THE CONSEQUENCES OF DOL'S ONE-SIZE-FITS-ALL OVERTIME RULE FOR SMALL BUSINESSES AND THEIR EMPLOYEES

HEARING

BEFORE THE

SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
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THE CONSEQUENCES OF DOL'S ONE-SIZE-FITS-ALL OVERTIME RULE FOR SMALL BUSINESSES AND THEIR EMPLOYEES

THURSDAY, OCTOBER 8, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Cresent Hardy [chairman of the subcommittee] presiding.

Present: Representatives Hardy, Chabot, Rice, Bost, Kelly, Velázquez, Adams and, Takano.

Chairman HARDY. Good morning. I would like to call this hearing to order. Sorry for being late.

I would like to thank our witnesses for being here today, and especially those small businesses who have traveled so far to get her and testify. We really appreciate that.

So I will start off with a statement here. Fair Labor Standards Act is a primary federal law governing the employee wages, hours worked, and overtime pay. When the Fair Labor Standards Act was enacted—it was in 1938—an exemption from the Act's overtime provision was provided for certain executive, administrative, and professional employees. This is commonly referred to as a "white collar exemption." In March of last year, President Obama directed the Department of Labor to streamline and simplify the regulation governing the white collar exemption. The DOL issued those regulations on July 6th of this year. Judging by the reaction from small business owners across the country, this proposed regulation does not streamline or simplify. Instead, it increases the cost for small businesses and reduces flexibility for American workers.

As we have seen too often, the DOL has done a poor job of analyzing the impact of the rule on small businesses as required by the Regulatory Flexibility Act, and it has vastly underestimated the number of affected small businesses and what the real ramifications are for those companies and their employees. The Administration's own Chief Counsel of Advocacy stated that the analysis relies on numerous assumptions and lacks detailed industry information, even though it was available. In addition, the small business owners have pointed out several other problems. For example, the proposed rule would raise the salary level under which the employees qualify for overtime pay, from $23,660 per year to $50,440 per year in 2016. That is a 102 percent increase that will have a heck of a lot of impact on small business owners' bottom line.

Another problem that I have heard from my constituents back home in Nevada is that the rule adopts the "one-size-fits-all" standard. It simply does not recognize the geographic diversity of the American economy and will particularly hurt the rural small businesses that are recovering from this Great Recession. Simply put, $50,440 per year salary threshold might be fine for an employer in San Francisco or midtown Manhattan, but not so much in Ely, Nevada. The impact on the regulation and that of the countless other regulations we have examined here in the Small Business Committee shows that this Administration is tone deaf when it comes to actually helping small businesses. If the DOL finalizes this rule as written, it will make it harder for small business to grow and create jobs.

I look forward to hearing from our small business witnesses who will tell us how this regulation will affect their businesses, their employees, and now I yield to Ranking Member Adams for her opening statement.

Ms. ADAMS. Thank you, Mr. Chairman.

The Fair Labor Standards Act is a result of the Great Depression, to ensure the protections of American workers. Included in that act were rules requiring overtime payment for hours worked in excess of the standard 40 hours per week. Overtime provisions are important for covered workers, including 75 million hourly wage workers. These workers value having a 40-hour work week and earning extra pay when they work overtime, yet more and more Americans are working longer hours while wages are flat. Preserving the right to overtime pay is particularly crucial at a time when lower and middle income family wages are stagnant. However, the regulations governing eligibility for overtime are severely outdated. For example, in 1975, more than 65 percent of salaried American workers earned time-and-a-half pay for every hour worked over 40 a week. But by 2013, just 11 percent of those workers qualified for overtime pay. The Department of Labor's proposed regulations would extend overtime protections to nearly five million white-collar worker within the first year of its implementation. Such a change not only puts more money in workers' pockets, it also strengthens our economy by driving consumer spending.

Despite these positive outcomes, there remains some concern as to how these proposed regulations would impact our nation's small businesses. Increasing the salary threshold and the numbers of workers eligible for overtime pay will add significant compliance costs and paperwork burdens on small entities. This fact is particularly true for small employers located in low-wage regions and in industries that operate with low profit margins. More concerning is that small businesses have commented that the high cost of this rule could lead to hourly cutbacks to employees or even salary adjustments. Such actions run counter to the goals of this rule and could ultimately harm employees. And while these potential consequences are concerning, I am confident that today's hearing will be helpful in determining how to properly implement this rule that is beneficial to all sides.

I want to thank all the witnesses for being here today and I look forward to your comments.

Thank you, Mr. Chair. I yield back.

Chairman HARDY. I would like to start with if there are any Committee members that have an opening statement, I would like to make sure they submit it for the record. I would like to also discuss the five minute rule. You will each have five minutes to discuss your testimonies. Then the light will start out green. When it gets down to one minute it will turn yellow. When it hits red, I would appreciate you wrapping up as soon as possible, and I would like you to adhere to that limit.

I would like to start with introductions if I could. Our first witness is Kevin Settles, owner of Bardenay Restaurant with locations throughout Idaho. He was named Idaho Restauranteur in the year 2011, and his business has earned nationwide recognition in Forbes and Wall Street Journal and the television show Modern Marvels. He also serves as a commissioner on the Idaho Human Rights Commission as a member of the National Restaurant Association's Board of Directors for whom he is testifying on behalf of here today. Thank you for being here, Mr. Settles. We appreciate you coming here.

Next up is Mr. Brady, president and CEO of Brady Homes in Bloomington, Illinois, testifying on behalf of the National Association of Home Builders today. He serves as first vice chair of the board. Ed is a second generation home builder, taking over his family business started by his father in 1962. Over that time, the company has built over 1,800 homes and has developed more than 2,000 single-family lots. He was also named the Builder of the Year in his local association in 1996 and in 2001. We appreciate your participation here today, and thank you for being here.

Our next witness is Terry Shea, co-founder of Wrapsody, Inc., a unique gift shop which offers a variety of home and personal products. Wrapsody started with a 2,700 square foot storefront in Hoover, Alabama, that has now expanded and moved into a 5,100 square foot space with the second floor opening soon. She brings over 30 years of experience to the retail and sales contributing to the success of notable companies like Nike and Proctor and Gamble. She is testifying on behalf of the National Retail Federation. Ms. Shea, thank you for being here.

I now would like to turn the time over to the Ranking Member Adams for her to recognize her member.

Ms. ADAMS. Thank you, Mr. Chair.

It is my pleasure to introduce Mr. Ross Eisenbrey, vice president of the Economic Policy Institute. Prior to joining EPI, he worked as the former commissioner of the U.S. Occupational Safety and Health Review Commission and as the policy director of the Occupational Safety and Health Administration. Welcome, Mr. Eisenbrey.

Chairman HARDY. I would like to start with Mr. Settles. If you would not mind.

STATEMENTS OF KEVIN SETTLES, PRESIDENT AND CEO, BARDENAY RESTAURANTS AND DISTILLERIES; ED BRADY, PRESIDENT, BRADY HOMES ILLINOIS; TERRY SHEA, CO-OWNER, WRAPSODY, INC.,; AND ROSS EISENBREY, VICE PRESIDENT, ECONOMIC POLICY INSTITUTE

STATEMENT OF KEVIN SETTLES

Mr. SETTLES. Good morning, Chairman Hardy, Ranking Member Adams, and distinguished members of the Subcommittee. I would like to thank you for the opportunity today to testify on the impacts to small business of the Department of Labor's proposed regulations on overtime. As said, my name is Kevin Settles. I own and operate the Bardenay Restaurants and Distilleries headquartered in Boise, Idaho. I am honored to share the perspective not only of my company but that of the National Restaurant Association as well. I am proud to say that I serve on their board of directors.

My testimony will focus on four areas. One, the time period allowed to evaluate and comment on the proposals. Two, the minimum salary level. Three, the Department's desire to automate and annualized increases to the minimum salary level. And fourth, the potential adjustments to the current duties test.

On issue number one, the time period allowed for comment was inadequate. It would have been helpful to have been allowed more time to review and comment on the proposed rules. The Department of Labor was asked by our association and many others, including the U.S. Small Business Administration, for an extension. In declining, they cited that the listening sessions held prior to the release of the proposed rules made this unnecessary. I, along with other board members and staff from the NRA, participated in one of the listening sessions. While we appreciated the conversation, it was a conversation focused on general ideas. There was too much vague issues in there for us to feel like we truly were allowed to participate and provide input.

Two, the Department's proposed minimum salary level is inappropriate for our industry. The proposed rate of $50,400 per year is a very large step from where we are today, but that is not our only problem with the proposal. We also have problems with the way the comparative salary survey was done. Traditionally, it was based on low income areas in the U.S., and it has now moved to a national average. In addition to moving to a national average, they moved from the 20th percentile of that average to the 40th percentile. This represents an increase of nearly $10,000 higher than what they currently use in California, or $15,000 higher than in New York. If that is high for them, think about areas like mine in the U.S. It means that we will not be able to take advantage of the exempt salary status. This status was originally created to allow for above average fringe benefits, greater job security, and better opportunities for advancement. The ability for me to delineate programs and perks by salaried versus nonsalaried status has been a great tool and a great benefit for my employees. Setting a minimum rate that is inappropriate for entry level managers in rural areas in our country will end up reducing the benefits available to them.

On the third issue, automatic salary level increases, we think it will only perpetuate bad policy. The Department wants to switch from reviews to resetting the rate internally. We would only learn about the new rates when it is published in the Federal Register. No notice, no comment, no compliance with the Regulatory Flexibility Act. The Department is charged with regular review and updating of the minimum salary. They acknowledge that they have not done this for too long, and we agree, but they cite overall agency workload. Really? They are willing to put a key task for the Department on autopilot at the expense of America's employers and employees because they are too busy? This change would increase the likelihood that more employees would fail to qualify every year. One analysis that the National Restaurant Association has reviewed indicates that if just one quarter of the salaried workforce moved to hourly, in five years, the 40th percentile salary level would be in excess of $72,000 per year. If half were to move, by 2020, the rate would be nearly $96,000.

The fourth issue is adjustments to the duties test are not necessary and should be avoided. In 2004, the Department optimized the duties test to reflect the realities of the modern economy. The Department now says that this may have been a mistake. Our industry disagrees. Our managers need to have a hands-on approach to ensure that our operations run smoothly. Particularly alarming in this issue is the references in the documents to California's over 50 percent qualitative requirements. This reference increase our concerns that the Department may decide to enact changes without any comment period.

In closing, I would like to state that we are not against increasing the salary threshold for exempt status but it has to be at a reasonable level. In addition, any future increases need to be subject to the regulatory process. When it comes to the duties test, we cannot emphasize enough that the restaurant industry does not want to see any changes. And finally, from the process standpoint, we believe the Department should have granted at least as much time for review and comment as it did in 2004.

With that, I would like to thank you for this opportunity to testify today, and I look forward to any questions.

Chairman HARDY. Thank you, Mr. Settles.

Now, I want to recognize Mr. Brady.

STATEMENT OF ED BRADY

Mr. BRADY. Thank you, Mr. Chairman, Ranking Member Adams. Thanks for the opportunity to testify today.

My name is Ed Brady. I am a home builder and developer from Bloomington, Illinois. I also am the 2015 first vice chairman for the National Association of Home Builders. I have served as president of Brady Homes for the last 15 years. It is a family-owned business my father started in 1962. We primarily build single-family homes, but we have also constructed several light commercial projects. In addition to the home building company, I own two RE/MAX franchises and a property management company.

I am greatly concerned that the proposed overtime regulation could have negative repercussions for my own business and the broader home building industry. This "one-size-fits-all" approach to the overtime rules will have a substantial financial impact on housing. The proposal to raise the standard salary level from $455 per week to $970 per week represents an unprecedented increase of over 102 percent. NAHB analysis shows about 116,000 construction supervisors would be affected by this proposal. The rule could also affect other occupations in the industry, including sales reps, administrative staff, and local trade association employees.

NAHB and its members are concerned about the impact of the rule for several reasons. One is that the proposal fails to account for regional differences in pay. Construction wages can vary considerably from one area to the other even in my own state from town to town. What a construction supervisor earns in Tennessee is different from what one earns in California, sometimes significantly. Moreover, such a dramatic surge in the salary threshold is unlikely to result in an increase in workers' take-home pay. Instead, it would force business owners to scale back on pay and benefits, or to cut hours to avoid the overtime requirements. These are not acceptable outcomes.

Employees who are currently salaried are likely to become hourly workers and view their nonexempt status as a demotion. They may even earn less money than before. These employees will also lose the workplace flexibility that comes with being a salaried employee, especially in my industry.

I am also concerned about what the proposal means to my own business. I currently employ one construction supervisor who would become nonexempt under the new salary threshold. My supervisor currently receives a competitive salary with benefits, but the rule does not consider the workers' total compensation package. If the rule forces small businesses to choose between increasing a salary above the threshold or paying for health insurance, I do not think the employee is going to be better off. In fact, when all factors are considered, the employee may be worse off, if not unemployed.

Flexibility is a key component to any job, but specifically in our industry. By their very nature, supervisors are schedulers. Workers representing an average of 22 specialty trades are needed to complete a home, and it is a supervisor's job to ensure the trades complete their work efficiently and to the proper specs. Because homes are constructed outdoors, the supervisor needs flexibility to account for bad weather, especially in the Illinois winters. He might not work for a few days due to a storm, but then work six days the following week. Scheduling changes occur frequently and it is important that construction supervisors have that flexibility to ensure projects stay on time and on track. It is also common for a construction supervisor to respond to phone calls after hours, emails, and even evenings and weekends.

It is very important for my business to accurately predict cost so I know how to price a home. If the proposal becomes law, I will have to seriously consider replacing my supervisor—my employed supervisor with an outside contractor because it will allow me to accurately project my costs. Because of its overly broad approach, I think it is also likely that if the proposal is implemented we will encounter additional problems we have not anticipated.

The bottom line is that more than doubling the overtime threshold will do more harm than good in the home building industry.

NAHB strongly opposes this overtime proposal. I would like to thank you for your time and look forward to any questions.

Chairman HARDY. Thank you, Mr. Brady.

Ms. Shea?

STATEMENT OF TERRY SHEA

Ms. SHEA. Chairman Hardy, Ranking Member Adams, and members of the Subcommittee, thank you for inviting me to testify before you today on the Department of Labor's proposed overtime rule. My name is Terry Shea, and I am the proud co-owner of Wrapsody, Incorporated, a gift boutique. I am pleased to be testifying on behalf of the National Retail Federation.

Wrapsody is a hometown gift and home accessory boutique with storefront locations in Hoover and Auburn, Alabama. We also have a web store, Wrapsodyonline.com. In August of 2004, my business partner, Sarah Brown and I opened Wrapsody in Hoover, Alabama, with three part-time associates. By 2009, despite the recession, we had opened a second storefront in Auburn and hired our first full-time managers.

Wrapsody invests in our staff. We employ four full-time salaried managers and 25-plus part-time associates depending upon the season. Managers and assistant managers have the opportunity to earn quarterly bonuses in addition to their annual salary. Management also receives two weeks paid vacation annually, and in 2015, we began a 401(k) plan with a 3 percent company match. We take our management team to Atlanta to Gift Market where they get to meet with key vendors and network with other retailers. We also have an offsite retreat. Our employees really value these opportunities to learn more about the industry and build professional relationships.

I tell you all of this because the Department of Labor's proposed overtime rule will suffocate this type of employment development, company growth, and positive community impact. Wrapsody simply will not be able to increase our four salaried employees to the new minimum salary of $50,440 for many reasons. First, our labor costs are a fixed percentage of our sales, which means we cannot just increase everyone's salaries by such a large amount, nor can we pass on the more than 100 percent increase along to our customers in the form of higher prices. If this new salary threshold takes effect, we will be forced to convert all salaried management to an hourly wage and require them to clock in and out.

Second, in our area of the country, we pay a very competitive salary and we offer a generous benefits package, which is why we have such an awesome team. However, the overtime rule ignores the fact that the cost of living in Hoover, Alabama is very different from that in New York City.

Third, converting salaried positions to an hourly wage adds pressure to get the job done in a 40-hour work week. An increase in overtime eligibility will not necessarily mean an increase in overtime pay for our workforce, but it will take away my managers' flexibility both personally and professionally. My managers' salary exempt status affords them a great deal of flexibility, which they truly value. For example, in August, our Auburn store manager asked to leave a few hours early because her four-year-old daughter was starting dance that day. She needed to register and get her comfortable. Of course we said yes. I mean, no-brainer. These types of incidents happen all the time. Our managers are constantly going above and beyond, and we give them the freedom to schedule themselves. They are just as much a part of our success as we are—as Sarah and I are.

Diminished flexibility will also negatively impact customer service. Right now, if a customer walks into our store a few minutes before closing at 6:00, my managers assist them even if that means that they have to stay late or stay after closing. They would never ask them to leave right at 6:00. My business depends as much on customer service as it does on unique gifts and unique products.

Beyond this loss of flexibility, converting a salaried manager back to hourly status will have a demoralizing impact. Salaried exempt status gives my managers a sense of pride of ownership and it is accompanied by a broader benefits package.

This new overtime rule is bad for employees and small business owners. I am still trying to understand the implications of all these regulations and what it means for our business, but I can tell you right now that the Department of Labor's estimates of the regulatory burden are way too low. I am not the only one who thinks this. The Small Business Administration expressed concerns in its comments that the compliance burdens and costs of the rule are way underestimated. At Wrapsody, every dollar spent on compliance burden is one less dollar that we could have used to grow our business or reinvest in our employees and our community.

In closing, we take great care of our employees. And like other retailers, we want to help our team grow. We believe careers are the answers, not timecards. The Department of Labor's "one-size-fits-all" salary threshold, the accompanying proposed annual increases, and any potential change to the duties test will both burden my small business and more costly mandates and limit career advancement for my team. We are trying to do what we do best at Wrapsody—we create a fun and happy environment. We sell great products. We create wonderful jobs and we give back to our community. The uncertainty and cost associated with this government overreach, like the new overtime rule, are making it much harder for us to do business and smile.

Thank you, Mr. Chairman.

Chairman HARDY. Thank you.

Ms. SHEA. Thank you for the opportunity to share my views. I would be happy to answer questions.

Chairman HARDY. Thank you, Ms. Shea.

We now recognize Mr. Eisenbrey, I believe it is.

STATEMENT OF ROSS EISENBREY

Mr. EISENBREY. Hi. Thank you for inviting me to testify. My name is Ross Eisenbrey. I am the vice president of the Economic Policy Institute, a nonprofit, nonpartisan think tank created in 1986 to include the needs of low and middle income workers in economic policy discussions. EPI believes every working person deserves a good job with fair pay, affordable healthcare, retirement security, and work-life balance, and we are a small business, too. Just a tiny bit bigger maybe than Terry Shea's business.

Work-life balance is precisely what the Fair Labor Standards Act is about. Because of its requirement to pay most employees a premium for time worked beyond 40 in a week, the FLSA is the single most important family friendly law ever passed in the United States. Everyone claims to care about work life or work-family balance, but for many employers it is talk, just as it was 70 years ago. If not for the law's overtime rules, tens of millions more workers would be working 50, 60, or 70 hours a week for no additional pay, just as millions of Americans did before the FLSA was enacted in 1938.

An uninformed person might think the 40-hour work week is part of the natural order, but of course, it is not. It exists in the U.S. because President Roosevelt persuaded Congress to pass the FLSA, which by imposing a duty to pay time and a half for overtime makes it expensive for a business to work employees more than 40 hours a week. If the FLSA's regulations are not updated from time to time as the law intends, the 40-hour work week could become a thing of the past. I tis critical to remember there is no inherent difference between an hourly worker and a salaried worker. How they are paid us up to their boss. And salaried employees need time with their families and time for themselves just as much as hourly workers do. Congress recognized this in 1938 and made no distinction. Hourly workers and salaried workers alike were entitled to overtime pay, whether they were blue collar or white collar, whether they worked in a factory or an office. In fact, some of the most exploited workers at the time were women working 12-hour days, six days a week, in giant typing pools for $6 or $7 a week.

It is equally critical to remember that the employees who work in small businesses are no different from those who work in medium-size and large businesses. They, too, need time with their families and for themselves. There is no rule that says small businesses get to exploit their employees, work them excessive hours, or deny them time with their families. For all of these reasons, the Department of Labor should enact its proposed rule that would in 2016 raise the threshold below which all workers are automatically eligible for overtime to $50,440. This would be the most important improvement in the labor standards of America's working families in many years.

Now, the law is supposed to protect salaried workers, but in fact, large percentages of managers and other white collar employees say that increasingly the law is failing to protect them. And I quote this Ernest and Young Survey which shows that too little pay and excessive overtime are among the three most common reasons employees quit; that half of managers work more than 40 hours a week. Four in 10 say their hours have increased over the past five years, and that younger generations are seeing this more than the boomers did. Gen X and Millennials in particular.

The implications of this overwork are obvious in terms of work-life conflict. Who will take care of the kids? Who will go to their ballgames, school plays, or counseling meetings? The conflict is especially intense because children increasingly have two parents working at least 35 hours per week. Ernst and Young finds that over half of full-time employees in the U.S. indicate that their spouse or partner works 35 hours or more a week, but for Millennials or Gen Xers, the rates are even higher.

It is not just work-family conflict, stress, or lack of sleep that is at stake. It is also the physical health of workers. Overwork actually kills. People who work 55 hours or more per week have a 33 percent greater risk or stroke and a 13 percent greater risk of coronary heart disease than those working standard hours.

Now, you would think from the comments that you have heard that this rule is breaking some sort of new ground in setting a single standard for the whole nation. That has been the case since 1938. Every time the Department has set the overtime salary threshold it has set it a single level for the whole nation. That is not new. What is new is that the levels have fallen to the point that whereas as Ms. Adams said, at one point 65 percent of salaried workers were protected. It is now less than 10 percent in this year. And from more than 12 million being guaranteed overtime, salaried workers being guaranteed overtime in 1979, we are down to three and a half million today. So what the Department is doing is absolutely essential to restore what Congress intended as the law to protect workers from excessive work.

Thank you very much.

Chairman HARDY. Thank you, Mr. Eisenbrey.

Now we will start a line of questions. I am going to start with myself. Each member will have an opportunity to take five minutes worth of questioning.

So with that I would just like to make one quick comment. Six hundred eighty five individuals from one organization sent letters to this Committee in opposition to this rule. It must be having a pretty good impact on their bottom line and on their employee status.

I would like to start with the business folks here. Can you tell me a little bit about what this regulation and others like it this administration have handed down, what kind of impact it has put on your business, both for time to keep up with these compliance rules, and as we all know, time is money in business, and how much more you are going to spend now versus what you did five years ago and maybe even 10 years ago.

We will start with you, Mr. Settles, if you would not mind.

Mr. SETTLES. Thank you, Mr. Chairman.

You know, for us, the biggest headache my staff, my managers have right now is managing the schedule for the hourly workers, and it has to do with healthcare. I kind of hate to take it that direction but we pay for healthcare for about 65 out of our 200 employees, about half of our employees are half-time. So managing their hours to make sure that they are fully qualified, et cetera. And so when we look at this new regulation, it is just one more headache. Our salaried employees are asked to schedule for 45 hours a week. That is it. We are not here to kill them. We are not here to do anything else. But it gives them the flexibility to manipulate the schedules and work with the schedules. And make sure that we are covered at all hours of the day. That is really their role. And so it allows the single mom that I have that is an assistant manager to come and go and pick up her kid and take him to sporting events and go back and forth. And so that is one scheduling difficulty. We have actually created a new position in our company with three locations that her whole job is to manage the schedule for each department. This is a brand new thing, and it is not to meet the employees' requirements or the needs of the business; it is to make sure we meet all the regulatory requirements of the ACA, and now we are looking at this requirement. So it has gone up tremendously.

Chairman HARDY. Mr. Brady or Ms. Shea?

Mr. BRADY. I would say the regulatory burden on our industry has been huge over the last 8 to 10 years. Every new regulation and compliance to those types of regulations, including this, is a burden on the business. It raises cost. It delays construction. For instance, where I used to build homes in 90 days, now because of some of the regulatory permits that are required and the cumbersome compliance issues that we have to comply with have really extended the time to provide our product where a manufacturing company just happens to be onsite throughout the country. And so anywhere from wetlands expansion to overtime pay increases the cost to our business which inevitably raises the cost of housing to the consumer. Specifically to the overtime pay, I concur that my supervisor works 40, 45, 50 hours a week at times but in the Midwest there could be three days of snow that they do not come to the job. My supervisor does not clock in. He does not come to the office every day. He leaves from his home to go to the jobsite, and I do not know what he is doing during the day. And so in this particular regulation, it is an overreach, and frankly, I think will hurt the employee opportunity.

Chairman HARDY. Ms. Shea, I would like to take a little different direction if you do not mind with you. In the conversations testimony you talk about where Mr. Brady, he can pass it down to his consumer, and you stated that you cannot pass it down. Could you give me the reason why you cannot and what cause and effect that is?

Ms. SHEA. Sure. Sure. You know, you are looking at a 100 percent increase, for instance. I mean, I will just use a candle. If we are retailing a candle for $20, okay, we cannot take that same candle and then tell the consumer, our customer, oh, this candle is now worth $40. I mean, what makes that candle worth that much more money? It is not the candle. It is not a bigger candle. It does not burn longer. Nothing happens with the candle. We are saying we have to pass that expense on to our consumer and they just will not pay it. And the other thing is I do not think that the larger retailers, it will hit them as much. And those are the people that we actually compete with for that, for our products.

Chairman HARDY. Thank you. My time is expired.

I would like to recognize Ranking Member Adams.

Ms. ADAMS. Thank you, Mr. Chair. And thank you all for your testimony.

The DOL's proposed amendments set the minimum standard threshold at the 40 percentile of weekly earnings for full-time salaried workers, and based on 2013 data, this would amount to a minimum salary of $921 per week, or $47,892 annually. Yet, instead of using the 2013 data, they used projected numbers for 2016, which is $970 per week. But they did not use the same projections for the exemption for highly compensated employees.

Mr. Eisenbrey, can you explain the theory behind the DOL using projected numbers for one increase but not the other?

Mr. EISENBREY. Actually, if that is true, I really cannot explain it. I think it does not make any difference in terms of what we are going to see as the rule. They are saying they will set it at the 90 percent level, and they will determine that next year when the rule becomes final, they will announce what that is. And for the highly compensated and for the regular standard threshold, it will be set at 40 percent and that will be determined next year. They are guessing, you know, what that level will be right now, but they will actually set it based on the data that they have in 2016. So at this point they are speculating for both of them what the value will be in 2016.

Ms. ADAMS. Okay. Mr. Brady, what are the benefits and challenges with taking an incremental approach and raising the salary threshold over a longer period of time?

Mr. BRADY. What are the benefits you are asking?

Ms. ADAMS. Yes, and challenges.

Mr. BRADY. Well, the challenges, I mean, this particular, the unprecedented 102 percent increases is unprecedented I should say. We are not opposed to increases, but to increase it so significantly and take many employees from a salaried position to an hourly position in particular industries, one size does not fit all. In my industry, I cannot clock in my supervisor, as an example. I cannot tell you how many hours he or she is working. So I think that the jump from 24,000 to 50,000 is incredible and cumbersome.

Ms. ADAMS. All right. What approach or which approach is more effective in achieving the goal of increasing overtime pay for workers, and what options are available to help ease the potential compliance burden of this threshold for small businesses?

Mr. BRADY. I guess I would beg the question, is there an issue with overtime pay? I mean, many of us as small businesses, if we overwork somebody, they are going to move. They are going to go somewhere else. And my particular business, we are very loyal to our employees. If they are overworked, they are not going to be happy, and therefore, the customer service, the issues that we would have, they would move to another business. So I would beg the question that there is an issue on overtime and whether or not people are paying, or that is a problem in the industry.

Ms. ADAMS. Mr. Eisenbrey?

Mr. EISENBREY. Yes. I can say that I have read many of the comments that were submitted to the Department of Labor, and I have personally talked to people working in retail who worked 70 hours a week for no additional compensation. They were told when they were hired that they would work 44 hours a week, and they were given so little staff that they ended up doing the work that the staff would have done, the hourly staff would have done. I know several cases where people worked themselves to the point that they were broken down physically. And they were not actually small businesses; those were larger employers—CVS and Dollar Store. But people are overworked in the United States.

And I would like to correct one very important thing here which is there is no requirement in this rule that anybody be changed from salary to hourly when this threshold changes. That is a complete misunderstanding of the rule. In fact, the Home Builders did a survey and it is testified to today where they asked, "What will you do? What will you as a construction employer do?" And only a third of them said that they would make any change at all; two-thirds said they would make no change. And most of them said they would not change their employees from salaried even though they would have to pay them time and a half.

Ms. ADAMS. Thank you, sir. I am out of time.

I yield back, Mr. Chairman.

Chairman HARDY. The gentlelady yields back.

I would like to recognize Mr. Rice.

Mr. RICE. Did you get the slide? The problem with this, Mr. Eisenbrey, you said just a minute ago that you know of several workers that worked themselves to the point of physical deterioration. This regulation, this new regulation from what I read in this memo here will affect 1.8 million people. And so I certainly do not want to see anybody overworked to the point of physical deterioration. But to say that that happens on such an isolated number of people and to dramatically affect the livelihoods, you know, the potential that their jobs will no longer exist for 1.8 million people, is such a dramatic overreach. And this Administration in six years has created more regulations than any administration since Johnson. In six years. And most of these presidents have had eight years. And the result of that is that household incomes are stagnant. They have actually dropped 8.7 percent since 2007. A lot of that was in the recession, but they have not come back. And there is a reason that they have not come back. It is because we are drowning these businesses in regulation. Between the Affordable Care Act, between the limit to access to capital under Dodd-Frank. All these things are well-intentioned. I mean, I am not saying they are not well intentioned. But they are significant constraints on small businesses. The fact is, according to Gallup—and she is working on the slides, and I did not get them to her until just now—for the last five years, more small businesses closed than have opened. And that is the result of this huge regulatory overreach. And this is just more icing on the cake.

Let me say one other thing. In reading this memo—and I am certainly no expert on this—but the Department of Labor—and I am not saying that we should abolish the Fair Labor Standards Act, and in your testimony that is what it sounded like you were trying to say. Nobody is suggesting that. What we are suggesting is that this is an enormous regulatory overreach to double this thing and make 40 percent of the salaried workers subject to it.

Do you know when the last time that occurred? Because this memo says, "In 1958, the Department of Labor set the standard at 10 percent," and there has been 10 percent, the way I read this, for decades. Why would we suddenly go to 40 percent?

Mr. EISENBREY. So I am sorry to say the memo is wrong. The way the Department used to set this back in the '50s is they would look at all of the enforcement cases that they had done and where they had found somebody to be an exempt executive, for example, then they would take the 10 percentile salary of people who they had already in their enforcement determined to be executives. It is a very different methodology you are talking about and——

Mr. RICE. Well, when they set it at 10 percent in 1958 for the next 12 years, the American worker enjoyed some of the most prosperous times in our history.

Mr. EISENBREY. Yes.

Mr. RICE. And their standards of living shot through the roof.

Mr. EISENBREY. Yes. And the percentage of——

Mr. RICE. And now we are going to pile more regulation on these businesses, and we are going to smother that very opportunity.

Mr. EISENBREY. But you are misunderstanding. The percentage of salaried workers covered was over 50 percent then.

Mr. RICE. I want to go through these slides here. If you will look at this Mercatus Center slide, this is a graph of every administration since the Johnson administration, and you will see the very top name there is Barack Obama has added 120,000 new regulations on small businesses in six years. We still have two years to go. He has outpaced every other administration.

Next slide. Skip that slide. Skip that slide. Skip that slide. All right. Back one.

That is the business closings versus business startups, and you will see since 2010, the number of small businesses dissolved in this country has outpaced business formations. And you have got to understand, small businesses employ 70 percent of the workers in this country.

Next slide. Next slide.

This is the percentage of the American population in the workforce. There are more people outside the workforce now than since the numbers have ever been recorded because we continue to pile more and more cost and regulation. As of 2013, the Small Business Administration said the cost of regulatory compliance in this country amounts to $10,500 roughly per employee per year, and it seems to me this is going to be a huge cost, this proposal.

Next slide.

This is the median household income, which is exactly what you are hitting on. If you look at that blue line, you will see since 2007, median household income has actually dropped 8.7 percent. In the same time, energy cost, utility cost, and food cost have all increased and due largely to regulatory burden placed by the federal government. Now, one point that I have here is I understand the last time this threshold was adjusted was 2004. Median household income has actually dropped since 2004. How could we possibly think that it would be right to double the threshold from 2004 when median household income has dropped? It makes no sense to me.

I am sorry. My time is up. It was more of a statement than a question.

Chairman HARDY. The gentleman's time has expired.

I would like to recognize the Ranking Member Velázquez over Small Business.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

I just would like to read and quote the Washington Post from 2012 regarding the cost of regulations issued by various precedents.

In the last 10 fiscal years, the highest costs were imposed in 2007. The last three years of the Bush administration saw higher regulatory costs than the three years of the Obama administration. If you are looking for the year with the highest regulatory costs on record, you will have to go all the way back to 1992, under President George W. Bush. So I want the record to reflect that because it is always great to come here and make statements that do not reflect the reality. And so, look, we work in this Committee to make sure that we create a climate that is conducive for small businesses to continue to do what you do best, and that is creating jobs. But there has to be a balance, and we are trying to strike that balance here.

Mr. Eisenbrey, we have heard from some of the witnesses today that their salaried workers get workplace flexibility and benefits, like healthcare and paid time off that they will otherwise not get if paid hourly. Is it realistic for the DOL to take these other benefits into account when setting a higher threshold, and how do we value them?

Mr. EISENBREY. Well, I do not think that the Department should. I think that this has been—remember what this law is intended to do. The Fair Labor Standards Act was meant to give everybody the right to work a 40-hour work week and to discourage employers from working people any longer than that. So the question is—and there is a very narrow exemption for executives, professionals, and administrators—the question is, who are those people? Who is this small subset of people? The way it has always been done since 1938 is to look at their salaries and to say if you make less than a certain amount, you are not valued so much by your employer, or you are not so independent and important that you should be denied overtime pay.

Now, when you look at what it costs in Bloomington or Auburn or Boise for a basic family budget, just a modest family budget, it is far greater than we are talking about with the $50,000 salary level. I mean, it is $72,000 a year in Bloomington; $62,000 in Auburn. To say that somebody making $50,000 is an executive who should not get this overtime protection when they cannot afford a basic budget I think is just wrong.

Ms. VELÁZQUEZ. So currently, only about 11 percent of salaried workers qualify for overtime.

Mr. EISENBREY. Automatically qualify.

Ms. VELÁZQUEZ. Correct. The rules include an automatic inflationary adjustment. Why is this needed in the final rule?

Mr. EISENBREY. Well, you look at the history. What happened for 29 years was because of bureaucratic hostility or neglect, the Department did not adjust the rule. Nothing happened, and the value, the protection fell to the point, as I said, from 12 million people being protected to three and a half million. If it is not set automatically, we will go through the same thing again.

Ms. VELÁZQUEZ. Thank you.

Mr. Settles, the duty test is an analysis of an employee's work duties and it is used to determine exemption eligibility. However, the DOL's proposed regulations did not propose any specific changes; rather, they asked for comments on how best to alter it.

Mr. Settles, what is the best way to update the duty test to accurately reflect business reality?

Mr. SETTLES. Thank you for the question, Ranking Member Velázquez. You know, I think that it is a robust conversation and some solid proposals that can be looked at. We like the current duties test. We feel in 2004 it was dealt with appropriately, and we would like to see that same sort of process gone through again if there is insistence. We really kind of feel like in this proposal that they did not recommend a change but they threatened a change, and it is either give us this higher amount, which is significantly higher than we are today, or we are going to do this. And we do not feel that is fair. This is supposed to be an open negotiation on the entire package, not just parts and pieces.

Ms. VELÁZQUEZ. Thank you.

Thank you, Mr. Chairman. I yield back.

Chairman HARDY. Thank you. The gentlelady's time has expired.

I would like to recognize Mr. Kelly.

Mr. KELLY. Thank you, Mr. Chairman. Thank you witnesses for being here.

One size does not fit all. I come from Mississippi, very close to Alabama there, Ms. Shea. And we have a rural district, and I can tell you, if you make $72,000 a year in my district, you are not the poor people, you are the rich people. That is a fact of life. $72,000 a year in my district is an extreme amount of money.

The other point I would like to make is one of the frontline managers in an entry level position, I started at $20,500 a year with McRae's many, many years ago in retail. But now our second lieutenants in our Army and the Marine Corps and our ensigns in our Navy are the frontline entry level leaders, the brightest, most committed, most dedicated members of our entire nation, and they make as a second lieutenant, in a managerial position, $34,862.40 a year in salary. They work a lot of overtime. I can tell you they do. They work 18 and 20 hour days because they are committed to this nation, and they are committed to their business, the largest, or one of the largest employers in this nation. And I know that it does not apply to them, but I am saying that is entry level, the brightest of our bright, our managers, who we are training to be the leaders in the future which is what our small businesses do.

Can you tell me, Ms. Shea, how this proposed rule will impact you on who you hire or what you have to do with your staff and your employees that you currently employ?

Ms. SHEA. Sure. Actually, I feel like this regulation is really worse for the employee than it is for me because my expenses are fixed. I mean, I can only pay so much and still be profitable. That is just the bottom line, and I have to be competitive. I am competitive. Sarah and I are very competitive in what we pay.

I asked my manager before I came up here, one of my managers, I said, you know, what do you think about this? Because I am really going to talk for everybody up here. And she said this just inspires mediocrity because you have an assistant manager that makes one thing and you have a store manager that makes this, this amount. Yet you are getting ready with this proposed regulation, I would have to bring them up to the same wage. That is just not right. The store manager has volume responsibility. They bring a lot more experience to the table. I mean, you know, they really do it all. And we do not overwork our employees. I know that there are probably some companies that do, and shame on them. You know, I think there needs to be a safety net, but this regulation just really puts us all in a cage and it just keeps you from advancing. It keeps you from, just like you said, coming in an entry level position. We do not hire girls out of college—I hate to use the word "girls," but anyway, that is who comes to my store—out of college—and pay them $50,440 to come in and manage a store with no management experience. You have to start somewhere. There has to be an entry level. And I really feel like this just totally does away with entry level positions and with middle management.

Mr. KELLY. Mr. Settles, either you or Mr. Brady on this. $50,000 is quite a bit of money in Mississippi to be anything below that—or above that to be salary. That is a lot of money. And quite frankly, I am also a lawyer. I do not often admit that freely, but I was a prosecutor before I came here, and there is an inordinate amount of people coming out of law school who would give anything in my area to make $50,000 a year as an attorney, as a professional with an advanced degree. Do you find that in your areas—because they are different than my region—that $50,000 is an excessive wage to bring in to say you are salaried if you make or you are hourly if you make less than $50,000?

Mr. SETTLES. I find it very interesting that there is this constant struggle in America right now to figure out how to get wages up, and I can tell you from personal experience the best way in the world to get wages up is to get unemployment down low. My managers make well above this. My full managers make well above this. It will not affect them at all. It is the people that are learning to be managers. It is the mid-level managers that will get it. Minimum wage, we do not pay that in our state. Three percent unemployment, it gets you wage increases. That is the most effective way I know.

Mr. KELLY. Thank you. I yield back the balance of my six seconds, Mr. Chairman.

Chairman HARDY. Thank you. I appreciate that.

I would like to recognize Mr. Takano. He is a guest of ours today here on this Committee. Thank you.

Mr. TAKANO. Thank you, Mr. Chairman. I appreciate the opportunity to join the Subcommittee this morning. As you discussed, the Department of Labor's proposed update to our nation's overtime rules. While I do not serve on this Subcommittee, I have been following the development of this rule closely, and I appreciate both the chairman and the ranking member for allowing me to join in today's discussion.

There are many tradeoffs that business owners face on a constant basis, but at the end of the day, I believe the Department's rule is about a fair day's pay for a hard day's work. The intent of the white collar exemption was to exempt those with sufficient power in the labor market who are able to advocate for better wages and hours for themselves. That is clearly not the case today. In 1975, 62 percent of salaried workers were eligible for overtime. Now, only 8 percent of workers are eligible. And this is because we have not been enforcing the intent of this rule under the Fair Labor Standards Act, and we have allowed it to lapse. And all of a sudden we are realizing, oh, my goodness. Only 8 percent of our workforce is now eligible for overtime pay—salaried workforce.

Americans are working longer hours and are more productive; yet, their wages are flat. Updating the overtime exemption will help millions of workers make ends meet and give an added boost to our economy. And I just do not agree with the idea that stagnant wages are only about regulation; that we have seen stagnant wages in our country. This has been a trend, and since the Great Recession, I just do not think we can say that what is killing jobs is regulation. We had a huge thing called the Great Recession that had a huge impact on employment.

Mr. Eisenbrey, could you talk more about the argument that employers will have to pass along the increased labor costs to their consumers? Even though the income threshold is doubling, that does not mean labor costs will double. Employers will only be required to start paying for those hours over 40 hours. So I just want you to clarify that.

Mr. EISENBREY. Yes. I think Ms. Shea gave the impression that because the threshold was doubling, she would have to double the cost of the candles she is selling. In fact, she said that she has managers who are paid in the mid-40s. If she wanted not to have to pay overtime to them and she gave them a raise to get them to the $50,000 level, that would be less than a 20 percent increase, not a 100 percent increase, and that would just be that one part of her cost. So it is just not true that this would have those kinds of effects.

I think it is really important to look at—Mr. Settles complained about regulation, you know, and its impact on business, and in his testimony, I think he said he would not move to California because of the excessive regulation, the high overtime threshold, for example, and in the restaurant business they have the tip credit. California's employment growth is the fourth greatest in the nation. It is higher than the national average. They have added more jobs and wages are going up faster in California than in the rest of the nation. So the notion that regulation is somehow squashing employment growth is just wrong.

Mr. TAKANO. To his point about more people being employed, is it the case that if employers have to make this choice between paying their managers overtime or hiring more people, hiring more people is expanding the workforce; right?

Mr. EISENBREY. The Retail Federation itself, the National Retail Federation—Ms. Shea is representing them today—said that in their sector alone, over 100,000 jobs would be added as a result of this rule.

Mr. TAKANO. So the rule creates jobs?

Mr. EISENBREY. It is a job-creating rule. I mean, they put that into the record.

Mr. TAKANO. Imagine that. A regulation that creates jobs. Amazing.

Mr. Rice mentioned the high number of Americans outside the workforce. Mr. Eisenbrey, your testimony mentioned that there is a 10 percent employment rate. Can you talk more about the impact the rule will have on unemployment and the incentives to hire more workers? And we have just been talking about that.

Mr. EISENBREY. I think it is very interesting to see what the home builders said in their comment that they submitted. They said that two-thirds of their businesses would make no change at all; a third would make a change. Of those that did, they would reduce overtime hours for some. Twenty-seven percent said they would raise salaries to put people over the threshold. And——

Mr. TAKANO. So the rule would have the effect of raising salaries and causing people to hire more people?

Mr. EISENBREY. Exactly. Exactly.

Mr. TAKANO. Mr. Chairman, I yield back.

Chairman HARDY. Thank you.

I would like to recognize Mr. Bost for just a second.

Mr. BOST. Thank you, Mr. Chairman.

Chairman HARDY. A second is up.

Mr. BOST. Mr. Eisenbrey, I do not know your history. I know where you are at now. But have you ever ran a business?

Mr. EISENBREY. Yes.

Mr. BOST. Okay. What business was that?

Mr. EISENBREY. One that I have been at since 2002, the Economic Policy Institute. It is a small business.

Mr. BOST. Okay. All right. I would question that but that being said, I just wanted to know what the background was.

I am trying to figure out how it is that bureaucrats have the ability to understand what it is like to actually make payroll. What it is like to actually have a small business. I came from a small business. I came from several of them. And quite often what we end up having is we have government that sits here on the Hill or sits in our state capitols and truly does create such burdens on our business, and then they are shocked when they see people laid off, and they are shocked when they see businesses fail. But I need to probably just ask the panels some questions because I am listening to this and I am getting very, very frustrated because once again that is what we are doing here. We are not paying attention to the people who provide those jobs. We are not paying attention to them. We are actually almost talking down to them in the fact that why it is that they are not smart enough to understand that if they just raise their wages up to the point that they almost shut their business down, that everything is going to be hunky-dory. But the reality is that is not how it works.

Now, when this rule was first put in, and I want to ask this of Shea, Brady, and the members there with the business groups, when it was first put in and Bush proposed it, there was a process that was in place there; is that correct? What was wrong with that process in your idea?

Mr. SETTLES. We do not know.

Mr. BOST. Okay, so Mr. Eisenbrey, what was wrong with it in your idea?

Mr. EISENBREY. Well, I am not sure which process you are talking about. What was wrong with the 2004 rule?

Mr. BOST. Yes.

Mr. EISENBREY. Well, it set the salary threshold far below the level that it had been set, for example, in the Nixon and Ford administrations. It covered very few people. It said essentially that an executive was somebody whose salary was no better than the poverty level, which is crazy. It was a crazy rule, and I was opposed to it at the time, and I am very happy to see the Obama administration saying, no, an executive salary is a salary that is—it is not even the average salary in the United States, the $50,000 salary that they are proposing. But it is at least something that could support a family.

Mr. BOST. Mr. Brady?

Mr. BRADY. Two things I want to correct. I think Chairman Hardy suggested that we could pass cost on. That is not always the case. I know you cannot raise it to $30 on the candle, and I cannot raise the price of housing to the regulatory compliance issue that we have done. So I just wanted to correct that.

The other fallacy is in our industry there is a labor shortage. We cannot just go out and find new people. So many people have left our industry, to replace them and not pay overtime, or just stop at 40 and hire somebody else, and in my case, project managers are project managers. You cannot have three or four project managers. So they have to stay on the job. To me this is anti-worker. This is an issue to where my employee who counts on his weekly paychecks guarantees that he is going to be able to pay his bills based on that. If I move him to an hourly and we go to a cold, hard winter, Congressman, in Illinois, and he does not work for a week, he is not going to pay his utility bills. And so from my perspective, you have got to look at this as not only a small business. We have to survive. We have to know our costs. We have to be able to make a profit in order to provide 70 percent of the employees in this country, and with this rule, we would not be able to know our costs. We could not hire as many people as it might take to do the job.

Mr. BOST. Yeah, and I do not think any one of you there does not want to pay the best wage you can possibly pay, but you have got to do it based on what your business will provide for, and I think that is something that is just being missed here completely.

And Mr. Chairman, I yield back.

Chairman HARDY. Thank you, Mr. Bost.

I would like to take, with indulgence, go another round of questioning if you do not mind, and I will begin myself.

I apologize if there was a misunderstanding there, Mr. Brady. You may have the opportunity to do that where she was very clear that she could not pass it on.

You know, I have 40 years in the construction industry myself, and I appreciate the fact that Mr. Eisenbrey keeps bringing up that industry because the reason our salaries are going up is because of the lack of trade craftsmanship and the ability that we have to find those type of workers. They are just not there. They are not available. People are not looking at that industry like they used to. You know, I made a living out of this, but I cannot find employees. So with that, when you have less employees, it drives that portion of it up, so to say that this salary benefit of raising those salaried employees up, I do not believe has any impact on whether we change how we are. We have to keep those employees.

But Mr. Brady, I would like to go to you. With that experience, understanding that supervisor that you have hired, have you ever had a supervisor that would not rather have that salary over that hourly employee?

Mr. BRADY. No. I mean, it is a bonus to them. I mean, they look at it as salaried employees get benefits that sometimes hourly employees do not, so it is a promotion when I move from an hourly employee to a salaried employee to run a job. So I cannot tell you that I have ever had a superintendent that says I would rather go hourly.

Chairman HARDY. Ms. Shea?

Ms. SHEA. No. The salaried employees definitely, I mean, they want to be salaried. They enjoy the flexibility. They know that they can count on that same paycheck. If they have to leave and go to a school play, you let them go. We are very flexible. They love the flexibility. We monitor how much our employees work, our salaried associates work, because we do not want them to work too many hours. Anything over 46 hours, we comp them with a day off. I mean, and they can use it whenever they want to. If they want to use it the next week, great. But if not, if they want to save it and use it another time and tack it onto vacation, we let them do that. I looked at my books before I came, and last year my store managers worked 40 hours a week. That is what they averaged. There were some weeks when they worked more, but we compensated them for time off. And there were some weeks when they worked less because that is just the nature of my job, just like yours. You know, fourth quarter is when we make our money. That is when we go in the black, so you know, that is when the business is there, that is when the customer is there, and that is when management is there.

Chairman HARDY. I would like to give you a quick minute, Mr. Settles, if you would not mind.

Mr. SETTLES. You know, can I start by replying to Mr. Eisenbrey's comment about California? I have friends that do business in that state, and they are not happy, and what would the state be if I actually wanted to take my business there? So you have to count the number of businesses that are choosing not to open there because of the regulation.

Secondly, I think that a lot of that, this process came at us fairly quickly. As I said, we had a conversation. When we read the rules we were like, did they pay attention? And we have not had the time to do the analysis. I do not think most people realize, yes, we have the option to keep them at the point they are today and then plus up for every hour that they work. Figure out an overtime rate. Well, to go find the calculator and understand the process and apply it to your staff, and from my standpoint, just figuring out how you get them to be able to clock in and clock out and make sure that they keep track of things, that is not what a salaried position in my business does. They come and go and are there when they are needed, and it may sound stupid, but it is a complexity for them to actually have to start to track their hours. So we sit down at our regular reviews and go, how much do you think you are working? And we are making sure they are not working to death.

I have been open for 16 years. I have a GM that has been there for 15 years. I have a GM that has been there for 13. I have a GM that has been there for nine years, and that almost equals the length I have been open in every place. We are not losing employees because we do not pay enough. And this just changes. It is one of those things that just makes the job a little more irritating. And I will tell you right now, the number one complaint that my managers have is trying to keep track of hours that they did not have to keep track of at this level before. It just used to be just is it overtime or not overtime? Now it is do they get this benefit? Do they get that? Blah, blah, blah.

Mr. HARDY. And what my earlier testimony stated is that this administration's own folks that represent small businesses stated themselves that they did not do a complete analysis with all the available stuff that was there to them, so I believe that this is kind of one of those surveys that might be a lot like a real estate appraiser. However hires the real estate appraisal is going to get the best appraisal. That happens in this Administration. That happens all over the country, one side or the other. So we have to look at all the data, all the folks that are happy versus ones that are not happy to make sure where we stand.

With that, my time is expired. I would like to recognize Ms. Adams.

Ms. ADAMS. Thank you, Mr. Chair.

Just one question. Mr. Eisenbrey, the 40th percentile of weekly earnings represents a significant increase for the salary threshold but may still not be enough for workers. So what would the ideal salary threshold and what kind of impact would it have for employees?

Mr. EISENBREY. Well, that is a hard thing to say. Other people here, Mr. Brady said that he liked the 1958 methodology that the Department of Labor used. If you used an inflation adjustment from that, the salary level would be about $65,000 to $70,000 a year. So I am not saying that that is ideal, but that would be certainly, you know, using—not even taking into account the fact that we are more productive than we were in 1958 as a nation. We are wealthier. Incomes are greater. Just a pure inflation adjustment from the 1958 level would give you a level of around $65,000 a year. So this is a very modest—my point is what the Department of Labor has chosen is a modest level that takes into account the south. It takes into account rural areas. It set the level at a level where you could say at least with a straight face that a true executive, a bona fide executive is making at least this much.

Ms. ADAMS. Okay. Thank you, Mr. Chairman.

Chairman HARDY. I would like to recognize Mr. Rice for five minutes.

Mr. RICE. I do not have the median household income as of this moment in front of me, but I believe this level would be higher than the median household income in the country. And I know, I mean, here in Washington, D.C. versus where I am from in Myrtle Beach, South Carolina, costs are vastly different. And an apartment that I am paying $2,000 a month for in Washington, D.C., would cost $600 in Myrtle Beach, South Carolina. And food costs are different. And fuel costs are different. And every other cost. So to say that a "one-size-fits-all" across the country is something that is justifiable is absolutely absurd and ludicrous, and by any standard it is ridiculous. And to say that placing more regulation and cost on small business creates jobs is La-la Land. It is absolutely absurd and ridiculous.

You know, we have a very small sample here, and we have got a bureaucrat, so let us talk about our samples of employers.

Mr. Settles, in your business, would this generate business for you and would you hire more employees if your cost per employee went up? In violation of all economic principles that I understand, would you hire more employees?

