



National Federation of Paralegal Associations, Inc.

Please Reply To:

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June 27, 2003

Tammy D. McCutchen
Administrator, Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative,
Professional, Outside Sales and Computer Employees
29 C.F.R. Part 541

Dear Ms. McCutchen:

The National Federation of Paralegal Associations, Inc. (NFPA) appreciates the opportunity to submit this testimony in response to the Department of Labor's proposed significant changes to 29 CFR Part 541 (the "Proposed Rule"). The Department should be applauded for taking the time to reorganize the regulations, consolidating similar regulations, cleaning up redundancies, and updating definitions of key terms and phrases. The proposed cosmetic changes have made the regulations clearer and more concise.

NFPA's comments are intended to provide the Department with information regarding our Federation and the paralegal profession as a whole. And, provide the Department with specific comments and suggested changes to the Proposed Rule.

Background of NFPA

NFPA is a non-profit professional organization comprising state and local paralegal associations throughout the United States and Canada. Founded in 1974, NFPA is a federation of 52 member associations representing over 13,000 individual members who reflect a broad diversity of experience, education and job responsibilities. NFPA has been the national voice for the paralegal profession for over 25 years. Designed as a grass-roots organization, NFPA is an issues-oriented, policy driven association directed by its membership.

NFPA prides itself on the professionalism of its members and its position as a leader in the profession. NFPA routinely monitors legislation, case law, proposed changes to rules of professional responsibility, and ethics opinions that affect the paralegal profession. In monitoring these activities, NFPA has reviewed the Proposed Rule, which would propose updates and changes to the regulations issued under the Fair Labor Standards Act (FLSA) implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees (the “white collar exemptions”).

NFPA members affirm the paralegal profession as a self-directed profession that supports increased quality, efficiency and accessibility in delivering legal services. NFPA promotes growth, development, and recognition of the profession as an integral partner in delivering legal services. Further, NFPA encourages study of means to improve access to legal services and supports any activity intended to increase the use of paralegal services for delivering legal services.¹

Our stated mission is to expand the practice of paralegals. By working with other members of the legal team, educators, the judiciary and legislators, we have and are continuing to expand our profession in a responsible and ethical manner.

Since its formation, NFPA has:

- monitored legislation, case law and researched reports on various issues that could affect the paralegal profession;
- worked with and testified before many organizations such as legislatures, bar association task forces, and court committees on issues related to paralegal participation in delivering legal services and the paralegal profession generally;
- filed *amicus* briefs with courts throughout the United States on several issues that could affect the paralegal profession;
- participated in the ABA’s Commission on Non-Lawyer Practice;
- participated in the New Roles and the Law Conference in 1996; and,
- adopted an advanced competency examination, PACE.²

¹ See attachment 3, NFPA’s *Paralegal Responsibilities*.

² PACE is the Paralegal Advanced Competency Exam that was developed and marketed to paralegals, whether members of NFPA or not. See attachment 7.

History of the Paralegal Profession

The formal establishment of the paralegal profession can be traced to the 1960s when individuals were trained to assist attorneys in making legal services available to the poor during the "War on Poverty." Shortly after public agencies began hiring paralegals, private law firms and corporations recognized the benefits of employing paralegals to supply efficient support, reduce the expense of legal services, and increase the availability of services to the public.

Individuals with diverse backgrounds are employed as paralegals. Education and training requirements differ widely but are generally related to the responsibilities of the position.³ Specialized training in other fields sometimes determines the paralegal's area of practice. For example, paralegals with medical training often work in personal injury or medical malpractice, while a paralegal in environmental law may have had experience as a naturalist.

Certain federal and state agencies allow non-lawyer representation. For example, the Veterans Administration, the Social Security Administration and OSHA allow non-lawyer representation. Ten states allow non-lawyers to appear before certain state agencies. For example, California allows paralegals to represent clients before Workers Compensation boards with the permission of the client and under supervision.

Paralegal Roles and Responsibilities

Traditional paralegals constitute the majority of paralegals in the profession. Many paralegals have expanded their practice into broad and diverse specialties. The demand for expertise has led many paralegals to develop knowledge and skills in highly technical or specialized subject areas. Paralegals place great importance on service, flexibility, openness to new approaches of handling client needs and diverse job definitions. These attributes have allowed the paralegal profession to maintain a client and public interest focus, to demonstrate a willingness to grow, and to change in response to the demands of society. NFPA is strongly committed to expanding the roles and responsibilities of all paralegals, including those working in traditional settings.

