." These "managers" are not "bona fide executives." Similarly, Document Review Attorneys are not traditional attorneys performing all the tasks described in the occupational code description of O*NET.[4] And like these "managers," Document Review Attorneys "do not in fact, enjoy the flexibility and status traditionally associated with such positions" and therefore similarly should be entitled to the overtime protections the FLSA was designed to provide. While they do practice law in the sense that they perform the critical function of discovery analysis for relevance to the case, the work is often routine given that a majority of the documents are simple images, logos, news articles or otherwise easily recognizable to the layperson as not relevant.

On a related note, the hiring of Document Review Attorneys at such low wages without overtime is exploitative because law firms can afford to pay Contract Attorneys more, as evidenced by a small number of law firms which still do, like Sullivan & Cromwell, LLP. Even

[4] See http://www.onetonline.org/link/summary/23-1011.00

more alarming is the fact that the profit margin for law firms billing out Contract Attorneys is often 15-fold. In one case, a law firm attempted to bill its clients an hourly rate of $466.00 for Contract Attorneys who were then paid $32.00 by the employment agency.[5] Even with a mark-up by the agencies, the profit margin is inordinately high and law firms can certainly afford to pay Contract Attorneys overtime.

IV. Given All the Pre-Existing Industry Specific Exceptions, Carving Out A Document Review Attorney Exception to the Professional Exemption for Attorneys Should Be Considered, and Using an Hourly Salary Basis Therefor.

"The Department has long recognized that the salary paid to an employee is the 'best single test' of exempt status . . . and that setting a minimum salary threshold provides a 'ready method of screening out the obviously nonexempt employees' while furnishing a 'completely objective and precise measure which is not subject to differences of opinion or variations in judgment.'"[6] Given this is the case, it would be simplest to do away with the professional exemptions entirely, and more accurate to change the salary basis test to an hourly basis test given the contingent nature of employment today.

The DOL has precedents for industry-specific exceptions of all sorts, including for computer workers and those in the motion picture industry. These exceptions also vary in their use of an hourly or weekly salary basis test and the amount of the salary base used. For instance, the DOL currently proposes an increase from $695 a week to $1,404 per week for the motion picture industry specific exception to the salary basis. The DOL further stated that the motion picture industry exception from the "'salary basis' requirement was created to address the 'peculiar working conditions existing in the [motion picture] industry.'"

Likewise, the UCA submits that there are peculiar working conditions for Document Review Attorneys that merit a deviation from the licensed professional exemption and from the weekly salary basis test. **There are some Contract Attorneys who currently make $25.00 an hour, and with fifty-hour weeks make $1,250 a week – less than the motion picture industry worker salary basis of $1,404 per week.** This seems even more unjust when considering the "peculiarly" high debt burden of attorneys, who are required to obtain expensive advanced degrees as a condition of employment. Contract Attorneys would benefit from an exception to the professional exemption using a higher base salary given this debt.

Furthermore, there is also already a precedent for an industry specific exception for hourly workers. FLSA provides that computer workers who meet the duties test are exempt if they meet a salary basis test or earn a certain hourly wage. Contract Attorneys meet the duties test given their routine work, and are often paid hourly at $25.00, or even $19.00 – lower than

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[5] See http://www.forbes.com/sites/danielfisher/2013/08/01/judge-cuts-fees-in-citigroup-settlement-citing-waste-and-inefficiency/ (citing In Re Citigroup Inc. Securities Litigation).

[6] Internal citations omitted.

the 2004 $27.63 hourly rate for computer workers after which they become automatically exempt from overtime. In fact, under the same duties and hourly wage test applied to computer workers, Contract Attorneys would qualify for overtime.[7]

Although the DOL maintains that "it would not be appropriate to include the wages of hourly workers in setting the EAP salary threshold and that the resulting salary level was too low to work effectively with the standard duties test," this is false. Temporary workers are a novel part of the 21st century workforce, and though the FLSA originally used a weekly salary basis – as weekly payment was the norm for most workers at the time of its enactment – the FLSA was intended to protect all workers. Temporary workers, who are the most vulnerable, are just the population the FLSA intended to protect. The current employment picture includes the fact that 53 million workers in the U.S. now freelance, which includes the temporary workforce.[8] In keeping with the original intent of the statute, the FLSA should be updated to keep pace with the changing employment landscape.