Mr. SETTLES. Well, you know, if we were to do that, in our industry it would be more part-time employees and people under 30 hours to keep our costs down, and that is really not where we want to be. We have a very complex business that it takes a trained professional to work, and I think people discount how difficult it is to work in the restaurant industry.

Mr. RICE. And are there any other recent major federal laws that you are aware of that might encourage you to hire part-time versus full-time employees?

Mr. SETTLES. Absolutely.

Mr. RICE. What would that be?

Mr. SETTLES. Well, it would be the Healthcare Act.

Mr. RICE. Yeah. So it seems that the Obama Administration is just on a direct course to let us force everybody in the country to part-time jobs.

Mr. Brady—and maybe that has something to do with the fact that, you know, wages have dropped 8.7 percent since 2007 and are not recovering. You know, maybe that has something to do with that. Mr. Brady, let me ask you, in your business, would the imposition of this regulation, or any other federal regulation that costs you $500 per employee, plus have an increased salary cost, would that somehow magically cause you to hire more employees? Or do you see that generating more income for your business?

Mr. BRADY. No. I think just the opposite. We probably would hire contract employees versus—so our employees would probably lose their jobs and we would go to a contract basis versus having to pay them on an hourly basis. And not only my employees——

Mr. RICE. Well, there is another hot-button thing that we are looking to, I mean, the Obama Administration is looking to heavily regulate. Be careful there, too.

Mr. BRADY. I understand. I understand. Not only my business, but I subcontract most of my labor, almost all of my labor, and those employees that are on an hourly basis or a salaried foreman basis of a carpenter crew would be hurt by this regulation because, again, they are a salaried employee. When there is work, they may work 60 hours that one week and they may be off next week, and they cannot afford that inconsistency and that flexibility or that inconsistent income. So I think the subcontractor base of our business, the actual worker, the skilled laborer this regulation hurts.

Mr. RICE. Ms. Shea, do you anticipate under this regulation, or any other regulation that increase your cost per employee, do you think that would make you hire more employees or increase your income?

Ms. SHEA. No.

Mr. RICE. No, I do not think it would either.

Ms. SHEA. Definitely not increase the income.

Mr. RICE. That does not sound economically sound.

Would you please back up a slide or two here? Yeah, that one right there is the one I want.

I want you to look at that for a minute. You see this is since, what 1980, and you can see each recession in gray there, and you can see the result of every recession is a dramatic drop in employment, participation in the workforce. You can see, of course, the last recession was by far the deepest, and most erratic drop. Notice right after the recession what happens. In every case there is a huge snapback in employment, but you do not see that in this recession. I wonder why that is. Could it perhaps be all this additional regulation placed on these employers by the federal government? Could it perhaps be the Dodd-Frank law which limits access to capital and is stifling small business across our country? Could it perhaps be the Affordable Care Act which raises the cost per employee? And I think that this law is going to be one more nail in the coffin.

Could you back up another slide for me, please? Keep going. That slide right there.

I think that is the most telling slide, and the most scary thing, most scary fact that is occurring in this United States economy, and that is that more businesses are dissolving in our American economy than are being formed. Over five years in a row. And I do not think it has happened for one year since the Great Depression. This is a horrifying statistic, and it bodes very poorly for our children and our grandchildren. And if we do not get the federal government off the backs of small businesses, expect this not to turn around but to accelerate.

My time has expired.

Chairman HARDY. The gentleman's time has expired.

I would like to thank all the witnesses, especially those small businesses that have traveled so far, again, for being here today. This "one-size-fits-all" regulation that will hurt small businesses and their workers, particularly those in the rural areas, I will be sending a letter to the Department of Labor about the concerns we have heard here today and urge them to reconsider moving forward on this rule as drafted.

I am asking the members for unanimous consent; that I have five legislative days to submit the statements and supporting materials for the record.

Without objection, so ordered.

This hearing is now over. Thank you.

[Whereupon, at 11:28 a.m., the Subcommittee was adjourned.]

APPENDIX

Statement
On behalf of the
National Restaurant Association
&
Bardenay Restaurants & Distilleries

ON: THE CONSEQUENCES OF DOL'S ONE-SIZE-FITS-ALL OVERTIME RULE FOR SMALL BUSINESSES AND THEIR EMPLOYEES

TO: U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON SMALL BUSINESS, SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT, AND REGULATIONS

BY: KEVIN SETTLES, PRESIDENT/CEO, BARDENAY RESTAURANTS & DISTILLERIES; BOARD MEMBER, NATIONAL RESTAURANT ASSOCIATION

DATE: OCTOBER 8, 2015

Statement on: "The Consequences of DOL's One-Size-Fits-All Overtime Rule for Small Businesses and their Employees"

By: Kevin Settles

On Behalf of the National Restaurant Association & Bardenay Restaurants & Distilleries

House Committee on Small Business, Subcommittee on Investigations, Oversight, and Regulations
2360 Rayburn House Office Building
October 8, 2015 at 10:00am

Good Morning Chairman Hardy, Ranking Member Adams, and distinguished members of the Subcommittee. Thank you for the opportunity to testify today on the impact that the proposed overtime regulations would have on small businesses like mine and the concerns small businesses have with some of the ideas being considered by the Department of Labor ("Department") for the final regulation.

My name is Kevin Settles and I own and operate Bardenay Restaurants & Distilleries with three locations: Boise, Eagle and Coeur d'Alene, Idaho. I'm honored to share the perspective of my company and the National Restaurant Association, where I serve on the organization's Board of Directors and its Jobs & Careers Committee.

Today, my testimony will focus on some of the issues that my company, and the restaurant industry, have been struggling with while trying to provide feedback to the Department on its proposed changes to the current overtime regulations. I will also touch on some of the potential changes we are considering if the rules are adopted as presented. These are changes that need to be considered if Bardenay is to be fully compliant with the law while remaining economically healthy and vibrant.

Some of the issues I will address today include:

1. The time period allowed to evaluate and comment on the Department's proposed overtime rule and its Regulatory Flexibility Act analysis.
2. The proposed salary level.
3. The proposed automatic increases to salary levels.
4. The adjustments to the duties test being considered.

I must point out that the these overtime regulatory proposals add to the tremendous amount of uncertainty created by new and expanding federal regulations over the last five years. This uncertainty has been a key factor in extending the longest time period without expansion in my years as an independent businessman.

Bardenay Restaurants & Distilleries

Bardenay Restaurants and Distilleries are a cornerstone of Idaho's restaurant and bar industry; our three locations capture the spirit of Idaho and the Northwest. Employing about 200 people, Bardenay is a small business with a goal of being the employer of choice in our industry.

As the nation's first restaurant distillery, Bardenay has set an industry precedent as a full service restaurant and bar with the ability to create handcrafted liquor on-site. We made history on April 25, 2000, when we served the first cocktail to include spirits distilled in a restaurant in the United States.

The Restaurant and Foodservice Industry

The National Restaurant Association is the leading trade association for the restaurant and foodservice industry. Its mission is to help members like me establish customer loyalty, build rewarding careers and achieve financial success. The industry is comprised of one million restaurant and foodservice outlets and employs 14 million people. The majority of restaurants in America qualify as small businesses yet our industry is the nation's second-largest private sector employer. Restaurants are job-creators and we currently employ approximately ten percent of the U.S. workforce.

Restaurants can provide great careers but we are also the employers of choice for people looking for flexible work schedules. We employ a high proportion of the population looking for part- time and/or seasonal work. As an industry of small businesses, more than seven out of ten eating and drinking establishments are single-unit operators. As popular as the restaurant business is to be in, the industry averages relatively low profit margins; only four to six percent before taxes, with labor costs being one of the most significant line items for a restaurant.

The time period allowed for comments was inadequate for a proper economic analysis of the proposed regulations.

It would have been helpful to the regulated community to have had more time to review and comment on the proposed rules. In denying requests from the U.S. Small Business Administration Office of Advocacy as well as thousands of employers for an extension, the Department referred to the "listening sessions" it held. The proposed changes are lengthy and complicated and an insufficient time was allowed for the data to be gathered and analyzed plus the listening sessions were held prior to the proposed regulations publication. In addition, more time would have enabled our industry to better assist the Department in gathering substantive and more accurate information on the impact the proposed revisions would have on the nation's employers.

I personally participated in one of the early listening sessions, along with other leaders from our industry. While we appreciated the listening sessions, they were focused on general ideas and were no substitute for the robust notice and comment requirements mandated by law. While I can see from the Department's Proposed Rules documentation that they at least took notes on our comments, I see very little indication that the Department actually listened to our main concerns.

The Department's proposed minimum salary level is inappropriate for our industry and makes the exemption inoperative in my part of the country.

The Department's proposal to tie the indexing of the salary level to the 40th of non-hourly employees is a huge overreach with very negative consequences. Preliminary research points to it resulting in a death spiral that would render the exemption obsolete in just a few years. The relevant data used to determine the 40th percentile of full-time salaried workers is found in the Current Population Survey from the Bureau of Labor Statistics (BLS). The data consists of the total weekly earnings for all full-time, non-hourly paid employees and represents a major shift from previous methods.

The Department believes that its proposed salary level will not exclude from exemption a high number of employees which meet the duties test. When applied to my industry, the contrary is true. The proposed rules are a radical departure from the traditional formula used to set the minimum salary. They not only double the current salary target but also serves to eliminate the consideration of regional economies.

Most managers and crew supervisors in our industry would not meet the proposed salary level of $970 per week. However, more would qualify as exempt under the new proposed salary level if the Department allows bonuses to be used to calculate the employee's salary level. Nondiscretionary bonuses based on restaurant performance are common in our industry and can make up a significant portion of a Manager's pay.

Historically, a key purpose of a set salary level has been to provide a method for screening out obviously nonexempt employees. In other words, the salary level should be set at a level at which the employees below it would clearly not meet a duties test. With the proposed changes, the Department is upending this historic rationale and setting the salary level at a point at which all employees above the line would be exempt. This would greatly limit the number of employers in the restaurant industry able to use the exemption.

For example; the median annual base salary paid to crew and shift supervisors in our industry is $38,000. Even those in the upper quartile at $47,000 would not qualify as exempt under the Department's proposed $50,440 salary level for 2016. Likewise, the median base salary for restaurant managers is $47,000, while the lower quartile stands at $39,000.

These are employees who would meet the duties test but who would become non-exempt under the proposed salary level. It is clear that, at least in reference to the restaurant industry (the nation's second-largest private-sector employer), the proposed salary level does exclude from exemption an unacceptably high number of employees who meet the duties test. The impact would be magnified in many regions of the country.

In my company, the proposed minimum salary level of $50,440 per year would represent an outsized income for mid-level managers. These would be the Assistant Managers and Sous

Chefs; generally, people that are learning the position and moving up. The increase would be too large for us to absorb, so those positions would end up being moved back to an hourly rate—a rate that would net them the equivalent of what they earn today during the 45 hour work week we currently request that they schedule for.

While this would be an easy transition to make from a management and bookkeeping standpoint, it removes a key part of the reason that exempt status was originally created; above average fringe benefits, greater job security and better opportunities for advancement. Not only does it remove the certainty of a fixed paycheck that they currently have, it would have numerous other impacts. We currently use salaried versus non-salaried to set eligibility for extra paid vacation (currently two to three weeks annually) as well as management investment/ownership pool and annual holiday bonuses. Probably the biggest benefit is that we have been able to extend sick leave for a few salaried employees; paying full wages while they have battled life threatening issues such as cancer, kidney failure and septicemia.

The ability to delineate programs and perks by salaried versus non-salaried has been a great tool for upper management as well as a great benefit for our employees. Setting a minimum rate that is inappropriate for entry-level managers in rural areas in our country will end up reducing the benefits of our mid-level managers, not because we want to, but because of secondary consequences of the proposed changes.

The National Restaurant Association has suggested, as better options, three alternatives considered by the Department. They are outlined in the proposed regulations as:

1) "Alternative 1" calculate a new salary level by adjusting the 2004 salary level of $455 for inflation from 2004 to 2013, as measured by the CPI–U. This would result in a salary level of $561 per week ($29,250 per year).
2) "Alternative 2," use the 2004 method to set the salary level at $577 per week ($30,085 per year).
3) Acknowledging that the Department now finds the salary level it set in 2004 as too low, the industry is also willing to support "Alternative 3," set the salary level at $657 per week ($34,255 per year).

I would like to point out that the Department estimated that 75 percent of newly overtime-protected employees would see no change in compensation and no change in hours worked based on the proposed regulations. However, in the restaurant industry salaried employees enjoy a number of benefits not available to hourly employees, as shown by my own example. Thus, in addition to getting paid a salary regardless of the fact that they may not be working over 40 hours a week, these newly overtime-protected employees could lose flexibility as well as benefits, including substantive bonuses, paid vacation, flex time, paid holidays, and health insurance.

Finally, throughout the proposed regulation, the Department created the impression that salaried employees feel they are being taken advantage of by virtue of their exempt status. In reality, employees often view reclassifications to non-exempt status as demotions, particularly where other employees within the same restaurant continue to be exempt. Most employees view their exempt status as a symbol of their success within my company.

Automatic salary level increases will only perpetuate bad policy.

In the current proposed rulemaking, the Department wants to announce a new salary level each year in the Federal Register without notice-and-comment, without a Regulatory Flexibility Act analysis, and without any of the other regulatory requirements established by various Executive Orders.

The Department is charged with regular review and update of the minimum salary level and they acknowledge that they have not done this. The reason they give is the "overall agency workload and the time-intensive nature of the notice and comment process have hindered the Department's ability to achieve this goal." I take this to mean that they are willing to put a key task for the Department on auto-pilot at the expense of employers and employees.

Putting aside legal objections to the Department's attempt to permanently index the salary level at $50,440, an automatic yearly increase at this level tied to CPI-U would make the exemption perpetually unusable for large portions of our industry.

As the new salary level becomes effective, the number of workers who will report to the BLS that they are paid on a non-hourly basis will decrease. As workers fail the salary test and are moved to hourly due to the loss of exemption there will be a dramatic upward swing of compensation levels for non-hourly employees. If the 40th percentile test is adopted and then updated annually without review, in the years following the proposal, the salary level required for exempt status would be so high as to effectively eradicate the availability of the exemptions in our industry.

For example, the Department predicts that the initial salary level increase will impact 4.6 million currently exempt workers. Employers must then choose to:

1) Reclassify such workers as nonexempt and convert them to an hourly rate of pay;
2) Reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked; or,
3) Increase the salaries of such workers to the new salary threshold to maintain their exempt status.

The Department estimates that only 67,000 currently exempt workers will see an increase in their salaries, bringing them up to the new salary threshold and maintaining their exempt status. We believe the majority of affected employees would be reclassified as non-exempt. In our industry, particularly under the proposed $970 per week salary level, most of these employees will be converted to an hourly method of payment.

One economic analysis that we were able to review states that if just one quarter of the full-time, non-hourly workers earning less than the proposed 40th percentile were reclassified as hourly workers each year, in five years the new 40th percentile salary level would be $1,393 per week ($72,436 per year). The more likely scenario is that an even greater percentage of employees would be reclassified from salaried to hourly. If just half of full-time, non-hourly employees are converted to hourly positions, the 40th percentile salary level would increase to $1,843 per week ($95,836 per year) by 2020; a 47% increase!

Adjustments to the duties test are not necessary and should be avoided.

While the proposed rules indicate a desire to reduce litigation, it is clear to us in the industry that any reduction would be lost if there are changes to the duties test. The industry is extremely troubled by the notion that the Department is looking at California's over-50% quantitative requirement for an exempt employee's primary duty. In meetings with the Secretary of Labor and others, my colleagues with businesses in California emphasized that the state's labor law changes have resulted in considerably higher levels of litigation, as plaintiff's lawyers and employers fight over the percentage of time spent on various tasks and whether those tasks are appropriately classified as exempt or nonexempt.

I am currently looking to open my first location outside of the state of Idaho and am focusing on states nearby. While California meets my travel and population parameters, it does not meet my regulatory parameters. In addition to its over regulation, making it a very difficult state to do business in, it is certainly not a low-litigation state.

It appears that the Department may decide to enact changes to the duties test based only on answers to the general questions asked in the proposed regulations. Changes should be based upon comments made on specific proposals. If they are not, the requirements of the Administrative Procedure Act ("APA"), the Regulatory Flexibility Act, and the various Executive Orders related to regulatory activity will not have been followed. The Department needs to seek input based on actual proposals, not hypotheticals. It should provide actual regulatory proposals that the regulated community can consider, evaluate, and comment upon. Adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA.

The Department optimized the duties test in 2004 to reflect the realities of the modern economy, a move that recognized the unique roles and responsibilities restaurant managers have. The Department now says that this was a mistake; our industry disagrees. Our managers need to have a "hands-on" approach to ensure that operations run smoothly. Any attempt to artificially cap the amount of time exempt employees can spend on nonexempt work would place significant administrative burdens on restaurant owners, increase labor costs, cause customer service to suffer and result in an increase in wage-and-hour litigation.

I am also extremely concerned that the Department expresses throughout the proposed regulations its belief that any amount below its proposed salary level would necessitate a more rigorous and restrictive long duties test. We strongly disagree. The current test works regardless of the salary level chosen by the Department. A more rigorous and restrictive long duties test would place significant administrative burdens on restaurant owners.

The Department should leave the concurrent duties rule in place and untouched. The concurrent duties test rule recognizes that front-line managers in restaurants play a multi-faceted role in which they often perform nonexempt tasks at the same time as they carry out their exempt, managerial function. It recognizes that exempt and nonexempt work are not mutually exclusive.

The Department's own Field Operations Handbook highlights that "performing work such as serving customers or cooking food during peak customer periods" does not preclude exempt status. Exempt supervisors make these decisions while remaining responsible for the success or failure of business operations under their management and can both supervise subordinate employees and serve customers at the same time.

Conclusion

The Department should have granted at least as much time for review and comment as it did in 2004. The proposal's complexity and unusual new theories and mandates make this even more important. I cannot emphasize enough that the restaurant industry would find the use of a long duties test to be the wrong approach. The Department claims it is attempting to "modernize" and "simplify" the applicability of the exemption, but a return to a long duties test would certainly achieve the opposite. If the Department is determined to mandate a new duties test, it should comply with all regulatory requirements and allow for notice and comment on any specific new duties test proposal.

In closing, I would like to state that I am not against increasing the salary threshold for exempt status but it has to be a reasonable level so small employers like me, and those in rural areas, can also benefit. I am both proud and grateful for the responsibility of serving America's communities—creating jobs, boosting the economy, and serving our customers. My industry is committed to working with Congress to find solutions that foster job growth and truly benefit our communities.

Thank you again for the opportunity to testify before you today regarding small business concerns with the proposed overtime regulations. I look forward to your questions.

Testimony of Ed Brady

President, Brady Homes Illinois

2015 First Vice Chairman, National Association of Home Builders

Hearing on

"The Consequences of DOL's One-Size-Fits-All Overtime Rule for Small Businesses and their Employees."

Before the

Subcommittee on Investigations, Oversight, and Regulations of the

House Committee on Small Business

October 8, 2015

Introduction

I appreciate the opportunity to participate in today's hearing on the U.S. Department of Labor's (DOL) overtime proposal. My name is Ed Brady. I am a home builder and developer from Bloomington, Illinois, and currently serve as the National Association of Home Builders' (NAHB) 2015 First Vice Chairman of the Board.

I have nearly 30 years of experience in the housing industry. Like many in this industry, mine is a family business. My father, William Brady Sr., founded the company in 1962. I have served as the President of Brady Homes for the past 15 years. We primarily build single-family homes, but we have also constructed several light commercial projects. In addition to the home building company, I own two Re/Max franchises and a property management company.

I also serve on the board of directors of the Federal Home Loan Bank of Chicago and am a member of the Bipartisan Policy Center Housing Commission, which was formed in the wake of the housing crisis to examine the nation's housing policies and help further the reform debate. In 2016, I will become chairman of NAHB's Board of Directors.

I am greatly concerned that DOL's proposed overtime regulation could have negative repercussions for my own business and the industry at large. DOL's "one-size-fits-all" approach to the overtime rules will result in a substantial financial impact on the home building industry. I appreciate the committee's consideration of how the rule will affect small businesses.

The Proposed Salary Level Is Unprecedented

The Fair Labor Standards Act (FLSA) requires covered employers to pay non-exempt employees overtime pay at time and one-half the regular rate of pay for all hours over 40 hours in a workweek. However, the FLSA does provide a number of exemptions. Section 13(a)(1) of the FLSA provides an exemption from overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees (i.e., white collar employees). To qualify for the exemption, employees generally must:

1. Be salaried, meaning that employees are paid a predetermined fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (i.e., the "salary basis test");
2. Be paid more than the specified threshold, which currently requires employees be paid on a salary basis at not less than \$455 per week or the equivalent of \$23,660 annually for full-time employees. (i.e., the "salary level test"); and
3. Primarily perform executive, administrative, or professional duties, as defined by the DOL's implementing regulations at 29 CFR Part 541 (i.e., the "duties test").

The salary level requirements have been updated seven times since 1938. DOL's most recent overtime proposal updates the salary and compensation levels to the salary threshold of \$970 per week (\$50,440 per year for a full-year worker as of 2016), which will cover the 40th percentile of earnings for all full-time salaried workers.

DOL's proposal to raise the standard salary level from $455 per week to $970 per week, an increase of $515 per week over the current level, represents an unprecedented jump of over 102%. This massive increase will not only negatively impact home builders and their employees and operations, but such a significant change is unprecedented in the 77-year history of FLSA. In 1958, for example, DOL set the threshold at a level that included the lowest 10th percentile of employees. If this method was applied today, the resulting minimum salary would be $657 per week or $34,167 annually. Further, DOL provides no rationale for selecting the 40th percentile. There is insufficient support in the overtime proposal to economically justify the proposed salary level increase.

The Proposal Does Not Take Into Account Regional Wage Differences

By setting a high universal standard pay threshold, the DOL proposal will inappropriately result in a larger impact in areas with lower wages and cost of living. NAHB conducted an analysis that shows, in total, approximately 116,000 construction supervisors would be affected in some way by the proposal.[1] More than 31% of total employment for this occupation class sector would no longer be eligible for the exemption.

The total count of construction supervisors affected varies with state size. However, as a percent of workers in that state, it is clear that lower cost-of-living states, namely in the South, are particularly affected. The state with the largest number of supervisors affected is Texas, followed by Florida, North Carolina and California. However, on a percentage of employment basis, the states with the largest scope of impacts are Arkansas, Mississippi, New Mexico and Tennessee. In each of these four states, the DOL proposal will affect approximately 50% or more of supervisors who are currently employed. This geographic distribution is due to the fact that the DOL overtime proposal uses a nationwide 40th percentile threshold, but wage amounts vary state to state.

The DOL overtime proposal is a "one-size-fits-all" standard. Given the potential broad impact of the proposed rule, an obvious issue is that wage amounts vary greatly from location to location, as well as among business sectors. As the analysis above shows, construction wages are very regional. What one construction supervisor makes in Tennessee is different than what one earns in California—sometimes significantly.

The Proposal Will Harm Employees and Housing Affordability

In an effort to better identify and quantify the challenges the proposal creates, NAHB recently included in its monthly industry Housing Market Index (HMI) survey a set of questions that focused on overtime issues with regard to construction supervisors.[2] According to the data, 64% of the respondents reported having a construction supervisor on payroll. The respondents also

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[1] *See* attachment, "Occupation of First-Line Supervisors of Construction Trades and Extraction Workers," National Association of Home Builders, Housing Economics and Policy Group (July 2015).

[2] Responses were collected from 373 builder-members in August 2015. *See* Housing Market Index: Special questions on DOL's Proposed Overtime Rule, National Association of Home Builders, Economics and Housing Policy Group (August 2015).

reported that 86% of construction supervisors were paid with a salary, in contrast to an hourly wage.

For those firms reporting a change in policy would occur should the proposal as currently written become law, 56% of respondents indicated that they would take steps to minimize overtime, such as cut workers' hours. Additionally, 55% reported they would reduce or eliminate bonuses. Thirty-three percent indicated they would reduce or eliminate other benefits; 27% indicated they would raise the salary above the $50,440 threshold; 19% stated they would reduce or eliminate health insurance; 13% said they would reduce salary to compensate; and 13% said they would switch from a salary to an hourly wage.

Broadening the examination of impacts, 44% of builders noted that the change in the proposed overtime rules would result in higher home prices. A further 25% indicated that the proposed DOL change would make some projects unprofitable, and 19% reported that the change would cause their business to turn down some projects.

None of these are acceptable outcomes. Currently salaried employees converted to hourly workers will view their new "non-exempt" status as a demotion, and perhaps even make less money than previously. These employees will lose the workplace flexibility that comes with being a salaried employee. It is also of the utmost importance that the federal government refrain from implementing policies that will be damaging to the marketplace and housing affordability.

I am also concerned about what the DOL proposal means to my own business. I currently employ one construction supervisor who would become non-exempt under the new salary threshold. My supervisor currently receives a competitive salary and benefits, including a car allowance. However, I am already considering whether the company will need to take steps to minimize paying overtime to the supervisor should the DOL proposal become law. Another issue with the rule is that it doesn't consider the total compensation package a worker receives. Even if the worker's salary is increased, his or her benefits could go away.

Construction supervisors are, by their very nature, schedulers. An average of 22 specialty trades are needed to build a home, and it is the supervisor's main responsibility to ensure the trades complete their work efficiently and to the customer's specifications.

My own supervisor generally arrives directly to the jobsite from his home in the morning. Because homes are constructed outside, flexibility is needed to account for inclement weather, especially during the winter. The supervisor frequently works non-traditional hours and whenever the weather is favorable. Sometimes he is needed on the weekends if it has rained and a project's deadline is impending. It is also common for him to respond to phone calls or e-mails from myself or the trades on evenings or weekends. Because scheduling changes frequently occur, it is of the utmost importance he has the flexibility necessary to ensure projects stay on track.

Under the DOL proposal, I would find it very challenging to track my supervisor's hours if I wanted to minimize his overtime eligibility. It is especially important for my business to accurately predict costs so I know how to price our homes and limit unforeseen costs. To me, it seems DOL's intent is to turn back the clock and bring back the manufacturing economy of the past, where workers use punch cards to track their hours on one specific jobsite. This type of business model no longer takes into account the reality of the economy today and certainly not the needs of the housing industry. If DOL's proposal is written into law, I would genuinely explore whether the role of our construction supervisor would need to be performed by a contracting company in order to accurately predict our costs.

Conclusion

The dramatic surge in the salary threshold that has been proposed by DOL is unlikely to result in an increase in workers' take home pay. Rather, it would force business owners to restructure their workforce to compensate by scaling back on pay and benefits, as well as taking other steps such as cutting workers hours to avoid the overtime requirements. The impacts are not confined to just construction supervisors; other residential construction occupations in executive, administrative, and professional positions will be affected as well.

Although DOL contends that this rule will ensure that the FLSA's overtime protections are appropriately applied, the agency has taken an overly broad approach that will result in problems and unintended consequences that have not even been explored. NAHB strongly opposes the overtime proposal in its current form. DOL must closely examine the financial impact of this rule on home builders and other small businesses and revise this proposal accordingly. Thank you again for the opportunity to testify today.

NAHB

First-Line Supervisors of Construction Trades Workers Impacted by Changing Overtime Threshhold From $23,660 to $50,440

State	Industry / Sub-industry	Total Employed	Share Under $23,660	Share Under $50,440	#Workers Under $23,660	#Workers Under $50,440	# Impacted by the Change
Alabama	Sector 23 - Construction	7,230	0.0%	42.8%	0	3,092	3,092
Alabama	Residential Building Construction	850	0.0%	53.6%	0	455	455
Alabama	Land Subdivision	30	0.0%	63.9%	0	19	19
Alabama	Specialty Trade Contractors	3,050	0.0%	43.4%	0	1,324	1,324
Alabama	Residential Trade Contractors	902	0.0%	43.4%	0	391	391
Alabama	All Residential Categories	1,782	0.0%	48.5%	0	865	865
Alaska	Sector 23 - Construction	630	0.0%	2.4%	0	15	15
Alaska	Residential Building Construction	60	0.0%	7.8%	0	5	5
Alaska	Specialty Trade Contractors	190	0.0%	0.9%	0	2	2
Alaska	Residential Trade Contractors	69	0.0%	0.9%	0	1	1
Alaska	All Residential Categories	129	0.0%	4.7%	0	6	6
Arizona	Sector 23 - Construction	11,890	0.0%	35.6%	0	4,232	4,232
Arizona	Residential Building Construction	1,970	0.0%	37.5%	0	739	739
Arizona	Land Subdivision	80	1.4%	7.5%	1	6	5
Arizona	Specialty Trade Contractors	6,080	0.0%	36.9%	0	2,246	2,246
Arizona	Residential Trade Contractors	3,033	0.0%	36.9%	0	1,120	1,120
Arizona	All Residential Categories	5,083	0.0%	36.7%	1	1,865	1,864
Arkansas	Sector 23 - Construction	3,470	0.0%	59.8%	0	2,075	2,075
Arkansas	Residential Building Construction	400	7.5%	63.6%	30	255	225
Arkansas	Specialty Trade Contractors	1,390	0.0%	65.5%	0	910	910
Arkansas	Residential Trade Contractors	533	0.0%	65.5%	0	349	349
Arkansas	All Residential Categories	933	3.2%	64.7%	30	604	574
California	Sector 23 - Construction	34,810	0.0%	15.1%	0	5,273	5,273
California	Residential Building Construction	7,130	0.0%	16.9%	0	1,208	1,208
California	Land Subdivision	200	0.0%	16.7%	0	33	33
California	Specialty Trade Contractors	15,210	0.0%	17.0%	0	2,587	2,587
California	Residential Trade Contractors	7,868	0.0%	17.0%	0	1,338	1,338
California	All Residential Categories	15,198	0.0%	17.0%	0	2,579	2,579
Colorado	Sector 23 - Construction	8,950	0.0%	27.3%	0	2,442	2,442
Colorado	Residential Building Construction	1,430	5.1%	32.9%	73	470	397
Colorado	Specialty Trade Contractors	3,770	0.0%	33.0%	0	1,244	1,244
Colorado	Residential Trade Contractors	1,812	0.0%	33.0%	0	598	598
Colorado	All Residential Categories	3,242	2.3%	32.9%	73	1,068	995
Connecticut	Sector 23 - Construction	3,280	0.0%	14.0%	0	458	458
Connecticut	Residential Building Construction	280	0.0%	10.7%	0	30	30
Connecticut	Specialty Trade Contractors	1,900	0.0%	18.8%	0	358	358
Connecticut	Residential Trade Contractors	829	0.0%	18.8%	0	156	156
Connecticut	All Residential Categories	1,109	0.0%	16.8%	0	186	186
Delaware	Sector 23 - Construction	1,270	0.0%	19.4%	0	246	246
Delaware	Residential Building Construction	320	0.0%	33.0%	0	106	106
Delaware	Specialty Trade Contractors	390	0.0%	14.1%	0	55	55
Delaware	Residential Trade Contractors	164	0.0%	14.1%	0	23	23
Delaware	All Residential Categories	484	0.0%	26.7%	0	129	129
District of Columbia	Sector 23 - Construction	960	0.0%	18.9%	0	182	182
District of Columbia	Residential Building Construction	220	6.6%	22.7%	15	50	35
District of Columbia	Specialty Trade Contractors	200	0.0%	9.2%	0	18	18
District of Columbia	Residential Trade Contractors	25	0.0%	9.2%	0	2	2
District of Columbia	All Residential Categories	245	6.1%	21.2%	15	52	37
Florida	Sector 23 - Construction	28,020	0.0%	44.0%	0	12,318	12,318
Florida	Residential Building Construction	5,560	0.0%	42.9%	0	2,383	2,383
Florida	Land Subdivision	160	0.0%	67.7%	0	108	108
Florida	Specialty Trade Contractors	13,390	0.0%	48.6%	0	6,502	6,502
Florida	Residential Trade Contractors	7,806	0.0%	48.6%	0	3,791	3,791
Florida	All Residential Categories	13,526	0.0%	46.4%	0	6,282	6,282

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State	Industry / Sub-industry	Total Employed	Share Under $23,660	Share Under $50,440	#Workers Under $23,660	#Workers Under $50,440	# Impacted by the Change
Georgia	Sector 23 - Construction	10,990	0.0%	37.5%	0	4,116	4,116
Georgia	Residential Building Construction	1,010	0.0%	43.1%	0	435	435
Georgia	Specialty Trade Contractors	5,530	0.0%	43.8%	0	2,425	2,425
Georgia	Residential Trade Contractors	1,804	0.0%	43.8%	0	791	791
Georgia	All Residential Categories	2,814	0.0%	43.6%	0	1,226	1,226
Hawaii	Sector 23 - Construction	1,640	0.0%	7.3%	0	120	120
Hawaii	Residential Building Construction	280	0.0%	1.0%	0	3	3
Hawaii	Land Subdivision	40	0.0%	0.0%	0	0	0
Hawaii	Specialty Trade Contractors	770	0.0%	10.5%	0	81	81
Hawaii	Residential Trade Contractors	285	0.0%	10.5%	0	30	30
Hawaii	All Residential Categories	605	0.0%	5.5%	0	33	33
Idaho	Sector 23 - Construction	1,870	0.0%	44.3%	0	828	828
Idaho	Residential Building Construction	330	0.0%	48.9%	0	161	161
Idaho	Specialty Trade Contractors	860	0.0%	46.0%	0	395	395
Idaho	Residential Trade Contractors	575	0.0%	46.0%	0	264	264
Idaho	All Residential Categories	905	0.0%	47.0%	0	425	425
Illinois	Sector 23 - Construction	8,690	0.0%	20.1%	0	1,745	1,745
Illinois	Residential Building Construction	1,160	0.0%	40.1%	0	465	465
Illinois	Specialty Trade Contractors	4,520	0.0%	16.4%	0	740	740
Illinois	Residential Trade Contractors	1,871	0.0%	16.4%	0	306	306
Illinois	All Residential Categories	3,031	0.0%	25.4%	0	771	771
Indiana	Sector 23 - Construction	6,920	0.0%	26.7%	0	1,845	1,845
Indiana	Residential Building Construction	880	0.0%	42.4%	0	373	373
Indiana	Specialty Trade Contractors	3,070	0.0%	34.1%	0	1,048	1,048
Indiana	Residential Trade Contractors	1,187	0.0%	34.1%	0	405	405
Indiana	All Residential Categories	2,067	0.0%	37.6%	0	778	778
Iowa	Sector 23 - Construction	4,230	0.0%	41.3%	0	1,746	1,746
Iowa	Residential Building Construction	280	0.0%	65.3%	0	183	183
Iowa	Specialty Trade Contractors	2,070	0.0%	39.9%	0	826	826
Iowa	Residential Trade Contractors	834	0.0%	39.9%	0	333	333
Iowa	All Residential Categories	1,114	0.0%	46.3%	0	516	516
Kansas	Sector 23 - Construction	3,940	0.0%	39.2%	0	1,543	1,543
Kansas	Residential Building Construction	440	0.0%	60.8%	0	267	267
Kansas	Specialty Trade Contractors	1,590	0.0%	40.8%	0	649	649
Kansas	Residential Trade Contractors	747	0.0%	40.8%	0	305	305
Kansas	All Residential Categories	1,187	0.0%	48.2%	0	572	572
Kentucky	Sector 23 - Construction	4,490	0.0%	33.0%	0	1,484	1,484
Kentucky	Residential Building Construction	330	3.7%	52.2%	12	172	160
Kentucky	Specialty Trade Contractors	1,850	0.0%	38.1%	0	704	704
Kentucky	Residential Trade Contractors	713	0.0%	38.1%	0	271	271
Kentucky	All Residential Categories	1,043	1.2%	42.5%	12	443	431
Louisiana	Sector 23 - Construction	6,780	0.0%	30.3%	0	2,052	2,052
Louisiana	Residential Building Construction	270	0.0%	34.1%	0	92	92
Louisiana	Specialty Trade Contractors	2,850	0.0%	33.9%	0	966	966
Louisiana	Residential Trade Contractors	668	0.0%	33.9%	0	227	227
Louisiana	All Residential Categories	938	0.0%	34.0%	0	319	319
Maine	Sector 23 - Construction	1,650	0.0%	40.2%	0	663	663
Maine	Residential Building Construction	250	0.0%	52.6%	0	131	131
Maine	Specialty Trade Contractors	850	1.9%	41.5%	16	352	336
Maine	Residential Trade Contractors	396	1.9%	41.5%	7	164	157
Maine	All Residential Categories	646	1.1%	45.7%	7	295	288

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State	Industry / Sub-industry	Total Employed	Share Under $23,660	Share Under $50,440	#Workers Under $23,660	#Workers Under $50,440	# Impacted by the Change
Maryland	Sector 23 - Construction	10,440	0.0%	21.0%	0	2,190	2,190
Maryland	Residential Building Construction	1,160	0.0%	20.6%	0	239	239
Maryland	Land Subdivision	50	0.0%	30.6%	0	15	15
Maryland	Specialty Trade Contractors	6,140	0.0%	22.9%	0	1,405	1,405
Maryland	Residential Trade Contractors	2,209	0.0%	22.9%	0	505	505
Maryland	All Residential Categories	3,419	0.0%	22.2%	0	759	759
Massachusetts	Sector 23 - Construction	6,680	0.0%	14.7%	0	981	981
Massachusetts	Residential Building Construction	880	0.0%	15.8%	0	139	139
Massachusetts	Specialty Trade Contractors	3,760	0.0%	16.9%	0	635	635
Massachusetts	Residential Trade Contractors	1,519	0.0%	16.9%	0	257	257
Massachusetts	All Residential Categories	2,399	0.0%	16.5%	0	396	396
Michigan	Sector 23 - Construction	7,930	0.0%	34.2%	0	2,713	2,713
Michigan	Residential Building Construction	1,270	0.0%	45.0%	0	572	572
Michigan	Specialty Trade Contractors	4,110	0.0%	36.4%	0	1,497	1,497
Michigan	Residential Trade Contractors	1,683	0.0%	36.4%	0	613	613
Michigan	All Residential Categories	2,953	0.0%	40.1%	0	1,185	1,185
Minnesota	Sector 23 - Construction	3,700	0.0%	17.8%	0	657	657
Minnesota	Residential Building Construction	420	0.0%	45.6%	0	192	192
Minnesota	Specialty Trade Contractors	1,300	0.0%	16.2%	0	211	211
Minnesota	Residential Trade Contractors	550	0.0%	16.2%	0	89	89
Minnesota	All Residential Categories	970	0.0%	29.0%	0	281	281
Mississippi	Sector 23 - Construction	3,450	0.0%	51.0%	0	1,758	1,758
Mississippi	Residential Building Construction	240	12.8%	85.8%	31	206	175
Mississippi	Specialty Trade Contractors	1,520	0.0%	57.0%	0	866	866
Mississippi	Residential Trade Contractors	369	0.0%	57.0%	0	210	210
Mississippi	All Residential Categories	609	5.1%	68.3%	31	416	385
Missouri	Sector 23 - Construction	4,370	0.0%	32.8%	0	1,434	1,434
Missouri	Residential Building Construction	530	0.0%	42.3%	0	224	224
Missouri	Specialty Trade Contractors	2,050	0.0%	33.7%	0	691	691
Missouri	Residential Trade Contractors	835	0.0%	33.7%	0	281	281
Missouri	All Residential Categories	1,365	0.0%	37.0%	0	505	505
Montana	Sector 23 - Construction	1,970	0.0%	33.8%	0	665	665
Montana	Residential Building Construction	340	6.8%	33.7%	23	114	91
Montana	Specialty Trade Contractors	820	1.1%	42.3%	9	347	338
Montana	Residential Trade Contractors	469	1.1%	42.3%	5	198	193
Montana	All Residential Categories	809	3.5%	38.6%	28	312	284
Nebraska	Sector 23 - Construction	3,190	0.0%	40.7%	0	1,298	1,298
Nebraska	Residential Building Construction	130	0.0%	45.7%	0	59	59
Nebraska	Specialty Trade Contractors	1,790	0.0%	42.0%	0	752	752
Nebraska	Residential Trade Contractors	775	0.0%	42.0%	0	326	326
Nebraska	All Residential Categories	905	0.0%	42.5%	0	385	385
Nevada	Sector 23 - Construction	3,060	0.0%	25.4%	0	779	779
Nevada	Residential Building Construction	330	0.0%	25.8%	0	85	85
Nevada	Specialty Trade Contractors	1,640	0.0%	31.5%	0	516	516
Nevada	Residential Trade Contractors	805	0.0%	31.5%	0	253	253
Nevada	All Residential Categories	1,135	0.0%	29.8%	0	338	338
New Hampshire	Sector 23 - Construction	1,450	0.0%	29.4%	0	427	427
New Hampshire	Residential Building Construction	240	0.0%	46.0%	0	110	110
New Hampshire	Specialty Trade Contractors	600	0.0%	27.9%	0	168	168
New Hampshire	Residential Trade Contractors	301	0.0%	27.9%	0	84	84
New Hampshire	All Residential Categories	541	0.0%	35.9%	0	194	194

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State	Industry / Sub-industry	Total Employed	Share Under $23,660	Share Under $50,440	#Workers Under $23,660	#Workers Under $50,440	# Impacted by the Change
New Jersey	Sector 23 - Construction	6,660	0.0%	11.2%	0	749	749
New Jersey	Residential Building Construction	1,980	0.0%	18.2%	0	361	361
New Jersey	Land Subdivision	30	7.4%	23.5%	2	7	5
New Jersey	Specialty Trade Contractors	2,850	0.0%	7.5%	0	214	214
New Jersey	Residential Trade Contractors	1,400	0.0%	7.5%	0	105	105
New Jersey	All Residential Categories	3,410	0.1%	13.9%	2	473	471
New Mexico	Sector 23 - Construction	3,340	0.0%	50.3%	0	1,679	1,679
New Mexico	Residential Building Construction	330	0.0%	64.9%	0	214	214
New Mexico	Specialty Trade Contractors	1,640	0.0%	52.3%	0	858	858
New Mexico	Residential Trade Contractors	568	0.0%	52.3%	0	297	297
New Mexico	All Residential Categories	898	0.0%	56.9%	0	511	511
New York	Sector 23 - Construction	13,810	0.0%	14.7%	0	2,037	2,037
New York	Residential Building Construction	2,030	0.0%	15.7%	0	319	319
New York	Land Subdivision	40	0.0%	31.8%	0	13	13
New York	Specialty Trade Contractors	7,060	0.0%	18.3%	0	1,290	1,290
New York	Residential Trade Contractors	3,128	0.0%	18.3%	0	572	572
New York	All Residential Categories	5,198	0.0%	17.4%	0	904	904
North Carolina	Sector 23 - Construction	16,370	0.0%	41.9%	0	6,857	6,857
North Carolina	Residential Building Construction	3,660	0.0%	41.3%	0	1,511	1,511
North Carolina	Specialty Trade Contractors	7,450	0.0%	48.7%	0	3,629	3,629
North Carolina	Residential Trade Contractors	3,573	0.0%	48.7%	0	1,740	1,740
North Carolina	All Residential Categories	7,233	0.0%	44.9%	0	3,251	3,251
North Dakota	Sector 23 - Construction	2,570	0.0%	33.3%	0	857	857
North Dakota	Residential Building Construction	300	0.0%	58.1%	0	174	174
North Dakota	Specialty Trade Contractors	990	0.0%	39.6%	0	392	392
North Dakota	Residential Trade Contractors	344	0.0%	39.6%	0	136	136
North Dakota	All Residential Categories	644	0.0%	48.1%	0	310	310
Ohio	Sector 23 - Construction	10,450	0.0%	27.3%	0	2,849	2,849
Ohio	Residential Building Construction	1,050	0.0%	40.0%	0	420	420
Ohio	Land Subdivision	40	0.0%	46.8%	0	19	19
Ohio	Specialty Trade Contractors	4,920	0.0%	31.0%	0	1,525	1,525
Ohio	Residential Trade Contractors	1,867	0.0%	31.0%	0	579	579
Ohio	All Residential Categories	2,957	0.0%	34.4%	0	1,018	1,018
Oklahoma	Sector 23 - Construction	4,840	0.0%	43.9%	0	2,126	2,126
Oklahoma	Residential Building Construction	330	0.0%	55.5%	0	183	183
Oklahoma	Specialty Trade Contractors	2,390	0.0%	42.7%	0	1,020	1,020
Oklahoma	Residential Trade Contractors	997	0.0%	42.7%	0	426	426
Oklahoma	All Residential Categories	1,327	0.0%	45.9%	0	609	609
Oregon	Sector 23 - Construction	3,550	0.0%	36.5%	0	1,297	1,297
Oregon	Residential Building Construction	610	0.0%	41.2%	0	251	251
Oregon	Specialty Trade Contractors	1,540	0.0%	45.6%	0	702	702
Oregon	Residential Trade Contractors	740	0.0%	45.6%	0	337	337
Oregon	All Residential Categories	1,350	0.0%	43.6%	0	588	588
Pennsylvania	Sector 23 - Construction	12,930	0.0%	20.7%	0	2,682	2,682
Pennsylvania	Residential Building Construction	1,280	0.0%	36.4%	0	465	465
Pennsylvania	Land Subdivision	30	0.0%	28.0%	0	8	8
Pennsylvania	Specialty Trade Contractors	6,600	0.0%	20.0%	0	1,321	1,321
Pennsylvania	Residential Trade Contractors	2,677	0.0%	20.0%	0	536	536
Pennsylvania	All Residential Categories	3,987	0.0%	25.3%	0	1,009	1,009
Rhode Island	Sector 23 - Construction	1,270	0.0%	21.7%	0	275	275
Rhode Island	Residential Building Construction	180	0.0%	18.9%	0	34	34
Rhode Island	Specialty Trade Contractors	660	0.0%	31.2%	0	206	206
Rhode Island	Residential Trade Contractors	316	0.0%	31.2%	0	99	99
Rhode Island	All Residential Categories	496	0.0%	26.8%	0	133	133

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State	Industry / Sub-industry	Total Employed	Share Under $23,660	Share Under $50,440	#Workers Under $23,660	#Workers Under $50,440	# Impacted by the Change
South Carolina	Sector 23 - Construction	7,090	0.0%	45.9%	0	3,253	3,253
South Carolina	Residential Building Construction	1,020	0.0%	47.0%	0	480	480
South Carolina	Land Subdivision	50	0.0%	0.0%	0	0	0
South Carolina	Specialty Trade Contractors	3,560	0.0%	48.3%	0	1,720	1,720
South Carolina	Residential Trade Contractors	1,533	0.0%	48.3%	0	740	740
South Carolina	All Residential Categories	2,603	0.0%	46.9%	0	1,220	1,220
South Dakota	Sector 23 - Construction	1,030	0.0%	27.1%	0	279	279
South Dakota	Residential Building Construction	90	0.0%	25.8%	0	23	23
South Dakota	Specialty Trade Contractors	490	0.0%	27.2%	0	134	134
South Dakota	Residential Trade Contractors	214	0.0%	27.2%	0	59	59
South Dakota	All Residential Categories	304	0.0%	27.0%	0	82	82
Tennessee	Sector 23 - Construction	5,920	0.0%	49.4%	0	2,927	2,927
Tennessee	Residential Building Construction	950	0.0%	50.7%	0	482	482
Tennessee	Land Subdivision	90	0.0%	34.6%	0	31	31
Tennessee	Specialty Trade Contractors	2,160	0.0%	52.9%	0	1,143	1,143
Tennessee	Residential Trade Contractors	845	0.0%	52.9%	0	447	447
Tennessee	All Residential Categories	1,885	0.0%	50.9%	0	960	960
Texas	Sector 23 - Construction	42,060	0.0%	38.6%	0	16,219	16,219
Texas	Residential Building Construction	4,080	0.0%	36.4%	0	1,486	1,486
Texas	Land Subdivision	200	0.0%	39.4%	0	79	79
Texas	Specialty Trade Contractors	18,510	0.0%	43.7%	0	8,094	8,094
Texas	Residential Trade Contractors	5,890	0.0%	43.7%	0	2,576	2,576
Texas	All Residential Categories	10,170	0.0%	40.7%	0	4,141	4,141
Utah	Sector 23 - Construction	5,380	0.0%	45.1%	0	2,429	2,429
Utah	Residential Building Construction	610	0.3%	46.4%	2	283	281
Utah	Specialty Trade Contractors	2,970	0.0%	55.0%	0	1,635	1,635
Utah	Residential Trade Contractors	1,679	0.0%	55.0%	0	924	924
Utah	All Residential Categories	2,289	0.1%	52.7%	2	1,207	1,205
Vermont	Sector 23 - Construction	1,130	0.0%	38.4%	0	434	434
Vermont	Residential Building Construction	230	0.0%	41.9%	0	96	96
Vermont	Specialty Trade Contractors	510	0.0%	41.2%	0	210	210
Vermont	Residential Trade Contractors	259	0.0%	41.2%	0	107	107
Vermont	All Residential Categories	489	0.0%	41.5%	0	203	203
Virginia	Sector 23 - Construction	13,270	0.0%	33.7%	0	4,470	4,470
Virginia	Residential Building Construction	2,160	0.0%	37.3%	0	806	806
Virginia	Land Subdivision	40	0.0%	29.5%	0	12	12
Virginia	Specialty Trade Contractors	6,190	0.0%	31.3%	0	1,940	1,940
Virginia	Residential Trade Contractors	2,511	0.0%	31.3%	0	787	787
Virginia	All Residential Categories	4,711	0.0%	34.1%	0	1,605	1,605
Washington	Sector 23 - Construction	9,180	0.0%	15.0%	0	1,373	1,373
Washington	Residential Building Construction	1,680	0.0%	17.3%	0	291	291
Washington	Land Subdivision	30	0.0%	4.2%	0	1	1
Washington	Specialty Trade Contractors	4,770	0.0%	16.9%	0	804	804
Washington	Residential Trade Contractors	2,365	0.0%	16.9%	0	399	399
Washington	All Residential Categories	4,075	0.0%	17.0%	0	691	691
West Virginia	Sector 23 - Construction	2,290	0.0%	39.5%	0	906	906
West Virginia	Residential Building Construction	280	0.0%	72.2%	0	202	202
West Virginia	Specialty Trade Contractors	930	0.0%	42.5%	0	396	396
West Virginia	Residential Trade Contractors	299	0.0%	42.5%	0	127	127
West Virginia	All Residential Categories	579	0.0%	56.8%	0	329	329
Wisconsin	Sector 23 - Construction	5,710	0.0%	25.4%	0	1,451	1,451
Wisconsin	Residential Building Construction	750	0.0%	35.9%	0	269	269
Wisconsin	Specialty Trade Contractors	2,540	0.0%	27.7%	0	703	703
Wisconsin	Residential Trade Contractors	1,121	0.0%	27.7%	0	310	310
Wisconsin	All Residential Categories	1,871	0.0%	30.9%	0	579	579

NAHB

First-Line Supervisors of Construction Trades Workers Impacted by Changing Overtime Threshhold From $23,660 to $50,440

State	Industry / Sub-industry	Total Employed	Share Under $23,660	Share Under $50,440	#Workers Under $23,660	#Workers Under $50,440	# Impacted by the Change
Wyoming	Sector 23 - Construction	1,690	0.0%	34.1%	0	576	576
Wyoming	Residential Building Construction	160	0.5%	32.5%	1	52	51
Wyoming	Specialty Trade Contractors	730	0.0%	38.8%	0	283	283
Wyoming	Residential Trade Contractors	231	0.0%	38.8%	0	89	89
Wyoming	All Residential Categories	391	0.3%	36.1%	1	141	140
Guam	Sector 23 - Construction	180	0.0%	77.4%	0	139	139
Guam	Residential Building Construction	100	0.0%	98.2%	0	98	98
Guam	All Residential Categories	100	0.0%	98.0%	0	98	98
Puerto Rico	Sector 23 - Construction	1,930	30.8%	100.0%	594	1,930	1,336
Puerto Rico	Residential Building Construction	520	29.3%	100.0%	152	520	368
Puerto Rico	Specialty Trade Contractors	660	44.1%	100.0%	291	660	369
Puerto Rico	Residential Trade Contractors	222	44.1%	100.0%	98	222	124
Puerto Rico	All Residential Categories	742	33.7%	100.0%	250	742	492
Virgin Islands	Sector 23 - Construction	70	0.0%	32.5%	0	23	23
U.S. Total	Sector 23 - Construction	370,670	0.2%	31.6%	594	117,194	116,600
U.S. Total	Residential Building Construction	53,370	0.6%	35.5%	339	18,943	18,604
U.S. Total	Land Subdivision	1,110	0.3%	31.6%	3	351	348
U.S. Total	Specialty Trade Contractors	173,380	0.2%	34.3%	316	59,399	59,083
U.S. Total	Residential Trade Contractors	74,415	0.1%	34.0%	110	25,295	25,185
U.S. Total	All Residential Categories	128,895	0.4%	34.6%	452	44,589	44,137

Note: The National Association of Home Builders (NAHB) relied primarily on data from the May 2014 Occupational Employment Statistics (OES, U.S. Bureau of Labor Statistics) to produce the above estimates. In particular, NAHB extracted state-level data on OES occupation code 47-1011 (First-Line Supervisors of Construction Trades and Extraction Workers) for the construction sector only. The OES data include the 10th, 25th, 50th, 75th and 90th percentiles for the distribution of annual wages in each category. NAHB fit cubic splines through these five points and used the result to estimate the shares of workers under $23,660 and $50,440, respectively. The 10th percentile was often substantially higher than $23,660, generating an estimate that no workers in a particular category in a particular state have annual wages below $23,660. OES data do not distinguish residential from non-residential specialty trade contractors. To estimate the share of first-line supervisors in specialty trades employed specifically by residential specialty trade contractors, NAHB used 2014 state-level data on employment by detailed industry from the Quarterly Census of Employment and Wages (also produced by the U.S. Bureau of Labor Statistics).

