

Congress of the United States
House of Representatives
Washington, DC 20515-0919

June 27, 2018

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Secretary Acosta:

We write to request that you modify an outdated and discriminatory portion of a U.S. Department of Labor (DOL) regulation negatively impacting travel agencies in our districts and across the country. Travel agents – online, “brick and mortar,” and many hybrid business models in between – play a critical role in the economy, and the broad travel and tourism industry. Agents are responsible for the sale of the majority of airline tickets in the U.S., selling over 430,000 air tickets *per day*, and are the primary distributors of cruises and tours.

Because the nature of the services rendered by travel agents requires overtime work at unpredictable times and to an unpredictable extent, it is very difficult for travel agencies, most of which are very small businesses, to manage employment costs and to budget realistically. When it passed the Fair Labor Standards Act (FLSA) of 1938,¹ Congress recognized that one-size-fits-all labor regulation didn’t make sense for every business model. Accordingly, while the Act generally requires employers to pay overtime to employees who work more than 40 hours in a week, Congress recognized that, in some instances, the policy can suppress economic activity and employee earnings. As a result, Congress created an exemption for some employees of “retail or service establishments.”² To qualify for the Retail or Service Establishment (RSE) exemption, an employee must work at an establishment “recognized as retail...in the particular industry” and where at least 75 percent of annual sales are not for resale. Further, the employee in question must be paid at least one-and-a-half times the applicable minimum wage and more than half of the employee’s earnings must consist of commissions.

However, travel agencies are inexplicably blocked from utilizing this exemption because, in 1970, the DOL included agencies on a list of industries that “lack a retail concept” and thus could not qualify under the RSE “under any circumstances.”³ The inclusion of travel agencies on this list is not only nonsensical – the typical travel agency is the very picture of a retail establishment – it is unsupported by case law. In the only court case that directly addressed the propriety of including travel agents on this “blacklist” (*Reich v. Cruises Only, Inc.*, 1997), a federal court determined that DOL’s regulations “excluding a travel agency from those establishments possessing a retail concept appear to be arbitrary and without any rational basis.”⁴

¹ 29 U.S.C. § 203.

² 29 U.S.C. § 207(i).

³ 29 CFR § 779.317, setting forth a partial list of establishments deemed to lack a “retail concept.”

⁴ 1997 U.S. Dist. LEXIS 23727 (M.D. Fla.1997).

After weathering challenges from changes in technology, the 9/11 attacks, and the Great Recession, travel agencies are contributing to economic growth all over America, with total industry employment increasing by eight percent over the last five years to over 105,000 at over 16,000 retail establishments according to the U.S. Census Bureau. As part of its reinvention, the industry has adopted a new retail approach to the market with state of the art storefronts opening across the country, a modern spin on what was once thought to be an obsolete occupation.

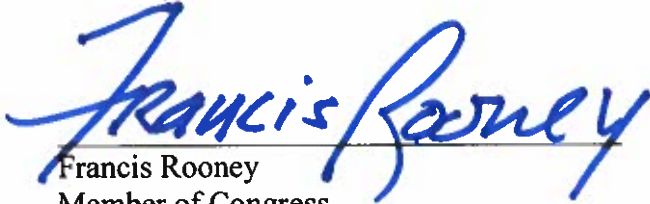
Given these facts, we find it indefensible that federal regulations are arbitrarily picking winners and losers by holding since 1970 that agencies “lack a retail concept” and thus are denied use of the RSE exemption. Agencies are clearly “retail” and should have an opportunity to claim the exemption if they qualify for it.


We believe the inclusion of travel agencies on the RSE blacklist is contrary to the intent of Congress and the considered view of the only court that has spoken on the matter. In our view, this is a matter of basic fairness – travel agents should be treated as any other retail business. Removing agencies from the blacklist ensures fairness for the 100,000 travel agency jobs by protecting agency owners against audits and lawsuits while giving them the flexibility to better serve their clients in the dynamic and hyper-competitive travel industry.


As such, we request that the Department remove “travel agencies” from the list in 29 C.F.R. § 779.317 of business types that are foreclosed from qualification as an RSE that may be exempt, if otherwise qualified, from the overtime requirements mandated in the FLSA.

Thank you for your prompt attention to this matter.


Sincerely,

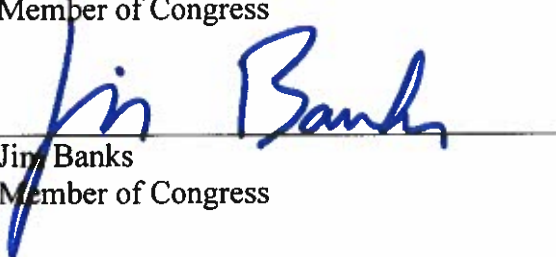

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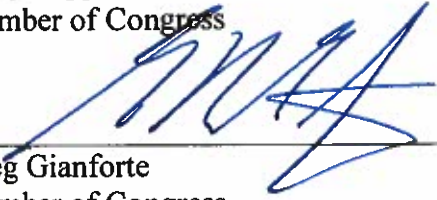

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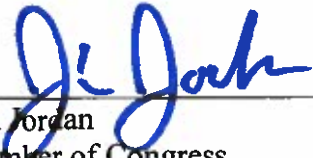
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