Furthermore, the blanket exemption for those holding licenses, such as lawyers, should be done away with given the economic realities of the workplace and the regular reliance by law firms on outsourced labor to contracted agencies. While Document Review Attorneys do use advanced knowledge and their degrees in making relevance determinations when applicable, the work is often a routine part of the practice of law. Document Review Attorneys should then be excepted from the professional exemption to overtime for the traditional lawyer, given their largely routine non-exempt work, comparatively low wages, and lack of benefits, privileges, and opportunities for advancement uncharacteristic of the traditional lawyer.

UCA would further agree with those who suggested that the "duties test for the HCE exemption should be dropped and the exemption should be based on compensation level alone" and extend that same approach to the licensed professional exemptions – that the automatic exemption for attorneys should be dropped entirely and FLSA overtime protection should be based on salary alone, although on an hourly salary basis. This would simplify the regulation and bring it back to its intended effect. Under this rubric, for example, Document Review Attorneys paid under $58.00 per hour in a 40-hour work week ($122,000 divided by 2080 hours per year) would automatically qualify for overtime.

It is unclear why there is an exemption for professionals anyway at this point, given the changes in salaries and duties of attorneys. Originally, in 1940, the professional exemption was based merely on a salary level based off a rate that was "reasonable in the light of the average

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[7] Just to put it in perspective, the compensation test for computer-related occupations was subsequently capped at $27.63 an hour as that amount constituted 6.5 times the hourly minimum wage rate that time. The presumption is that computer workers were exempt from overtime because they are professionals who make six and a half times more than minimum wage. At today's rates, six and a half times the $7.25 federal minimum wage is $47.13 an hour, and the vast majority of Contract Attorneys currently make nowhere near that.

[8] See https://www.upwork.com/press/2014/09/03/53-million-americans-now-freelance-new-study-finds-2/.

conditions for industry as a whole." A similar methodology should be used again for professionals, as in the past, so as to qualify Contract Attorneys for overtime again on the basis of salary alone. The current O*NET data does not reflect the industry average salary as a whole for lawyers, given the legal industry currently employs tens thousands of Contract Attorneys.

V. Comments on Methodology

The DOL is also seeking comments on methodology. In the past, the DOL used several salary surveys and sources and now relies on only one: the CPS. The past methodology and analysis was much more exhaustive and thorough. The DOL should go back to relying on multiple sources. Relying on several sources to obtain an average, with varied methodologies and sampling, is more thorough and offers greater accuracy.

In proposing that those earning temporary hourly wages should also qualify for overtime, the UCA proposes that the methodology to determine an appropriate salary basis include further research into temporary hourly wages – paid to those workers most in need of overtime – and including Contract Attorneys' temporary hourly rates, currently between $19.00 and $35.00. The DOL has already relied on lawyers' salaries in their calculation using the "CPS." While in 2004 the salaries of exempt professionals were excluded, currently the CPS includes the salaries of lawyers because "they nonetheless are part of the universe of salaried employees, and, as such, their salaries shed light on the salaries paid to employees performing exempt EAP duties." If the DOL is using attorneys' salaries, then we would suggest they use Contract Attorneys' salaries as well in calculating base rates for temporary workers. We would further propose that the DOL go one step further and calculate Contract Attorneys' actual earnings after subtracting the high debt burden.

VI. Meeting the Department's Goal of Litigation Reduction

The DOL also maintains that their goal in adjusting the salary basis test upwards as a "more clear line of demarcation between employees who are entitled to overtime and those who are not" is to reduce litigation related to white-collar employees who may have been misclassified as exempt. We submit that the same goal would be achieved for Document Review Attorneys who are currently lining up for litigation. Much to the disappointment of many Contract Attorneys and law firms alike, the Plaintiff in the case of Lola v. Skadden,[9] in an attempt to attain the overtime he deserves, argued that the work of Document Review Attorneys is not the practice of law, and therefore is overtime eligible. On appeal from an order dismissing the case, the 2nd Circuit Court pointed to the discretion the Secretary of Labor has to reinterpret the regulations on the licensed professional exemption for Document Review Attorneys. It is important to note that discovery had not yet occurred in Lola, and many document review projects differ as to how much professional legal judgment is permitted. Other cases such as

[9] Lola v. Skadden, Case No. 14-3845 (2d Cir.).