NATIONAL RETAIL FEDERATION

TESTIMONY OF

TERRY W. SHEA

CO-OWNER,
WRAPSODY, INC.

BEFORE THE HOUSE SMALL BUSINESS COMMITTEE
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS

HEARING ON

"THE CONSEQUENCES OF DOL'S ONE-SIZE-FITS-ALL OVERTIME RULE FOR SMALL BUSINESSES AND THEIR EMPLOYEES"

OCTOBER 8, 2015

National Retail Federation
1101 New York Avenue, NW
Suite 1200
Washington, DC 20005
(202) 783-7971
www.nrf.com

Chairman Hardy, Ranking Member Adams and members of the Subcommittee, thank you for inviting me to testify before you today to help provide a small business retail perspective on the Department of Labor's (DOL) proposed overtime rule. My name is Terry Shea, and I am the proud co-owner of Wrapsody, Inc., a gift boutique. I am pleased to be testifying on behalf of the National Retail Federation (NRF).

NRF is the world's largest retail trade association, representing discount and department stores; home goods and specialty stores; Main Street merchants; grocers; wholesalers; chain restaurants; and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs and 42 million working Americans. Retail contributes $2.6 trillion to annual GDP and is a daily barometer for the nation's economy. Retailers like myself create opportunities for life-long careers, strengthen communities, and play a critical role in driving innovation.

In August of 2004, my business partner, Sarah Brown, and I opened Wrapsody. Wrapsody is a "hometown" gift and home accessories boutique with storefront locations in Hoover and Auburn, Alabama. We also have a webstore, Wrapsodyonline.com. Wrapsody is a trendy, chic "go to place" to buy a gift. We offer free signature gift wrap, top notch customer service, and a fun shopping experience. In 2014, Wrapsody, Inc. posted sales of $2.5 million, and we are on track to improve by 6% for 2015.

We opened our first store in Hoover, Alabama with 2700 square feet of selling space and three part-time associates. Three and a half years later, in the spring of 2008, we expanded the store to 4100 square feet. In October of 2008, the recession hit. We scrambled as everyone did to keep our doors open, but in December of 2008, we were presented with an opportunity to open a second storefront in Auburn, Alabama. It was a great location, located right on the edge of the Auburn Campus and Toomers Corner. We took the chance, in the heat of the recession, and opened the Auburn store (4100 square feet) in March of 2009. Because of this expansion, we hired our first full-time salaried manager for the Auburn store, followed by a full-time manager for the Hoover location. As business increased, we added salaried assistant managers for both locations. In 2011, we relocated the Hoover store to a 5100 square foot space in the same center, and an increase in sales followed.

Wrapsody is an active member of the Hoover and Auburn communities. We employ four full-time salaried managers and 25 plus part-time associates, depending on the season. We also give generously to our local schools, churches, and charities. For the past two years, we have sponsored a college scholarship through our local Chamber of Commerce. A true spirit of giving is celebrated every day at Wrapsody!

Wrapsody also invests in our staff. Managers and assistant managers have the opportunity to earn quarterly bonuses based on store performance in addition to their annual salary. Management also receives two weeks paid vacation annually, a 40% discount on store products, and other benefits. In 2015, we began a 401k plan for qualifying associates with a 3% company match.

We develop our store managers and assistant managers by taking them to Atlanta to the wholesale gift market where they meet with key vendors and network with other retailers. They give us feedback on product "home runs" and product voids. Their input and creativity are invaluable to us, as they are on the frontlines daily. We also have offsite retreats where we discuss everything from time management and staffing opportunities to development, marketing and advertising, and anything else involving daily store operations. Our employees really value these professional development opportunities to network and learn more about our industry.

I tell you all of this because the Department of Labor's proposed overtime rule will suffocate this type of employee development and company growth. The rule more than doubles the minimum salary threshold to be exempt from $23,660 to $50,440 in 2016. Unlike past updates to the overtime rules, this one-size-fits-all increase does not account for regional differences in costs of living or lower wage industries. The proposed rule also includes an unprecedented automatic, annual increase in the salary threshold that will further limit opportunities for career advancement. For many reasons, Wrapsody simply will not be able to increase our four salaried employees to the new minimum salary of $50,440.

First, not all salaried positions are the same. Our store managers currently are salaried in the low $40,000's, and our assistant managers are salaried between the mid $20,000's to low $30,000's. This range for assistant managers is due to experience level, time on the job, store volume, and store level responsibility. Like most retailers, our labor costs are a fixed percentage of our sales, which means we can't just increase everyone's salaries by such a large amount, nor can we pass the more than 100% increase along to our customers in the form of higher prices. If this new salary threshold takes effect, we will be forced to convert all salaried management to an hourly wage and require them to clock in and out as non-exempt employees.

Second, in our area of the country, we pay a very competitive salary and offer a generous benefits package for our type of retail business, which is why we have such an awesome team. However, the overtime rule ignores the fact that the cost of living in Hoover, Alabama is very different than in New York City. According to a report prepared for NRF by Oxford Economics, approximately 49% of full-time salaried workers in Alabama make less than $970 per week, which demonstrates just how out of sync the $50,440 minimum salary level is with our labor market.[1] Such a dramatic, one-size-fits-all increase will have real consequences for my business and my employees.

Third, converting salaried positions to an hourly wage adds pressure to get the "job" done in a 40 hour work week. We avoid incurring overtime as much as possible and will continue to do so. An increase in overtime eligibility will not necessarily mean an increase in overtime pay for our workforce; but having to watch the clock for my managers and limit them to a 40 hour week will take away their flexibility, both personally and operationally.

[1] Oxford Economics, State Differences in Overtime Thresholds, Addendum to "Rethinking Overtime: How Increasing Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries," August 18, 2015, https://nrf.com/sites/default/files/Documents/retail%20library/OE%20Addendum%202%20-%20State%20level%20overtime%20threshold%20analysis.pdf.

My managers' salaried, exempt status affords them a great deal of flexibility. Currently, if one of our managers needs to leave early or run a personal errand, we accommodate them without requiring those hours to be made up. If they aren't feeling well, we encourage them to go see the doctor; if there is something special going on that they need to leave early for, we let them go early so they won't feel so rushed. Again, we do not require those hours to be made up.

Flexibility benefits our salaried staff. This August, for example, the manager at our Auburn store requested to leave a few hours early on a Friday because her four year old daughter was starting dance that day. She needed to register her and get her comfortable with this new Friday schedule. Of course we said yes. She had just worked one of our largest volume weeks at the store. We had already compensated her with a day off for the extra hours and the over the top performance she had turned in. Giving her this extra time off to spend with her daughter was an automatic decision.

Another example of the typical flexibility we offer our salaried staff took place this past September. The manager at our Hoover store had a long weekend planned at the beach over Labor Day. She and her husband were going to leave Birmingham on Friday, after she got off work. All I could think of was how horrible traffic would be heading south to the beach on Labor Day weekend. I let her go at 1pm. This gave her time to run last minute errands and have things ready to go when her husband got off work. Surprise… her husband's boss let him go early as well. They got out of town early and beat the traffic jam to the beach. She is an awesome manager and gives us well over 100% every day.

These types of incidents happen all the time. Honestly, I don't even keep track of the extra we give to our managers because I don't think of it as a gift. Our managers are constantly going above and beyond. They operate their stores as owners, and we give them the freedom to schedule themselves. They know what the job requires, and they get it done. We value them, and they are just as much a part of our success as Sarah and I are.

Furthermore, our store managers and assistant managers averaged a 40 hour work week last year. Management closes the stores two days a week, and on those days they come in at 10am and leave between 6:15pm and 6:30pm. They also work one Saturday a month, for which they are given a day off during the week. During "crunch time" weeks, a manager will work more than 40 hours. However, when any salaried associate works in excess of 46 hours in a week, they are compensated with a day off of their choosing. This day off may be used the following week or "banked" and taken later in the year. Our salaried employees love this type of flexibility. They view a day off during the week as "me" time, since they are working moms. Their evenings and weekends are full of family time and responsibilities, so "me" time is highly valued. This is how we maintain the "overall" 40 hour work week on an annual basis. If they are converted to hourly workers, this kind of flexibility will be eliminated.

Diminished flexibility will also negatively impact customer service. Right now, if a customer walks in the store a few minutes before 6pm, my managers assist those customers in finding the unique gift they require, even if it means having a customer in the store after closing. They would never shoo a customer out right at 6pm! My business depends as much on excellent customer service as it does on our unique products, but as non-exempt employees, my managers will no longer have the flexibility to accommodate those customers. In addition, any changes to the primary duties test would further restrict the latitude afforded to exempt managers and are strongly opposed by myself and the rest of the retail community.

Beyond this loss of flexibility, converting a salaried manager back to hourly status will have a demoralizing impact; this person has worked hard to climb up the ladder into a coveted salaried position. Salaried, exempt status is seen as a badge of success and in my company, like many others, it is accompanied by a broader benefits package – benefits my employees and their families have come to count on. A recent GfK study shows that 45% of retail managers believe a change to hourly status would leave them feeling as though they are performing a job instead of pursuing a career, and 33% believe that change would undermine career stability.[2] Another recent study by Oxford Economics found that the proposed changes in the overtime rules would result in the loss of exempt, salaried status – and the income stability and flexibility that accompany that status – for an estimated 694,500 employees in the retail and restaurant sectors alone.[3]

This new overtime rule is bad for employees, and it is bad for small business owners. I am still trying to wrap my mind around the rule and what it means for the future of my business. But I can tell you right now that the Department of Labor's estimates of the regulatory burden are way too low. I'm also not the only one who thinks this. The U.S. Small Business Administration noted in its comments on the rule that the proposed changes "will add significant compliance costs and paperwork burdens on small entities, particularly businesses in low wage regions and in industries that operate with low profit margins."[4] The agency also expressed concern that the rule "does not properly analyze the numbers of small businesses affected by this regulation and underestimates their compliance costs."[5] Every dollar spent on compliance burdens is one less dollar that we could have used to grow our business and invest further in our employees and community.

In closing, I take great care of my employees and like other retailers, I want to help them move up. But we believe careers are the answer not time cards. DOL's one-size-fits-all salary threshold, the accompanying proposed annual increases, and any potential changes to the duties test will both burden my small business with more costly mandates and limit career advancement for my team. Unfortunately the impact of this rule, as frightening as it is, does not exist in a vacuum. We are trying to do what we do best – sell good products, create jobs, and give back to

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[2] GfK, "The Proposed Overtime Regulations' Impact on Retail and Restaurant Managers," https://nrf.com/sites/default/files/Documents/retail%20library/NRF-GfK-Overtime-Study-Report.pdf.

[3] Oxford Economics, Updated Impacts of Raising the Overtime Exemption Threshold, Addendum to "Rethinking Overtime: How Increasing Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries," July 17, 2015, https://nrf.com/sites/default/files/Documents/retail%20library/Rethinking-Overtime-threshold-update_MEMO.pdf.

[4] Small Business Administration, Submitted Comments on the Proposed Overtime Rule, https://www.sba.gov/advocacy/942015-defining-and-delimiting-exemptions-executive-administrative-professional-outside.

[5] Ibid.

our communities – and the uncertainty and costs associated with government overreach like the new overtime rule are making it much harder to do business.

Mr. Chairman, thank you again for the opportunity to share my views on this important issue. I would be happy to answer any questions.

EPI

Testimony of

Ross Eisenbrey

Vice President, Economic Policy Institute

Before the

U.S. House of Representatives Committee on Small Business Subcommittee on Investigations, Oversight, and Regulations

10:00 a.m., Thursday, October 8, 2015
Rayburn House Office Building, Room 2360

My name is Ross Eisenbrey, vice president of the Economic Policy Institute, a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI believes every working person deserves a good job with fair pay, affordable health care, retirement security, and work–life balance.

Work–life balance is precisely what the Fair Labor Standards Act (FLSA) is about. Because of its requirement to pay many employees a premium for time worked beyond 40 hours in a week, the FLSA is the single most important family-friendly law ever passed in the United States. Everyone claims to care about work–life or work–family balance, but for many employers, it's just talk, just as it was 70 years ago. If not for the law's overtime rules, tens of millions more workers would be working 50, 60, or 70 hours a week for no additional pay, just as millions of Americans did before the FLSA was enacted in 1938.

An uninformed person might think the 40-hour workweek is part of the natural order, but of course it isn't. It exists in the United States because Franklin Delano Roosevelt persuaded Congress to pass the FLSA, which—by imposing the duty to pay time-and-a-half for overtime—makes it expensive for a business to work employees more than 40 hours a week. (Similarly, the weekend was not a given for most Americans before the New Deal.) If the FLSA's regulations are not updated from time to time, as the law intends, the 40-hour workweek could become a thing of the past.

It's critical to remember that there's no inherent difference between an hourly worker and a salaried worker. How they are paid is up to the boss. And salaried employees need time with their families and time for themselves just as much as hourly workers do. Congress recognized this in 1938 and made no distinction: Hourly workers and salaried workers alike were entitled to overtime pay, whether they were blue collar or white collar, whether they worked in a factory or an office. In fact, some of the most exploited workers at the time were women working 12-hour days, six days a week, as typists in giant office pools for $6 or $7 a week.

It's equally critical to remember that the employees who work in small businesses are no different from those who work in medium-sized and large businesses; they too need time with their families and for themselves. There is no rule that says small businesses get to exploit their employees, work them excessive hours, or deny them time with their families.

For all of these reasons, the Department of Labor (DOL) should enact its proposed rule that in 2016 would raise the threshold below which all workers are automatically eligible for overtime to $50,440. This would be the most important improvement in the labor standards of America's working families in many years.

Work–life balance, family responsibilities, and personal health

Having a decent work–life balance—which means having enough time outside of work for family and friends, for oneself, and for civic participation—is one of the two key goals of the FLSA's overtime requirements. But large percentages of managers and other white-collar employees say that increasingly, the law is failing to protect them, that they don't have enough time for their families. Parents' hours are increasing more than those of non-parents:

- An Ernst & Young survey found that too little pay and excessive overtime are among the three most common reasons employees quit.

- Approximately half (46 percent) of managers work more than 40 hours per week, and four in 10 say their hours have increased over the past five years.
- Younger generations have seen their hours increase the most in the last five years, at a time when many have moved into management and started families (47 percent of millennial managers reported an increase in hours, versus 38 percent for Gen X managers and 28 percent for boomer managers).
- Of managers, a larger share of full-time working parents (41 percent) have seen their hours increase in the last five years than non-parents (37 percent).[1]

The implications of this overwork are obvious in terms of work–life conflict. Who will take care of the kids? Who will go to their ballgames, school plays, or counseling meetings? The conflict is especially intense because children increasingly have two parents working at least 35 hours per week. Ernst & Young finds that "over half (57%) of full-time employees in the US indicate that their spouse/partner works 35 hours or more a week, but for millennials and Gen X, the likelihood that their partner works full-time is much higher than for Boomers. Also, parents (70%) are much more likely than non-parents (57%) to have a partner that works at least full-time."[2]

Specifically:

- "Millennials (78%) are almost twice as likely to have a spouse/partner working at least full-time than Boomers (47%).
- Millennials (64%) and Gen X (68%) were also much more likely to have a spouse/partner working 35 hours or more a week than Boomers (44%).
- Over a quarter of Boomers (27%) said their spouse/partner does not work outside the home or works part-time flexible hours (10%).
- Millennials (13%) and Gen X (14%) were much less likely to have a spouse/partner who did not work outside the home or who worked part-time but flexible hours (5% and 4% for millennials and Gen X, respectively).
- 'Finding time for me' is the most prevalent challenge faced by millennial parents who are managers in the US (76%) followed by 'getting enough sleep' and 'managing personal and professional life' (67%)."[3]

It's not just work–family conflict, stress, or lack of sleep that's at stake; it's also the physical health of the workers. Overwork kills. People who work 55 hours or more per week have a 33 percent greater risk of stroke and a 13 percent greater risk of coronary heart disease than those working standard hours.[4] When employers don't have to pay for overtime, they schedule much more of it, leading to the many stories among the rulemaking comments of managers working 60-hour weeks and longer until their health was destroyed, leaving them disabled.

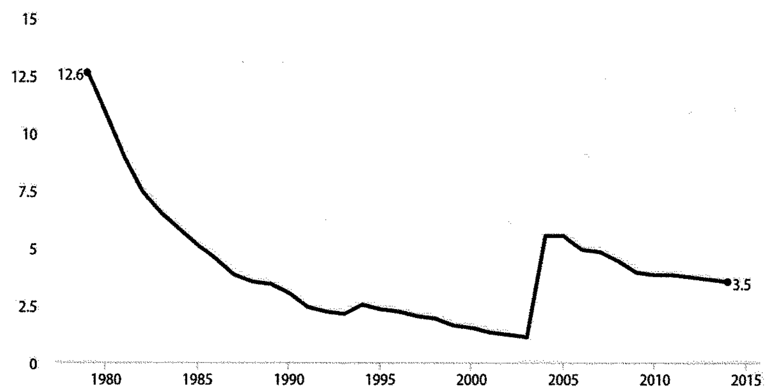
As currently enforced, the FLSA is failing salaried workers

Properly enforced, the Fair Labor Standards Act would prevent a great deal of this overwork and stress on families, but the law has been allowed to become almost a dead letter with respect to salaried employees. The single biggest reason for this failure is the low level of the salary threshold that determines whether workers are automatically eligible for overtime pay. As shown in the graph, in 1979 more than 12 million salaried workers earned less than the salary thresh-

FIGURE

The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979

Number of salaried workers covered by overtime salary threshold, 1979–2014 (in millions)*



* The sample included salaried (nonhourly), full-time workers who are 18 years or older. It excluded teachers (pre-K through college) and religious workers who are automatically exempt from overtime protections.

Note: The nominal threshold was set at $250 per week from 1975 until 2004 when it was increased to $455 per week.

Source: EPI analysis of Current Population Survey Outgoing Rotation Group microdata

ECONOMIC POLICY INSTITUTE

old and were therefore automatically guaranteed the right to overtime pay, regardless of their duties. Today, with a 50 percent bigger workforce, only 3.5 million salaried employees are automatically protected.[5]

The other purpose of the overtime rules was to reduce unemployment by reducing the average number of hours worked in certain jobs, thereby freeing up positions for additional workers. To maximize employment, it's obviously better to have three employees working 40 hours per week than just two working 60 hours each while the third is unemployed. U.S. underemployment is still at 10 percent six years after the end of the Great Recession—that's 14 million Americans who want a job or more hours but have not been able to find them. Black unemployment is still 10 percent.

Employers would prefer that every salaried employee was exempt from overtime pay, and they act as if the Department of Labor is stretching to cover employees Congress never intended to cover. Nothing could be further from the truth. In an excellent comment submitted to the rulemaking record, 57 legal scholars remind us that the basic rule is that all employees are entitled to time-and-a-half overtime pay, while the exemptions were meant to be very limited and narrow. For the most part, only relatively highly paid employees may be denied overtime pay:

> "Congress' intent was to allow exemptions from the Fair Labor Standards Act's overtime and minimum wage protections for a relatively small group of high-paid employees who were effectively already being compensated for the extra hours that they worked by their high level of compensation. Congress understood that these workers had sufficient individual bargaining power in the labor market and workplace to protect themselves, and so did not need the government to intervene to protect them from employers who might impose low wages and excessive over-work. One very strong indication of a worker's individual bargaining power is the salary that he or she can negotiate with an employer. More individual bargaining power generally produces a higher salary. Bona fide executive, administrative, and professional employees are able to negotiate high salaries because of their skills, knowledge, close association with powerful corporate leaders and, in many cases, limited availability in the labor market. For this reason, we agree with the Wage & Hour Division that an employee's salary level should be the most important factor in determining whether he or she is an exempt bona fide executive, administrative, or professional employee."[6]

A critical examination of arguments against raising the overtime salary threshold

Many businesses are unhappy that the Labor Department is proposing to restore overtime coverage almost to where it stood in the Nixon and Ford administrations. Businesses have become accustomed to working low-level salaried employees long hours for no extra compensation, but the pendulum has swung too far, and it's time to restore some balance. The arguments they make against the rule are uniformly without merit.

Let's examine the four most common of these arguments.

1. "Regulatory compliance costs will be excessive."

    a. DOL probably overestimated these costs. Every firm that has an obligation to comply with the FLSA has already made a determination about the duties of its current employees and whether they can be exempted under the law's provisions for executive, administrative, and professional employees (known as "EAP exemptions"). The proposed rule makes this process much simpler. Here's the new test: "Does the employee make less than $970 per week?" If yes, pay overtime; if no, don't pay overtime if you don't want to.

    b. DOL said becoming familiar with the new rules would take an hour, but in reality, it takes a few seconds, and anyone with ADP payroll processing software can make the necessary change in payroll in a few minutes.

    c. Going forward, it is beyond argument that millions of the decisions employers make about applying the exemption to employees earning above the current threshold but below the new threshold level ($23,660 to $50,440) will be made simpler: The complex duties tests will be irrelevant for those employees, and starting next year, the only question will be, "Does the employee earn a salary less than $970 per week?"

    d. Converting employees to hourly status is entirely a decision of the employer; if the employer wants to track employee time, it can but doesn't have to.

2. “The regulation will harm relationships between owners and affected employees.”

a. The National Federation of Independent Business (NFIB), for example, claims that employee morale will be hurt because employers will not just reclassify some managers as hourly but will also demote them, take away the manager title, take away their paid time off and their health benefits, and stop letting them leave early to pick up their kids from school. All of that is pure nonsense. Nothing in the rule makes an employer change a manager’s title or take away benefits, and it would be poor management to do so if it were going to harm morale.

b. NFIB assumes that businesses will insist that employees continue to work long hours and will refuse to pay anything additional for overtime. NFIB says employers will cut wages by as much as $5 per hour in order to keep their total wage bill unchanged. That has not been the history of the FLSA. We know that hourly workers are less likely to work long hours than salaried employees, and we have found no evidence that employees’ wages were ever cut this way in the past.

3. “The rule will take flexibility and opportunities from employees who are converted to hourly status.”

a. Research by Lonnie Golden at Penn State shows that employees paid a salary less than $50,000 a year generally have no more flexibility than hourly workers.[7]

b. The opportunity argument is indefensible. If my business promotes employees paid a salary of $25,000 to $50,000 into management but the rule leads me to reclassify them all as hourly, they’re still the same employees I would look to for promotion. Where else would I look? If not them, then who?

4. “The salary level is set too high for rural areas.”

a. The salary level is meant to do one thing: prevent employers from denying a 40-hour workweek and overtime pay to people who aren’t really executives and professionals. It doesn’t set salaries; it reflects what bona fide executives, administrators, and professionals are paid.

b. The $921 weekly level in the DOL’s notice of proposed rulemaking (NPRM) is not high; it is so low that it isn’t sufficient to provide a two-parent, two-child family with an income level necessary to live adequately yet modestly.[8] This is not truly an executive-level salary if an employee in 2014 could not support a family in a modest way on that salary.

c. The salary levels since 1938 have been set nationally, without exception.

d. In inflation-adjusted terms, the equivalent salary level in 1975 would be $57,462, according to the U.S. Chamber of Commerce.[9] That level took account of regional and urban/rural differences because it was an inflation adjustment of earlier levels that took them into account. Regional pay differences are much smaller today than in 1975, so the salary level in the NPRM actually overcorrects for regional differences. Moreover, the fact that the NPRM level is well below the 1975 level despite decades of productivity growth and accelerating income growth for executives means the salary level is more likely too low than too high.

e. The HR Policy Association (HRPA) says that one in seven rural and small city CEOs earns less than $940 per week.[10] It's a very misleading portrait of their income, if not totally meaningless, because it's based on the Current Population Survey report of weekly wage data, which leaves out a lot of income—perhaps most of it for CEOs. Here's what's left out: non-production bonuses, perquisites, profit-sharing payments, stock bonuses, and year-end bonuses. Taking into account their various bonuses and perks, it might be that none of them earns less than $75,000 a year—but we don't know.

f. CEOs are either the business owner, in which case they set their own salary and their own schedule, or they are employees of someone else. If the business owner isn't willing to pay its CEO more than $50,000, it will have to pay overtime. This will affect very few businesses.

g. The HRPA figure of one-seventh of rural and small city CEOs totals less than 18,000 CEOs, of whom 3,000 are public employees. In a nation with more than 7 million businesses, that represents 0.2 percent of firms.

h. Managers paid less than the level necessary for a two-parent, two-child family to make ends meet anywhere in the country, whether they live in rural or urban areas, should not be treated as exempt executives; they should be paid for their overtime.

The Secretary of Labor has done precisely what the law requires in resetting the salary test to a level that truly reflects the compensation of bona fide executives, administrators, and professionals. In doing so, he is making the most important improvement in the labor standards of America's working families—particularly middle-class families—in many years. The proposed rule should be applauded and supported, and the secretary should make it final.

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EPI

Economic Policy Institute

Ross Eisenbrey

September 3, 2015

VIA ELECTRONIC SUBMISSION: www.regulations.gov

Mary Ziegler, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W. Room S-3502
Washington, D.C. 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Regulatory Information Number (RIN): 1235-AA11

Dear Ms. Ziegler:

The Fair Labor Standards Act's overtime provisions constitute the most important family-friendly legislation ever enacted in the United States. They set the fundamental labor standard that work beyond 40 hours in a week must be compensated at a time-and-a-half premium, thereby discouraging overwork and protecting the right of workers to have time for themselves, to care for their families, and for civic participation. Section 7 of the Fair Labor Standards Act effectively created the five-day workweek with a two-day weekend, and preserving and enforcing its protections is part of the Department of Labor's fundamental mission.

This rulemaking is essential if the Department of Labor (DOL) is to fulfill its mission. The proposed rule will restore or strengthen overtime protections for 13 to 15 million salaried workers, protections that have been eroded by decades of bureaucratic hostility and neglect. The Economic Policy Institute commends Secretary Perez and Wage and Hour Administrator Weil for their leadership.

1. Purposes of the Fair Labor Standards Act overtime provisions and the EAP exemption

    a. As the Notice of Proposed Rulemaking (NPRM) spells out, the judicially recognized purposes of the FLSA overtime provisions are to spread work, to prevent "the evil of overwork," and to compensate employees for the burden of overwork. The benefit to the economy of spreading work is obvious: if, for example, three salaried insurance adjusters each work 40 hours a week, the buying power of the workforce is greater, and the costs of unemployment insurance and social welfare programs is less, than if two work 60 hours a week and the third is unemployed.

b. Overwork is "evil" because it is a drain on the family life, community life, and spiritual life of employees, but it is also a drain on productivity and a cause of expensive turnover. Christine Porath of the McDonough School of Business at Georgetown University and Tony Schwartz of The Energy Project partnered with the *Harvard Business Review* to survey more than 12,000 mostly white-collar employees. They discovered, as they described in a piece for the *New York Times*, that "employees who take a break every 90 minutes report a 30 percent higher level of focus than those who take no breaks or just one during the day. They also report a nearly 50 percent greater capacity to think creatively and a 46 percent higher level of health and well-being. The more hours people work beyond 40—and the more continuously they work—the worse they feel, and the less engaged they become. By contrast, feeling encouraged by one's supervisor to take breaks increases by nearly 100 percent people's likelihood to stay with any given company, and also doubles their sense of health and well-being."[1]

   The "evils of overwork" also include serious, negative health effects. Long work hours have been associated with heart disease, and with diabetes among workers with low socioeconomic status, and more recent research finds an increased risk of stroke, as well.[2]

c. Salaried workers whose weekly earnings fall below a certain salary threshold are automatically eligible for overtime pay (the "salary test") while those above that threshold are eligible only if they do not meet the "duties" test that categorizes them as higher level employees. The narrow exemption from overtime pay protection for bona fide executives, administrative employees, and professionals (EAP) was created both because certain high level employees have enough bargaining power that they don't need the law's protections and because the goal of spreading work is not served in the case of certain employees whose work "cannot be shared."

d. It is noteworthy that the EAP exemption is preceded in the statute by the modifier "bona fide," a signal that not just anyone with a corresponding title is to be excluded from the act's protections. As Marc Linder has shown in his history of the FLSA overtime provisions, *Time and a Half's the American Way*, Congress knew from experience with exemptions under the National Industrial Recovery Act's industrial codes and the President's Reemployment Agreement (which in 1933 began setting maximum work hours and minimum wages) that employers would try to avoid coverage by misclassifying ordinary workers as managers, executives, or other kinds of exempt "bosses." The National Recovery Administrator had felt compelled to declare that the recovery act's exemption would be limited "to those who exercise real managerial or executive authority" and warned employers that paying anyone less than $35 per week created an irrebuttable presumption that the exemption did not apply.[3]

e. A salary test has always been a key test of EAP status under the FLSA. In 1940, a report and recommendations to the department by its hearing officer (known as the "Stein report"), which were adopted, declared that, "The salary paid the employee is the best single test of the employer's good faith in characterizing the employment as of a professional nature."[4]

2. The salary threshold for EAP exemption is far too low and must be increased

a. As salaries increased in the decades following enactment of the FLSA in 1938, the salary threshold for exemption increased, too, both in nominal and inflation-adjusted dollars. By 1970, it exceeded $56,000 in today's dollars, compared with today's threshold of $23,660. Management and professional salaries, and especially CEO pay, have increased substantially since 1970—much faster than inflation, so the value of the salary threshold should have increased substantially, too. In the period from 1991 to 2001, for example, workers in executive, administrative, and managerial occupations saw a 12.4 percent real increase in total compensation and a 10.4 percent real increase in wages. [5] Over a much longer period, the pay of top executives skyrocketed. CEO pay among the top 350 U.S. corporations was almost 11 times higher in 2014 than it was in 1978, after adjusting for inflation.[6]

b. Unfortunately, through a combination of political and bureaucratic negligence and hostility to the purposes of the act, the salary threshold has lost more than half its inflation-adjusted value since 1975. The $250 per week salary threshold for EAP exemption set by the Ford administration in 1975 would be $1,000 per week today, adjusted fully for inflation over the last 40 years. The 2004 increase, the only adjustment since 1975, was so minimal that 11 years of mild inflation have been enough to reduce its value to less than the poverty line for a family of four. Plainly, a poverty level salary is not an executive, administrative, or professional salary and thus this salary threshold fails to carry out the statutory purpose of distinguishing bona fide exempt employees from employees whose status and responsibilities are insufficient to qualify them for exemption.

c. The threshold level is too low to protect more than a relatively small number of employees from misclassification as exempt. Almost 12 million full-time salaried workers earned less than the threshold amount in 1979 and were automatically nonexempt without any inquiry into their duties, but only 3.4 million salaried employees earn less than the threshold level today, even though the number of salaried employees is 50 percent greater today than in 1979.[7]

3. There is no single acceptable methodology for setting the threshold

a. Congress left the definition of EAP to the Secretary; that definition has always included a minimum salary level for exemption.

b. The Secretary has used a variety of reasonable methodologies over the years. The original salary tests in 1938 were modeled on the National Recovery Codes of Fair Competition under the National Industrial Recovery Act, rather than on a survey of exempt workers' salaries. The Stein Report in 1940 examined a variety of sources, including the salaries paid to professional employees in the federal government; the relative pay of bookkeepers, accountants, and auditors; the probable percentage of stenographers who would be exempted; and the federal government's classification of "the so-called clerical, administrative, and fiscal group of Government employees."[8] The 1949 report and recommendations were based in large part on survey information "obtained as a by-product of the Divisions' regular investigative programs." In 1958, the department's Wage and Hour Division set the salary thresholds at a level designed to deny the exemption to 10 percent of the employees found in its investigations to be exempt as EAP in the lowest-wage region, the lowest-wage industry, the smallest cities, or the smallest establishments. In 1975, the 1970 salary determinations were adjusted for most of the inflation that had occurred in the previous five years. None of these various methods was ever overturned in court.

c. The goal is to set the salary level high enough to exclude employees in nonexempt occupations but low enough to avoid excluding bona fide EAPs.

4. The 40th percentile salary (estimated $50,440 in 2016) is within the historical norms for the threshold and cannot be said to be unreasonable

   a. Ratio to the median wage, to the minimum wage, to the college-educated entry-level wage

      i. To be commensurate with the status and prestige expected of exempt managers and executives, the salary level should be well above the median wage, the wage paid to the "typical" employee. When the Ford administration raised the salary threshold in 1975, it was 1.57 times the median wage. The median wage in 2013 was $16.70 per hour. Were we to update the threshold using that same ratio—1.57 times the median wage—the threshold would be $26.22 an hour, around $1,050 on a weekly basis and $54,536 on an annual basis, suggesting that DOL's proposed $970 weekly threshold (in 2016 dollars) is on the low side.

      ii. In 1975, the short test salary level[9] was approximately 3 times the minimum wage, very close to the ratio of DOL's proposed level to the current $7.25 minimum wage, which is 3.36-to-1.

      iii. The salary level for exemption must also be, according to the Department of Labor's 1949 report, "considerably higher" than the level of newly hired "college graduates just starting on their working careers." As the report explained, "[t]hese are the persons taking subprofessional and training positions leading eventually to employment in a bona fide professional or administrative capacity." Entry-level wages and salaries for college graduates in 2013 were $21.89 per hour for men and $18.38 per hour for women. The 1949 rule set the level 25 percent above the college entry-level wage; applying that same ratio today would yield a salary of about $1,000 a week.[10]

   b. The 1960s and 1970s levels adjusted for inflation would yield a higher figure than DOL proposes.

      i. In 2013 dollars, the 1963 salary threshold was $998, the 1970 threshold was $1,071, and the 1975 threshold was $984 – all higher than the $50,440 threshold DOL proposes for 2016.

   c. Taking into account wage growth and especially growth in executive pay, the threshold should be higher, not lower, than the 1960s and 1970s thresholds.

   d. Contrary to the claims of the U.S. Chamber of Commerce that this increase is "unprecedented," it is not nearly the largest percent increase in an 11-year period. From 1938 to 1949, the administrative and professional salary tests increased from $30 to $75 per week (150 percent), and the short test was set more than three times higher, at $100. In a recent congressional hearing, the Chamber of Commerce testified that, in inflation-adjusted terms, the 1949 short test level would be $51,957.36 today—higher than the DOL proposal 66 years later, despite decades of real salary growth for EAP employees.[11]

5. An examination of occupations shows that the salary level properly excludes historically nonexempt occupations from exemption while allowing exemption of most employees in historically exempt occupations

   a. The proposed rule passes the test employed by the department in 1940, which was in essence: "Is the salary level high enough to deny exemption to bookkeepers (who ought to be entitled to overtime pay) but low enough so as not to deny exemption to too many accountants (most of whom ought to be exempt)?" In 1940, the Department of Labor set the threshold at a level designed to deny the exemption to all but 8 percent of bookkeepers while permitting the exemption of about 50 percent of accountants, those "whose work, while related to that of bookkeepers, requires in general far more training, discretion, and independent judgment." Achieving the same results today would require a threshold of at least $56,470, the 90th percentile salary for bookkeepers, according to the May 2014 Bureau of Labor Statistics (BLS) report of wages for Bookkeeping, Accounting and Auditing Clerks.[12] The median annual wage for accountants and auditors, according to BLS in May 2014, was $65,940.[13]

In 1949, the department's report and recommendations on revisions to the overtime pay exemptions restated the proper approach to setting the salary levels: "The salary level adopted must exclude the great bulk of nonexempt persons if it is to be effective." The Department of Labor set the level for administrative employees at $75 a week, high enough to exclude from exemption almost all bookkeepers and more than 25 percent of accountants (the middle 50 percent earned between $69 and $93 a week). In May 2014, the BLS reported the 25th percentile wage of accountants to be $51,130, higher than the threshold DOL proposes for 2016.[14]

b. The National Compensation Survey suggests $970 per week is an appropriate dividing line between exempt and nonexempt salaried workers.

- BLS publishes data (most recently from 2010) of supervisory workers by management occupation and median weekly earnings. (U.S. BLS National Compensation Survey). For management occupations, the BLS breaks out four levels of supervisory responsibilities, and the median weekly earnings range from $1,385 to $3,427.[15] Thus, by this metric, a $970 threshold is well below a level associated with supervisory, and presumably exempt, duties.
- Looking at the full list of median earnings for supervisory jobs in management, only "team leaders" who were preschool education administrators, food service managers, property managers, and "first line" lodging managers earned below this threshold (and note that for some of these occupations, the mean, as opposed to median, earnings were above $970 per week).
- BLS grading of occupations by leveling factors (scores given to each occupation based on its demands for skills, knowledge, and responsibilities) find the hourly wage of about $24 ($970/40) to be consistently below level 7 (out of 15), also consistent with nonsupervisory responsibilities.

6. Critics of the proposed rule wrongly assert that it is deficient because it fails to account for regional salary differences

The FLSA does not require a multiplicity of regional salary thresholds for the EAP exemption any more than it does for the minimum wage, and DOL has always set national salary levels under Part 541. In any event, regional wage and salary variations are much less significant than they were in the past.

The concern that establishing a national salary threshold imposes hardships on lower-wage states is always raised about any national standard, be it the minimum wage or earlier salary thresholds. There should be far less concern about the impact of regional wage disparities now than in the past, however, because these disparities have shrunk markedly over the last four decades as wages across states have converged toward the national average or median;

this is especially true in the bottom of the wage scale as lower-wage states have moved much closer to national norms.

Recent research by the Economic Policy Institute demonstrates that the wage distributions across the U.S. states are closer together now than they were four or five decades ago. This means that the salary threshold that divides EAP workers from other workers in lower-wage states is much closer to the national norm today than it was when prior levels of the threshold were established such as in 1975. This should allay concerns that a higher national salary threshold would not fit the employment conditions in lower-wage states.

Apprehensions about national standards are often motivated by the potential impact on lower-wage states in the South. **Figure A** displays the median hourly wage in the nine Census divisions, in 1968, 1979, 2007, and 2013. Of particular interest are the three Southern divisions (South Atlantic, East South Central, and West South Central), where state median wages have historically been lower than in other parts of the country. The data at the Census division level show a clear tendency toward compression between 1968 and 2013, with the ratio of the median wage in these three divisions moving from a range of 81–87 percent of the national median wage in 1968 to a range of 93–99 percent of the national median in 2013. That is, there is no Southern division (South Atlantic, East South Central, or West South Central) which has median wages more than seven percent below the national median, which means that the South's wages have strongly converged toward the national norm. These data demonstrate that any national wage standard such as the salary threshold will have less relative impact on southern states than was the case in 1968 or 1975.

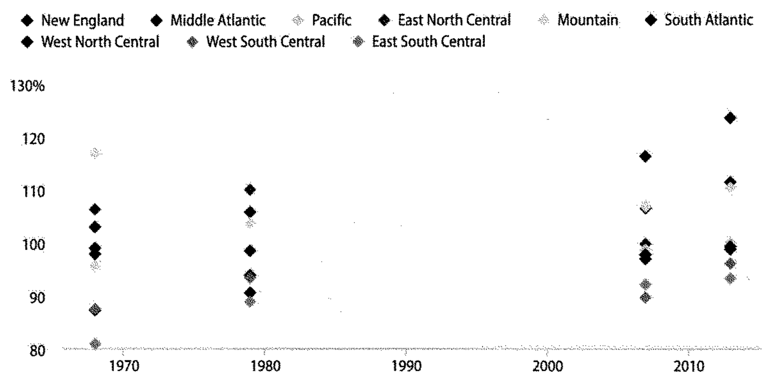
Figure B shows a similar analysis at the more disaggregated level of 30 "state groups." We use state groups rather than all 50 states because the Current Population Survey Annual Social and Economic Supplement data used to develop the figure do not identify all states individually before 1977 and have some states combined into groups. In 1968, Tennessee had the lowest median wage, equal to 78.2 percent of the national median. In the same year, California had the highest median wage, equal to 118.2 percent of the national median. By 2013, the gap between the top and bottom states had narrowed relative to 1968 (when excluding the high-wage outliers of Washington, D.C., and Connecticut), suggesting an important convergence in median wages across the states. In 2013, the state group with the lowest ratio of the state group median to the national median wage was composed of Arkansas and Oklahoma, at 88.8 percent; the highest ratio was in Connecticut (at 133.9 percent), and the second-highest was in Maryland (at 120.2 percent).[16] As these numbers demonstrate, most of the compression took place in the bottom half of the distribution, with the lower-wage states moving closer to the national median (even as some high-wage states pulled further away from the national median).[17]

As **Table 1** demonstrates, in 1968, three of the 30 state groups had a median more than 20 percent below the national median, and seven of the 30 had medians between 10 and 20 percent below the national median. By 2013, no state group was more than 20 percent below the national median, and only one state group (Oklahoma and Arkansas) was more than 10 percent below the national median. In that same year, two-thirds of the state groups (21) were within 10 percent of the national median, up from 18 in 1968—and eight were more than 10 percent above the national median, up from just two in 1968.

The analysis of wage convergence across states to this point has been addressed using median hourly wages. Given that the salary threshold affects workers with higher salaries and more education, it is useful to confirm these find-

FIGURE A

Census division median wages as a share of the national median wage, 1968, 1979, 2007, and 2013



Note: This figure originally appeared in David Cooper, John Schmitt, and Lawrence Mishel, *We Can Afford a $12.00 Federal Minimum Wage in 2020* (Washington, D.C.: Economic Policy Institute, 2015); http://www.epi.org/publication/we-can-afford-a-12-00-federal-minimum-wage-in-2020/. See data appendix of that report for methodology.

Source: EPI analysis of Current Population Survey Annual Social and Economic Supplement microdata, various years

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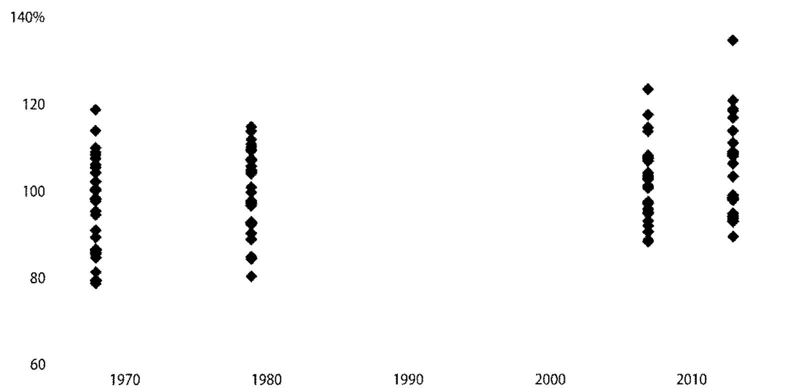
ings using data on the median hourly wage of college graduates (all college graduates, including those with advanced degrees). As was seen with median wages, there has been a strong convergence of college wages across states. **Table 2** shows that while in 1979 there were five states whose median college wage was at least twenty percent below the national median college wage (i.e., in the 70–80% category), by 2014 there was only one state (South Dakota at 78.2 percent). In 2014 there were 13 states with higher than national college median wages and another 21 which had wages within 10 percent of the national norm. These data indicate that college median wages have converged across states as did median wages of all workers. This provides further comfort that national standards for salaried workers are less potentially burdensome on lower-wage states than in earlier times, such as 1975, when the salaried threshold was reset.

When measuring the reasonableness of the proposed level today, it is also important to note that the department's past efforts to set the exemption did explicitly take into account the tendency of wages and salaries to be lower in the South than the national average. In 1958, for example, the department set the long-test thresholds at the level below which fell only 10 percent of exempt employees in each exemption category in the South. The short-test level, equivalent to the current standard test, was set at $125 per week to maintain its previous relationship to the

FIGURE B

State-group median wages as a share of the national median wage, 1968, 1979, 2007, and 2013



Note: The CPS does not report separate data for all 50 states for 1968; data are organized into 30 state groups available consistently from 1968 to the present. The District of Columbia is excluded from this figure. Darker points represent the middle 50 percent of the distribution of state-group median wages (i.e., the 25th percentile to the 75th percentile). This figure originally appeared in David Cooper, John Schmitt, and Lawrence Mishel, *We Can Afford a $12.00 Federal Minimum Wage in 2020* (Washington, D.C.: Economic Policy Institute, 2015); http://www.epi.org/publication/we-can-afford-a-12-00-federal-minimum-wage-in-2020/. See data appendix of that report for methodology.

Source: EPI analysis of Current Population Survey Annual Social and Economic Supplement microdata, various years

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long-test levels. According to the July 23, 2015, congressional testimony of the U.S. Chamber of Commerce, the inflation-adjusted value of that salary level today is $53,485.64, and the $200 short-test level set in 1970 would be $63,741.60 today. In effect, the department has "baked in" its earlier adjustments to account for the South, arguably to a much greater extent than is called for today, when regional differences are much less than they were 50 years ago.

Finally, I offer a comparison between the proposed salary threshold and the Economic Policy Institute's basic family budget, which calculates the cost of providing a modest living in over 600 urban and rural areas across the United States. EPI's family budget data dispel any notion that $50,440 is somehow excessive as a measure of executive, administrative, or professional salaries in any part of the country. Even in rural Mississippi, the cost of modest housing, food, child care, transportation, health care, taxes, and other necessities for a family of two adults and two children averages $60,778 a year, far more than the proposed threshold. The family budget does not include savings,

TABLE 1

Distribution of 30 state-group median wages relative to the national median wage, 1968, 1979, 2007, 2013

	1968	1979	2007	2013
Standard deviation				
All state groups	11.0	9.7	9.5	12.3
Excluding Washington, D.C.	11.2	9.8	9.1	10.7
State-group medians relative to national median				
Number greater than 20% above	0	0	1	3
Number between 10–20% above	2	4	4	5
Number between 0–10% above	9	11	11	7
Number between 1–10% below	9	9	10	14
Number between 10–20% below	7	5	4	1
Number greater than 20% below	3	1	0	0

Note: The Current Population Survey does not report separate data for all 50 states for 1968; data are organized into 30 state groups available consistently from 1968 to the present. Note: This figure originally appeared in David Cooper, John Schmitt, and Lawrence Mishel, *We Can Afford a $12.00 Federal Minimum Wage in 2020* (Washington, D.C.: Economic Policy Institute, 2015); http://www.epi.org/publication/we-can-afford-a-12-00-federal-minimum-wage-in-2020/.

Source: EPI analysis of Current Population Survey Annual Social and Economic Supplement

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TABLE 2

Count of states whose state median college wage is a certain share of the national median college wage, 1979–2014

Percent of national median college wage	1979	2014	Change 1979–2014
100%+	15	13	-2
90-100%	17	21	4
80-90%	14	16	2
70-80%	5	1	-4
Total	36	38	2

Note: Data are for the 50 states and the District of Columbia

Source: Current Population Survey Outgoing Rotation Group Microdata

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vacations, or college expenses, all costs that a bona fide managerial salary should cover. The family budget in rural Arkansas is $60,246, $57,508 in rural Louisiana, and $58,577 in rural Alabama.[18]

7. The Chamber of Commerce's argument that Congress disfavors automatic adjustment of the salary-level test is both wrong and legally irrelevant

   It is irrelevant because Congress in 1938 gave the authority to define and delimit the terms "bona fide executive, administrative, or professional" to the Secretary of Labor and has never taken it back, except with respect to very particular occupations, such as teachers and computer professionals. Those changes only strengthen the clear legal authority of the Secretary to say at what salary level an employee qualifies as EAP or how to change it, as the statute commands, "from time to time." In her Congressional testimony on behalf of the Chamber of Commerce, former Wage and Hour Administrator Tammy McCutchen nevertheless argued that "in 1996, when amending the FLSA to add the Section 13(a)(17) exemption for computer employees, Congress set the minimum hourly wage for exemption at $77.63 [sic] (6 1/2 times the 1990 minimum wage) without providing for automatic increases of that amount. Thus, it seems unlikely that Congress intended the DOL to impose automatic annual increases for the salary-based exemption from the FLSA's minimum wage and overtime requirements."[19] McCutchen failed to mention that a different Congress in 1990 *did* set the earnings test for the exemption of professional computer employees to rise automatically with increases in the minimum wage. The 1996 Congress amended section 13(a)(17) to remove the automatic adjustment. But what Congress said about that subsection of the act in 1996 is irrelevant to whether the Congress in 1938 or at any time thereafter limited the power of the Department of Labor to use an automatic adjustment mechanism to define and delimit the EAP exemption. Congress has had 77 years to add such a restriction to the law if it chose to do so. It has not, though it knows how to do so, as shown by the 1990 and 1996 amendments to section 13(a)(17).

8. Indexing the salary level is appropriate

   EPI agrees with the Department of Labor's rationale for indexing the salary threshold for overtime protection:

   "A rule providing for automatic updates to the salary level using a methodology that has been subject to notice and comment rulemaking would maintain the utility of the dividing line set by the salary level without the need for frequent rulemaking. This modernization of the regulations would provide predictability for employers and employees by replacing infrequent, and thus more drastic, salary level increases with gradual changes occurring at set intervals. Regular annual increases in the salary and compensation levels, instead of large changes that result from sporadic rulemaking, will provide more certainty and stability for employers."

   "The addition of automatic updating will ensure that the salary test level is based on the best available data (and thus remains a meaningful, bright-line test), produce more predictable and incremental changes in the salary required for the EAP exemptions, and therefore provide certainty to employers, and promote government efficiency by removing the need to continually revisit this issue through resource-intensive notice and comment rulemaking." (80 Fed.Reg. 38548)

   The department's reasoning is sound. Any fixed nominal salary threshold will be automatically and increasingly outdated with each passing year as both salaries and inflation continue to rise. The history of updates indicates that the current process—the threshold has been updated only seven times in 78 years—is ineffective in maintaining an appropriate salary threshold that reflects actual EAP compensation. Indexing the threshold in a transparent, predictable way will provide certainty and maintain the effectiveness of the salary threshold in advancing the act's purposes.

a. Indexing to wages or prices

The only substantive issue is whether the threshold should be indexed to wage growth or price growth, as raised by the Department of Labor.

The appropriate metric for updating the salary threshold is a wage metric. A simple inflation adjustment is inappropriate for several reasons. First, prices can sometimes decline, as they did in 2009. This can happen because some items have very volatile prices, with energy costs being the leading example of an item whose price can rapidly escalate or decline. Second, wages can be expected to grow over time and to grow faster than prices. The salary distribution of salaried workers will therefore tend to shift upward every year.

The reason for a wage metric is simple. The salary threshold acts as a bright line between likely EAP-exempt employees and those requiring overtime protections. Given the continuous growth of salaries, that salary line will need to move. By reference to the history of the threshold level, as discussed above, the 40th percentile is an apt bright line to divide the potentially exempt from the certainly nonexempt. It follows that the salary growth at the fortieth percentile appropriately updates that line, capturing the earnings improvements at that line. The simple logic is that a salary threshold requires a salary update.

b. Is reclassification a problem?

Some analysts have argued that the establishment of a new salary threshold will lead to a massive reclassification of salaried employees to be hourly employees. This would involve converting current salaried workers to hourly workers at a much lower rate of pay (i.e., compared with the imputed hourly rate of the former weekly salary assuming 40 hours worked). Such a scenario would, in this view, leave the workers with the same actual weekly earnings once overtime is paid even though they are paid a lower straight-time rate.