Only statutory or court authority or a supervising attorney's determination of a paralegal's competency limits the type of tasks a paralegal may perform. Paralegals perform *the same functions as an attorney* except for those tasks generally prohibited by unauthorized practice of law statutes, *i.e.*, accepting clients, sharing and setting legal fees, giving legal advice or representing others in court. Because the law is complex and often ambiguous, a paralegal must be intelligent with an analytical and logical mind. They must be able to recognize and evaluate relevant facts and legal concepts. Paralegals have the ability to organize, analyze, communicate and administer. Other interpersonal skills that service paralegals are conflict resolution, negotiation, and ability to relate well with various types of persons.

Over the years, NFPA has continually conducted research and studies to ascertain specific duties and responsibilities being accomplished by paralegals. NFPA's publication

entitled, *Paralegal Responsibilities*⁴ delineates current paralegal tasks in numerous specialty practice areas and a few general areas.

In the early 1980s, courts began to recognize that paralegals were distinguishable from support staff and encouraged attorneys to provide legal services in the most efficient manner possible. Courts awarding fees for paralegal services point out that if the work had not been done by paralegals, charging fees based upon attorneys' rates would have been necessary.

Paralegals are employed in private law firms, banks, corporations, insurance agencies, legal clinics, courts, governmental agencies, accounting and engineering firms, title companies, construction companies, and legal aid offices – in fact, almost everywhere law-related work is performed. Paralegals either work with attorneys who assume professional responsibility for the final work product, or work in areas where “lay” individuals are explicitly authorized by statute or regulation to assume certain law-related responsibilities.

Paralegals who work in the private sector are usually employed by law firms and corporations and often in specialized areas of law such as litigation, probate, real estate, corporate, taxation, domestic relations, medical malpractice and personal injury or employee benefits. Paralegals who work in the public sector are often employed by non-profit public law firms, state or local governmental agencies in areas such as welfare, family law, health care, landlord/tenant, disability benefits, unemployment compensation, or social security.

Definition

NFPA defines a paralegal as:

A person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work.

Terminology

NFPA prefers the term “paralegal” for our profession. The term “legal assistant,” which is often used interchangeably with the term “paralegal,” has evolved to mean anything from a legal secretary, to a paralegal, to an assistant district attorney in at least one jurisdiction. There may be many non-lawyers who work in a legal setting, each performing different tasks. It is becoming increasingly difficult for the general public to understand the distinction between roles within the legal field.

⁴

See attachment 3.

Education and Continuing Legal Education

NFPA believes that formal education is paramount to the development of the paralegal profession. Since the paralegal profession emerged, education has played an increasingly vital role in development of the profession. As legal matters delegated to paralegals but always performed under the ultimate supervision of an attorney increase in complexity and paralegal roles are expanded, education remains a critical issue.

NFPA strongly supports quality paralegal education, as evidenced by its extensive involvement with other national law-related organizations. Since 1986, NFPA has worked with the American Bar Association (ABA), the American Association for Paralegal Education (AAFPE) and others to develop a consensus on the issue of paralegal education. In addition, NFPA has a representative on the ABA Approval Commission, which works with the Standing Committee on Legal Assistants to evaluate paralegal education programs. These efforts continue and are increasing as consumer and attorney awareness about quality paralegal education heightens, and as activities to regulate paralegals by bar associations, courts, and legislatures escalate.

NFPA recommends that future practitioners should have a four-year degree to enter the profession. Individuals receiving a formal paralegal education should have 24 semester hours or the equivalent of legal specialty courses to enhance their ability to practice as paralegals. Paralegal education programs offer degrees and/or certificates.

NFPA recognizes that a two-year degree with an emphasis in paralegal studies is acceptable to employers in some markets as a minimum criteria for individuals to enter the paralegal profession. However, current trends across the country, as illustrated through various surveys, indicate that formal paralegal education has become a requirement to secure paralegal employment; a four-year degree is the hiring standard in many markets. In recognizing a two-year degree and recommending a four-year degree, NFPA has taken the lead in providing the profession with the necessary tools to prepare for its future role in the delivery of legal services.

Approximately 84% of paralegals responding to NFPA's 2001 Compensation and Benefit Report have formal education in paralegal studies.⁵

Additionally, NFPA's members recently established a minimum number of hours for continuing legal education, and recommends that NFPA members should aspire to twelve (12) hours of continuing legal education, including at least one (1) hour of ethics education, to be completed every two (2) years.