Henig v. Quinn Emanuel, in the U.S. District Court for the Southern District of New York,[10] were stayed pending the outcome of Lola, and more cases are in waiting or lining up, according to members of our group and colleagues.[11]

The ultimate decision in Lola has the potential to insult the tens of thousands of Contract Attorneys who have graduated from law school and may risk losing transferability of their practice of law to other jurisdictions. To help maintain the professional dignity of these Contract Attorneys, we submit that: 1) there should be an exception to the licensed professional exemption for Document Review Attorneys; 2) that they should be classified as learned professional employees; and 3) that they should subject to a duties test similar to the California 50% rule; because the legal professional judgment Document Review Attorneys exercise is less than 50% of their time, and largely routine by more than 50%, yet it still comprises an essential part of the practice of law during the discovery phase of litigation. If there were such an exception to the professional exemption based on duties, analogous to the EAP and HCE, and the California rule were to be applied, then Contract Attorneys could qualify for overtime on this basis alone, while maintaining their professional dignity without the need to resort to further costly litigation which risks demeaning contract attorneys' legal work.

VII. Conclusion

The legal industry in the past twenty years has changed enormously with the advent of technology and law firms' reliance on agencies, who employ tens of thousands of temporary Document Review, or Contract Attorneys, to determine the relevance of hundreds of thousands of documents as an essential component of the practice of law during the discovery phase of litigation. Many of these documents, when relevant, require a thoughtful analysis based on the legal protocol of the case, a task that does entail the independent legal judgment and discretion acquired in law school and during the practice of law. Many are also irrelevant images, news articles, and duplicate documents which do not require much independent legal judgment to ascertain they are not relevant, or how to tag them, and this part of the work is more likely categorized as routine mental work.

Beyond the often tedious and routine nature of document review, Contract Attorneys are paid precipitously low wages, currently averaging from $19.00 an hour to $35.00 an hour, on a project to project, as needed basis, with some Contract Attorneys' salaries falling short of the proposed $970 weekly salary basis applied to the EAP. Adding the undue student debt burden of their advanced degrees drops their actual earnings even lower, making the presumption that lawyers earn high professional salaries such that they should be automatically exempt as licensed professionals abysmally wrong.

[10] Henig v. Quinn Emanuel, Case No. 13-cv-01432 (S.D.N.Y.).
[11] See http://www.law360.com/articles/592027/court-pumps-brakes-on-quinn-emanuel-temp-atty-ot-case

Furthermore, the breakdown of document review work as the sole task of Contract Attorneys makes the O*NET occupational code for lawyers outdated, as this resource contains a description of the tasks of a more traditional lawyer: going to court, writing briefs, meeting with clients, and so forth. While the UCA maintains that Document Review Attorneys do practice law and exercise independent legal judgment, given the stark difference in function to the traditional lawyers, the UCA requests a new occupational code of document review attorney and an exception to the licensed professional exemption such that Document Review Attorneys qualify for overtime classified rather, as an EAP, specifically that of the learned professional employee category.

To qualify Contract Attorneys for overtime, the DOL then should adopt the California 50% primary duties test. When applied to Document Review Attorneys, the 50% rule qualifies them for overtime because less than 50% of their work requires the exercise of professional legal judgment and discretion, with more than 50% encompassing the often tedious and routine work of marking easily recognizable non-relevant or duplicate documents. The percentages can be determined based on the responsiveness rate of the documents themselves.

The DOL should go even further and allow an hourly salary basis for temporary workers such as Document Review Attorneys – some of whom, while considered "temporary," have worked over a decade in the industry and are most in need of the protections of FLSA. More specifically, the DOL should carve out a $35.00 per hour industry-specific hourly salary basis under which overtime would automatically be granted, given attorneys' greater student debt load. This sort of exception already has a precedent in the motion picture and computer industries, where the proposed weekly and hourly salaries often exceed that of the Contract Attorney.

Contract Attorneys equally merit such protections, as originally intended by the FLSA, while preserving their professional dignity and closing the floodgates of pending litigation like the ongoing Lola v. Skadden case, which risks granting overtime to Contract Attorneys at the cost of demeaning their years of hard work in law school and beyond. Even the Court hinted in its decision that the Secretary of Labor has the authority to change the regulation. The Secretary of Labor would be wise and kind to consider such reasonable and just proposals to preserve the professional dignity of practicing lawyers, and the integrity of the already-disappearing middle class.

Sincerely,

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