The problem with this scenario is that it assumes a market economy which is only one-sided, where employers have all the power to set the terms of exchange and employees have no other choice but to accept the employer's terms. This is never fully the case and will certainly not be the circumstances under which this new threshold will be implemented in the next two years. The employment landscape will be shifting as the economy moves toward full employment, a marker some analysts think we are currently near, and which even less-optimistic analysts consider we will be approaching in the next two years or so. The unemployment rate in July 2015 for college graduates was just 2.6 percent and for "Management, professional, and related" occupations, 3.1 percent.[20] These unemployment rates will be dropping over the next two years and, correspondingly, we can expect the quit rates of salaried workers to increase as employers compete more intensively for quality personnel. This is not an environment where employer choice fully dominates.

A consistent finding of both labor and macroeconomics is that nominal wages are "sticky," meaning that employers rarely will lower them (when employers want to cut wages of incumbent workers, they allow inflation to erode their real value). Thus, there will be extensive pushback to any attempt to lower an incumbent employee's hourly rate of pay. People are sensitive to what their rates are and can compare them with both their own rates in the past as well as others' rates, explicitly or implicitly. They will not be happy having their rates lowered and becoming the equals of other employees who have earned far less than they did in the past.

The setting of the threshold will also establish a clearly observable new norm in the workplace by setting a salary threshold under which employees will expect to earn overtime for extra work. It will be obvious to employees that any reclassification will be done to disadvantage them. These new norms in the workplace will limit employer ability to reshape the salary/wage structure to allow for lower hourly wages in order to accommodate continued extensive hours beyond 40. For these reasons and others it can be expected that employer ability to reconfigure pay rates will have clear limits.

Perhaps this shift to fewer salaried workers with overtime protections and to hourly workers at lower pay rates but working substantial overtime hours could occur over time along with staff turnover. If so, this would be a very slow and unsure process. Such a shift would require that the employer make clear to potential new hires that they are receiving very low hourly rates because they are expected to work many overtime hours. That may not be an attractive package to offer potential new hires who will compare the hourly rates they are offered to other jobs.

The wholesale reclassification of current salaried workers to hourly status, thereby shrinking the pool of full-time salaried employees and significantly raising the exemption threshold each year, seems an unlikely outcome. But if for any reason, the Department of Labor finds indexing at the 40^{th} percentile to be problematic, wage indexation done by adjusting the threshold for changes in the wages and salaries of managers and professionals would be appropriate. The BLS series to accomplish this is the Employment Cost Index for civilian workers, Table 8.[21]

9. The overtime regulation's duties test should be clarified, simplified, and returned to the original concepts expressed in the department's earliest rulemakings

Concepts enunciated in the earliest rulemakings reflect the time when congressional intent was fresh in the minds of department officials who had recently helped draft the FLSA. Those concepts included drastic limitations on the performance of nonexempt work by exempt employees. Originally, the regulations provided that exempt employees could perform no significant amount of nonexempt work, which was expanded to a maximum of 20 percent in 1940. These limits continued to expand over the years and were, unfortunately, abandoned altogether by the Labor Department in 2004. They should be reestablished with a rule that no exempt employee can perform nonexempt tasks during more than half of her work hours during the work week. The idea that an employee who spends all or even most of her time sweeping floors, running a cash register, serving coffee, stocking shelves, unloading trucks, or performing any other nonexempt work could be an executive with no right to overtime pay is absurd and runs contrary to the act's intent that only bona fide executives should be exempt.

The only limitation Congress has imposed on the department's authority to narrow the EAP exemption based on an employee's performance of nonexempt work is found in an exception that applies only to retail and service establishments: "an employee of a retail or service establishment shall not be excluded from the definition of an employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in such workweek are devoted to such activities." 29 USC 13(a)(1). Even with respect to retail and service establishments, therefore, DOL is clearly authorized to limit the EAP exemption to employees who devote no more than 40 percent of the hours in their workweek to nonexempt activities.

10. DOL underestimates how many employees would have their rights changed by the new threshold

The Economic Policy Institute has shown that DOL's reliance on exemption probability estimates made in the 1990s, which do not take into account changes necessitated by court decisions and the 2004 regulatory changes, have led to an undercount of the employees whose rights to overtime pay will change when the threshold is raised from $455 a week to $970. DOL calculates that 4.7 million employees will have their rights changed, while another 10 million will have their entitlement to overtime pay clarified and secured. It is difficult to be certain what the correct number is, but when taking into account those who are currently misclassified as exempt and the millions who lost overtime pay rights in 2004, it appears that 10 million would be a better estimate than 4.7 million.[22]

11. DOL underestimates how many jobs will be created as employers adjust to the new rules

The department underestimates job creation from the new rules because it underestimates how many of the 15 million affected employees earning salaries between $455 and $970 per week are currently being treated as exempt. The National Retail Federation (NRF) provides a clearer understanding of just how few of the affected employees are currently considered nonexempt and entitled to overtime pay by their employers. The NRF, operating on assumptions about the law that are widespread in industry, estimates that more than two million exempt employees in its sector (64 percent of all exempt employees in its sector) will have their right to overtime pay changed by the rule. Appendix C of the NRF report, Rethinking Overtime Pay, lists the top 15 retail occupations by number of currently exempt employees and estimates both the total number of employees and the number of currently exempt employees.[23] Measured against DOL's probability estimates, NRF identifies more than 1.1 million employees as currently exempt who are not. Because DOL does not consider these employees to be currently exempt, none of them is included in its estimates of employees whose rights will change when the threshold increases.

The retail and restaurant sector employs less than 20 percent of the U.S. workforce.

12. Nonprofit, charitable, and human service organizations will not be greatly affected by the rule

Opponents of the proposed rule have made a number of questionable claims, but one claim in particular—that nonprofit organizations providing services to the poor and the disadvantaged will see a crippling increase in personnel costs—is demonstrably false because FLSA coveragedoes not extend to most nonprofit employees or employers. Unless coverage is established for the employer or employees, the protections of the FLSA, including the proposed overtime rule changes, simply do not apply.

Coverage is determined in one of two ways. First, employers who are engaged in business that generates annual business or sales revenues of at least $500,000 per year are covered by the FLSA and must pay the minimum wage and overtime, unless another of the many exemptions in the law applies. The key criterion for this provision is *business or sales revenue*. Most nonprofits, including, for example, charitable organizations providing free meals to the hungry and nonprofits providing addiction or mental health services, are not engaged in business. They provide charitable services and their employees, therefore, are not typically covered by the FLSA.

The second way the FLSA could extend to employees of nonprofits is if employees' work regularly involves them in commerce between states ("interstate commerce")—individual workers who are "engaged in commerce or in the production of goods for commerce." Employees covered as individuals include those who produce goods, (such as a worker assembling components in a factory or a secretary typing letters in an office that will be sent out of state), regularly make telephone calls to persons located in other states, handle records of interstate transactions, travel to other states on their jobs, or do janitorial work in buildings where goods are produced for shipment outside the state. But again, the key is that the employee is engaged in commerce between the states. Most nonprofit organizations do not typically engage in this activity and if they do, can manage this interstate commerce activity so only a few employees are affected.

There are nonprofits that, in addition to their core charitable activities, also manage revenue-producing activities that may bring that part of the organization, but only that part, within the scope of the FLSA. An example could be a prisoner reentry program that as one of its employment strategies builds and sells office furniture to businesses. If this side business produces revenues of at least $500,000 annually, or if its employees are involved in interstate commerce as described above, those employees engaged in that covered commercial business or those employees engaged in interstate commerce are entitled to the protections of the FLSA, including the proposed overtime changes. But that is only fair—if a nonprofit is also competing with for-profit businesses it should be held to the same employment standards as the for-profit businesses. Leveling the playing field among employers was and remains a major policy objective of the FLSA, and requiring nonprofits that compete with commercial enterprises to comply with the same employment standard serves that policy goal.

The overtime changes in the NPRM are not burdensome for any employer. But they will have very little impact on organizations providing charitable services.[24] A nonprofit organization, unless it is also engaged in commercial activities, will not be deemed a covered enterprise, and only those individual employees engaged in interstate commerce will be covered. Most nonprofits and their employees will not be covered by the FLSA and, consequently, not affected by the proposed overtime change.

13. Workers will not lose privileges and flexibility

Employer organizations sometimes claim that workers will lose privileges and flexibility if they become entitled to overtime pay. It is true that at higher salaries, salaried workers have more workplace flexibility than hourly workers, but research by Lonnie Golden of Pennsylvania State University shows that there is little difference at salary levels below $50,000 a year.[25]

Using the General Social Survey as his database, Golden examined the relationship between being paid on a salary basis or an hourly basis at different levels of income and the outcomes for employees in terms of work-family conflict, work stress, and options for flexibility such as being able to vary one's work day starting and ending times, taking time off during the work day to attend to family matters, and being able to refuse employer requests for overtime work.

Following are excerpts from the key findings of his report:

- Hourly workers paid at least $22,500 but less than $50,000 are less able than salaried employees to adjust their starting and ending times, but the differences, while not trivial, are not large enough to constitute a serious loss of flexibility among such workers. The share of salaried workers who report that they are "sometimes" or "often" able to change their starting and quitting times was 43–44 percent for hourly employees paid between $22,500 and $49,999; for salaried workers the share was 53–55 percent. There is therefore little danger that effectively "converting" salaried workers paid up to $50,000 to hourly status by raising the overtime pay threshold to $50,000 would markedly reduce their work scheduling flexibility.
- Generally it is the salaried workers much higher up the pay distribution who have a lot more flexibility to vary their start and end times and these workers will not be affected by an increase of the OT pay threshold to the modest levels discussed here. Above $60,000, 80 percent of salaried workers have this flexibility.
- Contrary to a common assumption, salaried workers at the affected pay levels appear to have no more ability to take time off for personal or family matters than do hourly workers at the same annual earnings levels. Only 34 percent of salaried workers earning $40,000–$49,999 report that it is "not at all hard" to take time off during the work day to take care of personal or family matters, whereas 41 percent of hourly workers at the same earnings level say it is not at all hard. Thus, effectively "switching" employees from salaried to hourly by requiring employers to track their hours for purposes of overtime pay would not reduce, and might even increase, this important element of work flexibility.
- Salaried workers at the affected pay levels either report greater work-family conflict and work stress or report greater incidence of the conditions (such as mandatory overtime work) associated with such conflict and stress. Thus in terms of outcomes they have little to lose and in fact something to gain from falling within new OT thresholds.
- Because the salaried work force starts out with higher work-family conflict, a *de facto* reclassification as hourly might slightly reduce their work-family conflict.
- Levels of work stress are slightly higher among salaried workers than hourly workers, thus work stress would likely not increase.
- While working irregular shifts is a condition associated with greater work-family conflict (generally and for salaried workers), transforming salaried workers above $22,500 into hourly workers does not threaten to make these workers' schedules any more irregular.
- Because salaried workers in the affected pay brackets already work mandatory overtime at the same frequency as hourly workers and more days of overtime in general than hourly workers, raising the overtime threshold for them would not increase and in fact could decrease the work stress and work-family conflict associated with mandatory overtime.

Endnotes

1. Tony Schwartz and Christine Porath, "Why You Hate Work," *New York Times*, May 30, 2014

2. Catherine Saint Louis, "Researchers Link Longer Work Hours and Stroke Risk," *Well* [New York Times blog]

3. Marc Linder, *Time and a Half's the American Way: A History of the Exclusion of White-Collar Workers From Overtime Regulation, 1868-2004* (Iowa City: Fanpihua Press, 2004)

4. U.S. Department of Labor, Wage and Hour Division, Executive, Administrative, Professional ... Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (Washington: U.S. Govt. Print. Off., 1940).

5. EPI analysis of the Bureau of Labor Statistics' Employer Cost of Employee Compensation data series.

6. Lawrence Mishel and Alyssa Davis, *Top CEOs Make 300 Times More than Typical Workers: Pay Growth Surpasses Stock Gains and Wage Growth of Top 0.1 Percent* (Washington, DC: Economic Policy Institute, 2015)

7. EPI analysis of Current Population Survey data

8. U.S. Department of Labor, Wage and Hour Division, *Executive, Administrative, Professional ... Outside Salesman" Redefined*

9. The short tests refer to duties tests as revised in 1949 to include "special proviso[s] for high salaried" executive, administrative and professional employees.

10. Department of Labor, Wage and Hour Division, *Report and Recommendations on Proposed Revisions or Regulations, Part 541, Defining the Terms "Executive," "Administrative," "Professional," "Local Retailing Capacity," [and] "Outside Salesman"* (Washington: U.S. Govt. Print. Off., 1949)

11. Tammy D. McCutchen, "Statement of the U.S. Chamber of Commerce on Examining the Costs and Consequences of the Administration's Overtime Proposal to the House Education and Workforce Committee's Subcommittee on Workforce Protections," July 23, 2015.

12. *Occupational Employment and Wages, May 2014: 43-3031 Bookkeeping, Accounting, and Auditing Clerks.* (Washington, D.C.: U.S. Department of Labor, 2015)

13. *Occupational Employment and Wages, May 2014: 13-2011 Accountants and Auditors* (Washington, D.C.: U.S. Department of Labor, 2015)

14. *Occupational Employment and Wages, May 2014: 13-2011 Accountants and Auditors*

15. U.S. Bureau of Labor Statistics, *National Compensation Survey, All United States, December 2009–January 2011*, "Table 24: Civilian Supervisory Workers: Mean and Median Weekly and Annual Earnings and Mean Weekly and Annual Hours."

16. This excludes the outlier of Washington, D.C., which is also excluded from Figure B.

17. We exclude the District of Columbia, which is an even greater high-wage outlier than Connecticut. With this exclusion, the standard deviation in 1968 was 11.2, falling to 10.7 in 2013; including the District of Columbia, the standard deviation rose from 11.0 to 12.3. Data source: David Cooper, John Schmitt, and Lawrence Mishel, *We Can Afford a $12.00 Federal Minimum Wage in 2020* (Washington, D.C.: Economic Policy Institute, 2015)

18. Economic Policy Institute Family Budget Calculator, August 2015

19. Tammy D. McCutchen, Statement of the U.S. Chamber of Commerce on the Administration's Overtime Proposal

20. EPI analysis of the Bureau of Labor Statistics Current Employment Statistics data series.

21. "Employment Cost Index for Wages and Salaries, for Civilian Workers, by Occupational Group and Industry: Index for 'Management, Professional, and Related Workers.'"

22. Ross Eisenbrey and Lawrence Mishel, *The New Overtime Salary Threshold Would Directly Benefit 13.5 Million Workers: How EPI's Estimates Differ from the Department of Labor's* (Washington, D.C.: Economic Policy Institute, 2015)

23. Oxford Economics, *Rethinking Overtime: How Increasing Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries.* (Washington, D.C.: National Retail Federation, 2015); Note the NRF commissioned study was written before DOL issued the NPRM, hence the NRF's use of a $984 threshold in its report. NRF published a short, partial update using $970, but not to Appendix C.

24. Certain organizations that may be a nonprofit are covered by the FLSA by operation of law. These include Federal, state or local government agencies; hospitals (establishments primarily engaged in offering medical and surgical services to patients who generally remain in the establishment overnight, several days, or for extended periods); residential care facilities primarily engaged (50% or more of income attributable to) in the care of the sick, the aged, the mentally ill or developmentally disabled who live on the premises; and preschools, elementary and secondary schools (as determined under state law) and colleges.

25. Lonnie Golden, *Flexibility and Overtime Among Hourly and Salaried Workers: When You Have Little Flexibility, You Have Little To Lose* (Washington, D.C.: Economic Policy Institute, 2015)

College and University Professional
Association for Human Resources

October 8, 2015

Chairman Cresent Hardy
Subcommittee on Investigations,
Oversight and Regulations
2361 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Alma Adams
Subcommittee on Investigations, Oversight
and Regulations
B-343C Rayburn House Office Building
Washington, D.C. 2051

Dear Chairman Hardy and Ranking Member Adams:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR) thank you for holding today's hearing on the U.S. Department of Labor's (DOL) recently proposed overtime rule and its impact on small entities. Small entities protected by the Regulatory Flexibility Act include hundreds of colleges and universities that fit within the Act's definition of small business, small organization and/or small governmental jurisdiction.

CUPA-HR serves as the voice of human resources in higher education, representing more than 19,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions and 600 two-year and specialized institutions who will be affected by the proposed overtime changes. Colleges and universities employ over 3.9 million workers nationwide and there are institutions of higher education located in all 50 states.

Please find attached CUPA-HR's comments in response to the proposed rule, signed by 18 higher education associations representing 4,300 two- and four-year institutions. The higher education community believes that an increase to the current minimum salary threshold of $23,660, which was set in 2004, is due. The proposed minimum salary threshold ($50,440), however, is simply too high and, if implemented, will force colleges and universities to reclassify tens of thousands of employees in white collar jobs, that offer and require significant professional autonomy, which have always been exempt and are well suited to exempt status.

Such a change is not in keeping with the intent of the FLSA and will negatively impact many employees, institutions and students. Mass reclassification would be to the detriment of many employees often resulting in diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement. While hourly pay and nonexempt status is appropriate for certain jobs, it is not appropriate for all jobs; otherwise Congress would not have created any exemptions to the overtime pay requirements.

Additionally, institutions would need to both reduce services and raise tuition to accommodate the costs and challenges associated with complying with the proposed rule to the detriment of the very students these institutions serve. The changes would also increase the costs of and thus inhibit important research done by universities and their employees.

We have urged DOL to lower the threshold and ask you to do the same.

Thank you again for your leadership on this critical issue.

Respectfully Submitted,

Joshua A. Ulman
Chief Government Relations Officer
College and University Professional Association for Human Resources
Center Point Commons
1811 Commons Point Drive
Knoxville, TN 37932
202.642.1970
julman@cupahr.org

Cc: Members of House Small Business Committee

cupa-hr

College and University Professional Association for Human Resources

September 4, 2015

SUBMITTED ELECTRONICALLY VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov under e-Docket ID number WHD-2015-0001

Ms. Mary Ziegler
Director of the 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: Notice of Proposed Rulemaking; Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees (80 Fed. Reg. 38515, July 6, 2015) (RIN 1235-AA11)

Dear Ms. Ziegler:

I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) and the undersigned higher education associations in response to the above referenced Notice of Proposed Rulemaking (NPRM). CUPA-HR serves as the voice of human resources in higher education, representing more than 19,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions and 600 two-year and specialized institutions.

STATEMENT OF INTEREST

Colleges and universities employ over 3.9 million workers nationwide and there are institutions of higher education located in all 50 states.[1] The Fair Labor Standards Act (FLSA) and similar state laws cover all or nearly all of these employees. Many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the regulations that the U.S. Department of Labor (DOL) proposes to modify in the NPRM, yet many of those earn

[1] See http://nces.ed.gov/programs/digest/d13/tables/dt13_314.20.asp.

less than the NPRM's proposed minimum salary level for 2016 of $970 per week (or $50,440 per year).[2] As a result, colleges and universities, their employees, and the students they serve would be significantly affected by the changes in the NPRM.

The following higher education associations respectfully submit these comments outlining the impact of the NPRM on institutions of higher education and their students and employees and offer suggestions for improving the proposal. The higher education associations listed below represent approximately 4,300 two- and four-year public and private nonprofit colleges and universities and the professionals that work at those institutions.

American Association of Collegiate Registrars and Admissions Officers
ACPA—College Student Educators International
American Association of Community Colleges
American Association of State Colleges and Universities
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
American Council on Education
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
Hispanic Association of Colleges and Universities
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
NIRSA: Leaders in Collegiate Recreation

SUMMARY

On March 13, 2014, President Barack Obama issued a memorandum directing the Secretary of Labor to make changes to the regulations governing exemptions to the FLSA's overtime pay requirements for executive, administrative and professional employees (known as the EAP or white collar exemptions). On July 6, 2015, the Department of Labor (DOL) published the NPRM, which proposes several changes to the white collar exemptions and invites public comment on those proposals.

[2] According to the National Center for Education Statistics, 2.9 million (approximately 75%) of the 3.9 million workers in higher education are "professional staff," including at least 1 million employees that do not have teaching as their primary duty. See http://nces.ed.gov/programs/digest/d13/tables/dt13_314.20.asp. Median salary for exempt employees in higher education are detailed in CUPA-HR's salary survey and this related article http://chronicle.com/article/Median-Salaries-of/228735?cid=megamenu#rp.

Under the current regulations, an individual must satisfy three criteria to qualify as a white collar employee exempt from federal overtime pay requirements: first, they must be paid on a salaried basis (the salary basis test); second, that salary must be at least $455/week ($23,660 annually) (the minimum salary requirement or salary threshold); and third, their "primary duties" must be consistent with executive, professional or administrative positions as defined by DOL (the primary duties test). Employees who do not meet these three requirements or fail to qualify for another specific exemption as outlined in the regulations must be treated as "hourly" or "nonexempt" employees and must be paid for each hour worked and at a rate of one and a half times their normal hourly rate for all hours worked over 40 in a given work week (the latter is known as "overtime"). To ensure employees are paid for all hours worked and at the proper rate for overtime, employers must carefully track the hours nonexempt employees work.

DOL proposes several changes to the white collar exemptions, including increasing the current salary threshold of $455 per week ($23,660 annually) by 113% to $970 per week (or $50,440 per year), which the agency estimates will be the 40th percentile of earnings for all full-time salaried workers in 2016. DOL also proposes automatic annual increases to the salary threshold based on the Consumer Price Index for All Urban Consumers or by pegging the salary threshold to the 40th percentile for weekly earnings of all full-time non-hourly (i.e., salaried) employees. DOL proposes publishing the annual increase 60 days before the new threshold becomes effective. Finally, while DOL did not propose any specific changes to the duties test, it said in the NPRM that it is considering doing so. The agency asked several questions that suggest it is considering reinstating aspects of the pre-2004 "long duties test," which would limit the amount of time exempt employees could perform nonexempt work and/or eliminate the provision in the current regulations on concurrent duties (i.e., the provision in the regulations that allows exempt employees to concurrently perform exempt and nonexempt work such as a manager who supervises employees and serves customers at the same time).

We agree that an increase to the minimum salary threshold is due and that DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused. The proposed minimum salary threshold, however, is simply too high. To comply with the proposed change, colleges and universities would increase salaries for a few individuals whose current pay is closest to the new threshold, but would need to reclassify the vast majority of impacted employees to hourly status. While in some cases these changes would be appropriate and would keep with the intent of the FLSA, in too many instances colleges and universities would be forced to reclassify employees that work in jobs that have always been exempt and are well-suited to exempt status. This mass reclassification would be to the detriment of employees, institutions and students. Employees would face diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement with no guarantee of increased compensation. As nonprofits and public entities, institutions would not be able to absorb the increased costs that come with higher salaries for exempt employees, expanded overtime payments and other labor and administrative costs associated with transitioning traditionally exempt employees into nonexempt status. In the face of these costs and challenges, institutions would need to both reduce services *and* raise tuition, to the detriment of students. The changes would also increase the costs of and thus inhibit important research done by universities and their employees.

DOL has proposed a minimum salary level that is far higher than it has adopted in the past and fails to account for regional and industry sector differences in pay. We urge DOL to reconsider and set a salary level more in line with historic trends. Eighty-eight percent of the 796 CUPA-HR members responding to a survey on the NPRM felt DOL should take a more measured approach to raising the salary level, with a majority choosing a salary level of either $29,172 (21.5%) or $30,004 (36.5%), and nearly a third (30.1%) indicating $40,352 would be more appropriate. According to the NPRM preamble, DOL considered these salary levels as part of the current proposed update. The first amount represents the current level — which was set in 2004 — as adjusted for inflation; the second number would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and in retail; and the last number represents median earnings for all hourly and salaried workers combined (rather than just salaried).

If DOL will not consider lowering the proposed salary level for all employers, it should do so for nonprofit and public employers and/or consider expanding the exemption for certain learned professionals from the minimum salary level. DOL also should phase in the new salary level over time to allow employers and employees enough time to make adjustments and preparations, particularly if DOL decides to implement a salary level as high as what it proposed in the NPRM or something similar. This would help mitigate some of the negative consequences related to the proposal for colleges and universities, their employees and students.

Moreover, the undersigned do not believe DOL has the authority to impose automatic updates, and even if it did, the agency should not automatically update the salary level, as doing so will also negatively impact institutions' budgets and budget planning, their ability to provide merit-based increases and employee morale. DOL should instead revisit the salary level at regular intervals, as it did from 1938 to 1975, when the agency updated the salary level every five to nine years, and each salary increase should be made through notice and comment rulemaking that complies with the Administrative Procedure Act. If DOL does choose to move forward with automatic updates, the updates should occur at most every five years and the agency should provide the public with notice of the new level at least one year prior to implementation.

Finally, for procedural reasons alone, DOL should not change the duties tests at this time. DOL's decision to consider possible changes to the duties test without offering a specific proposal violates the spirit if not the letter of the Administrative Procedure Act. Like DOL's proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act and the various Executive Orders related to regulatory activity. Asking questions is simply no substitute for an actual regulatory proposal that the regulated community can consider, evaluate and comment upon. We strongly urge DOL to provide specific regulatory language for any changes to the duties test in a separate NPRM after it has set the salary level and allow the public sufficient time to review and comment on that proposal.

COMMENTS

I. DOL Should Lower the Proposed Minimum Salary Threshold

Many employees on campuses are currently exempt pursuant to the regulations that the DOL proposes to modify in the NPRM, and many of those earn less than the NPRM's proposed minimum salary level for 2016 of $970 per week (or $50,440 per year).[3] These employees include those in departments such as academic affairs (librarians, advisers, counselors), student affairs (residence hall managers, admissions counselors, financial aid counselors, student activities officers), institutional affairs (human resources professionals and trainers), fiscal affairs (accountants, head cashiers), auxiliary services (textbook managers, ticket managers) external affairs (alumni relations and fundraising professionals), facilities (head of mail services, farm manager), information technology, research and clinical professionals (including many with advanced degrees and those engaged in advanced training such as post-doctoral trainees and residents), athletic affairs (head coach, assistant coach, physical therapist, trainer), managers in food service, security, and building and grounds, and community outreach/educational extension functions (agricultural extension agents, industry extension consultants).[4]

While the undersigned agree that an increase to the minimum salary threshold is due and DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused, the proposed minimum salary threshold is simply too high. To comply with the proposed change, colleges and universities would increase salaries for a few, but would need to reclassify the vast majority of impacted employees to hourly status. While in some cases these changes would be appropriate and keep with the intent of the FLSA, in too many instances colleges and universities would be forced to reclassify employees that work in jobs that have always been and are intended to be exempt to the detriment of the employee, the institution and students.

A. Impact of Proposed Minimum Salary Level on Higher Education Employees

1) The Proposed Minimum Salary Level Will Trigger Mass Reclassification of Traditionally White Collar Employees, Particularly at Institutions With Fewer Resources and/or in Areas With Lower Cost of Living

As noted above, if DOL were to implement its proposal, colleges and universities would need to reclassify many currently exempt employees to hourly status, as institutions simply cannot afford to raise those employees' salaries to the proposed 2016 minimum of $50,440. The State University System of Florida, for example, found that raising all currently exempt salaries to

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[3] See id.

[4] Over 800 CUPA-HR members responded to a survey and identified employees in these occupations as currently exempt employees that make less than the proposed salary threshold.

meet the new threshold would cost its 12 universities a total of $62 million annually.[5] Similarly, the Iowa Association of Community College Trustees found that doing so would cost Iowa Community Colleges $12.6 million in the first quarter of 2016 alone.[6] Another university in the south told CUPA-HR that it estimates it would cost $17 million annually to adjust salaries to meet the minimum salary level — a similar cost estimate to another large private research university, which estimated costs at $14.8 million. These estimates are low in that they do not account for additional costs employers would need to incur to address resulting wage compression[7] and administrative costs (including the need to implement new or expanded timekeeping systems) related to implementing the rule.[8]

Faced with such cost increases, institutions would have no choice but to reclassify large numbers of employees from exempt to hourly, even though many of those employees work in jobs that have always been and are well suited by the nature of the duties to be exempt. In fact, in a recent survey of 814 higher education human resource professionals conducted by CUPA-HR, nearly 87% of those responding to the question (655 of 754) indicated they would have to reclassify *any* exempt employee currently making less than $47,500, as they would not be able to adjust salaries upward to maintain exemptions for those employees.

The number and type of employees reclassified at any given college or university, however, would depend largely on the institution's resources, location and workforce. In many cases, those with fewer resources and/or in areas with lower cost of living would be the most impacted by the proposal. For example, the Iowa Association of Community College Trustees estimates in its comments that "community colleges in the most rural areas of Iowa will have 40% to 60% of their staff impacted by the proposed Salary Level Test."[9] A small Texas university responding to CUPA-HR's survey stated that of their 437 exempt employees, 239 or 54.8% are currently paid under $50,440, representing the majority of entry-level and mid-level professionals. The director of athletics at a small southern university filed comments noting the disproportionate impact the proposed minimum salary will have on lower cost areas, stating that the change would increase his annual payroll costs by 10% — a cost he could not absorb without layoffs. This point was reiterated by a small liberal arts college in rural New York State,

[5] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

[6] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

[7] Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed and to avoid wage compression. Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.

[8] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.

[9] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

which informed CUPA-HR that it would have to lay off 20 of its 85 currently exempt employees making less than $50,440.

That said, employees at smaller institutions and those in lower cost areas of the country are not the only ones that would be impacted by the proposal — all colleges and universities would be significantly impacted. Because pay in higher education and the nonprofit and public sectors is frequently lower than nationwide averages, colleges and universities would need to reclassify a disproportionately larger percentage of their workforce than those in many other industries.[10] Employees working in higher education often trade lower pay for better quality of life or job satisfaction — such as the unique opportunity for professionals to pursue research — or other benefits unique to the higher education setting which make it attractive to employees, such as room and board or tuition reduction.[11] The value of these benefits, however, may not be counted towards meeting the minimum salary level.

Even larger universities and state systems will need to reclassify large numbers of employees. One Midwestern university state system said "[i]f the proposed rule is promulgated, the status of over 5,000 employees would change from exempt to nonexempt." A large public university in the South calculates that its nonexempt population would increase from 1/3 of its current regular workforce to 1/2, since it could not afford the $11.8 million salary increase to keep the current level of exemption. Similarly, the University of Iowa said in its comments that "over 2,700 individuals we employ ... would immediately change from exempt salaried to nonexempt hourly" as a result of the proposal.[12] One public land grant institution with 24,000 total employees informed CUPA-HR that 35% of its exempt workforce has salaries below the proposed threshold, including highly-educated scientists and postdoctoral researchers. Similarly, a large Florida university noted that approximately 25% of the exempt workforce would be affected if the proposal is implemented, and the changes would affect "those university functions that rely heavily on funding from grants, donations and other limited sources of funding support (primarily science and research jobs)."

In fact, several large research universities responding to CUPA-HR's survey noted they would need to reclassify many highly-educated research professionals. One large research university reported that 50% of the exempt scientific and research employees are below the minimum threshold of $50,400. The National Postdoctoral Association has also expressed concern about the impact of the proposal on its members.[13] Salaries for researchers working on grants are often below DOL's proposed minimum threshold of $50,440. In fact, the National Institutes of Health sets stipend levels for *postdoctoral* researchers well below DOL's proposed minimum salary level, as shown by the chart below.[14] According to the chart, any postdoctoral researcher

[10] The responses of more than 1,100 two- and four-year institutions to CUPA-HR's 2015 annual salary survey of professionals in higher education indicates that the median earnings of these individuals is about 10% lower than the median earnings of their counterparts in other industries.
[11] See http://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-board-time.
[12] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[13] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[14] Available at http://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-048.html.

with less than five years of experience would no longer be eligible for the white collar exemption, even though they clearly perform what has been traditionally considered exempt professional/learned work.

Career Level	Years of Experience	Stipend for FY 2015	Monthly Stipend
Postdoctoral	0	$42,840	$3,570
	1	$44,556	$3,713
	2	$46,344	$3,862
	3	$48,192	$4,016
	4	$50,112	$4,176
	5	$52,116	$4,343
	6	$54,216	$4,518
	7 or More	$56,376	$4,698

Based on the response to CUPA-HR's survey, the proposed minimum salary threshold would also require reclassification of many employees in other traditionally exempt jobs. According to one institution, 61% of exempt employees holding at least a bachelor's degree would have to be reclassified, including professional auditors and accountants and professionals in education, training, library, life sciences, community and social services, business and administration, educational extension services, and human resources.

2) Reclassification May Adversely Impact Employee Flexibility, Career Advancement and Ability to Perform Job Without Providing Any Increase in Compensation

As stated above, the undersigned agree that an increase to the minimum salary threshold is due and DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused. That said, while hourly pay and nonexempt status is appropriate for certain jobs, it is not appropriate for all jobs; otherwise Congress would not have created any exemptions to the overtime pay requirements. Moreover, while hourly employees have the advantage of receiving additional compensation for hours worked over 40 in one week, there are also many advantages to exempt status. Employers must closely track nonexempt employees' hours to ensure compliance with overtime pay and other requirements, and they often limit employees' work hours to avoid costly overtime pay. As a result, nonexempt employees often have less workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement than their exempt counterparts. In addition, not all jobs lend themselves to hourly work, and reclassified employees may find it difficult to do traditionally exempt jobs as hourly employees.

As noted above, many postdoctoral and other researchers and scholars are paid less than the proposed minimum salary threshold. In the face of limited budgets, some postdocs' pay might be raised above the proposed salary level, some may be laid off, and others would be reclassified as hourly. Yet, like many jobs that traditionally have been and are intended to be exempt, performing research does not lend itself to rigid, supervised schedules. Researchers may find it difficult to schedule lab time and experiments to fit within a required schedule for hourly employees. They also may struggle with abandoning incomplete experiments because they have exhausted their hours for the week or day. One CUPA-HR member describes the situation with postdocs as follows:

> Research in all fields requires collaboration with many individuals both within the institution and throughout the country, and frequently throughout the world. This type of collaboration is vital to innovation, teaching and discovery. Introducing a time clock into this equation will not foster this environment. It will only create another barrier to creative productivity. Much of this research is funded by the federal government, which has a vested interest in research productivity. This is particularly critical in the fields of medicine and technology, where improving the public good is a primary function of government.
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> Postdocs are critical to the success of obtaining grants and conducting research. Such a drastic change in the salary level means that either postdocs will not be able to work the necessary hours to be effective or that less grant funding will be available, as it will go to postdoc salaries currently below the proposed threshold.

This incompatibility between hourly employment and research/original scholarship may be why the National Postdoctoral Association did not even contemplate in their comments that postdocs would be classified as hourly, expressing concerns instead that "institutions may reduce the number of postdoctoral scholars they employ [or] choose to move postdoctoral scholars into non-employee classifications ..."[15]

Postdocs are not the only job classification that does not fit well within the hourly employee framework. In response to our survey, for example, one CUPA-HR member institution noted that for many land-grant institutions, the ability of "farm managers to do administrative work as well as farm work to support research efforts in experimental farms/greenhouses," typically for the benefit of that state's residents, is more productively completed when that individual has autonomy over their own schedule, and varies considerably by growing season. We also have heard from a significant number of members about the impact the proposal would have on athletic coaches, admissions recruiters, residence life and admissions staff who travel for work, necessarily keep irregular hours and have jobs with fluctuating seasonal demands that do not lend themselves to hourly status.

Reclassified employees may also witness a reduction in workplace flexibility that would have allowed them to adjust and incorporate their hours to fit their personal schedules. It is hard for employers to be flexible about when and where an employee works when they must carefully

[15] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

track that employee's hours. As the American Society of Association Executives noted, "flexible work arrangements pose challenges for employers tracking and capturing all compensable work hours and controlling overtime costs for nonexempt employees."[16] Many of our members have expressed concern about this issue. The University of Iowa said in its comments: "nonexempt hourly employees ... will have less independence in determining their work hours" and will be unable "to balance work needs with personal demands since there will be less flexibility within our monthly payroll cycle and budget."

Higher education is a sector that has traditionally been able to attract and accommodate a disproportionate number of part-time professionals. Personal demands that may require full-time employees to seek reduced or part-time schedules will be further hampered by the proposed salary level and resulting threat of reclassification. This is evidenced in much of the feedback that CUPA-HR members have provided, such as the statement from a Southeastern member that, "flexible work arrangements provided for exempt employees seeking reduced or part-time schedules for personal reasons will be significantly reduced under the proposed changes."

Because it is not clear from the DOL's statements in the preamble that it fully understands this issue, we provide the following example. Under the current regulations, an employee who performs tasks that clearly meet one or more of the exempt duties tests can be classified as exempt so long as his or her salary exceeds $23,660 per year. Thus, a part-time employee working a 50% schedule can still qualify as exempt so long as he or she works in a position that has a full-time salary of approximately $47,000 per year. This is true not because the full-time equivalent salary is $47,000, but because the part-time salary is still in excess of the regulatory minimum.

Under the DOL's proposed minimum salary level, that employee would no longer qualify for exemption. Instead, in Year 1 under the proposal, an employee working a 50% schedule would need to be working in a position earning more than $100,000 on a full-time basis. Obviously, without a pro rata provision, the number of employees who will be eligible for part-time exempt employment will be severely limited.

This was echoed by another comment, which states:

> We understand the intent of this regulation to stem abuse of overtime compensation, but the extension of the minimum exempt salary would be devastating to our small nonprofit. We are two professional women who job share as two half-time exempt employees, each earning less than $50,000. We love our job and are satisfied with our compensation. Neither of us wants to work full-time and the nonprofit cannot afford to pay us each $50,000 year. Hourly compensation does not make sense, as we both manage our own

[16] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1182.

> schedules and projects. Please do not adopt this regulation, and continue to provide us the flexibility to work as half-time professionals.[17]

Additionally, reclassification to nonexempt status may provide employees with fewer career training and advancement opportunities that would increase employees' earning potential later in their career. One Southwestern CUPA-HR member expressed concerns that, "the loss of potential experience and growth opportunities for nonexempt staff [and] the loss of potential out-of-town training opportunities due to the extensive time it takes to administer such travel and potential overtime cost" may delay an employee's trajectory up the wage ladder. Many employees that will need to be reclassified as a result of the NPRM are professionals who have already made great strides in their careers and, as one survey respondent puts it, "will now be required to go back to counting hours and be limited in working overtime, which is counterintuitive to their desire to do what they need to do to get the work done to [further] advance their careers." Similarly, when discussing the impact of reclassification on postdoctoral scholars, one survey respondent states that a 40-hour work week will negatively impact "the intent of a postdoc to advance his/her research training ... which would lead to academic papers, new discoveries and advancement of their research career."

Although easily inferred from the aforementioned examples, it is worth highlighting here that loss of autonomy, loss of flexibility and loss of career advancement opportunities contribute to a negative impact on employee morale. Many CUPA-HR members are concerned that DOL has not given sufficient acknowledgement to the reality that many higher education professionals view their exempt status as a reflection and recognition of their advanced education, academic success and professional prestige. Loss of exempt status may be seen as a demotion in perceived status, even if all other aspects of the work remain the same and even if their overall compensation remains stable or increases with the addition of overtime pay. As one university from New Mexico states, "employees in our organization typically tie exemption status to 'status' within the University, [so] moving an employee from exempt to nonexempt is therefore typically viewed as a demotion even though there is no change in pay." An Ohio university reports similar issues that, "there is typically a status aspect associated with being exempt, and changing status when nothing has changed regarding their duties will upset many people." At a Pennsylvania university, reclassifying "professional positions that regularly use independent discretion and independent decision making" will make employees "feel demeaned and undervalued." In fact, concerns that morale and status will be negatively affected were repeatedly referenced by over 300 of the responding institutions that took part in the CUPA-HR survey.

Moreover, exempt employees, many times, receive richer benefits than nonexempt employees, the access to which current employees would lose if they are reclassified as a result of the proposal. For many CUPA-HR institutions, vacation benefits for nonexempt employees are not as generous as those for exempt employees. Seven institutions comprising six different states

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[17] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2324 .

reported that the vacation accruals for exempt employees is greater than that of nonexempt employees. An institution from Iowa reports that, "new exempt employees have 4 weeks of vacation when they begin their employment [while] nonexempt begin with 2 weeks" which will result in all reclassified employees' vacation time being cut in half.

Reclassified employees may also see a reduction in their access to tuition reimbursement. Many institutions offer unique reimbursement plans that allow employees to pursue a higher degree for a fraction of the cost an individual outside of the industry would pay. However, according to one institution from Ohio, "employees who are exempt and will become nonexempt will receive less tuition benefits for family members, [as the] tuition waiver is increased over a 5-year time period for nonexempt and starts at 100% for exempt." Another institution from Florida is worried that reclassified employees will have to work for a whole year before they are eligible for tuition benefits they were entitled to previously, as exempt employees are "eligible to take advantage of tuition benefits one year earlier than nonexempt employees."

It is also important to keep in mind that being classified as exempt or nonexempt affects *how* an employee is paid and what hours they may work in a given week, but it does not necessarily affect *how much* they are paid. For employees that are reclassified from exempt to hourly, this would mean eligibility for overtime pay, but not necessarily any increase in pay. University of Iowa noted in its comments that "over 2,700 individuals we employ ... would immediately change from exempt salaried to nonexempt hourly" as a result of the proposal, but those employees' "work hours will necessarily be restricted to 40 hours per week [as t]he alternative of paying overtime would generally be cost prohibitive; the annual cost of one hour of overtime per week for each of our 2,700 impacted employees would increase University payroll costs by over $4 million."[18] These sentiments were echoed by the Iowa Association of Community College Trustees, which said in its comments that "[t]he same dollars that aren't available for raising all professional salaries to the proposed salary level are in short supply for overtime payments."[19] A CUPA-HR member at a large Southwestern state university similarly noted in response to the survey that because of limited budget resources, "overtime eligibility will not necessarily result in a windfall of overtime income for newly classified nonexempt employees, or in the hiring of additional staff due to resource issues."

It also doesn't mean that – to avoid overtime pay – higher education employers would alternatively add additional employees. Since colleges and universities are under constant pressure — including from the federal government itself — to keep the costs of higher education as affordable as possible, none of the alternatives are financially viable. Institutions cannot raise salaries, they cannot start paying new overtime, and they cannot hire additional employees. The only likely result is less service and support for students, fewer employees to perform more work and longer wait times for service recipients.

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[18] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.

[19] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

Finally, in some cases, institutions would be required to cut certain positions so they may raise salaries for others, resulting in layoffs for certain employees. As the director of athletics at one institution noted in his comments, if DOL increases the threshold to the proposed level, he would need to cut 10% to 20% of the department's staff, stating "I would not be alone in my ultimate course of action." The National Postdoctoral Association has also contemplated this possibility, expressing concerns that "if the proposed change to $50,440 is made effective immediately ... institutions may reduce the number of postdoctoral scholars they employ."[20]

B. Impact of Proposed Minimum Salary Level on Higher Education Institutions and Students

For colleges and universities, the administrative and labor costs associated with these changes would be significant in a time of limited and sometimes shrinking budgets for higher education.[21] The Iowa Association of Community College Trustees noted that "by necessity, education is personnel rich, and comprises 75% of their annual expenses," so changes in employee salaries have a large impact on college and university budgets.[22] As noted above, the State University System of Florida found that raising salaries to meet the threshold would cost its 12 universities a total of $62 million annually,[23] the Iowa Association of Community College Trustees found that doing so would cost Iowa Community Colleges $12.6 million in the first quarter of 2016 alone,[24] the University System of Maryland has put this cost at $15.5 million and another university in the south told CUPA-HR that it estimates it would cost $17 million annually. These estimates are low in that they do not account for additional costs employers would need to incur to avoid wage compression[25], corresponding benefits-cost impacts, and administrative costs related to implementing and administering the rule.[26] While institutions may be able to compensate for some of the salary increases driven by the proposal by eliminating certain positions and avoid other increases by reclassifying employees, both these

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[20] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

[21] See Universities Feel the Heat Amid Cuts at http://www.wsj.com/articles/SB10001424052702303734204577466470850370002; see also, Statement of F. King Alexander to the U.S. Senate Committee on Health, Education, Labor & Pensions. http://www.help.senate.gov/imo/media/doc/Alexander3.pdf

[22] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

[23] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

[24] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

[25] Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed and to avoid wage compression. Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.

[26] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.

options would cause a reduction in services. In short, in the face of these costs, institutions would be under pressure to both reduce services *and* raise tuition to cover costs.[27]

The impact on students is obviously tangible and would be felt directly and substantively in the forms of higher tuition costs and reduced student services. Many higher education institutions' primary source of revenue is derived through tuition and fees. As nonprofits and public entities, colleges and universities would not be able to absorb the increased costs that come with higher salaries for exempt employees or expanded overtime payments. The NPRM states that the new salary levels "will transfer income from employers to employees in the form of higher earnings." However, since there are no profits to transfer to employees, additional costs, whether due to increased salaries, overtime payments or related administrative costs, would need to come from increases in tuition, placing additional burdens directly on the shoulders of students. Such an experience is evident in Iowa Community College Trustees' comments stating "they have no profits to transfer to employees [and] the income transfer means taking tuition money from our students' pockets [in the form of] tuition increases [resulting in] students' significantly delaying, and likely dropping out of, their college education."[28] Another institution from New York similarly reports that "the costs would likely be passed on to students/families as [it is] 94% tuition driven and cannot absorb the additional compensation and related (for example, retirement contribution match) costs."

The negative potential impact that this proposal could have on students does not stop with greater financial burdens, but is also exacerbated by the potential for crucial student services to be cut as well. As one institution puts it, "to avoid paying overtime costs, we will need to make scheduling adjustments to allow for some employees who currently work at off-hour events and travel to spend less time in departments where they service students during regular business hours." Many of the intrinsic benefits of higher education, such as the ability for students to receive "extra help" or "guidance" in their studies and personal lives, may be greatly diminished as institutions accommodate budgetary stresses by "restricting hours of operations ... negatively impacting services provided to students." Institutions also would be required to cut certain positions, resulting in layoffs for employees and diminished resources for students. As noted above, the National Postdoctoral Association has also contemplated this possibility, expressing concerns that "if the proposed change to $50,440 is made effective immediately ... institutions may reduce the number of postdoctoral scholars they employ [or] choose to move postdoctoral scholars into non-employee classifications ..."[29]

For low-income students, the potential negative effects of the proposal are only exacerbated. At a time when the Executive Office of the President states that "large gaps remain in educational achievement between students from low-income families and their high-income

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[27] We have heard from institutions that costs cannot be recuperated by a tuition increase due to state government mandates, leaving them with few options for how to absorb such a large increase in their budgets.
[28] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[29] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

peers," [30] it should prove worrisome when a higher education institution reports that "reclassification of workers based on pay level will have a significant impact on our student workers (need to reduce number of workers and/or hours to keep student worker pay budget consistent) by effectively reducing employment opportunities and financial aid to students." A faith-based university in Ohio, which dedicates one third of its operating budget to financial aid, states that, "the financial burden this DOL change will put on us will subject all of these benefits to [a] decrease." When the Executive Office of the President highlights that a main barrier to college access for low-income students is a "lack of guidance and support they need to ... enroll and persist in their studies," it is worrisome that a New York university will not have the "ability to be flexible and provide services that our students have come to expect and rely on, especially our under-represented students."

C. DOL Should Lower the Proposed Minimum Salary Threshold and Phase the New Level in Over Time

As outlined in detail above, if the proposal is implemented, colleges and universities would need to reclassify far too many employees who work in jobs that have always been and are intended to be exempt to the detriment of the employee, the institution and students. This is because DOL has proposed a minimum salary level that is far higher than it has in the past and fails to account for regional and industry sector difference in pay.

We urge DOL to reconsider and set a salary level more in line with historic trends. Eighty-eight percent of the 796 CUPA-HR members responding to our survey felt DOL should take a more measured approach to raising the salary level, with a majority choosing either a salary level of $29,172 (21.5%)[31] or $30,004 (36.5%)[32] and nearly a third choosing $40,352 (30.1%)[33].[34]

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[30] Increasing College Opportunity for Low-Income Students, Promising Models and a Call to Action at https://www.whitehouse.gov/sites/default/files/docs/white_house_report_on_increasing_college_opportunity_for_low-income_students.pdf
[31] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 23 percent increase over the current threshold.
[32] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 27 percent increase over the current threshold.
[33] This equals approximately the 30th percentile of earnings for all full-time salaried workers and is a 71 percent increase over the current threshold.
[34] The complete responses were as follows:

Which level do you think DOL should use?

Answer Options	Response Percent	Response Count
$29,172/year or a 23% increase over the current threshold	21.5%	170
$30,004/year or a 27% increase over the current threshold	36.5%	289
$40,352/year or a 71% increase over the current threshold	30.1%	238
$50,440/year or a 102% increase over the current threshold	6.4%	51

According to the NPRM preamble, DOL considered these salary levels as part of the current proposed update. The first amount represents the current level — which was set in 2004 — adjusted for inflation; the second number would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and retail; and the last number represents median earnings for all wage and salaried workers combined. CUPA-HR's survey results are consistent with a nationwide poll by polling company, inc./WomanTrend, which found that 65% of respondents would increase the salary limit by no more than 50% to $35,490.[35] Taking a more measured approach will better ensure that DOL meets its own goal of avoiding costs associated with setting a salary level so high that it requires reclassification of employees to hourly status "who pass the duties test" (80 Fed. Reg. at 38531).

If DOL will not consider lowering the proposed salary level for all employers, it should do so for nonprofit and public employers[36] and/or consider expanding the exemption for certain learned professionals from the minimum salary level in a manner consistent with the State University System of Florida comments.[37] DOL also should phase in the new salary level over time to allow

$56,316/year or a 138% increase over the current threshold	2.4%	19
I don't know	3.0%	24
	answered question	**791**
	skipped question	**18**

[35] See Partnership to Protect Workplace Opportunity fact sheet at http://protectingopportunity.org/wp-content/themes/ppwo/ppwo_1pager.pdf.

[36] The American Society for Association Executives has also requested that DOL "set a lower salary level applicable to all employers or the minimum salary level at a lower percentile of the national average for nonprofit[s]." See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

[37] If DOL decides to expand the exemption to the minimum salaried level for certain learned professionals in line with what the State University System of Florida recommends, it should be done in a separate rulemaking where stakeholders have the opportunity to review and comment on a specific regulatory proposal (see herein section III). The State University System of Florida recommended the following in its comments:

> We recommend a new and revised detailed duties test for learned professionals in post-secondary colleges and universities. The current language is ambiguous relative to this class lacking sufficient detail to allow employers to make fair and confident decisions regarding the proper application of this exemption. This is illustrated by the number of opinion letters and requests for opinion letters over the past 20 years. The questions of teaching, imparting knowledge, classroom versus research, credit vs non-credit, librarians, coaches, trainers, graduate assistant versus teacher of record and the like, remain unaddressed. In an effort to provide clarity and rationale for the distinctions between exempt and nonexempt for each, the CUHRE/APAC is proposing a revision to information outlined in U.S. DOL Wage and Hour Division Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act with insertions noted in [bold] as follows.
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> > Educators ~~**Teachers**~~ are exempt if their primary duty is teaching, tutoring, instructing, lecturing, **advising, coaching, mentoring or researching** in the activity of imparting or creating knowledge, and if they are employed and engaged in this activity ~~**as a teacher**~~ in a higher educational establishment. Exempt teachers include, but are not limited to,

employers and employees to make adjustments and preparations, particularly if DOL decides to implement a salary level as high as what it proposed in the NPRM or something similar. This would help mitigate some of the negative consequences related to the salary increase for colleges and universities, their employees and students.

1) DOL's Proposal Is Inconsistent With the Purpose and History of the Minimum Salary Level

For over a half century, DOL has consistently stated the purpose of the minimum salary level is to provide a "ready method of screening out the obviously nonexempt employees" (69 Fed. Reg. at 22165). Keeping with this purpose, DOL has historically set the minimum salary at a level that tends to screen out only those employees who by virtue of their compensation obviously will not meet the duties tests. While over the years DOL has used different formulas to calculate the minimum salary level and made various changes to the duties test, the average minimum salary level for all tests for all years adjusted for inflation is $42,236.23. In addition, while the time periods between adjustments to the salary level have varied, increases to the level have been fairly consistent and have amounted to somewhere between 2.8% to 5% annually since 1949.