⁵

See attachment 8, *2001 Paralegal Compensation and Benefits Report*.

Paralegal Advanced Competency Exam (PACE)

NFPA recognizes the need to establish standards for the paralegal profession. Therefore, in the Fall of 1994, the membership voted to develop an exam to measure the proficiency level of practicing paralegals. To take the exam, paralegals must have either an associates degree in paralegal studies obtained from an institutionally accredited and/or ABA approved paralegal education program; and six (6) years substantive paralegal experience; OR a bachelor's degree in any course of study obtained from an institutionally accredited school and three (3) years of substantive paralegal experience; OR a bachelor's degree and completion of a paralegal program with an institutionally accredited school, said paralegal program may be embodied in a bachelor's degree; and two (2) years substantive paralegal experience, and must not have been convicted of a felony or had a license, registration or certification revoked. Those who successfully pass the exam are authorized to use the credential "PACE Registered Paralegal" or "RP."

The purposes of PACE are:

- to provide the groundwork for expanding paralegal roles and responsibilities;
- to provide the public and legal community with a mechanism to gauge the competency of experienced paralegals; and
- to be used in states considering regulation of experienced paralegals.

Paralegals who have passed NFPA's Paralegal Advanced Competency Exam, as well as many of those in local paralegal and bar associations, have a mandatory continuing legal education requirement, including an ethics component.

Ethics and Professional Responsibility

NFPA believes that paralegals should uphold a high level of ethical standards. After conducting extensive research and obtaining comments from paralegals, attorneys and individuals with expertise in the area of ethics, in 1993 NFPA adopted a *Model Code of Ethics and Professional Responsibility*.⁶ This document has received wide acceptance throughout the legal community. Many of NFPA's local member associations have also adopted, and their members are subject to, a Code of Ethics and Professional Responsibility.⁷ In addition, some jurisdictions have adopted ethical guidelines for paralegals.

NFPA believes that paralegals should possess integrity, professional skill and dedication to the improvement of the legal system and should strive to expand the paralegal role in the delivery of legal services. The *Model Code and Guidelines* delineate the ethical guidelines and standards for professional conduct to which all paralegals should aspire and make it possible for the professional associations or regulating entities to enforce the Canons and Ethical Considerations. It also expresses the commitment of NFPA's membership to increasing the quality and efficiency of legal services and recognizes the profession's responsibility to the legal community and consumers. NFPA *does not* support the unauthorized practice of law. NFPA members are provided with ethics decisions and changes to ethics rules and regulations on an on-going basis.

⁶ See attachment 2, *Model Code of Ethics and Professional Responsibility*.

⁷ *Id.*

Specific Comments to the Proposed Rules

1. Salary test amounts – While updating and increasing the salary test amounts is overdue, the proposed revision of \$425.00 per week is still too low given current economics. The Department should not be making its salary level decisions by focusing solely on one lower paying industry or geographic area. While this might provide some benefit to the employers and employees in those specific industries or regions, the Department effectively would be penalizing and negatively impacting industries and geographic areas where employees are receiving higher salaries and benefits due to increased costs and higher standards of living. If the mission of the Department is to foster and promote the welfare of the job seekers, wage earners, and retirees of the United States by improving their working conditions, advancing their opportunities for profitable employment and protecting their retirement and health care benefits through administering a variety of Federal labor laws, including those that guarantee workers' rights to safe and healthful working conditions, unemployment insurance, and other income support, then the Department should not be looking to lower the bar in regard to employee salary and benefits, but rather to raising the bar and choosing a salary level that is not at the lowest common denominator.

NFPA suggests that the proposed standard salary test requirement of \$425.00 per week be raised to a figure of not less than \$650.00 per week.

2. Duties Tests for Exempt Employees – While the Department has as its mission the protection of employees, it is unclear whether any analysis has been undertaken to show how the proposed revisions will affect the percentage of workers covered by the white-collar exemptions. However, the Economic Policy Institute has stated that, "The proposed changes that will make many more workers exempt from overtime pay involve the revisions and oversimplifications of what is known as the "duties test." The duties test is used to determine how much of an individual worker's time is spent performing managerial and "professional" tasks. By oversimplifying this test, the government will effectively throw many more workers into exempt status, thereby reducing their overtime pay."⁸ Job titles, nomenclature, or job descriptions do not determine the exemptions, nor does paying a "salary" rather than an hourly rate. Rather, whether an exemption applies depends on the specific duties and responsibilities of each employee's job, how much salary the employee is paid, and whether the salary is guaranteed without regard to the quality or quantity of work performed.⁹ Therefore, it seems inconsistent for the Department to recognize the importance of an employee's duties and responsibilities in determining whether an exemption applies while simultaneously reducing or eliminating the duties test.