The proposed minimum salary level of $50,440 is well above and a significant departure from historic minimum salary levels, and amounts to an annualized increase of 10.29% from the last adjustment in 2004.[38] By making such a dramatic increase, DOL appears to be abandoning the historical purpose of the salary level, as the proposed level would not only screen out employees that obviously cannot meet the duties tests, but also many employees who currently *do* meet the tests and work in historically exempt positions. As noted above, DOL's proposed minimum salary level will force colleges and universities to reclassify 40%, 50% and possibly as much as 60% of their currently exempt workers who currently meet the duties test, including highly educated scientists, athletics coaches managing entire teams, and admissions, human resources and other professionals, all of whom are relied upon for their skills and who

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> **professors, instructors, lecturers, librarians, academic advisors, researchers, post-doctoral associates, resident advisors, athletic trainers or coaches.** The salary and salary basis requirements do not apply to bona fide ~~teachers~~ **educators.** Having a primary duty of teaching, tutoring, instructing, **advising, coaching, mentoring or researching** in the activity of imparting or creating knowledge includes, by its very nature, exercising discretion and judgment.

These modifications will clarify and capture the academic professionals responsible for creating the holistic experience of the student's matriculation process from onboarding as freshman through to achievement of terminal degrees.

See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

[38] Wage growth from 2004-16 was far below 10.29% annually and in coming to this number DOL seems to have discounted the effects of the Great Recession (2007-2009) and resulting wage stagnation during that perid. See, *Sticky Wages and Nominal Rigidities: Why Nominal Wages Have Been Stagnant Since The Great Recession,* http://www.forbes.com/sites/jonhartley/2015/05/31/sticky-wages-and-nominal-rigidities-why-nominal-wages-have-been-stagnant-since-the-great-recession/.

consistently exercise discretion and independent judgment with respect to matters of significance.

DOL also provides little justification for this departure or for the $50,440 salary level, other than it amounts to the 40th percentile of earnings for all full-time salaried workers in 2016. Yet DOL cites no authority for its determination that the 40th percentile is the appropriate salary level. The 40th percentile has not been a target for past salary levels, and there is no indication that it serves as a particularly useful marker for delineating between which jobs are "obviously nonexempt" and which are not.

2) The Proposed Salary Level Fails to Account for Regional and Sector Differences in Pay

By setting the proposed minimum salary at the 40th percentile of earnings for all full-time salaried workers nationwide, DOL discounts regional and industry differences in pay to the detriment of nonprofits, public employers and those operating in areas with lower costs of living.

As noted above, pay in higher education and the nonprofit and public sectors is frequently lower than nationwide averages, and as a result colleges and universities are more impacted by the rulemaking than those in many other industries.[39] In short, the 40th percentile of all full-time salaried workers nationwide could be the 50th or 60th percentile for colleges and universities.

This is particularly true for institutions operating in areas with a lower cost of living. A salary level appropriate for New York City, San Francisco and Washington, D.C., will not work for Birmingham, Boise, Columbus, Detroit, Baton Rouge or Memphis, let alone the rural and small towns spread out across the country. In many "college towns," in fact, the local college or university is the major employer in town. Yet, DOL's proposed salary threshold is *higher* than minimums set under *any* state laws, nearly $10,000 higher than that of California and nearly $15,000 higher than New York, two of the states with the highest cost of living. As the American Society for Association Executives noted in its comments, "according to the relocation calculator of the FAS Relocation Network, an employee in Washington, D.C., earning an annual salary of $50,400 would only need to earn $26,505 to have a comparable standard of living in Marshalltown, Iowa, where the cost of living is calculated as 47.5% less expensive than in the nation's capital."[40] Further regional concerns with setting the minimum salary at the 40th percentile for all full-time salaried workers is evidenced in an Oxford economics study on regional pay commissioned by the National Retail Federation. For example, the 40th percentile of all full-time salaried workers in the states of Louisiana and Oklahoma is equivalent to

[39] The responses of more than 1,100 two- and four-year institutions to CUPA-HR's 2015 annual salary survey of professionals in higher education indicates that the median earnings of these individuals is about 10% lower than the median earnings of their counterparts in other industries.
[40] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1182.

$784/week — for Oklahoma this means that 54.7% of the currently exempt workforce earns below $970 per week.[41]

As a result, in many cases employees working at colleges and universities in lower cost areas of the country will be classified as hourly, while their counterparts performing the same job elsewhere will be classified as exempt, simply based on regional differences in pay.[42] In addition and as outlined in section I. A., those colleges and universities "with fewer resources and/or in areas with lower cost of living would be the most impacted by the proposal." This would be far less of an issue if the proposed salary level was more in line with historic trends.

3) DOL Should Phase In Over Time Any Salary Increase

Although CUPA-HR supports increasing the minimum salary to a level below DOL's current proposal, should the Department decide to increase the salary to $970 per week or anything above an inflation adjustment from the current (2004) level, it should do so incrementally, over the course of several years, to help smooth the transition and to allow institutions to adjust their budgets, raise tuition incrementally, and change work flows to minimize disruption. As currently proposed, DOL's minimum salary level would increase approximately 113% all at once. As has been discussed in great detail throughout these comments, this would pose huge complications for institutions of higher education. Phasing in the requirement over multiple years would mitigate some of these negative consequences for colleges and universities, their employees and their students.

Widespread and logical support for a phase-in of the salary level is evidenced in various and multiple requests DOL has received in this regard. The Iowa Association of Community College Trustees comments state that "should the Department continue to move the NPRM forward ... a minimum of a five-year phase-in period [should be adopted] for compliance."[43] This argument for a phased-in approach, as a result of the innumerable uncertainties posed in the NPRM, is made even stronger in the comments provided by the State University System of Florida which states that, "doing so would provide the DOL and the affected employers with real cost experience data with which to consider future changes to the minimum salary test going forward."[44] Complying with the NPRM is an incredibly difficult task for colleges and universities; however, the concern, as an Indiana institution reports, "is not just to comply with the law [but also] having enough time to balance all of these competing priorities strategically" and is why at least "a two- or three-year phase-in to give us time to respond" is necessary. The National

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[41] See https://nrf.com/sites/default/files/Documents/retail%20library/OE%20Addendum%202%20-%20State%20level%20overtime%20threshold%20analysis.pdf.

[42] DOL recognizes this possibility, noting that it chose the 40th percentile rather than a higher percentile because a higher percentile "could have a negative impact on the ability of employers in low-wage regions and industries to claim the EAP exemptions for employees who have bona fide executive, administrative or professional duties as their primary duty ..." 80 Fed. Reg. 38532.

[43] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

[44] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

Postdoctoral Association has also urged DOL to phase in the requirement "[g]iven the enormous complexity and cost of transitioning a large segment of the scientific workforce from an exempt to nonexempt status" and "unintended consequences that would negatively affect postdoctoral scholars in the short term" if the rule were to become effective immediately.[45] Many postdocs are paid on federally-sponsored research grants that must be proposed, awarded and funded three to five years in advance.[46] A phased approach would also allow employers to better adjust employment and other contracts, including collective bargaining agreements.

In addition, due to the rapid nature of the required increase, employers may make classification decisions today that they would not make if the increase was phased in over three or four or even five years. This would allow higher education the ability to prepare for the changes in a way that makes economic sense. It also would allow institutions to determine with additional certainty how many overtime hours are actually being worked by employees in the $23,660 to $50,440 range. Currently, because many of these exempt employees do not record their time, institutions are faced with an information deficit. As the State University System of Florida states, "at this point, the nation is going into this change virtually blind, since employers, for the most part and by definition of exempt status, have never tracked hours of work for exempt employees ... [requiring] several years of cost experience."[47] Without information regarding these hours, institutions would need to guess at how many hours are worked, and those guesses will almost certainly account for more overtime than will actually be worked, resulting in a net loss of income to impacted employees.

One large southern institution reports that its internal employee satisfaction/wellbeing survey indicated that exempt professional employees self-report routinely working closer to 50 hours per week than 40. If that were borne out in practice as hourly work, the cost to the institution of 10 hours per week of overtime for such newly-eligible employees would be an additional $10 million per year.

By allowing a gradual increase, colleges and universities can begin gathering the necessary data to ensure as smooth a transition as possible and to mitigate the significant budgetary impact on the institution. Although many of the same issues will exist with respect to morale, flexibility and opportunity, a gradual, phased-in implementation of the new minimum salary would limit the financial disruption experienced by both institutions and their employees.

II. DOL Should Not Automatically Update the Salary Levels

DOL proposes to increase the minimum salary threshold each year henceforth by tying it to either the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly

[45] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

[46] Many institutions have expressed concern about existing federal and state research grants which specify how funds must be allocated — specifically, jeopardizing millions of dollars of research funding by increasing salaries above the permitted threshold in the contract.

[47] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

earnings of full-time salaried employees. Employers would be given only 60 days' notice to adjust to the annual increases. The undersigned do not believe DOL should automatically update the salary level, as doing so would negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. Moreover, we do not believe DOL has the authority to impose automatic updates.

DOL should instead revisit the salary level at regular intervals, as it did from 1938 to 1975, when the agency updated the salary level every five to nine years and each salary increase should be made through notice and comment rulemaking that complies with the Administrative Procedure Act. If DOL does choose to move forward with automatic updates, the updates should occur at most every five years based on inflation rather than the 40th percentile, and the agency should provide the public with notice of the new level at least one year prior to implementation.

1) DOL Lacks the Authority to Impose Automatic Updates

DOL lacks the authority to impose automatic updates to the salary level and must engage in notice and comment rulemaking *each* time it wishes to make an increase. When Congress authorized DOL to issue regulations under the FLSA, it did not grant the agency the authority to index the minimum salary level. Rather Congress tasked DOL with updating the exemptions defining and delimitating the terms executive, administrative and professional employee from "time to time," *by regulation*. DOL recognized its lack of authority in this regard in 2004, when it acknowledged that "nothing in the legislative or regulatory history ... would support indexing or automatic increases." [48]

Congress could have expressly provided authority to impose automatic updates as it has expressly permitted indexing in other statutes, including the Social Security Act and the Patient Protection and Affordable Care Act, but it did not. Moreover, when Congress has amended the FLSA to increase the minimum wage, it similarly has not indexed that amount. Congress's actions — or, more precisely, lack of action — on this front demonstrates a clear intent that the salary level be revisited as conditions warrant, allowing DOL, and the regulated community, the opportunity to provide input into the appropriate level.

2) Regardless of Authority, DOL Should Only Increase the Salary Level Via Notice and Comment Rulemaking

Regardless of whether it has authority or not to impose automatic updates, DOL should only increase the salary level via notice and comment rulemaking. To date, every time DOL has increased the salary test, it has done so via Administrative Procedure Act rulemaking by proposing a new salary level and allowing the public to comment on the proposal. This process not only forces thoughtful examination of the exemptions and public participation, but also requires DOL to follow the Regulatory Flexibility Act and to undertake a detailed economic and

[48] 69 Fed. Reg. 22171

cost analysis — which is an important part of assessing the impact of any increase to the salary level. It also allows the agency to tailor any changes to the salary level and other regulatory requirements so the exemptions better meet their statutory purpose in the face of changing workforces and changing economies.

The history of changes to the exemptions exemplifies this point. Over the years, DOL rulemakings have made various adjustments to salary levels. Each time, the duration between updates and the rates of increase have varied (generally within a range), and in many cases DOL has imposed different salary levels for executives, professionals and administrative employees and different salary levels for different duties tests. Each time, DOL engaged in thoughtful rulemaking that resulted in tailored changes aimed at helping to ensure that the exemptions remained true to their purpose in the face of changing workforces and changing economic circumstances.

In the current rulemaking, however, DOL proposes to announce a new salary level each year in the *Federal Register* without notice and comment, without a Regulatory Flexibility Act analysis, without any of the other regulatory requirements established by various Executive Orders and without input from stakeholders. Each of those regulatory requirements is intended to force the agency and the public to consider the consequences of its proposed actions. Something as important as the FLSA exemptions, that impact millions of employees and employers, warrants this type of due diligence.

DOL needs to fulfill its duty and regularly update the threshold through notice and comment rulemaking, as it has with every past salary increase. Obviously, the agency has met that requirement before and can do so again in the future without imposing the rigid and costly automatic updates being considered.

3) Automatically Updating the Salary Level Would Negatively Impact Institutions' Budgets and Budget Planning, Ability to Provide Merit-Based Increases and Employee Morale

Automatically updating the salary level would negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. The annual increases proposed by DOL would create uncertainty year in and year out as to the application of the white collar exemptions. Once the specific salary threshold is ascertainable for a new year, colleges and universities would need to rapidly assess which exempt employees would be affected and determine the impact and viability of increasing salaries to maintain exemptions versus converting employees to hourly status.

The financial impact of conducting such analysis year in and year out is significant — and the cost of annual salary adjustments and reclassifications would be far more. In fact, 91% (644 of 705 responses) of CUPA-HR members responding to a survey question on this point said automatic increases would negatively impact their budgets, and 63.6% (444 of 698 responses) said it would negatively impact their ability to engage in financial planning.

Automatic updates would also interfere with operational and human resource functions as forced annual increases and related wage compression will make it hard for institutions to provide merit-based pay increases. Out of those responding to the survey question on this topic, 68.7% (475 of 691 responses) said automatic updates would negatively impact their institution's ability to provide merit-based increases to all employees.

Beyond such financial and operational impacts, transitioning employees from exempt to nonexempt status often triggers morale issues.[49] If automatic updating goes into effect, employers would need to reclassify employees on an annual basis, which would likely cause long-term morale issues. The morale issues would be exacerbated by two other unintended consequences resulting from the automatic increases — wage compression and deterioration in institutions' ability to provide merit-based increases. A whopping 86.6% (603 of 696 responses) of CUPA-HR members responding to a survey said the automatic increases would cause morale issues as a result of reclassification, wage compression and limit on merit-based increases.

In short, increasing the minimum salary level each calendar year would create uncertainty for employers in their budgeting and planning process and significantly undermine employee morale.

4) If DOL Imposes Automatic Updates, the Updates Should Occur at Most Every Five Years and the Agency Should Provide the Public With Notice of the New Level at Least One Year Prior to Implementation

If DOL does choose to move forward with automatic updates despite the undersigned's objections, the updates should occur at most every five years and the agency should provide the public with notice of the new level at least one year prior to implementation. A majority of CUPA-HR members surveyed felt five years is a reasonable period for revisiting the salary threshold, and nearly 60% felt they needed at least a year to implement any automatic updates.

As outlined above, annual automatic increases negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. While the undersigned question DOL's authority to automatically update the salary level and feel DOL and the regulated community would be better served if the agency used notice and comment rulemaking for any increase in the salary level, by extending the update window to five years, DOL could avoid many of the negative consequences associated with automatic annual increases.

DOL proposes to determine the new salary level each year by indexing it to certain data sets collected by the Bureau of Labor Statistics. Under either indexing method proposed by the DOL, it will be virtually impossible to determine the new salary level each year in advance of the

[49] See, infra, section I. A. 2).

DOL's pronouncement in the *Federal Register*. As a result, indexing will not make compliance with the exemptions easier and more routine; rather the indexing proposal creates enormous uncertainty and administrative chaos and will likely require an annual reconsideration of the classification for employees whose status will depend upon (potentially) the responses to a survey conducted several years prior, instead of a legal analysis of the executive, administrative and professional positions.

A lead time of 60 days as DOL has proposed is not nearly enough time for employers to evaluate the impact of the salary levels on labor costs and make sound decisions regarding compliance with the rule. In fact, 173 CUPA-HR members expressed a sense of severe or extreme hardship with having to implement increases within 60 days. As one member states, "our institution comprises five separate entities with a total of 40,000+ employees from across [our Midwestern state]. It would constitute a significant hardship for our institution to accomplish the analysis, formulate recommendations, inform stakeholders, communicate/educate staff and actually initiate the change to include all administrative details such as timekeeping for newly nonexempt employees." This uncertainty will create a trickle-down harm to employees. For instance, employers may implement hours reductions or salary freezes so that they can earmark money for labor costs in order to cover the increased payroll expenses created by the changes to the salary levels.

Furthermore, the timeframe becomes even more impractical given the likelihood that the annual increases will likely be off-cycle of an institution's fiscal and academic budget year. Many institutions will have already completed the budgeting process for their current academic year and fiscal year cycles, and requiring the rule to be implemented within 60 days unnecessarily burdens many higher education budgets. Challenges that arise as a result of a spike in costs will most likely result in layoffs because, as one Arkansas institution points out, "state budget dollars and tuition are set well ahead of the fiscal year [and] adjusting salaries could lead to layoffs, as we cannot raise tuition mid-year and will not receive additional state funding mid-year." Further concerns that a 60-day implementation period will harm tight budgets is also clear in an Alaska institution's response, which reports that the tight timeframe will impose an extreme hardship on the institution because, "state-funded appropriations [are] made a year or more in advance, [while] contracts are annual or multi-year, and collective bargaining agreements[50] [are made on] a three-year cycle," highlighting the impossibility of the potential task at hand.

For these reasons, DOL should limit updates to every five years and provide at least one year's notice of increases to the salary level.

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[50] With regards to collective bargaining agreements, a firm representing many institution noted that: *A significant portion of the university system's workforce is comprised of employees covered by a collective bargaining agreement among our 50 unions. Any changes to wages for positions or classifications covered by one of the collective bargaining agreements (CBA) would be a mandatory subject of bargaining, which could be a daunting task given that we administer 50 CBAs. We are very concerned that it would be very challenging to adequately address the concerns of each group in an equitable manner to meet as short of a deadline as it seems might be implemented based on the proposed rulemaking.*

5) If DOL Imposes Automatic Updates, the Updates Should be Based on Inflation Rather Than the 40th Percentile

If DOL imposes automatic updates, it should tie such updates to inflation rather than pegging it to the 40th percentile of all full-time salaried workers, because implementation of the rule itself will dramatically impact who is identified as a salaried worker and thus corrupt the outcome of the 40th percentile in future years. This could create a series of exponential increases to the salary level caused by changes brought about by implementation of the rule itself.

DOL predicts that in year one of the proposed new regulations alone, 4.6 million currently exempt workers will need to be reclassified as nonexempt or have their salaries raised to maintain exempt status because they currently do not earn a high enough salary to qualify for exempt status (80 FR 38518). Employers may choose to (i) reclassify such workers as nonexempt and convert them to an hourly rate of pay, (ii) reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked, or (iii) increase the salaries of such workers to the new salary threshold to maintain their exempt status. No matter which of these three options employers choose, the effect will be to drastically increase the 40th percentile in the coming years, skewing the number and making it an unreliable index, which is influenced by the rule itself.

In short, if DOL is correct that 4.6 million workers who are currently part of the BLS data will no longer qualify for exempt status under the proposed new regulations due to insufficient base salaries, then there are 4.6 million workers who will either be dropped from the data due to conversion to an hourly rate of pay or will be paid more in total compensation or base salary in response to the new salary level threshold. Accordingly, the 40th percentile of all full-time non-hourly-paid workers will necessarily shift drastically upwards as employers change the compensation of these 4.6 million workers. It is difficult to predict with any level of accuracy exactly what the BLS data on full-time non-hourly-paid workers would look like a few years from now as employers respond to the new salary level of the proposed regulations. It is not difficult to predict, though, that the 2.6% average annual growth rate that the DOL reports has occurred for the 40th percentile between 2003 and 2013 (see 80 FR 38587) is a far cry from the actual annual growth rates that would occur in the first several years after enactment of the new regulations. With an average annual growth rate drastically exceeding the 2.6% that DOL anticipates, it will not take more than a handful of years for the duties tests to be rendered nearly superfluous, as very few employees who are currently eligible for the exemptions would receive a high enough salary level to qualify for exempt status, regardless of their duties. In the low-wage regions and industries, the duties tests would become superfluous even sooner.

For all of these reasons, if the DOL enacts a final rule that includes automatic updates to the salary level based on indexing, the indexing should not be tied to the 40th percentile of all full-time non-hourly-paid employees.

III. DOL Should Not Make Changes to the Duties Test Without Issuing a Separate NPRM Containing Specific Proposed Regulatory Language

For procedural reasons alone, DOL should not change the duties test at this time. DOL's decision to consider possible changes to the duties test without offering a specific proposal violates the spirit if not the letter of the Administrative Procedure Act. Like DOL's proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act and the various Executive Orders related to regulatory activity. Asking questions is simply no substitute for an actual regulatory proposal that the regulated community can consider, evaluate and comment upon. We strongly urge DOL to provide specific regulatory language for any changes to the duties test in a separate NPRM after it has set the salary level and allow the public sufficient time to review and comment on that proposal.

CONCLUSION

The undersigned respectfully request DOL to consider our suggested changes and thank the agency for the opportunity to comment.

Respectfully Submitted,

Joshua A. Ulman
Chief Government Relations Officer
College and University Professional Association for Human Resources
Center Point Commons
1811 Commons Point Drive
Knoxville, TN 37932
202.642.1970
julman@cupahr.org

Basil Thomson
Government Relations Specialist
College and University Professional Association for Human Resources
Center Point Commons
1811 Commons Point Drive
Knoxville, TN 37932
603.582.7334
bthomson@cupahr.org

On Behalf of the Following Undersigned Organizations:

American Association of Collegiate Registrars and Admissions Officers
ACPA—College Student Educators International
American Association of Community Colleges
American Association of State Colleges and Universities
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
American Council on Education
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
Hispanic Association of Colleges and Universities
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
NIRSA: Leaders in Collegiate Recreation

Independent Insurance Agent®

Statement on Behalf of the
Independent Insurance Agents and Brokers of America
Before the
United States House of Representatives
Small Business Subcommittee on Investigations, Oversight and Regulations

October 8, 2015

IIABA is the nation's oldest and largest trade association of independent insurance agents and brokers, and we represent a nationwide network of more than a quarter of a million agents, brokers, and employees. Our members are small, medium, and large businesses that offer all lines of insurance, including property, casualty, life, and health insurance, employee benefit plans, and retirement products. Unlike other insurance distribution channels, independent insurance agencies and firms present consumers with a choice of policy options and have access to a range of different insurance companies.

The Department of Labor ("Department") proposes dramatic and sweeping changes that would have detrimental effects for workers and for the general public. The Department's proposal would dramatically, substantially, and arbitrarily increase the amount of salary required for a person to qualify for exempt status as an executive, administrative, or professional employee from the current level of $455 per week to approximately $970 per week beginning next year. Any employee earning less than this significantly higher threshold would no longer satisfy the requirements for the exemption and would become non-exempt or overtime-eligible. IIABA recognizes that the salary levels have not been altered since 2004 and agrees that a modification of some form is warranted, but an increase of more than 113% is disproportionate and unjustifiable. In contrast, simply adjusting the 2004 levels for inflation between 2004 and 2014 would raise the salary thresholds to $570 per week and result in a more reasonable increase of 25.3%. Unfortunately, the immense magnitude of the proposed adjustment will take away the exempt status of countless employees and have effects in the insurance marketplace and on consumers that have been underestimated and overlooked by the Department.

The challenges and problems created by imposing such a significant salary threshold increase are compounded by the fact that this adjustment will be applied on a one-size-fits-all basis in all regions of the country. This proposal ignores the sizable wage, income, and cost of living disparity that exists between affluent areas and other regions, and it will have a particularly adverse and disproportionate impact on those who reside or work in rural areas and regions with a lower cost of living. There is no need or rationale for establishing such a high salary threshold on a national basis, especially since states possess the authority to institute their own minimum salary levels for white collar employee exemptions of this nature.

IIABA is also troubled that the proposal would lock in these drastic revisions and, for the first time in the 77-year existence of the Fair Labor Standards Act, institute automatic annual increases to the salary thresholds. The notice suggests this new framework would provide "more certainty and stability for employers," but the reality is that annual adjustments of this nature (which could be instituted with as little as 60 days prior notice) would simply add to the compliance burden and compel employers to constantly assess and modify employee salaries in an effort to achieve the least disruptive and costly results possible under the rules. IIABA acknowledges that revising the salary thresholds only once in a 40-year period (which is what has occurred between 1975 and 2015) was inadequate and too infrequent, but the decision to institute annual increases at this excessive level is an unprecedented overreaction that will make it more difficult for businesses (especially small ones) to maintain compliance with the law, manage their staffs, plan for the future, and provide customers with the same degree and quality of service.

The proposed rules will have unfortunate yet predictable repercussions if implemented as drafted. Owners of independent insurance agencies and other employers will inevitably act to ensure that the impact of any rule changes have a neutral effect on their businesses, and many will take steps to maintain total compensation at existing levels. Insurance agencies operate in highly cyclical and volatile business environments and with incredibly thin margins, and many will be unable to pay overtime to those who previously qualified as exempt employees or to offer compensation increases that move those individuals above the new thresholds. Instead, they will be forced to cut base salaries, reduce or eliminate other benefits, utilize automation and outside vendors to a more significant extent, or find other ways to offset any increases in costs and overall compensation that arise as a result of the revisions. Employers will also be forced to reclassify many of their valued employees and reduce the number of exempt workers, and those affected in this manner will suffer the indignity of a perceived demotion, lose the flexibility and autonomy that comes with exempt status, and have their opportunities for advancement and promotion hindered. In addition, these changes will damage and undermine the hard-earned reputations of businesses and force employers to implement measures that are not in the best interests of the public. The promulgation of these proposed revisions will force employers to limit the working hours of valuable and senior-level employees, curtail or eliminate previously-available services, and forbid staff from responding to customer needs at critical times, and, as a result, it will be the average American consumer who is harmed and injured most by these rule changes.

In addition to the negative economic effects for employers, employees, and the public, the proposed rule also imposes significant new compliance burdens on businesses of all sizes. The Department estimates that businesses will need only one hour on average to review and familiarize themselves with the changes and only five additional minutes per week to schedule and monitor each affected worker expected to be reclassified as non-exempt. These projections underestimate the new compliance challenges facing businesses, as employers will be forced to spend considerable resources regularly assessing employee salary levels and restricting and tracking the work performed by employees that were previously exempt. The significant increase in the minimum salary levels ensures that knowledgeable employers will take steps to ameliorate or eliminate the economic impact of the changes, and this will require ongoing action and oversight by businesses. The notice of proposed rulemaking estimates that there are one million potentially affected "white collar" workers in the insurance industry, so the revisions will have a profound and especially sizable impact in our particular sector.

IIABA worries especially about the effects on our smaller members. According to a national study of the insurance agency universe completed by IIABA last year, 72.3% of independent insurance agencies have annual revenues of under $500,000 and these small enterprises dedicate a higher percentage of their resources on staff compensation compared to their larger counterparts. Businesses of this size already face significant economic and regulatory challenges, and they are less likely to possess the financial flexibility that bigger entities will use to work around any changes in the overtime rules.

While many of the effects of the proposed rule for independent insurance professionals are similar to the results that would arise in other industries, there are some insurance-specific considerations. First, the highly regulated nature of the insurance business creates unique challenges for insurance agencies and makes it impossible for them to pass along the new compliance costs that this proposal would impose. Specifically, the prices of insurance products are closely regulated by state officials, and our members are unable to charge their customers more or otherwise recover any new payroll costs from insurance buyers. The ability of agents and brokers to charge fees to their clients is also severely limited or prohibited by law in most jurisdictions. Second, while the proposed rule will hinder the ability of a wide range of industries to be accessible and responsive to their customers, the implications of such a result are particularly disturbing in the insurance industry. Insurance agencies are businesses that provide individuals, families, and commercial clients with coverage that addresses their needs and protects their assets and interests. When an insurance loss occurs (e.g. an individual is in a car crash or his/her home burns down), insureds naturally seek the assistance of their insurance providers for guidance and assistance with the claims process. They expect their insurance agency and trusted advisors to be available. Claims often occur at inopportune times and do not conveniently take place during the eight-hour window of the conventional business day, and independent insurance agencies take pride in the fact that they are accessible and ready to help when a disaster or loss occurs. The ability of agents and brokers to provide such support, service, and responsiveness, however, will be directly hindered by the implementation of the proposed rule.

In addition, it should be noted that the proposed regulations also directly apply to and affect IIABA and the dozens of affiliated state and local associations that advocate on behalf of independent insurance agents and brokers. The American Society of Association Executives and others have thoughtfully commented on the proposal and addressed the implications that these revisions will have for non-profit associations, and we share and echo that perspective.

Other Remarks

In addition to the substantive comments offered above, IIABA would like to address two additional related issues:

- First, the notice observes that many employers are concerned that employees who would become newly entitled to overtime compensation will lose the flexibility to check email or access electronic work files from outside of the office or to otherwise work remotely because of concerns about overtime liability. This is a source of interest and concern for many IIABA members, and we were disappointed to read that the Department views these issues as distinct and separate from the current rulemaking. If the Department promulgates these proposed revisions to the salary levels as proposed, employers will scramble to come into compliance with the new standards and will need to quickly assess how to utilize, classify, compensate, and monitor their various employees. The Department's perspective concerning offsite email access and related issues is relevant to the decision-making that employers will engage in following the adoption of any adjustments, and we urge you not to delay the issuance of any guidance that could be helpful to employers in this regard.

- Second, IIABA respectfully requests that the Department extend the comment period to enable our organization and its members to have a more meaningful opportunity to review, vet, and consider these revisions. This proposal is complex and its impact is significant, and the short comment period has not provided us with the ability to adequately collect input from our members and assess all of the likely effects of this rule. The need for additional time is heightened because the Department proposes automatic annual increases to the salary levels that essentially make the revisions perpetual in nature. In the past, salary level adjustments and other changes to the overtime rules have been made periodically, but the Department now proposes revisions that would likely eliminate future rulemakings of this nature (and the accompanying opportunity for public input). The Small Business Administration's Office of Advocacy recently noted that "it will be difficult for small businesses to provide enough data or meaningful comments within the 60 days provided in this rulemaking" and requested that the comment period be extended for 90 days. We strongly agree that an extension of some form is critically important.

We thank you for the opportunity to comment on these important issues and for your consideration of our views.

Saturday, October 3, 2015
The Honorable Cresent Hardy
Chairman
U.S. House of Representatives
Small Business Committee
Subcommittee on Investigations, Oversight and Regulations
2361 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hardy:

Thank you for holding this important hearing on the Department of Labor's proposed overtime rule and its effects on small businesses like mine. I am opposed to this rule because it will effectively demote thousands of employees from salaried to hourly classification and will impose significant burdens on small businesses.

One of the most damaging aspects of the new rule is it fails to account for key differences between businesses based on their location, size, or industry, which normally influences salary levels. In areas of the country where living expenses are lower, a salary exemption set at $50,440 per year means few employees will be exempt from overtime, regardless of their management roles or administrative functions. Further, the proposed rule will automatically raise the salary level each year according to the 40th percentile of all full time salaried employees across the country. Such unpredictable, automatic increases will make budgeting and accounting maddening for a small business owner like me and is likely to escalate the salary threshold level to an inappropriately high level in a matter of a few years as employees are moved from salaried to hourly classification. Due to varying local costs of living, there is no explanation for the Department proposing a salary level that is above the current minimum salary required under both New York and California law.

The extremely high salary level may make more employees eligible for overtime, but may not lead to many more employees actually receiving overtime. Many employers will be compelled to change exempt managers to hourly employees, effectively demoting them, reducing their professional status, hampering their career growth, and actually decreasing their take-home pay. Business owners will have to spend significant time reevaluating employee classifications and wage levels in order to comply with the new regulation. Small businesses like mine do not have the resources to deal with these types of regulations, especially when considering the myriad of other unnecessary regulations imposed by this Administration that are collectively overwhelming small businesses. The impact of the high salary level will impact nearly all employers, but it will disproportionately affect service sector small businesses like mine.

The proposed rule will detrimentally affect business planning too. Smaller businesses that experience a sudden or temporary spike in demand may not have the resources to hire more permanent employees, but strict overtime regulations and higher labor costs may prevent them from meeting this increased demand. The effects of the rigid rules will cascade upon themselves - these small businesses will not be able to sustain growth, which could hold down salary increases for current employees or prevent business owners from hiring new workers.

Finally, it is disappointing that the Department appears poised to change the very important "duties test," but has not publicly proposed changes on which business owners like me can comment. The current duties test provides balance between the needs of employees and employers and should be preserved.

Again, the overtime proposal is a misguided approach that will demote thousands of employees and unnecessarily interfere in small business operations. I am pleased the Committee is addressing the ill-considered changes to the DOL overtime rules that will surely hold back small business growth.

Sincerely,

John Adams
193 Railroad Mills Rd
Pittsford, NY 14534

Names and Addresses of Signatories

First Name	Last Name	Company	Address	City	State	Zip
John	Adams	Adams Kase LLC	193 Railroad Mills Rd	Pittsford	NY	14534
Amy	Adaniel	BrightStar of Delray Beach	6826 Houlton Cir	Lake Worth	FL	33467
Jesus	Adaniel	BRIGHTSTAR	6826 Houlton Cir	Lake Worth	FL	33467
Reeta	Aggarwal	BrightStar Care	11 Homestead Rd	Edison	NJ	08820
Louay	Akil	Learning Experience	6 Lawrence Ct	Old Tappan	NJ	07675
Stacey	Alexander	FASTSIGNS Carrollwood	13720 Springer Ln	Tampa	FL	33625
Chris	Allen		3501 Yachtclub Ct	Arlington	TX	76016
John	Allevato	Comfort Keepers - Fairfax	4414 N Carlin Springs Rd Apt 8	Arlington	VA	22203
Walt	Altmann	The UPS Store 4280	10115 E Bell Rd Ste 107	Scottsdale	AZ	85260
Claudio	Amaral	A&A Donuts Inc	14 Mallard Way	East Greenwich	RI	02818
James	Anderson	Forms Plus / FastSigns Buford/Duluth	525 Marsh Park Dr	Johns Creek	GA	30097
Tom	Anderson	The Riverside Company	8775 E Orchard Rd	Englewood	CO	80111
Irene	Anevski		688 Westwood Ave	River Vale	NJ	07675
Munana	Arafeh		6 Lawrence Ct	Westwood	NJ	07675
Bill	Archinal	Caring Senior Service of Amarillo	2609 S Van Buren St	Amarillo	TX	79109
Fernando	Aristeguieta	THE UPS STORE 3403	279 Kentucky Blvd	New Braunfels	TX	78130
Alvaro	Arnal	Fastsigns	110 Ashbury Dr.	Clarks Summit	PA	18411
Mary Jo	Arnal	FASTSIGNS	110 Ashbury Dr.	Clarks Summit	PA	18411
Thomas	Baber	IHOP	5 Wetherill Dr.	Millstone Township	NJ	08510
Colleen	Bailey	S.M.K. Donuts Inc dba Dunkin Donuts	123 Madison Rd	Norridgewock	ME	04957
Mark Davis	Bailey	MYM Ltd.	4907 Wisteria Dr.	Frisco	TX	75035
Saurabh	Bajaj	FASTSIGNS of Ventura	3959 E Main St Ste A	Ventura	CA	93003
Raj	Bansal	The Learning Experience	761 Route 33 W Ste 400	Hightstown	NJ	08520
Amie	Barone	The Learning Experience	7 Glen Ave	Stockholm	NJ	07460
Dean	Barone	The Learning Experience	1885 State Route 57	Hackettstown	NJ	07840
Stacey	Barry	The Learning Experience	3300 State Route 138	Belmar	NJ	07719
Forrest	Bassett	Signs By Tomorrow	3249 Windsor Rdg S	Williamsburg	VA	23188
David	Batista	Four Brothers Pizzaria	30 Severn Ct	East Greenwich	RI	02818
Raymond	Batton	Jani-King Hampton Roads	321 Turnstone Dr	Suffolk	VA	23435
Leeward	Bean	Big Frog Franchise Group	533 Main St	Dunedin	FL	34698
Robert	Beard	FASTSIGNS	6S115 New Castle Rd	Naperville	IL	60540
Robert	Beckwith	FASTSIGNS	7909 Heather Ave	La Vista	NE	68128
Scott	Bedford	Signs By Tomorrow	1300 N Florida Mango Rd Ste 20	West Palm Beach	FL	33409

Barb	Belle-Plutko	FastSigns	1323 Chartwell Dr	Pittsburgh	PA	15241
William	Belmont	TLG Signs Inc. t/a FASTSIGNS	622 Croasdale Dr	Langhorne	PA	19047
Ron	Benkert	Proven Process LLC d/b/a BrightStar Care	229 Ennismore Ln	Brentwood	TN	37027
Bill	Bennett	Level office	1616 Judson Ave	Evanston	IL	60201
Lynn	Berberich	BrightStar homecare of Baltimore City/County	5 Spyglass Ct	Lutherville Timonium	MD	21093
Hal	Berens	The UPS Store #4188	1002 Pembrook St	Herndon	VA	20170
Larry	Bernethy	Brightstar Care	PO Box 173	Bristol	TN	37621
Victor	Berrios	Titan Franchising LLC	212 Ennismore Ln	Brentwood	TN	37027
Amit	Bhandare		839 Atlantic City Blvd	Bayville	NJ	08721
Hussain	Bharmal	Danzo llc dba FASYSTSIGNS	1223 Main St	Gaithersburg	MD	20878
Beth	Bigham	ComForCare - South Indy	6639 Yellowstone Pkwy	Indianapolis	IN	46217
William	Bilnoski	Fastsigns	1667 N Willow Oak Rd	Gladewater	TX	75647
Richard	Blair	LCOTT Inc	1527 Mesa Verde Dr	League City	TX	77573
Tom	Blank	Molly Maid of SE Lake & NE Cook Counties	590 Rambler Ln	Highland Park	IL	60035
Keith	Blankenship		2115 Via Visalia	Palos Verdes Estates	CA	90274
Jac	Bloomberg	Alphagraphics	45 Heron Rd	Livingston	NJ	07039
Jon	Blum	FASTSIGNS	7198 Treeridge Dr	Cincinnati	OH	45244
Matt	Bocan	Express Employment Professionals	2301 River Run Dr	Lewisville	NC	27023
Richard	Bock	d/b/a Huntington Learning Center	1415 E Macphail Rd	Bel Air	MD	21015
Paula	Boehm	Paul Davis	23907 County Highway 32	Detroit Lakes	MN	56501
Jennifer	Bohan	merry maids	8091 N Military Trl	Palm Beach Gardens	FL	33410
Annette	Bojewski	FastSigns	5800 Wind Chime Ln	Fairview	PA	16415
Ray	Boller	BrightStar Care of Stamford	381 Old Stamford Rd	New Canaan	CT	06840
Jill	Bonilla	FASTSIGNS #66801	4831 Templeton St	Ventura	CA	93003
Ryan	Bowman	Fastsigns of Mechanicsburg	267 Snyder Rd	Halifax	PA	17032
Dan	Boykin	Signit Inc	3535 Popplewell St	Richland Hills	TX	76118
Clarissa	Bradstock	Any Test Franchising Inc.	2292 Snug Hbr NE	Marietta	GA	30066
Charles	Brandt	GC of Centennial CAB Hospitality LLC	6557 S Winnipeg Ct	Aurora	CO	80016
Dawn	Bransky	Caring Senior Service	6604 Baker Ct	Colleyville	TX	76034
Carol	Brauer	BrightStar Care	7740 Bay Ln	Fremont	WI	54940
Doug	Brauer	Fastsigns of Appleton	951 Forest Tree Ct	Appleton	WI	54914

Andy	Braver	Interim HealthCare of Fairfield county	54 Burning Tree Rd	Greenwich	CT	06830
Stephen	Brennock	Fastsigns-Tigard	3162 Sabo Ln	West Linn	OR	97068
Scott	Briesath	Merry Maids	W296S7692 Crossgate Dr	Mukwonago	WI	53149
Vern	Brockman	Rodeway Inn of Roswell	9061 E Plana Ave	Mesa	AZ	85212
Greg	Brooks	ServiceMaster of Upstate NY	1049 W Mountain Rd	Queensbury	NY	12804
Stephanie	Brooks	FASTSIGNS International Inc.	3909 Strattford Dr	Frisco	TX	75035
Alex	Brown	BrightStar Care Mountainside Sandy / Draper	8337 S Azul Way	Sandy	UT	84093
Grant	Brown	Interstate All Battery Center	374 Portland Pl	Lititz	PA	17543
Michael	Brown	Pillar to Post	34 Meadowview Dr	Northfield	IL	60093
Phil	Brown	Sport Clips Inc.	4427 95th Ave NE	Bellevue	WA	98004
Sarah	Brown	FranNet LLC	9829 Amador Ranch Ave	Las Vegas	NV	89149
Sonya	Brown		680 Berkeley Ave	Menlo Park	CA	94025
Tammara	Brown	BrightStar Care Mountainside	8337 S Azul Way	Sandy	UT	84093
Sara	Brownell	The Learning Experience	2215 Puma Pl	Fort Collins	CO	80525
Jim	Bruce	Allegra Print & Imaging	229 W Mount Rd	Kodak	TN	37764
Daniel	Bruk	Image360 - Brookfield	1320 Apple Tree Ln	Brookfield	WI	53005
Pete	Brushaber	FASTSIGNS of Spartanburg	200 W Silverleaf St	Greer	SC	29650
John	Buck	FASTSIGNS	1920 N Monroe St	Tallahassee	FL	32303
Marilyn	Buck	The Bucks Corp. DBA FASTSIGNS	6557 Alan A Dale Trl	Tallahassee	FL	32309
Cleopatra	Burke	Fastsigns fairfax	607 Michael Patrick Ct SE	Leesburg	VA	20175
Curt	Burkett	Alphagraphics US252 Inc	7210 Foothill Rd	Pleasanton	CA	94566
Brent	Cabrera		1759 L and A Rd	Metairie	LA	70001
Joe	Calagaz		90 Springdale Blvd	Mobile	AL	36606
Bryan	Caldwell	Caldwell Services Inc	165 Lab Dr	Buchanan	TN	38222
Joelene	Calvert	Jaycal LLC. DBA FASTSIGNS	23377 110th St NW	Elk River	MN	55330
Thomas	Calvert	Fastsigns-Chandler	3205 N Arizona Ave Ste 6	Chandler	AZ	85225
Dennis	Campbell		5160 Kelsey Ter	Minneapolis	MN	55436
Jonathan	Campbell	Cascadia Services Inc.	8228 Todderjen Ln SW	Olympia	WA	98512
Luz	Campo	The Learning Experience	18827 Cove Vista Ln	Cypress	TX	77433
Patrick	Campolo	The Learning Experience	2890N NW 28th Ter	Boca Raton	FL	33434
Dan	Caporale	BrightStar Care	43995 Lords Valley Ter	Ashburn	VA	20147
Joe	Carollo	Jani-King Cleveland	9000 Crooked Creek Ln	Broadview Heights	OH	44147
Joyce	Carpenter	Signs By Tomorrow	824 Creekside Dr	Brookhaven	PA	19015

Denise	Carr	FASTSIGNS	23 Adam Taylor Rd	Sterling	MA	01564
Rachel	Carson	Home Instead Senior Care	17 Rio Rd	Savannah	GA	31419
Jeff	Case	ComForcare Home Care	14721 Glenbeigh Ln	Cement City	MI	49233
Colin	Castle	Home Instead Senior Care	14202 62nd St N Apt M	Clearwater	FL	33760
Julie	Castle	Home Instead Senior Care	3041 Leanne Ct	Clearwater	FL	33759
Mike	Cendro	Jan-Pro Cleaning Systems of Sacramento	1355 Halyard Dr Ste 150	West Sacramento	CA	95691
Ignacio	Cespedes	BrightStar Care	125 Sunrise Ave	Roseville	CA	95661
Ron	Chamberlain	Sport Clips	3581 Corte Castillo	Carlsbad	CA	92009
Ajay	Champaneri	Lexington Hospitality	328 W Main St	Lexington	SC	29072
Lynn	Chatwin	Legacy Graphics Inc	1630 Palisades Dr	Carrollton	TX	75007
Peter	Chin		9587 Arrow Rte Ste D	Rancho Cucamonga	CA	91730
Arthur	Chmelik	BrightStar Care West Denver	2990 E 17th Ave	Denver	CO	80206
KC	Chowdhury	BrightStar Care of West Hartford	39 Cliffmore Rd	West Hartford	CT	06107
Butch	Clarke	Alphagraphics 749	2009B Industrial Blvd	Rockwall	TX	75087
Denise	Clemens	Corner Bakery Cafe	1712 Crestedge Ct	Colleyville	TX	76034
Carlos	Clement	G&A Signs LLC	13760 Vint Hill Rd	Nokesville	VA	20181
Todd	Clement	BrightStar Care	29737 New Hub Dr Ste 101	Menifee	CA	92586
Rick	Coffey	Barkefellers	435 Virginia Ave Unit 700	Indianapolis	IN	46203
Burton	Cohen	Burton D. Cohen & Associates LLC	300 Cedar Ave	Highland Park	IL	60035
John	Cohen	Molly Maid of WWMOC	48989 Tuscan Hills Dr	Plymouth	MI	48170
Lawrence	Cohen	Doc & Associates	9900 Kleppel Rd	Tomball	TX	77375
Mitch	Cohen	Baskin Robbins/Dunkin' Donuts Bayshore NY	749 Van Buren Ave	East Meadow	NY	11554
Thomas	Coke	Jani-King	12827 Highwick Cir	Knoxville	TN	37934
Amy	Collett	BrightStar Care Chattanooga	117 Nowlin Ln Ste 300	Chattanooga	TN	37421
Rick	Collett	Brightstar Care of Chattanooga	1503 Chickamauga Trl	Lookout Mountain	GA	30750
Douglas	Collins	FASTSIGNS	653 Woodburne Loop	Covington	LA	70433
James	Comstock	Comzak Inc. T/A Merry Maids	2205 Knox Ct	Virginia Beach	VA	23453
Dan	Conger	Franchise Services Inc	2821 Alta Vista Dr	Newport Beach	CA	92660
Shaleen	Conklin	Pisces Enterprizes LLC	180 Gunwale Rd	Manahawkin	NJ	08050
Jeff	Connally	CMIT Solutions Inc.	1 Ehrlich Rd	Austin	TX	78746
Mark	Conrad	Assess Enterprises Inc	2002 Pebble Ln	Friendswood	TX	77546
Susan	Cooper	BrightStar Care	306 N Rhodes Ave Ste 109	Sarasota	FL	34237

Cecelia	Corona	Signs & Graphics	19412 W 98th St	Lenexa	KS	66220
Tob	Coss	FASTSIGNS of Medina	6015 McClelland Ct	Wadsworth	OH	44281
Tim	Courtney	CruiseOne	21918 Rainberry Park Cir	Boca Raton	FL	33428
Kelly	Cox	Pillar To Post Home Inspectors	427 Saint Georges Ct	Satellite Beach	FL	32937
Michelle	Cox	FASTSIGNS	11661 Sierra Rojo Rd	Valley Center	CA	92082
Barbara	Craigie	Fastsigns	PO Box 902	Pomeroy	WA	99347
Robert	Craigo	FASTSIGNS	2403 Rodeo St	Selma	CA	93662
Victoria	Crane	FASTSIGNS	9908 Kika Ct	San Diego	CA	92129
Nancy	Critchfield	ServiceMaster Cleaning & Disaster Restoration	2097 W BAKERSVILLE EDIE RD	SOMERSET	PA	15501
Richard	Critchfield	Critchfield Construction Inc	2097 W BAKERSVILLE EDIE RD	SOMERSET	PA	15501
Merri	Cronk	FranNet Central Texas	15513 Spillman Ranch Loop	Austin	TX	78738
Donald	Crouch	National Fundraising Partners LLC	5 Lincoln Ave	Wallingford	CT	06492
Karen	Crouch	The UPS Store Inc.	728 Calle Casita	San Clemente	CA	92673
Brian	Culbertson	Allegra Fairfax	13348 Scotsmore Way	Herndon	VA	20171
Aaron	Culver	Thrive Community Fitness	1623 14th Pl NE	Issaquah	WA	98029
Darcel	Cumbo	The Learning Experience	208 Arborhill Ln	Holly Springs	NC	27540
Roger	Cunninghma	Fastsigns of Ann Arbor	3520 Washtenaw Ave	Ann Arbor	MI	48104
Phyllis	CygAN	Heritage Oak	747 N Rodeo Cir	Orange	CA	92869
Ric	Davenport	FASTSIGNS of Asheville	16 Dodd Ln	Inman	SC	29349
Gale	Davis	Right at Home	9510 Sabrina Ln	Elk Grove	CA	95758
Kris	Davis	BrightStar Care of West Fort Worth/Grapevine/Keller	2312 Beacon Hill Dr	Keller	TX	76248
Sonja	Davis	fastsigbs of raleigh	1800 Pendelton Dr	Raleigh	NC	27614
Rob	Day	Pittsburgh Popcorn Co	209 21st St	Pittsburgh	PA	15222
Daniel	Debra		6960 Corporate Dr	Indianapolis	IN	46278
Pat	Deering	FranNet	3001 N Rocky Point Dr E	Tampa	FL	33607
Jeff	Dejoseph	Interim HealthCare Inc.	27 Chestnut St	Ridgewood	NJ	07450
Jesse	Del Angel		7504 W Grand Ave	Elmwood Park	IL	60707
Michael	Demeter	Nextgen Associates Inc.	34870 Arroyo Rd	Lake Elsinore	CA	92530
James	Demos	IBS of Chicagoland	8056 Central Park Ave	Skokie	IL	60076
David	Dempsey	High Exposure Inc.	8 Preswyck Ln	Ocean View	NJ	8230
Debra	Desrosiers	Visiting Angels	23 Depot Rd	Auburn	NH	03032
Edward	Devaney	FASTSIGNS of Cherry Hill	4 Brookside Dr	Titusville	NJ	08560
Daniel	Devries	Front Range Home Inspections LLC	1345 Salem St	Fort Collins	CO	80525
Larry	Diana	Express Employment	3807 Camden Falls Ct	Greensboro	NC	27410
Emma	Dickison	Home Helpers	2265 Decamp Rd	Hamilton	OH	45013

Tim	Dillard	Express Employment Professionals	4220 Lakeland Dr Ste D&e	Flowood	MS	39232
Peter	Dilworth	Signs Now Baltimore	20 Fairwood View Ct	Phoenix	MD	21131
Tom	DiMarco	Salo Inc	960 Checkrein Ave	Columbus	OH	43229
Diana	Dimitroff	MDPreschools INC.	9158 S Old State Rd	Lewis Center	OH	43035
Sandra	Diugherty	Visiting Angels	5880 Fulton Dr NW	Canton	OH	44718
Michael	Divine		16940 Highway 3	Webster	TX	77598
Michael	Doepke	Home Helpers Home Care	4808 Lawn Ave	Western Springs	IL	60558
Lani	Dolifka	Watermill Express	13280 N 75th St	Longmont	CO	80503
Pamela	Doran	Doran Services Inc. d/b/a ServiceMaster by Doran	11335 N 600 W	Fountaintown	IN	46130
Becky	Dougherty Frazer	Dougherty-Nova Inc. t/a Merry Maids	111 Berry St SE Ste 104	Vienna	VA	22180
Maria	Dubnicka	ComForcare home Care	978 E Aurora Rd	Macedonia	OH	44056
Jessica	Ducote	Merry Maids	119 Lakeshore Dr	Youngsville	LA	70592
Stella	Dulanya	Sun Holdings Inc.	3318 Forest Ln Ste 200	Dallas	TX	75234
Christina	Durr	BrightStar Care	209 N 1st St	Sierra Vista	AZ	85635
Jennifer	Eberle	Allegra Marketing Services	7504 Kendrick Crossing Ln	Louisville	KY	40291
Stefan	Eckert	Eckert Inc. (Great Clips Franchisee)	131 Woodcrest Dr	Loveland	OH	45140
Jennifer	Eckfield	The Learning Experience Doylestown	1721 S Easton Rd	Doylestown	PA	18901
Brian	Edwards	Paul Davis Restoration of the Thumb MI	788 N Bay Port Rd	Bay Port	MI	48720
William	Edwards	Edwards Global Services Inc.	504 Cancha	Newport Beach	CA	92660
Clint	Ehlers	FASTSIGNS Lancaster	121 Centerville Rd	Lancaster	PA	17603
Allan	Einboden	Aristoxus LLC	302 Mikey Ln	Temple	TX	76502
Leslee	Eisen	Visiting Angels Suncoast	11379 Dancing River Dr	Venice	FL	34292
James	Elder	Allegra Marketing Print Mail	531 Legacy Pointe Dr	Saint Peters	MO	63376
Peggy	ELder		531 Legacy Pointe Dr	Saint Peters	MO	63376
William	Elder	PJE Printing Inc	14497 Callaway Ct	Chesterfield	MO	63017
Jeff	Elvin	Alphagraphics	811 Lasalle Ave	Minneapolis	MN	55402
Jeffrey	Emrich	BrightStar Care North Suburban	912 Cornell St	Wilmette	IL	60091
Mark	Engle	FASTSIGNS of Lina	307 W Mechanic St	Wapakoneta	OH	45895
Jennifer	Ensminger	BrightStar Care of Lane County	935 Oak St Ste B	Eugene	OR	97401
Debra	Erwin	Interstate All Battery Center	131 Beaufort Cir	Madison	MS	39110
Todd	Esposito	Culver's of Addison	8429 Mending Wall Dr	Woodridge	IL	60517

Sydnee	Evans	Wilcom Inc. dba JK-SLC	111 E Broadway Ste 300	Salt Lake City	UT	84111
Don	Evenson	Evenson Sign Corp.	1266 Market Pl	Waukesha	WI	53189
Ken	Fearnow	BrightStar Care of Edmond/Oklahoma City	19628 Stratmore Way	Edmond	OK	73012
Miguel	Fernandez	Florida One Care LLC	1191 NW 138th Ter	Pembroke Pines	FL	33028
Carmen	Fierro	quality inn	7212 Richmond Hwy	Alexandria	VA	22306
Ernest	Filice	Express Employment Professionals	18525 Sutter Blvd Ste 210	Morgan Hill	CA	95037
Brandy	Firebaugh	Home Instead Senior Care	106 E 20th Ave	Belton	TX	76513
Ted	Fireman	FranNet	90 Bishop Sq	Bexley	OH	43209
Charles	Fish	CEFKEF Inc.	3822 Old Farm Rd	Lafayette	IN	47909
Todd	Fitzgerald	FASTSIGNS Kingston	219 Minturn St	Port Ewen	NY	12466
Brian	Fitzpatrick	BrightStar Care	79 Mulberry Dr	Southampton	PA	18966
John	Flynn	Allegra	45668 Terminal Dr	Sterling	VA	20166
Diane	Fortner		2713 Harmony Pl	La Crescenta	CA	91214
Don	Fortney	Allegra Print	12140 Metro Pkwy Ste C	Fort Myers	FL	33966
Sheila	Fortney	Allegra Design marketing Print	12140 Metro Pkwy Ste C	Fort Myers	FL	33966
Don	Fox	Firehouse of America LLC	1141 Buckbean Branch Ln E	Saint Johns	FL	32259
Sam	Fox	Express Services Inc.	3909 Whitehawk Rd	Edmond	OK	73003
Matthew	Frankel		909 Via Mirada	Palos Verdes Peninsula	CA	90274
Jackie	Franklin	Merry Maids	1630 Pine St	Sycamore	IL	60178
Darci	Fredricks		18135 Penny Ct	Gladastone	OR	97027
Wayne	Freeman	Wildcat Investments LLC	14286 W 142nd St	Olathe	KS	66062
Renee	Friedman	Fastsigns	5000 E Colonial Dr	Orlando	FL	32803
Dan	Fruhling	Fastsigns Tucker	243 Chadwyck Ln	Canton	GA	30115
Janet	Galapo	Fastsigns	905 Westport Rd Ste F	Kansas City	MO	64111
Diego	Garcia		258 NE 3rd St.	Miami	FL	33132
Elias	Garcia	Foreign Translations	9403 Devonshire Dr	Huntersville	NC	28078
Melody	Garcia		9403 Devonshire Dr	Huntersville	NC	28078
Todd	Garcia	Allegra Coal City	273 S Broadway St	Coal City	IL	60416
Todd	Garcia	SCCUTS LLC	1032 Margaux	Bourbonnais	IL	60914
Andrew	Garrean	Home Instead Senior Care	1532 S Narcissus Pl	Broken Arrow	OK	74012
Anne Marie	Gattari	BrightStar Care	1062 Maryland St	Grosse Pointe Park	MI	48230
Keith	Gavigan	ServiceMaster Apple Valley/Farmongton Avon	50 Waterbury Rd	Prospect	CT	06712
Abe	George	Allegra Kennesaw	1200 Ernest W Barrett Pkwy NW Ste 116	Kennesaw	GA	30144

Nevine	George	Academy of Grow and Learn DBA The Learning Experience	4 Lakeview Dr.	Perrineville	NJ	08535
Trena	Giddens		2417 Beautyberry Ct	Tallahassee	FL	32308
Garret	Gifford	Fastsigns of Arvada	4691 W 100th Ave	Westminster	CO	80031
Thom	Gilday	BrightStar Group Holdings	1615 Diamond Lake Rd	Glastonbury	CT	06033
Danny	Gililland	Sweet P" Enterprises Inc."	9703 Bridge Creek Rd	Sherwood	AR	72120
L.Statham	Gilliam	Brightstar of Charlottesville	106 Oakwood Pl	Lynchburg	VA	24503
Kim	Gilpin	FASTSIGNS of Grand Rapids	8623 Lilly Ridge Dr SE	Alto	MI	49302
David	Gimbel	Signs by tomorrow alexandria	112 River Oaks Cir	Baltimore	MD	21208
Mark	Glenn	FASTSIGNS of Carrollton	2500 Meadow Hills Ln	Plano	TX	75093
Michelle	Gobert	Gobert Enterprises Inc. dba Signs Now	2201 Killdeer St	New Orleans	LA	70122
Gary	Goerke	Clarity Voice	6012 Greatwater Dr	Windermere	FL	34786
Carolyn	Golden	BrightStar Care	2668 New Hope Rd	Dacula	GA	30019
Tim	Golden	BrightStar Healthcare of Lawrenceville GA	2668 New Hope Rd	Dacula	GA	30019
Mark	Gonzales		PO Box 369	Oak Island	NC	28465
Abilio	Gonzalez	Image360 Boca Raton	1 N Ocean Blvd Apt 401	Boca Raton	FL	33432
Sue	gooding	Express Employment	7855 Popcorn Dr-92	Roanoke	IN	46783
Deborah	Goslin	Merry Maids	35 Agnes St	East Providence	RI	02914
Keith	Grabow	FASTSIGNS of Stamford	1552 Hope St	Stamford	CT	06907
Kathryn	Grady-Sykes	Allegra Print & Imaging	3366 Beard Rd	Eastover	NC	28312
James	Graf	Supercuts	5700 SW Old Highway 47	Gaston	OR	97119
Doug	Graham	FASTSIGNS of Parker/Castle Rock	18921 Plaza Dr Apt 102	Parker	CO	80134
John	Graham	Health Choice Enterprises Inc.	501 Olmsted St	Birmingham	AL	35242
Chris	Grandpre	Outdoor Living Brands Inc.	13408 Rupert Ct	Henrico	VA	23233
Amy	Grasser	Brightstar Care of Richmond	2528 Drammen Pl	Henrico	VA	23233
Mark	Grasser	BrightStar Care of Richmond	2528 Drammen Pl	Henrico	VA	23233
Ben	Graybar		6308 Count Fleet Trl	Tallahassee	FL	32309
Lisa	Graziani	The Learning Experience	218 Farmington Rd	Riverside	NJ	08075
Mario	Grech	Alliance Franchise Brands	5904 Turnberry Dr	South Lyon	MI	48178
Brian	Greenley	MAACO of Littleton CO	7270 Sagebrush Dr	Parker	CO	80138
Brian	Greer		2275 Judson St SE	Salem	OR	97302

Rick	Greff	Merry Maids 411	1114 Hidden Valley Ln	Choctaw	OK	73020
James	Griffith	Home Instead Senior Care	8147 Delmar Blvd Ste 215	Saint Louis	MO	63130
Richard	Grimord	Express Employment Professionals	14705 Pomona Rd	Brookfield	WI	53005
Dana	Grossman	Future Choices LLC	6 Cier Ct	Monroe Township	NJ	08831
Mark	Grossman	Future Choices LLC	6 Cier Ct	Monroe Township	NJ	08831
David	Groth		426 W 5th Ave	Naperville	IL	60563
Charles	Guion	Guion Custom Signs Inc	7132 N Lemmon Rock Pl	Tucson	AZ	85718
Nilesh	Gunda	The Learning Experience	4 Lynch Way	North Chelmsford	MA	01863
Saurabh	Gupta	Riverdale childcare experience llc	3448 Irwin Ave	Bronx	NY	10463
James	Guzdziol	BrightStar Care - Naperville	1809 N Mill St Ste F	Naperville	IL	60563
Dorothy	Hager		4800 Fox Lair Ct	Quinton	VA	23141
Judd	Haims	Visiting Angels	PO Box 1020	Eagle	CO	81631
Laurie	Hamilton	Home Instead Senior Care	3675 Vartan Way Ste 202	Harrisburg	PA	17110
Lee	Handis	The learning experience	103 Rolling Hill Dr	Plymouth Meeting	PA	19462
Linda	Handis		7798 La Mirada Dr.	Boca Raton	FL	33433
Debbie	Hansen	Merry Maids	1141 Deadwood Ave Ste 4	Rapid City	SD	57702
Fran	Hargarten	Allegra Prinr & Imaging	5416 Roaring Branch Rd	Columbus	GA	31904
Maureen	Harris	ZAMP Enterprises Inc	2298 Wellington Cir	Hudson	OH	44236
Sue	Harris	Merry Maids	53 S Jefferson Rd	Whippany	NJ	07981
Jack	Hartley	JWH Service Partners Inc	308 Knob Hill Rd	Valdosta	GA	31602
Barbara	Harvey	Servicemaster of Upstate NY	28 Dutch Meadows Dr	Cohoes	NY	12047
Dale	Hawkins	Signs By Tomorrow - Midwest city	1932 S Air Depot Blvd	Midwest City	OK	73110
Gail	Hawkins	Signs By Tomorrow	1325 Alviola Ave	Oklahoma City	OK	73110
Michael	Hawkins	Interim HealthCare SLC	2020 S 1300 E Ste C	Salt Lake City	UT	84105
Matthew	Hayes	BrightStar Care of Mid Missouri	108 E Green Meadows Rd Ste 8	Columbia	MO	65203
Robin	Hazel		13923 Icot Blvd	Clearwater	FL	33760
Bobby	Heckeroth	FASTSIGNS Katy	32711 Wingfoot Cir	Fulshear	TX	77441
Brian	Heckman	Home Helpers	5023 Birchmont Ave SW	Canton	OH	44706
Mike	Heffner	Express Employment Professionals	4020 Highland Park Dr	Greenwood	IN	46143
Matthew	Henson		3406 Oak Dr	Dickinson	TX	77539
John	Heppler	BrightStar Care Cincinnati	11305 Reed Hartman Hwy Ste 201	Cincinnati	OH	45241

Ronald	Herbert	FASTSIGNS International	3978 Veneto Dr	Frisco	TX	75033
David	Herchko	CertaPro Painters of Pittsburgh East	837 Westminster Dr	North Huntingdon	PA	15642
Maria	Herrera	Fastsigns of NBV	900 SW 8th St	Miami	FL	33130
Paul	Hicks	Corner Bakery Cafe	12700 Park Central Dr	Dallas	TX	75251
Doug	Higdon	Bluegrass Corrals LLC	319 Foxwood Dr	Richmond	KY	40475
Lori	High	LJK Holdings.	8877 Chambery Blvd	Johnston	IA	50131
Paul	Hill	Fastsigns	2089 Oxford Ridge Cir	Lehigh Acres	FL	33973
Kim	Hinkly		6244 Merriam Dr	Shawnee	KS	66203
Robin	Hoessly	Allegra Marketing Print Mail	2927 Virginia Beach Blvd	Virginia Beach	VA	23452
Ed	Hogan	Servicemaster of Bux-Mont	PO BOX 1837	ALBRIGHTSVILLE	PA	18210
Diana	Hohmann	BrightStar Care of Stroudsburg	41 Mount Pleasant Rd	Columbia	NJ	07832
Don	Hollensbe	BrightStar Care	348 Brandon Ave	Glen Ellyn	IL	60137
Keith	Hopkins	American Speedy Printing	240 Cedar Ave	Morton	IL	61550
Carol	Houghtby Watson	Brightstar Care	4729 126th St N	Saint Paul	MN	55110
Rita	Huggins-Halstead	FranNet	42572 Legacy Park Dr	Brambleton	VA	20148
Karl	Hughes	Allegra Design Print Marketing	110 S Elliott Rd	Newberg	OR	97132
Tom	Humrickhouse		210 River Dr	Cary	IL	60013
Raymond	Huntington	Huntington Learning Centers Inc.	496 Kinderkamack Rd	Oradell	NJ	07649
Christopher	Iacuzzo	Alphagraphics - Orlando	235 Nob Hill Cir	Longwood	FL	32779
Donna	Infurchia	ServiceMaster Franchise Services Group	8189 Cherryfield Ln	Germantown	TN	38138
Giri	Iyer	Fastsigns	4051 Coyte Dr	Marietta	GA	30062
Manuel and Shae	Jacome	The Learning Experience	13 Barley Ct	Plainsboro	NJ	08536
Mark	Jameson	Fastsigns	4115 Herschel Ave	Dallas	TX	75219
Paulette	Janak	ServiceMaster SouthWest	4011 Bayshore Dr	Bacliff	TX	77518
Garret	Janicke		14 Cherry Ln	Bedford	NH	03110
Melissa	Janicke	GM Home Care LLC dba BrightStar Care of Bedford / Manchester	14 Cherry Ln	Bedford	NH	03110
John	Jarrett	Absolute Computing Solutions	4026 Longleaf Ct	Tallahassee	FL	32310
Dennis	Jensen	Molly Maid of Reno Sparks	1380 Greg St Ste 233	Sparks	NV	89431
James	Jethwa	j&m hosp	1591 Highway 17 N	North Myrtle Beach	SC	29582

Kiran	Jhurani		1 Fox Hunt Dr	Monroe Township	NJ	08831
Dohn	Johnson	Fastsigns of Federal Way	34930 Enchanted Pkwy S Ste 170	Federal Way	WA	98003
Eve	Johnson	Signs By Tomorrow	1055 Swan Mill Ct	Suwanee	GA	30024
Len	Johnson	L. N. Johnson Enterprises Inc. dba Express Employment Professionals	246 Thompsonville Rd	Canonsburg	PA	15317
Mandy	Johnson	The Wall Street Journal	1033 Ellis Pond Dr	Rock Hill	SC	29730
Brent	Jones	West's Insurance Agency	317 W Sheridan Pl	Lake Bluff	IL	60044
Dave	Jones	Allegra Pittsburgh	18 W Steuben St	Pittsburgh	PA	15205
Ed	Jones	BrightStar of Stroudsburg	290 N Easton Belmont Pike	Stroudsburg	PA	18360
Rusty	Jones	Express Employment Proffessionals	810 Ohare Pkwy	Medford	OR	97504
Jubran	Jubran	BRITE TIKES LLC	366 N Broadway	Jericho	NY	11753
John	Judson	Two Men And A Truck	10966 Gravois Industrial Ct	Saint Louis	MO	63128
Scott	Juetten	Fastsigns	26631 SE 18th St	Sammamish	WA	98075
Robert	Kammer	BRG Inc T/A Alphagraphics 507	20564 Pembrooke Oval	Strongsville	OH	44149
Lonny	Kane	BrightStar Healthcare	6701 Aberdeen Ave	Lubbock	TX	79424
Fred	Kaplan	WeiserMazars LLP	1865 Hood Ln	Ambler	PA	19002
Mark	Kausalik	Identity Sign & Graphics Inc.	15285 Briarcrest Cir	Fort Myers	FL	33912
Gina	Kazmerski	Image360-Woodbury	1372 Schooner Way	Woodbury	MN	55125
Mike	Kazmerski	Image360 Woodbury	1372 Schooner Way	Woodbury	MN	55125
Dave	Kelor	Express	6233 Corporate Dr	Indianapolis	IN	46278
Grace	Kendall	TNT Signs Inc dba FASTSIGNS	4078 Campus Willows Loop NE	Lacey	WA	98516
Jim	Kenney	AlphaGraphics	719 Brom Bones Ct	Port Orange	FL	32127
Timothy	Keogh	Keogh Signs LLC dba Signs By Tomorrow Wallingford	10 Huntington Ridge Rd	Wallingford	CT	06492
Paul	Kessen	Allegra Naples	3930 Domestic Ave	Naples	FL	34104
Angie	Kimani	Tle hopewell.	795 Denow Rd	Pennington	NJ	08534
Robb	Kirschenmann		3027 Azahar Ct	Carlsbad	CA	92009
Saunda	Kitchen	Mr. Rooter	4955 Fern Pl	Rohnert Park	CA	94928
Alan	Kitts	RLS Enterprises LLC	9309C Daybreak Dr	Knoxville	TN	37931
John	Klearman	BrightStar Care	15992 S Woodson Dr	Ramona	CA	92065
Roy	Kleinert	Lares Home Care	133 Main St	Matawan	NJ	07747
Shannon	Klemann	BrightStar Care	6904 Dawson Ln	Minneapolis	MN	55435
Christine	Klingaman	Dunkin'Brands Inc.	231 Juniper Ln	Drums	PA	18222
Benjamin	Knight	FASTSIGNS South Tryon	17213 Hedgerow Park Rd	Charlotte	NC	28277
Tom	Koenig	BrightStar Care	5802 Arlingdale Dr	Palatine	IL	60067

Lane	Kofoed	Assisting Hands	5700 E Franklin Rd Ste 105	Nampa	ID	83687
Wiliam	Kohler	Griswold Home Care	10925 Greenbrier Dr	Carmel	IN	46032
David	Kovacs	Allegra Princeton	6 Young Ter	Millstone Township	NJ	08510
Mark	Kramer	FastSigns of Utah	5782 W Cuchara Way	Herriman	UT	84096
Robert	Kreek	Griswold Home Care	5 Corwood Rd	Bronxville	NY	10708
Allison	Kretzer	Ak & Ak LLC	13144 Wolf Bay Dr	Jacksonville	FL	32218
Rajeev	Krishna	SSP Enterprises	6 Meyers Way	Bridgewater	NJ	08807
Joshua	Kristowski		146 Fairchild St	Charleston	SC	29492
Janet	Kuebler	Right at Home	13 Whispering Way	Warren	NJ	07059
Monica	Kuhns	Home Instead	841 Capitola Dr	Lincoln	NE	68512
Mark	Kulkis	Chop Stop	2411 Moreno Dr	Los Angeles	CA	90039
Suresh	Kumar	Olive Drive Market	1046 Olive Dr	Davis	CA	95616
John	LaBarge	Corner Bakery Cafe	1903 Newport Ct	Southlake	TX	76092
Steve	Lajiness	Martinizing	8633 Secor Rd	Lambertville	MI	48144
J. Brian	Lamb	Signs Now Bradenton	4230 26th St W	Bradenton	FL	34205
Jonathan	Lamb	Granite Transformations of Raleigh NC	5020 NC Highway 55	Durham	NC	27713
Casey	Lambert	Jani-King	39628 River Oaks Dr	Ponchatoula	LA	70454
Justin	Lambeth	Corner Bakery Cafe	10534 Royal Springs Dr	Dallas	TX	75229
Boris	Landesman	CHISTI MANAGEMENT LLC	4421 Aicholtz Rd	Cincinnati	OH	45245
Michael	Lane	CertaPro Painters of Colorado Springs	2015 Bramblwood Ln	Colorado Springs	CO	80920
Kathleen	Laslo	Molly Maid of Aurora	20740 E Euclid Dr	Aurora	CO	80016
William	Lawson	On Our Way Inc.	39981 Thomas Mill Rd	Leesburg	VA	20175
Philip	LeBlanc	ComForCare Home Care	11147 Summer Star Dr	Riverview	FL	33579
Mitch	Levine	MLC Sgins LP dba Fastsigns	5200 Keller Springs Rd	Dallas	TX	75248
Jason	Lieb	BrightStar Care	533 Ridge Ave	State College	PA	16803
Timothy	Lightner		5501 Shale Rd	Fitchburg	WI	53711
Rick	Lincoln	BrightStar Care	1549 E Monroe Ave	Hartford	WI	53027
Chieu	Lipscomb	Interim Healthcare	20 Rollingwood Dr	Jackson	CA	95642
Benjamin	Litalien	Franchise Well LLC	29 Derrick Ln	Stafford	VA	22554
Roberto	Litwak	Feher & Feher	15206 Ventura Blvd # 302	Sherman Oaks	CA	91403
Ronald	Livecchi	FranNet of WNY	408 Quaker Rd Unit 98	East Aurora	NY	14052
Harold	Lloyd	CertaPro Painters of Hickory	5123 Foley Dr	Hickory	NC	28602
Peter	Lobravico	Interim HealthCare	1019 Beaver Dam Rd	Point Pleasant Beach	NJ	08742
Jeffrey	Loewenthal	BSH Denver LLC	240 S Leyden St	Denver	CO	80224
James	Logan	BrightStar Care	815 S Adams St	Hinsdale	IL	60521
John	Long	Allegra Marketing	7802 E 88th St	Indianapolis	IN	46256

Gerd	Looff	Signs By Tomorrow	1294 Berkshire Ln	Barrington	IL	60010
Marcos	Lora	AM&T Group	2109 Crossmeadow Ln	Brookeville	MD	20833
Jack	Louks	BrightStar Care of SE Wisconsin	3524 Waterbury Ln	Racine	WI	53403
Stacie	Lowe	The Learning Experience	2076 Hillwood Dr	Clearwater	FL	33763
Gary	Lucke	FASTSIGNS of St. Petersburg	408 33rd Ave N	Saint Petersburg	FL	33704
Michael	Lucke	Fastsigns of Clearwater	2781 Gulf To Bay Blvd	Clearwater	FL	33759
Patrick	Luers	Brightstar Care of Dayton	1585 W Pekin Rd	Lebanon	OH	45036
Ned	Lynch	Fenway Franchise Group Inc	43 Cantlewood Dr	Somers	CT	06071
Ron	Lynch	Tilted Kilt Franchise Operatimg LLC	5630 W Gail Dr	Chandler	AZ	85226
Larry	Lynn	Allegra Marketing	2009 Egret Cir	Evans	GA	30809
Art	Macauley	Image360- Marlon	24 Fox Hill Dr	Tabernacle	NJ	08088
Kareen	MacFarlane	FASTSIGNS	1578 Rocky Knoll Ln	Dacula	GA	30019
Jeff	Mackey	ServiceMaster Fire and Water Restoration	515 Sage Cir	Highlands Ranch	CO	80126
Manuel	Magallanes		18003 Lago Forest Dr	Humble	TX	77346
D Therese	Mahoney	Acadia Group LLC	5190 Doral Ct	Ann Arbor	MI	48108
John	Main	AlphaGraphics US366	2030 Powers Ferry Rd SE Ste 100	Atlanta	GA	30339
Scott	Makinson	Express Employment Professionals	155 S 4th St	Zionsville	IN	46077
Linda	Manci		2705 N Falkenburg Rd	Tampa	FL	33619
Ajay	Malpani		12729 Westin Estates Dr	Glen Allen	VA	23059
Peter	Manhoff	The Maids	4036 Fox Meadow Dr	Medina	OH	44256
Larry	Manning	BrightStar Care of Saint Augustine	9225 July Ln	Saint Augustine	FL	32080
Toni	Marinelli	AAA Marinelli Home Care inc	4051 NW 43rd St Ste 37	Gainesville	FL	32606
Mike	Marlow	AlphaGraphics Lake Norman	2371 Stoneview Ct	Denver	NC	28037
Sheila	Marr	MT Investments Inc	5458 McLeod Dr	Las Vegas	NV	89120
Mary	Martinez	Home Instead Senior Care	4112 Southwood Ct NW	Los Ranchos	NM	87107
Richard	Mason		4262 Entra Ct. Ste M	Chantilly	VA	20151
Russell	Mason	FASTSIGNS St Peters Mo	98 N Hillview Dr	Saint Peters	MO	63376
Keith	Maynard	FASTSIGNS Texarkana	1012 Brown Dr	Wake Village	TX	75501
Gregg	Mazza	BrightStarCare	180 Keystone Palms Blvd	Tarpon Springs	FL	34688
Joseph	Mazzarella		122 Wynchurch Cir	Pittston	PA	18640
Jon	McAlpine	Royal Franchising Inc	200 N Patrick Blvd Ste 900	Brookfield	WI	53045
Alison	McCreary	BrightStar Care of Northern Kentucky	8175 State Route 380	Wilmington	OH	45177
Tracey	McCullough	Signs By Tomorrow	401 Founders Pointe Blvd	Franklin	TN	37064

William	McCurry	McCurry Associates	6 Toth Ln	Rocky Hill	NJ	08553
Christian	McCutcheon	BrightStar Care Of Louisville	1205 Winter Springs Ct Unit 204	Louisville	KY	40243
Dennis	McDaniel	DVM	6848 E 21st St	Indianapolis	IN	46219
Robert	McDevitt	Golden Corral	5513 Somerford Ln	Raleigh	NC	27614
Keith	McDonald	Ag	14471 Enclave Ct NW	Prior Lake	MN	55372
Gregg	McDonough	Alphagraphics	1034 W Taylors Meadow Ct	Salt Lake City	UT	84123
Cheri	McEssy	BrightStar Care	915 W Huron St	Chicago	IL	60642
John	McGinley	DJMC Partners	6234 Deeside Dr	Dublin	OH	43017
Chad	McGinn	Fastsigns #100101	301 Appletree Ln	Wilmette	IL	60091
Patrick	McGivney	Northern Indiana Interim Healthcare Co. LLC	33 W Huron St Apt 411	Chicago	IL	60654
Susan	Mchugh	Tle franchise	1014 Fort Salonga Rd	Northport	NY	11768
Diane	McIntyre	BrightStar Care of Henderson	100 E Highland Dr	Henderson	NV	89015
Brenda	McKeag	McKeag Eterprises LLC	3103 Dial Dr	Council Bluffs	IA	51501
Michael	McKenna	Liberation LLC	915 Old Fern Hill Rd	West Chester	PA	19380
Sandra	Meesseman	Allegra Marketing Print Web	106 Laurel Ridge Cir	Aiken	SC	29803
Shishir	Mehta		46 Hillcrest Rd	Weston	MA	02493
Thomas	Meesseman	Allegra Marketing Print & Web	106 Laurel Ridge Cir	Aiken	SC	29803
Brian	Meister	Image360-Lauderhill FL	17402 NW 8th St	Pembroke Pines	FL	33029
Susan	Meister	A Graphic Difference Inc. d/b/a Image360 - Lauderhill	17402 NW 8th St	Pembroke Pines	FL	33029
Kevin	Mengel	K. Mengel Enterprises Inc. T/A FASTSIGNS	644 Perimeter Dr	Downingtown	PA	19335
Azim	Merali	AZM Inc	28029 142nd Pl SE	Kent	WA	98042
Pranav	Merchant	BrightStar of White Plains	70 Wyldewood Rd	Easton	CT	06612
Kevin	Merkel		2330 N Tucson Blvd Ste 110	Tucson	AZ	85716
Barbara	Meyers	FASTSIGNS 320101	875 Highland Ave	Buffalo	NY	14223
Nicole	Miele	FASTSIGNS	1209 Wheatfield Dr	Williamsport	PA	17701
Karen Jo	Miles	K&J Mgt Inc dba IHOP	9567 Melvin Ave	Northridge	CA	91324
Matt	Miles	FASTSIGNS International	12076 Ashaway Ln	Frisco	TX	75035
Chris	Miller	BrightStar Care of East Lansing	1309 Dennison Rd	East Lansing	MI	48823
Christopher	Miller	BrightStar Care Springfield	857 Loraine Ave	Springfield	IL	62704
Lori	Miller	BrightStar Care	2237 NW Birkendene St	Portland	OR	97229
Nathan	Miller	Express Employment Professionals	3112 W Twickingham Dr	Muncie	IN	47304
Shari	Millman	AlliedPRA Inc.	2456 Broadway	San Diego	CA	92102
Andrew	Mills	B-6 Corp	93787 Dorsey Ln	Junction City	OR	97448

Anthony	Mina		76 Stirling Rd	Warren	NJ	07059
Anthony	Mina		188 Mount Airy Rd	Basking Ridge	NJ	07920
Jerry	Mitchell	Northwest Professional Cleaning Inc.	3181 E St	Washougal	WA	98671
Susan	Mitchell	BrightStar	7790 Eagle Creek Dr	Sarasota	FL	34243
Vid	Mitta		220R Main St	Wilmington	MA	01887
Annette	Mixon	Sylvan Learning	1296 Haight St Apt 24	San Francisco	CA	94117
Blake	Moak	ServiceMaster by Century	36902 Anglers Way	Pinehurst	TX	77362
Steve	Moline	ServiceMaster Cleaning Professionals	521 N Broadway	Fergus Falls	MN	56537
Catherine	Monson	FASTSIGNS International	5305 Corinthian Bay Dr	Plano	TX	75093
Mark	Mooney	BrightStar Care of NW Orange County FL	725 Primera Blvd	Lake Mary	FL	32746
Caroline	Moore	Brightstar Care	770 E Harcourt Rd	Boise	ID	83702
Maureen	Moore	BrightStar Care	39 Wampum Hill Rd	Weston	CT	06883
Peter	Moore	Fairfield Healthcare Services Inc.	39 Wampum Hill Rd	Weston	CT	06883
Barbara	Moran-Goodrich	Moran Family of Brands	14110 S 85th Ave	Orland Park	IL	60462
Sergio	Moreira	Emerald Staffing	3600 Nicholas St	Easton	PA	18045
Roy	Morgan	Signs By Tomorrow-Wilmington	7212 Rabbit Hollow Dr	Wilmington	NC	28411
Daniel	Mormino	INFINITI HR	812 W Leah Ln	Gilbert	AZ	85233
Elaine	Morris	Home Instead Senior Care	890 Pebblecreek Dr	Mountain Home	AR	72653
Noel	Morris	Three Rivers Senior Services dba Home Instead Senior Care	890 Pebblecreek Dr	Mountain Home	AR	72653
Peter	Morris	BrightStar Care of Reno	848 Lichen Ct Unit D3029	Incline Village	NV	89451
Scott	Morrison	Healthcare Advantages LLC	4488 Fairemoore Walk	Suwanee	GA	30024
Suzanne	Morrison	BrightStar Care	4488 Fairemoore Walk	Suwanee	GA	30024
Harriet	Moser	FranSource LLC	515 E Piping Rock Rd	Phoenix	AZ	85022
Richard	Mott	Mott Ventures Inc.	4401 Arlen Ct	Plano	TX	75093
Grace	mount		8695 Baymeadows Rd E	Jacksonville	FL	32256
Harold	Muetzel	Express Employment Professionals	219 Saddletree Rd	Oxford	NC	27565
David	Myers	CertaPro Painters	41697 Hollister Ln	Murrieta	CA	92562
Jason	Myers		3836 Acacia Trl	The Colony	TX	75056
Kumar	Natarajan		2865 S Eagle Rd Ste 341	Newtown	PA	18940
Beth	Naumann	ServiceMaster by Ayotte	12752 100th St E	Northfield	MN	55057
Sarosh	Nayar	Janus Signs	6304 Trailwood Dr	Plano	TX	75024
Ali	Nekumanesh	Eagle Management Consulting	966 E Essex Dr	Fresno	CA	93720

Lynn	Nelson	Alphagraphics	3864 E 380 N	Rigby	ID	83442
Andy	Nethken	The UPS Store Inc.	10172 Black Mountain Rd Apt 93	San Diego	CA	92126
Howard	Newman	FASTSIGNS	6223 Clara Edward Ter	Alexandria	VA	22310
Michael	Newman	Always Best Care	1406 Blue Oaks Blvd	Roseville	CA	95747
Dada	Ngo	BCFC LLC	9383 Poinsettia Ave	Fountain Valley	CA	92708
Donald	Nickel	BrightStar of North Shore Nassau County	25 Ronald Ln	Syosset	NY	11791
Maureen	Nickel	BrightStar Care	25 Ronald Ln	Syosset	NY	11791
Diane	Nicol	BrightStar of Jupiter/Martin County	8864 SE Pelican Island Way	Hobe Sound	FL	33455
Richard	Nicol	BrightStar of Jupiter/Martin County	8864 SE Pelican Island Way	Hobe Sound	FL	33455
Michelle	Nock	BrightStar Sierra Vista/Tucson	3884 Plaza Margarite	Sierra Vista	AZ	85650
Cynthia	Nutwell		2505 Sunnyside Dr	McKinney	TX	75071
Edward	Norton	Culver's	8933 E Laurie Ann Dr	Tucson	AZ	85747
Jon	O'Data	Merry Maids of Beaver County	466 Ohio Ave	Rochester	PA	15074
Bland	Odell		1501 Lake Koinonia Dr	Woodstock	GA	30189
Steve	ODell	BrightStar Care of Erie PA	1001 State St Ste 1100	Erie	PA	16501
Robert	Okun	FASTSIGNS	4800 Baseline Rd Ste D102	Boulder	CO	80303
Jose	Oller	CertaPro Painters of Minneapolis	7333 Gallagher Dr Apt 139	Minneapolis	MN	55435
aaron	olson	Visiting Angels	6145 Park Square Dr Ste 4	Lorain	OH	44053
Jon	Olson	Alta Healthcare Inc	1208 Donnybrook Dr	Carmel	IN	46032
Robert	Ormsby	Ronomoza Inc.	8 Birdie Dr	Montebello	NY	10901
Victoria	Ortiz	MAE Educatioanal	157 E New England Ave Ste 202	Winter Park	FL	32789
Darin	Osborne	AlphaGraphics #4	815 W University Dr Ste 101	Tempe	AZ	85281
Fred	Osborne	Image360 Mokena	20555 Old Wolf Rd	Mokena	IL	60448
S.	Osburn	CertaPro Painters of the CSRA	781 Sparkleberry Rd	Evans	GA	30809
Clara	Osterhage	R.L.O. Inc. dba Great Clips	5140 Mad River Rd	Dayton	OH	45429
Jean	Overla	BrightStar Care of Lake County	9521 Indianapolis Blvd Ste O	Highland	IN	46322
Tracy	Overla	BrightStar of Lake County Indiana	9521 Indianapolis Blvd	Highland	IN	46322
Beryl	Packer	Molly Maid of The Crystal Coast	8717 Emerald Plantation Rd	Emerald Isle	NC	28594
Greg	Painter	FASTSIGNS	1010 Maple St	Helena	MT	59601
Ramon	Palmer	Alliance Franchise Brands	16 Trojan Horse Dr	Phoenix	MD	21131
Michael	Pane	The Learning Experience-Hackensack	530 Long Dr	Wyckoff	NJ	07481

Jennifer	Pantle	Franchise Services	38 Cambria Ln	Aliso Viejo	CA	92656
Chuck	Parker	CDAN Inc	4839 Whitner Dr	Wilmington	NC	28409
Clare	Parker	Home Helpers	107 Louisiana Ave	Signal Mountain	TN	37377
Donna	Parker	Merry Maids	4839 Whitner Dr	Wilmington	NC	28409
James	Parker		3719 N Belt Line Rd	Irving	TX	75038
Jeff	Parsons	FASTSIGNS	12397 SE Bari Ave	Happy Valley	OR	97086
Lori	Pastuszak	Signs Now #59	1103 E Willow Ave	Wheaton	IL	60187
Ashok	Patel	Art Corp Sc Inc	401 N Goose Creek Blvd	Goose Creek	SC	29445
Ashok	Patel		PO Box 4540	Florence	SC	29502
Hema	Patel	Courtesy Management	2960 Landing Way	Orangeburg	SC	29118
Jay	Patel	hotel masters management	444 Copper Creek Cir	Pooler	GA	31322
Milan	Patel	Naman Hotels	3426 Stockton Dr	Florence	SC	29501
Nilesh	Patel	GCwNY Rochester	31 Sutton Pt	Pittsford	NY	14534
Rajesh	Patel	Signs By Tomorrow	326 US Highway 22 Ste 8B	Green Brook	NJ	8812
Sam	Patel	Siddhi hotel llc	5342 Alex Harvin Hwy	Manning	SC	29102
Sam	Patel		1100 S Ocean Blvd	Myrtle Beach	SC	29577
Suryakant	Patel		1370 Scenicview Dr	San Leandro	CA	94577
Viral	Patel	Schlotzsky's of Irving TX	5 Castle Ct	North Brunswick	NJ	08902
Yatin	Patel	Shreeji Daycare Corp	762 State Route 34	Matawan	NJ	07747
Matthew	Patinkin	Double P Corp	401 N Wabash Ave	Chicago	IL	60611
Rajesh	Patnaik	Signs By Tomorrow Indianapolis Northwest	14269 Heather Knoll Pkwy	Carmel	IN	46074
Charles	Payne	Image360-Kansas City	3130 Tomahawk Rd	Mission Hills	KS	66208
Jim	Pearce	Image360	51 Weiss Ave	Flourtown	PA	19031
Kenneth	Peter	Pillar to Post Home Inspectors	5384 Saint Vrain Rd	Longmont	CO	80503
Todd	Pfister	FranNet MidAmerica	10770 Weather Stone Ct	Loveland	OH	45140
Allen	Phillips	Signcrafters Inc.	3016 Mayfair Rdg	Lewiston	ID	83501
Dan	Phillips	FASTSIGNS-South Arlington	812 Creekview Ln	Colleyville	TX	76034
Rick	Phillips	Signs By Tomorrow	2383 Barkwood Pass	Clearwater	FL	33763
Chris	Pinkston	Jani-King of Salt Lake City	4077 W Hayes Cir	Cedar Hills	UT	84062
Steven	Plaster	Pine Street Enterprises	3402 E Pine St	Wichita	KS	67208
Anda	Plavnieks	BrightStar Care	10400 Connecticut Ave	Kensington	MD	20895
Tiffany	Plott	Home Instead Senior Care	1204 Barrel Run	Haslet	TX	76052
Raelene	Plummer	Visiting Angels	1249 N Waldron Rd	Fort Smith	AR	72904
Gregory	Polizzi	The Learning Experience	11522 Grove Arcade Dr	Riverview	FL	33569
Ritu	Portugal	Denco Family Inc.	8 Club View Ln	Rolling Hills Estates	CA	90274
Jeff	Potts		2134 Generals Hwy Ste A	Annapolis	MD	21401

Doug	Pound	Maid in Iowa LLC	100 Hickory Lake Dr	Eads	TN	38028
Shawn	Powers	Allegra	1026 Spire Dr	Prescott	AZ	86305
Gary	Price		11040 Lawnhaven Rd	Dallas	TX	75230
Elizabeth	Pratt	Paul Davis Emergency Services	26111 Ynez Rd Ste B26	Temecula	CA	92591
Renee	Price	The Price Group DBA Express Employment Profressionals	1214 Twin Willows Ln	Louisville	KY	40214
Robert	Price	Express Employment Professionals	1214 Twin Willows Ln	Louisville	KY	40214
Charlie	Puchakayala	7hillslearning LLC	635 Halcyon Meadow Dr	Cary	NC	27519
Curtis	Puthoff	Famous Foods of Muskegon	1400 Lakeshore Ct	Muskegon	MI	49441
Mark	Pynnonen	5 Pyn Inc.	1225 Nakomis St	Negaunee	MI	49866
Victoria	Quero		4433 N Ravenswood Ave	Chicago	IL	60640
Rod	Quick	FASTSIGNS - Apopka	2106 White Jasmine Ct	Apopka	FL	32712
Pouya	Radfar	FASTSIGNS of Irvine	26895 Aliso Creek Rd Apt B51	Aliso Viejo	CA	92656
Thelma	Ramey	Plan Ahead Events - Tampa Bay	3053 Branch Dr	Clearwater	FL	33760
Geetha	Ranasinghe	Bright Tots LLC.	9 Leeds Ct	West Windsor	NJ	08550
Samitha	Ranasinghe	Bright Tots LLC	9 Leeds Ct	West Windsor	NJ	08550
Keith	Randall	Signs By Tomorrow - Murrieta	39590 Corte Gata	Murrieta	CA	92562
Babita	Randhawa	Window Breaker Inc. - The Learning Experience - Folsom	1608 W Campbell Ave # 330	Campbell	CA	95008
Susan	Rather	S and J Home Care LLC	1716 Brookside Ln	Waunakee	WI	53597
Gary	Ratkiewicz	BrightStar Care of Tinley Park	18311 N Creek Dr	Tinley Park	IL	60477
Christopher and Christine	Raymond	EPS Roseville	16236 E 13 Mile Rd	Roseville	MI	48066
Joseph	Reicheret	ServiceMaster Cleaning Solutions	1311 W Flintlock Way	Chandler	AZ	85286
Jackie	Reiter	Home Instead Senior Care	2153 Richmond Ave Ste 103	Staten Island	NY	10314
carmen	Rentzios	FASTSIGNS DTC	10697 E Briarwood Cir	Centennial	CO	80112
Jeff	Rey	Express Employment Professionals	4286 E Grand River Ave	Howell	MI	48843
Pat	Rhoades		4149 120th St	Urbandale	IA	50323
Mike	Richardson		2725 S Jalen Ct	Bloomington	IN	47403
David	Rice	Franchise Services Inc	28001 Festivo	Mission Viejo	CA	92692
Tracy	Rickman	FranNet of Northern Ohio	13296 Eckel Junction Rd	Perrysburg	OH	43551

Angela	Riddle	Elite Graphics Inc. d/b/a FASTSIGNS	114 Polo Dr	Salisbury	NC	28144
D Scott	Riddle	Elite Graphics Inc. d/b/a FASTSIGNS	114 Polo Dr	Salisbury	NC	28144
Loretta	Riddle	ServiceMaster franchise	201 Molly Walton Dr Apt A	Hendersonville	TN	37075
Maureen	Riser	MEO Enterprises led dab Home Instead Senior Care	8356 Forest Oaks Blvd	Spring Hill	FL	34606
Norm	Robertson	Express Employment Professionals	10115 Benamin Dr	Granger	IN	46530
Julie	Robinson	Jani-King Southwest	9668 E Topaz Dr	Scottsdale	AZ	85258
Kelly	Roddy	Roddy Investments	1955 County Road 103	Georgetown	TX	78626
Marina	Rodi	MPC LLC	1809 N Villa Dr	Gibsonia	PA	15044
michelle	rogers	Home Instead Senior Care	1841 Doane Ave	Mountain View	CA	94043
Deborah	Ronson		2730 US Highway 1 S	Saint Augustine	FL	32086
Janice	Rosas	the learning experience	2509 Dunlin Dr	Fort Mill	SC	29707
Kevin	Rose	KAR Industries Inc. d/b/a FASTSIGNS	128 Cooper Folly Rd	Atco	NJ	08004
Patrick	Rose	Interim healthcare	24640 Jefferson Ave Ste 206	Murrieta	CA	92562
Karen	Rosen	The Learning Experience	269 Thistle Ln	Bedminster	NJ	07921
Ron	Rosenzweig	Fastsigns	733 Marquette Ave	Minneapolis	MN	55402
Katherine	Ross	BrightStar Care of Friendswood	1910 Willow Lake Dr	Pearland	TX	77581
Edward	Rothschild	AlphaGraphics	6127 Holman St	Arvada	CO	80004
Robert	Rule	Signs Now #11	4511 N Porsche Way	Boise	ID	83713
Margaret	Ryan-DeBonis	Allegra Marketing Print Mail	469 Mary Dr	Waterloo	IL	62298
Eric	Saddler	KMCJ Inc	7967 Cincinnati Dayton Rd Ste A1	West Chester	OH	45069
Kenneth	Samuelson		115 Kittell Rd	Fayetteville	NY	13066
Michael	Sawyer		1831 Blankenbaker Pkwy	Louisville	KY	40299
Jose A	Sanchez	Allegra Print Signs Mail	5846 Stirling Rd	Hollywood	FL	33021
Mark	Scaparo	Pillar to Post	2540 Pineacre Ct	Powhatan	VA	23139
Charlie	Scarlett	Lifecare Missouri Inc. D/B/A BrightStar Care	11 Roosevelt Dr	Saint Louis	MO	63127
Lori	Scarlett	BrightStar Care	11 Roosevelt Dr	Saint Louis	MO	63127
Julie	Schelling	Home Instead Senior Care	9420 Hardy Dr	Overland Park	KS	66212
Sheldon	Schelling	Heritage Senior Care	9420 Hardy Dr	Overland Park	KS	66212
Bill	Schlies	Schroer Service System	12515 Sandstone Run	Carmel	IN	46033
Bryan	Schoch	BrightStar Care	1637 Edgemere Way	Dayton	OH	45414
John	Schreiber	The Learning Experience	1202 Butterfly Ct	Chester Springs	PA	19425

Kevin	Schriber	ServiceMaster All Phase Restoration	14098 SW Springbrook Ln	Portland	OR	97223
Maureen	Schuler	Fastsigns	6942 State Road 350 N	Aurora	IN	47001
Rick	Schuler	Fastsigns	6942 State Road 350 N	Aurora	IN	47001
Kathryn	Schulz		1341 Coach House Ln	South Lyon	MI	48178
Keith	Schulz	SZM Enterprises II LLC	1341 Coach House Ln	South Lyon	MI	48178
Gregory	Schwartz	Image 360 - Plymouth	1131 Waycroft Ln	Rochester	MI	48307
Jonathan	Schwartz	Fastsigns Escondido	1100 Collinswood Ln	Vista	CA	92081
Steven	Schwede	Fastsigns of Needham	75 Lyons Dr	Westwood	MA	02090
Mike	Scott	S B&B Corporation	20823 Country Creek Rd	Little Rock	AR	72223
Michael J	Seidl	Paul Davis Restoration of Southwestern Idaho	PO Box 446	Meridian	ID	83680
Steve	Selcho	AlphaGraphics Sandy	2904 E Nila Way	Salt Lake City	UT	84124
Deepak	Shah	Sai little angels daycare llc	4 Karen Ct	Old Bridge	NJ	08857
Dia	Shah	Ruby & Ryan Corp	2185 Davis Dr	Cary	NC	27519
Parimal	Shah		2185 Davis Dr	Cary	NC	27519
Payal	Shah	The Learning Experience	24 Linwood Dr	Monroe	NJ	08831
Sweta	Shah	The Learning Experience	24 Linwood Dr	Monroe Township	NJ	08831
Gretchen	Shelly	Merry Maids	313 N Bone Dr	Normal	IL	61761
Matthew	Shepherd	Mascott Ind DBA Great Clips	3851 Willowood Dr	Clemmons	NC	27012
Samir	Sheth	The Learning Experience	7 Olsen Ct	Kendall Park	NJ	8824
Aaron	Shiah		2646 Palma Dr Ste 175	Ventura	CA	93003
Debra	Shwetz	Nothing Bundt Cakes	1411 Foothills Village Dr	Henderson	NV	89012
joanne	sigafoos	servicemaster	1546 Rudolph Dr	Bethlehem	PA	18018
Brian	Silven	BrightStar Care of Norwood	66 Box Pond Dr	Bellingham	MA	02019
Tripp	Singer	The UPS Store	345 E 80th St Apt 6E	New York	NY	10075
Debbie	Sinopoli	Jani-King	14821 W 95th St	Lenexa	KS	66215
Andy	Sisavic	fastsigns beaverton	12700 SW Canyon Rd	Beaverton	OR	97005
Celia	Smith	s3 perspectives	4889 Masters Dr	Maryville	TN	37801
James	Smith	PaperGraphics Printing	2602 Quail Trl	Temple	TX	76502
Jeff	Smith		112 Gatlin Knl	New London	NC	28127
Joseph	Smith	Dwiggins Corp DBA FastSigns	1508 Birch Leaf Rd	Chesapeake	VA	23320
Mark	Smith	Merry Maids	3702 W Valley Hwy N # 308	Auburn	WA	98001
Robert	Smith	ServiceMaster St. Charles	72 Greensburg Ct	Saint Charles	MO	63304
Andrew	Smolko	Certapro Painters of Nashua	14 Addison Rd	Windham	NH	03087
Scott	Snoyer		1069 Sunset Rd	Brentwood	TN	37027
Roy	Snyder	Visiting Angels	2497 Fox Bridge Ct	Lake Saint Louis	MO	63367

Mark	Soloff	BrightStar Care of Morris County NJ	115 Highview Ave	Stamford	CT	06907
Loria	Spadafore	The Learning Expereince	975 Longstreet Dr	Bartlett	IL	60103
Denise	Spalding	Allegra Marketing Services	10910 Talon Way	Louisville	KY	40223
Karen	Spencer	fransystems	5311 Sunset Trl	Marietta	GA	30068
Shawn	Spencer	Fransystems	5311 Sunset Trl	Marietta	GA	30068
Gina	Spiller	Spiller Corp dba Fastsigns	109 NW 201st St	Shoreline	WA	98177
Brian	Spindel	PostNet International Franchise Corporation	1265 Silver Rock Ln	Evergreen	CO	80439
Andrea	Stammreich	Pillar to Post	1141 Via Francisca	San Pedro	CA	90732
Mark	Stanley	Culver's of Colorado Springs	19869 Kershaw Ct	Monument	CO	80132
Gordon	Stehr	Image360 Round Rock	1528 Foppiano Loop	Round Rock	TX	78665
Marc	Steiner	FranNet of SE Virginia	4300 Galston Ct	Chesapeake	VA	23321
Karen	Stephenson	Home instead senior care	1717 N North Park Ave	Chicago	IL	60614
Brenda	Stipanovich	FASTSIGNS	113 Long Ridge Ln	Uniontown	PA	15401
Ron	Stipanovich	FASTSIGNS	113 Long Ridge Ln	Uniontown	PA	15401
Ciara	Stockeland	MODE	1520 Robertson Ct	Grand Forks	ND	58201
William	Stockley	BK-STOCK INC.	3206 Briarhurst St	Corpus Christi	TX	78414
Jeff	Stone	BrightStar Care of Tulsa OK	9818 E 83rd Pl	Tulsa	OK	74133
Lisa	Stone	BrightStar Care of Phoenix NE NW Tempe	4515 S McClintock Dr Ste 203	Tempe	AZ	85282
David	Strassburg	BrightStar Care Serving Mobile/Baldwin Co.	216 South Dr	Fairhope	AL	36532
Craig	Stuart		213 W Monroe Ave Ste D	Lowell	AR	72745
Dale	Stuart	Visiting Angels of NWA	6409 Bridge Bay Ln	Rogers	AR	72758
Mike	Stygles	Melting Pot Restaurant	11 Hill St	Alplaus	NY	12008
Eric	Sugden	Sport Clips	308 17th St	Manhattan Beach	CA	90266
Jim	Sukiennik	Home Instead Senior Care	1322 Bayou Dr	Ocean Springs	MS	39564
Sohail	Sulahry		22224 Northwest Fwy Ste C	Cypress	TX	77429
Kevin	Sullivan	PDR of Northern VA	44601 Guilford Dr	Ashburn	VA	20147
Shelly	Sun	BrightStar Group Holdings Inc.	590 Academy Woods Dr	Lake Forest	IL	60045
Margot	Suszek	MD Preschools Inc	838 Aylesbury Dr	Gahanna	OH	43230
Castle	Swanson	ServiceMaster of Germantown	777 Aldis Cv	Collierville	TN	38017
Lance	Swearingen	BrightStar Care of Wichita-East	505 S Broadway St Ste 205	Wichita	KS	67202
James	Sweeney	Minuteman Press	2042 Lakeside Lndg	Seabrook	TX	77586