⁸ Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).

⁹ Federal Register, Part II, Department of Labor, Wage and Hour Division, 29 CFR Part 541, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees Proposed Rule," March 31, 2003.

Recommended Changes to the Proposed Regulations:

NFPA recommends that the proposed changes to 29 CFR Part 541 be modified in the following manner. (Additions are indicated by **bold and double underline**, deletions are indicated by [~~brackets and strikethrough~~]).

Sec. 541.100 General rule for executive employees.

(a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than \$~~[425]~~ **650** per week (or \$360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) With a primary duty of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; [~~and~~]

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees will be given particular weight;

(5) Customarily and regularly exercises discretion and judgment; and

(6) Who does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.

(b) The phrase "salary basis" is defined at Sec. 541.602; "board, lodging or other facilities" is defined at Sec. 541.606; "primary duty" is defined at Sec. 541.700; [~~and~~] "customarily and regularly" is defined at Sec. 541.701; **and "discretion and judgment" is defined at Sec. 541.702.**

Sec. 541.200 General rule for administrative employees.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$[425] 650 per week (or \$360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) With a primary duty of the performance of office or non-manual work related to the management or general business operations of the employer or the employer's customers; ~~and~~

(3) Who holds a position of responsibility with the employer;

(4) Customarily and regularly exercises discretion and judgment;
and

(5) Who does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.

(b) The term "salary basis" is defined at Sec. 541.602; "fee basis" is defined at Sec. 541.605; "board, lodging or other facilities" is defined at Sec. 541.606; ~~and~~ "primary duty" is defined at Sec. 541.700; "customarily and regularly" is defined at Sec. 541.701; and "discretion and judgment" is defined at Sec. 541.702.

Sec. 541.300 General rule for professional employees.

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$[425] 650 per week (or \$360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) With a primary duty of performing office or non-manual work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of

specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and/or work experience; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor;

(3) Customarily and regularly exercises discretion and judgment;

(4) Performs work that is predominantly intellectual and varied in character, is not easily spread to other workers, and is of such character that the output produced or result accomplished cannot be standardized in relation to a 37.5 to 40-hour work week; and

(5) Who does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work.

(b) The term "salary basis" is defined at Sec. 541.602; "fee basis" is defined at Sec. 541.605; "board, lodging or other facilities" is defined at Sec. 541.606; ~~[and]~~ "primary duty" is defined at Sec. 541.700; **"customarily and regularly" is defined at Sec. 541.701; and "discretion and judgment" is defined at Sec. 541.702.**

A new Section 541.702 titled Discretion and Judgment should be added and all subsequent subsections should be renumbered accordingly. The new Section 541.702 should read as follows:

Sec. 541.702 Discretion and Judgment.

(a) The term "discretion and judgment" shall mean:

(1) the forming of an opinion or evaluation by discerning, comparing, analyzing, or interpreting; and

(i) the ability to make a decision or choose a course of action based on such opinion or evaluation; or

(ii) having a position of advising or recommending a decision or course of action be made or followed based on such opinion or evaluation.

Conclusion

NFPA appreciates the opportunity to be heard on this matter. Should the Department have any questions or desire additional information, please feel free to contact either of us at the telephone numbers and email addresses listed below.

Thank you for your attention and courtesy.

Respectfully,

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Enclosures

ENCLOSURES

1. NFPA – *Statement on Issues Affecting the Paralegal Profession*
2. NFPA – *Model Code of Ethics and Professional Responsibility*
3. NFPA – *Paralegal Responsibilities*
4. NFPA – *Your Source for Paralegal Information*
5. NFPA – *The Paralegal's Partner in Progress*
6. NFPA – *What is a Paralegal? Often-Asked Questions about the Paralegal Profession*
7. NFPA – *PACE – Paralegal Advanced Competency Exam*
8. NFPA – *2001 Paralegal Compensation and Benefits Report*
9. NFPA – *Pro Bono – Paralegals Making a Difference*
10. NFPA – *National Paralegal Reporter*