Lisa Marie	Swiatkowski	BrightStar Care of South Sarasota	5346 Dominica Cir	Sarasota	FL	34233
Stacy	Swift	FranNet Colorado	1464 S Lafayette St	Denver	CO	80210
Robert	Szymanski	Fantastic Sams of Virginia Inc.	5925 Brookmeade Ter	Glen Allen	VA	23059
Robert	Tahiry	BrightStar Care	9606 Tierra Grande St Ste 206	San Diego	CA	92126
Frank	Talarico	ServiceMaster of Runnemede NJ	73 Coolidge Ave	Bellmawr	NJ	08031
Jane	Tapken	Jani-King of Dallas	5224 Westgrove Dr	Dallas	TX	75248
Keith	Terryberry	Interstate All Battery Center of Amherst	80 Plumwood Ct	East Amherst	NY	14051
Jeffrey	Tews	BrightStar Care	1716 Brookside Ln	Waunakee	WI	53597
Benje	Thomas	Servicemaster of Citrus Co.	1025 N Stoney Pt	Crystal River	FL	34429
Russell	Thomas	In-Home Care of the Triad LLC	315 Mountain View Dr	Kernersville	NC	27284
Scott	Thomas	FASTSIGNS	6060 Tippin Ave	Pensacola	FL	32504
Carolyn	Thompson	Carolyn Home Health Care Inc	5810 Hackmann Ave NE	Fridley	MN	55432
Walt	Thoms	FASTSIGNS	118 N Halsted St	Chicago	IL	60661
Tawfic	Tillawi	Merry Maids	2623 Chichester Ln	Fort Wayne	IN	46815
Debra	Tillery		845 Aylesbury Dr	Columbus	OH	43230
Stephen	Timoni	BrightStar Care of Union County	4 Windy Hill Rd	Dunellen	NJ	08812
Bill	Tolia	Brightstar Home Health Care	4100 Galt Ocean Dr	Fort Lauderdale	FL	33308
Kevin	Tomlinson	Merry Maids of Holyoke	163 State St	Chicopee	MA	01013
Tonya	Tomono	T&G Inc	6010 SW Port Orford St	Tualatin	OR	97062
Marla	Topliff	Rosati's Pizza	7020 W Greenleaf St	Niles	IL	60714
Ted	Torres	Caerus Hospitality	13969 E Kalil Dr	Scottsdale	AZ	85259
Becky	Torrez	BrightStar Care of West Central Las Vegas NV	3595 S Town Center Dr Ste 103	Las Vegas	NV	89135
Jon	Toy	FASTSIGNS - Two Toys Inc	125 Pentail Dr	Lancaster	PA	17601
Gary	Treiber	AlphaGraphics 554	3847 Sienna Canyon Ct	Encinitas	CA	92024
Ken	Trowbridge	BrightStar Care	3528 Darien Hwy Ste 214	Brunswick	GA	31525
Sean	Trumbo	Highland Healhcare LLC Dba BrightStar	1302 N Summersby Dr	Fayetteville	AR	72701
Timber	Tucker	Express Employment Professionals	116 S Madison St	Bloomington	IN	47404
Heather	Turk	JAN-PRO of Northern Illinois	408 S Kensington Ave	La Grange	IL	60525
Ralph	Turner	Wolf Harbor Management	4160 E Woodland Ct	Leesburg	IN	46538
Ron	Unk	ServiceMaster by Corbett	287 Perdue Ave	Akron	OH	44310

Charles	Valentine	Signs By Tomorrow Atlanta North	2030 Powers Ferry Rd SE	Atlanta	GA	30339
Roxie	Vannoy	Rock Signs. Inc	782 Foxcroft Ave	Martinsburg	WV	25401
David	Vantrease	BrightStar HealthCare	2725 Walton Way	Augusta	GA	30909
Takis	Vartelas	Blue Atlantis Inc	9700 Gilman Dr PMB 222	La Jolla	CA	92093
Susana	Vega	The Learning Experience	38 N Pentenwell Cir	Spring	TX	77382
Lenny	Verkhoglaz	Executive Care	95 Plymouth Rd	Hillsdale	NJ	07642
Lee	Vescelius	Laventure Inc. dba Great clips	1736 Churchview Ln	Columbus	OH	43220
Eric	Vetter	Allegra marketing print mail	3983 Linden Ave SE	Grand Rapids	MI	49548
Mechell	Vieira	Premium Life Care Inc. BrightStar	922 Felicia Way	San Luis Obispo	CA	93401
Stacey	Voshall	North Georgia Senior Home Care	6230 Westchester Pl	Cumming	GA	30040
Steve	Voshall	Brightstar Care - Home Care	6230 Westchester Pl	Cumming	GA	30040
Diane	Vu	Franchise Services Inc.	26722 Plaza	Mission Viejo	CA	92691
Joel	Walker	Interstate All-battery Center	4709 Beaver Creek Dr	Austin	TX	78759
Karen	Wall	BrightStar Care	7549 Haw Meadows Dr	Kernersville	NC	27284
Charles	Walton	BrightStar	113 Osprey Ln	Kitty Hawk	NC	27949
Michael	Walton	Tidewater Healthcare Services Inc	2010 Old Greenbrier Rd	Chesapeake	VA	23320
John	Wang	Alliance Hotels	21520 Yorba Linda Blvd Apt G338	Yorba Linda	CA	92887
Paul	Warner	Silo Cigars Inc.	8137 Jonesboro Rd	Knoxville	TN	37920
Sara	Waskow	FranNet of Dallas/Fort Worth	617 Greenbriar Dr	Keller	TX	76248
Joe	Webb	Corner Bakery Cafe	1103 Fontaine Dr	Southlake	TX	76092
Larry	Weigel	Merry Maids	9423 Beachberry Pl N	Pinellas Park	FL	33782
Kenneth	Weimann	Visiting Angels	903 Hillcrest Rd	Ridgewood	NJ	07450
JC	Weir	Allegra	5190 Belsera Ct	Reno	NV	89519
Richard	Weissman	The Learning Experience	2166 E Silver Palm Rd	Boca Raton	FL	33432
Patrick	Welch	AlphaGraphics	1234 Quigley Pl	South Bend	IN	46617
Lee	Wenninger	Express Employment Professionals	700 Round Ct	Zionsville	IN	46077
Jeffrey	Weyker	Focus Franchising Inc.	2850 Berwick Ct	Brookfield	WI	53045
Wally	Wheeler	Image360	2204 N Hillcrest Pkwy Ste 3	Altoona	WI	54720
Alison	White	BrightStarCare	189 Keystone Palms Blvd	Tarpon Springs	FL	34688
Dan	White	Growler USA	11211 E Arapahoe Rd Ste 100	Centennial	CO	80112
Denise	Wieand	Allegra Marketing Print and Mail	3 Lexington Ct	Ocean View	NJ	08230
Thomas	Wilhelm	Allegra	576 W Taylor Rd	Romeoville	IL	60446

Andrew	Williams	Home Instead Senior Care	211 Cleveland St Ste C	Blairsville	GA	30512
Tra	Williams	Lakeview Center	7870 2nd Ave S	Saint Petersburg	FL	33707
Sandra	Williamson	ServiceMaster of Gwinnett	1730 Lebanon Rd	Lawrenceville	GA	30043
Ben	Wilson	Fastsigns	2933 Misty Rock Cv	Dacula	GA	30019
Dan	Wilson	Fastsigns Lynnwood	2921 Alderwood Mall Blvd Ste 104	Lynnwood	WA	98036
Drew	Wilson	Rockin jump	860 Division St	Pleasanton	CA	94566
Kevin	Wilson	Mosquito Joe	349 Southport Cir Ste 106	Virginia Beach	VA	23452
James	Winschel	Sundance Kids	68 Livingston Ave	Cranford	NJ	07016
Larry	Yingling	ServiceMaster Cleaning & Restoration	512 1500n Ave	Mount Sterling	IL	62353
Diana	Zabadneh	ServiceMaster by Zaba	8948 Crawford Ave	Skokie	IL	60076
Brandy	Zambrano	J&B InHome Texas Care LLC	983 Whitehead Dr Ste 102	Granbury	TX	76048
Sharon	Zimmerman	BrightStar of Northern Michigan	9021 Odell Rd	Williamsburg	MI	49690
Steve	Zishka	BrightStar Fort Wayne	410 Club Course Dr	Fort Wayne	IN	46814

PARTNERSH P TO PROTECT
WORKPLACE OPPORTUNITY

October 6, 2015

Chairman Steve Chabot
House Small Business Committee
2361 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Nydia M. Velázquez
House Small Business Committee
B-343C Rayburn House Office Building
Washington, D.C. 20515

Chairman Cresent Hardy
Subcommittee on Investigations,
Oversight and Regulations
2361 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Alma Adams
Subcommittee on Investigations, Oversight
and Regulations
B-343C Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Chabot, Ranking Member Velázquez, Chairman Hardy and Ranking Member Adams:

On behalf of the Partnership to Protect Workplace Opportunity (PPWO) thank you for convening a hearing on the U.S. Department of Labor's (DOL) recently proposed overtime rule and the impact on small businesses. The PPWO consists of a diverse group of associations, businesses, non-profits and other stakeholders representing employers with millions of employees across the country in almost every industry who will be affected by the proposed overtime changes. Attached are the Partnership's comments in response to the proposed rule, signed by 133 organizations, including 92 national organizations and 41 state/local organizations, representing thousands of small businesses.

The Partnership is concerned that the Administration's proposal to increase the minimum salary level by over 100 percent will force employers to reclassify millions of salaried employees in managerial and other traditional white collar positions to hourly jobs, leading to fewer opportunities for workplace flexibility and career advancement and diminished employee morale.

The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.

Thank you again for your leadership on this critical issue to employers and employees.

Sincerely,

Lisa K. Horn

Lisa Horn
Chair, Partnership to Protect Workplace Opportunity

Cc: Members of House Small Business Committee

PARTNERSHIP TO PROTECT
WORKPLACE OPPORTUNITY

September 4, 2015

Submitted via regulations.gov

Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S–3502, 200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA11)

Dear Ms. Ziegler:

These comments on the proposal to change the criteria for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA) are submitted on behalf of the Partnership to Protect Workplace Opportunity (PPWO). The PPWO consists of a diverse group of associations, businesses, non-profits and other stakeholders representing employers with millions of "white-collar" employees across the country in almost every industry who will be affected by the proposed changes.

The PPWO's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees. Unfortunately, as we describe below, if implemented as proposed, the Department of Labor's (DOL or the Department) proposal would result in large numbers of employees being reclassified as non-exempt. Reclassification will:

- harm the ability of employers to provide, and employees to take advantage of, flexible scheduling options;
- result in employees in the same job classification (for the same employer) being treated differently based on regional cost-of-living differences;

- limit career advancement opportunities for employees;
- decrease morale for those employees who are demoted to non-exempt status, particularly where peers in other locations remain exempt;
- reduce employee access to a variety of additional benefits, including incentive pay;
- deter employers from providing newly-reclassified employees with mobile devices and remote electronic access, further limiting employee flexibility;
- increase FLSA litigation based on off-the-clock and regular rate of pay claims; and
- introduce other legal and operational issues, such as increased administrative costs.

Moreover, given the Department's proposal to increase the salary level on an annual basis, these are not one-time issues. Rather, these issues would recur each year, as employers decide whether continued classification of an employee as exempt is worth the annual salary increase.

The Department recognizes that "the exemptions were premised on the belief that the exempted workers typically earned salaries well above the minimum wage and were presumed to enjoy other privileges to compensate them for their long hours of work, such as above-average fringe benefits, greater job security, and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay."[1] Yet, because the Department's proposal would more than double the salary level, it would have the perverse effect of forcing many employers to take away the benefits, job security, and opportunities for advancement for those employees who will lose exempt status.

Due to these significant impacts the Department's proposed rule likely will have on employers, the regulated community made of hundreds of requests to extend the comment period to allow additional time to evaluate the consequences of this rulemaking. In rejecting those requests, the Department notes its pre-proposal outreach; this outreach, of course, is not part of the regulatory record. More significantly, the outreach did not include any actual proposals. "An" increase to the salary level is meaningless for analytical purposes; only when a dollar figure is attached can meaningful and valuable analysis take place.

Coupling the surprisingly high proposed salary level with the unprecedented effort to permanently index that salary level and the highly unorthodox approach the Department took with respect to duties, it is clear that the Department's belief that 60 days is sufficient is

[1] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule*, 80 Fed. Reg. 38,516, 38,517 (July 6, 2015).

erroneous. If the Department was interested in obtaining the best possible information with which to assess the impact of its proposal, it would have given additional time for comment.

As it is, however, the Department's proposal, in its current state, does little to promote the President's directive to "modernize" the regulations. At a time when more and more workers seek additional flexibility in their schedules and an ownership stake in their work, the Department's proposal will return us to a 1940s mentality of clock-punching for all but the most highly paid employees. As detailed below, this result is bad for employees, bad for employers, and bad for the economy. We urge the Department to reconsider its decision to proceed with such a disruptive rulemaking.

I. The Minimum Salary Level Proposed by the Department is Excessively High to Satisfy its Gatekeeper Function, is Inappropriately Disruptive to Employers with National Operations, and Will Harm the Very Employees the Department Purports to Protect.

The proposed salary level, which would be higher than the exempt salary levels set under <u>any</u> state law (*e.g.*, it is nearly $10,000 higher than the minimum salary for exemption in California and nearly $15,000 higher than the standard in New York), is too high to achieve the historical purpose of the salary level, will force employers to make classification decisions that ignore regional economic differences, and will cause significant disruption in the workplace. The wage costs, administrative expenses, and intangible consequences of the Department's proposal will be significant, particularly when considered against the fact that even if the Department's estimate of impact is correct — which it is not — more than 75% of the employees potentially impacted by this rulemaking will see no change in compensation and no change in hours worked.[2]

The problems associated with an abrupt and excessive increase are well-understood by the American public. A national February 2015 survey from the polling company, inc./WomanTrend found roughly one-in-five adults (21%) would not increase the overtime salary threshold at all. In fact, a 65%-majority preferred increasing the salary limit by no more than 50%, or $35,490. We discuss these problems in more detail below.

[2] *See id.* at 38,573 (3.5 million of 4.7 million potentially-impacted workers "work 40 hours per week or less and thus will not be paid an overtime premium despite their expected change in status to [nonexempt]").

A. The Department's Proposed Minimum Salary is Too High to Achieve its Purpose.

Since at least 1940, the Department has recognized that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously nonexempt employees."[3] That is, the salary level should be set at a level at which the employees below it clearly would not meet any duties test; above the level, employees would still need to meet a duties test in order to qualify for exemption. In setting the proposed level as high as it has, however, the Department has turned this analysis on its head. The Department seems to be setting the salary level at a point at which all employees above the line would be exempt, turning the salary level from its historical role as a screening device into the *de facto* sole test and a mechanism for greatly limiting the ability of employers to avail themselves of these exemptions. Indeed, built into the Department's (erroneous) assumption that litigation will decrease as a result of this rulemaking is the belief that employees above the line will be more clearly exempt.[4] That has never been the Department's goal in setting the salary level.

Such a dramatic departure from the historical purpose of the salary level will have far-reaching consequences. The Department's proposed minimum salary level will force employers to reclassify positions that clearly meet the duties test where the nature of the industry (*e.g.*, non-profit) or the regional economy cannot justify a salary increase. As noted in a recent article on the issue, the Department's analysis also fails on a more global level:

> *For example, the DOL placed the occupation "First Line Supervisors/Managers of Office and Administrative Support Workers" in the category corresponding to 90 to 100 percent of employees with sufficient managerial and professional duties to pass the duties test, yet 51 percent of employees in this occupation will likely fail the new salary test.*[5]

Where hundreds of thousands of positions that meet the duties test will need to be reclassified (or have their salaries increased) as a result of the salary level, the new salary level ceases to function as a gatekeeper.

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[3] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,165 (April 23, 2004).

[4] *See* 80 Fed. Reg. at 38,578 ("Reducing the number of white collar employees for whom a duties analysis must be performed in order to determine entitlement to overtime will also reduce litigation related to the [executive, administrative, and professional] exemption.").

[5] *Flawed Logic in DOL's Proposed White Collar Salary Test*, S. Bronars, D. Foster, and N. Woods, Employment Law 360 (Aug. 25, 2015).

As a result, the Department should reconsider its proposal and, to the extent that an increase to the minimum salary level is deemed to still be appropriate, that salary level should be set in accordance with the historical purpose of the salary level test — to exclude clearly non-exempt employees from further analysis.

B. The Department's Proposed Minimum Salary Level Fails to Account for Regional Economic and Market Differences.

Despite the Department's suggestion to the contrary, its methodology fails to account for regional differences.[6] As noted above and repeatedly by numerous sources, the proposed minimum salary level exceeds the minimum salary level for exempt status in both California and New York — by significant margins.

As the Department is well aware, the federal government considers geographic variations when setting the compensation level for its own employees. Among some of the highest compensation levels set by the federal government are those in California and New York.[7] Setting a salary level that exceeds the minimum level determined by those states' own legislatures to be appropriate demonstrates just how far removed from the historical role of the salary level test the Department's proposed salary level is. If it will have a significant impact in California and New York, the impact in Mississippi and Iowa, and other parts of the country, will certainly be much more significant.

There are substantial pay differences based on geographical region and pay differences between larger and smaller cities that are unlikely to be related to differences in job duties. For example, the median pay of "First Line Supervisors/Managers of Retail Sales Workers" is 50% higher in New York City than in Little Rock, Arkansas.[8] In some parts of the country, up to 100% of the employees in similar positions fall below the Department's proposed salary level.[9] Again,

[6] *See* 80 Fed. Reg. at 38,560.

[7] For example, the federal government provides a locality pay differential of 28.72% for employees in the New York metropolitan areas and 35.15% for employees in the San Francisco area.

[8] *Flawed Logic in DOL's Proposed White Collar Salary Test*, S. Bronars, D. Foster, and N. Woods, Employment Law 360 (Aug. 25, 2015).

[9] *See Without Local Cost Of Living Adjustments Proposed Salary Threshold May Be Problematic*, by S. Bronars, D. Foster, N. Woods (Edgeworth Economics) at http://www.edgewortheconomics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:09-03-2015-12-00am-without-local-cost-of-living-adjustments-proposed-salary-threshold-may-be-problematic/ ("First-line supervisors of food preparation and serving workers stand out as 100 percent of employees in this occupation in the state of Mississippi will fall below the new threshold. This means that every such employee would be deemed non-exempt when the final rule takes effect. However, the DOL's classification for the 1999 GAO study "White Collar

the salary threshold ceases to operate as a gatekeeper; in some cases, the proposed increase all but eliminates the ability to implement the exemption.

This effective elimination of the exemption for certain low-cost-of-living areas of the country raises the possibility of the Department exceeding its statutory authority. Congress directed the Department to define and delimit the terms in the statute; it cannot possibly have meant that the Department should effectively eliminate the exemption in certain regions. But because the minimum salary has been proposed at such a high level based on a national survey that does not account for regional differences in any meaningful way, that is precisely what the Department is doing. The South and Midwest will be placed at a competitive disadvantage to other regions; employers in urban areas will be able to maintain exempt employees at a rate that far exceeds rural areas.

The impact of the proposed salary level, however, will not simply be limited to employers in the lower-cost-of-living regions in the country. Many employers with national operations will be impacted as well. Because the cost of living varies greatly throughout the country, employers often have different salaries for the same job position depending on where the employee works, similar to how the federal government operates. The job duties are precisely the same. The only thing that differs is location.

For example, an employee in New York City will have a higher cost of living than an employee working in Knoxville, Tennessee. Accordingly, the employer may provide the employee in New York with a higher salary than the employee with the same job title and job responsibilities in Knoxville. With the Department's proposed increase to the minimum salary level, that employer may now need to decide whether the economics of the Knoxville location justify an increase to the new salary level or whether the Knoxville position will need to be reclassified as non-exempt. This again demonstrates the Department's significant departure from the traditional role of the salary test. Salary, rather than job duties, will determine exempt status.

Intuitively, employers and employees understand that different locations require different pay levels. In the Inc./WomanTrend survey discussed above, approximately 63% of adults agreed that "one size fits all" overtime rules should not be required throughout industries and geographies. In proposing a salary level in excess of even the levels in the highest-cost-of-living states in the country, the Department simply does not account for these regional and industrial variations.

Exemptions in the Modern Work Place" showed that 10 to 50 percent of employees in this occupation should pass the exempt duties test. This inconsistency is caused by the absence of regional adjustments to properly account for differences in cost of living between different geographies.").

C. The Department's Proposed Minimum Salary Will Negatively Impact the Ability of Employees to Work in Part-Time Capacities.

The Department's proposed increase to the minimum salary level would negatively impact the ability of employers to provide part-time exempt positions. Although the current regulatory scheme does not permit part-time exempt employees on a *pro rata* basis, the PPWO believes that such an adjustment is necessary under the proposed salary level to ensure that these types of positions can remain exempt and, therefore, continue to be offered.

Because it is not clear from the Department's statements in the preamble that it fully understands this issue, we provide the following example. Under the current regulations, an employee who performs tasks that clearly meet one or more of the exemption duties tests can be classified as exempt so long as his or her salary exceeds $23,660 per year. Thus, a part-time employee working a 50% schedule can qualify as exempt so long as he or she works in a position that has a full time salary of approximately $48,000 per year. This is true not because the full-time equivalent salary is $48,000, but because the part-time salary of $24,000 is still in excess of the regulatory minimum.

Under the Department's proposed minimum salary level, that employee would no longer qualify for exemption. Instead, in the first year under the Department's proposal, an employee working a 50% schedule would need to be working in a position earning more than $100,000 on a full-time basis. Obviously, without a *pro rata* provision, the number of employees who will be eligible for part-time exempt employment will be significantly limited. This limitation will have a disproportionate impact on women in the workplace, and, in particular, likely will impact mothers who may be seeking to re-enter the workplace as professionals, but not on a full-time basis. Similarly, older workers looking to pursue a phased retirement would likely be disadvantaged by the Department's increased minimum salary level.

If the Department fails to implement a *pro rata* provision, the proposed increase to the minimum salary level will create two classes of employees performing the same work: full-time exempt employees and part-time non-exempt employees. Employers would be unable (for practical purposes) to take a consistent approach to a job because it simply is not feasible to reclassify entire positions as non-exempt due to the issues related to part-time employees. As a result, however, individuals working side-by-side would be subject to different rules and obligations simply because one is a full-time employee and one is a part-time employee. Although fairness, and the nature of their work, should dictate that such colleagues be treated the same, the Department's proposed salary level would all but require the part-time employee to be treated differently. Teamwork, productivity, and morale will undoubtedly suffer.

In addition to the likely stigma associated with the different classification decisions based on full-time vs. part-time, the Department's proposed salary level would deprive employers of the ability to offer the types of flexible work and scheduling opportunities that are crucial to meeting the demands of the modern workplace. Punching a clock is not conducive to allowing employees to build their schedules around their personal or family needs and preferences. Many job-sharing and part-time opportunities, as well as seasonal positions, will be diminished if an employer cannot classify those positions as exempt.

If the Department permitted the salary to be prorated, however, employers would be far more likely to allow such arrangements. We therefore urge the Department to add a *pro rata* provision to the regulations, regardless of the salary level ultimately adopted in a final rule.

D. The Department's Proposed Salary Level Will Negatively Impact Employee Compensation, Flexibility, and Morale.

In creating conditions in which employees must be reclassified to non-exempt status, the Department's proposed salary level will negatively impact many employees' ability to earn incentive compensation. When employees are converted to non-exempt status, they often find that they have lost their ability to earn incentive pay. Under the existing rules for calculating overtime rates for hourly workers, many incentive payments must be included in a non-exempt employee's "regular rate" (*i.e.*, the base rate for overtime) of pay. Faced with the difficult calculation (and recalculation) of these overtime rates—sometimes looking back over every pay period in a year—employers often simply forgo these types of incentive payments to non-exempt employees rather than attempt to perform the required calculations.

Although reclassification as a non-exempt employee often has such economic consequences for an employee, reclassification is not limited to those economic consequences. The change to non-exempt status means that many employees also will lose the ability to structure their time to address needs such as attending their child's school activities or scheduling doctors' appointments. Many other employees will lose the opportunity to work from home or remotely, as it can be difficult for employers to track employees' hours in those situations. Employers may also cease providing employees with mobile devices, as any time spent checking them would now have to be accounted for.

In addition, employees often view reclassifications to non-exempt status as "demotions." Particularly where other employees within the same organization will continue to be exempt (due to regional economic variations or full-time status), it is easy to see why. The non-exempt employee will now need to account for his or her time in a way he or she has not had to previously. In addition, because of the increased attention that must be paid to the hours worked by the non-exempt employee, he or she is likely to be at a competitive disadvantage to the exempt employee in the same role. Many training opportunities will now become compensable time under the FLSA and where those opportunities would put the non-exempt employee into an overtime situation, his or her access to those opportunities may be limited; the same is not so for his or her exempt colleague.

Similarly, the non-exempt employee may be limited in his or her ability to "get it done" now that he or she must record and account for all hours worked. These types of intangibles — being known as someone who "just gets the job done" — are often considered in whether an employee receives a promotion, bonus, or training opportunity. As a result of the Department's dramatically increased proposed minimum salary level, career advancement may become more a function of where an employee sits than what he or she does.

The importance of this issue is worth repeating here: the Department fails to sufficiently acknowledge the reality that many workers view their exempt status as a symbol of their success within the company. In fact, even when all other aspects of the work remain the same and even when their overall compensation increases with the addition of overtime pay, employees frequently view the transition from exempt to non-exempt as a demotion. Far from being enthusiastic, members of the PPWO have described reclassified employees as feeling like they were being disciplined and distraught over being reclassified.

E. Bonuses and Commissions are Critical Components of an Employee's Total Compensation and Should Count Towards the Minimum Salary Level.

The Department asks whether it should count towards the minimum salary level nondiscretionary bonuses and incentive payments, such as "nondiscretionary incentive bonuses tied to productivity and profitability."[10] It then significantly limits the viability of using such payments to satisfy the salary level test by suggesting that such payments should be limited to 10% of the weekly salary level and that payments must be made at least monthly, with no ability to make an annual "catch up" payment.[11]

The PPWO believes that all forms of compensation should be used to determine whether the salary level has been met. It should make no difference to an exemption analysis whether someone earns $45,000 per year in base salary with $45,000 in bonus potential or $50,000 per year in base salary with $40,000 in bonus potential. As far as the employee is concerned, at the

[10] 80 Fed. Reg. at 38,535.

[11] Such catch up payments currently are permitted for the Highly Compensated Employee (HCE) exemption. *See* 29 C.F.R § 641.601(a)(2).

end of the year, the total compensation is the same. In a similar vein, this is how employers value compensation — in terms of total compensation, rather than the individual components — and the regulatory scheme should reflect that reality, and permit that flexibility, rather than attempt to change it.

The majority of employees who receive incentive payments are those who would otherwise qualify for an exemption.[12] Those employees are most likely to have the ownership mentality — the "sense of ownership" that the Department claims it is trying to assist through this regulatory suggestion.[13]

Unfortunately, the Department's suggestion that the bonus inclusion would be limited to payment intervals more frequent than monthly undoes much of what its original suggestion seems to put into place. Bonus payments are typically made less often than monthly because they are tied to productivity, revenue generation, profitability, and other larger and longer-term business results that can fluctuate significantly on a month-to-month basis. We urge the Department to consider inclusion of bonuses paid quarterly, semi-annually, or annually to reflect how these incentive payments are made by employers.

Similarly, the Department's suggested limitation on the application of these payments to 10% of the salary level does not adequately reflect how these payments are made by employers. Under this limitation, in Year 1, the Department would allow $97 per week to be satisfied by a bonus that could be hundreds or thousands of dollars. As noted elsewhere in these comments, the point of the salary level is to assist the Department in screening out non-exempt employees. Where someone is performing duties that qualify for exemption, is paid a substantial amount of money for doing so, and is paid a salary, it is difficult to see why the precise manner in which the employer attributes the payments should make a difference as to whether that employee is non-exempt.[14]

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[12] Indeed, as noted elsewhere, non-exempt employees often are not eligible for incentive-type payments due to the regular rate calculation issues associated with providing them.

[13] *See* 80 Fed. Reg. at 38,535 (recognizing employers' understanding that a shift from bonuses to increased salary "would undermine managers' sense of 'ownership' in their organizations.").

[14] To the extent that the Department considers this more of a salary basis issue, rather than a salary level issue, the fact of the matter is that it has long been the position of the Department that additional payments, such as non-discretionary bonuses and commissions, do not impact the analysis of whether an employee is paid on a salary basis. Thus, it would be acceptable for an employee to earn the regulatory minimum in salary, even if his or her total compensation was two, three, or ten times that amount — and subject to meeting certain metrics. It is hard to see why it would not be acceptable for an employee to earn less than the minimum in base salary, if the total compensation earned exceeded it.

We also believe that the Department should allow "catch up" payments in the event that the metrics for an incentive payment were not met for a given employee. Would the employee thus become non-exempt for the time period covered by the bonus? For all time? It makes far more sense to allow a catch up payment in lieu of any bonus that might be due.

As part of this discussion on incentive pay, the Department also suggests that it will not count commissions toward the requisite salary. There simply is no reason why commissions should not be permitted to be used to satisfy the salary level. Indeed, to the extent that the Department will treat non-discretionary bonuses as satisfying the salary level, there is no logical reason for the Department to treat commissions differently.

Failure to do so will almost certainly result in litigation over whether a specific payment is a "commission" or whether it is a "non-discretionary bonus." Many managerial employees who are clearly covered by the executive or administrative exemption receive "commissions" that are based not on their own sales, but on the sales performance of their company, division, product line, branch office, store, or other portion of their business. With no definition of "commission" for these purposes, litigation will inevitably follow. Even with a definition, however, it is unlikely that the Department will be able to provide guidance on all of the variations of bonus/commission plans used by employers, which will necessarily mean additional litigation. As a result, we urge the Department to treat commissions in a manner similar to non-discretionary bonuses and allow them to be used to satisfy the salary level.

We also urge the Department to apply discretionary bonuses toward the minimum salary level. Such payments are in many ways even more reflective of an individual employee's efforts and contributions (and by implication their exercise of independent judgment and other characteristics of the duties' test) than nondiscretionary bonuses. Thus, they too help effectuate the laudable business objectives the Department recognized ("sense of ownership" and the like) and often represent a substantial portion of an employees' earnings for a given time period.

There is one final point worth noting in the context of the Department's discussion on incentive pay. The Department suggests that commissions should not be included in the compensation that would satisfy the salary level. Its explanation, however, seems to be an effort to change regulatory standards without specifically proposing to do so. The current regulation specifically states that commission payments, made in addition to the minimum salary amount, are permissible and do not violate the salary basis requirement.[15]

[15] 29 C.F.R. § 541.604(a).

The Department, however, explains its apparent belief that "commissions" are paid only to sales employees, and, thus, employees who earn commissions would not meet any duties test (except for potentially the outside sales test). This effort to undermine the application of the duties tests with respect to an employee due to the employee's receipt of certain payments is improper. Employees either meet the duties tests or they do not. If an employee does not meet the duties test, he or she will not be exempt, no matter how much he or she is paid. If that employee, meets the test, however, there is no reason why the receipt of commissions should change that analysis.

For support that commissions are (1) consistent with exempt status and (2) actually paid to employees who are otherwise exempt, the Department need look no further than its own opinion letters. In a November 27, 2006 Opinion Letter, which is still in effect, the Wage and Hour Administrator concluded that registered representatives in the financial services industry qualified for the administrative exemption.[16] The registered representatives were paid in part by commissions, and the Administrator confirmed the Department's position that the commission payments to the registered representatives were permissible and did not violate the salary basis test, stating

> *that the salary basis test would be met if "the employee receives no less than the weekly-required amount as a guaranteed salary constituting all or part of total compensation, which amount is not subject to reduction due to the quality or quantity of the work performed, and that the employee is never required to repay any portion of that salary even if the employee fails to earn sufficient commissions or fees."*[17]

Based on the Department's expressly stated position, we believe that the Department should withdraw its suggestion in the preamble that commissions are inconsistent with exempt status; should it decide that it wants to make such a dramatic change to the regulatory landscape, we suggest that the Department engage in notice-and-comment rulemaking in which it actually makes a proposal to do so.

F. The Department Should Phase Any Salary Increase in Over Time.

Despite the numerous negative impacts that would result from increasing the salary to the Department's suggested level, should it nevertheless decide to increase the salary, the PPWO believes the Department should do so incrementally. Specifically-identified interim levels,

[16] See WH Op. Ltr. FLSA2006-43 (Nov. 27, 2006).

[17] *Id.*

spread out over the course of several years, will ensure a smooth and compliant transition and will allow employers the necessary time to adjust their budgets, revenues, and work flows to minimize disruption. As currently proposed, the Department's minimum salary level would increase approximately 113% in an extraordinarily short amount of time.

In addition, due to the rapid nature of the required increase, employers may make classification decisions today that they would not make if the increase was phased in over multiple years. A gradual and previously-specified increase would allow employers the ability to prepare for the changes in a way that makes more economic sense. It also would allow employers to determine with additional certainty how many overtime hours are actually being worked by employees in the $23,660 to $50,440 range. Currently, because many of these exempt employees do not record their time, employers are faced with an information deficit. Without information regarding these hours, employers will need to guess at how many hours are worked; those guesses will almost certainly account for more overtime than will actually be worked, resulting in a net loss of income to impacted employees.[18]

By allowing a gradual increase, the employer can begin gathering the necessary data to ensure as smooth a transition as possible and to therefore minimize the monetary impact on both the employee and the business. Although many of the same issues will exist with respect to morale, flexibility, and opportunity, a gradual, phased-in implementation of the new minimum salary would reduce the financial disruption experienced by both employers and employees.

G. The Department Should Not Increase the Minimum Required Salary for Application of the Highly Compensated Employee Exemption.

For many of the same reasons discussed above with respect to the standard salary level, the Department should not increase the minimum salary required for application of the HCE exemption. Although the sample size is significantly smaller, the issues remain the same: for example, regional variations within the same business may result in different employees in the same classification being treated differently from an exemption perspective based almost entirely on the location in which they work. In addition, when HCE employees must be reclassified as non-exempt, the issues associated with that reclassification are compounded by the increased compensation level and status of such positions within the business. These employees are likely to have various levels of advanced education and have come to expect to be treated as salaried professionals.

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[18] Assuming that an employer attempts to compensate a reclassified employee at approximately the same level as prior to the reclassification, any new salary will be based on an understanding of how many overtime hours will be worked. Should that understanding be higher than the actual number of overtime hours worked after reclassification, the affected employee will earn less than he or she did prior to reclassification.

II. The Department Should Not Adopt Its Proposal To Automatically Increase the Salary Level.

The PPWO strongly objects to the Department's proposal to automatically increase the salary level. These automatic increases would require annual speculation on the part of employers to determine the proper salary level for the next year, essentially revisiting the process above on an annual basis.

Although the proposed automatic increases are a bad idea for a variety of reasons, as an initial matter, the Department lacks the authority to mandate them. Furthermore, the Department's proposal would not properly account for changes in economic conditions, would not permit notice-and-comment on subsequent salary levels, would dramatically increase the administrative burden as classification decisions would need to be revisited on an annual basis, and has the potential to increase the minimum salary level at such a dramatic rate as to render the duties tests wholly superfluous.

For these reasons, as discussed below, we urge the Department to abandon its proposal to automatically increase the salary level.

A. The Department Lacks the Authority To Automatically Increase the Salary Level.

In the NPRM, the Department states that it seeks "to 'modernize' the EAP exemptions by establishing a mechanism for automatically updating the standard salary test."[19] The Department suggests that automatic updates would "promote government efficiency by removing the need to continually revisit the issue through resource-intensive notice and comment rulemaking."[20]

The Department, however, cannot avoid its obligations to engage in notice-and-comment rulemaking simply because notice-and-comment rulemaking takes time and resources; a federal agency cannot exceed the limits of its authority or otherwise "exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law'" no matter how difficult an issue it seeks to address.[21]

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[19] *See* 80 Fed. Reg. at 38,537.

[20] *Id.*

[21] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (internal citations omitted).

At no point since Congress authorized the Department to issue regulations on the FLSA's section 13(a)(1) exemption has Congress granted the Department the authority to index its salary test. Congress could have provided such authority if it desired the Department to have it; Congress has permitted indexing expressly in other statutes, including the Social Security Act (which preceded the passage of the FLSA and was amended to add indexing in 1975) and the Patient Protection and Affordable Care Act (which was passed subsequent to the most recent revision to the Part 541 regulations). Yet Congress, despite full knowledge of the fact that the Department has increased the salary level required for exemption on an irregular schedule, has never amended the FLSA to permit the Department to index the salary level.[22] Congress's actions in the face of regulatory history demonstrate a clear intent that the salary level be revisited as conditions warrant, allowing the Department, and the regulated community, the opportunity to provide input into the appropriate level.

The Department's own actions in reaching out to the regulated community before publication of the NPRM, as well as soliciting input on the salary level in the NPRM itself, demonstrate the importance of notice-and-comment on the salary level. In 2004, the comment process resulted in increases to both the proposed salary level and the proposed highly compensated employee salary level. The Department is not omniscient on these issues, and automatic increases to the salary level are inconsistent with both the Department's statutory authority and with the Department's long-held understanding of the salary level's purpose. An annual revision to the salary level is inconsistent with the salary level's gatekeeper function. How can it be the case that an employee is "clearly exempt" on December 31 and "clearly non-exempt" on January 1 of the following year because of the rate of inflation or some other indexing calculation? A gate need not be moved on an annual basis to ensure that it functions properly; only when it approaches the end of its usefulness does it need to be "fixed."

The Department recognized its lack of authority to index the salary level in its 2004 rulemaking. And it acknowledges as much in the current NPRM, noting that it determined "nothing in the legislative or regulatory history . . . would support indexing or automatic increases."[23] The Department was correct in 2004, and nothing has occurred since that time to justify a different conclusion.

When the Department has increased the salary level in the past, it has done so by stating what the new salary level would be and by leaving adjustments to that level to the Administrative Procedure Act's required notice-and-comment rulemaking process. The current regulatory

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[22] Similarly, when Congress has amended the FLSA to increase the minimum wage, it has not indexed that amount.

[23] *See* 80 Fed. Reg. at 38,537.

process also requires the Department to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis. In the current rulemaking, however, the Department proposes to announce a new salary level each year in the Federal Register without notice-and-comment, without a Regulatory Flexibility Act analysis, and without any of the other regulatory requirements established by various Executive Orders. Each of those regulatory requirements is intended to force the agency to consider the consequences of its proposed actions and to ensure that the regulatory actions are carefully crafted and well-supported before being implemented. The current proposal operates as a "super-proposal," deciding once and for all what (in the Department's belief) is best without consideration of its impact now or in the future. In fact, it would not be possible for the Department to accurately estimate the impact of the automatic increases in future years as the workforce and the economy are always changing.

The Department should therefore abandon its proposal to automatically increase the salary level based on an index for these reasons alone.

B. The Proposal to Automatically Index the Salary Level Fails to Adequately Consider Its Economic and Practical Impacts.

The Department proposes to determine the new salary level each year by indexing it to certain data sets collected by the Bureau of Labor Statistics (BLS). Under either indexing method the Department suggests, it will be difficult, if not impossible, for employers and employees to determine with precision each year's new salary level in advance of the Department's pronouncement in the Federal Register. As a result, indexing the salary level will not make compliance with the exemption requirements easier; instead, the indexing proposal creates uncertainty and administrative and compliance difficulties, as employers likely will need to conduct an annual reconsideration of the classification for employees whose status will depend upon (potentially) the responses to a survey conducted several years prior that now are reflected in a BLS data set.

1. Indexing to the 40th Percentile Results in an Endless Spiral of Dramatic but Unpredictable Increases.

Both suggested methods of indexing are improper exercises of the Department's regulatory authority and would result in the administrative and compliance difficulties discussed in these comments, as well as the resulting economic impact. The "40th percentile test," however, is particularly problematic.

The objective of the salary level test is "to differentiate exempt and nonexempt white collar employees" by setting a salary level at an amount that is slightly lower than the dividing line between exempt and nonexempt employees.[24] That is, the salary level is intended to be set at a level that is over-inclusive of potentially non-exempt employees. Indeed, in setting the proposed salary level at the 40th percentile, the Department notes that it chose that level because a higher percentile "could have a negative impact on the ability of employers in low-wage regions and industries to claim the [executive, administrative, and professional] exemptions for employees who have bona fide executive, administrative, or professional duties as their primary duty."[25] As explained above in our salary level comments, however, the Department does not adequately establish why the 40th percentile meets these standards.

Unfortunately, the Department's proposal to permanently tie the salary level to the 40th percentile of full-time salaried workers will compound the Department's error. The BLS data upon which the deciles are based is found in the Current Population Survey. The relevant data consists of the total weekly earnings for all full-time, non-hourly paid employees, based on workers who respond to the survey.[26] According to BLS, "total weekly earnings" includes overtime pay, commissions, and tips.[27] The respondents are asked whether they are paid hourly; they are not asked whether they are paid a salary, earn commissions, or are paid another way. In other words, the data is based upon a worker's response that he or she is not paid hourly and includes in the "salary" threshold elements of compensation that are not salary.[28]

The number of workers who respond that they are not paid hourly will decrease as workers who fail the salary test in year one (and subsequent years) are reclassified as non-exempt. If the 40th percentile test is adopted, in the years following the proposal, the salary level required for exempt status likely will be so high as to effectively eradicate the availability of the exemptions in low-wage regions and industries.

This is due to the fact that the regulatory actions of the Department will change the parameters of the data set. As noted previously, the Department predicts that the initial salary level increase will impact 4.6 million currently exempt workers. Employers may choose to (i) reclassify such workers as nonexempt and convert them to an hourly rate of pay, (ii) reclassify

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[24] 80 Fed. Reg. at 38,527.

[25] 80 Fed. Reg. at 38,532.

[26] *See* 80 Fed. Reg. at 38,527 at n.20.

[27] *See* http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.

[28] This would be particularly inappropriate if the Department does not allow employers to include commissions and other types of earnings towards satisfying the salary test.

such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked, or (iii) increase the salaries of such workers to the new salary threshold to maintain their exempt status. In the Department's estimate, however, only 71,000 workers will fall into category (iii).[29]

The overwhelming majority of affected employees, in the Department's estimate, will be reclassified as non-exempt. Most of these employees will be converted to an hourly method of payment, although some will undoubtedly become "salaried, non-exempt" employees. Because the workers who will be converted to an hourly method of payment will no longer respond to the Current Population Survey question as being paid "non-hourly," they will drop out of that BLS data set.

The effect of the regulation on the data set is significant. As one economic analysis states:

> *The 40th percentile of this distribution is $950 per week. If just one quarter of the full-time nonhourly workers earning less than $49,400 per year ($950 per week) were re-classified as hourly workers, the pay distribution among the remaining nonhourly workers would shift so that the 40th percentile of the 2016 pay distribution would be $54,184 ($1,042 per week), about 9.6 percent higher than it was in 2015. This process will continue each year as the lowest paid nonhourly workers fail the salary test and many are re-classified as non-exempt hourly workers. [After five years,] the new 40th percentile of the nonhourly pay distribution would be $72,436 ($1,393 per week).*[30]

Of course, reclassification to hourly of only one-quarter of potentially affected salaried employees seems low, even by the Department's own estimate. In all likelihood, a far greater percentage of employees who would have to be reclassified to non-exempt will be paid on an hourly basis. If only half of those employees are converted to hourly positions, the minimum salary would increase to $95,836 per year by 2020.[31]

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[29] 80 Fed. Reg. at 38,574.

[30] *See Indexing the White Collar Salary Test:* ***A Look at the DOL's Proposal***, S. Bronars, D. Foster, N. Woods (Edgeworth Economics) at http://www.edgewortheconomics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:08-27-2015-12-00am-indexing-the-white-collar-salary-test-a-look-at-the-dol-s-proposal/.

[31] *Id.*

Instead of expressing the consequences of indexing in the future, the Department instead discusses a 2.6% average annual growth rate for the 40th percentile between 2003 and 2013.[32] With the significantly higher rate of salary increase discussed above, in several years, the duties tests would be virtually eliminated, because very few employees would receive a high enough salary level to qualify for exempt status, regardless of their duties. In low-wage regions and industries, the duties tests would become irrelevant even more quickly.

For the same reasons that indexing the salary level to the 40th percentile would frustrate the Department's goals, indexing the total compensation of the highly-compensated employee exemption to the 90th percentile of all full-time, non-hourly paid employees would be unworkable as well.

2. Annual Updating Will Require Employers to Incur Costs to Evaluate Otherwise Exempt Positions on an Annual Basis, with the Resulting Uncertainty.

Rather than simplifying the regulations, as President Obama directed, the automatic increases proposed by the Department instead will create a cycle of annual uncertainty. After the new salary threshold is announced, employers will engage in an unavoidable last-minute rush to identify which employees will get a salary increase and remain exempt, and which employees will be reclassified to non-exempt status. In other words, the efforts of Year 1 implementation would have to be repeated year after year in perpetuity. These cost and time obligations are dramatically understated in the required economic analysis accompanying the proposal.

The financial impact, however, is enormous — including not only the costs of increased salaries or potential overtime pay, but also employer's costs in conducting the classification analysis, the decision-making process, and implementation of any changes in response to the new salary level when it is announced each year. Beyond these financial impacts, as is discussed elsewhere in this comment, transitioning employees from exempt to non-exempt status requires careful planning and implementation to avoid undermining employee morale.

3. The Department's Suggestion of 60 Days' Notice is Insufficient and Compounds the Problems Described Above.

The Department has suggested that it will provide employers with 60 days' notice of the new salary level each year. Such short notice of the automatic annual increases to the salary level would compound the problems described above. Because employers will be operating for most of the year without knowledge of what the new salary level will be, even with advanced planning, the uncertainty regarding the salary level threshold and the likely impact on labor

[32] *See* 80 FR at 38,587.

costs and employee headcount will make accurate advanced budgeting and business operations planning extraordinarily difficult.

Sixty days is not nearly enough time for employers to evaluate the impact of the salary levels on labor costs and make appropriate decisions to ensure compliance with the rule. This uncertainty undoubtedly will cause economic harm to employees as employers implement hours reductions or salary freezes to ensure sufficient funds for labor costs necessary to cover increased payroll and administrative expenses created by the changes to the salary levels.

For all of these reasons, the PPWO opposes any indexing of the salary level. No methodology, identified by the Department or not, can overcome the Department's lack of authority to automatically increase the salary level in the manner proposed. Nor does any methodology cure the logistical and operational issues — and associated expense — that comes with an annual redefinition of exempt status. The Department should withdraw the proposal to index the minimum salary level.

III. The Department Should Not Make Revisions to the Duties Tests.

For a variety of procedural, substantive, and practical reasons, the Department should not change the duties tests at this time. As an initial matter, the Department's decision to avoid a specific proposal with respect to the duties tests, yet nevertheless consider substantial changes to the duties test, is wholly inappropriate and violates at least the spirit of the Administrative Procedure Act. Like the Department's proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act, and the various Executive Orders related to regulatory activity. Asking questions — questions that the Department has considered and requested input on for more than a year — is simply no substitute for an actual regulatory proposal that the regulated community can consider and comment upon. Furthermore, if these changes are included in a final rule without being proposed, employers will have only the time before the effective date to become familiar with them — a wholly inadequate window for such significant changes.

This is particularly true because the changes being contemplated by the Department are significant and deserve a full regulatory vetting. The changes suggested by the Department's questions could result in having to monitor and track if and how often exempt employees are performing non-managerial, or nonexempt, work for the business. They would dramatically impact the cost of implementing the proposal.

Changing the duties test based on the questions asked in the NPRM's preamble frustrates the intent of the APA – a purpose of which is to ensure that interested parties have a meaningful opportunity to comment on regulatory actions that will affect them. Adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA. Before any changes to the duties tests are finalized, the Department should provide the public an opportunity to review and comment on a specific proposal and related cost estimates.

Moreover, as a general matter, combining revisions to the primary duty test with the Department's proposed annual salary increases is a recipe for disaster. As employers and employees begin to learn any new requirements for the exemption, an entirely new group of employees would be subject to review as a result of the increased salary. The combined proposal would require near constant review of job classifications, with the concomitant cost. None of this is accounted for in the Department's proposal.

Despite the wholly insufficient nature of the "notice" provided to the regulated community with respect to these issues, we provide the following comments in response to the Department's questions.

A. The Department Should Not Adopt California Law or Any Other Percentage-of-Time Requirement.

The Department asks whether it should adopt a percentage-of-time rule for purposes of the exemptions' primary duty test, and, specifically, whether it should adopt California's 50% rule. It should not. As the Department has recognized previously, a percentage-of-time rule would result in burdensome recordkeeping requirements, increased litigation costs, and would further complicate the exempt status analysis, contrary to President Obama's directive.

Monitoring compliance with California's rule results in an administrative nightmare. The Department recognized this in 2004, when it explained that a time-based rule "would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens)."[33] In many ways, the recordkeeping obligations for exempt employees would become more onerous than they are for non-exempt employees.[34] In addition to simply tracking hours worked, employers would have to monitor the duties each exempt employee performs, and for what increments of time, during those hours.

[33] 69 Fed. Reg. at 22,186.

[34] Indeed, it is difficult to see how the Department could achieve compliance in this area without significant revisions to the recordkeeping regulations, complete with notice-and-comment rulemaking and a detailed regulatory flexibility analysis.

A percentage-of-time rule would increase FLSA litigation at a time when such litigation is already exploding. Even for employers that attempt to track their exempt employees' work hours with precision and to build contemporaneous records supporting how that time is spent, costly litigation would eventually follow concerning fact-sensitive issues around each aspect that goes into a percentage of time rule (*e.g.*, the hours worked, the breakdown of those hours, and the exempt character of each duty within that breakdown). This would particularly be the case if the Department rejected the concurrent duties rule, which is discussed below.

Rather than serving as a model for the federal standard, California's standard should be viewed as a cautionary tale. As the Department notes, California's primary duty requirement is quantitative: any duty to which an employee does not devote at least half of her time is not her "primary" duty, which is dramatically different from the federal regulations. California requires identifying work tasks as either exempt or nonexempt.[35] In other words, there are no concurrent duties, and employers must ascertain the type of work the employee is actually doing, measure the time spent on each task, and characterize that time as exempt or non-exempt. Not surprisingly, California leads the way for wage and hour litigation, as plaintiff's lawyers and employers fight over the percentage of time spent on various tasks and whether those tasks are appropriately classified as exempt or non-exempt.

Ultimately, the ease of administration of a percentage-based test is a myth, complicated by the realities of today's global workplace, where employees work remotely without constant supervision and are often performing multiple different duties at the same time. The modern workplace, and the exemptions from the law that employers are entitled to use, simply do not lend themselves to a percentage-based test. Adding such a test would undermine Congress's expressed intent in having these exemptions because employers likely would cease using them except in limited cases.

B. The Department Should Not Re-Implement the Short and Long Test Model.

The Department's consideration of returning to an antiquated short and long test is misplaced. As noted in the preamble to the 2004 Final Rule, the Department acknowledged the problems with the long test—the test that implemented a percentage limitation on non-exempt work—and, unsurprisingly, placed those problems squarely at the feet of that limitation:

> *Yet reactivating the former strict percentage limitations on nonexempt work in the existing "long" duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers*

[35] *See Heyen v. Safeway Inc.*, 216 Cal. App. 4th 795, 826-827 (2013).

> *to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the "long" test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes.*[36]

For these reasons, and as more specifically described above, the Department should not return to the short and long test model.

C. The Department Should Not Make Revisions to the Concurrent Duties Rule.

The concurrent duties rule recognizes that front-line managers (and other exempt supervisory employees) in many industries (*e.g.*, retail, hospitality, restaurant) may routinely perform non-exempt tasks while nevertheless at all times carrying out their exempt, managerial function. As the Department described in 2004, the concurrent duties rule is consistent with case law that "makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the executive exemption."[37] The Department should not change the rule.

The concurrent duties rule reflects the practical reality that exempt and non-exempt work are not mutually exclusive. The current regulation provides an example: an assistant manager can stock the shelves while at the same time overseeing the work of her subordinates.[38] Similarly, a hotel manager can work the checkout desk while watching how a bellman interacts with a guest; a restaurant manager can seat a party while monitoring how tables are being handled; and a retail manager can help to unpack a delivery while also considering the items to order for the next shipment.

As the Department stated in 2004, "exempt executives generally remain responsible for the success or failure of business operations under their management while performing [any] nonexempt work."[39] The modern manager is trained, financially incentivized, and evaluated for his or her ability to manage, not to perform the routine tasks that sometimes are necessary to

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[36] 69 Fed. Reg. at 22,127.

[37] *Id.* at 22,186.

[38] *See* 29 C.F.R § 541.106(b).

[39] 69 Fed. Reg. at 22,137.

ensure quality customer service and efficiency of operation. The management function is constant.

The Department's suggestion that a percentage-of-time limitation in the concurrent duties rule might be appropriate would eliminate any benefits associated with the rule. A concern about time spent on non-exempt tasks instead of exempt work conflicts with the underlying idea of the rule: that managers can simultaneously perform non-exempt tasks while still carrying out their exempt role. It is unclear how the Department could layer a percentage-of-time limitation on top. To be clear, it should not.

The DOL embraced this underlying idea in 2004. The DOL explained then that the concurrent duties rule was consistent with a body of federal case law which accepts "that an employee can have a primary duty of management while concurrently performing nonexempt duties" and has held that retail managers who spend 80% or 90% of their time on non-management tasks could be exempt.[40] Endorsing this framework, the Department announced that "this case law accurately reflects the appropriate test of exempt executive status and is a practical approach that can be realistically applied in the modern workforce . . ."[41] It makes little sense to reject the rule and the underlying principles that were considered modernized and practical eleven years ago in favor of an antiquated and robotic understanding of work.

The Department should not change the concurrent duties rule, whether to add a percentage-of-time requirement or in any other manner.

D. The Department Did Not Propose Any Examples and Should Not Add to the List of Examples.

Although the Department invites comments on whether it should add job-specific examples for additional guidance in administering the exemptions, it does not provide any specific proposals in the regulatory text. In 2004, the regulated community had the ability to review the specific examples proposed by the Department and provide comment on the Department's conclusions. Here, rather than propose specific examples on which to comment, the Department simply asks whether additional examples should be added. The types of positions, the Department's conclusion, and even the Department's analysis of the exemption's applications will remain completely unknown until the final rule. Much like it did when it abandoned opinion letters in which a regulated entity provided the facts in favor of Administrator Interpretations in which the Department described its own facts, the manner in

[40] *See* 69 Fed. Reg. at 22,136-137.

[41] *Id.*

which the Department seeks to address the "examples" issue leaves no opportunity for meaningful comment.[42]

Because any examples undoubtedly will be used to influence litigation — including pending litigation — the Department should not develop them in a vacuum. This is precisely the reason why notice-and-comment rulemaking exists. Yet, the Department's solicitation of possible examples makes it impossible for any entity to comment properly. If the Department wishes to include examples, it should engage in a supplementary rulemaking and provide an opportunity to provide comment on those examples.

IV. The Department's Economic Analysis is Flawed.

As an initial matter, because the Department did not actually "propose" changes to the duties tests, it does not include in the NPRM any assessment of the costs and benefits associated with any proposed changes related to the duties tests. That is, for what has the potential to be the most significantly impactful portion of a final rule, the Department has avoided preparation of an analysis of that impact by asking questions instead of proposing regulatory text. As we have noted elsewhere, should the Department decide to proceed with revisions to the duties tests, it should do so through a full and transparent application of the regulatory process—making specific regulatory proposals, preparing a comprehensive analysis of the anticipated impact of those proposals, and allowing the regulated community the opportunity to comment both on any proposal and on the Department's assessment of such a proposal.

Even with respect to the proposals the Department has made, however, the Department dramatically underestimates the economic impact of its proposals. For example, the Department's analysis fails to adequately consider the economic cost of avoiding salary compression for those employees who are already paid more than the proposed minimum salary level. Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed.

Higher levels of education, skill, experience, responsibility, and seniority should (and currently do) correspond to increased compensation. Employers thus attempt to avoid actual or perceived disparity between job titles and comparative compensation. Employees with higher positions, more job responsibility, and better qualifications than others expect to be paid

[42] *See* http://www.dol.gov/whd/opinion/opinion.htm ("The Administrator believes that this [across-the-board approach] will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome.").

accordingly. If an employer fails to do so, the salary compression will negatively impact employee morale in the workplace.

Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 per week to continue their exempt classification does not simply impact those employees. Their supervisors—although not legally required to be paid more to be treated as exempt—nevertheless will need to be paid more to maintain morale and avoid salary compression.

The increased costs to employers to avoid salary compression are not considered in the Department's economic analysis. Similarly, the Department fails to address the difficulty of addressing the salary compression issue, as well as its impact on the determination on whether to reclassify a position to non-exempt as a result of the increased minimum salary level. These are real administrative expenses. The decision on classification cannot be made in a vacuum; it must consider the impact on other positions from a salary compression standpoint. The Department's proposal, however, does not adequately account for any of these significant costs.

Likewise, the Department underestimates the costs of the rulemaking with respect to compliance efforts. Regulatory familiarization, adjustment, and managerial costs are all dramatically understated. Contrary to the Department's suggestions, compliance with the proposed rule would not be as simple as reviewing the salary level and making a decision. Due to the many, varied issues identified within these comments, the time and effort associated with complying with the proposed rule will be immense as employers determine which positions will remain exempt, which will be reclassified as non-exempt, and how the employer will implement the conversion to non-exempt status, including adjustments to time and attendance systems and associated administrative issues.

Finally, the Department similarly fails to account for these costs on a recurring basis. As noted above, the same compliance review activities that take place in Year 1 will be repeated on an annual basis, for different groups of employees that fall below the new salary minimum.

V. Conclusion.

For all of the reasons discussed above, the Department should withdraw this proposal.

Of Counsel
Alexander J. Passantino
Seyfarth Shaw LLP
975 F Street, N.W.
Washington, DC 20004-1454

National Organizations
ACCA - The Indoor Environment & Energy Efficiency Association
AmericanHort
American Association of Advertising Agencies (4A's)
American Bankers Association
American Council of Engineering Companies
American Farm Bureau Federation
American Frozen Food Institute
American Hotel & Lodging Association
American Insurance Association
American Institute of Certified Public Accountants
American Rental Association
American Society of Travel Agents
American Staffing Association
American Supply Association
American Veterinary Distributors Association (AVDA)
Asian American Hotel Owners Association
Associated Builders and Contractors
Associated General Contractors of America
Auto Care Association
Building Service Contractors Association International (BSCAI)
CAWA - Representing the Automotive Parts Industry
Coalition of Franchisee Associations
College and University Professional Association for Human Resources
Consumer Electronics Association
Convenience Distribution Association
Electronic Transactions Association
Food Marketing Institute
Franchise Business Services
Gases and Welding Distributors Association
Heating, Air-conditioning & Refrigeration Distributors International
HR Policy Association
Independent Electrical Contractors

Industrial Supply Association
International Association of Amusement Parks and Attractions
International Bottled Water Association
International Foodservice Distributors Association
International Franchise Association
International Public Management Association for Human Resources
International Warehouse Logistics Association
IPC – Association Connecting Electronics Industries
Irrigation Association
ISSA—The Worldwide Cleaning Industry Association
IT Alliance for Public Sector
Manufacturer & Business Association
Manufactured Housing Institute
Metals Service Center Institute
NAHAD – The Association for Hose & Accessories Distribution
National Apartment Association
National Association of Chemical Distributors
National Association of Home Builders
National Association of Insurance and Financial Advisors
National Association of Landscape Professionals
National Association of Manufacturers
National Association of Professional Insurance Agents
National Association of Wholesaler-Distributors
National Association of Electrical Distributors
National Automobile Dealers Association
National Christmas Tree Association
National Council of Chain Restaurants
National Federation of Independent Business
National Franchisee Association
National Grocers Association
National Lumber and Building Material Dealers Association
National Multifamily Housing Council
National Newspaper Association
National Pest Management Association
National Public Employer Labor Relations Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National School Transportation Association
National Tooling and Machining Association
North American Association of Subway® Franchisees ("NAASF")
North American Die Casting Association

North American Meat Institute
Pet Industry Distributors Association
Precision Machined Products Association
Precision Metalforming Association
Retail Industry Leaders Association
Secondary Materials and Recycled Textiles Association (SMART)
Service Stations Dealers of America and Allied Trades
Small Business & Entrepreneurship Council
Snack Food Association
Society for Human Resource Management
Textile Care Allied Trades Association
Tire Industry Association
U.S. Chamber of Commerce
Water & Sewer Distributors of America (WASDA)
Wine & Spirits Wholesalers of America
WorldatWork

State and Local Organizations
Alliance of Automotive Service Providers of PA
Arizona Retailers Association
Arkansas Grocers & Retail Merchants Association
Automotive Aftermarket Association of the Carolinas and Tennessee, Inc.
Chesapeake Automotive Business Association
Florida Retail Federation
Georgia Retail Association
Greater Fairbanks Chamber of Commerce
Hawaii Society of CPAs
Hawaii Transportation Association
Illinois Retail Merchants Association
Independent Garage Owners of North Carolina
Iowa Society of CPAs
Kansas Society of Certified Public Accountants
Louisiana Retailers Association
Maryland Association of CPAs
Michigan Retailers Association
Midwest Automotive Parts & Service Association
Missouri Retailers Association
Nevada Society of CPAs
New Hampshire Retail Association
New York State Association of Service Stations and Repair Shops, Inc.
Northwest Automotive Trades Association
North Carolina Retail Merchants Association
North Dakota Petroleum Marketers Association

North Dakota Retail Association
Ohio Council of Retail Merchants
Pennsylvania Food Merchants Association
Pennsylvania Institute of Certified Public Accountants
Retailers Association of Massachusetts
South Carolina Retail Association
South Dakota CPA Society
Southwest Car Wash Association
Texas Independent Automotive Association
Texas Retailers Association
Texas Tire Dealers Association
Utah Association of Certified Public Accountants
Vermont Retail & Grocers Association
Virginia Retail Merchants Association
Washington Maryland Delaware Service Station & Automotive Repair Association
Washington Retail Association
Washington Society of Certified Public Accountants

SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

October 8, 2015

Chairman Steve Chabot
House Small Business Committee
2361 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Nydia M. Velázquez
House Small Business Committee
2361 Rayburn House Office Building
Washington, D.C. 20515

Chairman Cresent Hardy
Subcommittee on Investigations,
Oversight and Regulations
2361 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Alma Adams
Subcommittee on Investigations,
Oversight and Regulations
2361 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Chabot, Ranking Member Velázquez, Chairman Hardy and Ranking Member Adams:

On behalf of the Society for Human Resource Management (SHRM), thank you for convening a hearing on the U.S. Department of Labor's (DOL) recently proposed overtime rule.

Founded in 1948, the SHRM is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

SHRM is concerned that DOL's proposed overtime rule will negatively impact employers and employees. While we understand the need to update the salary threshold, rapidly increasing it by 113 percent and setting it at the 40th percentile of weekly earnings for salaried workers, in addition to annually updating the salary threshold, will have a significant impact on the labor costs for organizations. We are specifically concerned how the increase to the salary threshold will impact nonprofit employers, small businesses, and employers in lower cost of living areas in the country.

In addition, the proposed overtime rule will lead to the reclassification of many currently exempt employees to non-exempt employees, resulting in less workplace flexibility. Employers must closely track the hours of non-exempt employees to ensure compliance with FLSA overtime requirements, often resulting in less flexibility and autonomy in the workplace. Exempt employees, however, are paid a fixed salary regardless of the hours worked and enjoy greater workplace flexibility in deciding when and where work occurs.

Finally, we are concerned that the proposed rule does not explain what the DOL is planning with regard to the duties test. SHRM and our members have invested a significant amount of time to understand and apply the current duties test. Any changes will result in many hours spent to understand the new rules and will likely result in inaccurate classifications. In addition, a California-style duties test based on the percentage of time spent on exempt versus non-exempt duties will be overly burdensome to track and is unworkable in many workplaces today where otherwise exempt employees must also conduct nonexempt activities.

A copy of SHRM's full comment letter filed on September 4, 2015 is attached. I appreciate your attention to this important issue affecting employers and employees. If I can answer any questions please do not hesitate to contact me.

Sincerely,

Michael P. Aitken
Vice President, Government Affairs

Cc: Members of House Small Business Committee

SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

September 4, 2015

Ms. Mary Ziegler, 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: RIN 1235-AA11; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule

Dear Ms. Ziegler;

The Society for Human Resource Management (SHRM) is pleased to submit these comments in response to the notice of proposed rulemaking published in the *Federal Register* by the Department of Labor's (DOL's) Wage and Hour Division (WHD) on July 6, 2015.[1] The proposal seeks to revise the regulations implementing the Fair Labor Standards Act's (FLSA's) exemption for executive, administrative, professional, outside sales, and certain computer employees.

In addition to SHRM, these comments are endorsed by the SHRM affiliates listed on the signatory page. These affiliates include SHRM state councils and SHRM local chapters as well as the Council for Global Immigration ("CFGI"). CFGI is a nonprofit trade association and strategic affiliate of SHRM, comprised of leading multinational corporations, universities, and research institutions committed to advancing the employment-based immigration of high-skilled professionals.

While SHRM would support a reasonable increase to the rule's minimum salary threshold, the proposed level is too high. In addition, we do not support the proposal to automatically adjust salary levels under the rule. We support the position taken in the proposal to refrain from making any changes to the existing duties test, although we express serious concern

[1] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule, 80 Fed. Reg. 38,515.

that the Department is considering further restricting the executive exemption, in particular. Finally, we think the Department's proposal to permit some amount of nondiscretionary bonus payments to count toward the minimum salary level is valid but too restrictive to be widely used.

Statement of Interest

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

I. While Some Increase in the Salary Threshold Is Justified, the Proposed Increase Is Too High and Will Have a Significant Negative Impact on Employers and Employees.

DOL has proposed increasing the minimum salary threshold that must be paid in order for executive, administrative, and professional employees to qualify for exemption from $455 per week to approximately $970 per week. SHRM has a record of supporting reasonable increases in the salary threshold, and we were pleased to support the increase proposed in 2003 and implemented in 2004. While we agree that it is again time to update the threshold, the proposed increase in the salary level is too high and will present significant challenges for many employers and employees. This is particularly true among nonprofit organizations, state and local governments, and organizations based in certain regions of the country with lower costs of living and lower incomes. Our comments below address first the methodology chosen by the Department for setting the salary level and then some of the adverse consequences that will flow from establishing an inappropriately high salary threshold.

Significant Changes to the Methodology for Setting the Minimum Salary Threshold Are Not Warranted

DOL has proposed establishing the new salary threshold at the 40th percentile of earnings for full-time salaried employees. This is a significant change in the method by which DOL has historically set the minimum salary level. As described in more detail below, DOL has historically set the salary threshold "at about the levels at which no more than about 10 percent of those in the lower-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."[2] In 2004, the Department used similar methodology, but instead relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, in part due to the elimination of the long duties test. This regulatory history reflects both Democratic and Republican administrations adjusting the salary level between 10 and 20 percent while taking into consideration regional and industry differences.

DOL now argues, however, that a salary level "significantly lower than the 40th percentile of full-time salaried employees would pose an unacceptable risk of inappropriate classification of overtime-protected employees without a change in the standard duties test." The Department claims that the adjustment is needed because the 2004 salary level increase did not appropriately account for changes caused by abandonment of the long duties test for relatively lower-paid employees.

<u>The proposed salary threshold is based on incorrect assumptions about the purpose of the salary test</u>

In the preamble to the proposed rule, DOL summarizes selected regulatory history of the salary threshold and its adjustments over the years in order to justify its proposed approach to establish the new salary threshold. However, that summary does not fairly portray the history and purpose behind the threshold.

DOL's regulations have long been structured to provide a three part test for most employees to determine whether they are exempt under the FLSA's exemption for executive, administrative, and professional employees. This test consists of (1) being paid on a salary basis that does not fluctuate, (2) being paid a salary that meets or exceeds the established regulatory threshold, and (3) meeting one of several enumerated duties tests.

While the role of the salary threshold, or salary level, test has always been important, it has not been the primary focus of the regulations. Indeed, from the earliest days, DOL has acknowledged limits on its ability to set a salary under the regulations. This was made clear in the 1949 Weiss Report, which observed that "The Administrator is not authorized to set wages or salaries for executive, administrative, and professional employees."[3] Instead, these tests are

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[2] Report and Recommendations on Proposed Revision of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (*hereinafter* Kantor Report) at 6-7.

[3] Report and Recommendations on Proposed Revisions of Regulations, Part 651, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) (*hereinafter* Weiss Report) at 11.

"essentially guides to help in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories."[4]

In its proposal, DOL improperly inflates the role of the salary threshold test and, as a result, makes it the sole arbiter of the determination. Instead of serving as a method to exclude the obviously non-exempt, the proposed salary threshold will instead serve as a bar to millions of employees who otherwise perform the duties of exempt professionals.

In the preamble to the proposal, DOL asserts that the current salary threshold is ineffective because it does not screen out large portions of workers who fail the duties test and therefore "does not serve the intended purpose of simplifying application of the exemption by reducing the number of employees for whom employers must perform a duties analysis."[5]

However, simplification in order to reduce the number of employees subject to the duties tests has never been the purpose of the salary threshold. As stated in the 1949 Weiss Report, the salary threshold levels "have simplified enforcement by providing a ready method of screening out the obviously non-exempt employees, making an analysis of duties in such cases unnecessary. ... In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations."[6]

In other words, the Department found the salary threshold to be an appropriate proxy for the duties tests when used to screen out employees who would obviously not meet the duties tests in the first place. As such, there was value in the objectivity and simplicity of the salary threshold test. Until now, the salary threshold has never been used to limit the application of the exemption to large numbers of employees who will meet the requirements of the duties tests. This is evidenced in the 1949 Weiss Report, which states "There was no evidence, moreover, that the salary tests had in the past resulted in defeating the exemption for any substantial number of individuals who could reasonably be classified for purposes of the act as bona fide executive, administrative, or professional employees."[7] Similarly, in 1958, the Kantor Report observed "there have been no indications that the salary tests have resulted in defeating the exemption for any substantial number of individuals who could reasonably be classified for purposes of the Act as bona fide executive, administrative, or professional employees."[8]

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[4] *Id.*
[5] 80 Fed. Reg. at 38,529.
[6] Weiss Report at 8.
[7] Weiss Report at 9.
[8] Kantor Report at 3.

However, DOL now estimates that if its proposed salary threshold is adopted, 25 percent of employees who currently meet the duties test will not meet the proposed salary threshold.[9] This new methodology improperly changes the careful balance in the regulations to focus much more on the wages an employee earns than the job performed.

The proposed salary level should take into account differences in salary based on geographical region, industry, and business size

Historically, in setting the salary threshold, DOL has considered the impact on a broad range of businesses operating in the United States. As observed in the Weiss Report:

> To be sure, salaries vary, industry by industry, and in different parts of the country, and it undoubtedly occurs that an employee may have a high order of responsibility without a commensurate salary. By and large, however, if the salary levels are selected carefully and if they approximate the prevailing minimum salaries for this type of personnel and are about the generally prevailing levels for non-exempt occupations, they can be useful adjuncts in satisfying employers and employees as well as the Divisions as to the exempt status of the particular individuals.[10]

In 1958, the Department considered wage data grouped by geographic region, broad industry groups, number of employees, and size of city. It then set the minimum salary level "at about the levels at which no more than about 10 percent of those in the lower-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."[11]

In its 1958 analysis, the Department first considered the executive exemption. It examined actual salaries paid to executives in the lowest-wage region, the South. It then considered salaries paid in establishments with seven or fewer employees and in those with eight to 19 employees. It also considered salaries paid in towns with a population less than 2,500. Finally, it considered salaries paid to executives in the lowest wage industry, services. DOL conducted a similar exercise for administrative and professional employees.[12]

DOL followed similar methodology in 1963 and 1970. In 2004, the Department used similar methodology, but instead relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent. In the 2004 rulemaking, DOL justified this deviation, in

[9] 80 Fed. Reg. at 38,529.
[10] Weiss Report at 11-12.
[11] Kantor Report at 6-7.
[12] Kantor Report at 7-8.

part, due to changes in the duties tests. In particular, DOL eliminated most of the long test and instead adopted modified versions of the old short test as a new standard test. DOL's 2004 analysis also included in-depth review of salaries in particular regions and industries.[13]

DOL's current proposal has not included any in-depth review of regional variations in pay and cost of living or variations due to industry or sector. Such analyses must be done to ensure that the salary threshold will not have a significant adverse impact on a wide variety of employers and employees.

According to a report published last year in the *Nonprofit Times*, the average salary for the Chief Executive Officer of small nonprofits was $59,510 in 2013.[14] Importantly, this salary level is an average. Many small nonprofit CEOs in the sample likely earned salaries below the proposed salary threshold. These numbers are consistent with other reported data. For example, the American Society of Association Executives has reported that its 2014 survey of compensation practices of nonprofit organizations found that the low end of the range of reported annual compensation of CEOs at nonprofit organizations was $37,500.[15]

The Chief Executive Officer of a small nonprofit would, in almost all circumstances, meet the duties test as an exempt executive employee. Yet DOL's proposed rule will lead to significant additional restrictions imposed on those CEOs earning less than the proposed salary threshold. In addition, many other senior staff at small nonprofits may also be exempt under the duties test, but may be reclassified based on the significant increase in the salary threshold. According to the *Nonprofit Times*, average salaries for additional small nonprofit executives in 2013 were:

Chief Financial Officer	$40,000
Chief Operating Officer	$41,813
Chief Development Officer	$56,000
Communications/PR Director	$59,600
Chief Program Officer	$41,970[16]

[13] In preparing to issue its proposed rule in 2003, the Department retained an outside consultant, CONSAD Research Corporation, to prepare an in-depth economic analysis. No such analysis has been made publicly available as part of the current rulemaking.
[14] Special Report: NPT Salary & Benefits Study (Feb. 1, 2014) at 3, *available at* http://www.thenonprofittimes.com/wp-content/uploads/2014/01/2-1-14_SpecRep_SalaryBenefits.pdf. Small nonprofits are those with revenues under $500,000 per year.
[15] American Society of Association Executives, Comments on the Department of Labor's Notice of Proposed Rulemaking to Revise FLSA Regulations, at 2, *available at* http://asae.cms-plus.com/files/ASAE%20Overtime%20Rule%20Comments%208.4.2015.pdf.
[16] Special Report: NPT Salary & Benefits Study (Feb. 1, 2014) at 3.

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In addition to considering how the proposed salary threshold would apply to low wage sectors, and particularly nonprofits, DOL should have undertaken greater analysis of how the rule would apply in particular geographical regions and in small businesses. In preparing our response to this proposal, SHRM received feedback from our members with numerous examples of employers in retail, service and nonprofit organizations that will be adversely affected by the proposed regulation. One member, for example, expressed concerns about how DOL's proposal would reduce and diminish the services provided to at-risk youth by her organization:

> At our nonprofit organization, we prioritize a continuity of care model that ensures that the at-risk youth population receives services and care from the same therapists and supervisors. Months and sometimes years go into building that trust and bond, and this can't be replicated by swapping in another professional to avoid exceeding 40 hours on the part of the primary professional. Under this overtime proposal, continuity of care would be undermined by limiting the ability of therapists to effectively respond to clients' clinical needs, as well as their school and work schedules.
>
> Furthermore, currently many exempt employees are available during non-traditional hours and overnight on a regular basis to provide crisis services or supervisory response to crisis as needed. In our residential setting, managers commonly work longer hours and shift their schedules to ensure their presence during anticipated difficult admissions and discharges or, again, if client behaviors are elevated and unsafe, in order to provide direction and support to staff members.
>
> Limiting managers' availability to their units risks jeopardizing client care and staff safety and violates state regulation. If the overtime regulations were to be implemented, my organization would likely have to decrease services because, as noted earlier, we would not be able to afford the additional overtime pay. In addition, we would be forced to reduce our client base and unfortunately underserve our county and family stakeholders.

The proposal's impact on different geographic regions raises similar concerns. Simple on-line tools demonstrate that, when taking cost of living into account, a $55,000 annual salary in Washington, DC, is comparable to a salary of just over $35,000 in Martinsburg, WV; a salary of $75,000 in San Francisco is comparable to a salary of $47,500 in Fresno; and a salary of $60,000 in Trenton, NJ, is comparable to a salary of $46,800 in Rochester, NY.[17] Yet, DOL's

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[17] Examples obtained through CNN Money's Cost of Living Calculator, *available at* http://money.cnn.com/calculator/pf/cost-of-living/ (citing the Council for Community and Economic Research for source data).

proposal contains no meaningful analysis to determine the impact on jobs in regions with low cost of living. The Department's proposed salary threshold is one-size-fits all, there are no regional variations. That would not necessarily be a problem if the Department appropriately considered regional variations in selecting the salary threshold, but it did not.

While DOL has provided some analysis with respect to the rule's impact on small businesses as part of its Initial Regulatory Flexibility Analysis, a more thorough review is warranted. As noted in the Weiss Report:

> The importance of giving careful consideration to the effect of a higher salary test on small establishments should be apparent when it is realized that about 500,000 of the 638,000 establishments covered by the act have less than 20 employees. The salary test for bona fide executives must not be so high as to exclude large numbers of executives of small establishments from the exemption. In these establishments, as in the large ones, the level selected must serve as a guide to the classification of bona fide executive employees and not as a barrier to their exemption.[18]

A review of Census data indicates that there were more than 5.7 million firms operating more than 7.4 million establishments in 2012.[19] More than 5.1 million of these firms employ fewer than 20 employees each. All together, these very small firms employed more than 20.4 million people. This same dataset demonstrates that a total of more than 5.7 million firms had fewer than 500 employees and employed 56 million employees.

The Department's analysis, however, did little meaningful analysis of the impact of the rule on this population aside from estimate the number of workers who would likely be affected by the rule change. The Department did not in any way examine the particular impact that reclassification could have on small entities, instead applying the same analysis it had undertaken for larger firms.[20]

DOL's methodology does not account for the adverse impact of the proposed change in the salary threshold that will be felt most acutely in nonprofits and other low-wage sectors, in lower cost-of-living regions, and small businesses. DOL should examine the particular impacts that large scale reclassification is likely to have prior to establishing its proposed salary threshold.

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[18] Weiss Report at 15.
[19] Statistics of U.S. Businesses (SUBS), *available at* http://www.census.gov/econ/susb/.
[20] 80 Fed. Reg. at 38,605.

Maintaining current methodology for setting the salary level does not pose a significant risk of inappropriate classification

In the current proposal, DOL now argues that a salary level "significantly lower than the 40th percentile of full-time salaried workers would pose an unacceptable risk of inappropriate classification of overtime-protected employees without a change in the standard duties test." The Department claims that the adjustment is needed because the 2004 salary level increase did not appropriately account for changes caused by abandonment of the long duties test for relatively lower-paid employees.

However, the Department's analysis fails because DOL has not provided any significant analysis demonstrating whether the new salary threshold will operate as an effective proxy for those employees who would be unlikely to satisfy the duties tests. In fact its analysis shows the opposite. According to the proposal, some 4.6 million salaried white collar employees pass the duties test but earn less than the Department's proposed salary threshold. [21]

In addition, as detailed above, it is not the sole job of the salary threshold to limit all risk of inappropriate classification. This is the primary role of the duties test. While the duties test was changed in 2004, there is no compelling evidence that these changes resulted in mass misclassification of employees. Indeed, all the evidence of the impact of the 2004 revisions shows a dramatic increase in the number of employees classified as non-exempt rather than exempt. In response to the proposed changes to the overtime regulations, SHRM Research conducted the 2015 SHRM Overtime Regulations Survey in June 2015. Of members who reported reclassifying employees after the 2004 overtime regulations revision, three times more organizations reclassified employees from exempt to non-exempt than the other way around. In addition, 82 percent of members made no change to employee classification after the 2004 update.

While there will likely always be some employers that struggle when applying the duties tests in particular cases, this is not sufficient reason to significantly restrict access to the exemption through a significantly increased salary threshold.

In short, in addition to mischaracterizing the purpose of the salary threshold test, DOL has not made a sufficient case to so significantly alter the methodology for setting the salary threshold under the regulations. We respectfully disagree with the Department's revised methodology and urge it to revisit these matters using the previous methodology so that a more appropriate salary adjustment may be considered.

[21] 80 Fed. Reg. at 38,559.

Dramatic Salary Threshold Increase Will Negatively Impact Many Employers and Employees

The proposal seeks to effectively double the minimum salary threshold. According to the Department's own economic analysis, some 4.6 million employees would be directly affected by the salary level increase because they currently earn a salary higher than the current threshold of $455 per week but less than the proposed salary threshold. However, only 988,000 of these employees work more than 40 hours in a week. Should the proposed regulation be finalized in its current form, employers will need to decide whether to increase salaries so that the employees remain exempt or reclassify employees as non-exempt. In addition, employers may find it necessary to restructure jobs and business models, for example by decreasing the number of lower-level management positions.

While only 988,000 employees are likely to see any benefits from the regulation in terms of additional salary, overtime wages, or additional time off, far more employees are likely to experience negative consequences of reclassification, including reduced workplace flexibility, loss of professional status, and reduced access to opportunity to gain needed experience. This is because 3.7 million employees who earn less than the proposed minimum salary threshold do not regularly work more than 40 hours in a week. They will not reap any reward from the Department's proposal in the form of additional compensation or time off. Indeed, they are the employees who are most likely to be reclassified to a non-exempt status.

Reclassification of employees to non-exempt status can have several significant adverse consequences. In the 2015 SHRM Overtime Regulations Survey, we asked members how likely certain scenarios would be if DOL's revised regulation led to an increase in eligibility for overtime pay. In that survey, the most significant result identified was the implementation of restrictive overtime policies leading to potential reduction in employees working overtime, with 70 percent of respondents indicating that would be a likely outcome. Decreased workplace flexibility and autonomy was the next most significant change, with 67 percent responding that such a change would be likely.

In addition to loss of workplace flexibility and more restrictive overtime policies, additional adverse consequences that employees will experience due to reclassification are loss of opportunity, more restrictions on job sharing or working part-time exempt jobs.

<u>Restrictions on Hours Scheduled</u>

Reclassification will pose significant challenges for both employers and employees. If employers are required to reclassify individuals as non-exempt, they will be more likely to adjust schedules in such a way as to minimize the potential for unplanned overtime costs. This may be especially true in sectors of the economy less able to pass on the costs associated with new wage mandates, such as the nonprofit sector that is more dependent upon charitable contributions, member dues, or state and federal grants.

As we have discussed the Department's proposal with SHRM members around the country, it is clear that many employers reclassifying employees will take further steps to ensure that such employees do not work more than 40 hours in a week, including restructuring jobs to rely on more part-time employees. For example, as described by one SHRM member:

> We are a not for profit. We are not in a position to pay overtime at the mid-manager staff level. We would be forced to cut all employee hours to part time to ensure no overtime. Alternative 1: 4 days/week at 9 hours... they would be 36-hour employees and lose 4 hours of pay. Alternative 2: they all go to 3 days/week, all employees work 24 hours a week.

Loss of Workplace Flexibility

According to the 2014 National Study of Employers, a report released by the Families and Work Institute (FWI) and SHRM, human resource professionals believe the most effective way to attract and retain the best people is to provide workplace flexibility.[22] Moreover, a large majority of employees – 87 percent – report that the flexibility offered would be "extremely" or "very" important in deciding whether to take a new job.[23] The report indicates that from 2008 to 2014 workplace flexibility for full-time employees increased. For example, more employers are offering some employees the option to telecommute occasionally, with 67 percent providing this option in 2014 compared to 50 percent in 2008.

Given the importance of this issue to our members, SHRM has a strong track record of advocating for public policy proposals that encourage or incentivize employers to create effective and flexible workplaces. To that end, the Society formed a multiyear partnership with the FWI to educate HR professionals about the business benefits of workplace flexibility. The primary goal of the partnership is to transform the way employers view and adopt workplace flexibility by combining the influence and reach of the world's largest association devoted to human resource management with the research and expertise of a widely respected organization specializing in workplace effectiveness.

[22] Challenges Facing Organizations and HR in the Next 10 Years (2010). Society for Human Resource Management.
[23] National Study of the Changing Workforce (2008). Families and Work Institute.

DOL's current proposal runs counter to SHRM's longstanding support of encouraging greater workplace flexibility because many employees who are reclassified will lose access to workplace flexibility options.

Due to concerns about off-the-clock work and recordkeeping responsibilities, many employers do not permit non-exempt employees to check email or otherwise work when away from the office or outside of their normal, fixed work schedule. The ability to perform work outside of the office allows employers to offer many more flexible work arrangements for employees, including the ability to attend to a wide variety of family or personal needs, knowing that the employee can be reached if needed or that work can be completed outside of the fixed work schedule.

Our members report that reclassifying employees as non-exempt could force employees to utilize vacation time to cover appointments instead of having the flexibility as an exempt professional to leave a few hours early. Furthermore, non-exempt employees are often restricted from accessing certain online training platforms from their homes because of challenges associated with tracking those hours and the inability to pay overtime. Phones, watches and other "smart" devices commonly enjoyed by today's workforce will present challenges to the newly classified non-exempt employees.

The restriction in flexibility is one reason why many employees view reclassification as akin to a demotion, causing a decline in morale. Being classified as exempt promotes a sense of responsibility and ownership in the company as well as the ability to control when and where work gets done. Many employees have worked to attain that exempt classification through advanced training, continuing education and years of experience. If forced to reclassify, employees will believe their sense of status in an organization as a true professional has been removed. Our members report supervisors who are emotionally attached to their professional status will certainly view reclassification as a demotion to their career. As described in greater detail by one SHRM member:

> The proposed changes to FLSA will result in our location managers, most of our [human resources (HR)] team as well as many other professionals losing their exempt status. Of course the HR team is well aware of the changes and they are angry and frustrated with the changes. Currently they have the flexibility to extend their lunch periods, come in later or leave early if their duties are complete. Moving these roles to non-exempt will remove that flexibility. In addition, they feel like the exempt status they have worked for and achieved is being taken away thus taking away an achievement they have worked hard to achieve either through advanced education or through a combination of education and years of experience. The

exempt classification carries a professional status which provides the individuals the opportunity to plan their work loads and schedule their time accordingly. If this regulation passes they will be denied that opportunity to schedule their work, take extra time at lunch, leave early to attend to personal responsibilities because they will now have to get in their hours. They will have to be at work even if they have completed their responsibilities or they won't receive their same compensation.

Job Sharing and Part-Time Exempt Work

The ability to job share or work in part-time exempt jobs will also be significantly curtailed if the minimum salary threshold is raised substantially. Currently, two employees could share an exempt job, with each working the equivalent of half-time. But if each earns less than $970 per week, then neither will be eligible for exempt status. This could cause employers to offer fewer part-time exempt options and instead only hire a single full-time employee for such positions, further limiting workplace flexibility.

Loss of Opportunity for Professional Development and Career Advancement

The Department acknowledges the loss of employee autonomy by stating in the preamble that "not all workers would prefer to work fewer hours, and thus some of these workers might" view reclassification negatively. DOL is correct that many employees want the opportunity provided by being able to work additional hours. An employee whose hours are limited does not have the discretion to take on extra work that may lead to greater experience or provide additional opportunity for career development. For example, a lower-level manager who is non-exempt will have less opportunity to participate in important decision-making that happens after hours or take advantage of work conferences and networking.

In addition, many employers have self-paced training programs that exempt employees are free to take at their pleasure. Exempt employees also typically enjoy a richer benefits package that non-exempt employees. For example, exempt employees are often provided a higher basic life insurance policy, more flexible and generous leave packages, different bonus options, and may have access to more options for retirement savings.

Non-exempt employees typically have more limited benefit programs and may have more limited professional development and career advancement opportunities due to the strict recordkeeping requirements applicable to non-exempt employees and the desire to limit overtime expenses.

While DOL's proposal acknowledges that the proposed rule may have some adverse effect on employees, the consequences of reclassification are not considered in any depth. Of course, the Department could mitigate the impact of these negative consequences by more appropriately setting the salary threshold so that it serves as a reasonable proxy for those employees unlikely to pass the duties test.

II. The Minimum Salary Threshold Should Not Be Automatically Increased.

In addition to significantly increasing the proposed salary level, the proposed rule also seeks to establish a mechanism for automatically updating the standard salary threshold. This proposed automatic annual update to the salary threshold is a significant change in the method by which DOL has historically adjusted the salary level. In fact, automatic updates have been considered in the past but consistently rejected as a method of updating the salary level. The proposed regulatory text simply states that the salary level will be updated each year through a notice in the *Federal Register* published at least 60 days in advance of taking effect. The Department states that it has not included proposed regulatory text because it has not decided which approach to take in making annual updates.

In the proposal's preamble, DOL states that it is considering two alternative methodologies for updating the salary threshold, the "fixed percentile" approach and the "CPI-U" approach. The fixed percentile approach would periodically evaluate what specific salary level is equivalent to the 40th percentile of full-time salaried workers while the CPI-U approach would adjust the salary level based on changes in the consumer price index for all urban consumers. In the preamble, DOL states that it believes either methodology would produce roughly similar salary thresholds in the future.

We appreciate the Department's desire to create a mechanism to help ensure that the salary level remains a meaningful test to distinguish between bona fide exempt and non-exempt employees. We also agree that the Department could and should review the salary level on a more systematic basis while providing the regulated community with the opportunity for notice and comment, but we cannot support the mechanism suggested to automatically adjust the salary threshold in the current proposed regulation for the reasons discussed below.

Automatic Salary Adjustments Pose Serious Compliance Challenges

First, our members have expressed significant concern that automatic increases in the salary threshold could pose real practical challenges to effective compensation practices. Regularly mandated inflationary increases would significantly impair the ability of employers to manage merit increases for employees at or near the salary threshold. For example, consider an employer with a pool of ten exempt employees performing similar jobs earning $975 per week ($50,700 per year) in 2016, above the proposed salary level of $970. The employer budgets a three percent increase for annual salary increases, which is a total pool of about $15,210. The employer may wish to provide the same three percent increase to all employees, or it may decide to base salary adjustments on merit, awarding higher raises to good or excellent performers and lower increases or no increase to average or poor performers.

However, consider the impact of a mandated two percent increase in the salary threshold. In this example, an employer would be required to adjust all ten salaries up to $989 per week in order to maintain their exempt status, reducing the total amount available for merit increases to $7,930. While the employer could still distribute the remaining funds in the manner it sees fit, by utilizing almost half of the budgeted funds with mandated increases, it will be harder to award larger increases to excellent performers.

This is one reason why the Department's proposal is likely to cause significant salary compression issues, especially as implemented over time. After several years of mandated salary level increases, the gap in pay between more senior and less senior, more experienced and less experienced, or more productive and less productive employees will become smaller over time, creating significant morale problems and other management challenges.

In addition, we are concerned that automatic adjustments to the salary threshold will not account for the ways in which the workforce changes over time. National average salaries may continue to rise, but this does not mean that all salaries in all industries and in all regions will also rise at the same rate and at the same pace. Ensuring that adjustments to the minimum salary threshold are made through notice and comment rulemaking helps ensure that geographical and sectoral disparities are accounted for. The Department largely dismisses this concern in the preamble to its proposal, stating that it can always engage in notice and comment rulemaking at a later date should such changes occur. However, we question whether this is realistic. The burden should be on the Department to carefully examine the impact of any new salary threshold, including regional and sectoral disparities, and allow for public comment before it is implemented.

The Department's Methodology for Automatic Increases Will Rapidly Increase the Salary Level in Future Years

The Department has indicated that one of the methods it is considering using to calculate automatic adjustments to the salary threshold is to adjust the salary regularly so that it stays at the 40th percentile of earnings for full-time salaried workers. However, as time goes on and as employees who earn less than the salary threshold are reclassified, there will be fewer relatively lower-paid employees within the dataset used to determine the 40th percentile of earnings for full-time salaried employees. In other words, in each successive year, the salary adjustment will be based on a smaller and smaller pool of employees earning higher and higher wages.

Basing automatic updates on such data is not appropriate as it will create a salary threshold that rises much more rapidly than any reasonable measure of wages or inflation and will only serve to reduce access to the exemption.

The Timing of Any Increase Must Account for Budget Constraints

The Department has suggested that it will make salary level increases available 60 days in advance. However, many employers budget for labor costs well in advance of 60 days. In fact, many, such as municipal employers, may have relatively inflexible budgets set considerably in advance of their fiscal year. They will have few options to respond to increases made to the salary threshold during a fiscal year and more constraints on doing so. Should the final regulations include automatic adjustments, DOL should provide at least one year notice to the regulated community to ensure that appropriate planning can be undertaken to budget for such increases.

III. The Department Should Not Make Substantive Changes to the Duties Tests Without First Making a Specific Proposal Available for Notice and Comment.

The Department has not proposed any changes to the duties tests for executive, administrative, professional, outside sales, or computer employees although the preamble to the proposal includes a series of questions primarily focused on whether changes should be made to the executive duties test. We address the substantive issues raised in the proposal below. However, we must first emphasize that we do not believe it would be appropriate or lawful for the Department to include substantive changes to the duties test in a final rule without first making specific proposals available for notice and comment.

The Administrative Procedure Act (APA) requires notice and comment rulemaking for informal rules, such as the current proposal issued by the Department. The purpose of the notice and comment requirement is, in part, to ensure that the regulated community has sufficient notice of proposed changes to which they will be bound so that they have an opportunity to respond to the proposal and offer the regulator opinions, facts, and other information that will be helpful in crafting a final rule.

In the preamble to the proposal, the Department invites comments on a handful of questions, including a very general question asking whether any changes should be made to the duties tests. However, asking general questions in a notice of proposed rulemaking does not provide the regulated community with sufficient information to adequately assess the impact of any eventual proposal. Indeed, federal case law makes it clear that in notice and comment rulemaking the proposed rule must "fairly apprise interested parties of the scope and substance of a substantially revised final rule."[24]

The Department's regulations are complex and include several provisions that work together in an integrated scheme for determining the scope of the FLSA's exemptions. Calling for comments on provisions that may need to be updated is appropriate, even commendable. However, it is not sufficient for the regulated community to assess the potential impact of any change. Instead, should the Department decide to move forward with any proposed changes to the duties tests, it should issue another proposed rule describing proposed changes or alternatives in detail before proceeding to a final regulation.

Further, publishing a proposal with any specific changes to the duties tests will help ensure that the Department's proposal is in compliance with the Paperwork Reduction Act, Regulatory Flexibility Act, Executive Orders 12866 and 13563, and other regulatory process requirements. Compliance with these laws and Executive Orders will help ensure that the public has a better understanding of the economic impact of the proposed change and alternatives considered.

IV. The Executive Duties Test Should Not Be Further Limited.

The Department asks several questions related to the duties test for executive employees. The questions suggest that the Department is concerned that the current regulations allow employees who are properly classified as non-exempt to be too easily swept up into the executive exemption. The Department's proposed solution to this perceived problem is to very significantly increase the salary threshold. The proposal suggests, however, that the Department may be considering further restrictions on the use of the executive exemption as an alternative or in addition to the proposed increase in the minimum salary level.

All of the questions DOL asks with respect to the executive exemption suffer from the same flawed presupposition: that the performance of non-exempt job tasks and performance of exempt duties are mutually exclusive. Just because a manager spends 60 percent of his or her time on tasks commonly viewed as non-exempt does not mean that only 40 percent of time is spent performing exempt duties. Indeed, it is quite possible that the employee spends 100 percent of his or her time performing exempt management duties even though he or she is spending a large portion of time performing job tasks that are viewed as non-exempt.

[24] Chocolate Manufacturers Association of the United States v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).

The regulation's current structure is robust enough to ensure that only those employees with a primary duty of management may be exempt and includes several examples demonstrating how employees may or may not be exempt depending on the facts of each case. While the concurrent duties provision was adopted as part of the 2004 revisions, it was not a new concept at the time. In fact, prior to the adoption of the 2004 regulations, many court decisions had embraced the view that an individual's primary duty may be management even though he or she spent considerable time performing non-exempt tasks.[25]

Furthermore, the Department should recognize that many employers today operate within flatter organizational structures, with fewer staff in support roles and many employees performing a combination of exempt and non-exempt work. In fact, the 2015 SHRM Overtime Regulations Survey indicates that two-thirds (66%) of organizations employ exempt employees who must regularly perform non-exempt tasks. Of those organizations, four out of five reported that up to 40% of their total exempt workforce must perform non-exempt work while *simultaneously* conducting exempt work.

While this phenomenon occurs in many modern workplaces, it is even more common for nonprofits and small businesses to employ a workforce that must pitch in and work at the front desk, answer client phone calls and check in on clients. If overtime regulations are modified to eliminate the ability of employees to perform concurrent duties and maintain their exempt status, many organizations would need to be restricted in ways that diminish the services being provided.

SHRM members from California report substantial burdens in compliance with that state's rule requiring that a majority of time be spent exclusively on exempt duties to qualify for exemption. Employers in California have struggled mightily to construct systems that document that managers spend a majority of their time on exempt duties, but still face significant compliance and litigation challenges.

California's rule has not helped reduce litigation or made the rules simpler to apply. In contrast, SHRM members have reported significantly increased litigation focusing on the percentage of time spent on particular tasks and how particular job duties are characterized. In short, California's rule provides a strong cautionary tale warning against a rigid examination of percent of time spent on job tasks and in favor of an examination as to what the employee's most important duties are. Additional costs would also be imposed as employers develop systems that

[25] See, e.g., Jones v. Virginia Oil Co., Inc., 69 Fed. Appx. 663 (4th Cir. 2003); Murray v. Stuckey's Inc., 939 F.2d 614 (8th Cir. 1991); Donovan v. Burger King Corp., 672 F.2d 614 (8th Cir. 1991); Horne v. Crown Central Petroleum, Inc. 775 F. Supp. 189 (D.S.C. 1991).

attempt to track the amount of time that otherwise exempt employees spend performing specific job tasks.

For these reasons, while the percentage of time spent performing particular tasks may be one of many indicators as to an individual's true primary duty, it is not a good proxy for weeding out the obviously non-exempt.

Another consideration relevant to the Department's questions as to whether the regulations should examine the percentage of time working on specific tasks is the Department's prior use of the sole charge exception. While the Department characterizes the old long test, with its limitation on the amount of non-exempt work, as a requirement that applied to all employees whose salaries were not sufficient to qualify for the short test, this is somewhat misleading because it omits the fact that since at least 1940 the percentage limitation contained an important exception, under the executive exemption, for individuals in sole charge of an independent establishment.[26] In other words, the regulations recognized that there were circumstances where relatively lower-paid individuals should still be considered exempt even though they may spend a significant portion of time performing non-exempt tasks.

This should not be surprising. As recognized as early as the 1940 Stein Report, in examining those employees who may be exempt from the act, even though less-well paid than others, it was recognized that exempt positions offer "compensating advantages that may be found in the nature of the employment to justify the denial of the benefits of the [FLSA]."[27] Further, it was recognized that it was "the entire definition," not merely the salary proviso, which provided protection from abuse.[28]

As described further in the Stein Report discussing the executive exemption:

> More importantly, as justification for unlimited hours of work, the opportunities for promotion to higher executive positions are clearly greater for those who already occupy some type of executive position. These intangible advantages are normally, though not always, accompanied by more tangible advantages, such as paid vacation and sick leave. Still more important is the fact that executives have greater security of tenure than almost any other group of workers. ... Thus even the lower paid executives enjoy certain prerogatives that must be given weight.[29]

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[26] See, for example, 29 C.F.R. § 541.1(f), as published in the *Federal Register* on October 15, 1940. 5 Fed Reg. 4,077.
[27] Executive, Administrative, Professional ... Outside Salesman Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) (*hereinafter* Stein Report) at 21.
[28] *Id.*
[29] *Id.* at 21-22.

To be clear, SHRM does not support a return to the long test or any duties test requiring an exacting measure of the amount of time spent on specific job duties. However, if the Department is to reinstate a provision that closely examines the percentage of time spent performing work tasks, it should also examine the policy reasons that justified the sole charge exception.

Finally, because the Department has not proposed any specific changes to the duties tests, none of its economic analyses have accounted for such changes. If DOL were to suddenly impose a percentage limitation on the amount of time spent performing specific tasks, it could dramatically increase the size of the workforce that must be reclassified as well as increase costs of recordkeeping. This impact could vary considerably depending on what percentage of non-exempt work DOL felt was too much to qualify for exemption.

V. The Salary Level Increase for Highly Compensated Employees Is Acceptable But Should Not Be Annually Increased.

The proposal would increase the total annual compensation amount for using the highly compensated employee test from $100,000 per year to $122,148 and would adjust the level annually. As with its proposed annual increase in the minimum salary threshold, the Department would publish notices of total compensation level adjustments 60 days in advance. The Department is also proposing to annually adjust the total compensation amount.

The highly compensated employee test serves two useful purposes. First, it allows employers to focus compliance resources on properly ensuring relatively lower-paid employees are classified correctly by creating a simpler analysis to determine exempt status for many highly compensated employees. Second, it can help reduce frivolous or non-meritorious litigation by highly compensated employees, again freeing resources to address issues of relatively lower-paid employees. We support the highly compensated employee test and the Department's decision to retain the test.

Unlike the proposed increase to the minimum salary level test, the proposed increase to the total compensation amount for highly compensated employees has been calculated using a relatively similar methodology to that used when the level was first established in 2004. The proposed increase in the total compensation amount seems appropriate in this context and we, therefore, agree with the proposal.

However, the Department has also proposed making annual adjustments to the total compensation amount. As with the proposed annual adjustments of the minimum salary threshold, the proposal states that the Department is considering two options. The first would base the total compensation amount on the annualized value of the 90th percentile of weekly wages for full-time salaried employees. The second would adjust the level based on changes in the CPI-U.

SHRM does not support automatically updating the total compensation amount for the same reasons we do not support automatically updating the minimum salary threshold. In particular, because utilizing the rulemaking process for salary level increases will help ensure that the impact of any change is more thoroughly considered before implementation.

VI. Including Some Amount of Nondiscretionary Bonus Payments Toward the Salary Threshold Is Appropriate; However the Proposal Is Too Limiting To Be of Much Utility.

In the preamble to the proposal, the Department states that it is considering permitting minimum salary threshold determinations to be made by including a limited portion of certain nondiscretionary bonus payments. As described in the preamble, the Department believes that the amount of nondiscretionary bonus payments that could be included should be strictly limited to no more than 10 percent of the minimum salary level. In addition, the Department is considering strictly limiting the time period in which the nondiscretionary bonus must be paid to monthly or more frequently.

We appreciate and commend the Department's willingness to consider inclusion of nondiscretionary bonuses toward the minimum salary level. However, we are concerned that the proposal under consideration is too limited to be of much utility as few nondiscretionary bonus plans are likely to meet the strict tests under consideration by the Department. Increasing the portion of the minimum salary level that could be paid through nondiscretionary bonuses and lengthening the period of time over which such payments must be made would make this option more attractive for a greater variety of employers.

VII. Additional Examples of Exempt and Non-exempt Work Should Be Subject to Notice and Comment.

In the preamble to the proposal, the Department notes that the regulations currently contain several sections describing particular jobs and assessing whether those jobs are more likely to be exempt or non-exempt, such as those for exempt administrative employees (Section 541.203), learned professionals (Section 541.301(e)), and executive and administrative computer employees (Section 541.402). The Department then calls for comments on specific additional examples that should be added.

While we believe that examples are an important component of the current regulations and can help stakeholders more clearly see the reasoning behind DOL's regulations, we do not believe that it is appropriate to publish examples in the final rule without first making them available for public comment. Should DOL decide to add additional examples to the rules, or to modify existing examples, it should provide notice to the regulated community of the specific changes contemplated and an opportunity for comment.

VIII. Effective Date of Salary Increases.

While DOL's proposal includes a discussion of when notice of automatic increases of the salary level may be provided, it does not provide any indication of the Department's thinking as to when the initial salary threshold may go into effect. If the increase in the salary threshold is significant, employers will need more time to make important business decisions related to whether to reclassify employees, change rates of compensation, or restructure their workforce such as by hiring more part-time employees or downsizing. In addition, HR departments will need to change their human resource information systems (HRISs) and payroll systems, and make adjustments to employee benefit packages. Equally important, given the potential impact on the workplace, employers need time to develop a communication strategy to educate employees in order to minimize the effects on morale resulting from reclassifying employees to non-exempt positions.

In 2004, the Department established an effective date for its final revisions that was 120 days after publication of its final rule. Based on our experience at that time, compliance within that window was extremely challenging for employers. Optimally, the Department would provide employers with at least one year to prepare for implementation of the new regulation. At a minimum, we urge the Department to ensure that any initial salary threshold increase, or other changes made to its revisions, take effect at least 120 days after publication.

Furthermore, should the Department finalize a rule with a salary level increase as proposed, or similar, it should consider implementing the increase in phases. A phased-in approach will provide some flexibility to employers. Implementing the increase over time will provide more of an opportunity for employers to gather information about hours worked by currently non-exempt employees and assess how to address potential reclassification of those jobs. Further, phased-in implementation will give employers more time to plan and budget for any increased expenses, be it in the form of labor costs, recordkeeping, and the like.

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Conclusion

The Society for Human Resource Management believes that DOL's proposed increase to the salary threshold is too high. While we would support a more reasonable increase, we do not support the methodology used by the Department and have serious concerns about the adverse impact such a change would have upon both employers and employees. In addition, we do not support automatic updates of the salary level test or the test for highly compensated employees as such changes should only be done through notice and comment rulemaking after an analysis of the proposed impact on different sectors of the economy and different geographic regions. Finally, we support the decision taken in the proposal to not alter any of the duties tests at this time.

Thank you for your consideration of these comments.

Respectfully Submitted,

Michael P. Aitken
Vice President, Government Affairs
Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314

Additional Signatories:

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